

**MEMORANDUM RE:
Truck Access Through The Town of Bath
(Berkeley Springs),
Morgan County, WV, Via U.S. Route 522**

Prepared for:
Morgan County Citizens Coalition
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MEMORANDUM

To: Michael D. Hausfeld, Esq.
Cc: Joseph M. Sellers, Esq.; Barbara J. Pratt
From: John V. Berry, Esq.
Date: 10/28/98
Re: Truck Access Through Town of Bath/Morgan County Via U.S.
Route 522

1. Introduction:

You have requested research into the potential legal avenues for restricting truck traffic through the resort area known as the Town of Bath (Berkeley Springs), West Virginia. The following research offers a comprehensive list of the methods which may be employed to protect the residents, as well as the natural environment, from overbearing interstate trade. This Memorandum proposes several methods for the curtailment of heavy truck traffic on U.S. Route 522 through the Town of Bath. The possible methods available to restrict truck access include:

- (1) Through Truck Traffic Prohibition;**
- (2) Truck Weight and Size Restrictions;**
- (3) Truck Tolling;**
- (4) State and Federal Environmental Regulation;**

The first three of these suggestions remain the strongest arguments for limiting through

truck traffic. As a secondary approach, state and federal environmental laws and regulations may provide another means for discouraging high volume through truck traffic.

II. Overview of the Town of Bath:

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The Town of Bath, West Virginia, is a resort community located in proximity to the state lines of Pennsylvania, Maryland and Virginia. The resort is located on U.S. Route 522, well within the reach of Interstates 68, 70 and 81. The town is located within the borders of Morgan County. The Town of Bath is home to a wealth of early American history and has staked its claim as the oldest spa in the United States. The current discontent arises, as you are aware, from the discussion of potential improvements for U.S. Route 522 and the likely increased through truck traffic which would accompany any such expansion and/or bypass.

The general public has only recently become aware of the potential for the expansion of U.S. Route 522. An Internet press release from the West Virginia Department of Transportation has indicated that U.S. Route 522 will be expanded:

Upgrading of U.S. 522 from the Virginia state line to the Maryland state line will be the subject of a meeting from 4 to 8 p.m. Tuesday, June 2, in the cafeteria of Berkeley Springs High School

Four build alternatives proposed to alleviate the traffic congestion and alignment deficiencies of the existing route by providing a four-lane highway through Morgan County, including a by-pass of Berkeley Springs, range in cost from \$92.6 million to 116.1 millions and will affect from 26 to 43 residences and up to 10 businesses. Cutoff for comments is July 3.

See West Virginia Department of Transportation, Newsline, Public Meetings Slated (visited Sept. 20, 1998) <[http://www.state.wv.us/wv.dot/wvdotctr/newsinfo/news/publicmeetings set.html](http://www.state.wv.us/wv.dot/wvdotctr/newsinfo/news/publicmeetings/set.html)> (emphasis added); and Peter Heerwagen, U.S. 522 Corridor and Rail Studies Proposed, Quad-State Business Journal, Sept. 1998, at 24. In fact, the President of the Morgan County Commission has requested funds for a U.S. 522 development study “to encompass quality of life and economic development issues, among other items.” Id.

The potential for increased truck traffic through expansion has drawn significant opposition. Opposition is likely from those that share in the historical nature of the Town of Bath and foresee the potential for heavy truck traffic congestion and the accompanying visual, air and noise pollution. This opposition is also probably rooted, in part, in the recent history of accidents on U.S. Route 522 at its present size. Two relatively recent accidents on U.S. Route 522 have involved trucks. See Truck-Bike Wreck Kills 12-Year-Old, The Charleston Gazette, Aug. 31, 1994, at 2C (twelve-year-old bicyclist killed on U.S. Route 522 by tractor-trailer); and Four Killed in Fiery Collision Had Been Celebrating Birthday, The Washington Post, Nov. 22, 1993, at B4 (car/truck collision results in four deaths on U.S. Route 522). In light of these incidents and a firm belief that further expansion could bring more accidents, an opposition to the expansion of U.S. Route 522 has developed.

The Draft Environmental Impact Statement has also recited the high accident rate on the present portion of U.S. Route 522 that passes through the Town of Bath:

A traffic accident rate analysis was prepared for the overall project . . . to illustrate the high accident rate in the city of Berkeley Springs. The result of the analysis are shown in Table 1-6 for the period from January 1, 1992 to December 31, 1994 (3 years), and the table presents a statistical overview of actual accidents, fatalities, and injuries on U.S. 522. For this period on U.S. Route 522, there was a total of 232 accidents, resulting in 6 deaths and 166 injuries.

