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.

REPLY BRIEF OF PETITIONER, SWN PRODUCTION COMPANY, LLC

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)

Shawn N. Gallagher
WV I.D. No. 12853
shawn.gallagher@bipc.com
Kathleen Jones Goldman
WV I.D. No. 6917
kathleen.goldman@bipc.com

Buchanan Ingersoll & Rooney LLP
Union Trust Building, Suite 200
501 Grant Street
Pittsburgh, PA 15219
(412) 562-8362

Counsel for Petitioner,
SWN Production Company, LLC

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I. INTRODUCTION

In its Response Brief, the City resorts to distorting the plain meaning of the West Virginia Oil and Gas Act's express preemption provision in an effort to avoid its unambiguous mandate: WVDEP has sole and exclusive authority to regulate the location of horizontal oil and gas wells in West Virginia.[1] There is no exception made for local zoning authorities.

The City further attempts to recast this case as a matter of preserving the rights of municipalities to adopt "traditional zoning" regulations concerning the mere location of oil and gas development. The City cites to cases in West Virginia and other jurisdictions in support of its argument that "traditional zoning" does not interfere with the state permitting of oil and gas development. The cases cited to by the City do not support its argument. Rather, those cases bolster the conclusion that the City's zoning ordinance attempts to regulate precisely the same subject matter that is covered by the West Virginia Oil and Gas Act. Further, the City's attempt to recast this matter as nothing more than its attempt to zone where oil and gas may be located rings hollow, considering the Brownlee Site at issue in this case was zoned as an appropriate area for oil and gas development at the time of SWN's application.

The City's Response Brief actually serves to highlight the reasons why the West Virginia Oil and Gas Act preempts all local zoning authority. SWN thus presents this Reply Brief to correct the City's factual and legal misrepresentations and to address the fallacies in its arguments.

[1] Capitalized terms in this Reply Brief shall have the meaning ascribed to them in SWN's Opening Brief.

II. ARGUMENT

A. The West Virginia Oil and Gas Act Contains an Unambiguous and Express Preemption Clause

In its Response Brief, the City now takes the position the West Virginia Oil and Gas Act does not contain an express preemption clause, despite the existence of Section 22-6A-6(b) of the West Virginia Oil and Gas Act, which unambiguously provides that:

> ***[T]he [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***.

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

In the Circuit Court proceedings, the City initially took the completely unsupported (and misleading) position that the West Virginia Oil and Gas Act is "devoid of any explicit statement or suggestion that the [WVDEP] is vested with the *sole and exclusive authority* to regulate *all aspects* of the oil and gas industry in this State. Nothing in the [West Virginia Oil and Gas Act] remotely suggests that the Legislature intended for the WVDEP to have exclusive jurisdiction of the regulation of oil and natural gas drilling activities." (App. 242) (emphasis in original). But, in fact, Section 22-6A-6(b) of the West Virginia Oil and Gas Act contains precisely the language that the City claimed to the Circuit Court it did not.

It was only after SWN pointed out the express preemption language in Section 22-6A-6(b) to the Circuit Court that the City began to argue that WVDEP's "sole and exclusive authority to regulate the…location…of oil and gas wells" does not mean have its plain meaning. In its Response Brief, the City now resorts to distortion of the plain text of Section 22-6A-6(b) and to irrelevant canons of statutory construction, all of which are inapplicable where, as here, no ambiguity exists. Regarding the rules of statutory interpretation, the West Virginia Supreme Court of Appeals has explained that:

> It is basic in our law and universally accepted that where the language of a statute is free from ambiguity, its plain meaning is to be accepted and applied without resort to interpretation… Accordingly, it is only where there is some ambiguity in the statute or some uncertainty as to the meaning intended that resort may be had to rules of construction of statutes…When a statute is clear and unambiguous and the legislative intent is plain the statute should not be interpreted by the courts, and in such case it is the duty of the courts not to construe but to apply the statute.

Crockett v. Andrews, 153 W.Va. 714, 718, 172 S.E.2d 384, 387 (1970) (internal citations omitted).

Here, the plain meaning of W. Va. Code § 22-6A-6(b) could not be clearer. That section provides that WVDEP "has sole and exclusive authority to regulate the…location…of oil and gas wells." (emphasis added). The plain meaning of the wording chosen by the legislature is clear and unambiguous. Black's Law Dictionary defines "exclusive" as "[l]imited to a particular person, group, entity, or thing" and "exclusive power" as "[a] power held by only one person or authoritative body." *Black's Law Dictionary* (11th ed. 2019). Similarly, Merriam-Webster's Collegiate Dictionary defines "exclusive" as "control…by a single individual or group," "sole," "being the only one," and "belonging exclusively or otherwise limited to one usually specified individual, unit, or group." *Merriam-Webster's Collegiate Dictionary* (11th ed. 2004). Accordingly, the plain text of Section 22-6A-6(b) unambiguously provides that WVDEP is the *only* entity with the power to regulate the "location" of horizontal oil and gas wells. Thus, Section 22-6A-6(b) expressly preempts local zoning laws to the extent they purport to vest decision making power over the location of horizontal gas wells *in any entity other than WVDEP*. And, because there is no ambiguity, the City's resort to canons of statutory interpretation is both unnecessary and improper.

Nevertheless, in an effort to avoid the obvious preemptive effect of Section 22-6A-6(b), the City would have this court flippantly disregard the plain meaning of the word "location." *See* City's Response Brief, at p. 13 ("On appeal, Petitioner persists in arguing that the word 'location' in §22-6A-6(b) should be taken out of context and read to make the DEP secretary's

approval of a well location a 'final approval' of every siting decision."). The City argues that the principles of statutory construction require that "'the word location, like the other words in the statute, should fit…into a harmonious whole and must be read in…context and with a view to their place in the overall statutory scheme." *Id. citing Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1989).

