

**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**SAMUEL J. SWIGER, et al.**

**Plaintiffs Below and Appellees,**

**v.**

**UGI/AMERIGAS, INC., a Foreign Corporation,  
d/b/a AMERIGAS, INC. et al.,**

**Defendants Below and Appellants.**

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**Supreme Court No. 31792**

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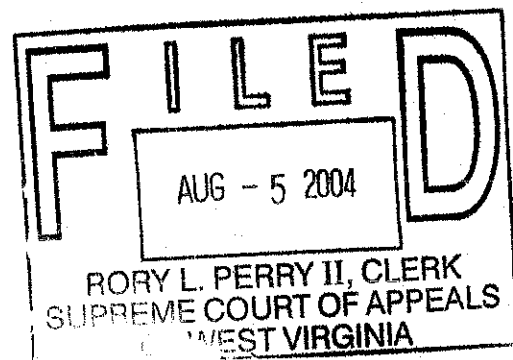
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August 5, 2004

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## I. INTRODUCTION

This appeal is brought by AmeriGas Propane, L.P. (“AmeriGas”),<sup>1</sup> a distributor of liquefied propane, including in certain parts of West Virginia. The subject matter of this appeal presents straightforward issues of *stare decisis*, statutory construction, and deference to validly enacted legislative rules, each of which alone, and certainly collectively, warrant this Court’s reversal of the Circuit Court’s answers to the certified questions.

In brief, the certified questions raise issues about the proper interpretation of the West Virginia State Fire Code and a particular exemption therein. In 1979, the West Virginia Legislature adopted as a legislative rule the State Fire Code which – as is true with fire codes in several other states<sup>2</sup> – exempts one- and two-family dwellings from application of its provisions. Specifically, at § 1.5, the State Fire Code provides:

The State Fire Code has no application to . . . buildings used wholly as dwelling houses for no more than two families.<sup>3</sup>

As explained below, the Circuit Court was made aware of this express language, but declined to apply it, and in doing so disregarded this Court’s prior ruling in *Redden v. Comer*, 200 W. Va. 209, 213, 488 S.E.2d 484, 488 (1997), in which the § 1.5 Exemption was examined and declared “dispositive.”<sup>4</sup> Rather, the Circuit Court found, without any supporting authority, that the § 1.5 Exemption either was not intended to apply to “sophisticated business entities”

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<sup>1</sup> An individual, James Walters, is also a named defendant and this appeal is also brought in his name. Throughout the course of the case below, the corporate defendants improperly have been identified as UGI/AmeriGas, Inc. However, as AmeriGas has informed both plaintiffs below and the Circuit Court, the proper corporate defendant is AmeriGas, L.P., the entity that operates propane distribution activities in West Virginia. See Preliminary Opposition to Motion to Amend the Complaint, dated September 25, 2003, at pp. 4-7.

<sup>2</sup> See *infra* discussion pp. 32-33 and accompanying notes.

<sup>3</sup> W. Va. C.S.R. § 87-1-1.5 (2004) (hereinafter the “§ 1.5 Exemption” or “the Exemption”).

<sup>4</sup> 200 W. Va. at 213, 488 S.E.2d at 488.

such as AmeriGas, and was contrary to the public policy of West Virginia. Nonetheless, in so deciding, the Circuit Court agreed to certify the following three questions.<sup>5</sup>

1. **Question:** Does 87 C.S.R. 1, § 1.5, which exempts application of the Fire Code's provisions to buildings used wholly as dwelling homes for no more than two families, violate the intent and purpose of the West Virginia State Fire Code, and the public policy of this State?

**Answer by the Circuit Court:** Yes.

2. **Question:** Was 87 C.S.R. 1, § 1.5 intended to be applicable to commercial suppliers of liquid propane gas, such as Defendant AmeriGas, when such commercial vendors install or supply liquid propane gas to one- and two-family dwellings in this State?

**Answer by the Circuit Court:** No.

3. **Question:** Even if the express exemption in Section 1.5 is found to be invalid against third-party service providers, is it proper to impose on a retrospective basis negligence *per se* liability against such service providers for violations of the State Fire Code with respect to one- and two-family dwellings?

**Answer by the Circuit Court:** Yes.

For the reasons set forth in detail below, this Court should find that:

1) the § 1.5 Exemption does *not* violate the intent and purpose of the State Fire Prevention and Control Act or the State Fire Code;

2) the § 1.5 Exemption, as its express language makes clear, was intended to apply to one- and two-family dwellings, including to *both* homeowners and commercial vendors and contractors who provide services to those homeowners; and

3) the Circuit Court's third question need not be reached because the State Fire Code (and the § 1.5 Exemption therein) constitutes a valid and proper legislative rule, which should be enforced as written and adopted, but in the unlikely event that this Court finds any problems with the State Fire Code's language, that a decision to invalidate the § 1.5 Exemption be given prospective effect only.

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<sup>5</sup> See Amended Order of Certification to the West Virginia Supreme Court of Appeals, dated March 1, 2004, at 4. The Amended Order modified in minor respects an earlier order issued on February 26, 2004, containing a few typographical errors.

## II. STATEMENT OF FACTS AND PROCEDURAL BACKGROUND OF THE CASE

### A. The Nature of the Case

This case originated with a 1996 fire that occurred at the home of Named Plaintiffs Samuel and Brenda Swiger (hereinafter “the Swigers”). The Swigers alleged that the fire was caused by AmeriGas’s failure to install their underground propane gas line at the required depth, with the result being that the line was punctured, ultimately causing propane to leak and ignite. Suit was filed in July 1998, with the Swigers seeking to recover damages for personal injuries, property damage to their home, and breach of contract.<sup>6</sup> They also sought to bring claims for “all other similarly situated individuals.”<sup>7</sup>

On October 21, 1999, the Circuit Court granted the motion for class certification, determining that the claims shall be open to “all persons residing in West Virginia who have had LP gas lines installed on their property by AmeriGas in violation of the standards set forth in the National Fuel Gas Code.”<sup>8</sup> No class notice, however, has ever been sent.<sup>9</sup>

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<sup>6</sup> Compl., at ¶¶ 27-31, 36.

<sup>7</sup> *Id.* at ¶ 1. Notably, since the 1996 Swiger incident, there have been no similar occurrences arising from any AmeriGas installation in West Virginia, and perhaps only one other circumstance elsewhere in the country. In their Opposition to the Petition for Certification, Appellees criticized AmeriGas for its claim that no other similar incidents have occurred elsewhere in the country and attached a report showing that a fire had occurred in 2003 at a pool heater in Florida that resulted from an AmeriGas gas line being disturbed by a landscaper. While AmeriGas acknowledges that an incident report exists showing such a fire, it notes that no claims have been brought arising from that incident. In any case, it is plain that no similar incidents have occurred in West Virginia in the eight years since the Swiger incident giving rise to the instant case.

<sup>8</sup> Order Certifying Class, dated October 21, 1999. AmeriGas unsuccessfully sought reconsideration of this class ruling and then filed a writ of prohibition with this Court, which this Court declined to issue, with two judges dissenting. *See* Order in *State of West Virginia, ex rel. v. UGI/AmeriGas, Inc., et al.*, No. 993354, *Honorable Robert B. Stone, et al.*, dated December 14, 1999.

<sup>9</sup> Plaintiffs later filed an amended complaint to add claims for nuisance; violation of the West Virginia Consumer Protection Act; and the tort of outrageous conduct. *See* Amended Compl., filed April 10, 2000. These claims have never been certified. In addition, the Swiger family’s individual claims have been settled. *See* Order Confirming Infant Settlement, dated May 29, 2003. Plaintiffs also added several new Named Plaintiffs, but those additional persons have never been certified as class representatives. In September 2003, Plaintiff moved to add yet other defendants to the case, and to expand their claims and

## **B. The State Fire Code and the State Building Code**

During all relevant times, the State Fire Code has incorporated various standards set forth in a series of National Fire Protection Association (“NFPA”) pamphlets, including NFPA 54 – known as the National Fuel Gas Code – and NFPA 58 – the Liquefied Petroleum Gas Code.<sup>10</sup> It is NFPA 54 that is referenced in the Circuit Court’s 1999 definition of the class.

The State Building Code,<sup>11</sup> which was first adopted in 1989, incorporates a different set of professional and safety standards. Specifically, the State Building Code, at the time the suit below was brought, incorporated the standards and requirements published by the Building Officials & Code Administration International (“BOCA”) and the Council of American Building Officials (“CABO”) and in particular, the 1996 BOCA National Building Code, the 1996 BOCA International Mechanical Code and the 1995 CABO One- and Two-Family Dwelling Code.<sup>12</sup> These last three codes addressed underground propane line standards.

Notably, the State Building Code does not have automatic statewide application. Rather, the authorizing statute provides that it is applicable only “in those counties or municipalities

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the class definition to encompass propane installations that AmeriGas serves (as opposed to those that it installed). *See* Pls.’ Motions to Amend Complaint, dated September 16, 2003 and Pls.’ Motion to Amend and Redefine Class Definition, filed September 15, 2003. These latter motions are pending at the time of this submission.

<sup>10</sup> *See* W. Va. C.S.R. § 87-1-1.4 and Appendix A thereto.

<sup>11</sup> *See* W. Va. C.S.R. § 87-4-1 *et seq.*

<sup>12</sup> *See* W. Va. C.S.R. § 87-4-4.1 (1998 version of State Building Code). A new version of the State Building Code became effective as of April 1, 2003, and that version incorporates, in turn, updated versions of the BOCA and CABO codes, including completely new and revamped International Code Council standards such as the International Fuel Gas Code and the International Residential Code. *See* W. Va. C.S.R. § 87-4-4.1.4 and § 87-4-4.1.7 (2003 version of State Building Code). These newer codes both call for a twelve inch burial depth for underground propane lines. The 2003 State Building Code contains an exception to both of these professional codes, providing: “Underground piping systems shall be installed a minimum depth of 12 inches (305 mm) below grade. If the minimum depth cannot be maintained, the piping system shall be installed in conduit or shielded in an approved manner.” W. Va. C.S.R. §§ 87-4-4.1.4 and 87-4-4.1.7 (2003).

adopting the state building code.”<sup>13</sup> Moreover, one year after the promulgation of the first State Building Code (*i.e.*, 1989), all municipal and county building codes were deemed void by statute, and if a locality chose subsequently to adopt a building code it was required to be the State Building Code as promulgated by the State Fire Commission.<sup>14</sup>

In any case, evidently recognizing that the two state codes incorporated different professional standards, the State Building Code provides that if a conflict exists between the State Fire Code and the State Building Code, the State Fire Code language prevails.<sup>15</sup>

### **C. The Initial Debate Regarding the Applicable Burial Depth Standards**

Plaintiffs and the Circuit Court initially believed the appropriate burial depth standard to be set forth in NFPA 54, which is the provision cited in the class certification language.<sup>16</sup> However, while all came to agree that NFPA 54 was not the correct NFPA pamphlet applicable to this matter, a debate arose concerning which standard did apply.

