

CIVIL CASE INFORMATION STATEMENT
CIVIL CASES

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

2014 OCT 17 PM 2:06 CP

I. CASE STYLE:

Plaintiff(s)

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

Case #

14-C-1877

Judge

Zakula

vs.

Days to
Answer

Type of Service

THE CITY OF MORGANTOWN,
WEST VIRGINIA
c/o Morgantown City Council
389 Spruce Street
Morgantown, WV 26505

60

Private Process Server

THE WEST VIRGINIA DEPARTMENT
OF TRANSPORTATION, DIVISION
OF HIGHWAYS
c/o Paul A. Mattox, Jr., P.E.
Building 5
1900 Kanawha Boulevard E
Charleston, WV 25305

60

Private Process Server

Original and 5 copies of complaint furnished herewith.

1-2 ✓
PYMT Type K
Rcpt # 521801 \$200 ☒ \$135 ☐
Iss. Sum. ☒ cc ☐ No Sum. Iss ☐
☒ Ret. to Atty. ☐ \$20cm X ☐
☐ Mailed CM/RM ☐ \$5 clk X ☐
☐ Mailed to sos w/ck# ☐
☐ Sent to ☐ w/ck# ☐

PLAINTIFF(S): Nuzum Trucking Company and Preston Contractors, Inc. DEFENDANT(S): The City of Morgantown, West Virginia and The West Virginia Dept. of Transportation, Div. of Highways	CASE NUMBER: _____
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II. TYPE OF CASE:

TORTS	OTHER CIVIL	
<input type="checkbox"/> Asbestos	<input type="checkbox"/> Adoption	<input type="checkbox"/> Appeal from Magistrate Court
<input type="checkbox"/> Professional Malpractice	<input type="checkbox"/> Contract	<input type="checkbox"/> Petition for Modification of Magistrate Sentence
<input type="checkbox"/> Personal Injury	<input type="checkbox"/> Real Property	<input checked="" type="checkbox"/> Miscellaneous Civil
<input type="checkbox"/> Product Liability	<input type="checkbox"/> Mental Health	<input type="checkbox"/> Other
<input type="checkbox"/> Other Tort	<input type="checkbox"/> Appeal of Administrative Agency	<input type="checkbox"/> Fraud and Conversion

III. JURY DEMAND ☐ Yes ☒ No

CASE WILL BE READY FOR TRIAL BY (MONTH/YEAR): 12 / 14

IV. DO YOU OR ANY OF YOUR CLIENTS OR WITNESSES IN THIS CASE REQUIRE SPECIAL ACOMMODATIONS DUE TO A DISABILITY OR AGE? ☐ YES ☒ NO

- ☐ Wheelchair accessible hearing room and other facilities
- ☐ Interpreter or other auxiliary aid for the hearing impaired
- ☐ Reader or other auxiliary aid for the visually impaired
- ☐ Spokesperson or other auxiliary aid for the speech impaired
- ☐ Other: Unknown at this time

Attorney Name: PAUL R. CRANSTON

Firm: Cranston & Edwards, PLLC

Address: 1200 Dorsey Avenue, Ste. 2,
Morgantown, WV 26501

Telephone: (304) 296-3500

Representing:

- ☒ Plaintiffs ☐ Defendant
- ☐ Cross-Complainant ☐ Cross-Defendant

Dated: 10/17/14

Signature: 

☐ Pro Se

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

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

Plaintiffs,

v.

CIVIL ACTION NO. 14-C-1877
THE HONORABLE Zakula

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

Defendant,

and

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

Indispensable Party/Defendant.

W.VA. T. CT. R. 16.12
EXPEDITED RELIEF REQUESTED

VERIFIED COMPLAINT

NOW COME Co-Plaintiffs Nuzum Trucking Company and Preston Contractors, Inc., by
and through their counsel, and for their Verified Complaint, aver as follows:

Nature of the Action

1. On September 2, 2014, the Morgantown City Council passed Ordinances (collectively "Heavy Truck Ordinance") amending Articles 301 and 347 of the City of Morgantown's traffic code, thereby prohibiting "heavy trucks" "from being operated in Morgantown's B4 Business District. See Exhibit 1.

2. The Heavy Truck Ordinance is preempted by state and federal law, unconstitutionally and unlawfully interferes with Plaintiffs' ability to use the state roads and the federal highway system to operate their businesses economically, was passed by City Council without the requisite legal authority to do so, and, although allegedly promulgated to address safety concerns, allows the most cited traffic violators to continue to transverse Morgantown's B4 Downtown Business District while preventing Plaintiffs from doing so.

3. Accordingly, Plaintiffs seek declaratory relief and a permanent injunction preventing the enforcement of the Heavy Truck Ordinance, as well as their attorneys' fees and expenses.

The Parties

4. Plaintiff Nuzum Trucking Company ("Nuzum") is a duly formed and validly existing West Virginia Corporation engaged in a variety of motor carrier and freight trucking business enterprises, including, but not limited to, transporting resources and goods in, around, and through the City of Morgantown's B4 Business District. Nuzum's principal office address is P.O. Box 38, Shinnston, West Virginia, 26431.

5. Plaintiff Preston Contractors, Inc. ("Preston") is a duly formed and validly existing West Virginia corporation engaged in a variety of motor carrier and freight trucking business enterprises, including, but not limited to, transporting resources and goods in, around, and through the City of Morgantown's B4 Business District. Preston's principal office address is P.O. Box 606, Kingwood, West Virginia, 26537

6. The Defendant, the City of Morgantown, West Virginia ("Morgantown" or "the City"), is a Class II city as defined in W. Va. Code § 8-1-3. Based on long-standing West Virginia law, Morgantown, like every other municipality in West Virginia, has no inherent

powers. Morgantown is a creature of the State, and it can execute only those functions of municipal government that have been specifically conferred upon it by the Constitution of West Virginia or delegated to it by the West Virginia Legislature. Further, Morgantown has no inherent or actual authority to trump or preempt state and federal laws and must, consistent with fundamental democratic and constitutional principles, ensure compliance with any and all state and federal laws.

7. Morgantown functions solely through its instrumentalities, including its City Council, which, upon information and belief, was created by Morgantown's Charter, such Charter having been approved by Morgantown's electorate on April 29, 1977.

8. Indispensable Party/Defendant, the West Virginia Department of Transportation, Division of Highways ("WV DOH"), is an executive, subsidiary agency of the West Virginia Department of Transportation, and is responsible for planning, engineering, right-of-way acquisitions, construction, reconstruction, control, traffic regulation and maintenance of more than 35,000 miles of West Virginia state roads.

Venue

9. This proceeding seeking declaratory and injunctive relief, among other things, presents an actual case and controversy within the Court's jurisdiction.

10. Venue is proper in this Court pursuant to W.Va. Code § 14-2-2 as the WV DOH is a state executive agency and proceedings against a state agency wherein a state agency is a party defendant "shall be brought and prosecuted only in the Circuit Court of Kanawha County, West Virginia."

11. Plaintiffs unequivocally have standing because, as set forth herein: Plaintiffs have suffered an injury in fact; there is a causal connection between the conduct complained of and

the injury; it is likely that the injuries suffered by Plaintiffs will be redressed by adjudication of the merits; and Plaintiffs are affected West Virginia citizens and taxpayers. Further, this matter is justiciable as it undisputedly involves a vital public function, access to state roads and highways free of unlawful municipal prohibitions, and it is foreseeable that in the absence of adjudication on the merits the issue will arise again. See e.g. White by White v. Linkinoggor, 176 W.Va. 410 (1986).

Facts

A. Introduction

12. The City of Morgantown has violated state and federal law through a series of incomprehensible municipal legislative actions and omissions in which its City Council has disregarded or otherwise ignored long-established state and federal laws to "force" into law an unlawful and unconstitutional ordinance barring heavy truck traffic from traversing state highways and state truck routes in Morgantown's B4 Business District.

13. Morgantown's actions and omissions in this regard injure local trucking businesses, frustrate basic constitutional principles, and fail to acknowledge Morgantown's status as a local municipality that operates within the broader system of state and federal laws.

14. Rather than acknowledge the clear legislative limitations prohibiting a municipality from regulating state highways and state truck routes in intrastate and interstate commerce, Morgantown has unquestionably exceeded the lawful authority vested in a municipality through unlawful and unconstitutional actions and omissions that directly and adversely affect Plaintiffs' business enterprises.

15. The central legal issue in this action, whether a municipality has a right to prohibit arbitrarily defined "heavy truck" traffic from traveling on state highways, roads and state truck

routes within a municipality's confines, is clearly settled as a matter of statutory law. W.Va. Code § 17-4-1 is controlling authority and provides that: "[t]he authority and control over the state roads shall be vested in the commissioner of highways." Moreover, the West Virginia Supreme Court, in interpreting this statute firmly stated: "it 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," and the Court further held that "the State Commissioner of Highways has exclusive authority and control over state roads." State ex rel. Keene v. Jordan, 192 W.Va. 131, 132-133 (1994) (emphasis added).

16. Indeed, the Heavy Truck Ordinance is inconceivable, as it leads to the absurd result of empowering cities, such as Morgantown, to usurp the WV DOH's authority and control over the state road system.

17. The foregoing citations represent a mere scintilla of the legal authority which Morgantown failed to acknowledge before passing the Heavy Truck Ordinance.

18. Stated succinctly, state roads, state routes and state highways within Morgantown, and within other municipalities across West Virginia, are what they say they are: state roads, state highways and state routes under the exclusive jurisdiction and control of the WV DOH. The WV DOH, as the party with exclusive jurisdiction, is a necessary defendant in this action given WV DOH's unique role as the entity charged with oversight of West Virginia state road system.

19. State highways and state routes are not city streets or city alleys, and municipalities have no authority or jurisdictional basis to interfere with WV DOH's operation

and control of state highways, state roads and state routes.

20. In sum, on the state level, Morgantown's ordinance is untenable as it invades the province of the WV DOH and fundamentally seeks to disrupt motor carrier transit statewide to the extent that if such an ordinance is given credence municipalities across the state will be free to bar motor carriers unlawfully and arbitrarily from state roads and state routes within municipal boundaries. The results of such legislation would create economic chaos and uncertainty in the transport of goods and natural resources throughout the state road system.

21. Indeed, appended hereto as Exhibit 2 is a map illustrating the conceptual breadth of Morgantown's legislation. See Exhibit 2.

22. To the extent that other municipalities would adopt similar ordinances, "heavy trucks" could be prohibited from traveling on any state roads and state routes within municipal boundaries (as evidenced by Exhibit 2). Id.

23. Disregarding the law, and the broader economic impact of its actions, Morgantown blindly passed the Heavy Truck Ordinance.

24. As pleaded, the facts coupled with the law demonstrate an unconstitutional and unlawful municipal intrusion into intrastate and interstate commerce by Morgantown that stymies commerce and undercuts West Virginia businesses' ability to compete in a constantly evolving world marketplace.

B. Plaintiffs' Morgantown Trucking Operations

25. Plaintiffs have historically traversed West Virginia State Route 7 ("WV 7") to efficiently and economically transport products in and around Morgantown's B4 Business District as part of motor carrier operations in both the intrastate and interstate market.

26. WV 7 is an east-west state highway with major junctions with West Virginia

Route 2 near New Martinsville, West Virginia, United States 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. See Exhibit 3.

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. See Exhibit 4.

28. Plaintiffs transport various products in their motor carriers to facilities located both in and around Morgantown via WV 7 and to facilities located beyond Morgantown's borders.

29. For decades, Plaintiffs have transported various products via WV 7 through Morgantown's B4 Business District into the broader system of intrastate and interstate commerce free of arbitrary and unlawful municipal regulations.

30. Plaintiffs have historically transported these products in the most economical and lawful manner via usage of WV 7.

31. The use of and the right to the unimpeded use of intrastate and interstate State Routes, State Highways, Federal Routes, and the Federal Highways is of vital importance to and a primary asset of Plaintiffs in conducting their daily trucking operations.

32. Unlawful and overly restrictive municipal regulations, such as the ordinance at issue, thwart Plaintiffs' businesses and may lead to substantial job losses due to increased costs.

33. Plaintiffs exercise their right to participate in intrastate and interstate commerce in and around Morgantown's B4 Business District on a daily basis, in the course of their normal business operations, and have done so for decades.

C. Morgantown's Historic Failure to Enact a Truck Ordinance

34. In the early 2000s a group of individuals with businesses and/or property located along WV 7 sought to prohibit heavy motor carriers from traversing in and around Morgantown's B4 Business District under the guise that motor carriers presented a safety risk to Morgantown's pedestrians.

35. Specifically, upon information and belief, on or about May 20, 2005, a Morgantown Councilmember whose law office was located on WV 7 initiated the drafting of a proposed ordinance prohibiting heavy trucks from traveling in and through Morgantown's B4 Business District.

36. Upon information and belief, this ordinance was specifically proposed and, thereafter, drafted to prevent motor carriers such as Plaintiffs from transporting products via WV 7.

37. Upon information and belief, on or about May 20, 2005, Morgantown was advised by the WV DOH that it had no legal authority to restrict ANY truck traffic from traveling on WV 7 in and through Morgantown's B4 Business District.

38. Upon information and belief, ignoring the WV DOH's position, the then acting City Council nonetheless continued to vet the proposed ordinance banning heavy truck motor carriers from traveling in and through Morgantown's B4 Business District.

39. On September 2, 2005, Morgantown's then acting City Manager, at the direction of City Council, mailed a copy of a proposed City Ordinance barring heavy trucks from traveling through Morgantown's B4 Business District to the WV DOH in the hope that the WV DOH's position would change upon a thorough review of the proposed City ordinance. See Exhibit 5.

40. 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.

41. Morgantown's proposed 2005 ordinance sought to regulate heavy truck traffic pursuant to W. Va. Code §§ 17C-17-12(c) and 17-4-26, *et seq.*, and pursuant to unspecified federal common law. Id.

42. On October 4, 2005, the WV DOH responded to Morgantown's correspondence. See Exhibit 6.

43. In its response, the WV DOH concluded as follows: "even if the proposed ordinance was revised to meet the objections noted above, it would be subject to Federal preemption under 49 U.S.C. 14501... the purported safety concerns recited by the MPO, and adopted by the city in the proposed ordinance, are already addressed by state and federal law and may be addressed by a more narrowly crafted ordinance. Moreover, these concerns are not unique to Morgantown's Downtown (B-4) Business District or demonstrated to be substantially different from similar impacts in other urban and non-urban areas of the state. In addition, if the concerns are those of safety, there appears to be no rational basis for exempting local delivery commercial motor vehicles or governmental entities' commercial motor vehicles." Id.

44. Despite the WV DOH's response, upon information and belief, in January and February 2006, the then acting City Council again vetted the legality of the proposed ordinance in its Committee of the Whole Meetings.

45. Concerning Morgantown's authority to enact such an ordinance, Morgantown's then acting deputy mayor stated as follows: "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." See Exhibit 7.

46. Ultimately, frustrated by the WV DOH's position and at the insistence of certain City Council members, Morgantown sought a formal legal opinion from retained counsel justifying the attempt to prohibit heavy truck traffic in its B4 Business District.

47. On or about March 6, 2006, Steptoe & Johnson, PLLC, in the capacity of Morgantown's counsel, delivered a Memorandum to Morgantown addressing the legality of the proposed heavy truck ordinance. See Exhibit 8.

48. In addressing state preemption, Morgantown's retained counsel advised the City to refrain from passing such an ordinance. Id.

49. Upon information and belief, on March 28, 2006, the proposed heavy truck ordinance was yet again vetted by Morgantown's City Council at its Committee of the Whole Meeting.

50. Upon information and belief, the then acting City Council decided on March 28, 2006, that the as-proposed ordinance was overly broad and decided to craft a more "narrowly tailored" ordinance in a last chance effort to force the enactment of municipal legislation.

51. Upon information and belief, after the March 28, 2006 meeting, Morgantown sought a survey from the WV DOH highlighting the traffic and safety concerns associated with heavy truck traffic in Morgantown's B4 Business District.

52. Upon information and belief, at Morgantown's insistence, on June 13th and 14th and July 25th and 26th, 2006, the WV DOH took traffic counts along WV 7 and conducted a safety analysis.