West Virginia Division of Highways, Draft Environmental Impact Statement, U.S. 522, at 1-10 (1998) (emphasis added) (hereinafter “Draft Environmental Impact Statement”).

The actual map of the proposed expansion by the West Virginia Division of Highways,
has just recently been made public.

INSERT EXPANSION

MAP

See Map of Proposed 4-Lane U.S. 522, The Morgan Messenger, Sept. 30, 1998, at 5 (map of West Virginia Department of Transportation–“Preferred Alternate Alignment I”).

The community opposition to the expansion of U.S. Route 522 and/or bypass has proposed alternate arrangements to satisfy the demand by commercial traffic, while still maintaining the serenity and heritage of the Town of Bath. Significant alternatives to expansion on U.S. Route 522 exist, including the development of a connector between Interstates 70 and 81, through the expansion and/or improvement of West Virginia State Route 9.

This Memorandum will now address the various methods by which the Town of Bath, the Morgan County Commission, the Highway Commissioner, and the West Virginia State Government, may seek to restrict truck access on U.S. Route 522.

III. Authority to Enact Regulation:

The enactment of measures related to the restriction of truck access on highways, if the power to do so is delegated by the state, rests with town and county officials:

It is well settled that the use of highways and streets by vehicular or pedestrian traffic may be limited, controlled, and regulated by the responsible public authority in the exercise of the police power whenever, and to the extent, necessary to provide for and promote the safety, peace, health, morals, and general welfare of the people. . . . The use of the highways and streets by vehicular or pedestrian traffic is subject to reasonable regulation by the state under the police power with which it is vested, and by municipalities and by administrative bodies or officials acting under a delegation of such power to them by the state.

7A Am. Jur. 2d Automobiles and Highway Traffic § 14 (1997) (emphasis added) (hereinafter “Highway Traffic”).

The authority of public bodies to enact meaningful regulation is clear with respect to vehicles engaged in transportation for hire. In other words, the Town of Bath, the Morgan County Commission, the West Virginia Highway Commissioner and the West Virginia State Legislature have great leeway when enacting restrictions relating to trucks: “The use upon the

public highways of motor vehicles engaged in transportation for hire may be prohibited, restricted, or conditioned by the controlling public authority.” Id. at § 25 (emphasis added).

1. Authority of The Town of Bath Municipal Government:

Contrary to public perception, municipalities in the State of West Virginia possess a substantial amount of authority in regards to the streets and highways falling within the town limits. In C & P Tel. Co. of West Virginia v. City of Morgantown, 144 W. Va. 149,159-60, 107 S.E.2d 489, 495 (1959) (attachment “1”), the Supreme Court of West Virginia offered a comprehensive review of the powers vested by the legislature in the municipalities:

[M]unicipalities own such portions of the highways for such public uses and purposes as the Legislature by express declaration or implication recognizes as lawful. They hold them as agencies of the state for such public uses, and therefore they can limit, restrict or regulate such uses in such manner and to such extent only as the Legislature has authorized. For the promotion of local comfort, convenience, and prosperity, the Legislature has empowered them to establish, maintain, and improve highways and given them authority to raise money by taxation for such purposes

Id. (quoting Ex parte Dickey, 76 W.Va. 576, 85 S.E. 781, 784 (1915)) (emphasis added).

The ability of a locality to enact restrictions, as discussed in Morgantown, is provided for by the West Virginia Code. The Code makes reference to several authorities given to the localities, including the right to restrict truck access. Specifically, section 17C-17-12 (attachment “2”) of the West Virginia Code provides localities with the authority to restrict truck access to highways falling within their jurisdiction. The section states, in pertinent part:

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

...

(c) Local authorities with respect to highways under their jurisdiction may also, by ordinance or resolution, prohibit the operation of trucks or other commercial vehicles, or may impose limitations as to the weight

thereof, on designated highways, which prohibitions and limitations shall be designated by appropriate signs placed on such highways.

Id. (emphasis added).

The West Virginia Code, in discussing the power to enact restrictions, frequently refers to the phrase “local authorities.” The Code defines a local authority as follows: “‘Local authorities’ means every county, municipal, and other local board or body having authority to enact laws relating to traffic under the Constitution and laws of this State.” W. Va. Code § 17C-1-34 (1998) (emphasis added). In addition, § 17-1-20 of the Code dictates that: “‘local authorities’ shall mean and include representatives of political subdivisions of the State, duly elected or appointed to administer the laws and ordinances of the state.” Id. (emphasis added). Under these two definitions, both the Town of Bath, as well as the Morgan County Commission retain the power to enact truck restrictions under the state code.