In the summer of 2001, AmeriGas voluntarily began an inspection and/or replacement program for its West Virginia underground line customers. AmeriGas proceeded based on its long-standing interpretation of NFPA 58, which at the time provided that underground LP gas lines shall be buried a minimum of eighteen inches, but that “[t]he cover shall be permitted to be reduced to 12 in. (300 mm) if external damage to the pipe or tubing is not likely to result. If a

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<sup>13</sup> See W. Va. Code § 29-3-5b(a).

<sup>14</sup> See W. Va. Code § 8-12-13(b) and W. Va. Code § 7-1-3n(b).

<sup>15</sup> W. Va. C.S.R. § 87-4-3.1 (2003) (“Whenever there is a conflict between the ‘state building code’ and the ‘state fire code,’ the state fire code takes precedence.”). This same language appeared in earlier editions of the State Building Code.

<sup>16</sup> Order Certifying Class, dated October 21, 1999, at 11. At one time, NFPA 54 applied to the portion of an underground propane line that was located between an external storage tank and the regulator placed on the outside of the building structure. However, in 1996, NFPA revised its pamphlets such that the external portion of the installation was thereafter controlled by NFPA 58.

minimum of 12 in. (300 mm) of cover cannot be maintained, the piping shall be installed in conduit or bridged (shielded).”<sup>17</sup>

Plaintiffs then filed a motion seeking a declaration that a flat eighteen inch burial depth standard should apply, pointing as authority to the then applicable BOCA standards incorporated in the State Building Code.<sup>18</sup> Plaintiffs further argued that CABO standards, which also were incorporated into the State Building Code and which set a twelve inch burial depth, should *not* be applicable.<sup>19</sup> Plaintiffs also argued that the NFPA 58 standard affirmatively *requires* an eighteen inch depth, despite the language permitting a twelve inch depth if there is no likelihood of external damage.<sup>20</sup>

Initially, neither the parties nor the Circuit Court focused on the § 1.5 Exemption in the State Fire Code. Plaintiffs argued that the most stringent provision – BOCA’s International Mechanical Code eighteen inch requirement – applied, while AmeriGas argued that the State Fire Code’s NFPA 58 standard applied. At a September 5, 2001, hearing on these matters, the

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<sup>17</sup> In 2001, at the time that AmeriGas undertook its voluntary line inspection project, the then prevailing State Fire Code – *i.e.*, the 1998 version – had incorporated the 1997 edition of the NFPA codes. In 1997, the most recent edition of Pamphlet 58 was dated from 1995 – as individual pamphlets are not reissued each year. The language quoted above in the main text is from the 1995 NFPA 58 pamphlet. Newer editions of NFPA 58 issued in 1998 and 2001, with the quoted language remaining essentially the same. However, the 2004 version of NFPA 58, which became effective as of February 5, 2004, now reads in relevant part: “Buried metallic pipe and tubing shall be installed underground with a minimum of 12 in. (300 mm.) of cover. The minimum cover shall be increased to 18 in. (460 mm.) if external damage to the pipe or tubing from external force is likely to result. If a minimum 12 in. (300 mm.) of cover cannot be maintained, the piping shall be installed in conduit or shall be bridged (shielded).” The underground depth requirements for plastic piping are the same as for metallic.

<sup>18</sup> See September 5, 2001 Transcript, at 72, 76-77 [hereinafter “9/05/01 Tr.”].

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

Circuit Court indicated its belief that the NFPA 58 standard controlled, but appeared to construe that provision as effectively requiring AmeriGas to bury lines at an eighteen inch depth.<sup>21</sup>

Eventually, on June 19, 2002, the Circuit Court issued a written Order ruling on Plaintiffs' motion and found that the State Fire Code's NFPA standards prevailed over the Building Code standards.<sup>22</sup> However, by this time, AmeriGas had pointed to the § 1.5 Exemption and asked the Circuit Court to reconsider its ruling. Given the length of time that had gone by, the Circuit Court thought it best to rule on what had actually been presented to it, but explicitly stated that the ruling was "based on what was submitted to the Court at this time with regard to burial depth required for propane gas lines under West Virginia law" and that "the parties may ask the Court to revisit or reconsider this ruling at a later time."<sup>23</sup>

Meanwhile, in an effort to continue with AmeriGas's voluntary line project, in 2002, AmeriGas and Plaintiffs agreed (even before the Circuit Court's June 19, 2002 decision) to enter into a "Protocol" setting forth particular rules and procedures for performing line replacements.<sup>24</sup> The Protocol included a provision requiring that propane lines be buried at a depth of eighteen inches, unless that depth could not be obtained after making reasonably feasible efforts.<sup>25</sup>

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<sup>21</sup> 9/05/01 Tr. at 74, 79-80.

<sup>22</sup> See Order Regarding (i) Class Plaintiffs' Motion For An Order Regarding Establishing Of Criteria For Defendants Alteration And/Or Destruction Of Inspections And/Or Replacements Of LP Gas Lines By Defendants and (ii) Class Plaintiffs' Motion for Summary Judgment Regarding Determination Of Applicable State Law For The Lawful Installation And Maintenance Of Gas Lines And Apparatus, dated June 19, 2002 [hereinafter "June 2002 Standards Order"].

<sup>23</sup> See May 30, 2002 Transcript, at 11-12, 15-16; see also June 2002 Standards Order at 3-4.

<sup>24</sup> See Joint Motion for Court Approval Establishing Protocol for Propane Line Replacement Procedures and Request for Future Hearing Dates to Determine Related Issues and Orders, dated May 30, 2002.

<sup>25</sup> The Protocol was approved in a June 19, 2002 Order [hereinafter "June 2002 Protocol Order"] and later was amended in minor respects by an Order, dated December 6, 2002. The Protocol is attached to each Order and provides that AmeriGas will attempt to bury the propane line at an 18 inch depth and that if this is not feasible after taking other "reasonable steps" to do so, AmeriGas "will next attempt to bury the line to a minimum depth of at least 12", but as deep as practical." See Attachments to Order of June 19, 2002.

AmeriGas agreed to this provision solely for the purpose of establishing a clear Protocol, under which its replacement work would not be challenged by Plaintiffs, but in doing so did not agree or concede that eighteen inches represented the correct or required burial standard. The Order approving the Protocol makes this position clear: "The parties' agreement to this Protocol shall not constitute . . . an admission by either party of what the pertinent legal standards are or were .

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**D. AmeriGas's Motion to Reconsider and for Partial Summary Judgment**

On November 11, 2002, AmeriGas formally moved for reconsideration of the Court's June 2002 Order and partial summary judgment based on the § 1.5 Exemption.<sup>27</sup> In support of its motion, AmeriGas relied on this Court's prior decision in *Redden*, in which the § 1.5 Exemption was considered, affirmed and declared "dispositive."<sup>28</sup>

AmeriGas further contended that since the Fire Code exempts one- and two-family homes, the standards governing the burial depth of propane lines at such structures would be provided by the State Building Code, *assuming* that the Building Code had been adopted by the applicable county or municipality, and that as between competing provisions of the Building Code, (*e.g.*, between: (i) the 1996 BOCA National Building Code; (ii) the 1996 BOCA

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<sup>26</sup> June 2002 Protocol Order at 2.

<sup>27</sup> See AmeriGas Motion For Reconsideration Of West Virginia Underground Propane Line Depth Standards Applicable to One and Two Family Homes and for Partial Summary Judgment and/or Declaration of Law, dated November 11, 2002 [hereinafter "AG Motion for Recon."]. The Motion was to be considered in September 2002, but Plaintiffs sought a continuance on the grounds that an expert, who they anticipated might present testimony, was ill. See Pls.' Motion For Continuance Of Hearing Scheduled For Sept. 12, 2002 and Order, dated August 7, 2002. The parties later determined that witnesses would not be called. Accordingly, the hearing date was set for December 9, 2002, with briefs submitted prior thereto.

<sup>28</sup> In further support of its position and its reliance on *Redden*, AmeriGas supplied to the Circuit Court and Plaintiffs copies of the underlying appellate briefs submitted in the *Redden* case and which this Court reviewed in reaching its decision. See December 9, 2002 Transcript at 19-21 [hereinafter 12/09/02 Tr.].

International Mechanical Code; and (iii) the 1995 CABO One- and-Two Family Dwelling Code),<sup>29</sup> the appropriate and governing standard for one- and two-family dwellings was CABO's twelve inch depth standard.<sup>30</sup>

The motion was argued on December 9, 2002.<sup>31</sup> On April 25, 2003, during a previously scheduled conference, the Circuit Court, after acknowledging what a difficult issue the § 1.5 Exemption presented,<sup>32</sup> orally denied AmeriGas's motion.<sup>33</sup> The Circuit Court found that despite the § 1.5 Exemption language "that jumps out at me every time I pick up this case,"<sup>34</sup> the Fire Code and its NFPA 58 standards *do* apply to one- and two-family homes.<sup>35</sup> The Circuit Court further acknowledged that there is a difference of opinion on what these NFPA standards

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<sup>29</sup> AmeriGas's argument was based on the version of the State Building Code that was in effect at the time that it filed its motion – *i.e.*, the 1998 State Building Code, and the referenced BOCA and CABO codes incorporated therein. As of April 1, 2003, the State Building Code adopted a 12 inch depth standard (or a lesser depth if the line was shielded). *See supra* note 12.

<sup>30</sup> In partial support of this position, AmeriGas provided to the Circuit Court a letter from West Virginia Fire Marshal Sterling Lewis stating that it was the opinion of the State Fire Marshal's Office that: (i) "the NFPA underground line burial depth standards do not apply to one and two family dwellings"; (ii) the State Building Code "does not apply if [it] has not been adopted"; and (iii) "the 1995 CABO code is the applicable code for governing the underground depth of propane lines for one and two family dwellings that are located in jurisdictions that have adopted the State Building Code." *See* Letter from Sterling Lewis, Jr., State Fire Marshal, to Walter Smittle, November 7, 2002 (*See* Exhibit J to AG Motion for Recon.) [hereinafter "Lewis Letter"]. Plaintiffs claimed that the Lewis letter was procured improperly because AmeriGas retained former State Fire Marshal Walter Smittle as its consulting expert, and had Smittle meet with Marshal Lewis and present him with a letter setting forth various questions to which Lewis responded on the same day. *See* 12/09/02 Tr. at 45. Accordingly, Plaintiffs insisted on taking Smittle's deposition. However, Smittle's testimony only confirmed that the Lewis letter was procured appropriately and that it represents Fire Marshal Lewis's independent view of these various provisions. *See* Deposition Transcript of Walter Smittle, III, January 27, 2003, at p. 32, line 4 - p. 37, line 13. [hereinafter "Smittle Dep."]. Mr. Smittle's testimony also sheds light on the background of the initial promulgation of the § 1.5 Exemption. *See infra* discussion p. 19, note 75.

<sup>31</sup> *See* 12/09/02 Tr.

<sup>32</sup> *See* April 25, 2003 Transcript, at 28 [hereinafter "4/25/03 Tr."].

<sup>33</sup> *Id.* at 36.

<sup>34</sup> *Id.* at 30.