53. Upon information and belief, rather than bolstering Morgantown's safety

concerns, the WV DOH survey found that there were no safety concerns with the then-existing truck traffic and that during peak traffic hours, heavy trucks did not exceed three (3) percent of all vehicles passing through the four main intersections in Morgantown's B4 District connected to WV 7.

54. Upon information and belief, on August 2, 2006, the WV DOH findings were distributed to the then sitting City Council members.

55. Upon information and belief, personnel from the WV DOH were in attendance at Morgantown's August 2, 2006 City Council meeting.

56. Upon information and belief, concerning the WV DOH's recommendations and the lack of any actual safety concern, Morgantown's then acting City Manager stated as follows: "We basically have three options. We could appeal the DOH decision to the secretary of state or the governor; we could seek changes in state law that allows cities to have more control; or we could do as the letter instructed [and stand down]." See Exhibit 9.

57. Upon information and belief, Morgantown did not appeal the DOH decision to the secretary of state or the governor or obtain changes in state law that allow municipalities to have greater municipal control related to the regulation of "heavy trucks".

58. Ultimately, with the City Council recognizing that it lacked the legal authority to enact any ordinance regulating heavy truck traffic in Morgantown's B4 Business District related to WV 7, the proposed ordinance died on the floor.

D. Morgantown's Current Enactment Process

59. Upon information and belief, in 2013, a group of individuals labeling themselves as "Safe Streets Morgantown" again advanced the concept of a prohibition on heavy truck traffic in Morgantown's B4 Business District.

60. Upon information and belief, the prohibition on heavy truck traffic advanced by "Safe Streets of Morgantown" was spearheaded by the son-in-law of the former City Councilmember who initiated the attempted heavy truck prohibition in 2005

61. Upon information and belief, by letter dated June 17, 2014, "Safe Streets Morgantown" sought to compel municipal regulation of heavy trucks by proposing an ordinance to City Council. See Exhibit 10.

62. Upon information and belief, "Safe Streets Morgantown" did not identify any safety concern, or any source of empirical data evidencing a safety concern, in its June 17, 2014, correspondence. Id.

63. Upon information and belief, "Safe Streets Morgantown" failed to acknowledge intrastate and interstate legal concerns in its correspondence as it was aware of the shortcomings of its proposed legislations. Id.

64. Following the June 17, 2014 transmittal, presentations and pleas were made by "Safe Streets Morgantown" to City Council to enact the as proposed heavy truck ordinance.

65. Upon information and belief, certain City Council members ("Members") with acute knowledge of Morgantown's historic failures to pass such an ordinance campaigned on a platform that if elected to City Council they would prohibit heavy trucks from traversing state highways located in Morgantown.

66. Upon information and belief, in an attempt to justify their actions, these Members directed Morgantown's City Manager to again confer with the WV DOH to attempt to find some machination to justify enactment.

67. At the Members' direction, 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 Anthony G. Halkias, Director of the Legal Division at the WV DOH, concerning the Members' desire to enact an ordinance barring heavy trucks from traveling in and over state highways located in Morgantown's B4 Business District. See Exhibit 11.

68. By letter dated July 29, 2014, the WV DOH firmly stated its position: "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 permission of the Commissioner, any such municipal regulation would be invalid." Id.

69. As further stated in the WV DOH's letter, "the City's broad reading of one specific statutory provision allowing municipalities to regulate traffic directly conflicts with several other express powers granted to the Commissioner." And, "in this specific factual instance, the Division of Highways maintains proper jurisdiction over the roadways at issue." Id.

70. On July 29, 2014, a proposed ordinance prohibiting "Heavy Truck" traffic was presented to City Council by "Safe Streets Morgantown."

71. At the Committee of the Whole Meeting on July 29, 2014, "Safe Streets Morgantown" continually claimed that the heavy trucks were a safety concern and certain Members expressed an unfounded willingness to pass the ordinance despite its illegality.

72. Concerning the safety of "heavy trucks," on August 6, 2014, Morgantown City Staff delivered a letter to City Council identifying the companies and organizations involved in the most motor vehicle accidents in Morgantown from 2006 through present. See Exhibit 12.

73. The letter evidences that the top five (5) companies and organizations with documented traffic incidents in and around Morgantown's B4 Business District are: (1) Mountain

Line; (2) Monongalia County Schools; (3) Advantage Tank Lines; (4) Allied Waste; and (5) Blue Ridge Beverage. Id.

74. Upon information and belief, Morgantown City Staff also expressed concerns regarding enforcement of any proposed ordinance prohibiting heavy truck motor carriers from traveling through Morgantown's B4 Business District.

75. Plaintiffs, and any similarly situated motor carriers, are absent from the list of the top five (5) companies and organizations with documented traffic incidents in and around Morgantown's B4 Business District.

76. As illustrated below, under the adopted Heavy Truck Ordinance, all motor vehicles associated with the aforementioned five (5) incident prone companies are exempt from the adopted ordinance.

77. Following these findings, in yet another attempt to find a machination justifying enactment, Morgantown again retained counsel to issue a formal opinion, this time solely concerning federal preemption.

78. On August 15, 2014, Kay, Casto, & Chaney PLLC tendered a legal opinion to Morgantown that further eroded the City's authority to enact and enforce any municipal ordinance prohibiting heavy truck traffic from traversing Morgantown's B4 Business District on state highways, such as WV 7. See Exhibit 13.

79. Upon information and belief, on the day of the First Reading, August 19, 2014, City Council, at the insistence of the "Safe Streets Morgantown" group and certain Members, and in response to the concerns raised by Kay, Casto, & Chaney PLLC, edited the proposed ordinance to express general and unsubstantiated safety concerns in a pre-textual manner for the

calculated purpose of bolstering the proposed ordinance, in direct contravention of the actual findings regarding safety, as expressed by Morgantown City Staff. See Exhibit 1.

80. On August 19, 2014, at a regularly scheduled meeting and after the insertion of the aforementioned pre-textual edits, City Council voted 6-1 to enact the as-presented Heavy Truck Ordinance at the ordinance's First Reading.

81. At this passage, City Council failed to produce any evidence of incidents, accidents, or data documenting safety, noise, or pollution violations, citations, or concerns regarding "heavy truck" motor carriers. Rather, City Council proceeded to pass the Heavy Truck Ordinance at its First Reading under the guise of general safety concerns attributable to heavy trucks.

E. The Enacted Heavy Truck Ordinance

82. As previously stated, on September 2, 2014, City Council passed the Heavy Truck Ordinance amending Articles 301 and 347 of Morgantown's traffic code, thereby prohibiting "heavy trucks" from being operated in the Downtown Business District, as defined in Article 301 of the City's [Morgantown's] Traffic Code. See Exhibit 1.

83. 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.

84. As enacted, the Heavy Truck Ordinance defines "Downtown Business District" as "the entirety of the B-4 General Business District... not [to] include Beechhurst Avenue, University Avenue south of Beechhurst Avenue, and Don Knotts Boulevard south of University Avenue." Id.

85. Initially, the Heavy Truck Ordinance was to be effective immediately upon passage by the City Council. However, City Council postponed enforcement for a ninety (90) day period so that Morgantown could install scales, signage and other infrastructure to enforce the Heavy Truck Ordinance.

86. The Heavy Truck Ordinance does not limit or restrict:

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;

(2) the operation of emergency or military vehicles;

(3) the operation of vehicles by public utilities;

(4) the operation of any governmental or quasi-governmental vehicle in the performance of any official function or duty;

(5) the operation of solid waste disposal vehicles;

(6) the operation of vehicles lawfully engaged in the business of towing, hauling or carrying wrecked or disabled vehicles;

(7) the operation of trucks upon any officially established detour in any case where a truck could lawfully be operated on the street for which such detour was established; and

(8) the issuance of a special permit by the City Manager as provided in subsection (c).

87. 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.

88. Upon information and belief, the Morgantown Police Department is to actively enforce the ordinance after expiration of the ninety (90) day period.

89. The Heavy Truck Ordinance, as enacted, fails to identify any source of legal authority justifying its enactment and further fails to identify any mechanism of enforcement.

90. The Heavy Truck Ordinance will immediately, severely, and adversely affect Plaintiffs' business operations and intrastate and interstate commerce rights, and will continue to do so prospectively, as outlined above.

91. Following enactment, the WV DOH again informed Morgantown that its municipal regulation of state highways was an unlawful exercise of municipal regulatory authority over a state highway. See Exhibit 14.

92. City Council's unprecedented action does not promote the safety of the general public and other motorists as claimed.

93. The Heavy Truck Ordinance disrupts the longstanding status quo with respect to truck traffic in and around Morgantown, on roads under the exclusive control and jurisdiction of the WV DOH.

COUNT I
STATE PREEMPTION
DECLARATORY AND INJUNCTIVE RELIEF

94. The allegations in Paragraphs 1 through 93 are incorporated herein by reference.

95. In West Virginia, municipalities are creations of the state and derive all powers, explicit and inherent, from the State. "A municipal corporation is a creature of the State, and can only perform such functions of government as may have been conferred by the constitution, or delegated to it by the law-making authority of the State. It [a municipality] 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, 168 S.E.2d 551 (W. Va. 1969) (citing Syl. pt. 1, Brackman's, Inc. v. City of Huntington, 27 S.E.2d 71 (W. Va. 1943)).

96. When a conflict arises between a local ordinance and a state statute, the state statute will always prevail. "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 legal principle that where an ordinance is in conflict with a state law the former is invalid." American Tower Corp. v. Common Council of the City of Beckley, 557 S.E.2d 752, 756 (W. Va. 2001) (citing Vector Co. v. Board of Zoning Appeals, 184 S.E.2d 301, 304 (W. Va. 1971)); see also W. Va. Const. Art. 6, Sect. 39a ("Provided, that any such [a municipal 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 of the general laws of the state then in effect, or thereafter from time to time enacted.").

97. A municipal ordinance conflicts with a state statute, or statutory scheme, if it states a proposition that is irreconcilable with that contained in a state statute. See Vector Co. v. Board of Zoning Appeals, 184 S.E.2d 301, 304 (W. Va. 1971).

98. The powers vested in local municipalities by the State are generally stated in W. Va. Code § 8-12-5.

99. In enacting the Heavy Truck Ordinance, the city relied on the unfounded notion that Morgantown possessed the unilateral, unfettered authority to regulate state highways, state roads and state routes, specifically WV 7, based on non-specified safety concerns without reference to any source for such authority.

100. To the contrary, "the authority and control over the state roads shall be vested in the Commissioner of Highways." W.Va. Code § 17-4-1.

101. Morgantown proffered no state statute or common law source as justification for the Heavy Truck Ordinance.

102. The Heavy Truck Ordinance, and Morgantown's unlawful exercise of perceived municipal power, is in conflict with the West Virginia State Code, West Virginia common law, and the WV DOH's stated position that the WV DOH is vested with plenary statutory authority to regulate state highways within municipalities. See Exhibits 1, 6, 7, 9 and 14.

103. Among others, West Virginia Code Sections 17-4-1 prohibits municipalities from regulating state highways, state roads, and state routes as jurisdiction of state highways is vested solely in the WV DOH and the WV DOH "shall" control state roads. See W. Va. Code § 17-4-1.

104. Principles of statutory construction mandate the conclusion that state road regulation is an area of law to be regulated entirely by the state. First, usage of the word "shall" in a statute has been held to confer mandatory powers on a state agency, such as the WV DOH, and thereby make those powers exclusive to the agency. "It is well established that the word 'shall', in the absence of language showing a contrary intent on the part of the Legislature, should be afforded a mandatory connotation." Syl. pt. 4, Am. Tower Corp. v. Common Council of City of Beckley, 557 S.E.2d 752 (W. Va. 2001) (citing Syl. pt. 1, Nelson v. W. Va. Pub. Employees Ins. Bd., 300 S.E.2d 86 (W. Va. 1982)).

105. 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.

WHEREFORE, Plaintiffs request expedited declaratory relief holding that the Heavy Truck Ordinance is void and unenforceable and Plaintiffs further request a permanent injunction prohibiting Morgantown from enforcing the enacted Heavy Truck Ordinance and such other and further relief as the Court deems to be appropriate, including their attorneys' fees and costs.

COUNT II
VIOLATION OF STATE AND FEDERAL EQUAL PROTECTION
DECLARATORY AND INJUNCTIVE RELIEF

106. The allegations in Paragraphs 1 through 93 are incorporated herein by reference.

107. The Equal Protection Clause of the West Virginia Constitution is found in Article III, Section 10 of the West Virginia Constitution and stands for the principle that state actors cannot treat similarly situated persons in disadvantageous manners. See generally Israel v. WVSSAC, 182 W.Va. 454 (1989).

108. The Equal Protection Clause of the Fourteenth Amendment of the United States Constitution provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. 14, § 1.

109. One purpose of Equal Protection Clauses is to protect every person within a state's jurisdiction against arbitrary discrimination occasioned by the express terms of a local ordinance or statute.

110. The Equal Protection Clauses requires that the laws of the state, and the laws of a State's instrumentalities such as a municipality, i.e., Morgantown, treat persons in the same manner as others similarly situated.

111. Morgantown and the City Council are required to act in conformance with Article II, Section 10 of the West Virginia Constitution and the Fourteenth Amendment of the United States Constitution.

112. The Heavy Truck Ordinance, without any rational basis, treats Plaintiffs and similarly situated entities seeking to travel on state highways in Morgantown's B4 Business District differently than other similarly situated natural persons and entities.

113. As the WV DOH has stated, "if the concerns are those of safety, there appears to be no rational basis for exempting local delivery commercial motor vehicles or governmental entities' commercial motor vehicles." See Exhibit 7.

114. Indeed, Morgantown's Heavy Truck Ordinance allows the top five (5) entities with reported traffic incidents to continue to travel in Morgantown's B4 Business District while prohibiting Plaintiffs' motor carriers from traveling in and through state highways located in Morgantown's B4 Business District.

115. By way of illustration, the following operators that have a history of traffic violations are exempt from the Heavy Truck Ordinance: (1) Mountain Line; (2) Monongalia County Schools; (3) Advantage Tank Lines; (4) Allied Waste; and (5) Blue Ridge Beverage while Plaintiffs' trucks are subject to the Heavy Truck Ordinance.

116. By way of further example, commercial shippers of gravely hazardous materials, such as automobile fuel, are allowed to travel in and through state highways in Morgantown's B4 Business District while Plaintiffs' motor carriers, carrying non-hazardous materials, are barred from operating on state highways in Morgantown's B4 Business District.

117. No rational basis exists that can justify this harsh, disparate treatment.

118. The Heavy Truck Ordinance violates the Equal Protection Clauses of West Virginia and the United States Constitution by irrationally treating Plaintiffs and their motor carriers differently than similarly situated entities and transporters.

119. The Heavy Truck Ordinance was initiated and enacted by the City Council in an arbitrary, capricious, and unjustifiable manner.

WHEREFORE, Plaintiffs request expedited declaratory relief holding that the Heavy Truck Ordinance is void and unenforceable and Plaintiffs further request a permanent injunction

prohibiting Morgantown from enforcing the enacted Heavy Truck Ordinance and such other and further relief as the Court deems to be appropriate, including their attorneys' fees and costs.

COUNT III
FEDERAL PREEMPTION
FAAAA -DECLARATORY AND INJUNCTIVE RELIEF

120. The allegations in Paragraphs 1 through 93 are incorporated herein by reference.

121. The Heavy Truck Ordinance adopted by Morgantown imposes restrictions on the routes and services of motor carriers providing transportation of property in intrastate and interstate commerce.

122. Specifically, the Heavy Truck Ordinance prohibits motor carriers from accessing facilities in Morgantown via the most efficient route, WV 7.

123. The requirement to abide by the Heavy Truck Ordinance constitutes a regulation of the routes and services of a motor carrier in intrastate commerce.

124. The Federal Aviation Administration Authorization Act ("FAAAA") of 1994, section 601(c), codified at 49 U.S.C. § 14501(c)(1) and (2), states:

[A] State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation or other provision having the force and effect of law related to a price, route, or service of any motor carrier... with respect to the transportation of property...

[C] [this restriction] shall not restrict the safety regulatory authority of a State with respect to motor vehicles, the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or the authority of a State to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization.

(emphasis added).

