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

**No. 22-ICA-83**



**SWN PRODUCTION COMPANY, LLC,**

***Plaintiff Below, Petitioner,***

**v.**

**CITY OF WEIRTON and
CITY OF WEIRTON BOARD OF
ZONING APPEALS,**

***Defendants Below, Respondents.***

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# OPENING BRIEF OF PETITIONER, SWN PRODUCTION COMPANY, LLC

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Arising from Order of Court dated August 23, 2022 in
Civil Action Nos. CC-05-2021-C-71 & CC-05-2021-P-35,
Circuit Court of Brooke County, West Virginia
(Honorable Jason A. Cuomo)

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## I. ASSIGNMENTS OF ERROR

1. The Circuit Court erred by determining that municipal zoning regulations are neither expressly nor impliedly preempted by the West Virginia Oil and Gas Act, W. Va. Code §§ 22-6-1 *et seq.* as amended to address horizontal drilling by W. Va. Code §§ 22-6A-1 *et seq*., where the West Virginia Oil and Gas Act delegates "sole and exclusive authority" over all aspects of the permitting and location of oil and gas exploration and production activities to the Secretary of the West Virginia Department of Environmental Protection.

## II. STATEMENT OF THE CASE

### A. Introduction

This lawsuit arises from the City of Weirton's ("City") unlawful attempt to regulate, and now effectively ban, lawful natural gas drilling activities within its borders. The City has historically maintained a Unified Development Ordinance, which purports to regulate where and how and natural gas drilling can occur within the City. However, in early 2021, and unbeknownst to SWN, the City worked in a feverish pace to adopt a new ordinance that would effectively ban natural gas drilling within the City's borders completely, only after SWN had alerted the City of its intentions to drill on land it had leased within the City. Nonetheless, despite the City's best efforts, SWN submitted its application to the City prior to the effective date of the new ordinance.

Even though SWN's application complied with all of the then-applicable ordinance requirements, the City of Weirton Board of Zoning Appeals ("Board") denied SWN's Application. In response, SWN filed its Verified Complaint in this case, seeking to enjoin enforcement of both the City's prior and newly updated Unified Development Ordinance because they are preempted by state law with respect to natural gas drilling activities.[1]

[1] On October 29, 2021, SWN also filed with the Circuit Court a Petition for Writ of Certiorari ("Petition") seeking review and reversal of the Board's denial, which was consolidated

As a matter of law and contrary to the Circuit Court's August 23, 2022 Order Regarding Pre-Emption in this case ("Decision"), the West Virginia Oil and Gas Act, W. Va. Code §§ 26-6-1, *et seq*., as amended and supplemented to address horizontal drilling by West Virginia Code §§ 26-6A-1, *et seq*., expressly preempts all local zoning authority of oil and gas drilling activities. Furthermore, the comprehensive permitting scheme adopted by the legislature demonstrates the state's intent to preempt and occupy the entire field of oil and gas regulation. As such, the City's oil and gas regulations are also preempted under the principles of implied field preemption and conflict preemption.

Accordingly, SWN respectfully requests that this honorable Court reverse the Circuit Court's Decision and hold that the West Virginia Oil and Gas Act preempts municipal zoning regulation of oil and gas exploration and production activities.

## B. Statement of Facts

### 1. SWN's State Permit to Drill for Natural Gas in the City

Hydraulic fracturing, sometimes known as "fracking," has been used to safely stimulate wells and recover oil and natural gas in the United States since the 1940s. (Appendix Record ("App.") at 18, 147). In fact, fracking is used in nearly all oil and gas wells drilled in the United States today. *Id*.

The West Virginia Department of Environmental Protection ("WVDEP") regulates all oil and gas drilling and extraction activities in the State, including fracking and horizontal drilling. (App. 147, 201). On October 18, 2021, SWN applied to WVDEP for permits to drill for and develop natural gas at a well site located on a large vacant parcel in the City ("Brownlee Site").

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with the instant matter and which was stayed by the Circuit Court pending resolution of the pre-emption issues argued herein. (App. 18).

(App. 151).[2] With its application, SWN provided WVDEP with an array of technical data and information, including a detailed erosion and sediment control plan that met or exceeded the requirements of the West Virginia Erosion and Sediment Control Manual as adopted pursuant to the control program established through Section 208 of the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. § 1288. (App. 148, 162-198).

On February 8, 2022, WVDEP issued Well Work Permit No. 47-009-00328-00-00 ("State Permit") for SWN's Brownlee Land Ventures BRK No. 6 Well, which authorizes SWN to begin drilling on the Brownlee Site. (App. 162-198).

**2. SWN's Conditional Use Application**

Prior to issuance of the State Permit, on June 11, 2021, SWN submitted an application for a conditional use permit ("Application") to the City in order to obtain local zoning approval for the Brownlee Site pursuant to the terms of the City's then existing Unified Development Ordinance ("Original UDO"). (App. 152, 204). Despite state preemption of the Original UDO, SWN submitted the Application because it desired to be a good corporate neighbor and engage in a positive working relationship with the City moving forward. (App. 148).

The Original UDO contained only two objective standards relating to conditional uses for oil and gas extraction activities, as follows:

a. No well may be located closer than two hundred (200) feet to any residential use.

b. All oil and gas exploration shall be subject to the Oil and Gas Laws, Chapter Twenty-two, Article Four, of the Code of West Virginia, as amended, and the rules and regulations of the West Virginia Department of Environment Protection.

[2] SWN is the lessee of record for the Brownlee Site totaling 301.83 acres in the City, which is located off of Park Drive on property owned by Brownlee Land Ventures L.P., Tax Parcel Identification Number 05-06-00W3-0004-0000. Pursuant to the lease, SWN has the right to drill and operate for and produce oil and natural gas from the Brownlee Site. (App. 88).

*See* Original UDO § 9.6(24); (App. 152).

On August 3, 2021 and September 7, 2021, the Board held hearings to consider SWN's conditional use Application. (App. 152, 205). SWN presented its case through a series of professional engineers, noise and traffic experts. *Id*. In support of its Application, SWN also submitted more than 240 pages of technical studies and reports, which demonstrated that the Brownlee Site would not be detrimental to the health, safety or welfare of City residents. *Id*.