The West Virginia Legislature has delegated the power to enact truck restrictions, in essence, to the Bath Town Government, the Morgan County Commission, as well as the West Virginia Commissioner of Highways. The municipal authority of the Town of Bath is empowered to enact restrictions on for highways within the jurisdiction of the Town of Bath, including U.S. Route 522. These statutory restrictions include the ability to prohibit trucks altogether on the particular portion of highway in question or in the alternative, to enact weight restrictions.

1. Commerce Clause Discussion:

2.

It is important to note that the powers delegated by the State of West Virginia are checked by the Commerce Clause of the U.S. Constitution. It is well settled that, even where Congress has not acted, state legislation which materially affects interstate commerce, is invalid. Because

the Constitution puts the ultimate power to regulate commerce in Congress, rather than the states, the degree of state legislation's interference with that commerce may be weighed by federal courts to determine whether the burden makes the statute unconstitutional. Highway Traffic, supra, at § 27. The courts cannot invalidate federal legislation for the same reason because Congress, within the limits of the Fifth Amendment, has authority to burden commerce if that seems to it a desirable means of accomplishing a permitted end.

While U.S. Route 522 remains a federal highway, under the guise of state control, it is not part of the interstate system. This fact alone militates in favor of successful restrictions on trucks through a valid town or county ordinance. Per Section 17C-17-12, the state has delegated the truck restriction power to the localities and as such, the Town of Bath and the Morgan County Commission are properly viewed as agents of the state. Thereby, the ordinances of these localities will be evaluated by the courts in the state-actor context.

As states have regulated the instrumentalities of interstate commerce, through the highways, they have typically done so in the name of public safety objectives as opposed to local economic concerns. Hence, the existence of a legitimate state objective has not traditionally been in doubt and the Supreme Court has judged truck restrictions on the basis of either: (1) a rational relationship test analyzing means and safety objectives; or (2) a balancing test based on local benefit versus burden on interstate commerce. One concern remains paramount: The Supreme Court has been much more likely to uphold a transportation regulation where the evidence offered demonstrates that even if a measure creates burdens on interstate commerce, that it is not discriminatory against interstate commerce.

In South Carolina State Highway Dep't. v. Barnwell Bros., Inc., 303 U.S. 177 (1938), the Court upheld a regulation prohibiting the use on state highways of trucks wider than ninety inches or weighing more than 20,000 pounds even though the vast majority of trucks used in interstate commerce exceeded both of these limitations. Justice Stone opined that so long as the regulations were applicable to interstate and intrastate traffic alike “[t]he fact that they affect alike shippers in interstate and intrastate traffic commerce in large number within as well as without the state is a safeguard against their abuse” Id. at 187. In other words, so long as the burden affects interstate, as well as intrastate commerce equally, then the Court has been remiss to strike down the regulation. The Town of Bath and the Morgan County Commission, in enacting truck restrictions should avoid making any distinction between intrastate (local) and interstate truck access for the ordinance to be upheld by the courts.

The Supreme Court traditionally employs a balancing test as well when interpreting these state/local transportation regulations. This test weighs the benefit derived by the state or locality from the regulation versus the burden on imposed interstate commerce. The Court, however, has traditionally favored the discretion of state legislatures in this regard. Therefore, a Commerce Clause violation is usually only found in cases when the regulation’s contribution to safety is so marginal or extremely speculative that it is outweighed by the burdens placed on interstate commerce. See Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520 (1959) (state highway measure affecting interstate commerce will be upheld unless, from the record as a whole, it can be concluded that the total effect of state law as a safety measure in reducing accidents and casualties is so slight as to not outweigh the national interests in interstate commerce).

The fact that at least three alternative routes, Interstates 68, 70 and 81, all remain unencumbered, allows the municipality and county some leeway here. Even more compelling is the argument for restriction by either the municipality or county of all through truck traffic if an alternate route, such as West Virginia Route 9, is expanded to connect Interstates 70 and 81. The burden on interstate commerce of diverting truck traffic entirely to these routes could be upheld if a valid safety objective is stated in the ordinance and the restrictions imposed are not altogether unreasonable. This safety concern is easily satisfied based on the accident rates on the present portion of U.S. Route 522. See Draft Environmental Impact Statement, supra, at 1-10.