125. The aforementioned statutes were based on Congressional findings that "(1) the regulation of intrastate transportation of property by the States has: (A) imposed an unreasonable

burden on interstate commerce; (B) impeded the free flow of trade, traffic, and transportation of interstate commerce; and (c) placed an unreasonable cost on the American consumers. . . .”
Public Law 103-305, section 601(a).

126. 49 U.S.C. § 14501(c)(2) vests safety regulatory authority in a State to impose highway route controls or limitations based on vehicle size or weight of a motor vehicle.

127. Morgantown is not a "State" within the meaning of 49 U.S.C. § 14501(c)(2) and has no safety regulatory authority, and no ability to impede commerce traveling on state highways and truck routes as set forth in 49 U.S.C. § 14501(c)(2).

128. Under the FAAAA, the Plaintiffs are motor carriers of property.

129. Morgantown is subject to FAAAA express, field and/or conflict preemption that bars a local municipality from exercising safety regulatory authority to restrict intrastate commerce as the FAAAA has a broad preemptive purpose that bars local governments from enforcing or enacting any law or regulation "related to a price, route, or service of any motor carrier [of property]... with respect to the transportation of property" and no safety concern validates Morgantown's enactment. 49 U.S.C. § 14501(c)(1).

130. Plaintiffs' position is consistent with the WV DOH's insofar as the State of West Virginia, through the WV DOH, has the ability to regulate and control state highways.

131. 49 U.S.C. § 14501(c) prohibits Morgantown from enacting or enforcing any law, regulation, or other provisions having the force and effect of law, related to a route or service of any motor carrier with respect to the transportation of property by a motor carrier.

132. 49 U.S.C. § 14501(c)(2) prohibits Morgantown from exercising safety regulatory authority to enact ordinances that contravene authority vested in the State of West Virginia and the WV DOH.

133. Article VI, clause 2 of the U.S. Constitution (the "Supremacy Clause") provides: "This Constitution, and the Laws of the United States which shall be made in pursuance thereof... shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or the laws of any State to the contrary notwithstanding."

134. Morgantown's use of purported legislative municipal power to regulate heavy truck access to facilities through Morgantown's B4 Business District causes a detrimental harm to the Plaintiffs' business operations and violates the FAAAA.

135. Moreover, Morgantown's purported safety rationale for adopting the Heavy Truck Ordinance is pre-textual given Morgantown's and the City Council's course of conduct.

136. The Heavy Trucking Ordinance is void and unenforceable because it is preempted under the Supremacy Clause.

WHEREFORE, Plaintiffs request expedited declaratory relief holding that the Heavy Truck Ordinance is preempted, void, and unenforceable and Plaintiffs further request a permanent injunction prohibiting Morgantown from enforcing the enacted Heavy Truck Ordinance and such other and further relief as the Court deems to be appropriate, including their attorneys' fees and costs.

COUNT IV
VIOLATION OF U.S.C. § 1983
DECLARATORY AND INJUNCTIVE RELIEF

137. The allegations in Paragraphs 1 through 93 are incorporated herein by reference.

138. 42 U.S.C. § 1983 protects Plaintiffs' rights established by the Commerce Clause of the Constitution, Article I, Section 8, Clause 3, to engage in intrastate and interstate commerce free of undue burdens and discriminations by local municipalities and legislative bodies, such as Morgantown and the City Council.

139. 49 U.S.C. § 14501(c)(2) prohibits local municipalities, such as Morgantown, from exercising safety regulatory authority to enact ordinances that contravene authority vested in the State of West Virginia and fundamental, long-standing principles of intrastate and interstate commerce.

140. Morgantown lacks the power, express or inherent, under West Virginia or Federal law, to regulate intrastate and interstate commerce by prohibiting arbitrarily defined heavy trucks or motor carriers from traveling in and through Morgantown's B4 Business District on state highways.

141. Morgantown's prohibitions unlawfully condition the right of free commerce because "heavy trucks" and motor carriers lawfully registered under the laws of the United States and the State of West Virginia are prohibited from engaging in the movement of property on highways in the flow of intrastate and interstate commerce.

142. The Heavy Truck Ordinance places an unreasonable burden on the stream of intrastate and interstate commerce, injuring the ability of Plaintiffs to engage in their core daily business operations and burdening their ability to compete in the market of intrastate and interstate commerce, thereby depriving Plaintiffs of the benefits of intrastate and interstate commerce.

143. Morgantown's total safety consequences rationale for enacting the Heavy Truck Ordinance is pre-textual and Morgantown can point to no empirical evidence tending to establish that its prohibition counteracts an existing safety concern. The Heavy Truck Ordinance has the purpose and effect of discriminating against and unreasonably depriving Plaintiffs of their right to participate in intrastate and interstate commerce.

144. By enacting the Heavy Truck Ordinance, Morgantown has deprived Plaintiffs of their right to engage in intrastate and interstate commerce free of unreasonable burdens and discrimination, as protected by the Commerce Clause.

145. Upon information and belief, Morgantown is purporting to act under color of state law or a right of municipal regulation to deprive Plaintiffs, and other similarly situated individuals and entities, of their constitutionally and statutorily protected interest to use the State and Federal highway systems.

146. Upon information and belief, Morgantown is purporting to act under color of state law or right of municipal regulation and the asserted right to so act is arbitrary, capricious, and unjustifiable, as Morgantown's actions contravene law, advice of counsel, and the legal position of the WV DOH.

147. Morgantown's Heavy Truck Ordinance is unlawful, void and unenforceable pursuant to 42 U.S.C. § 1983 and the Commerce Clause of the Constitution as an unreasonable and unjustifiable burden on intrastate and interstate commerce.

WHEREFORE, Plaintiffs request expedited declaratory relief holding that the Heavy Truck Ordinance is void and unenforceable and Plaintiffs further request a permanent injunction prohibiting Morgantown from enforcing the enacted Heavy Truck Ordinance and such other and further relief as the Court deems to be appropriate, including their attorneys' fees and costs.

COUNT V
FEDERAL PRÉEMPTION
STAA-DECLARATORY AND INJUNCTIVE RELIEF

148. The allegations in Paragraphs 1 through 93 are incorporated herein by reference.

149. The Surface Transportation Assistance Act ("STAA"), Title 49, section 31114 of the United States Code provides:

Access to the Interstate System:

(a) Prohibition on denying access. A state may not enact or enforce a law denying to a commercial motor vehicle subject to this chapter [49 U.S.C. §§ 31111 *et seq.*] or subchapter I of this chapter [49 U.S.C. §§ 31111 *et seq.*] reasonable access between--

(1) the Dwight D. Eisenhower System of Interstate and Defense Highways (except a segment exempted under section 31111(f) or 21113(e) of this title and other qualifying Federal-aid Primary System highways designated by the Secretary of Transportation); and

(2) terminals, facilities for food, repairs, rest, and points of loading and unloading for household goods carriers, motor carriers of passengers, or any truck tractor semi-trailer combination in which the semitrailer has a length of not more than 28.5 feet and that generally operates as part of a vehicle combination described in section 31111(c) of this title [49 U.S.C. § 31111(c)].

150. The Federal Highway Administration has enacted regulations regarding the use of the United States Interstate Highway System at 23 C.F.R. § 658.19(d), which provide: "(d) No state may enact or enforce any law denying access within 1 road-mile from the National Network [of Federal Highways] using the most reasonable and practicable route available except for specific safety reasons on individual routes."

151. Nuzum and Preston operation "commercial motor vehicles" as defined by the STAA, 49 U.S. Code § 31114.

152. WV 7 is within one road-mile of the National Network of Federal Highways, specifically Interstate 68 and Interstate 79.

153. The most reasonable and practicable route for Plaintiffs to move products or property to certain facilities located on the Monongahela River is to travel on Interstate 68 and WV 7 through Morgantown's B4 Business District.

154. The Heavy Truck Ordinance violates 49 U.S.C. §§ 31114 and 23 C.F.R. § 658.19(d) in that the ordinance effectively denies Plaintiffs reasonable access to the Federal

Interstate Highway System as Plaintiffs' motor carriers are prohibited from using the most reasonable and practicable route to transport natural resource products to export facilities within intrastate and interstate commerce.

155. The Heavy Truck Ordinance violates 49 U.S.C. §§ 31114 and 23 C.F.R. § 658.19(d) in that only the State of West Virginia may enact or enforce any law denying access within one road-mile from the National Network.

156. Further, assuming Morgantown is a sufficient state actor, the Heavy Truck Ordinance violates 49 U.S.C. §§ 31114 and 23 C.F.R. § 658.19(d) because there are no specific safety reasons on individual routes, such as WV 7, justifying Morgantown's restrictions in intrastate and interstate commerce.

157. The Heavy Truck Ordinance frustrates the goal of the STAA of ensuring reasonable access to highways.

158. The Heavy Truck Ordinance contravenes the STAA's express preemption clause.

159. Further, the STAA authorizes injunctive relief, and specifically permits a district court to issue a permanent injunction to ensure compliance with the STAA. 49 U.S.C. § 31115.

WHEREFORE, Plaintiffs request expedited declaratory relief holding that the Heavy Truck Ordinance is preempted, void, and unenforceable and Plaintiffs further request a permanent injunction prohibiting Morgantown from enforcing the enacted Heavy Truck Ordinance and such other and further relief as the Court deems to be appropriate, including their attorneys' fees and costs.

COUNT VI
VIOLATION OF U.S.C. § 1983-CONTRACT CLAUSE
DECLARATORY AND INJUNCTIVE RELIEF

160. The allegations in Paragraphs 1 through 93 are incorporated herein by reference.

161. The Contract Clause of the United States Constitution provides that no state shall "pass any... Law impairing the Obligation of Contract...." U.S. Const. Art. I, § 10, Cl. 1.

162. The Heavy Truck Ordinance, passed by an instrumentality of the state, Morgantown, prohibits and unlawfully interferes with Plaintiffs' existing and prospective contractual relationships related to the transport of products in and around Morgantown.

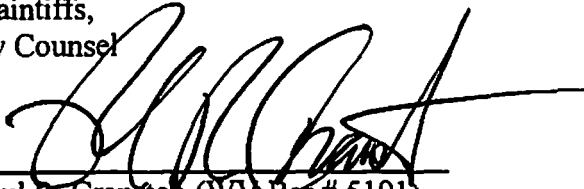
163. If Plaintiffs are not permitted to enjoy the benefits of their contractual arrangements, Plaintiffs will suffer harm that substantially interferes with Plaintiffs' right to transact business in intrastate commerce.

WHEREFORE, Plaintiffs request expedited declaratory relief holding that the Heavy Truck Ordinance is void and unenforceable and Plaintiffs further request a permanent injunction prohibiting Morgantown from enforcing the enacted Heavy Truck Ordinance and such other and further relief as the Court deems to be appropriate, including their attorneys' fees and costs.

PLAINTIFFS REQUEST EXPEDITED RELIEF PURSUANT TO W.VA. T. CT. R. 16.12

DATED: October 17, 2014.

Respectfully submitted,
Plaintiffs,
By Counsel



Paul R. Cranston (WV Bar # 5191)
James B. Shockley (WV Bar #7222)
CRANSTON & EDWARDS, PLLC
1200 Dorsey Avenue, Suite II
Morgantown, WV 26501
Phone: (304) 296-3500
Fax: (304) 296-3600

VERIFICATION

I, Roger A. Nuzum, being first duly sworn, aver that I am the President of Nuzum Trucking Company, that I am authorized to make this Verification on its behalf and that the statements of fact contained in the foregoing **Verified Complaint** are true and correct to the best of my knowledge, information, and belief, subject to correction if error should appear at a later date.

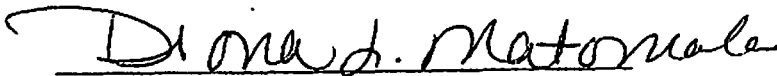


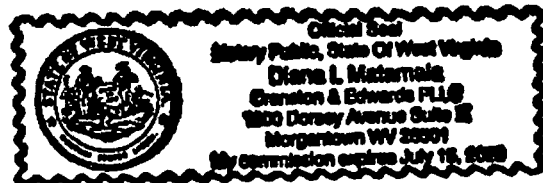
Taken, subscribed and sworn to before me this 8th day of October, 2014.

My commission expires:

July 15, 2023

Signature:





VERIFICATION

I, Edward P. Boyle, II, being first duly sworn, aver that I am the Secretary of Preston Contractors, Inc., that I am authorized to make this Verification on its behalf and that the statements of fact contained in the foregoing **Verified Complaint** are true and correct to the best of my knowledge, information, and belief, subject to correction if error should appear at a later date.

Edward P. Boyle II
Secretary

Taken, subscribed and sworn to before me this 8th day of October, 2014.

My commission expires: 7/25/2023

Signature: Diana L. Matamala

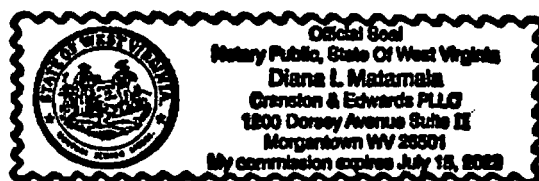


EXHIBIT 1

ORD 14-38

AN ORDINANCE AMENDING ARTICLE 301 OF THE CITY OF MORGANTOWN TRAFFIC CODE BY ADDING NEW SECTIONS 301.071 AND 301.111 TO IT, DEFINING THE TERMS "DOWNTOWN BUSINESS DISTRICT" AND HEAVY TRUCKS.

The City of Morgantown hereby ordains that Article 301 of its Traffic Code is hereby amended to include new Sections 301.071 and 301.111 which read as follows (new matter underlined):

301.071: Downtown Business District

"Downtown Business District" means the entirety of the B-4 General Business District as defined in the City of Morgantown's Planning and Zoning Code, but does not include Beechurst Avenue, University Avenue south of Beechurst Avenue, and Don Knotts Boulevard south of University Avenue.

301.111: Heavy Truck

"Heavy Truck" means any vehicle which is designed or operated for the transportation of property and 1) has combined declared gross weight of over 26,000 pounds as combined declared gross weight is defined in W.Va. Code § 17A-3-3©, and 2) commercial motor vehicle registered as class 7 or greater rating.

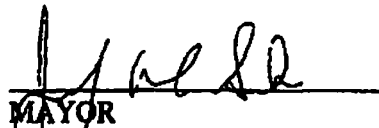
This Ordinance shall be effective upon date of adoption.

FIRST READING: August 19, 2014

ADOPTED: September 2, 2014

FILED: September 3, 2014

RECORDED: September 3, 2014


MAYOR


CITY CLERK

ORD 14-39

AN ORDINANCE BY THE CITY OF MORGANTOWN AMENDING ARTICLE 347 OF ITS TRAFFIC CODE BY AMENDING SECTIONS 347.01(a) AND 347.01 (c), AND ADDING NEW SECTIONS 347.01 (d) AND 347.01 (e), AS THE SAME APPLY TO HEAVY TRUCKS WITHIN THE DOWNTOWN BUSINESS DISTRICT.