<sup>35</sup> *Id.* at 36.

require.<sup>36</sup> After considering the parties' proposed orders, on September 25, 2003, the Circuit Court issued a written order denying AmeriGas's motion.<sup>37</sup>

**E. The Circuit Court's Decision Invalidating the § 1.5 Exemption for One- and Two-Family Homes**

Based on the Circuit Court's oral ruling and written Order, it is apparent that the Circuit Court relied upon three basic arguments in declaring the § 1.5 Exemption "inapplicable under the facts in this case."<sup>38</sup> First, despite any indication in the Exemption or otherwise, the Circuit Court found "that the . . . exemption . . . was never intended to apply to an entity such as AmeriGas, a sophisticated commercial business entity which installs and delivers a hazardous substance such as propane,"<sup>39</sup> and that AmeriGas is "obviously not a one- or two-family dwelling" and, thus, "may not rely on the exemption in Section 1.5 of the regulation."<sup>40</sup>

Second, the Circuit Court could not countenance the consequences that it thought would result from applying the Exemption, reasoning that "to adopt AmeriGas's theory would deprive the vast majority of citizens who live in homes, trailers, and small apartments of any protection of the State Fire Code."<sup>41</sup> Hence, the Circuit Court found the exemption invalid as contrary to

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<sup>36</sup> *Id.* at 37. In this regard, AmeriGas also supplied the Court with a new NFPA interpretation expressly confirming that propane lines could be buried at 12 inch depths if there was no likelihood of external damage to the line without any obligation to first try to bury the line at an eighteen inch depth as Plaintiffs contended. *See* Defendants' Response and Opposition to Motion of Plaintiffs' Class to Enforce Order Establishing Line Depth Replacement Protocol, dated April 17, 2003 at 4 and Exhibit C; *see also* 4/25/03 Tr., at 13-14 and 20-24. Moreover, as indicated above, *see supra* note 17, the 2004 version of NFPA 58 calls for a 12 inch burial depth unless external damage to the line was likely, at which point 18 inches would be required.

<sup>37</sup> Order, dated September 25, 2003 [hereinafter "Sept. 2003 Order"].

<sup>38</sup> *Id.* at 6.

<sup>39</sup> *Id.* at 4.

<sup>40</sup> *Id.* at 6.

<sup>41</sup> *Id.* at 5.

the purpose of the authorizing statute – *i.e.*, the State Fire Prevention and Control Act<sup>42</sup> – which it viewed as intending to safeguard “the people and businesses of this State . . . from the hazards of fire and explosion that could be created from dangerous substances like liquid propane gas.”

Finally, apparently not crediting the briefs from the *Redden* case that detailed the arguments made therein and which AmeriGas described and provided to the Court,<sup>43</sup> the Circuit Court stated “I don’t think the Supreme Court was asked [in *Redden*] to fully analyze what they did or what the impact of that exclusion of one- and two-family dwelling houses or residences would be on the State . . . .”<sup>44</sup> The Circuit Court further found that *Redden* was not controlling because it “did not consider whether § 1.5 of the State Fire Code regulations is contrary to the State Fire Prevention and Control Act itself” and “did not deal with a factual situation involving a sophisticated commercial entity installing and supplying propane gas systems.”<sup>45</sup>

Subsequent to this oral ruling, the Circuit Court ultimately issued its written Order and certified the three questions set out above.<sup>46</sup>

### **III. ARGUMENT**

#### **A. The Standard of Review Is *De Novo***

Given that this matter concerns the interpretation of a statute and legislative rule, and presents a pure question of law, the standard of review is *de novo*. *CNG Transmission Corp. v. Craig*, 211 W. Va. 170, 564 S.E.2d 167, 169 (2002).

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<sup>42</sup> *Id.* at 5.

<sup>43</sup> 12/09/02 Tr. at 19.

<sup>44</sup> Sept. 2003 Order at 6.

<sup>45</sup> *Id.* at 5-6.

<sup>46</sup> *See supra* p. 2.

**B. The Section 1.5 Exemption Is Valid and Enforceable**

**1. This Court's Prior Decision in *Redden* Controls the Disposition of this Matter**

The crux of the Circuit Court's decision stemmed from its conviction that the § 1.5 Exemption is contrary to and inconsistent with the legislative intent as reflected in the West Virginia Fire Prevention and Control Act, as well as a general (if unarticulated) public policy favoring the existence of some sort of rules or regulations that would apply to one- and two-family homes.<sup>47</sup>

However, in coming to this decision, the Circuit Court specifically elected not to follow a prior *controlling* decision of this Court – *i.e.*, *Redden v. Comer*.<sup>48</sup> In *Redden*, the issue was whether plaintiff could recover in negligence for the death of his son, who died in a fire at a rented single-family home that did not have a smoke detector installed as required by the West Virginia Fire and Prevention Act.<sup>49</sup> That section provided, in relevant part, then (as it does now) that “On or before the first day of July, one thousand nine hundred and ninety-one, an operational smoke detector shall be installed in the immediate vicinity of each sleeping area within all one- and two-family dwellings . . . .”<sup>50</sup> However, another portion of the Smoke Alarm Statute – W. Va. § 29-3-16(g) – provides that “A violation of this section shall not be deemed . . . to constitute evidence of negligence . . . in any civil action or proceeding for damages.”<sup>51</sup>

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<sup>47</sup> 4/25/03 Tr. at 36; Sept. 2003 Order at 5.

<sup>48</sup> *Redden v. Comer*, 200 W.Va. 209, 488 S.E.2d 484 (1997).

<sup>49</sup> West Virginia Fire Prevention Act, W. Va. Code, §29-3-16(a) [hereinafter the “Smoke Alarm Statute”].

<sup>50</sup> *Id.* Although there have been some amendments to the statute, they have not affected the import of the quoted language.

<sup>51</sup> See *Redden*, 200 W. Va. at 213, n.3, 488 S.E.2d at 487 and n.3 (citing the 1991 version of the Smoke Alarm Statute at § 29-3-16(g)). The most recent version of the Smoke Alarm Statute places this same language in § 29-3-16(j). In any case, the statute has consistently permitted a non-complying owner to be fined for failure to install a smoke alarm. See *id.* at § 29-3-16(i).

A few years before *Redden*, this Court in *Reed v. Phillips*<sup>52</sup> considered the effect of this latter provision in an action for negligence against a landlord when a tenant died from a fire in an apartment that was part of a single family home where no smoke detector had been installed. In *Reed*, this Court determined that in adopting subsection (g), the Legislature clearly intended not to create an action in tort for violation of the Smoke Alarm Statute.<sup>53</sup>

The *Reed* plaintiffs, however, argued that the matter did not end there because the State Fire Code had adopted the NFPA Life Safety Code, which requires the installation of smoke detectors in one- and two-family private dwellings and that, therefore, the lack of a smoke detector at the single family home in question constituted a violation of statute, which in turn, constituted *prima facie* evidence of negligence. This Court agreed with that analysis, holding that in light of the provisions of the State Fire Code, and the professional codes adopted therein, the landlord/defendant's failure to install a smoke detector constituted a *prima facie* showing of negligence, thereby allowing the plaintiffs to proceed with their tort action.<sup>54</sup> Notably, similar to what occurred in the initial stages of the instant case, the *Reed* opinion did not include any discussion of the § 1.5 Exemption.

Three years later, the *Redden* plaintiffs, upon essentially identical facts – *i.e.*, the tragic loss of a loved one from a fire in a single family home without a smoke detector – sought to proceed under the rationale in *Reed*. However, in *Redden*, the defendants pointed to the § 1.5 Exemption and argued that the Exemption prohibits any application of any provision of the State Fire Code to a single-family home. In response, as the underlying *Redden* appellate brief shows,

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<sup>52</sup> *Reed v. Phillips*, 192 W. Va. 392, 452 S.E.2d 708 (1994).

<sup>53</sup> *Id.* at 397, 452 S.E.2d at 713.

<sup>54</sup> *Id.* at 398, 452 S.E.2d at 714.

the *Redden* plaintiffs *unsuccessfully* argued – just as Plaintiffs have argued in this case, and just as the Circuit Court found – that the § 1.5 Exemption is contrary the West Virginia Fire Prevention and Control Act and that the State Fire Commission did not have the authority to exempt one- and two-family homes from application of the State Fire Code.<sup>55</sup> Thus, the posture of the parties in this case are very similar to the posture of the parties in *Redden*.

Indeed, the two questions presented for review in the *Redden* case, as articulated in the *Redden* appellant's brief, were:

1. Whether the State Fire Commission has the authority to exempt single- and double-family dwellings from the application of the West Virginia State Fire Code?
2. Whether the exemption as set forth by the West Virginia State Fire Commission in adopting and promulgating the West Virginia State Fire Code would have any application in this case, in light of the Fire Prevention and Control Act, as read in it's [sic] entirety?<sup>56</sup>

Having posited these questions, the unsuccessful *Redden* appellants went on to make the same arguments Plaintiffs in the instant action argued below and which the Circuit Court in large measure adopted, including:

- The State Fire Commission's authority to promulgate regulations arose strictly from W. Va. Code § 29-3-5 of the Fire Prevention and Control Act, and that the statute called for the adoption of regulations that shall be accordance with standard safe practices as embodied in widely recognized standards of good practice for fire prevention;<sup>57</sup>

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<sup>55</sup> Brief of Appellant, Junior Marcus Redden, in *Redden v. Comer*, No. 961325, November 1, 1996, at 7-12 [hereinafter "Redden Appellant Brief"].

<sup>56</sup> Redden Appellant Brief at 7.

<sup>57</sup> Redden Appellant Brief, at 9-10; *see also* Plaintiff Class Members' Response to Defendant's Motion for Reconsideration, dated December 2, 2002, at 7-11 [hereinafter "Pls.' Response to Recon."].

- Other than a provision relating to treatment of historical structures, the Fire Prevention and Control Act granted no authority for the adoption of any exemptions by the State Fire Commission;<sup>58</sup> and
- The language of the Fire Prevention and Control Act was clear and unambiguous such that it should be applied as written without any interpretation and that the State Fire Commission, therefore, acted outside of its vested authority by including the one- and two-family dwelling exemption in the State Fire Code.<sup>59</sup>

The *Redden* defendant/appellee countered these points by noting the express authority of the Fire Commission to promulgate regulations consistent with the State's Administrative Procedures Act (W. Va. Code § 29-A-1-1 *et. seq.*) (hereinafter the "APA"); and that:

- The State Fire Code was properly adopted as a Legislative Rule, consistent with the APA, which requires that the proposed rule be submitted to a legislative review committee that by statute must consider, among other things: (i) whether the agency has exceeded the scope of its statutory authority in approving the proposed rule; (ii) whether the proposed legislation is in conformity with the legislative intent of the authorizing statute; and (iii) whether the proposed rule is reasonable, especially as it affects the convenience of the general public; and
- The effect of this statutory scheme is, at least, to create a presumption that the legislature was cognizant of the spirit and intent of the original statute in approving a proposed rule.<sup>60</sup>

These were essentially the *Redden* parties' only arguments presented to this Court.

Having reviewed these issues, this Court responded:

Significantly, . . . the *Reed* case did not involve a consideration of the exemption before us in this action. . . . [T]o the extent that this Court, in

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<sup>58</sup> Redden Appellant Brief, at 10-11; *see generally* 12/09/02 Tr. at 59-62.