Even though SWN submitted each and every application item required by the Original UDO, the City complained at length that SWN should not be permitted to introduce additional evidence to support its Application at the hearings. (App. 152). During the hearings, the City repeatedly violated SWN's due process rights by refusing to allow SWN the opportunity provide rebuttal testimony to the lay opposition testimony provided by the City. (App. 153). Despite SWN's submission of a complete application and its compliance with the objective requirements of the Original UDO, the Board voted to deny SWN's application at the conclusion of the hearings on September 7, 2021. (App. 153, 205).

The Board further issued a written decision supporting its denial on October 1, 2021. Among its reasons for denial, the Board found that "SWN has failed to prove that the requested conditional use will not be adverse in any respect to the public health, safety and welfare." *Id.* As set forth below, the Board's conclusions directly conflict with WVDEP's issuance of the State Permit, and consequently, its actions are preempted by State law.

**3. The New Unified Development Ordinance**

Prior to submitting the Application, SWN had approached the City earlier in 2021 to discuss the City's permitting process for oil and gas development. (App. 153, 206). After the City

became aware of SWN's plans, unbeknownst to SWN, the City worked to adopt a new ordinance that would effectively ban natural gas drilling within the City's borders. *Id*.

On June 7, 2021, the City voted to enact a new Unified Development Ordinance ("New UDO") to become effective on July 7, 2021. *Id.* The New UDO purports to place a new 2,500 foot setback requirement on all drilling activities from residential, church or school uses. This setback requirement in the New UDO is a 1,250% percent increase from the 200 foot setback requirement contained in the Original UDO. *Id*. In addition, the New UDO rezoned the Brownlee Site and removed oil and gas extraction as a permitted conditional use from the zoning district where the Brownlee Site is located.[3] (App. 153-54, 206). The New UDO's map amendment and setback requirements effectively ban natural gas drilling within the City limits because there are no areas located within the City where these requirements can be satisfied.

Despite the City's best efforts to rush passage of the new UDO, SWN submitted its Application to the City prior to the effective date of the New UDO. (App. 154, 206). However, as described above, the Board nevertheless unlawfully denied SWN's Application. (App. 153, 205). Today, if SWN were to submit a new application, oil and gas production on the Brownlee Site would no longer be permitted as a conditional use under the New UDO. (App. 154, 206). This is precisely the type of local interference with oil and gas development that the West Virginia Legislature sought to prevent when it delegated all oil and gas regulatory functions to WVDEP.

[3] Under the Original UDO, the Brownlee Site was located in the City's PDD – Planned Development District, where "Oil/Gas Extraction" uses were permitted by conditional use. Under the New UDO, the Brownlee Site was rezoned to the FB – Flex Business District, where "Oil/Gas Extraction" uses are now not permitted at all. (App. 154, 206).

### C. Procedural Background

On October 29, 2021, after the Board denied SWN's Application, SWN filed the Verified Complaint in the instant matter, docketed at Brooke County Civil Action No. CC-05-2021-C-71, which seeks: (1) a declaration from this Court that by the Original UDO and New UDO are preempted by state law; and (2) an injunction enjoining the City from enforcing, either directly or indirectly, either the Original UDO or the New UDO with respect to oil and gas exploration activities ("Preemption Action"). (App. 18-30). On the same date, SWN also filed the Petition, docketed at Brooke County Civil Action No. CC-05-2021-P-35, in order to preserve its right to appeal Board's denial of the Application ("Defensive Appeal"). (App. 18).

On March 14, 2022, upon a Motion by the City, the Circuit Court entered an Order transferring and consolidating the Preemption Action with the Defensive Appeal. (App. 142-146). The Court further ordered that the issues originally presented in the Defensive Appeal be stayed until such time as the Court makes a final determination on the state preemption issues raised in the Preemption Action. *Id.*

On March 29, 2022, after seeking and obtaining permission from the Court, SWN filed its First Amended Verified Complaint, which amended the Verified Complaint to include a copy of the SWN's State Permit for the Brownlee Site. (App. 147-199). On April 18, 2022, the City filed its Answer to the First Amended Verified Complaint. (App. 200-214). On August 23, 2022, after considering the parties' briefs on the matter, the Circuit Court issued its Decision holding that the West Virginia Oil and Gas Act does not preempt municipal zoning regulation of oil and gas exploration and production activities. (App. 1-17).[4]

[4] The Circuit Court's Decision stated that "[t]his Court considers this to be a final appealable order." (App. 17).

On September 7, 2022, SWN filed the instant Notice of Appeal with this Court seeking to overturn the Circuit Court's Decision. On September 14, 2022, SWN filed a Motion for Direct Review of the Decision to the West Virginia Supreme Court of Appeals, which was refused on October 25, 2022.

## III. SUMMARY OF ARGUMENT

Neither the Constitution of West Virginia nor the Legislature have conferred or delegated any oil and gas regulatory or environmental protection functions upon or to any West Virginia municipalities. Rather, all oil and gas regulatory and environmental protection programs in West Virginia - including those relating to the siting and location horizontal drilling and fracking operations - are regulated by WVDEP. In such instances, where the Legislature has comprehensively regulated an entire industry, the West Virginia Constitution requires that conflicting municipal regulations be declared invalid and void. Here, the City's ordinances are in direct conflict with the West Virginia Oil and Gas Act because they purport to prohibit exactly what the state law permits – oil and gas drilling activities on the Brownlee Site. Therefore, the City's ordinances should be declared invalid to the extent they attempt to regulate the exploration and production of oil and natural gas.

## IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to the criteria set forth in Rule 18(a) of the West Virginia Rules of Appellate Procedure, SWN respectfully submits that oral argument is appropriate in this case under Rule 20 of the Rules of Appellate Procedure. The issues raised in this case are suitable for oral argument under all of the criteria set forth in Rule 20(a). The issue of whether local zoning regulations are preempted by the West Virginia Oil and Gas Act: (1) is an issue of first impression; (2) is an issue of fundamental public importance; (3) involves constitutional questions regarding the validity of

a municipal ordinance; and (4) involves inconsistencies or conflicts among the decisions of lower tribunals. *See* W.Va. R. App. P. 20(a).