DOWNTOWN BUSINESS DISTRICT HEAVY TRUCK LIMITATION

- WHEREAS, the 2013 Comprehensive Plan identifies the reduction of freight trucks within city limits as a community priority ¹; and
- WHEREAS, key findings from the Comprehensive Plan's public input process revealed that "[t]he presence of large trucks within the city evoked frustration from many respondents. The community wants to see truck traffic rerouted around the city and prohibited within the city's core" ¹; and
- WHEREAS, the Morgantown Monongalia Metropolitan Planning Organization's 2013-2040 Long Range Transportation Plan recommends reduction of "truck traffic in residential neighborhoods and on other streets where significant numbers of bicycles and pedestrians are present" ²; and
- WHEREAS, the City of Morgantown Planning and Zoning Code classifies the City of Morgantown into districts according to their intended function ³; and
- WHEREAS, the purpose of the General Business District (B-4) is to "promote development of a compact, pedestrian-oriented central business district..." ³; and
- WHEREAS, the 2010 Morgantown Pedestrian Safety Plan advises 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 the desirability of the City and the sense of safety which is important to pedestrians" and furthermore, that "driving of large truck vehicles over curbs and sidewalks" has been reported as "troubling to pedestrians" ⁴
- WHEREAS, the Downtown Strategic Plan aims to enhance the cultural, environmental, historic, educational, economic, recreational, and transportation elements of downtown Morgantown in part by enhancing pedestrian access ⁵; and
- WHEREAS, the City of Morgantown and the State of West Virginia continue to invest significant public resources in streetscaping, pedestrian crosswalks, pedestrian access, and curbing in the Downtown Business District; and

WHEREAS, the safety of pedestrians and motorists is threatened by the movement of heavy trucks on narrow streets and roads requiring heavy trucks to enter or occupy either more than one travel lane or a travel lane intended for oncoming traffic, cargo and debris falling from heavy trucks, deteriorated roads and bridges, and decreased visibility of traffic signals and signs caused by the width and height of heavy trucks;" and

NOW, THEREFORE, the City of Morgantown hereby ordains, pursuant to its safety regulatory authority, that Section 347.01 of its Traffic Code is amended as follows (new matter underlined, deleted matter struck through):

347.01 OVERSIZE OR OVERWEIGHT VEHICLES.

- (a) (a) General Prohibition. No person shall operate or move a vehicle or combination of vehicles of a size or weight of vehicle or load exceeding the maximum specified in West Virginia Code Article 17C-17 upon any street or highway within the Municipality, except pursuant to special written permit issued by the Commissioner of Highways or the City Manager. Every such permit shall be carried in the vehicle or combination of vehicles to which it refers and shall be open to inspection by any police officer.

No holder of a permit issued by the Commissioner of Highways shall be required to obtain any local permit or license or pay any local fee or charge for movement on any State route within the Municipality; however, it shall be unlawful 1) to operate any such vehicle or combination of vehicles upon any roadway within the Municipality which is not a State route, except as provided in subsection (c) hereof; and 2) to operate any Heavy Truck within the Downtown Business District, as defined within Article 301 of the City's Traffic Code, except as provided in subsections (c) and (d) hereof.

- (b) Five-ton Limitation on Local Streets. Whenever it becomes apparent to the City Manager that any street is being destroyed or permanently injured by the operation thereover of commercial vehicles, in excess of ordinary wear and tear, he has authority to close any such street to vehicles whose gross weight, including load, exceeds five tons. When any street has been so closed by the City Manager, and notice of such closing posted at the entries thereto, it shall, during the continuance of such closing, be unlawful for any person to operate thereupon any vehicle whose gross weight exceeds five tons. Any street so closed by the City Manager shall be promptly reported to Council.
- (c) Local Permit and Conditions. Upon application and for good cause, the City Manager may issue a local permit authorizing an applicant to move an oversize or overweight vehicle or combination of vehicles upon local streets or to operate a Heavy Truck on streets and highways located within the Downtown Business District, as defined within Article 301 of the City's Traffic Code. No permittee

shall be required to obtain a special permit from the Commissioner of Highways for the movement of the vehicle or combination of vehicles on streets or highways under local jurisdiction or for the movement of Heavy Trucks within the Downtown Business District; however, the approval of the Commissioner of Highways shall be required for movement upon State routes as provided in subsection (a) hereof.

The City Manager may grant a permit for a single or round trip, or for such period of time, not to exceed one year, as the City Manager in his discretion deems advisable, or for the duration of any construction project. The City Manager may limit or prescribe terms or conditions of operation for such vehicle or combination of vehicles by designating the route, hours, speed or such other restrictions as may be necessary for the preservation of the public peace, property, health and safety. The City Manager may require the posting of bond or other security necessary to compensate for any damage to a roadway or road structure. Every such permit shall be carried in the vehicle or combination of vehicles to which it refers and shall be open to inspection by any police officer.

For each such permit, the City Manager shall charge five dollars (\$5.00) and for each hour of time or any part thereof spent by each police officer in supervising the movement of such vehicle, the applicant shall pay the sum of ten dollars (\$10.00).

Signs shall be posted indicating "no thru trucks - gross weight 5 tons" or words of similar import to apprise drivers of the limitations imposed by subsection (b) hereof. No driver shall disobey the instructions indicated on any such sign. Violation of any of the limitations, terms or conditions of the permit granted by the City Manager shall be cause for immediate revocation or suspension of such permit, and denial of request for any future permit. Such violation shall also subject the violator to the penalty prescribed by Section 303.99.

347.01(d) HEAVY TRUCK LIMITATION IN DOWNTOWN BUSINESS DISTRICT.

No person shall operate a Heavy Truck in the Downtown Business District, as defined in Article 301 of the City's Traffic Code.

This provision does not limit or restrict:

- (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;
- (2) The operation of emergency or military vehicles;
- (3) The operation of vehicles by Public Utilities;
- (4) The operation of any governmental or quasi-governmental vehicle in the performance of any official function or duty;
- (5) The operation of solid waste disposal vehicles;
- (6) The operation of vehicles lawfully engaged in the business of towing, hauling or carrying wrecked or disabled vehicles;
- (7) The operation of trucks upon any officially established detour in any case

where a truck could lawfully be operated on the street for which such detour was established;

(8) The issuance of a special permit by the City Manager as provided in subsection (c).

347.01(e) TRUCK SIGNAGE.

Signs shall be posted indicating "no thru trucks - limit 13 tons" or words of similar import to apprise drivers of the limitations imposed by subsection (d) hereof.

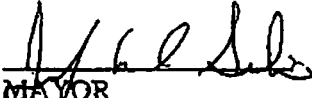
This Ordinance shall be effective 90 days from date of adoption.

FIRST READING: August 19, 2014

ADOPTED: September 2, 2014

FILED: September 3, 2014

RECORDED: September 3, 2014


MAYOR


CITY CLERK

Footnote Citations:

¹Comprehensive Plan Ordinance of Morgantown, West Virginia, 2013, available at: <http://www.morgantownwv.gov/about/crossroads-2012-comprehensive-plan/>
Section 4, Transportation

²Morgantown Monongalia Metropolitan Planning Organization 2013-2040 Long Range Transportation Plan, available at: <http://plantogether.org/LRTP%20Chapter%203%20Transportation%20Goals%20and%20Objectives.pdf>

³Morgantown Planning and Zoning Code, Section 1349.01 available at: <http://www.morgantownwv.gov/wp-content/uploads/Planning-and-Zoning-Code-2012.pdf>;
see also the Morgantown Zoning Map, available at: http://www.morgantownwv.gov/wp-content/uploads/official_zoning_map_07-01-2012.pdf

⁴2010 Morgantown Pedestrian Safety Plan, available at: http://www.morgantownwv.gov/wp-content/uploads/MPSE-Plan-8_13_2010.pdf

⁵Morgantown Downtown Strategic Plan, available at: <http://www.morgantownwv.gov/government/reports>

EXHIBIT 2

WEST VIRGINIA STATE OF HIGHWAY BASE MAP

2004
SCALE
1:50,000
U.S. DEPARTMENT OF TRANSPORTATION
IN COOPERATION WITH
WEST VIRGINIA DIVISION OF HIGHWAYS
PLANNING AND RESEARCH DIVISION

LEGEND
 INTERSTATE ROUTE
 APPALACHIAN ROUTE
 U.S. ROUTE
 COUNTY ROUTE
 PROPOSED DIVIDED HIGHWAY
 PROPOSED HIGHWAY

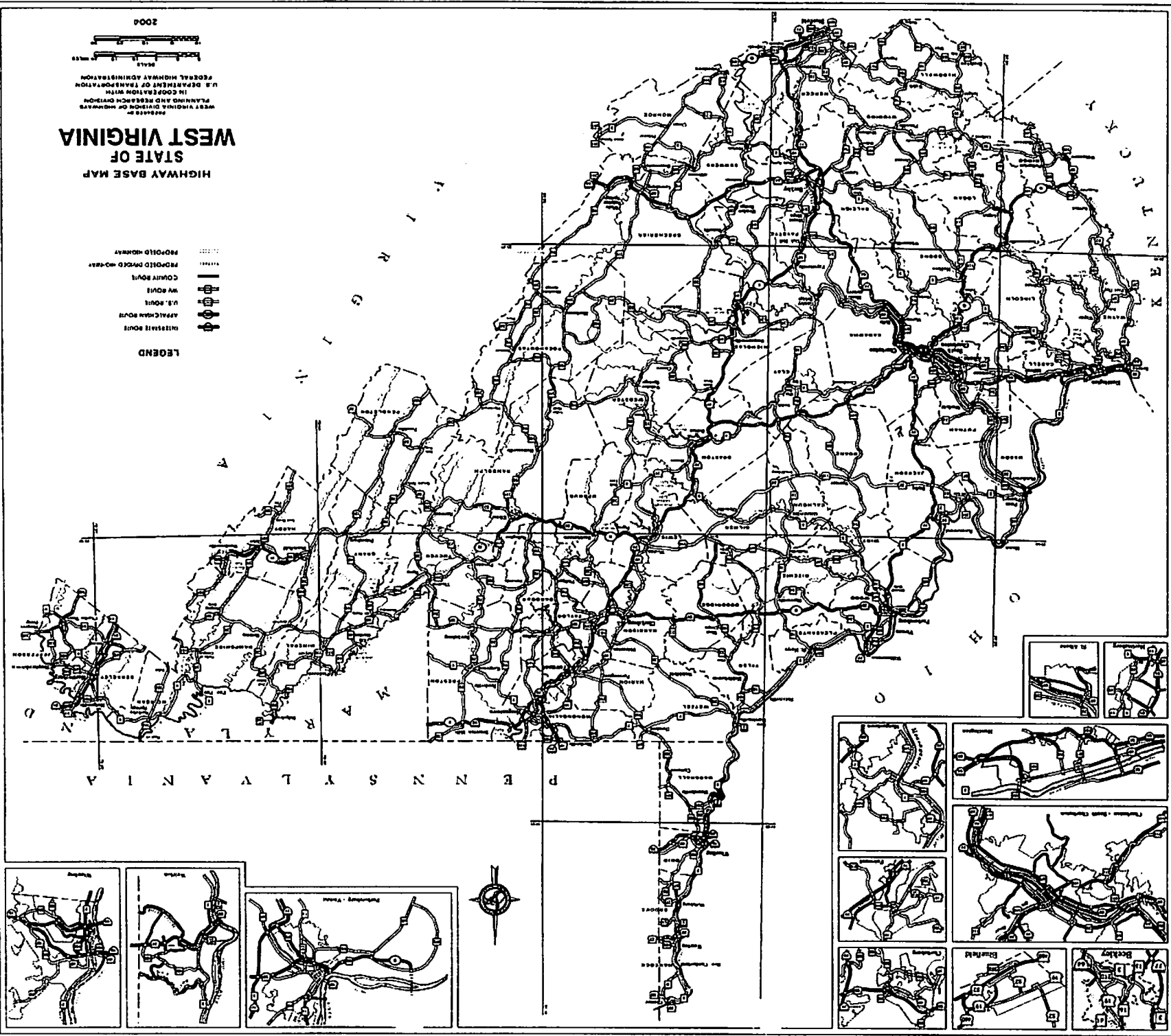


EXHIBIT 3



1980 R

EXHIBIT 4

5th
2nd 207c

THE STATE ROAD COMMISSION OF WEST VIRGINIA
Charleston, West Virginia

Abstract
FROM
THE RECORDS OF THE COMMISSIONER'S
ORDERS DATED JUNE 12, 1945

istr.
Chief Eng.
S. Eng.
D. Eng.
A.
P. D.
Inf. Bureau
G. H. H.

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 13, 1936, be amended, the designation to be as follows:

"BEGINNING at the Pennsylvania State Line connecting with a state route leading to Pt. Marion; thence southerly via Morgantown, Laurel Point, Georgetown, and Arnettsville to the Marion County Line connecting with a primary state route leading to Fairmont.

W.V. 73

"Beginning at the Marion County line on the Morgantown Turnpike near Smithtown; thence generally with the Morgantown Turnpike, via Smithtown, Uffington to Morgantown.

W.V. 7

"Beginning at the Pennsylvania State line connecting with a state route leading to Mt. Morris; thence via Bowly to Morgantown; thence via Sabraton and Dellsalew to the Preston County line connecting with a primary route leading to Kingwood.

W.V. 7

"Beginning at the Wetzel County line on the state primary route leading to New Martinsville; thence easterly via Wadestown, Hana, Blacksville, Gere, and Cassville to Randall at the mouth of Scotts Run, connecting with a primary state route leading from Morgantown to Bowly.

W.V. 7

"Beginning at the Taylor County line on a state primary route leading to Orafton; thence via Halleck to intersect with the Fairmont-Morgantown road north of Uffington.

W.V. 73

"Beginning on the primary route leading from Morgantown to Pt. Marion (Pennsylvania) at a point near Easton; thence via Ice's Ferry to the Preston County line connecting with a primary route leading to Bruceton Mills.

(Continued)

PLANNING DIVISION

W.VA. 7 SPUR
West 11/27/46
Spencer

Now
"Beginning at Morgantown, thence via Beechurst Avenue,
and in a northwesterly direction to Star City; thence crossing the
Monongahela River to a connection with a primary route at the mouth
of Scotts Run near or at Randall.

Cont. on file

wn 92
Beginning on a Primary Route 67 or
near the Junction of Gustons Run and
Scotts Run, thence up Gustons Run and
crossing over to the head of Wade Run,
thence to a Junction with a primary Road
near the Pennsylvania State line
leading to Waynesburg, PA.

STATE OF WEST VIRGINIA,
THE STATE ROAD COMMISSION OF WEST VIRGINIA, to-wit:

I, Don McLaugherty, Secretary of The State Road Commission of
West Virginia, do hereby certify that the foregoing is a true
abstract from the Commissioner's Orders entered of record on
the 18th day of June, 1946.

Given under my hand and seal of The State Road Commission of
West Virginia this 18th day of June, 1946.

Don McLaugherty
Secretary of The State Road
Commission of West Virginia.

EXHIBIT 5



The City of Morgantown

389 SPRUCE STREET
MORGANTOWN, WEST VIRGINIA 26505
(304) 284-7405 TDD (304) 284-7512

OFFICE OF CITY MANAGER

September 2, 2005

Mr. Paul Mattox, Jr., Commissioner
W V Division of Highways
1900 Kanawha Blvd., East
Building 5, Room 110
Charleston, WV 25305

Dear Mr. Mattox:

At the direction of City Council, I am writing to you about a serious problem in Downtown Morgantown and the residential areas adjacent to it. Truck traffic on State routes through the area is creating extraordinary problems unlike that experienced in any other, major West Virginia City.

Large coal trucks and "eighteen wheelers" starting at 4:00 a.m. rumble through residential areas on Route 7 into and through the Downtown and continue throughout most of the day. Trucks three and four at a time travel together generating exhaust, noise, safety concerns, and congestion in the area while driving over sidewalks trying to make sharp turns on City streets. The volume of this traffic is now at a point that City Council does not consider it acceptable for an urban area.

Attached to this letter you will find a proposed City Ordinance to resolve the issue. Council asks that you review it in the context of the local situation and offer any suggestions or ideas that may improve it. Council very much looks forward to your comments and with them in hand will plan to move forward with this initiative in October. During the interim, if you or your staff should have any questions or need any additional information to process this request, please call upon me at once. Thank you again for your consideration.

Respectfully,

Dan Boroff
City Manager

AN ORDINANCE CREATING A NEW ARTICLE 312 WITHIN THE CITY OF MORGANTOWN TRAFFIC CODE; PROHIBITING COMMERCIAL MOTOR VEHICLES FROM DRIVING THROUGH THE DOWNTOWN (B-4) BUSINESS DISTRICT WHEN NOT ON ROUTE TO OR FROM PROVIDING SERVICES TO A SPECIFIC LOCATION WITHIN THE DOWNTOWN (B-4) BUSINESS DISTRICT.