1. Prohibition of Through Truck Traffic on U.S. Route 522:

An ordinance by the Town of Bath or Morgan County prohibiting through truck traffic entirely from that portion of U.S. Route 522 extending from the state line, while technically feasible according to West Virginia law, would have to be carefully planned. That said, the municipal government and county commission have the ability to curtail through truck traffic on the portion of U.S. Route 522 within its borders entirely. There remains a dearth of case law on the subject of whether states or cities, regulating in the state-actor context, have been able to completely bar truck access from public highways, however, I have been able to cull a few cases on point.

In general, “the right to use the public highways for purposes of profit is a special and extraordinary privilege which the legislature may prohibit or condition.” U.S. v. Husband R., 453 F.2d 1054, 1062 (5th Cir. 1971) (citing Stephenson v. Binford, 287 U.S. 251 (1932)). The Supreme Court of West Virginia, in an often cited turn of the century case, offered one of the first discussions of the distinction between citizen travel and travel for profit:

The right of a citizen to travel upon the highway and transport his property thereon, in the ordinary course of life and business, differs radically and obviously from that of one who makes the highway his place of business and uses it for private gain, in the running of a stage coach or omnibus. The former is the usual and ordinary right of a citizen, a common right, a right to all, while the latter is special, unusual, and extraordinary. As to the former, the extent of legislative power is that of regulation; but, as to the latter, its power is broader. The right may be wholly denied, or it may be permitted to some and denied to others, because of its extraordinary nature.

Ex parte Dickey, 76 W.Va., at 576 (emphasis added) (court upholding city ordinance regulating licensing and taxing of “jitney busses”(motor busses)). The West Virginia Supreme Court in Ex Parte Dickey clearly makes the assertion that so long as municipalities are delegated express powers by the legislature that they may even prohibit vehicles for hire. Clearly, such a provision, however, is subject to the strictures of the Commerce Clause. See also, The Chicago Motor Coach Co. v. City of Chicago, 337 Ill. 200, 169 N.E. 22 (1929) (“The legislature may prohibit by general law the operation of automotive vehicles upon the public highways of the State and it may delegate to the cities in the State the power to prohibit such operation with the respective cities.”).

The Town of Bath and the Morgan County Commission retain the potential authority to bar truck access on designated highways. However, a regulation purporting to completely bar access to trucks within the respective jurisdictions of the town and county might be met by a state statute superseding the ordinance. See Highway Traffic, supra, at § 19 (“Moreover, a state may withdraw its delegation of authority to a city to regulate traffic.”). In addition, if no alternative route is provided for by the town or county, a court could find that the burdens placed on interstate commerce are unreasonable. However, the proposal to expand West Virginia Route 9 would completely alleviate these concerns.

b. Weight Restrictions:

A restriction based on the weight of a vehicle, as opposed to a complete prohibition on trucks, is more likely to be upheld. A first concern in enacting weight restrictions is that when enforcing any ordinance or resolution adopted by a municipality, the West Virginia Attorney General's Office has opined that "police officers must conform to the method prescribed in this section for determining weight of vehicles." § 17C-17-12 (1998) (history) (citing 45 Op. Att'y Gen. 8 (1952)). In short, municipal police officers must comply with Section 17C-17-10 of the West Virginia Code governing officer inspection of truck weight. Before enacting a restrictive truck ordinance, the Town of Bath and Morgan County should first train its officers in compliance with the statute.

Weight restrictions imposed by the Town of Bath, acting as an agent for the State of West Virginia, on trucks incoming through the portion of U.S. Route 522 must comply with both the Commerce Clause of the U.S. Constitution, as well as federal law and regulation. One authoritative discussion on the subject noted that:

As a matter of broad principle, it is clear that in the exercise of properly authorized police power, government has the power to impose reasonable and not unreasonably discriminatory limitations upon the weight of vehicles or their loads, with respect to their use of the streets and highways. A frequent supporting rationale is that a governmental authority having the responsibility for the construction and maintenance of its streets has the power to prevent their destruction or deterioration.

Annotation, Power to Limit Weight of Vehicle or its Load with Respect to Use of Streets or Highways, 75 A.L.R.2d 376, at *1 (1997) (hereinafter "Power to Limit Weight").

It has been conclusively established that states possess the power to enact regulations applicable to both interstate and intrastate traffic, "where Congress has not promulgated

paramount regulations and there is no discrimination against interstate traffic and the limitation does not unreasonably burden interstate commerce.” Id.; see also, Morris v. Duby, 274 U.S. 135 (1927) (Supreme Court holding it to be within the power of a state to reduce the maximum weight of loads that might be carried on motor trucks operating on a interstate highway in the absence of national legislation on the subject); and Sproles v. Binford, 286 U.S. 374 (1932) (state statute limiting the net load permissible for trucks operating on public highways upheld in the absence of national legislation on the subject).