<sup>59</sup> Redden Appellant Brief, at 10-12; *see also* Pls.' Response to Recon., at 7-8, 16. Likewise, the *Redden* plaintiffs, like Plaintiffs below, argued that Section 29-3-12 of the Fire Prevention and Control Act exclusively lists the powers and duties of the State Fire Marshal and that among those powers only a single exemption existed relating to one and two family dwellings – *i.e.*, enforcement of the laws relating to fire exits, *except at buildings used wholly as dwelling houses for no more than two families*. (Emphasis in the original.) *Compare Redden* brief at 13-14 with Pls.' Response to Recon. at 9-11. The *Redden* plaintiffs also argued that this single statutory exemption did not permit the Fire Commission to advance a blanket exemption to one and two family homes and, accordingly, the State Fire Commission acted outside of its statutory authority in including the one and two family dwelling exemption in the State Fire Code. *Compare Redden* brief at 14 with Pls.' Response to Recon. at 9-10.

<sup>60</sup> *See Redden* Appellee's brief at 10-11.

*Reed*, relied upon the State Fire Code, we also rely upon the State Fire Code in this action, the difference being that, in this action, this Court has before it an exemption to the smoke detector requirement. . . . Consequently, this Court concludes that the exemption in the State Fire Code is dispositive and precludes the appellant's action against the appellees . . .

*Clearly, the State Fire Commission was authorized by statute to create a State Fire Code. That Code, as adopted, contained a clear exemption regarding 'buildings used wholly as dwelling houses for no more than two families[.]' Under the circumstances of this action, that exemption is dispositive.*<sup>61</sup>

In short, this Court quickly and decisively dispensed with all of the *Redden* plaintiff/appellant's arguments urging that the Fire Commission had acted outside of its statutory authority in adopting the one- and two-family home exemption or that the § 1.5 Exemption was contrary to the statutory scheme and intent under which it arose.<sup>62</sup>

This history demonstrates that the Circuit Court here improperly based part of its decision on a finding that in *Redden* this Court did not consider whether the § 1.5 Exemption is contrary to the State Fire Prevention and Control Act.<sup>63</sup> In fact, however, that was the precise, and essentially sole, issue that this Court *did* consider – and it rendered a very clear and unambiguous response. Respectfully, the Circuit Court should not have deviated from this Court's plain and

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<sup>61</sup> *Redden*, 488 S.E. 2d at 488 (emphasis added).

<sup>62</sup> Plaintiffs below questioned the validity of the 1997 *Redden* decision in light of the fact that it is a *per curiam* opinion and that it was issued prior to this Court's clarification of the precedential value of *per curiam* opinions in *Walker v. Doe*, 210 W. Va. 490, 558 S.E.2d 290 (2001). In *Walker*, this Court explained very clearly that any view that a *per curiam* opinion contains merely dicta "is . . . incorrect as a matter of law"; that "*per curiam* opinions . . . have precedential value as an application of settled principles of law . . ."; and that "we hereby renounce any prior statement of this Court to the effect that *per curiam* opinions are not legal precedent." *Id.* at 496, 558 S.E.2d at 296. Having made this point, the Court then went on to affirm reliance on an earlier *per curiam* opinion, *Dalton v. Doe*, 208 W. Va. 319, 540 S.E.2d 536 (2000). *Walker*, therefore, dispenses with any notion that *Redden* has no precedential value or somehow has lesser value because of its *per curiam* status or that because the rule in *Walker* was not announced until 2001 that *per curiam* opinions pre-dating that decision, such as *Redden*, are to be treated differently than those issued post-*Walker*.

<sup>63</sup> See Sept. 2003 Order at 5.

straightforward analysis of the § 1.5 Exemption in *Redden*.<sup>64</sup> Nor, as is discussed in connection with the second certified question,<sup>65</sup> should the Circuit Court's attempt to distinguish *Redden* be approved when the proffered distinction has no relevance to or support whatsoever in the § 1.5 Exemption.

## 2. The Rules and Canons of Statutory Interpretation Support the Validity of the § 1.5 Exemption

Even if *Redden* were not controlling – which it is – or even if the Court were inclined to reconsider it, this Court should in any case uphold the validity of the Section 1.5 Exemption. While there are various decisions that the Court has handed down regarding the proper interpretation of statutory language and the rules of construction to be applied in construing legislative rules, two cases are particularly enlightening in this circumstance – *Appalachian Power Company v. State Tax Dept. of West Virginia*,<sup>66</sup> and *West Virginia Health Care Cost Review Authority v. Boone Memorial Hospital*.<sup>67</sup>

Taking these two cases together, each of which upheld the validity of the challenged legislative rules, involving respectively a tax regulation and a health care facility matter, the following analysis emerges.

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<sup>64</sup> See *Haney v. County Commission of Preston County*, 212 W. Va. 824, 828, 575 S.E.2d 434, 438 (2002) (finding prior Supreme Court decision concerned “verbatim . . . the language at issue in the instant case” and that principles of *stare decisis*, which promote certainty, stability and uniformity in law, preclude a re-examination of that determination without a compelling justification; considerations of *stare decisis* have special force in the areas of statutory interpretation because legislative power is implicated); see also *Appalachian Power Company v. State Tax Dept. of West Virginia*, 195 W. Va. 573, 466 S.E.2d 424 (1995) (“Once this Court determines a statute’s clear meaning, we will adhere to that determination under the doctrine of *stare decisis*.”).

<sup>65</sup> See *infra* pp. 35-38 and accompanying notes.

<sup>66</sup> *Appalachian Power Company v. State Tax Dept. of West Virginia*, 195 W. Va. 573, 466 S.E.2d 424 (1995) The Circuit Court purported to rely upon *Appalachian Power* in finding the § 1.5 Exemption to be invalid. See Sept. 2003 Order at 6.

<sup>67</sup> *West Virginia Health Care Cost Review Authority v. Boone Memorial Hospital*, 196 W. Va. 326, 472 S.E.2d 411 (1996).

First, in reviewing a rule or regulation of an administrative agency, a reviewing court must decide whether the rule is legislative or interpretative.<sup>68</sup> This is important because legislative rules are authorized by acts of the Legislature such that they have the “force of a statute [themselves]” and are “entitled to more than mere deference” and are “entitled to controlling weight.”<sup>69</sup> Here, the State Fire Code is adopted as a legislative rule.

Second, if the rule is legislative, it can be ignored only if the agency has exceeded its statutory authority or it is arbitrary or capricious.<sup>70</sup> In other words, a court must inquire whether the legislative rule was “valid” under the procedures discussed in *Chico Dairy Co. v. West Va. Human Rights Comm’n*.<sup>71</sup> As the Court in *Appalachian Power* stressed, legislative rules must

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<sup>68</sup> *Appalachian*, 195 W. Va. at 586, 466 S.E.2d at 437.

<sup>69</sup> *Id.* at 585, 466 S.E.2d at 436. See also *Smith v. West Virginia Human Rights Comm.*, No. 31645, 2004 WL 1489057 (W. Va. July 2, 2004) (regulation that is proposed by an agency and approved by the Legislature is a legislative rule and as such has the force and effect of law). Interpretative rules merely clarify an existing statute or regulation and do not go through the legislative authorization process. For these reasons, interpretative rules do not have the force of law nor are they irrevocably binding on the agency or a court. *Appalachian*, 195 W. Va. at 583, 466 S.E.2d at 434.

<sup>70</sup> *Id.* at 585, 466 S.E.2d at 436.

<sup>71</sup> See *Chico Dairy Co. v. Human Rights Comm’n*, 181 W. Va. 238, 382 S.E.2d 75 (1989), as interpreted by *Appalachian Power*. See 195 W. Va. at 585-86, 466 S.E.2d at 436-437. A portion of the *Appalachian Power* decision addresses the validity of legislation under the Court’s earlier decision in *Kincaid v. Mangum*, 189 W. Va. 404, 432 S.E.2d 74 (1993) in which enactment of legislation via an omnibus bill was declared prospectively invalid and required that any such bills be given “special scrutiny” to determine whether they nonetheless could be deemed enforceable. Appellants submit that this issue should have no application here on the grounds that the contested portion of the State Fire Code – *i.e.*, the § 1.5 Exemption – has been part of the State Fire Code since 1979 and has remained so with little change (other than to expand it, see *infra* pp. 31-33 and accompanying notes) since that time. Although it is possible that in earlier years various revisions and amendments may have been adopted as part of omnibus legislation (though Appellants do not have this information), since *Kincaid* was announced in 1993, several further versions of the State Fire Code have been adopted, including one in April 1998, prior to the initiation of this law suit, and then again in 2002. The relevant portion of the § 1.5 Exemption did not change with these later versions. Accordingly, given the consistency of the language, both pre- and post-*Kincaid*, there is no reason to engage in a *Kincaid* “special scrutiny” analysis here. Moreover, in *Boone Memorial Hospital*, the Supreme Court essentially eliminated the need to engage in a *Kincaid* “special scrutiny” analysis unless “specific procedural or substantive infirmities are brought to [the Court’s] attention.” 196 W. Va. at 335-36, 472 S.E.2d at 420-21. No such infirmities have been argued

comply with the State Administrative Procedure Act, including: (i) review by a legislative rulemaking committee which expressly considers whether the agency exceeds the scope of its statutory authority, and whether the legislative rule is in conformity with legislative intent or conflicts with other provisions of the Code;<sup>72</sup> and (ii) a recommendation by the committee to the full Legislature to authorize the agency to promulgate the proposed rule or take other curative action.<sup>73</sup>

Here, there can be little doubt that the § 1.5 Exemption was validly enacted and authorized. Under W. Va. Code § 29-3-5, the Legislature authorized the State Fire Commission, consistent with the State APA, “to promulgate, amend and repeal regulations for the safeguarding of life and property from the hazards of fire and explosion” and that these regulations “were to be known as the state fire code.”<sup>74</sup> Consistent with that directive, such a Code was promulgated and considered for approval by the legislative rulemaking committee. During those proceedings, however, according to the testimony of the then-Fire Marshal, members of the legislative rulemaking committee specifically inserted the one- and two-family dwelling exemption, which had not been part of the Fire Commission’s proposed language.<sup>75</sup>

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in this matter that arise as a result of the State Fire Code possibly having been adopted at times through the years by way of omnibus legislation and appellants are not aware of any.

<sup>72</sup> See *Appalachian Power*, 195 W. Va. at 585, n. 11, 466 S.E.2d at 436 n.11 (citing W. Va. Code § 29A-3-11(b)).

<sup>73</sup> *Id.* at 436.

<sup>74</sup> W. Va. Code § 29-3-5(a) and (b) (1976).

<sup>75</sup> See *Smittle Dep.* at p. 152, line 20–p. 154, line 18 (one and two family dwelling house exemption inserted by Senator Steptoe and Delegate Shiflett during legislative rule committee deliberations and was not part of Fire Commission’s proposed language). Unfortunately, to the best of AmeriGas’s knowledge there is no formal legislative history available relating to the adoption of the Exemption. See *Appalachian Power*, 466 S.E.2d at 437, n.14 (“Normally, legislative history in West Virginia is difficult to discover . . .”).