WHEREAS, the greater Morgantown Metropolitan Planning Organization (hereinafter "MPO") has issued an April 21, 2005 report analyzing the effects of "truck traffic", using the City of Morgantown as a "through" route, and determined that at its present level such through truck traffic presents public health and safety concerns to City residents and downtown businesses;

WHEREAS, the MPO has in its April 21, 2005, report recommended that the City of Morgantown direct truck traffic, not contributing to the commerce of downtown businesses, around the downtown area of the City;

WHEREAS, Section 17C-17-12(c) of the West Virginia Code authorizes municipalities to prohibit the operation of trucks or other commercial vehicles upon designated highways within its jurisdiction;

WHEREAS, West Virginia Code Sections 17-4-26 through 31 provide for concurrent jurisdiction of municipalities and the State relating to State highways running through the City and designated as "connecting parts" of the State Highway System;

WHEREAS, Federal Courts have held that States have safety regulatory authority to impose highway route controls upon motor vehicles; and

WHEREAS, Morgantown City Council agrees with the individual safety concerns presented by the MPO in its April 21, 2005, report and, for that reason, is of the opinion that it should adopt an ordinance that prohibits all commercial motor vehicles, other than those which are on route to or from providing a service within the City of Morgantown's Downtown (B-4) Business District, from driving through the City of Morgantown's Downtown (B-4) Business District.

NOW, THEREFORE, the City of Morgantown hereby ordains that a new Article 312 is added to the Traffic Code of the City of Morgantown which reads as follows:

ARTICLE 312

COMMERCIAL MOTOR VEHICLES AND DOWNTOWN BUSINESS DISTRICT

312.01 PURPOSE.

The purpose of this Article is to limit the use of streets and roadways by Commercial Motor Vehicles within the Downtown (B-4) Business District, thereby reducing public health and safety concerns related to said commercial motor vehicles, and their negative impact upon the citizens and downtown businesses of this community.

312.02 CERTAIN COMMERCIAL MOTOR VEHICLES PROHIBITED IN DOWNTOWN (B-4) BUSINESS DISTRICT.

No commercial motor vehicle shall utilize the streets or roadways within the Downtown (B-4) Business District for purposes of traveling through the City. Only those commercial motor vehicles which are on route to or from providing services to a specific location within the downtown (B-4) Business District, shall be allowed to travel the streets and roadways of the Downtown (B-4) Business District.

312.03 DEFINITION OF COMMERCIAL MOTOR VEHICLE.

For purposes of this Article, the term "Commercial Motor Vehicle" shall be the same as that contained within Section 17E-1-3 of the West Virginia Code.

312.04 EXEMPTIONS.

The Federal Government, State of West Virginia and City of Morgantown, and their employees shall be exempt from the requirements of this Article while performing work for such government entity. The Monongalia County Urban Mass Transit Authority, also known as "Mountain Line" shall also be exempt from the requirements of this Article.

312.05 PENALTY.

The driver of a commercial motor vehicle violating the provisions of this Article shall be guilty of a misdemeanor and fined not less than \$100.00 nor more than \$500.00 for each such offense.

This ordinance shall be effective upon date of adoption.

FIRST READING:

Mayor

ADOPTED:

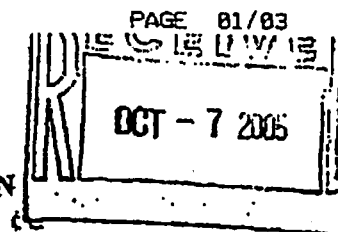
FILED:

City Clerk

RECORDED:

EXHIBIT 6





WEST VIRGINIA DEPARTMENT OF TRANSPORTATION
Division of Highways

1900 Kanawha Boulevard East • Building Five • Room A109
Charleston, West Virginia 25305-0430 • 304/558-3505

Joe Manchin III
Governor

October 4, 2005

Mr. Don Boroff
City Manager
The City of Morgantown
389 Spruce Street
Morgantown, West Virginia 26505

Dear Mr. Boroff:

Thank you for your letter dated September 2, 2005, in which you requested that the Division of Highways (DOH) review the proposed Morgantown Traffic Code Ordinance 312. This Ordinance proposes to prohibit all commercial motor vehicles as defined in W.Va. Code §17-E-1-3 from using streets or roadways within the City's Downtown (B-4) Business District, excepting those commercial motor vehicles which are en route to, or from providing services within, the District. Federal, State and City Governments, and their employees, are exempted from the prohibition of this ordinance while performing work for the governmental entity, as is the Monongalia County Urban Mass Transit Authority.

As you know, WV 7 runs through the Downtown (B-4) Business District. This road is currently used as a through route by commercial motor vehicles which are not on route from, or providing services to, locations within the District.

The (DOH) cannot approve passage of the proposed ordinance for the following reasons:

- 1) The class of vehicles prohibited appears to be overbroad given the purported safety concerns of the Greater Morgantown Metropolitan Planning Organization (hereinafter "MPO"), which are expressly adopted in the proposed ordinance. These concerns relate to through truck traffic and not to all commercial motor vehicles, as defined in W. Va. Code §17-E-1-3, which includes school buses. Further, the MPO analysis addresses only through truck traffic on WV 7, and not on all streets or roads within the District.
- 2) The ordinance provides no exemption for Monongalia County employees or vehicles.

Mr. Don Boroff
October 4, 2005
Page Two

- 3) The concerns and recommendations of the MPO refer to impacts of trucks related to size, weight, speed, cargo, securing of cargo, and manner of operation. These more narrowly focused concerns are already addressed by state statutes and are the subject of Federal regulation. In this context, the total prohibition of through commercial traffic again appears overbroad and not narrowly tailored to address the concerns expressed by the MPO.

Even if the proposed ordinance was revised to meet the objections noted above, it would be subject to Federal preemption under 49 U.S.C. 14501, which provides in pertinent part:

§ 14501. Federal authority over intrastate transportation

(c) Motor carriers of property •

(1) General rule • Except as provided in paragraphs (2) and (3), a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier (other than a carrier affiliated with a direct air carrier covered by section 41713(b)(4)) or any motor private carrier, broker, or freight forwarder with respect to the transportation of property.

(2) Matters not covered. • Paragraph (1) •

(A) shall not restrict the safety regulatory authority of a State with respect to motor vehicles, the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or the authority of a State to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization;

(B) does not apply to the transportation of household goods; and. -

(C) does not apply to the authority of a State or a political subdivision of a State to enact or enforce a law, regulation, or other provision relating to the price of for-hire motor vehicle transportation by a tow truck, if such transportation is performed without the prior consent or authorization of the owner or operator of the motor vehicle.

Mr. Don Boroff
October 4, 2005
Page Three

Federal Courts have stated that restrictions affecting routes in state and local law must be premised on genuine safety concerns. As noted above, the purported safety concerns recited by the MPO, and adopted by the city in the proposed ordinance, are already addressed by state and federal law and may be addressed with more particularity with respect to municipal streets by a more narrowly crafted ordinance. Moreover, these concerns are not unique to Morgantown's Downtown (B-4) Business District or demonstrated to be substantially different from similar impacts in other urban and non-urban areas of the state. In addition, if the concerns are those of safety, there appears to be no rational basis for exempting local delivery commercial motor vehicles or governmental entities' commercial motor vehicles.

Other federal laws that may be implicated by the proposed ordinance include but are not limited to 49 U.S.C. 31114 et. seq., 49 C.F.R. Part 350 and 23 C.F.R. Part 650.

Accordingly, I request that the City submit for review by the DOH a traffic engineering study of WV 7 within Morgantown Downtown (B-4) Business District documenting whether roadway design criteria or accident history demonstrate one or more genuine safety problems related to the size, weight, speed, nature or securing of cargo, or manner of operation of commercial motor vehicles using WV 7 through the District. In addition, I recommend that you contact the West Virginia Public Service Commission, Motor Carrier Division, for additional assistance.

If you have any questions, you may contact Jeff Miller at (304) 558-9273 or Barry Warhottig at 558-3063. I hope these comments prove to be of value to the Morgantown City Counsel in its consideration of this proposed ordinance.

Very truly yours,


Paul A. Mattox, Jr., P. E.
Commissioner of Highways

PAM:Mm

cc: Henry Compton, FHWA w/Enclosures
Gary Edgell, WVPSC Motor Carrier Division w/Enclosures
WV Motor Truck Association w/Enclosures

EXHIBIT 7

Publication: The Dominion Post; Date: Feb 4, 2006; Section: Front Page; Page: 1-A



City faces roadblocks to truck law

Divided council awaits research from legal firm

BY GARY GRAY The Dominion Post

CITY COUNCIL hired Steptoe & Johnson to review federal and state code. Council will decide whether to move forward with the ordinance once they receive that legal evaluation.

More than one year after a Morgantown City Councilman drafted an ordinance to reroute truck traffic away from downtown, the number of legal avenues through which the city can make that plan happen are dwindling.

Both Steve Fanok, Morgantown city attorney, and the state's Division of Highways legal staff already have told the city that the ordinance won't fly.

In an effort to get an independent assessment, the city hired the Morgantown law firm Steptoe & Johnson to research federal and state legal codes. Now the city is waiting on that opinion, which will likely dictate if council can restrict truck traffic on W.Va. 7.

Ron Justice, Morgantown mayor, said that he does not favor or oppose an ordinance, because an ordinance has not made its way to council for approval.

"In my opinion, both the opposition to rerouting trucks and proponents of the issue have 'put it out there' much further than where we actually are on this issue at the present time," he said.

In this case, commerce, jobs, individual rights, safety, and quality of life are all important, and all of these factors must be considered if and when council is faced with making a decision, he said.

Justice, who also is the Monongalia/Morgantown Metropolitan Planning Organization chair, said that he still wants to review Steptoe & Johnson's findings.

"The issue is whether or not a proposed ordinance is legal," he said. "I feel we are currently going through that process. I cannot vote on an ordinance that would put the city in jeopardy of future legal action or damages."

The concern has centered on the noise, pollution and congestion caused by heavy trucks laden with limestone and coal that cut through downtown on W.Va. 7 and other routes to their destinations. The city proposed rerouting the traffic to Green Bag Road or to Interstate 68, but legal uncertainties have halted the move.

Dan Boroff, Morgantown city manager, has said that trucks hauling material from Greer Limestone Co. account for about 80 percent of the coal and limestone trucks traveling through town. But the 80 percent of heavy trucks downtown being associated with Greer is "only a rough estimate," Boroff said Friday.

The major consideration for Greer is that the company is trying to expand its business, said John Raese, co-owner of Greer Industries Inc.

Greer Limestone is a division of Greer Industries.

Raese said Greer has put millions of dollars into the old Decker's Creek Mine on W.Va. 7 about 10 miles southeast of Morgantown.

"We've enjoyed having the opportunity to deliver our product through the state route," he said. "But in the middle of the ocean they've decided to take our oars from us. If West Virginia is 'open for business,' as the governor has said, then we shouldn't be restricted by local government."

When asked to comment more specifically on what proponents of the ordinance have been saying, Raese replied, "I don't like to go negative on everybody. I'd rather keep my eye on the ball and go forward."

Councilman Bill Byrne, who introduced the proposed ordinance, said he supports rerouting the heavy trucks. However, Byrne acknowledged that "the ordinance as drafted needs considerable work."

"The key point here is the insignificance of this change and the small added cost to transport this material around the city rather than through it," Byrne said. "It is but a few miles more to take either the Green Bag Road or the Interstate from Greer's plant in Richard to one of its loading facilities on south University Avenue or Beechurst Avenue."

Jim Manilla, Morgantown deputy mayor, has said repeatedly that he would not support the ordinance if it was not on solid legal ground.

"It would be nice if heavy trucks didn't go through downtown," he said. "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."

Councilwoman Teresa Miller said she needs much more information on the subject before committing to the ordinance as it stands right now.

"We haven't heard any hardcore facts, and we're not able to get the facts and figures we need," she said. "It's too early to tell, and ambiguities are something that always occur at the beginning of an issue."

Councilman Frank Scafella agreed with Miller and said he is reserving judgment until all questions have been answered and all facts are on the table.

"What if, for example, truckers were willing to take either alternate route for a couple of weeks, keeping careful and accurate records and thereby documenting the additional cost per load hauled by avoiding the downtown?" he said. "If they were willing to do this, I believe that City Council, through the city manager, could find a way to secure compensation for the truckers due to their added cost in fuel and mileage. It might even be possible to compensate them on a permanent basis for using an alternate route."

Council is working the problem through in order to reach consensus on a solution, and "one person's opinion will not carry the day," Scafella said.

Councilman Don Spencer brought forward quality of life considerations. "It is vitally important that Greer Industries comes to understand the breadth of economic and personal investment that thousands of people have in having a healthy, protected work and living environment along Brockway Avenue in downtown Morgantown," he said.

Councilman Ron Bane was not available for comment.

Meanwhile, it's no secret that, without large trucks, downtown businesses would suffer as well.

L.J. Giuliani, owner of the nightclub 123 Pleasant St., said he understands that rerouting the heavy **trucks** could hurt **truckers** and that the coal and limestone **trucks** driving by his business don't necessarily constitute a problem.

"We have beer distributors that deliver here maybe four times a week," he said. "They park out on the street in a loading zone that also serves other businesses nearby. Do the coal and limestone **trucks** come onto Pleasant Street and in front of the business? Yes. But from a business standpoint, they have no bearing on us. Do they affect the quality of life for people downtown? Maybe."

Robert Witte, general manager of Buffalo Wild Wings Grill & Bar at 268 High St., said a large **truck** hauling goods to the business parks on the street twice a week to unload. "It can be a hindrance at time for motorists wanting to make a turn," he said about delivery **trucks** servicing the business. "But the coal **trucks** — I hear complaints from our guests that they extremely loud. It seems like they (council) have been talking about this issue for a long time, and I just wish they'd make a decision one way or the other."

JOHN RAESE and David Raese are coowners of West Virginia Newspaper Publishing Co., publisher of The Dominion Post. The Raese brothers are also co-owners of West Virginia Radio Corp. and Greer Industries Inc.

The following is wording from a proposed ordinance introduced in 2005 by Morgantown City Councilman Bill Byrne. No final ordinance has been formulated and introduced to council for a vote.

"An ordinance creating a new article 312 within the city of Morgantown traffic code; prohibiting commercial motor vehicles from driving through the downtown (B-4) business district when not on route to or from providing services to a specific location with the downtown business district ..."

Print

EXHIBIT 8

MEMORANDUM

To: City Council of The City of Morgantown

From: Steptoe & Johnson PLLC
Vincent A. Collins
Thomas L. Aman, Jr.

Date: March 6, 2006

Re: Proposed Ordinance Regulating Truck Traffic in Downtown Business District

Privileged Attorney-Client Communication

It is our understanding that the City Council of the City of Morgantown (the "City") is considering the enactment of an ordinance which would regulate truck traffic in the downtown business district of the City. The City has requested that we attempt to determine whether if enacted, such an ordinance would withstand a legal challenge. The primary questions are:

1. Does the State of West Virginia, the City or both have jurisdiction over the roadways that the City proposes to regulate?
2. Is there legal authority under West Virginia law permitting municipal regulation of through truck traffic?
3. Does federal law preempt municipal authority to regulate through truck traffic?

We will discuss each of these issues separately and then provide our conclusions and recommendations.

Jurisdiction Over Roadways in Municipality

Every municipality and the governing body thereof has the authority by ordinance or resolution, as the case may require, and by appropriate action based thereon, to establish, construct and keep in good repair, streets and roadways for the use of the public. W. Va. Code § 8-12-5(1). Municipalities have the further right and power to regulate the use of streets and roadways which belong to the municipality. W. Va. Code § 8-12-5(4). This leads to the question of which city streets belong to a municipality? Certainly, those that were established and constructed by the municipality would belong to the municipality. However, the West Virginia Supreme Court of Appeals seems to have taken a broader view in stating that municipalities own such portions of the highways within their corporate limits for such public uses and purposes as the Legislature by express declaration or implication recognizes as lawful: The Chesapeake & Potomac Telephone Company of West Virginia v. City of Morgantown, 144 W. Va. 149, 107 S.E.2d 489 (1959). This would indicate that a municipality has sole jurisdiction of the streets within its borders. However, such is not the case, as the State Road Commissioner also has jurisdiction over roadways located within municipalities.

The State Road Commissioner may designate as a "connecting part" of the state road system any bridge or street within a municipal corporation. W. Va. Code § 17-4-26. Roads in Monongalia County which have been designated as "connecting parts" of the state highway system include US 119, WV 73, and parts of WV 7. The State Road Commissioner may construct, reconstruct, improve and maintain the designated connecting part at the cost and expense of the State. W. Va. Code § 17-4-26. Further, 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 systems generally. W. Va. Code § 17-4-27. Thus, from the foregoing it appears that municipalities retain some, but not exclusive, jurisdiction to regulate traffic over the roadways located within their borders.