1. Approved Weight Limits:

“[A] state is not required to equate its own [weight] limitations with those of sister states.” Power to Limit Weight, 75 A.L.R. 2d 376, at *1. Cases debating the propriety of weight limits have been examined by several courts and offer a starting basis from which to enact truck regulations, although the town and county, prior to enacting any restrictive ordinances would need to consult with traffic engineers to provide a substantive basis for any regulation. As discussed in the portion of this Memorandum concerning the West Virginia Highway Commissioner, infra, the state imposes a duty to respond to municipal engineering requests upon the Commissioner.

The following courts have upheld several differing types of weight restrictions as compatible with the Commerce Clause. See Morris v. Duby, 274 U.S. 135 (1927) (Supreme Court upholding a state weight limitation of 16,500 pounds); Barnwell Bros., 303 U.S. at 667 (Court affirming state weight limitation on trucks that exceed 20,000 pounds, even though other states had imposed more liberal standards); City Grocery Co. v. State Road Dept. of Florida, 60 F.2d 331, 1932 U.S. Dist. LEXIS 1340 (D. Fla. 1932) (Florida court upholding statute limiting

motor trucks using highways to a weight of 16,000 pounds). See also Sproles, 286 U.S. at 374 (Supreme Court permitting state statute limiting to 7,000 pounds the net load permissible for trucks operated on public highways).

According to the Federal Highway Administration, the State of West Virginia currently maintains the following weight restrictions: “The State’s weight limits include 20,000 pounds for a single axle, 34,000 pounds for a tandem axle . . . with a maximum gross of 80,000 pounds.” Letter from the Federal Highway Administration of September 30, 1998 (attachment “3”). With the current regulations in place the town and county could enact an ordinance which falls below the weight standards currently in place, but one that can still be considered reasonable.

c. Lane Restrictions:

It is well settled that simply because “everyone has an equal right to use the public highways, [it] does not mean that any person can use all parts of them for all known modes of travel.” Highway Traffic, supra, at § 258. Public authorities, as delegated by the state, may “by regulations which are reasonable under the circumstances and conditions, restrict traffic or particular kinds or classes of traffic or uses to particular lanes or portions of the way.” Id.

With this under consideration, and in light of the portion of the West Virginia Code Section 17C-17-12(c), relating to local authority over roads, lane restriction may discourage high volume truck congestion. The Code states that “[l]ocal authorities with respect to highways under their jurisdiction may also, by ordinance or resolution, prohibit the operation of trucks or other commercial vehicles, or may impose limitations as to the weight thereof, on designated highways” Id.

This portion of the Code, relating to town and county truck weight restrictions appears to provide a basis for restricting lane usage. Restricting truck traffic to specific lanes appears to be an appropriate “limitation.” By enacting an ordinance restricting trucks to the use of one lane, on the basis of weight restrictions, the desired effect of reducing truck volume may become more likely. One treatise on the subject has described lane restriction of highways as follows:

Ordinances requiring heavy or slow-moving vehicles to use a designated portion of the way are generally upheld as reasonable. Thus, slow-moving vehicles may be required to keep to the right side of the street at points where traffic is heavy or the streets are usually congested. Such an ordinance does not deprive a person of any right but simply regulates the exercise of the right of use of the highways, and its effect may be to afford all travelers much better opportunities for travel than they could otherwise enjoy.

Highway Traffic, supra, at § 258 (emphasis added). While the issues have been rarely litigated in recent times, a trio of older cases affirms the authority of a locality to enact lane appropriate lane restrictions. See Kohloff v. City of Chicago, 192 Ill. 249, 61 N.E. 446 (Ill. 1901) (“The city council of the City of Chicago has ample power to designate portions of the streets of the city to be used by horsemen and vehicles, and to reserve other portions of the streets for the use of pedestrians.”); State v. Boardman, 93 Me. 73 (1899) (ordinance mandating vehicles over 2,500 pounds use a certain portion of highway upheld). See also City of Georgetown v. Hambrick, 104 S.W. 997 (Ct. App. Ky. 1907) (city may properly fix the width of lanes for heavier traffic, such as carriages within reasonable limits).

2. National Legislation/Regulation:

The Commerce Clause is not the only federal concern in enacting truck restrictions. Certain federal laws and regulation apply to limit a state and thereby its agent in the promulgation of local regulations in regards to federal highways. While U.S. Route 522 carries with it a U.S. designation, it is in reality a state highway.