## V. ARGUMENT

### A. Standard of Review

"Where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, [the appellate court] appl[ies] a *de novo* standard of review." Syl. Pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 139, 459 S.E.2d 415, 416 (1995). When reviewing a lower court's decision under a *de novo* standard, no deference is afforded to the lower court's ruling. As stated by the West Virginia Supreme Court of Appeals, "[w]hen employing the *de novo* standard of review, we review anew the findings and conclusions of the circuit court, affording no deference to the lower court's ruling." *Blake v. Charleston Area Med. Ctr., Inc.*, 201 W.Va. 469, 475, 498 S.E.2d 41, 47 (1997) *citing West Virginia Div. of Envtl. Protection v. Kingwood Coal Co.*, 200 W.Va. 734, 745, 490 S.E.2d 823, 834 (1997).

### B. Legal Framework for Preemption in West Virginia

In West Virginia, municipalities are creations of the state, and thus derive all of their powers, both explicit and inherent, from the state. "A municipal corporation is a creature of the State, and can only perform such functions of government as may have been conferred by the constitution, or delegated to it by the law-making authority of the State. It has no inherent powers, and only such implied powers as are necessary to carry into effect those expressly granted." Syl. pt. 1, *Toler v. City of Huntington,* 168 S.E.2d 551 (W. Va. 1969) (citing Syl. pt. 1, *Brockman's, Inc.* v. *City of Huntington,* 27 S.E.2d 71 (W. Va. 1943)). "Attached to every statute, every charter, every ordinance or resolution affecting, or adopted by, a municipality, is the implied condition that the same must yield to the predominant power of the State, when that power has been exercised.

To hold otherwise would lead to serious confusion, and at times absurd results." Syl. Pt. 4, *Delardas* v. *Morgantown Water Comm'n,* 137 S.E.2d 426 (W. Va. 1964).

When a conflict arises between a local ordinance and a state statute, the state statute will always prevail. "That municipal ordinances are inferior to in status and subordinate to legislative acts is a principle so fundamental that citation of authorities is unnecessary. Equally fundamental is the legal principle that where an ordinance is in conflict with a state law the former is invalid." *American Tower Corp.* v. *Common Council of the City of Beckley,* 557 S.E.2d 752, 756 (W. Va. 2001) (citing *Vector Co.* v. *Board of Zoning Appeals,* 184 S.E.2d 301, 304 (W. Va. 1971)). In fact, pursuant to the West Virginia Constitution, any municipal ordinance or charter "***shall be invalid and void if inconsistent or in conflict with*** this Constitution or the ***general laws of the State*** then in effect, or thereafter, from time to time enacted*."* W. Va. Const, art. 6, §39(a) (emphasis added).

In his preeminent treatise on municipal government, Eugene McQuillan succinctly explained the relationship between the laws and regulations passed by various levels of government, including municipalities and state legislatures:

> It is fundamental that ***municipal ordinances are inferior in status and subordinate to the laws of the state.*** The purpose of the preemption doctrine is to establish a priority between potentially conflicting laws enacted by various levels of government. Consistently, it is a general rule, sometimes expressly enunciated by the state constitution, statutes, or city charters, that ordinances regulating subjects, matters, and things on which there is a general law of the state must be in harmony with that state law, and ***in any conflict between an ordinance and a statute the latter must prevail,*** unless under the statutes or law of the state the ordinance plainly and specifically is given predominance in a particular instance or as to a particular subject matter. Fundamental to the doctrine of preemption is the understanding that ***local governments lack the authority to craft their own exceptions to general state laws.***

E. McQuillin, *The Law of Municipal Corporations* § 15:18 (Clark, Boardman, Callaghan, 3d ed. 1986) (emphasis added; internal citations omitted). Furthermore, key to any analysis of

preemption is the fundamental principle, "that which is allowed by the general laws of the state cannot be prohibited by ordinance, without express grant on the part of the state." *Id.* The West Virginia Supreme Court of Appeals has agreed, holding that, "where both the State and a municipality enact legislation on the same subject matter, it is generally held that if there are inconsistencies, the municipal ordinance must yield." *Davidson v. Shoney's Big Boy Restaurant*, 181 W.Va. 65 at 68, 380 S.E.2d 232 at 235 (1989).

In determining whether an ordinance is preempted by state law, courts must look not only at the express language of the particular law, but also to the legislative purpose behind the law:

> [T]he fact that a local ordinance does not expressly conflict with the statute will not save it when the legislative purpose in enacting the statute is frustrated by the ordinance. Similarly, an intent by the state to preempt an entire field of legislation need not be expressly declared. Preemption may be implied from the nature of the subject matter being regulated and the purpose and scope of the state statutory scheme.

*McQuillin, supra*. Thus, "[w]hen the general law of the state has dealt comprehensively with the subject-matter of a municipal ordinance, the general law is dominant and controlling and the ordinance is invalid and unenforceable, in the absence of specific authority therefore conferred by the Legislature." Syl. Pt. 2, *State* v. *Robinson*, 104 S.E. 473 (W. Va. 1920).

### C. The West Virginia Oil and Gas Act Preempts Local Zoning Regulation of Oil and Gas Development

The Circuit Court erred when it held in its Decision that "the West Virginia Legislature, by virtue of its enactment of the [West Virginia Oil and Gas Act] neither expressly nor impliedly [sic] sought to preempt authority vested in local authorities…from enacting lawful…zoning ordinances/regulations which may affect where companies who seek to conduct oil and gas operations and production place their facilities or conduct their business within municipal limits." (App. 13.). As set forth below, the Circuit Court's holding directly contradicts the express

language of the West Virginia Oil and Gas Act, as well as the principles of field preemption and conflict preemption.

### 1. The West Virginia Oil and Gas Act Expressly Preempts The City's Ordinances Because The WVDEP Has Sole And Exclusive Authority To Regulate The Location And Permitting of Oil And Gas Wells In The State

In its Decision, the Circuit Court incorrectly stated that, "[i]n support of its pre-emption argument, SWN cites no specific preemption language within Chapter 22, Article 6 or 6A." (App. 10). But, contrary to the Circuit Court's assertion, SWN did in fact cite to a specific provision of the West Virginia Oil and Gas Act that expressly preempts local zoning authority to determine the location of oil and gas wells. (App. 261-262). Specifically, Section 22-6A-6(b) of the West Virginia Oil and Gas Act provides that:

> Except for the duties and obligations conferred by statute upon the shallow gas well review board pursuant to article eight, chapter twenty-two-c of this code, the coalbed methane review board pursuant to article twenty-one of this chapter, and the oil and gas conservation commission[5] pursuant to article nine, chapter twenty-two-c of this code, ***the [WVDEP] has sole and exclusive authority to regulate the permitting, location,*** spacing, drilling, fracturing, stimulation, well completion activities, operation, any and all other drilling and production processes, plugging and reclamation ***of oil and gas wells*** and production operations within the state.