The actual State Fire Code was adopted as of December 1979, and contained the one- and two-family dwelling exemption the rulemaking committee members had added.<sup>76</sup> To the best of AmeriGas's knowledge, every State Fire Code since 1979 has contained the same Exemption.<sup>77</sup> Moreover, in reviewing the § 1.5 Exemption, the *Redden* court held that "the State Fire Commission was authorized by statute to create a State Fire Code,"<sup>78</sup> thus removing any issue about it being enacted validly. And, as this Court said in *Boone Memorial*, "courts presume the Legislature drafts and passes statutes with full knowledge of existing law,"<sup>79</sup> which in this case would refer back through every re-enactment to the original adoption in 1979. In short, there is absolutely no suggestion that the § 1.5 Exemption was not validly enacted and re-enacted over the course of twenty-five years.

The only remaining question is whether the legislative rule is "clear as to its intent and not contrary to the legislative enactment that triggered its promulgation."<sup>80</sup> As noted in *Boone Memorial*, "[W]hen there is conflict between the legislative rule and the initial statute, that conflict will be resolved using ordinary canons of interpretation" including that "when two statutes conflict, the general rule is that the statute last in time prevails as the most recent expression of legislative will."<sup>81</sup>

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<sup>76</sup> See Letter from Walter Smittle, III, State Fire Marshal, to David D. Molgaard, dated November 17, 1995, attached as Exhibit C to AG Motion for Recon., and also attached as Exhibit A to the *Redden* Appellee's brief [hereinafter "Smittle Letter"].

<sup>77</sup> AmeriGas is aware that through the years amendments have been made to § 1.5, including its *expansion* to other types of facilities. See *infra* discussion p. 31.

<sup>78</sup> *Redden*, 200 W. Va. at 213, 466 S.E.2d at 488.

<sup>79</sup> *Boone Memorial*, 196 W. Va. at 336, 472 S.E.2d at 421.

<sup>80</sup> *Appalachian Power*, 195 W. Va. at 586, 466 S.E.2d at 437.

<sup>81</sup> *Boone Memorial*, 196 W. Va. at 336, 472 S.E.2d at 421.

Applying this standard of review to the legislative rule in question in *Boone Memorial*, this Court said that it “would have no hesitancy in” giving effect to the legislative exemption at issue in that case.<sup>82</sup> AmeriGas submits that this analysis and conclusion are equally applicable here in light of the long history of the State Fire Code, including the § 1.5 Exemption, which has been adopted and re-enacted, consistent with the requirements of the State’s APA, for twenty-five years by West Virginia’s legislators.

The *Boone Memorial* Court, however, did not end its analysis at that point on the grounds that the decision announced a new approach relating to legislative rule analysis – *i.e.*, that the *Kincaid* “careful scrutiny” standard for reviewing those legislative rules adopted via omnibus legislation no longer would be deemed automatically necessary.<sup>83</sup> Indeed, it was in the context of announcing this new rule that the *Boone Memorial* Court explained that even if there is a conflict between the legislative rule and the initial statute, the later in time analysis would apply, as a Legislature is presumed to review and adopt legislation with full knowledge of pre-existing law.<sup>84</sup> However, because the rule was new, the Court felt compelled to engage in a legislative rule analysis consistent with the standards used by the United States Supreme Court in the *Chevron*<sup>85</sup> case: “If we were to stop and start with the new standard that we adopt here today, [the agency] would be home free. However, the new standard looks to future cases, and our prior precedent does not permit us to confine our case to such narrow margins.” *Boone Memorial*, 196 W. Va. at 335, 472 S.E.2d at 420.

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<sup>82</sup> *Id.*

<sup>83</sup> See *supra* note 71.

<sup>84</sup> *Boone Memorial*, 196 W. Va. at 33, 472 S.E.2d at 421.

<sup>85</sup> *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984).

Thus, the prospective application of the *Boone Memorial* holding supports ending the analysis of the Exemption at this point without any further scrutiny – and, as in *Boone Memorial*, the State Fire Code and the § 1.5 Exemption should be regarded as “home free” given the twenty-five year’s worth of re-enactments representing “the most recent expression of legislative will.”<sup>86</sup> However, as discussed below, even under an *Appalachian Power/Chevron* analysis, the § 1.5 Exemption still should be given effect.

**a. The Section 1.5 Exemption Is Neither Contrary to Any Specific Legislative Directive in the Fire Code’s Enabling Legislation Nor Arbitrary and Capricious**

Under a *Chevron* type analysis, the first question to consider is whether the Legislature has “directly spoken to the precise legal question at issue.”<sup>87</sup> Turning to the State Fire Prevention and Control Act, it cannot be said that there the Legislature directly spoke to the precise legal question at issue here – *i.e.*, whether one- and two-family homes are subject to the State Fire Code. Neither the statute’s section on “Legislative Findings and Declaration of Policy” (W. Va. Code § 29-3-2)<sup>88</sup> nor any other provision makes such a clear and direct statement. Rather, the statute’s identified policy is simply that “[a] significant part of the population of this state needs improved fire prevention and control;” “a coordination program for fire prevention and control for the entire state is necessary to promulgate the safety and well-being of the citizens and residents of this state;” and “[a]dequate fire prevention and control are not likely to become a reality unless certain functions and procedures are enacted by law.”<sup>89</sup>

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<sup>86</sup> *Id.*

<sup>87</sup> *Appalachian Power*, 195 W. Va. at 582, 466 S.E.2d at 433 (citing *Sniffin v. Cline*, 193 W. Va. 370, 373-74, 456 S.E.2d 451, 454-55 (1995) and relying on *Chevron*, 467 U.S. at 842).

<sup>88</sup> It is this section that is specified in the Circuit Court’s Order denying AmeriGas’s motion. See Sept. 2003 Order at 5.

<sup>89</sup> W. Va. Code § 29-3-2(a)-(c).

Simply stated, although the statute contains a reference to “*a significant part* of the population,” it plainly does *not* say “all of the population,” or a “majority of the population” or any other language that indicates that the purpose was to capture everyone in the State of West Virginia and in particular the owners and occupants of one- and two-family homes. Indeed, the use of the phrase “significant part of the population” explicitly suggests that the Legislature consciously chose not to focus its attention on all segments of the West Virginia population. Certainly, had the Legislature intended to cover all segments of the entire population of West Virginia, it could have used explicit language to convey such an intention. But, it did not. And, the words “significant part” must be read with their ordinary meaning,<sup>90</sup> and not one that simply *assumes* that the Legislature must have meant to capture one- and two-family homes within the scope of that language.

In short, there is no indication that the legislative focus of the enabling statute was on one- and two-family homes specifically, as opposed to businesses, multi-family rental housing, apartment buildings, boarding houses, hospitals, churches, assembly halls or any other sort of structures in which people find themselves living, gathering or working. In fact, a decision of this Court issued much closer in time to the enactment of the original statute examined closely a series of statutory initiatives that the Legislature enacted in the mid-1970s to address perceived problems with the rental housing and sanitary housing issues then present in the State of West Virginia.<sup>91</sup>

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<sup>90</sup> See *Jackson v. State Farm Mutual Automobile Ins. Co.*, Nos. 313-72, 31643, 2004 WL 1488566 (W. Va. July 2, 2004) (in absence of definition of intended meaning of words used in legislation, such words will be given their common, ordinary and accepted meaning).

<sup>91</sup> See *Teller v. McCoy*, 162 W. Va. 367, 375-77, 253 S.E.2d 114, 120-122 (1978) (listing, *inter alia*, the State Fire Protection and Control Act; the State Fire Code (as applied to landlords); W. Va. Code § 16-1-7 (plumbing and sewage requirements for residential and commercial structures); W. Va. Code § 8-12-13 (granting municipalities plenary power to regulate safety aspects of building structures); W. Va. Code §

Thus, persons living in rental housing are a portion of the “significant part of the population” to which the Fire Prevention and Control Act was referring. But it cannot be said that, by identifying in only a generalized fashion a “significant part,” the Legislature absolutely intended to capture one- and two-family homes. Had the Legislature had such an intention, it would have and certainly could have so stated.<sup>92</sup>

**b. Other Provisions of the Act Demonstrate an Intent to Consciously Exclude One- and Two-Family Homes**

Other aspects of the State Fire Prevention and Control Act also show an intent, original and continuing, specifically to *exclude* one- and two-family dwelling structures from the reaches of the Act. For example, W. Va. Code § 29-3-12(a)(4), which sets forth the power and duties of the State Fire Marshal, provides that the Fire Marshal shall enforce all laws having to do with the means and adequacies of exits in case of fire “from buildings and all other places in which persons work, live or congregate . . . for any purpose, *except buildings used wholly as dwelling houses for no more than two families.*”<sup>93</sup>

Since 1976, the State Fire Prevention and Control Act has provided that, as to “Inspections Generally,” “The state fire marshal shall inspect all state, county and municipally

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7-1-37 (giving county commissioners with a population of 45,000 or more the power to adopt building and housing codes); W. Va. Code § 16-15-2 (creating Corporate Housing Authority in order to alleviate the lack of safe and sanitary low income housing)).

<sup>92</sup> Other statutes demonstrate that the Legislature makes choices not to enforce or require mandatory state safety standards on all of its citizens. For example, as noted in *Teller*, the statute granting county commissioners with a population of 45,000 or more the power to adopt building and housing codes, *excluded* persons living in rural areas of lesser populations. *Teller*, 162 W. Va. at 376, n.7, 253 S.E.2d at 121, n.7. The non-mandatory State Building Code provides another example. *See infra* discussion pp. 34-35.

<sup>93</sup> W. Va. Code § 29-3-12(a)(4) (emphasis added). This provision was noted in the underlying briefs filed by the Appellant in *Redden* to demonstrate that only a single exemption was to be found in the Act. This Court did not find that argument compelling as indicated by its very decisive language about the dispositive nature of the State Fire Code and the clear authority of the Fire Commission to adopt that Code. *See supra* discussion pp. 13-16.

owned institutions, all public and private schools, theaters, churches and other places of public assembly as to fire exits and reasonable safety . . . .”<sup>94</sup> Notably, this section made no mention of one- and two-family homes, thereby indicating that they were excluded from the inspection authority of the State Fire Marshal. In the year 2002, this exclusion was made explicit, when the Legislature amended this subsection to read: “The state fire marshal shall inspect all structures and facilities, *other than one- and two-family dwelling houses*, subject to the state fire code and this article, including, but not limited to, state, county and municipally owned institutions, all public and private schools, theaters, churches and other places of public assembly to determine whether the structures or facilities are in compliance with the state fire code.”<sup>95</sup>

Subsection (e) of the same provision relates to the “Right of Entry” of the State Fire Marshal and originally provided in 1976 that “The state fire marshal may at all reasonable hours enter any building or premises, *except those actually occupied for single-family dwelling purposes*, for the purpose of making an inspection. . . .”<sup>96</sup> In 1978, that language was modified slightly to read: “The state fire marshal may at all reasonable hours enter any building or premises, *other than dwelling houses*, for the purpose of making an inspection. . . .”<sup>97</sup> In 2002, this subsection was amended again such that a new sentence was added, providing that “The state fire marshal [and any deputy] may enter upon any property, or enter any building, structure or premises, *including dwelling houses during construction and prior to occupancy*, for the purpose of ascertaining [compliance with any license or fee requirement].”<sup>98</sup>

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<sup>94</sup> W. Va. Code § 29-3-12(d) (1976).

<sup>95</sup> W. Va. Code § 29-3-12(d) (2002) (emphasis added).