As amended, the Surface Transportation Assistance Act, 49 U.S.C.A. § 31114 (West 1998), “forbids the states from enacting or enforcing laws that prohibit trucks and trailers of approved length and weight from travelling[sic] on the national network, i.e., the system of interstate highways and other federally-funded primary routes designated by the Secretary of Transportation.” New Hampshire Motor Transport Ass’n v. Town of Plaistow, 67 F.3d 326, 329 (1st Cir. 1995). U.S. Route 522 is not subject to the Act, however, as it is not an interstate highway nor has it been designated by the Secretary of Transportation as a federally-funded primary route at the present time. See 23 C.F.R Part 658 (1998) (Appendix A).

3. Speed Limitations:

Localities also hold the power to determine speed limits on certain parts of surrounding highways. This power, however, is checked by the fact that such an ordinance must be ratified by the state highway commissioner. According to Section 17C-6-3 of the West Virginia Code (attachment “4”):

§ 17C-6-3. When local authorities may alter speed limits

(c) Authority to decrease fifty-five mile limit – Whenever local authorities within their respective jurisdictions determine upon the basis of an engineering and traffic investigation that the speed under this chapter upon open country highway outside a business or residence district is greater than is responsible or safe under the conditions found to exist upon such street or highway, the local authority may determine and declare a reasonable and safe limit thereon but in no event less than thirty-five miles per hour subject to subsection (e) of this section, which reduced limit shall be effective at all times or during hours of darkness or at other times as may be determined when appropriate signs giving notice thereof are erected upon such street or highway.

...

(e) Alteration of limits on state highways in municipalities – Alteration of limits on state highways or extensions thereof in a municipality by local

authorities shall not be effective until such alteration has been approved by the commissioner of highways.

Id. (emphasis added).

The power to regulate the speed limits of trucks as mentioned in the statute is limited by the West Virginia Highway Commissioner. An enactment by the Town of Bath or the Morgan County Commission, lowering the speed limit to perhaps forty-five miles per hour would have the effect of discouraging through truck traffic within the town or county limits. If this is the route that the Town of Bath or Morgan County seeks then it is recommended that an engineering and safety study be conducted to provide evidence that the fifty-five mile per hour speed limit in place is not reasonable or safe. There is no downside to such an enactment as the Highway Commissioner can merely refuse to approve the ordinance. There is always the chance that the Commissioner, with public pressure, may decide to approve the restrictions.

1. County Commission of Morgan County:

The county government of Morgan County, as discussed throughout the previous section, also possesses the authority to enact restrictions on trucks traveling on highways within their jurisdiction, such as U.S. Route 522. Section 7-1-3 of the West Virginia Code dictates that: “The county commissions . . . have the superintendence and administration of the internal police and fiscal affairs of their counties, including the establishment and regulation of roads, ways, streets, avenues, drives and the like” Id. While § 7-1-3 does not specifically state that counties have jurisdiction over highways, it is implied through the use of the term “local authority” to describe those empowered to prohibit trucks and in the alternative impose weight restrictions. See §§ 17-1-20; and 17C-1-34.

Clearly, an enactment by the County Commission of Morgan County would hold more weight than one by the Town of Bath as the county retains more of U.S. Route 522 within its jurisdiction than the Town of Bath does. The county commissions are subject to the same limitations that the town would be subject to in reference to Commerce Clause discrimination and federal regulation.

C. Highway Commissioner Authority:

The Highway Commissioner of the State of West Virginia is vested with the vast majority of power in the state to enact restrictions on West Virginia highways. Section 17-2A-8 of the West Virginia Code vests the Commissioner with several powers. Most important, the section delegates to the Commissioner a duty of “general supervision over the state road program and the construction, reconstruction, repair and maintenance of state roads and highways.” *Id.* at § 17-2A-8(1). The Code also dictates that the commissioner has the power to “[n]egotiate and enter in reciprocal contracts and agreements with proper authorities and of the United States relating to and regulating the use of roads and highways with reference to weights and types of vehicles” *Id.* at § 17-2A-8(8). In considering a potential town ordinance, the commissioner is obligated to “[p]rovide traffic engineering services to municipalities of the State upon request of the governing body of any such municipality and upon terms as may be agreeably arranged.” *Id.* at § 17-2A-8(21). The Code does not provide a duty to provide the county government with traffic engineering studies.

If the Town of Bath or the Morgan County Commission seek to enact speed limit restrictions, as mentioned previously, the power of final approval of the ordinance is delegated to the Commissioner as well.