[5] It is clear under the rules of statutory construction that local zoning authority is preempted by the West Virginia Oil & Gas Act because the legislature specifically excepted the shallow gas well review board, the coalbed methane review board and the oil and gas conservation commission but *not* municipalities or the Land Use Act. *See Manchin v. Dunfee*, 174 W.Va. 532, 535, 327 S.E.2d 710, 713 (1984) ("In the interpretation of statutory provisions the familiar maxim *expression unius est exclusion alterius,* the express mention of one thing implies the exclusion of another, applies."); *Christopher J. v. Ames*, 241 W.Va. 822, 832, 828 S.E.2d 884, 894 (2019) ("We have long recognized that '[t]his doctrine informs courts to exclude from operation those items not included in the list of elements that are given effect expressly by statutory language.'"); *Young v. Apogee Coal Co., LLC*, 232 W. Va. 554, 562, 753 S.E.2d 52, 60 (2013) ("Critically, we have found that [t]he *expressio unius* maxim is premised upon an assumption that certain omissions from a statute by the Legislature are intentional."); *Banker v. Banker,* 196 W. Va. 535, 546-47, 474 S.E.2d 465, 476-77 (1996) ("It is not for this Court arbitrarily to read into [a statute] that which it does not say. Just as courts are not to eliminate through judicial interpretation words that were purposely included, we are obliged not to add to statutes something the Legislature purposely omitted.").

W. Va. Code § 22-6A-6(b) (emphasis added).[6]

To establish a case of express preemption requires proof that the legislature, through specific and plain language in the statute, preempted the specific field covered by local law. *Morgan v. Ford Motor Co.*, 224 W. Va. 62, 69–70, 680 S.E.2d 77, 84–85 (2009). Here, the legislature's intent to entirely preempt the local regulation of the oil and gas industry could not be clearer. Contrary to the City's assertion, the West Virginia Oil and Gas Act unambiguously provides that WVDEP has "***sole and exclusive authority*** to regulate the ***permitting*** [and] ***location***…" of horizontal oil and gas wells within the state. *See* W. Va. Code § 22-6A-6(b) (emphasis added). Thus, the legislature has plainly and expressly stated its intent to preempt the entire field of oil and gas regulation, even in those areas that are traditionally left to local zoning ordinances, such as site location.

But, despite the plain language of this provision demonstrating the Legislature's express intent to preempt the regulation of all aspects of the natural gas industry, including site location, the Circuit Court almost completely disregards it existence entirely. In doing so, the Circuit Court somewhat confusingly reads out most of the operative language of Section 22-6A-6. Specifically, the Circuit Court held that:

> SWN argues that because the secretary of the DEP has been designated by Article 6A-6(b) to have sole and exclusive authority to regulate the permitting, location, spacing, drilling, etc., of oil and gas wells and production operations within the state, then our Legislature clearly intended complete pre-emption of any and all zoning laws that touch upon oil and gas. However, SWN's argument takes this section of Chapter 22 out of context. ***This***

[6] Chapter 22, Article 6A of the West Virginia Code is the article of the West Virginia Oil and Gas Act that provides regulations applicable to horizontal drilling activities. *See* W. Va. Code § 22-6A-5. Section 22-6A-5(a) provides that "To the extent that horizontal wells governed by this article are similar to conventional oil and gas wells regulated under article six of this chapter, the following sections of article six of this chapter are hereby incorporated by reference in this article…Any conflict between the provisions of article six and the provisions of this article shall be resolved in favor of this article."

> ***paragraph relates to the authority of the DEP secretary to regulate "any and all ... drilling and production processes," not to a local municipality's authority to provide for compatible land uses under Chapter 8A***.

(App. 10) (emphasis added) (footnote omitted).

In doing so, the Court ignores the fact that Section 22-6A-6(b) not only applies to the Secretary's authority to regulate "any and all other drilling and production processes," which is clearly does. Rather, the plain language of the statute provides that WVDEP shall have "sole and exclusive authority to regulate the…permitting [and] location…[of oil and gas wells] " as well as "any and all other drilling and production processes…" W. Va. Code § 22-6A-6(b) (emphasis added). Thus, the express language of the statute provides that WVDEP has sole and exclusive authority: (1) to regulate the permitting and site location of oil and gas wells; and (2) to regulate any and all other drilling and production processes pertaining to oil and gas wells in the state. In its Decision, the Circuit Court simply ignores the statute's express grant of sole and exclusive authority to WVDEP to regulate the *location* of oil and gas wells, as well as various other enumerated areas of the industry, and focuses only on WVDEP's sole and exclusive authority to regulate "any and all other drilling and production processes."

Again, the express language of the statute could not be clearer. The Legislature granted WVDEP "sole and exclusive authority" to regulate the site location of oil and gas wells and, in doing so, expressly preempted local municipalities from regulating the location of oil and gas wells through local zoning regulations. Fundamentally, the Legislature could not have intended municipalities to have *any* authority to regulate the location oil and gas wells where it granted "sole and exclusive authority" to WVDEP to regulate the same subject.[7] *Id*.

[7] The Circuit Court also relied on the City's argument that "[t]o accept SWN's argument that exclusive permitting authority in the secretary preempts all West Virginia zoning laws would also be to find that zoning cannot regulate surface coal mines (W. Va. Code § 22-3-8), geothermal power (W. Va. Code § 22-33-7), above ground storage tanks (W. Va. Code § 22-30-24),

### 2. The City's Ordinances Are Preempted By The West Virginia Oil and Gas Act Under The Principles Of Implied Field Preemption

The foregoing provision, when viewed in the context of the entire West Virginia Oil and Gas Act, also demonstrates that local zoning authority is preempted under an implied field preemption analysis. Implied field preemption occurs where the scheme of state regulation is so pervasive that it is reasonable to infer that the legislature left no room for the states to supplement it. *In re Flood Litig.*, 216 W. Va. 534, 547, 607 S.E.2d 863, 876 (2004).[8] Field preemption may only be founded upon clear and manifest intent of the legislature to occupy the field. *Harrison v.*

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underground storage tanks (W. Va. Code§ 22-17- 5), and hazardous waste (W. Va. Code § 22-18-5)." (App. 11).