Legal Authority Which Would Permit Regulation of Truck Traffic

Municipalities, with respect to highways under their jurisdiction may, 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. W. Va. Code § 17C-17-12(c). This provision grants to municipalities the power to prohibit operation of trucks, and the power to limit truck weight on roadways under municipal jurisdiction. This conclusion is supported by the statutory provisions relative to "connecting parts" of the state highway system which were discussed above. In this respect, it is provided that 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 systems generally. W. Va. Code § 17-4-27. Prohibiting the operation of trucks or limiting the weight of trucks on municipal roadways would likely be considered regulation of traffic as permitted with respect to "connecting parts" of the state highway system.

However, the power of a municipality to prohibit operation of trucks and to regulate truck weight is substantially limited by certain powers which are reserved for the State of West Virginia. The West Virginia Code specifically provides that municipal truck prohibitions and weight limitations shall be designated by appropriate signs placed on such highways. W. Va. Code § 17C-17-12(c). Furthermore, W. Va. Code § 17C-2-8 provides that no ordinance or regulation restricting the use of highways as authorized in [§ 17-C-12] shall be effective until signs giving notice of such

local traffic regulations are posted. However, W. Va. Code § 17-4-27 provides that 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 constructed with state or federal aid shall be subject to the approval of the State Road Commissioner. Through the power to reject signs and traffic signals which a municipality is required to post in order to validate and enforce an ordinance prohibiting trucks or limiting the weight thereof, the State Road Commissioner effectively has the ability to block efforts of a municipality to restrict truck traffic through enactment of such an ordinance.

Federal Exemption of Municipal Authority to Regulate Truck Traffic

Federal law provides that a state, political subdivision of a state, or political authority of two or more states may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier with respect to the transportation of property. 49 U.S.C.A. § 14501(c)1. Taken alone, this provision would prohibit the City from enacting or enforcing an ordinance that would impose route controls on through truck traffic in the downtown business district. However, the federal legislation also provides an exception which would likely apply to the proposed City ordinance. The above referenced federal statute shall not restrict the safety regulatory authority of a state with respect to motor vehicles, the authority of a state to impose highway route controls or limitations based upon the size or weight of the motor vehicle or the hazardous nature of the cargo. 49 U.S.C.A. § 14501(c)2. Further, a state may delegate regulatory authority to municipalities to enact motor carrier restrictions based on safety concerns and size and weight restrictions, but not to enact regulations concerning prices, routes, or service that are

not based thereon. California Dump Truck Owners Association v. Davis, 302 F. Supp. 2nd 1139 (2002).

Thus, federal preemption would not likely prevent the City from enacting a narrowly tailored ordinance which addresses the specific safety and health concerns identified by the Greater Morgantown Metropolitan Planning Organization (the "MPO") in its April 21, 2005 memorandum. The MPO memorandum details safety and public health concerns related to through truck traffic on Route 7 in the downtown business district of the City. The safety concerns identified by the MPO include: (i) potential injury to buildings and pedestrians due to the narrow road and lack of buffers; (ii) cargo or debris falling from trucks and injuring people and property; and (iii) truck weight, width and speed causes long stopping times, making it difficult to navigate, and decreasing visibility for other motorists. For preemption purposes, the ordinance would have to be narrowly tailored to address the specific safety and health concerns identified by the MPO in its memorandum. The ordinance could also minimize the possibility of federal preemption by imposing route controls based upon the weight of the vehicles that would be regulated. These ordinance provisions would bring the ordinance into compliance with the safety regulatory authority and route control based on weight exceptions to preemption set forth in 49 U.S.C.A. § 14501(c)2.

Conclusion and Recommendation

A court would likely determine that the City has jurisdiction to regulate traffic on the portion of WV Route 7 that passes through the municipal boundaries of the City. Further, legal authority exists to support the proposition that the City could enact a narrowly tailored truck ordinance that regulates through truck traffic in the downtown business district based upon the safety concerns identified by the MPO in its April 21, 2005 memo, or which imposes route controls based

upon the weight of the vehicles. However, the legal authority which would support such an ordinance is undermined by the fact that the State Road Commissioner has the authority to reject any proposed traffic signs or signals that would be needed to validate and enforce such an ordinance.

It is probable that if an ordinance of the type contemplated were to be enacted, litigation would be initiated by the businesses that routinely truck products through the downtown business district. The probable outcome of such a legal challenge is difficult to predict. Authority exists for a court both to find in favor of the City and to rule against the City. The City should plan for a likely protracted legal battle and attendant costs if it chooses to enact and enforce such an ordinance.

The City might consider attempting to negotiate reasonable restrictions on truck traffic with the trucking companies that are most likely to contest the proposed ordinance. Failing this, the City might consider working with the State Road Commissioner to determine whether they would be willing to impose reasonable regulations.

EXHIBIT 9

Publication: The Dominion Post; Date: Nov 26, 2005; Section: Local; Page: 9-A



Council to take on big trucks

Traffic issues, MUB rate increase on meeting slate

BY GARY GRAY The Dominion Post

The issue of re-routing heavy coal trucks and tractor-trailers away from downtown is back on the table after a city proposal to make that happen was put aside last month by the state Division of Highways.

The matter is among about a dozen slated for discussion at Morgantown City Council's committee-of-the-whole meeting beginning at 6:45 p.m. Tuesday. No action will be taken at the meeting.

"This is the first time we've had a chance to really open this up for discussion at council," said Dan Boroff, Morgantown city manager. "We basically have three options. We could appeal the DOH decision to the secretary of state or the governor; we could seek changes in state law that allows cities to have more control; or we could do as the letter instructed."

On Sept. 2, Boroff sent the DOH a letter on behalf of council stating the gravity of the problem.

"Truck traffic on state routes through the area is creating extraordinary problems unlike that experienced by any other major West Virginia city," Boroff stated in the letter. "The volume of this traffic is now at a point that City Council does not consider it acceptable for an urban area."

Accompanying Boroff's letter was a proposed city ordinance that would move heavy truck traffic off W.Va. 7 and onto other routes not going through downtown.

Paul Mattox, DOH commissioner of highways, responded to the city's request for approval of the ordinance in an Oct. 4 letter to Boroff.

Mattox wrote that the DOH could not approve the proposed ordinance and asked the city to submit an engineering study of W.Va. 7 within the Morgantown Downtown Business District.

MUB rate hike

Jim Green, MUB general manager, has announced that the W.Va. Public Service Commission has issued a final order allowing Morgantown Utility Board a 22 percent combined water and sewer rate hike.

The average residential customer in Morgantown consuming 4,500 gallons per month will pay an average rate of \$21.86.

Council now will begin the process of making the rates official by amending a city code that sets fees for water service.

"These rates allow for about a \$1.5 million surplus for our water and sewer upgrade programs," Green said. "This is about \$500,000 less than we had originally designed in the tariff ordinance."

[Print](#)

EXHIBIT 10

SAFE STREETS MORGANTOWN
safestreetsmorgantown@gmail.com

June 17, 2014

BY HAND AND EMAIL

Morgantown City Council
389 Spruce Street
Morgantown, West Virginia 26505

RE: Proposed Ordinance Regulating Heavy Truck Traffic in the Downtown Business District

Mayor Selin, Deputy Mayor Shamberger, Members of City Council:

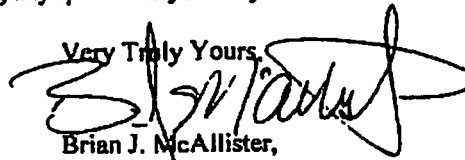
For many years, we acquiesced in believing that our City is powerless to regulate the movement of large trucks traveling through our downtown business district on state roads. Because a fair reading of West Virginia Code §§ 17-4-27 and 17C-17-12 justifies the opposite conclusion, and because we in Morgantown concluded that the movement of large trucks through our downtown business district is detrimental to the health and vitality of nearby neighborhoods as well as to the downtown business district itself, we include herewith a proposed ordinance regulating heavy truck traffic through our City's downtown. We also include the applicable statutory provisions, which grant Morgantown the authority to regulate traffic in this manner.

Please place this proposal on the Committee of the Whole agenda for June 24. At that time, we will ask that you immediately advance the proposed ordinance to the regular agenda and that you pass and enact the proposed ordinance as efficiently as possible. By regulating the movement of heavy trucks through and within the City's downtown business district, this Council will not only act in conformity with the authority specifically bestowed upon it by our Legislature, but you will simultaneously advance the collective will of our fellow citizens, as clearly expressed within our Comprehensive Plan, the Downtown Strategic Plan, the Morgantown Monongalia Metropolitan Planning Organization Long-Range Transportation Plan, the Morgantown Pedestrian Safety Plan, and designations in our Planning and Zoning Code. Additionally, you will erase years of frustration borne of our unsuccessful attempts to satisfactorily resolve this issue by negotiation.

Downtown businesses will benefit by the enactment and enforcement of this ordinance. Neighborhoods and residents will benefit by the enactment and enforcement of this ordinance. Accordingly, Morgantown will unquestionably benefit by the enactment and enforcement of the ordinance we now present for your consideration.

Mr. Evan Hansen and I will attend the Committee of the Whole meeting on June 24, 2014, so that you can make inquiry on this topic as you see fit. We thank you for your attention to this very important proposal, and we look forward to answering any questions you may have on the 24th of June.

Very Truly Yours,



Brian J. McAllister,
Coburn Avenue

BJM

Enclosures: Downtown Business District Heavy Truck Limitation Proposal;
W. Va. Code §§ 17-4-27 and 17C-17-12.

Cc: Jeff Mikorski, ICMA-CM
Steve Fanok, Esquire
Linda Little, CMC

DOWNTOWN BUSINESS DISTRICT HEAVY TRUCK LIMITATION

WHEREAS, the 2013 Comprehensive Plan identifies the reduction of freight trucks within city limits as a community priority¹; and

WHEREAS, key findings from the Comprehensive Plan's public input process revealed that "[t]he presence of large trucks within the city evoked frustration from many respondents. The community wants to see truck traffic rerouted around the city and prohibited within the city's core"¹; and

WHEREAS, the Morgantown Monongalia Metropolitan Planning Organization's 2013-2040 Long Range Transportation Plan recommends reduction of "truck traffic in residential neighborhoods and on other streets where significant numbers of bicycles and pedestrians are present"²; and

WHEREAS, the City of Morgantown Planning and Zoning Code classifies the City of Morgantown into districts according to their intended function³; and

WHEREAS, the purpose of the General Business District (B-4) is to "promote development of a compact, pedestrian-oriented central business district..."³; and

WHEREAS, the 2010 Morgantown Pedestrian Safety Plan advises 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 the desirability of the City and the sense of safety which is important to pedestrians" and furthermore, that "driving of large truck vehicles over curbs and sidewalks" has been reported as "troubling to pedestrians"⁴.

WHEREAS, the Downtown Strategic Plan aims to enhance the cultural, environmental, historic, educational, economic, recreational, and transportation elements of downtown Morgantown in part by enhancing pedestrian access⁵; and

WHEREAS, the Downtown Strategic Plan recommends improved pedestrian connections through the creation of enhanced streetscaping and setbacks, pedestrian streets, enhanced alleys and multipurpose trails⁵; and

WHEREAS, the City of Morgantown and the State of West Virginia continue to invest significant public resources in streetscaping, pedestrian crosswalks, pedestrian access, and curbing in the Downtown Business District;

BE IT THEREFORE RESOLVED that the City Traffic Code is amended as follows:

Article 301 shall be amended to include:

301.071: Downtown Business District

"Downtown Business District" means the entirety of the B-4 General Business District as defined in the City of Morgantown's Planning and Zoning Code, but does not include Beechurst Avenue, University Avenue south of Beechurst Avenue, and Don Knotts Boulevard south of University Avenue.

301.111: Heavy Truck

"Heavy Truck" means any vehicle which is designed or operated for the transportation of property and 1) has combined declared gross weight of over 20,000 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.

Article 347.01(a) shall be amended to read:

(a) General Prohibition. No person shall operate or move a vehicle or combination of vehicles of a size or weight of vehicle or load exceeding the maximum specified in West Virginia Code Article 17C-17 upon any street or highway within the Municipality, except pursuant to special written permit issued by the Commissioner of Highways or the City Manager. Every such permit shall be carried in the vehicle or combination of vehicles to which it refers and shall be open to inspection by any police officer.

No holder of a permit issued by the Commissioner of Highways shall be required to obtain any local permit or license or pay any local fee or charge for movement on any State route within the Municipality; however, it shall be unlawful 1) to operate any such vehicle or combination of vehicles upon any roadway within the Municipality which is not a State route, except as provided in subsection (c) hereof; and 2) to operate any Heavy Truck within the Downtown Business District, except as provided in subsections (c) and (d) hereof.

Article 347.01(c) shall be amended to read:

(c) Local Permit and Conditions. Upon application and for good cause, the City Manager may issue a local permit authorizing an applicant to move an oversize or overweight vehicle or combination of vehicles upon local streets or to operate a Heavy Truck on streets and highways located within the Downtown Business District.

No permittee shall be required to obtain a special permit from the Commissioner of Highways for the movement of the vehicle or combination of vehicles on streets or highways under local jurisdiction or for the movement of Heavy Trucks within the Downtown Business District; however, the approval of the Commissioner of Highways shall be required for movement upon State routes as provided in subsection (a) hereof.

The City Manager may grant a permit for a single or round trip, or for such period of time, not to exceed one year, as the City Manager in his discretion deems advisable, or for the duration of any construction project. The City Manager may limit or prescribe terms or conditions of operation for such vehicle or combination of vehicles by designating the route, hours, speed or such other restrictions as may be necessary for the preservation of the public peace, property, health and safety. The City Manager may require the posting of bond or other security necessary to compensate for any damage to a roadway or road structure. **Every such permit shall be carried in the vehicle or combination of vehicles to which it refers and shall be open to inspection by any police officer.**

For each such permit, the City Manager shall charge five dollars (\$5.00) and for each hour of time or any part thereof spent by each police officer in supervising the movement of such vehicle, the applicant shall pay the sum of ten dollars (\$10.00).

Signs shall be posted indicating "no thru trucks - gross weight 5 tons" or words of similar import to apprise drivers of the limitations imposed by subsection (b) hereof. No driver shall disobey the instructions indicated on any such sign.

Violation of any of the limitations, terms or conditions of the permit granted by the City Manager shall be cause for immediate revocation or suspension of such permit, and denial of request for any future permit. Such violation shall also subject the violator to the penalty prescribed by Section 303.99.

Article 347.01(d) shall be added to read:

347.01(d) Heavy Truck Limitation in Downtown Business District.

No person shall operate a Heavy Truck in the Downtown Business District.

This provision does not limit or restrict:

(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;

(2) The operation of emergency or military vehicles;

(3) The operation of any governmental or quasi-governmental vehicle in the performance of any official function or duty;

(4) The operation of solid waste disposal vehicles;

(5) The operation of vehicles lawfully engaged in the business of towing, hauling or carrying wrecked or disabled vehicles;

(6) The operation of trucks upon any officially established detour in any case where a truck could lawfully be operated on the street for which such detour was established;

(7) The issuance of a special permit by the City Manager as provided in subsection (c).

Article 347.01(e) shall be added to read:

Signs shall be posted indicating “no thru trucks – limit 10 tons” or words of similar import to apprise drivers of the limitations imposed by subsection (d) hereof.

¹**Comprehensive Plan Ordinance of Morgantown, West Virginia, 2013**, available at <http://www.morgantownwv.gov/about/crossroads-2012-comprehensive-plan/>, Section 4, Transportation.

²**Morgantown Monongalia Metropolitan Planning Organization 2013-2040 Long Range Transportation Plan**, available at <http://plantogether.org/LRTP%20Chapter%203%20Transportation%20Goals%20and%20Objectives.pdf>.

³**Morgantown Planning and Zoning Code**, Section 1349.01 available at <http://www.morgantownwv.gov/wp-content/uploads/Planning-and-Zoning-Code-2012.pdf>; see also the **Morgantown Zoning Map**, available at http://www.morgantownwv.gov/wp-content/uploads/official_zoning_map_07-01-2012.pdf.