D. State Authority to Enact Regulation:

The Legislature of West Virginia, having delegated the vast majority of power to the Highway Commissioner, can still enact the proposed truck restrictions at any time. In the alternative, the Legislature could pass legislation imposing a toll on the portion of U.S. Route 522 which is being expanded. Toll booths, for reasons that follow, may not be upheld by the courts. The West Virginia Constitution vests the Legislature with the supreme power to regulate revenues derived from highways:

Revenue from gasoline and other motor fuel excise and license taxation, motor vehicle registration and license taxes, and all other revenue derived from motor vehicles or motor fuels shall, after deduction of statutory refunds and cost of administration and collection authorized by legislative appropriation, be appropriated and used solely for construction, reconstruction, repair and maintenance of public highways

W. Va. Const. Art. VI, § 52 (1998) (emphasis added). The legislature has delegated this authority in regards to the parkway and turnpikes to the West Virginia Parkway's Authority. This apparently has been the only delegation of the power to place tolls on West Virginia highways. See W. Va. Code § 17-16A-6 (1998). The Parkway Authority, however, does not have jurisdiction over the highways in general. A special enactment from the legislature would be necessary to authorize the placement of new toll booths. The potential toll booth statute would have to vest either the Parkway Authority or a new organization with the power to collect tolls on U.S. Route 522.

1. Installing Toll Booths for Trucks:

In recent discussions between members of the groups opposed to the expansion of U.S. Route 522, it was suggested that the best answer to the truck problem was to erect toll booths at the north and south ends of Route 522.

One potential snag to the placement of toll booths on U.S. Route 522 is 23 U.S.C. § 301, which bars tolls from being placed on highways which were built with federal dollars. The statute reads as follows: “Except as provided in section 129 of this title with respect to certain toll bridges and toll tunnels, all highways constructed under this title shall be free from tolls of all kinds.” *Id.* (emphasis added). The precursor to this statute, 23 U.S.C. § 9, which is virtually identical, has received some evaluation by the courts. In *Bogart v. County of Westchester*, 57 N.Y.S.2d 506 (1945), the Supreme Court of New York offered the following discussion on highways built with federal monies:

Under Federal statutes, any roads which have been constructed with any Federal moneys[sic] must be forever toll free. These parkways, as to very small segments, were constructed with the aid of Federal moneys[sic]. The officials of the County of Westchester and the State Superintendent of Public Works have conducted certain negotiations with the United States Commissioner of Public Works for the purpose of withdrawing the parkways in question from the map of the Federal-aid system, thus permitting the imposition of tolls upon such parkways. Concerning this matter, the United States Commissioner of Public Works has written as follows: ‘We will approve the withdrawal of these two routes from the Federal-aid system on condition that the amount of Federal Funds paid to the State on account of the projects constructed therein in Westchester County be repaid by crediting such amount against vouchers hereafter submitted on other projects, such credits to be continued until the full amount is reimbursed but to be spread over a period not to exceed five years.’

Id. at 509-10 (emphasis added); But cf. *Johnson Transfer & Freight Lines v. Perry*, 47 F.2d 900, 904 (“[S]ince the entire cost of maintaining the federal-aid roads was put upon the states, it can hardly be thought Congress intended to exclude all taxation for that purpose which has any reference to the use of the road, or is measured by the extent of the use. Especially would this be doubted when the taxation is on the business of carriage, which is not an ordinary, but an extraordinary, use of the road.”).

While the courts have not extensively reviewed the implications of 23 U.S.C. § 301, and there remains a potential open question in light of Johnson Transfer as to whether a state may place tolls on trucks traveling on federal highways, it seems fairly certain that the analysis in Bogart holds true today. For the State of West Virginia to enact legislation placing toll booths on U.S. Route 522, several issues need to be settled. First, the state must determine what proportion of U.S. Route 522 was built with federal funds. U.S. Route 522 was built primarily through federal funding and is maintained through disbursements from the federal government. If that remains the case, then the state would have to negotiate the withdrawal of the federal designation from U.S. Route 522 with the Department of Transportation and the Federal Highway Administration. This, as occurring in Bogart, would likely entail the repayment of the federal government for the costs of building and/or maintaining the highway. As in Bogart, it is reasonable to assume that repayment could take the form of a reduction in payment vouchers on other federally funded roads in West Virginia.