While perhaps persuasive on its face, this argument ultimately fails because none of the environmental laws cited by the City and Circuit Court contain express preemption language granting WVDEP the "sole and exclusive authority" over the permitting, location or all other aspects of the applicable industry. Specifically, the Surface Coal Mining and Reclamation Act vests "in the secretary the authority to enforce all of the laws, regulations and rules established to regulate blasting.." W. Va. Code § 22-3-2(b)(9). The Geothermal Resources Act provides that "[t]he secretary is vested with jurisdiction over all aspects of this article and has the exclusive authority to perform all acts necessary to implement this article." W. Va. Code § 22-33-7(a). The Aboveground Storage Tank Act provides that "the secretary has the exclusive authority to perform all acts necessary to implement this article." W. Va. Code § 22-30-24(a). And, neither the Underground Storage Tank Act, W. Va. Code §§ 22-17-1, *et seq.* nor the Hazardous Waste Management Act provide, W. Va. Code §§ 22-18-1, *et seq.* contain language granting the Secretary of WVDEP any exclusive authority whatsoever. The absence of express language granting sole and exclusive authority to the Secretary in these other environmental laws to regulate all aspects of an entire industry (including site location) only bolsters SWN's position that the Legislature intended to preempt the entire field of the horizontal gas drilling industry with Section 22-6A-6(b) of the West Virginia Oil and Gas Act, which specifically grants WVDEP the sole and exclusive authority to regulate each and every aspect of the horizontal drilling industry, unlike the other laws cited by the City and Circuit Court.

[8] As applied to oil and gas development, the United States District Court for the Southern District of West Virginia held that the West Virginia Supreme Court of Appeals would apply the field preemption doctrine "between state and local governments substantially in the same way it does between the states and the federal government." *EQT Prod. Co. v. Wender*, 191 F.Supp.3d 583, 595–96 (S.D.W. Va. 2016), aff'd, 870 F.3d 322 (4th Cir. 2017) ("*EQT I*") ("For just as federal law will displace state law when the two meet, so, too, is state law superior to local law.") *citing Vector Co. v. Bd. of Zoning Appeals*, 155 W.Va. 362, 367, 184 S.E.2d 301 (1971).

*Skyline Corp*., 224 W. Va. 505, 512, 686 S.E.2d 735, 742 (2009) (citing *English v. General Electric Co.,* 496 U.S. 72, 79, 110 S.Ct. 2270, 110 L.Ed.2d 65 (1990)). "To prevail on a claim of implied preemption, evidence of [] intent to pre-empt the specific field covered by [local] law must be pinpointed." *In re Flood Litig*., 607 S.E.2d at 876 *citing Hartley Marine Corp. v. Mierke*, 196 W. Va. 669, 673, 474 S.E.2d 599, 603 (1996).

Here, the legislature's intent to completely preempt and occupy the field of unconventional oil and gas activities can be "pinpointed" to the express statutory grant of "sole and exclusive authority" to WVDEP to regulate all aspects of drilling in the state. *See* W. Va. Code § 22-6A-6(b). Furthermore, even in the absence of this provision, the West Virginia Oil and Gas Act proceeds to regulate every conceivable aspect of drilling as it relates to human health and safety and the environment, including, but not limited to: the issuance of permits for water pollution control; notice to and comments by property owners affected by the drilling; review of well work applications by the director of the WVDEP; the requirement of plats prior to drilling; the requirement of plats prior to introducing liquids or waste into wells; objections to drilling by affected parties; the required filing of a "well log"; the prescription of methods of abandonment, plugging, and reclamation of a well; the rights of adjacent property owners; the procedural stance of courts as to fresh water contamination near wells; offenses and penalties under the Article; and the WVDEP's ability to enjoin any violator or would-be violator of the West Virginia Oil and Gas Act. *See* W. Va. Code §§ 22-6-7 through 41; W. Va. Code §§ 22-6A-7 through 9.

The West Virginia Oil and Gas Act provides that WVDEP may not issue a drilling permit if it determines that: the proposed well work will constitute a hazard to the safety of persons; the plan for soil erosion and sediment control is not adequate or effective; damage would occur to property; or the proposed well work fails to protect fresh water sources or supplies. *See* W. Va.

Code § 22-6A-8(d). Further, WVDEP must confirm that all well location restrictions set forth in the West Virginia Oil and Gas Act have been satisfied. *See* W. Va. Code § 22-6A-8(e). Finally, WVDEP is tasked with promptly reviewing and considering all comments raised by the public. W. Va. Code § 22-6A-8(f).

As illustrated by the complex and comprehensive permitting scheme it adopted, the legislature has clearly demonstrated its intent to preempt the entire field of oil and gas regulation. Indeed, by the plain terms of the West Virginia Oil and Gas Act, the WVDEP cannot issue a drilling permit unless is has evaluated each and every one of the considerations listed above. For these reasons, the City's ordinances are also preempted by the West Virginia Oil and Gas Act under the principles of implied field preemption.

### 3. The West Virginia Oil and Gas Act Preempts The City's Ordinances Because The Ordinances Directly Conflict With The Same Matters Regulated By The Act

Lastly, the City's ordinances are preempted under a conflict preemption analysis. Conflict preemption occurs where provisions of a state law directly conflict with those of a local ordinance. "That municipal ordinances are inferior to in status and subordinate to legislative acts is a principle so fundamental that citation of authorities is unnecessary. Equally fundamental is the legal principle that where an ordinance is in conflict with a state law the former is invalid." *American Tower Corp.* v. *Common Council of the City of Beckley,* 557 S.E.2d 752, 756 (W. Va. 2001) (citing *Vector*, 184 S.E.2d at 304). "There is a further general principle that municipalities may only exercise powers not in conflict with general law, unless the power to do so is plainly and specifically granted." *Brackman's Inc., v. City of Huntington*, 126 W. Va. 21, 27 S.E.2d 71, 73 (1943). The principle of conflict preemption has been enshrined in the West Virginia Constitution, which provides that any municipal ordinance or charter "***shall be invalid and void if inconsistent***

***or in conflict with*** this Constitution or the ***general laws of the State*** then in effect, or thereafter, from time to time enacted." W. Va. Const, art. 6, §39(a) (emphasis added).