⁴**2010 Morgantown Pedestrian Safety Plan**, available at http://www.morgantownwv.gov/wp-content/uploads/MPSB-Plan-8_13_2010.pdf.

⁵**Morgantown Downtown Strategic Plan**, available at <http://www.morgantownwv.gov/government/reports/>.

West's Annotated Code of West Virginia

Chapter 17. Roads and Highways

Article 4. State Road System

W. Va. Code, § 17-4-27

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

Currentness

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.

Credits

Acts 1933, Ex. Sess., c. 40; Acts 1945, c. 109; Acts 1967, c. 175.

<Acts 1995, c. 169 repealed the state road commission, and transferred powers and duties to the West Virginia commissioner of highways. See § 17-1-2.>

Notes of Decisions (9)

W. Va. Code, § 17-4-27, WV ST § 17-4-27

Current with laws of the 2014 Regular and First Ex. Sess. with effective dates through June 2, 2014

End of Document

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West's Annotated Code of West Virginia

Chapter 17C. Traffic Regulations and Laws of the Road

Article 17. Size, Weight and Load (Refs & Annos)

W. Va. Code, § 17C-17-12

§ 17C-17-12. When state road commission or local authorities may restrict right to use highways

Currentness

(a) Local authorities with respect to highways under their jurisdiction may by ordinance or resolution prohibit the operation of vehicles upon any such highway or impose restrictions as to the weight of vehicles to be operated upon any such highway, for a total period of not to exceed ninety days in any one calendar year, whenever any said highway by reason of deterioration, rain, snow, or other climatic conditions will be seriously damaged or destroyed unless the use of vehicles thereon is prohibited or the permissible weights thereof reduced.

(b) The local authority enacting any such ordinance or resolution shall erect or cause to be erected and maintained signs designating the provisions of the ordinance or resolution at each end of that portion of any highway affected thereby, and the ordinance or resolution shall not be effective unless and until such signs are erected and maintained.

(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.

(d) The state road commission shall likewise have authority as hereinabove granted to local authorities to determine by resolution and to impose restrictions as to the weight of vehicles operated upon any highway under the jurisdiction of said commission and such restrictions shall be effective when signs giving notice thereof are erected upon the highway or portion of any highway affected by such resolution.

Credits

Acts 1951, c. 129.

<Acts 1995, c. 169, repealed the state road commission and transferred powers and duties to the West Virginia commissioner of highways. See § 17-1-2.>

W. Va. Code, § 17C-17-12, WV ST § 17C-17-12

Current with laws of the 2014 Regular and First Ex. Sess. with effective dates through June 2, 2014

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EXHIBIT 11



WEST VIRGINIA DEPARTMENT OF TRANSPORTATION

Division of Highways

Legal Division

**1900 Kanawha Boulevard East • Building Five • Room A-517
Charleston, West Virginia 25305-0430 • (304) 558-2823**

**Earl Ray Tomblin
Governor**

**Paul A. Mattox, Jr., P. E.
Secretary of Transportation/
Commissioner of Highways**

July 29, 2014

**Mr. Jeff Mikorski
Morgantown City Manager
389 Spruce Street
Morgantown, West Virginia 26505**

**BY FACSIMILE TRANSMISSION
(304) 284-7430**

Dear Mr. Mikorski,

I would like to thank you for taking the time to meet with Secretary Mattox and Jonathan Storage, Esq. on Friday, July 25, 2014. As was discussed during the meeting, this Division has further reviewed the City of Morgantown's proposal to regulate the operation of heavy trucks on state roads in the City's business district and has come to the conclusion that current statutes do not allow for such municipal regulations without the approval of the West Virginia Commissioner of Highways.

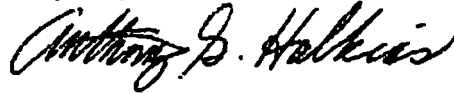
When read in context, West Virginia Code Sections 17-4-27 and 17C-17-12 do not allow for local management of roads within the state road system. The Legislature has granted the Commissioner of Highways plenary power to manage and control the use of public highways comprising the state road system. Therefore,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

The City's broad reading of one specific statutory provision allowing municipalities to regulate traffic directly conflicts with several other express powers granted to the Commissioner. Even where such municipal regulation of local roadways is proper, the municipality's authority is subject to West Virginia Code § 17-2A-8(11), which grants the Commissioner broad authority to exercise jurisdiction, control, and supervision over local roads, outside of the state road system, to the extent determined by him to be expedient and practicable. Therefore, any regulatory authority that the City may have over the local roads within its jurisdiction may also be subject to the approval of the Commissioner of Highways. In this specific factual instance, the Division of Highways maintains proper jurisdiction over the roadways at issue.

Jeff Mikorski
July 29, 2014
Page 2

Should you have any further questions, please feel free to contact Jonathan Storage,
Esq. at (304) 558-2823.

Very truly yours,

A handwritten signature in black ink, appearing to read "Anthony G. Halkias". The signature is fluid and cursive, with the first name "Anthony" being more prominent.

Anthony G. Halkias, Director
Legal Division

AGH:Ss

cc: Jonathan Storage

EXHIBIT 12

Zimbra

ckelly@cityofmorgantown.org

Truck Reference Data

From : Glen Kelly <ckelly@cityofmorgantown.org>
 Subject : Truck Reference Data
 To : City Council <citycouncil@cityofmorgantown.org>
 Cc : Jeff Mikorski <jmikorski@cityofmorgantown.org>

Wed, Aug 06, 2014 04:45 PM

Ladies and Gents,

The City Manager has asked me to update you on some data that has been requested regarding the Trucks Inside City Limits issue.

First, many councilors asked about the safety data on accidents. I got with our Police Chief to see what data was readily available on the State Accident database maintained for the WV State Police by Report Beam. We were able to pull all commercial vehicle accidents from 2006-2014. The companies and organizations arranged in descending order by number of accidents in the city were:

1. Mountain Line
2. Monongalia County Schools
3. Advantage Tank Lines
4. Allied Waste
5. Blue Ridge Beverage
6. CEV Morgantown (Fuel Transportation)
7. OBA Petroleum
8. DRI/APRC Granville-LLC
9. First Fleet Inc.
10. NEIER Inc.
11. Reinhart Transportation LLC
12. Transport Inc.

Councilor Bane had asked if the police could enforce the ordinance as it is not clear that it is within our authority to enact such a law. I discussed this with Ed Preston and had him do some research. I also spoke with our Liability Insurance carrier regarding lawsuits as I was told by Mr. Sabatelli that we were not covered during the Marcellus Shale suit. Our insurance carrier stated to me that if our officers, administration or councilors were operating out of their scope of responsibilities (unlawfully qualifies), "there is real potential that we would not be covered under our lawsuit insurance". She also stated this would be based on each individual case and that the local office would not determine coverage.

Steve Fenck was contacted by Greer's attorney yesterday and asked if any councilors had been sued individually. Steve stated they had not, but that Terry Hough had been sued individually by Dave Blafora, but that suit was dropped before going to court. Ed Preston answered with this:

Mr. Kelly,

Per our earlier conversations - Police Officers are charged with the enforcement of criminal law. As a result of their duties the courts have recognized and granted officers "Qualified Immunity" where the officers are acting according to clearly established laws and principles of laws in order to enforce the code or law. Example an officer may commit a battery in order to arrest an individual who is committing battery or attempting to flee by force. An Officer loses that "Qualified Immunity" when the officer exceeds existing law or reasonable principles of law or even if the officer relies on the approval of superiors. An example is the court has held that officers are not protected by "Qualified Immunity" in the serving of an arrest warrant, issued by a judicial official, when a competent officer could or should determine that such a warrant should not be issued. As we have been discussing enforcing traffic regulations, even though adopted by a political body, when the officers know that the body does not have the authority to make such a regulation, the officer could be held liable and sued for issuing citations and or making arrests. A traffic stop is considered a seizure under the fourth amendment and is subject to review as to whether the stop was reasonable. If the law that the officer is trying to enforce is invalid/unenforceable then the officer can be held liable.

There are a lot of issues regarding enforcement issues and I am available to discuss them at your convenience.

V/R

Ed Preston
Chief of Police
Morgantown Police Department

State-conferred immunity is no bar to a suit brought pursuant to 28 U.S.C. § 1331 receives some, perhaps unexpected, support from the Supreme Court's analysis of 42 U.S.C. §§ 1983 and 1988. *Moore v. County of Alameda*

In *Becker v. Besudolin*, *supra*, the Rhode Island Supreme Court abrogated the doctrine of governmental immunity in tort as to municipal and quasi-municipal corporations, "subject, however, to any legislation which has been or may be enacted by the general assembly limiting or regulating the prosecution of such claims." *Id.* 261 A.2d at 901. Since the general assembly has seen fit to regulate the prosecution of such claims only as against towns and cities of the State, R.I.G.L. § 45-15-5, we must conclude that as to the School Committee, *qua* Committee, the concept of governmental tort immunity has been totally abandoned. Therefore, if the School Committee retains any state-conferred immunity at all, it must derive from that still possessed by the Town of Smithfield (hereinafter "the Town"), that is, the notice requirement of R.I.G.L. § 45-15-5. Such a conclusion would be warranted only if the Court were to find that the Committee is the "alter ego" of the Town, in that a finding of liability against the Committee in effect constitutes a finding against the Town. See generally *Edelman v. Jordan*, *supra*; *Moore v. County of Alameda*, *supra*.

Go to page 16 of this link. Even though this is from another state, it gives a perfect 3 paragraph summary.

<http://www.sagepubs.unc.edu/cmg/cmg12.pdf>

Ed Preston
Chief of Police
Morgantown Police Department
Damien Davis answered cost of maintaining the roads bridges below:

Glen,

The cost to repave Route 7 from the 857 Intersection(Hardoes, CVS and Walgreens Intersection) to Spruce Street would be approximately \$500,000 to \$600,000.
To replace the two bridges along Route 7.

1. The bridge just past the Hogback Turn probably in the \$1,000,000 - \$2,000,000 range.
2. The Walnut Street Bridge would cost approx. \$6,000,000 - \$10,000,000

J. Damien Davis, PE, CFM
Assistant City Engineer
City of Morgantown
Public Works Department - Engineering Division
389 Spruce Street
Morgantown, WV 26505

From Hartman Run Rd In to Spruce Street the cost would be approx. \$400,000 to \$500,000

J. Damien Davis, PE, CFM
Assistant City Engineer
City of Morgantown
Public Works Department - Engineering Division
389 Spruce Street
Morgantown, WV 26505

Steve Fanok is still looking into the Interstate Commerce issues and we will report on them once we have the data. Jeff has asked that we submit all the data to the State Attorney General to gain his legal opinion into the jurisdiction issue, we will facilitate this and update you once we receive and opinion.

Glen Kelly
Assistant City Manager

EXHIBIT 13

MEMORANDUM

TO: Steven Fanok For Delivery to the City Manager
FROM: Debra Scudiere
DATE: August 15, 2014
RE: Legal opinion on downtown truck regulation

Issue

The City of Morgantown requests an opinion on the applicability of Federal Trucking regulations referenced in the Highway Commissioner's October 4, 2005, letter to Dan Boroff and in Vince Collins' March 6, 2006, legal opinion to the City to a draft ordinance entitled "Downtown Business District Heavy Truck Limitation" which would amend Articles 301 and 347 of the Municipal Code to prohibit operation of certain defined heavy trucks in the Downtown Business District.

The Highway Commissioner's letter identified the Federal laws and regulations that may impact the City's ability to adopt or enforce an ordinance restricting heavy truck traffic: 49 U.S.C. § 14501, 49 U.S.C. § 31114 *et seq.*, 49 C.F.R. Part 350, and 23 C.F.R. Part 650. The legal opinion provided by Vince Collins limits discussion of Federal law to 49 U.S.C. § 14501 and related case law. As requested, this Memorandum discusses whether the proposed ordinance may violate the referenced Federal laws and regulations.

Discussion

The proposed ordinance limits heavy truck traffic, described as vehicles exceeding 20,000 pounds gross weight, from traveling through the downtown business district – except use of identified portions of Don Knotts Boulevard/University Avenue/Beechurst Avenue – without a permit, business purpose in the district, or specific exception provided in the ordinance. The proposed ordinance would enact these limitations with the goal of promoting a safe, pedestrian-oriented downtown business district by avoiding or limiting large or heavy vehicles in proximity to pedestrians, noxious emissions, and loud vehicular noise.

I. 49 U.S.C. § 14501

Title 49, Section 14501 of the United States Code provides the scope of Federal authority over intrastate transportation. State and Local governments are prohibited by this Section from regulating the routes of motor carriers of property except in specifically defined areas such as safety, size, and weight. The specific text providing these restrictions and authorities is as follows:

(1) **General rule.**--Except as provided in paragraphs (2) and (3), a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier (other than a carrier affiliated with a direct air carrier covered by section 41713(b)(4)) or any motor

private carrier, broker, or freight forwarder with respect to the transportation of property.

(2) Matters not covered.—Paragraph (1)---

(A) shall not restrict the safety regulatory authority of a State with respect to motor vehicles, the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or the authority of a State to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization;

49 U.S.C.A. § 14501. Under the provisions of this Section, the proposed ordinance may only preclude the use of a route through the downtown business district if it relies upon a regulatory authority identified in Paragraph (2)(A). Although Paragraph (2)(A) refers only to the authority of a "State," it confers authority on local governments when they have been delegated authority by the State. *City of Columbus v. Ours Garage and Wrecker Service, Inc.*, 536 U.S. 424 (2002) (statute does not preempt local safety laws and does not bar the State from delegating to municipalities and other local units the State's authority to establish safety regulations governing motor carriers of property).

The proposed ordinance regulates heavy truck traffic in order to promote pedestrian safety and to limit noxious fumes and noise in the downtown business district. The ordinance directly relates to truck routes, and therefore it must fit within a defined exception in order to avoid Federal preemption. The ordinance regulates traffic based on size and weight, a specific exception to preemption. 49 U.S.C.A. § 14501(c)(2)(A). Court decisions considering the validity of a municipal size or weight restriction under the Statute are limited. However, a California District Court upheld municipal authority to regulate based on size or weight without requiring that the size and weight restrictions further a safety purpose. *California Dump Truck Owners Ass'n v. Davis*, 302 F. Supp. 2d 1139, 1144 (E.D. Cal. 2002). Considering the Supreme Court's decision in *Ours*, the California court reasoned that, not only the safety exception, but also the size and weight exception, may be delegated to municipalities, and it also held that the size and weight exception and safety exception are separate bases for avoiding preemption. *Id.* A recent Ninth Circuit decision also references in *dicta* the specific and separate exception to preemption for size and weight restrictions. *Dilts v. Penske Logistics, LLC*, 12-55705, 2014 WL 3291749 (9th Cir. 2014) ("They simply must take drivers' break times into account—just as they must take into account speed limits or weight restrictions, 49 U.S.C. § 14501(c), which are not preempted by the FAAAA."). Under this theory, the proposed ordinance is not preempted because it regulates size and weight of trucks permitted on the route. However, the decision is not binding precedent¹ and it did not consider whether a size and weight restriction is valid when it applies to some but not all vehicles of a certain size or weight, as does the proposed ordinance.

¹ A District Court decision in North Carolina – within the Fourth Circuit – did find that the exceptions within Section 14501(c)(2)(A), specifically the hazardous waste exception, do not apply to political subdivisions. *S. Blasting Services, Inc. v. Wilkes County, N.C.*, 162 F. Supp. 2d 455, 464 (W.D.N.C. 2001) *aff'd sub nom. S. Blasting Services, Inc. v. Wilkes County, N.C.*, 288 F.3d 584 (4th Cir. 2002) ("What is more, § 14501(c)(2)(C) does not even operate to exempt the Wilkes County Fire Marshal from preemption. The term 'political subdivision[s]' is mentioned seven times in § 14501. See, e.g., 14501(c)(2)(C). However, the term is notably absent from § 14501(c)(2)(A). Consequently, it is only logical to interpret that section narrowly and to find that it does not exempt

In addition to the size and weight exception, the ordinance may avoid preemption by fitting within the Statute's safety exception. The ordinance's stated purpose to promote safety falls within the specific exceptions to preemption. However, the ordinance "must be 'genuinely responsive to safety concerns.'" *Am. Trucking Associations, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1053 (9th Cir. 2009) (citing *City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 442, 122 S.Ct. 2226, 2237, 153 L.Ed.2d 430 (2002); *Tillison v. City of San Diego*, 406 F.3d 1126, 1129 (9th Cir.2005)). A reviewing court will find that an ordinance fits within the safety exception only when it determines that the intent is truly safety and when the regulation is genuinely responsive to safety concerns. *Id.*; see also *Tillison v. Gregoire*, 424 F.3d 1093, 1104 (9th Cir.2005); *Loyal Tire & Auto Ctr., Inc. v. Town of Woodbury*, 445 F.3d 136, 145-47 (2d Cir.2006).