The likelihood of success with this option is very slight. It is doubtful that the state would wish to not only be responsible for the increased costs for maintaining U.S. Route 522, but to also incur reduced funding to pay for the transfer. Perhaps another agreement between the state and the U.S. Department of Transportation could be negotiated which would be more palatable than a loss or decrease in funding. Even though the state now controls the highway, it was built with federal monies and thus a toll cannot be enacted unless the State of West Virginia repays the federal government for the cost of constructing the highway. If U.S. Route 522 does not encounter problems associated with Section 301, then the following analysis applies.

The use of taxes or tolls to restrict truck access is not a new proposition. In fact, many states have enacted tolls to ensure such restrictions and more importantly for the production of revenue. “[T]he Supreme Court has held that a state, in the absence of federal legislation covering the subject, may impose upon motor vehicles reasonable fees for the use of its highways, and that such fees, when applied to vehicles moving in interstate commerce, do not violate the Federal Constitution’s Commerce Clause.” Daniel A. Klein, Annotation, State Tax or Fee Imposed for Motor Carrier’s Use of Highways as Violating Commerce Clause (Article I, § 8, Clause 3) of the Federal Constitution-Supreme Court Cases, 97 L. Ed. 843, at *1a (1997) (quoting Hendrick v. Maryland, 235 U.S. 610 (1915)).

However, a state must be careful when enacting such a toll, as it also has the potential to violate the Commerce Clause. The Supreme Court has consistently maintained that “[u]nder our consistent course of decisions in recent years a state tax that favors in-state business over out-of-state business for no other reason than the location of its business is prohibited by the Commerce Clause.” American Trucking Ass’ns. v. Scheiner, 483 U.S. 266 (1987). The toll booth solution suggested by U.S. Route 522 expansion opponents holds merit, however the drafting of such regulation must be exceedingly careful so as not to run afoul of the Commerce Clause. Any proposed regulation, placing tolls on trucks, must not discriminate between out-state trucks and in-state trucks. A regulation that attempts to impose tolls on out-of-state trucks versus in-state trucks would almost assuredly be struck down by the courts.

IV. Additional Causes Which May Merit Further Research:

The following two issues may merit further research if it becomes necessary to evaluate further methods to block truck access: (1) The Noise Control Act; and (2) state and federal environmental regulations.

In particular the Noise Control Act, which seemingly prohibits state or local restrictions on environmental noise levels of motor carriers, can potentially be used to the benefit of the Town of Bath. For instance, the Act allows the Secretary of Transportation to determine that “special local conditions” necessitate the promulgation of special local standards for noise control. See 42 U.S.C. § 4917(c) (1) & (2) (1989). More research would need to be uncovered to determine exactly what leeway the Secretary has in determining appropriate local conditions.

In addition, there are several environmental laws and regulations on the state and federal levels which could provide a basis for restricting trucks that haul certain types of material on U.S. Route 522. This method of restriction would need to be researched further as well and may provide a secondary defense against truck congestion.

V. Conclusion:

Based on the aforementioned research, the town and county have the authority to enact weight restrictions on trucks, within the portion of U.S. Route 522 that falls within their respective jurisdictions, which would support increased public safety and that are bolstered by engineering studies as well as other empirical data. The town or county also have the authority to enact a complete ban on trucks, particularly in light of the fact that such a ban would not unduly burden interstate commerce since alternate plans such as an expansion/improvement of West Virginia State Route 9 or other alternatives are available.

Lane use restrictions have been upheld by the courts and it can be derived from the West Virginia Code that both municipalities and counties have the authority to enact these types of ordinances on highways falling within their jurisdictions using weight as the basis of restriction. In addition, these localities should pass resolutions lowering the speed limit, where possible, on U.S. Route 522 to around forty-five miles per hour. This restriction would have the effect of discouraging the bulk of truck traffic associated with the expansion of U.S. Route 522. A compromise as to the speed limit may have to be reached as the state highway commissioner must approve the alteration in speed limit.

On the state level, the highway commissioner and state legislature have the power to enact the above-mentioned measures, albeit it is easier to convince the localities of the local need for such initiatives. Additionally, if the state is able to clear the hurdles involved in enacting tolls on federal-aid highways derived from 23 U.S.C. § 301, this type of restriction may also have the desired effect of reducing truck traffic.

Other potential remedies exist for the reduction of traffic flow, which would require a complete search of environmental laws and regulations of the states, to examine how to reduce truck traffic. A study determining what type of goods that these motor carriers generally carry over U.S. route 522, could lead to possible restrictions. Additionally, the state may be able to petition the Secretary of Transportation for an exemption from the Noise Control Act and that may provide an additional avenue to discourage high volume truck traffic. These last two suggestions require further research.