Here, the objective terms of the West Virginia Oil and Gas Act directly conflict with the specific requirements of the City's ordinances. For example, the West Virginia Oil and Gas Act provides that "the center of well pads may not be located within ***six hundred twenty-five feet of an occupied dwelling structure***." *See* W. Va. Code § 22-6A-12 (emphasis added).[9] In contrast, the New UDO, which only permits oil and gas extraction in the City's industrial districts, provides that "[n]o well may be located closer than ***two thousand five hundred (2,500) feet*** to any residential, church or school use." *See* New UDO § 9.6.20(A). Because this local requirement is in direct conflict with the West Virginia Oil and Gas Act, it must necessarily yield to state law and be declared invalid. W. Va. Const, art. 6, §39(a).

However, even more compelling is the fundamental conflict between the West Virginia Oil and Gas Act and all local zoning laws, each of which purport to vest final approval of well locations in a body other than WVDEP. The City's approval scheme is in direct conflict with the West Virginia Oil and Gas Act's express language, which vests WVDEP with "sole and exclusive authority" to regulate the "permitting" and "location" of horizontal gas wells. W. Va. Code § 22-6A-8(d). This language cannot be reconciled with the City's position that a municipality retains the authority to require zoning approval for a gas well that has already been approved under the state's permitting program. Where, as here, local zoning ordinances provide inconsistent

[9] The City has erroneously argued that if SWN's preemption theory were accepted "natural gas well pads in every residential area within the state." (App. 250). That is simply false. Although there are a number of reasons why development would never occur in a residential district, the West Virginia Oil and Gas Act expressly prohibits ***any*** development within 625 feet of a structure. *See* W. Va. Code § 22-6A-12. Thus, so long as a well is located more than 625 feet from an occupied dwelling, it can be located anywhere in a municipality, regardless of the zoning district, so long as WVDEP has issued a permit.

requirements or vest final approval power in a body other than WVDEP, they conflict with the West Virginia Oil and Gas Act and are therefore preempted under the principles of conflict preemption.

### D. The City's General Power To Enact Zoning Laws Does Not Preclude Preemption Of Local Zoning Ordinances With Respect To Oil And Gas Activities

The Circuit Court also held that, because the City is generally empowered by the Land Use Planning Act, W. Va. Code §§ 8A-7-1 *et seq.*, to enact traditional zoning laws, and the Land Use Planning Act does not specifically limit the City's ability to regulate oil and gas, it retains the power to do so. The Circuit Court and City take this position, even where a state permit has been approved authorizing a proposed well in a specific location. As set forth below, the City's contention directly contradicts the West Virginia Supreme Court of Appeals' holding in *Brackman's Inc, supra*, as well other cases decided by state and federal courts considering the preemptive effect of the West Virginia Oil and Gas Act.

In *Brackman's Inc.*, the West Virginia Supreme Court of Appeals court rejected a city's attempt to prohibit a business from selling "non-intoxicating beer" within city boundaries, despite the fact that the business was licensed by the state to do exactly that. *Id*. Once the state had "acted in the matter" by issuing a license pursuant to a state statute, the court concluded, localities lacked the power to "nullify the [s]tate's action" by "depriv[ing]" the license holder of the "use of such privilege." *Id.* at 78. The Supreme Court reasoned that the West Virginia legislature would not delegate to its "creature" municipalities the power to undo its own permitting scheme as follows: "Did the Legislature ever intend, on the one hand, to grant to a citizen a license to engage in a particular business or occupation, and, with the other, empower its creatures to nullify its action? We think not." *Id.*

*Brackman's Inc.*, and the principles on which it rests, govern this case. West Virginia law simply does not permit a municipality to preclude an activity—here, the drilling of a horizontal gas well—that is licensed and regulated by the state pursuant to a comprehensive and complex permit program. Instead, to avoid the "serious confusion[ ] and often times absurd results" that otherwise would follow, the City's ordinances, like all local law in West Virginia, are subject to the "implied condition" that where it is inconsistent with state law, it "must yield to the predominant power of the State." *Id.* This is true whether or not the City is empowered to adopt zoning ordinances of general applicability. If such general ordinances conflict with the West Virginia Oil and Gas Act, they also must yield.

This principal was recently confirmed in *EQT Prod. Co. v. Wender*, 870 F.3d 322, 337 (4th Cir. 2017) ("*EQT II*"). There, a County ordinance purported to prohibit underground injection wells and certain storage of drilling fluids at conventional well sites, which was inconsistent with the provisions of Water Pollution Control Act, W. Va. Code § 22-11-1 *et seq*., and the West Virginia Oil and Gas Act. Analogous to the City's and Circuit Court's reliance on the Land Use Planning Act here, the County argued that it retained the right to regulate oil and gas activities because of the general authority contained in W. Va. Code § 7-1-3kk, which authorizes counties to "enact ordinances, issue orders and take other appropriate and necessary actions for the elimination of hazards to public health and safety and to abate or cause to be abated anything which the commission determines to be a public nuisance." The United States Court of Appeals for the Fourth Circuit disagreed.

Citing to *Brackman's Inc*., the court explained that:

> "It is safe to assume that the Legislature meant to deal fairly with those to whom it granted licenses," and "difficult to believe that it was ever intended" that a locality would be empowered by the legislature to deny the effective use of state-issued permits. Absent 'express' language clearly "vest[ing] in [localities] what may be

> termed the veto power against the issuance of particular licenses," the court concluded, it would not infer a right to "nullify" state permits—***not from a general grant of authority to a locality***, and ***not even from a grant of power covering licensing itself***. *Id.; see also Davidson*, 380 S.E.2d at 235 (unless state law "plainly and specifically" authorizes inconsistent state and local regulation, it would be "illogical" to assume that result).

*EQT II*, 870 F.3d at 334 *citing Brackman's Inc, supra* (emphasis added). Accordingly, the court found that the county's ordinance was preempted by both the Water Pollution Control Act[10] and the West Virginia Oil and Gas Act.