<sup>96</sup> W. Va. Code § 29-3-12(e) (1976) (emphasis added).

<sup>97</sup> W. Va. Code § 29-3-12(e) (1978) (emphasis added).

<sup>98</sup> W. Va. Code § 29-3-12(e) (2002) (emphasis added).

The foregoing shows that the Legislature has made a conscious choice to exclude one- and two-family dwelling homes in certain circumstances from the jurisdiction of the State Fire Marshal. In fact, the exclusions have grown with the years, not decreased, such that the dwelling home exception as to fire escapes and exits is now but one of many provisions that specifically carve-out one- and two-family homes from application of the Act. Thus, the § 1.5 Exemption, far from being an anomaly, is consistent with these other statutory provisions.<sup>99</sup>

Yet another provision of the statute demonstrates that the Legislature was aware of the one- and two-family dwelling house exemption in the State Fire Code, and chose to legislate a narrow exception to the § 1.5 Exemption. Specifically, W. Va. Code § 29-3-16(a) (the “Smoke Alarm Statute”), which was first adopted in 1984, *requires* as of July 1, 1991, the installation of a smoke detector “in the immediate vicinity of each sleeping area within *all* one- and two-family dwellings.”<sup>100</sup> Notably, as explained in *Reed*, the State Fire Code incorporates the NFPA Life Safety Code, which itself requires a smoke detector in one-and two-family private dwellings.<sup>101</sup> Given that the State Fire Code via its incorporation of the NFPA’s Life Safety Code already required the installation of smoke detectors at all one- and two-family dwellings, there would

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<sup>99</sup> In addition, the wording of and amendments to the Exemption that the Legislature authorized and re-enacted on multiple occasions also reflect a conscious intent by the Legislature to exclude one- and two-family residences and certain other dwellings, such as small personal care homes, from State Fire Code regulation. Moreover, yet another section of the Fire Code exempts one- and two-family homes. Specifically, W. Va. C.S.R. § 87-1-3, relating to unvented heaters, states: “All unvented heaters are prohibited for all occupancies *except one (1) and two (2) family dwellings.*” (Emphasis added.) Hence, the non-inclusive treatment of one- and two-family homes is consistent within the State Fire Code.

<sup>100</sup> W. Va. Code § 29-3-16a(a) (emphasis added). The original 1984 version of the statute called for smoke detectors in one- and two-family homes not occupied by the owner thereof. W. Va. Code § 29-3-16(a) (1984). The statute was amended in 1989 to require smoke detectors in such non-owner occupied one- and two-family homes, as well as homes completed after July 1, 1990. W. Va. Code § 29-3-16(a) (1989). The language requiring *all* one- and two-family homes to have such smoke detectors was part of a 1991 amendment to the statute. W. Va. Code § 29-3-16(a) (1991).

<sup>101</sup> *Reed*, 192 W. Va. at 295, 452 S.E.2d at 711.

have been no need to adopt legislation requiring the same conduct. The obligation already existed. However, in adopting and amending the Smoke Alarm Statute, the Legislature must be deemed to have understood<sup>102</sup> that the § 1.5 Exemption overcame the requirements of NFPA's Life Safety Code,<sup>103</sup> and that to the extent that a public policy choice was made to require smoke detectors in one- and two-family homes, special and specific legislation was required.

### 3. The Section 1.5 Exemption Is Not Contrary to Public Policy

One of the chief reasons given by the Circuit Court for finding the § 1.5 Exemption to be invalid was its belief that it contradicted a public policy contained in the Fire Prevention and Control Act. For the reasons discussed in detail above, that statute does not set forth an unambiguous and clear public policy regarding the degree to which one- and two-family dwellings were to be regulated by state law. Without a high level of specificity and clarity, a court should not read into a statute, or a regulation adopted by the Legislature, language that is not there. Indeed, as explained in *Appalachian Power*:

[A court's] power to review the [agency's] decisions on policy grounds is extremely limited. We are not at liberty to affirm or overturn the [agency] regulations or decision merely on the basis of our agreement or disagreement with his policy implications, even when important issues of [public policy]<sup>104</sup> are at stake. This Court has stressed the importance of liberally permitting administrative agencies to carry out legislative dictates; we have recognized that aggressive judicial intervention would disrupt agency processes and negate the legislative body's legitimate delegation of authority. . . . Thus, we are loath to engage in the arduous

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<sup>102</sup> See *Appalachian Power*, 195 W. Va. at 498, 466 S.E.2d at 436 ("Legislature is presumed to have known and understood the laws that they earlier enacted.")

<sup>103</sup> This is in fact the very reading to the State Fire Code and the Smoke Alarm provision that this Court gave in its *Redden* decision, in that it found – contrary to its prior reading in *Reed* – that the § 1.5 Exemption overcame any other provision in the State Fire Code relating to requirements at one- and two-family homes. See *Redden*, 200 W. Va. at 213, 488 S.E.2d at 488 (State Fire Code contains exemption to smoke detector requirement vis-à-vis one- and two-family homes).

<sup>104</sup> As explained above, the issue in *Appalachian Power* related to tax legislation and regulation on sales of electricity.

task of rewriting legislation, regulations and agency structure simply on the whim of a few who have expressed dissatisfaction with an agency's action. . . .

Under *Chevron*, we may not impose our own construction of the statute. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the Court is whether the [agency's] answer is based on a *permissible construction* of the statute.<sup>105</sup>

Here, the Circuit Court ignored these tenets, as well as the twenty-five year history of the Exemption and the Legislature's consistent re-adoption of its language, and instead imposed its own views of proper public policy. A court is not permitted to so act.

Our job is not to weigh the wisdom of, nor to resolve any struggle between, competing views of public interest, but rather to respect legitimate policy choices made by an agency in interpreting a statute. Moreover, it is not necessary for us to find that the regulation is the only reasonable one or even that it is the result we would have reached had the question arisen in the first instance in this Court.<sup>106</sup>

These are the rules to which the Circuit Court should have adhered, but from which it improperly deviated.

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<sup>105</sup> *Appalachian Power*, 195 W. Va. at 501 and 504, 466 S.E.2d at 439 and 442. See also *Dunlap v. Friedman's, Inc.*, 213 W. Va. 394, 398, 582 S.E.2d 841, 845 (2003) (court cannot substitute its own judgment for that of the Legislature and significantly rewrite a statute; "[i]t is not for [courts] arbitrarily to read into [a statute] that which it does not say . . . we are obligated not to add to statutes something the Legislature purposely omitted.") (alterations in original) (quoting *Williamson v. Greene*, 200 W. Va. 421, 490 S.E.2d 23, 28 (1997) (internal quotations omitted)).

<sup>106</sup> *Boone Memorial*, 196 W. Va. 339, 472 S.E.2d at 424. The *Boone Memorial* Court further explained: "The baseline assumption always must be that an enacted statute should be construed to achieve an effective and operative result, and we will not lightly presume the Legislature and [the agency] lost sight of so abecedarian a principle." *Id.* Compare e.g., *Charter Communications VI, PLLC v. Community Antenna Service, Inc.*, 211 W. Va. 71, 561 S.E.2d 793 (2002) (finding W. Va. Code § 24D-2-10 to be repugnant to the purpose of the West Virginia Tenants Right to Cable Services Act when a provision purports to allow landlords and cable operators to establish the terms upon which cable television facilities are to be installed in multiple dwelling facilities, including agreements for exclusive cable TV coverage and payments to the landlord to facilitate such exclusivity, when the purpose of the Act was to provide tenants access to, and a choice of, cable TV providers and where other provisions of the Act specifically prohibited the type of agreement that W. Va. Code § 24D-2-10 purported to permit.).

**a. The Circuit Court Misapprehended the Consequences of Upholding the § 1.5 Exemption**

Moreover, even if courts were permitted to inject their own views regarding the wisdom of legislative or agency action, the Circuit Court incorrectly discerned the consequence of giving effect to the § 1.5 Exemption – that AmeriGas (and others) would be free to install propane tanks and gas lines and other apparatus free from any control or regulation of the fire safety codes of this state.<sup>107</sup> To the contrary, there are other statutory and regulatory provisions that would be applicable to AmeriGas's conduct.

For example, the State Building Code does adopt professional standards that today require a twelve inch underground burial line depth (or burial in conduit at a shallower depth if twelve inches cannot be achieved). While the Court (and Plaintiffs below) expressed concern that only three counties had adopted the State Building Code, some 49 cities and towns *have* adopted the State Building Code.<sup>108</sup> That others have not – or have not yet – is consistent with a deliberate statutory scheme that elected *not* to make Building Code standards automatically applicable on a state-wide basis.

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<sup>107</sup> Sept. 2003 Order at 5 (“[adopting] AmeriGas’s theory would deprive the vast majority of citizens . . . of any protection of the State Fire code. . .”).

<sup>108</sup> Thus, the Circuit Court’s concern that so many homeowners must not be covered by the State Building Code was exaggerated and not well taken. *Id.* at 5. Plaintiffs submitted census figures purporting to show that some 75% of the population of West Virginia are homeowners. The Circuit Court assumed that the vast majority of these persons live in counties that have not yet adopted the State Building Code. However, the Circuit Court gave no consideration to the population figures of the numerous cities and towns that have adopted the State Building Code and, therefore, are covered by its regulations. In short, the reliance on the census figures on homeownership to reach a conclusion concerning the proportion of citizens protected by the State Building Code was incomplete, hardly scientific and distorted the impact of the State Building Code’s non-mandatory nature.

Other laws also exist to regulate conduct concerning fire safety. Indeed, another portion of the Fire Prevention and Control Act speaks to this issue.<sup>109</sup> Thus, the fact that the State Fire Code, and the underground propane line depth standards set by NFPA 58, which is incorporated into the State Fire Code, would not be applicable to AmeriGas's one- and two-family home customers, does not mean necessarily that AmeriGas can act without regard to safety matters.

**b. The Exemption Represents Public Policy Given that It Has Consistently Been Reauthorized and Reenacted by the Legislature**

In addition, the circumstances surrounding the Legislature's creation and adoption (time and again) of the § 1.5 Exemption very much support sustaining its validity, and demonstrate that it is not contrary to public policy as the Circuit Court found, but instead, clearly reflects it. The first State Fire Code promulgated pursuant to the Fire Prevention and Control Act was adopted in 1979, and for twenty-five years since that time, through various re-issuances and re-authorizations, the language exempting one- and two-family dwellings has remained intact. As explained in *Boone Memorial*, where there is "evidence that the Legislature both contemplated and authorized . . . [a previous regulation] as a formal legislative rule. . . [t]he only reasonable conclusion that can be drawn . . . is that the Legislature [concurred with the language]."<sup>110</sup> Here, there can be no question that the Legislature has had ample opportunity through the years to

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<sup>109</sup> See, e.g., W. Va. Code § 29-3-14(a) (making it unlawful for any person to engage in conduct that results in a fire hazard and giving the Fire Marshal authority to issue reasonable orders to rectify the situation).