In order to determine whether a regulation is genuinely responsive to safety concerns, a court will likely consider the legislative history of the ordinance and the practical effect of its limitations. The Second Circuit Court of Appeals stated the following standard:

First, a court "must consider any specific expressions of legislative intent in the statute itself as well as the legislative history." Then, it must assess those "purported safety justifications . . . in light of the existing record evidence."

Automobile Club of New York, Inc. v. Dykstra, 520 F.3d 210, 214-15 (2d Cir. 2008) (citing *Loyal Tire & Auto Center, Inc. v. Town of Woodbury*, 445 F.3d 136, 145 (2d Cir.2006)). Reported decisions applying these standards, and determining when an ordinance fits within the safety exception to preemption, relate mainly to broad registration and licensing schemes or to restrictions on tow truck services. Courts generally find that comprehensive licensing measures involving record-keeping and fee payments are not genuinely responsive to motor vehicle safety and are thus preempted by the Statute. See *Am. Trucking Associations, Inc. v. City of Los Angeles*, 559 F.3d 1046 (9th Cir. 2009) (requirements to transition drivers from independent contractors to employees and to preferentially hire experienced drivers are likely to be preempted as impermissible economic regulation); *United Parcel Serv., Inc. v. Flores-Galarza*, 385 F.3d 9, 13 (1st Cir.2004) (requirements to maintain records, pay licensing fee, and provide criminal records of corporate officers are not responsive to motor vehicle safety). However, specific safety requirements such as requiring truck operators to be licensed drivers, requiring vehicle maintenance plans, and permitting authorities to inspect safety records were found sufficiently related to safety to avoid preemption, even where the regulations duplicated existing State or Federal regulations. *Am. Trucking Ass'ns, Inc. v. City of Los Angeles*, 596 F.3d 602, 605-06 (9th Cir. 2010)².

Regarding towing laws, an ordinance requiring a towing company to maintain an operations site within one mile of a municipality in order to qualify for assignment to the rotational towing list

political subdivisions of the states from the preemptory language of § 14501(c)(1)."). However, the decision was rendered before the Supreme Court's decision in *Ours* and should not be followed.

² The Supreme Court found that restrictions requiring off-street parking preempted, but the decision did not consider any argument that those restrictions were safety-related; rather, it decided the issue based on an agreement that the regulations related to truck routes and only on the disputed issue of whether the Port's regulations had the force and effect of law. *Am. Trucking Associations, Inc. v. City of Los Angeles, Cal.*, 133 S. Ct. 2096, 2102 (2013).

was found preempted as not responsive to a genuine safety purpose. *Loyal Tire & Auto Ctr., Inc. v. Town of Woodbury*, 445 F.3d 136, 146 (2d Cir. 2006) (finding claims that towing to sites further from the city created a danger from longer walks to towed vehicles, reduced police presence in the city when officers respond to the site, and longer tows equate to greater danger unsupported by result of ordinance). Conversely, provisions of a city ordinance requiring tow truck drivers to hold a city-issued permit to operate in the city were found to fit within the safety exception to preemption even where they indirectly related to safety and the ordinance did not specifically state a safety purpose. *California Tow Truck Ass'n v. City and County of San Francisco*, 693 F.3d 847, 859 (9th Cir. 2012).

The reported decisions do not offer any authority directly on point regarding the proposed ordinance. Based on courts' treatment of comprehensive licensing regulations, it appears that the proposed ordinance would likely be found not to have impermissible economic implications and rather relate directly to a safety purpose. Some decisions indicate that a court will inquire into whether the ordinance achieves the stated safety purpose, which would involve a fact-based inquiry into whether the limitation on specific classes of vehicles exceeding the identified weight limit will serve the stated purposes of enhancing pedestrian safety and avoiding noxious fumes and disruptive noise. It should be noted that the Supreme Court has found that no general "public health" exception to preemption exists. *Rowe v. New Hampshire Motor Transport Ass'n*, 552 U.S. 364, 374 (2008) (finding requirements relating to transport of tobacco products preempted). However, the Supreme Court has also suggested that the safety exception is not to be narrowly construed. *Ours*, 536 U.S. at 440 ("A congressional decision to enact both a general policy that furthers a particular goal and a specific exception that might tend against that goal does not invariably call for the narrowest possible construction of the exception. Such a construction is surely resistible here, for § 14501(c)(1)'s preemption rule and § 14501(c)(2)(A)'s safety exception to it do not necessarily conflict."). Based on the language of the proposed ordinance, it is likely that the safety exception applies and that the ordinance should not be preempted by 49 U.S.C. § 14501. However, the application of the safety exception to these provisions is not clearly delineated by statute or case law and would be subject to a legal challenge in which a court would inquire as to whether the regulations in the proposed ordinance are genuinely responsive to motor vehicle safety.

II. 49 U.S.C. § 31114 *et seq.*

Title 49, section 31114 of the United States Code limits State restrictions on access by commercial motor vehicles between the Interstate highways and various facilities:

A State may not enact or enforce a law denying to a commercial motor vehicle ... reasonable access between—

(1) the Dwight D. Eisenhower System of Interstate and Defense Highways ... and other qualifying Federal-aid Primary System highways designated by the Secretary of Transportation; and

(2) terminals, facilities for food, fuel, repairs, and rest, and points of loading and unloading for household goods carriers, motor carriers of passengers, or any truck tractor-semitrailer combination in which the semitrailer has a length of not

more than 28.5 feet and that generally operates as part of a vehicle combination described in section 3111(c) of this title.

Id. The limitation on State laws contains an exception for safety regulation of vehicles exceeding 28.5 feet in length that does not apply to the proposed ordinance. Whether the proposed ordinance is preempted by Section 31114 (sometimes referred to as the "Surface Transportation Assistance Act" or "STAA") will be determined by whether the ordinance prevents reasonable access to a listed amenity. In a case considering local weight restrictions on a road that ultimately accessed the Interstate highway system from a propane loading terminal, the Seventh Circuit held that a weight restriction which entirely precluded trucks from loading at the terminal and accessing the Interstate was preempted by the STAA. *Aux Sable Liquid Products v. Murphy*, 526 F.3d 1028 (7th Cir. 2008). In *Aux Sable*, the local regulation effectively precluded all access to the Interstate, because the only alternate route from the terminal to the Interstate was already subject to weight restrictions that precluded truck travel. *Id.* The Court noted that reasonable access is dependent upon the scenario particular to a given ordinance. *Id.* at 1036 ("See *New Hampshire Motor Transp. Ass'n.*, 67 F.3d at 330 (opining that it would be within a state or local government's discretion, in accord with the 'reasonable access' provision under § 31114(a), to impose 'a restriction that routed heavy traffic on a detour of a few miles to assure quiet in a hospital zone'). Under this framework, states are still free to exercise their police powers over state highways and local roads, so long as these regulations do not impede 'reasonable access' for commercial motor vehicles traveling between the Interstate and places such as terminals."'). *Aux Sable* and *New Hampshire Motor Transportation Association v. Town of Plaistow*, 67 F.3d 326 (1995)³ suggest that reasonable access includes weight limitations requiring detours of a few miles to access the Interstate system from the amenities defined in STAA. The regulations implementing STAA do provide a specific limitation on access within one mile of an Interstate highway, as follows: "No State may enact or enforce any law denying access within 1 road-mile from the National Network using the most reasonable and practicable route available except for specific safety reasons on individual routes." 23 C.F.R. § 658.19(d). Under the same Regulation, States are directed to ensure that roads under the jurisdiction of local governments comply with the reasonable access provisions. 23 C.F.R. § 658.19(h). Compliance is determined in part by a review of State access plans as performed by the Federal Highway Administration. 23 C.F.R. § 658.19(j). Although compliance is the State's responsibility, this regulatory scheme suggests that the proposed ordinance, if enacted, should be submitted to the State so that it may review any impact on the approved access plan.

Related statutory provisions and regulations provide for review by the Secretary of the Department of Transportation of all motor vehicle safety laws enacted by a State, defined to include laws enacted by a political subdivision, and require States to annually determine whether its laws comply with Federal motor carrier safety regulations. 49 U.S.C. § 31141 (providing for submission and review of safety-related laws); 49 C.F.R. 355.21(a) (requiring annual review by States). These requirements do not appear to limit the authority of local government to enact otherwise-authorized ordinances so long as the ordinance does not restrict reasonable access to the Interstate or identified terminals and services. They do require State action for review, and they further suggest that the proposed ordinance, if enacted, should be submitted to the State for

³ *Plaistow* held that time restrictions on accessing a terminal did not violate the STAA.

a determination as to whether it impacts motor carrier safety laws and must be reviewed under these provisions.

The proposed ordinance likely would not be found to violate Federal law requiring reasonable access by commercial motor vehicles to the Interstate highway system and certain services and terminals so long as it does not restrict access within one road mile of the Interstate system and otherwise permits access through a travel route of a few miles.

III. Federal Regulations

The Federal regulations codified at 49 C.F.R. Part 350 and 23 C.F.R. Part 650 were identified as regulations that may be implicated by traffic restrictions similar to the proposed ordinance. 49 C.F.R. Part 350 contains the regulations for the Federal Motor Carrier Safety Assistance Program. The Motor Carrier Safety Assistance Program "sets forth the conditions for participation by States and local jurisdictions and promotes the adoption and uniform enforcement of safety rules, regulations, and standards compatible with the Federal Motor Carrier Safety Regulations (FMCSRs) and Federal Hazardous Material Regulations (HMRs) for both interstate and intrastate motor carriers and drivers." 49 C.F.R. § 350.101. Part 350 requires that State laws affecting motor carrier safety track the Federal Motor Carrier Safety Rules. Any law affecting interstate commerce which is more stringent than the FMCSRs can be enforced only "if the State can demonstrate the law or regulation has a safety benefit or does not create an undue burden upon interstate commerce." 49 C.F.R. § 350.333; 49 C.F.R. Part 355. Laws affecting intrastate commerce may waive the FMCSRs subject to the variances provides in 49 C.F.R. § 350.341. Incompatible laws may result in a reduction or cessation of funding under the Motor Carrier Safety Assistance Program. 49 C.F.R. § 350.335. The State is directed to annually undertake a review of its laws, including the laws of its political subdivisions, in order to determine whether they are in compliance with the FMCSRs or allowable exceptions. 49 C.F.R. § 355.21. This review will determine whether the ordinance is in compliance with FMCSRs, including whether it is a regulation affecting the safety of commercial motor vehicles and whether, if it is such a regulation affecting interstate commerce and is more stringent than the FMCSRs, the associated safety benefits and effect on interstate commerce allow it to be enforceable. While applicability of this regulation is to be determined by the State and submitted to the Federal Motor Carrier Safety Administration, a review of the "Guidelines for the Regulatory Review" in Appendix A to 49 C.F.R. Part 355 does not disclose any standards relating to weight restrictions on local roads.

The purpose of 23 C.F.R. Part 650 is to regulate "Bridges, Structures, and Hydraulics." It provides standards for the design of hydraulic structures encroaching in flood plains; prescribes standards to control erosion, water pollution, and sediment deposits on highways; creates national bridge inspection standards; implements a highways bridge replacement and repair program; prescribes ratings for bridges to determine the priority of the expenditure of funds; and prescribes navigational clearances for certain bridges. 23 C.F.R. 650, Subparts A-G, respectively. The regulations in this Part do not appear to be related to local regulation of heavy truck traffic. Subsequent Parts within the same Subchapter of the Regulations do relate to size and weight enforcement, including Part 657, which sets forth the policy of the Federal Highway Administration that States must enforce size and weight limitations on Interstate Highways and

related highways systems in order to prevent excessive wear and damage. 23 C.F.R. § 657.5. In addition, 23 C.F.R. § 658, discussed in Section II., *supra*, implements Federal law requiring reasonable access for commercial motor vehicles to the Interstate highway system and certain related facilities.

It is not apparent from the Regulation text that the cited regulations would inhibit the City's ability to pass the proposed ordinance. If the ordinance were found unenforceable due to noncompliance with the Federal Motor Carrier Safety Rules, the City could risk a loss of funding under the Motor Carrier Safety Assistance Plan, although that might be avoided by repeal of the ordinance if necessary. The City may consider requesting the State's review of the ordinance for compliance with its motor carrier safety plan under 49 C.F.R. Part 350 prior to passage in order to determine whether the State would find that the ordinance is a law affecting motor carrier safety and falls outside the permissible scope of such a law.

Conclusion

Local ordinances that alter truck routes based on size and weight or safety generally are not preempted. The proposed ordinance attempts to regulate based on one or both of those categories and would likely not be preempted. However, the determination of Federal preemption is a fact-based inquiry dependent on the circumstances of each law enacted, and no reported decision dictates a favorable result for the City, so litigation challenging the proposed ordinance on these grounds may be likely. Federal law limiting access restrictions to Interstate highways likely does not limit adoption of the ordinance so long as it leaves open a reasonable route between services and facilities and the Interstate highway and does not restrict access within one road mile of an Interstate highway. Federal regulations implementing these laws and other Federal transportation rules do not appear to provide additional specific limitations on adoption of the proposed ordinance; however, State review of the ordinance for compliance with Federal Motor Carrier Safety Rules will be required.

EXHIBIT 14

TRUCK BAN LAW

Rocky road ahead

City hits bump with the DOH regarding signs

BY DAVID BEARD

The Dominion Post

The city's new truck ban takes effect in about three months, but

the city and state both acknowledge there will be speed bumps and probably road blocks along the way.

Given the uncertainty of the ban's legality, it may end up in court, both sides acknowledge.

The ban, passed Tuesday, intends to keep certain vehicles, exceeding 26,000 pounds, out of the downtown business district.

City Manager Jeff Mikorski

and Division of Highways (DOH) attorney Jonathan Storage discussed what's ahead.

City view

Mikorski addressed two areas — signage and weigh stations.

The city has always understood it will need DOH approval to erect signs along the truck-ban route, he said. "We're pursuing that," he said. The city has submitted a

formal request to the DOH.

The DOH has its own sign shop, but the city also hires others to produce them, he said. Who will make the signs, where they will be placed and what they will say are issues to be worked out.

Asked if the DOH has expressed opposition to signage, Mikorski said, "It's something where we're going to present it to them and that

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will present the rationale for them to respond to it.

Enforcement will call for weigh stations, which falls under the jurisdiction of the Public Service Commission, Storage said.

Mikorski said the city is looking at a number of issues on this topic where it needs clarification and understanding. "In the meantime, we realized that the city itself didn't have the capability of enforcing any kind of weight limits." It has no equipment or trained staff.

So as they're working through the ban, whatever the outcome, they need to train some officers and get an understanding of weight limits and safety laws already in code that they can already enforce, he said.

That "will be worked out as we work through the court system on the question of city authority."

State view

Storage said the city met with DOH officials as it was investigating and proposing the ban. They were told it's improper under state code.

After the ban passed, "We

were all a little bit surprised. Our position is somewhat of shock. In our view, the code is clear. The Division of Highways has jurisdiction over this," he said.

The city has to get approval for signs, he said, and some — he didn't say who — are under the mistaken impression the DOH has no option but to approve it. He cited state code 17C-3-2: "No local authority shall place or maintain any traffic-control device upon any highway under the jurisdiction of the state road commission except by the latter's permission."

Since the ban's validity is at issue, he said, it's premature to discuss signage. "I don't think we will grant permission for signage if we don't think the ordinance is legitimate."

Will it go to court? "That's hard to say," and is under constant discussion. "It seems the city is itching for a legal fight," Storage said.

Meanwhile, he said, between now and the ban's effective date, the DOH has time to strategize, to make sure it is responsive to Morgantown and the best interests of the whole state and its citizens.