The Circuit Court of Monongalia County, West Virginia reached the same conclusion when faced with an ordinance adopted by the City of Morgantown purporting to prohibit hydraulic fracturing of oil and gas wells within city limits. *See Northeast Natural Energy, LLC* v. *The City of Morgantown*, 2011 WL 3584376 (No. 11-C-411, August 12, 2011). There, much like the City and Circuit Court here argue that the Land Use Planning Act grants the City broad authority to enact zoning regulations to protect the health, safety and welfare of Weirton's citizens, the City of Morgantown argued that its Home Rule Charter granted it "broad authority to protect its citizens, in this case, from the nuisance perceived to be created by the fracking process." (App. 16); *Id*. at *4.

Despite recognizing that Morgantown plainly "has an interest in the control of its land within its municipal borders," the Circuit Court in *Northeast Natural Energy* concluded that the "provisions [of the West Virginia Oil and Gas Act] clearly indicate that this area of law is

[10] The court also found the ordinance to be preempted under the Water Pollution Control Act, even though it contained a "savings" clause, which provided that "[N]othing herein contained shall abridge or alter rights of action or remedies ..., nor shall any provisions ... be construed as estopping the state, municipalities, public health officers, or persons ... in the exercise of their rights to suppress nuisances or to abate any pollution..." As noted by the court, the West Virginia Oil and Gas Act does not contain a "savings" clause reserving any power whatsoever to local governments. Thus, it was also found to preempt the local regulations. *Id*.

exclusively in the hands of the WVDEP. No exception is carved out for any locality or municipality. In fact throughout the regulation it is explicit that all authority lies solely within the hands of the Director [of WVDEP]." *Id* at *4. Therefore, the Circuit Court struck down the Ordinance as preempted by the Oil and Gas Act. *Id.* at *4, 5. In striking down Morgantown's ordinance, the court further explained:

> Based upon this analysis, this Court concludes that the State's interest in oil and gas development and production throughout the State as set forth in the W.VA. CODE § 22W.VA. CODE § 22-66, et seq. (1994) provides for the exclusive control of this area of law to be within the hands of the WVDEP. ***These regulations do not provide any exception or latitude to permit the City of Morgantown*** to impose a complete ban on fracking ***or to regulate oil and gas development and production***.

*Id* (emphasis added).

Here, nothing in the West Virginia Oil and Gas Act "plainly and specifically" authorizes municipalities to take actions inconsistent with state issued permits. *EQT II*, 870 F.3d at 334. To the contrary, the West Virginia Oil and Gas Act contains no savings clause or exception that authorizes municipalities to exercise any regulatory authority whatsoever over the permitting of oil and gas wells. *Northeast Natural Energy*, at *4. Thus, it would be "illogical" to assume that result, even where a municipality has authority to enact other laws of general applicability, such as zoning laws. Under the principles set forth in *Brackman's Inc., EQT II and Northeast Natural Energy*, it is clear that the City's ordinances are preempted by the West Virginia Oil and Gas Act.[11]

[11] The Circuit Court made no attempt to distinguish *Brackman's Inc., EQT II or Northeast Natural Energy* from the case at bar. Throughout this case, the City's has contended that *EQT II* and *Northeast Natural Energy* should simply be disregarded because they involved complete bans on an activity, rather than lesser regulation. However, in both cases, the courts' holdings rested on the fact that the West Virginia Oil and Gas Act delegated sole authority for the regulation of oil and gas to WVDEP, not on the fact there was a complete ban. *See EQT II*, 870 F.3d at 336 ("Under the Oil and Gas Act, the legislature has vested in the state DEP the exclusive authority over regulation of the state's oil and gas resources, including in 'all matters' related to the 'development, production, storage and recovery of this state's oil and gas.'"); *Northeast Natural Energy*, 2011 WL 3584376 at *4 ("This area of law is exclusively in the hands of the WVDEP. No exception is

Despite the cases cited above by SWN demonstrating that the general authority of a municipality to protect the health, safety and welfare of the community do not trump the clear preemptive intent of the West Virginia Oil and Gas Act, the Circuit Court's Decision relies heavily on the broad authority of the City to enact zoning regulations under the Land Use Planning Act. (App. 14-16). Specifically, the Circuit Court and City cite to Section 8A-7-10 of the Land Use Planning Act, which provides that

> Nothing in this chapter authorizes an ordinance, rule or regulation preventing or limiting, outside of municipalities or urban areas, the complete use (i) of natural resources by the owner; or (ii) of a tract or contiguous tracts of land of any size for a farm or agricultural operation as defined in § 19-19-2 by the owner. For purposes of this article, agritourism includes, but is not limited to, the definition set forth in § 19-36-2.

W. Va. Code § 8A-7-10(e). The City has argued that this Section of the Land Use Planning Act provides it with the general authority to enact zoning laws restricting oil and gas drilling within its limits, because the language ostensibly permits zoning regulations that have the effect of preventing the complete use of natural resources *within* municipalities or urban areas.

However, the Land Use Planning Act does not define "natural resources" and makes no reference to oil and gas extraction specifically. Nor does it define what constitutes "complete use" or an "urban area." If the Legislature had intended to allow for zoning regulation of oil and gas extraction in "urban areas" and municipalities, it would have done so specifically. *See* Syllabus Point 1, *UMWA by Trumka v. Kingdon*, 174 W.Va. 330, 325 S.E.2d 120 (1984) ("The general rule of statutory construction requires that a specific statute be given precedence over a general statute relating to the same subject matter."); *Bowers v. Wurzburg*, 205 W.Va. 450, 462, 519 S.E.2d 148, 160 (1999) ("Typically, when two statutes govern a particular scenario, one being specific and one being general, the specific provision prevails."); *Daily Gazette Co., Inc. v. Caryl*, 181 W.Va. 42,

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carved out for any locality or municipality. In fact throughout the regulation it is explicit that all authority lies solely within the hands of the Director [of WVDEP].").

45, 380 S.E.2d 209, 212 (1989) ("The rules of statutory construction require that a specific statute will control over a general statute[.]").

Here, the West Virginia Oil and Gas Act *specifically* provides that WVDEP shall have the "sole and exclusive authority" to regulate all aspects of the oil and gas industry, including the location of natural gas wells. W. Va. Code § 22-6A-6(b). While the Land Use Planning Act *generally* provides that it does not authorize zoning ordinances that have the effect the denying "complete use" of "natural resources" outside of municipalities and urban areas, it never grants municipalities specific authority to adopt zoning ordinances that purport to regulate any aspect of the oil and gas industry. Accordingly, the general grant of authority to enact zoning ordinances affecting "natural resources" must necessarily yield to the express preemption provision of Section 22-6A-6(b) of the West Virginia Oil and Gas Act, which specifically provides WVDEP the sole and exclusive authority to regulate the location of natural gas wells.