<sup>110</sup> *Boone Memorial*, 196 W. Va. at 339, 472 S.E.2d at 424. See also *Appalachian Power*, 195 W. Va. at 486, n.25, 466 S.E.2d at 444, n.25 ("Crucial" to the decision to uphold the regulation was the fact that the contested language was considered and given a legislative "stamp of approval" in later legislation. "If any doubt existed as to the meaning of the statute and what the Legislature intended, the doubt was removed by the adoption of a subsequently enacted omnibus bill . . . [that] gave its endorsement to the [agency's] interpretation.").

contemplate and authorize the language of the § 1.5 Exemption, and has chosen to do so on numerous occasions.<sup>111</sup> Hence, this consistent choice represents the very voice of public policy.

In fact, not only has the Exemption been re-enacted over this twenty-five year history, but it has been *expanded* over time. In 1984, the Exemption was amended to add immediately prior to the one- and two-family dwelling home language an exclusion for “personal care homes caring for five or less patients.”<sup>112</sup> The inclusion of this amending text demonstrates that not only was the Legislature aware of the one- and two-family language in the § 1.5 Exemption, but that they consciously chose to *expand* the exemption to another class of housing – *i.e.*, small personal care homes with a few number of patients. In other words, the Legislature knowingly elected to eliminate from Fire Code compliance certain types of patient care facilities. That language has remained in the Fire Code since its 1984 adoption, though the number of patients later was reduced from five to three.

It also is significant that since the *Redden* decision upholding the validity and application of the § 1.5 Exemption issued in 1997, the Legislature *twice* thereafter has re-issued and re-authorized the State Fire Code – in 1998 and 2002 – including the contested exemption. This post-*Redden* legislative action – or, better said, inaction – strongly supports a further finding of legislative agreement with the language of the exemption and this Court’s *Redden* interpretation. As the Court stated in *Haney v. County Commissioner of Preston County*, a case concerning the interpretation of a statutory provision in which the plaintiff sought to have the Court overturn a

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<sup>111</sup> In addition to the original 1979 version, the State Fire Code has been amended and/or re-adopted many times, including in 1984 (which expanded the exemption to cover small personal care homes), 1986, 1988, 1989, 1990, 1992, 1994, 1998 and 2002. In each case, the § 1.5 Exemption as applicable to one- and two-family dwellings remained intact.

<sup>112</sup> W. Va. Code § 64-6-2(a) (1991). *See infra* p. 36, setting forth full text of the present version of § 1.5 Exemption.

prior decision issued a few years before interpreting the same language, “the Legislature has had more than eight years to correct this Court’s construction of [the statute] as set forth in [our prior decision], if it disagreed with it, and it has not done so.”<sup>113</sup> This same view applies equally here, for certainly had the Legislature been offended by the *Redden* decision, it has had the time and opportunity to alter the State Fire Code language to reflect a different view of public policy. It has not done so, thereby further indicating its agreement and support.

Taken together, the consistent iterations of the § 1.5 Exemption in the State Fire Code indicate a strong legislative will to exempt one- and two-family dwellings from the regulations contained in the State Fire Code and plainly demonstrate that this will is the public policy of the State – not contrary to it, as the Circuit Court found.

**c. Other States Have Also Acted to Exempt One- and Two-Family Homes From Application of Their State Fire Codes, Thereby Further Supporting the Validity of the West Virginia Legislature’s Similar Action**

Several other states also have elected to exempt one- and two-family homes from application of their state fire codes, thereby undercutting Appellees’ and the Circuit Court’s intimations that the § 1.5 Exemption represents an unsustainable aberration contrary to all reason. For example, in North Carolina, the state adopted the International Code Council’s<sup>114</sup> International Fire Code, but then included at Section 102A an exception stating that the

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<sup>113</sup> 212 W. Va. at 828, 575 S.E.2d at 438 (2002). *Cf. Appalachian Power*, 195 W. Va. at 486, n.26, 466 S.E.2d at 444, n.26 (“We cannot ignore the argument that the Legislature not only expressly approved the regulation, but did not change the wording of the statute, despite the fact that the regulation in question had been in existence and contested since 1989.”).

<sup>114</sup> The International Code Council (“ICC”) acts as somewhat of an umbrella group under which BOCA contributes to the development of various ICC codes.

“Provisions of this Code shall not apply to . . . one and two family dwellings.”<sup>115</sup> Likewise, in Kentucky, the state regulation states “the Kentucky Standards of Safety [the state fire code] shall be enforceable on all property *except* single family dwellings.”<sup>116</sup> Georgia also specifies in its authorizing statute that the state’s fire safety standards are applicable to all buildings and structures “except one-family and two-family dwellings.”<sup>117</sup> Other states have similar exceptions, including South Carolina, Tennessee, Connecticut, Delaware, and New Jersey.<sup>118</sup> That other states have seen fit to exempt such dwelling structures supports the notion that the West Virginia Legislature was following a philosophical approach shared by other states’ officials that determined that different public policy interests – *e.g.*, privacy concerns, concerns about costs on individual home owners – outweighed encumbering one- and two-family dwellings with safety requirements that were deemed acceptable at less private or multi-residential structures.

**d. Other Legislative Actions Indicate that the Legislature Recognizes and Accepts that Certain Safety Regulations Will Not Be Applicable to All Citizens**

Other acts of the West Virginia Legislature demonstrate that at various times it deliberately has elected to pursue the establishment of safety standards, but has not imposed

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<sup>115</sup> North Carolina Fire Prevention Code at Section 102A (2004) (available at website of North Carolina Fire Marshal, [www.ncdoi.com](http://www.ncdoi.com)).

<sup>116</sup> See 815 KAR 10:060, Sec. 2 (2004).

<sup>117</sup> See Ga. Code Ann. § 25-2-4 (2004); Ga. Comp. R. & Regs. 120-3-3-.04 at § 103.2 (exception providing that that Code does not apply to one and two family dwellings).

<sup>118</sup> See S.C. Code Regs. 71-8300.1 (2004) (establishing fire prevention standards) and 71.8300.5 (exempting buildings occupied exclusively as one- and two-family homes); Tenn. Code Ann. § 68-120-101(c) (2003) (exempting one- and two-family dwellings); Conn. Agencies Regs. § 29-292-1d(b) (2004) (exempting private dwellings from application of the State Fire Safety Code other than with respect to smoke alarms); Del. State Fire Prevention Regs. § 1-3.1.3 and commentary thereto (precluding application of regulations to one- and two-family dwellings other than post-fire inspections); N.J. Admin. Code, tit. 5, § 5:70-3.2 (2004) at F.101.2.1 (excluding application of State Fire Prevention Code to owner-occupied one- and two-family dwellings).

them on all citizens of West Virginia. This approach likewise undercuts the Circuit Court's (and Appellee's) disbelief that the Legislature in approving the State Fire Code and the § 1.5 Exemption would have – or validly could have – chosen to exempt a portion of the population from application of the State Fire Code's requirements.

Certainly, the adoption and terms of the State Building Code provide a perfect example of the balance that the State Legislature periodically strikes between what it perceives to be the safety needs of West Virginia's citizens and other counterbalancing concerns. The State Building Code, a legislative rule which is promulgated by the State Fire Commission pursuant to W. Va. Code § 29-3-5(b) is, according to the authorizing statute, applicable *only in those jurisdictions that have chosen to adopt it*.<sup>119</sup> In fact, as the authorizing statute and related statutes make plain, for those jurisdictions that have chosen not to adopt the State Building Code, no other local or other building code may be adopted and any municipal or county building codes that pre-existed the State Building Code when it was first adopted in 1989 were statutorily declared null and void one year after the State Building Code issued. *See* W. Va. Code § 8-12-13(b) and W. Va. Code § 7-1-3n(b).

Hence, the Legislature deliberately adopted a statutory scheme by which it is entirely possible and permissible for a jurisdiction – and all of its citizens, private and commercial – to have no building code, regulations or standards at all because that jurisdiction or locality has selected, for whatever reason, not to adopt the State Building Code. Therefore, all citizens of such jurisdictions are without protections that the State Fire Commission saw fit to promulgate and the Legislature saw fit to adopt as a legislative rule, with state-wide application – albeit, a non-mandatory application.

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<sup>119</sup> W. Va. Code § 29-3-5b(a).

While some people may question or quibble with the wisdom of this legislative choice, it nonetheless reflects a clear choice of exclusion, and one that is consistent with the legislative decision to exclude one- and two-family homes from application of the State Fire Code. In both cases, the goal on the one hand appeared to be to set certain safety standards that were to prevail throughout the state. Another goal, however, co-existed whereby the Legislature determined that safety protections would bow to other public policy concerns. That this may not have been the choice that the Circuit Court would have made, or Appellees would have made, does not render the Legislature's choice invalid or an absurd result that cannot be sustained. The choice has been made by the duly elected public officials whose job it is to make those public policy decisions, and as this Court clearly has held, it is not the role of the courts to second guess those decisions simply because they do not agree with them.<sup>120</sup> That is what the Circuit Court impermissibly did here.

**C. Regarding the Second Certified Question, Nothing in the Section 1.5 Exemption Suggests that It Would Be Applicable to One Class of Person, but Not Another**

As to the second certified question, the Circuit Court determined that even if the § 1.5 Exemption were valid and enforceable, it was not intended to be applicable to “commercial suppliers of liquid propane gas” – or presumably any other commercial entity that performs work at a one- or two-family dwelling. This determination flies in the face of the plain language of the exemption, and leads to incongruous results, for which there is no legislative or regulatory support.

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<sup>120</sup> See *supra* discussion pp. 27-28 and note 105. Cf. *Dunlap v. Friedmans, Inc.*, 213 W. Va. at 403, n.4, S.E.2d at 850, n. 4 (2003) (“the highest exercise of judicial duty is to subordinate one’s personal pulls and one’s private views to the law of which we are all guardians – those impersonal convictions that make a society a civilized community, and not the victims of personal rule.”)(Davis, J. and Maynard, J, dissenting opinion) (quoting Hon. Tom C. Clark, *Mr. Justice Frankfurter: A Heritage for All Who Love the Law*, 51 A.B.A.J. 330, 332 (1965) (quoting Frankfurter, J.).

Again, the § 1.5 Exemption provides in its entirety:

This State Fire Code has no application to personal care homes caring for three or less patients or buildings used wholly as dwelling houses for no more than two families and has no application to farm structures. Provided; however, that farm structures (1) used for group sleeping accommodations for farm workers or (2) used for educational, health care, assembly or detention/correctional occupancy are not exempt from the requirements of this State Fire Code.<sup>121</sup>

Taking this language on its face, in all of its simplicity, it is clear that no proviso or exception is made limiting the application of the exemption depending on who performs the work – *i.e.*, the owner of the property or someone hired or retained by the owner to perform work on the property. Rather, the Exemption applies to activities at the dwelling structure itself and certainly includes no limitation based on who performs the actual work. Obviously, whether the work is performed by the owner or a third-party, bringing a one or two family dwelling in compliance with all of the requirements of the Fire Code would increase the cost of home ownership. West Virginians have the highest rate of homeownership in the country.<sup>122</sup> Many of those houses, however, are rather modest, and it would be logical under these circumstances for the Legislature to have made a policy decision to exempt those houses and families that dwell therein from the requirements of the State Fire Code.

Were the Circuit Court's interpretation accepted, the result would prove to be arbitrary and capricious. For example, under the Circuit Court's flawed analysis, if a homeowner chose to perform a variety of "home improvement" projects, including installing a propane heater, a regulator at the outside of the house and an underground propane line that attached to a storage

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<sup>121</sup> W. Va. C.S.R. § 87-1-1.5 (2004).

<sup>122</sup> [www.census.gov/hhes/www/housing/hvs/annual03/ann03t13.html](http://www.census.gov/hhes/www/housing/hvs/annual03/ann03t13.html).

tank,<sup>123</sup> that homeowner would be exempt from application of the State Fire Code, even if he/she had improperly performed the work and created a fire hazard. However, if a problem arose and the homeowner then called a contractor or other third-party provider to fix the problem, the contractor would not simply be able to make the repair – at least, not without risking liability for having that work found to be inconsistent with code requirements or without re-doing the homeowner’s work to comply with the code. In either event, the cost of the work presumably would be far more expensive than it is today and the uncertainty created would be a crippling problem. Such a result makes no sense whatsoever and, more importantly, cannot be sustained through any reading of the § 1.5 Exemption.

In addition, by couching its ruling in terms of a “sophisticated” company, the Circuit Court added another layer of complexity that would only further confuse the issue and create even greater uncertainty. What makes one vendor “sophisticated,” while another is not? Is a father-son team of repairmen to be exempt whereas a local representative of a nationwide franchise would fall outside the exemption? What would be the standard, and who makes these decisions? Obviously, none of the answers to these questions is to be found in the § 1.5 Exemption, or anywhere else in the State Fire Code or the Fire Prevention and Control Act. Certainly, nothing about the *Redden* decision suggests in any way that the result there or the Court’s analysis would have been different if the single-family dwelling that burned and in which a person died had been owned by a commercial entity (sophisticated or otherwise) as opposed to individuals, or that the private homeowner would have faced liability had someone, for example, been hired to install a smoke detector and that detector failed to operate properly.

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<sup>123</sup> It should be noted that some propane consumers do, indeed, own their own tanks and could have installed their own underground line.

Rather, the question was whether the § 1.5 Exemption permitted application of the State Fire Code to an event that occurred at a single family home – and the answer was a decisive “no.”

Finally, the Circuit Court’s finding that AmeriGas is “obviously not a one- or two-family dwelling” and hence may not rely on the § 1.5 Exemption<sup>124</sup> makes no sense. It appears to stand for the proposition that the exemption applies to the structure, but not people who either live in it or people/companies who perform work at it at the instruction of the owner. If this analysis were correct – which it clearly is not – then the *Redden* defendants/owners should not have been able to rely upon the exemption, as they too were not a single family home. This Court, of course, found otherwise, and did so through a plain reading of the language and not one that twisted it beyond all rational meaning.

**D. Regarding the Third Certified Question, If the § 1.5 Exemption Were Declared Invalid or Inapplicable to Sophisticated or Commercial Parties, that Ruling Should Be Given Only Prospective Effect**

The third question, which was answered in the affirmative by the Circuit Court, was whether it would be proper to apply retroactively a decision to invalidate the § 1.5 Exemption. Based on the preceding arguments, AmeriGas believes that it should not be necessary for the Court to reach this question. However, assuming *arguendo* that the question is reached, AmeriGas submits that retroactive application of such a decision would be manifestly unjust and contrary to the principles relating to retroactive application that this Court previously has announced.

The guiding principles on retroactive versus prospective application of a new ruling are found in *Kincaid v. Mangum*, 189 W. Va. 404, 432 S.E.2d 74 (1993). There, the Court identified the following factors as bearing on the issue:

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<sup>124</sup> Sept. 2003 Order at 5-6.

- 1) when the issue involves “a settled area of law” and the new rule was “not clearly foreshadowed,” retroactivity is less justified;
- 2) whether the overruled decision or statute deals with “procedural law” or “substantive law,” it being understood that when procedural issues are involved, “retroactivity ordinarily will be more readily accorded”;
- 3) whether the overruling was of “common law issues” that are more compatible with retroactivity since the substantive issue usually has a “narrower impact”;
- 4) whether “substantial public issues are involved, arising from statutory or constitutional interpretations that represent a clear departure from prior precedent,” such that “prospective application will ordinarily be favored”; and
- 5) whether and how other courts have determined the retroactive/prospective question in the same area of law in their overruling decisions.<sup>125</sup>

Not all factors carry the same weight and the weight of any given factor may vary with the facts of a case.<sup>126</sup> Nonetheless, all these factors and others clearly militate in favor of prospective, rather than retroactive, application of any decision that the § 1.5 Exemption is invalid or otherwise limited in scope.

First, the twenty-five year history and existence of the § 1.5 Exemption strongly indicates that this was a well-settled area and not one prone to change. Moreover, to the extent that any lingering questions existed, the 1997 *Redden* decision settled the matter and did so simply and decisively. Certainly, nothing in *Redden's* plain language labeling the § 1.5 Exemption as “dispositive” could be said to foreshadow a future change or modification of that ruling.

Further, two State Fire Marshals – *i.e.*, the immediate past-Fire Marshal, as well as the present Fire Marshal – have stated in their official capacities that the State Fire Code has no application to one- and two-single family dwellings. As then-Fire Marshal Smittle explained in

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<sup>125</sup> *Kincaid*, 189 W. Va. at 414, 432 S.E.2d at 84 (citing *Bradley v. Appalachian Power Co.*, 163 W. Va. 332, 336, 256 S.E.2d 879, 882-889 (1979)).

<sup>126</sup> *Id.* at 414, 432 S.E.2d at 84; *Bradley*, 189 W. Va. at 342, 256 S.E.2d at 888-889 (stating that in any attempt to list factors, it should be stressed that not all factors always carry the same weight).

his 1995 letter to counsel for the *Redden* defendants: Since December 1, 1979, “the State Fire Code as expressed in §1.5 has NO application to one- and two-single family dwellings” and “[t]herefore, [the State Fire Marshal’s] office does not enforce the provisions of the State Fire Code applicable to [one- and two-single family] dwellings.”<sup>127</sup> More recently, present State Fire Marshal Lewis stated that the “State Fire code . . . currently in effect, has *never* applied to one- and two-family dwellings.”<sup>128</sup> These consistent positions expressed by the officials responsible for enforcing and administering the State Fire Code clearly demonstrate that the issue of applicability has not been in flux and that an expectation that the Exemption would remain in force was entirely reasonable and warranted.

A second factor favoring prospective application arises from the substantive nature of the Exemption. As *Kincaid* explained, if the issue is one of procedural law, as opposed to substantive, “retroactivity ordinarily will be more readily accorded.”<sup>129</sup> Here, the converse rule should apply – to wit: because the § 1.5 Exemption is of a substantive nature, prospective application should be favored.

Another basis supporting prospective application is that the issue at hand concerns a long-standing and legislatively approved exemption and not a common law decision, which “usually has a narrower impact and is likely to involve fewer parties.”<sup>130</sup> Certainly, retroactively invalidating the § 1.5 Exemption would impact broadly not only the litigants in this case, but – very unexpectedly – the entire propane distribution industry, along with contractors, vendors, engineers, developers, and a host of other providers performing services for residential

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<sup>127</sup> See Smittle Letter at p. 1.

<sup>128</sup> See Lewis Letter (Exhibit J to AG Motion for Recon.) (emphasis added).

<sup>129</sup> *Kincaid*, 189 W. Va. at 414, 432 S.E.2d at 84 (quoting *Bradley*, 189 W. Va. at 342, 256 S.E.2d at 889).

<sup>130</sup> *Id.*

customers, as well as homeowners themselves, all of whom have long had reason to rely on the State Fire Code exemption.

*Kincaid* also emphasizes that where substantial public issues arise from a change in a prior statutory interpretation, prospective application is favored.<sup>131</sup> Here, in addition to the impact a change will have on the various private and commercial citizens of the State, retrospective application . . . “[would] burden[] [the] government’s ability to plan or carry out its programs,” and, therefore, would “injure[] all of the government’s constituents.”<sup>132</sup> Here, for example, it is highly doubtful that West Virginia’s state government has funding readily available to meet the substantial costs that would arise were the § 1.5 Exemption suddenly declared invalid. It is also highly doubtful the State Fire Marshal’s office possesses the infrastructure or the staff, let alone the funding, that would be required to begin immediate and unanticipated enforcement at the dwellings that had been covered by the § 1.5 Exemption. Placing such burdens on the State’s fiscal and administrative resources clearly constitutes a “public issue” and one that deserves the prospective application called for by *Kincaid*.

*Kincaid*’s last factor is of little help because there do not appear to be any decisions from other courts that would provide guidance on this issue since the other states that have exemptions for one- and two-family homes in their state fire codes<sup>133</sup> have not invalidated those exemptions.

In sum, if this Court were to invalidate or narrow the application of the § 1.5 Exemption as the Circuit Court suggests, all the traditional factors strongly suggest that the decision be given prospective effect only. Indeed, were the decision to have retroactive effect, basic

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<sup>131</sup> *Id.*

<sup>132</sup> *Id.* 415, 432 S.E.2d at 85 (quoting with approval *American Trucking Assoc. Inc. v. Smith*, 496 U.S. 167, 185-186 (1990)).

<sup>133</sup> See *supra* discussion pp. 32-33 and accompanying notes.

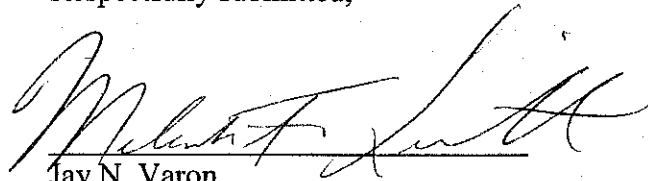
questions of fundamental fairness would arise. Individuals and businesses which had understandably relied on the plain language of the Exemption and/or this Court's decision in *Redden*, would suddenly find that they performed work that might not be in compliance with a Fire Code whose provisions would now be deemed controlling, but which were not applicable at the time that the work was performed. A change of this nature should be introduced with due notice and sufficient time to permit compliance to be achieved, and should not be cast without warning upon an unsuspecting citizenry, who could suddenly find themselves subject to claims of negligence *per se* or other regulatory infractions previously inapplicable to them.

#### IV. CONCLUSION

For all the foregoing reasons, this Court should reverse the answers submitted by the Circuit Court with its Certified Questions and hold: (i) consistent with the ruling in *Redden* that the Section 1.5 Exemption is valid and not contrary to public policy; (ii) that the Section 1.5 exemption is applicable to AmeriGas and to all work or service performed at one- and two-family dwellings regardless of who performs the work; and (iii) in the unlikely event it is necessary to respond to the third certified question, that any decision invalidating the § 1.5 Exemption be given prospective effect only.

Dated: August 4, 2004

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I, Melinda F. Levitt, an attorney, hereby certify that on August 4, 2004, I caused the foregoing **APPELLANTS' BRIEF** to be served on Plaintiff Class Members, via **OVERNIGHT DELIVERY**, such that delivery is to be made on August 5, 2004, to:

David J. Romano, Esq.  
Romano Law Office  
363 Washington Avenue  
Clarksburg, West Virginia 26301

A handwritten signature in cursive script, appearing to read "Melinda F. Levitt", written in black ink.

Melinda F. Levitt