### E. There is No "False Conflict" Between the West Virginia Oil and Gas Act and the City's Authority to Adopt Zoning Regulations

Finally, relying on *Longwell v. Hodge*, 171 W. Va. 45, 297 S.E.2d 820 (1982), the Circuit Court takes the position that "[a]ny perceived 'conflict' between the City of Weirton's authority under Chapter 8A and the [WVDEP's] authority under Chapters 6 and/or 6A is a 'false conflict.'" (App. 11).

The Circuit Court's position is untenable. To the contrary, the conflict is real. It is undisputed that WVDEP has issued a well work permit to SWN for the Brownlee Site. (App. 148, 201). It is undisputed that the City has denied a zoning permit for the same use in the same location pursuant to its Original UDO. (App. 153, 205). It is undisputed that the New UDO does not allow oil and gas development in the district the Brownlee Site is located. (App. 154, 206). And, more fundamentally, the West Virginia Oil and Gas Act vests "sole and exclusive authority" in WVDEP

to determine the location of oil and gas wells in West Virginia and the City's ordinances purport to vest final approval authority in a body other than WVDEP. Despite these undisputed facts, the Circuit Court and City maintain there is a "false conflict" between the West Virginia Oil and Gas Act and the City's zoning regulations.

The Circuit Court's reliance on *Longwell* is misplaced. There, the court found that there was a "false conflict" between the Legislature's licensing regime for non-intoxicating beverages and the municipality's zoning ordinance because "[t]he State, by licensing the sale of beer, neither acquires, nor seeks to acquire, ***any positive interest*** in the operation of taverns or restaurants selling beer at particular locations within municipalities. Rather, ***the State's interest is defensive***, to assure that beer is not sold by an 'unsuitable person" or in an 'unsuitable place' *See*, W. Va. Code, 11–16–12 [1972]." *Id*. (emphasis added). Specifically, the express legislative intent of the Nonintoxicating Beer Act provides:

> It is hereby found by the Legislature and declared to be the policy of this state that it is in the public interest to regulate and control the manufacture, sale, distribution, transportation, storage, and consumption of the beverages regulated by this article within this state and that, ***therefore, the provisions of this article are a necessary, proper, and valid exercise of the police powers of this state and are intended for the protection of the public safety, welfare, health, peace and morals and are further intended to eliminate, or to minimize to the extent practicable, the evils attendant to the unregulated, unlicensed, and unlawful manufacture, sale, distribution, transportation, storage, and consumption of such beverages and are further intended to promote temperance in the use and consumption thereof…***

W. Va. Code § 11-16-2 (emphasis added). Thus, the *Longwell* court determined that the Nonintoxicating Beer Act was "defensive" in nature because it is intended solely to protect against the "evils attendant" to such beverages.

Here, however, the State's interest in oil and gas regulation is not merely "defensive." Although the West Virginia Oil and Gas Act does contain defensive elements, the Act's express

legislative findings also include positive interests relating the well-being of the West Virginia economy:

> ***Allowing the responsible development of our state's natural gas resources will enhance the economy of our state and the quality of life for our citizens*** while assuring the long term protection of the environment…. The Legislature declares that the establishment of a new regulatory scheme to address new and advanced natural gas development technologies and drilling practices is in the public interest and should be done in a manner that protects the environment ***and our economy*** for current and future generations.

W. Va. Code § 22-6A-2(a)(8) & (b). Thus, the West Virginia Oil and Gas Act does not merely purport to defensively protect against the environmental impacts of oil and gas activities. Rather, it also seeks to safely promote oil and gas development throughout the state for the economic benefit of the citizens of West Virginia, and it vests sole and exclusive authority in WVDEP to effectuate that purpose. Accordingly, the holding in *Longwell* does not apply here.[12]

## VI. CONCLUSION

The laws of the State of West Virginia place sole responsibility for the regulation of oil and gas exploration and production activities with the WVDEP, and the same laws provide no exception or provision through which local municipalities can insert themselves into the process. Therefore, the Original UDO and the New UDO are preempted by the West Virginia Oil and Gas

[12] Importantly, the Nonintoxicating Beer Act only vests the Alcohol Beverage Control Commissioner with "sole responsibility ***for the administration of this article***". *See W. Va. Code* § 11-16-4(a) (emphasis added). In contrast, the West Virginia Oil and Gas Act vests the Secretary of WVDEP with "sole and exclusive authority" to regulate the ***permitting, location, spacing, drilling, fracturing, stimulation, well completion activities, operation, any and all other drilling and production processes, plugging and reclamation of oil and gas wells and production operations within the state***." W. Va. Code § 22-6A-6 (emphasis added). Unlike the Nonintoxicating Beer Act, the West Virginia Oil and Gas Act does not merely empower WVDEP with the authority to administer the act. Rather, it specifies that WVDEP will have sole and exclusive authority to regulate the permitting and location and of all oil and gas wells. The Nonintoxicating Beer Act does not contain any such express and specific preemption language.

Act to the extent they attempt to regulate oil and gas exploration activities. For these reasons, SWN respectfully requests that the Court enter an Order:

1. Declaring that the Original UDO and New UDO, to the extent they regulate oil and gas exploration and production activities, are preempted by the West Virginia Oil and Gas Act and are unenforceable; and

2. Preliminarily and permanently enjoining the City from enforcing, directly or indirectly, either the Original UDO or New UDO against SWN.

Respectfully submitted,

Dated: December 22, 2022

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

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| SWN PRODUCTION COMPANY, LLC, | : | |
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| *Petitioner*, | : | Civil Action No. 22-ICA-83 |
| v. | : | (Brooke County, Nos. CC-05-2021-C-71 & |
| | : | CC-05-2021-P-35) |
| CITY OF WEIRTON and | : | |
| CITY OF WEIRTON BOARD OF | : | |
| ZONING APPEALS, | : | |
| | : | |
| *Respondents*. | : | |

## CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of December, 2022, I served the foregoing ***Opening Brief of Petitioner*** upon the Respondents' counsel via the West Virginia E-Filing System (File & Serve Express), to the following:

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