The City's position is untenable. First and foremost, no statutory interpretation is necessary here because the terms "sole and exclusive authority" and "location" are entirely unambiguous. *See Crockett*, 153 W.Va. at 718 ("Where the language is unambiguous, no ambiguity can be authorized by interpretation. Plain language should be afforded its plain meaning. Rules of interpretation are resorted to for the purpose of resolving an ambiguity, not for the purpose of creating it."). In fact, Section 22-6A-6(b) plainly and unambiguously states what the City claims it somehow does not: WVDEP has "sole and exclusive authority to regulate the...location…of oil and gas wells" and no exception is made for local zoning authorities. Second, even if the rules of statutory construction were relevant, express preemption would still exist under Section 22-6A-6(b). Simply put, the City fails to explain how an interpretation of Section 22-6A-6(b) that places "final approval of every siting decision" with WVDEP is not "harmonious" with the overall statutory scheme of West Virginia Oil and Gas Act.[2]

[2] Indeed, as the City notes in its Response Brief, 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 WV 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. *See* W. Va. Code § 22-6A-8(f). Contrary to the City's assertion, upon WVDEP's evaluation all of these considerations, it is entirely "harmonious" with the West Virginia Oil and Gas Act that the WVDEP should be vested with "sole and exclusive authority" to determine the final location of an oil and gas well.

The City also attempts to distort the wording of Section 22-6A-6(b) by contending this section is only concerned with "drilling and production processes" and not to the siting or location of oil and gas wells. Specifically, the City argues that:

> This section of the Code grants the DEP secretary the power to exercise regulatory authority over all gas operations regulated by [W. Va. Code §22-6A-l et seq. W. Va. Code § 22-6A-6(a)(2). The paragraph relied on by Petitioner relates to that same regulatory authority - the authority to regulate 'any and all... drilling and production processes,' not to local authority to provide for compatible land uses under the Land Use Planning Act.

See City's Response Brief, at p.14.

Importantly, the City omitted the following underscored language from its citation to Section 22-6A-6(b): "any and all <u>other</u> drilling and production processes." This omission is significant, because it demonstrates the City's attempt to mislead the Court into assuming that Section 22-6A-6(b) only grants WVDEP the sole and exclusive authority to regulate "drilling and production processes," when that is clearly not the case. In fact, Section 22-6A-6(b) grants WVDEP the sole and exclusive authority over "permitting, location, spacing, <u>drilling, fracturing, stimulation, well completion activities, operation, any and all other drilling and production processes</u>, plugging and reclamation of oil and gas wells and production operations within the state." (emphasis added).

The City's interpretation would render the inclusion of the terms "permitting," "location" and "spacing" entirely meaningless, because none of these terms are types of "drilling and production processes," which the City claims are the only subject matter of Section 22-6A-6(b). Accordingly, the City's interpretation is erroneous. *See* Syllabus Point 3, *Meadows v. Wal–Mart Stores, Inc*., 207 W.Va. 203, 530 S.E.2d 676 (1999) ("A cardinal rule of statutory construction is that significance and effect must, if possible, be given to every section, clause, word or part of the statute."); *State ex rel. Johnson v. Robinson*, 162 W.Va. 579, 582, 251 S.E.2d 505,

508 (1979) ("It is a well known rule of statutory construction that the Legislature is presumed to intend that every word used in a statute has a specific purpose and meaning.").

Again, the preemption in this case is express and unequivocal. WVDEP is plainly and unambiguously vested with "sole and exclusive authority" to determine the "location" of horizontal gas wells. No exception is made for local zoning authorities. Therefore, any provision of a municipal zoning ordinance purporting to regulate the final location of a horizontal gas well is necessarily preempted as a matter of law.

B. The Only Cases Interpreting the Scope of the West Virginia Oil and Gas Act Support a Finding of Preemption in this Case

Because the West Virginia Oil and Gas Act contains an express preemption clause that specifically preempts any local regulation of horizontal drilling, there is no need to resort to field preemption and conflict preemption analyses in order to find that the City's UDO is preempted as a matter of law. However, even if Section 22-6A-6(b) did not expressly preempt local regulations of horizontal drilling activities, the West Virginia cases cited by SWN in its Opening Brief, which were decided under the West Virginia Oil and Gas Act's conventional well provisions, nevertheless support a finding preemption here based upon field preemption and conflict preempt principles. Specifically, the courts in both *EQT Production Company v. Wender*, 870 F.3d 322 (4th Cir. 2017) and *Northeast Natural Energy, LLC* v. *The City of Morgantown,* 2011 WL 3584376 (No. 11-C-411, August 12, 2011) both found that municipal regulation of conventional oil and gas wells was preempted, even in the absence of the express preemption provision for horizontal drilling contained in Section 22-6A-6(b).

Section 22-6A-6(b) became effective on December 14, 2011, as part of the enactment of Chapter 6A of the West Virginia Oil and Gas Act. *See* W. Va. Code, § 22-6A-1.[3]

[3] In adopting Chapter 6A, the Legislature found that "[t]he advent and advancement of new and existing technologies and drilling practices have created the opportunity for the efficient

The Legislature adopted Chapter 6A (also known as the Horizontal Well Control Act) in order to update and supplement the existing West Virginia Oil and Gas Act to address horizontal drilling specifically. Importantly, *EQT* involved a challenge to a county ordinance's restriction of wastewater storage at conventional drilling sites and *Northeast Natural Energy* involved a challenge to a local ban on horizontal drilling that occurred prior to the Legislature's enactment of Chapter 6A. Thus, both *EQT* and *Northeast Natural Energy* concerned the preemptive effect of the West Virginia Oil and Gas Act without regard to the express preemption provision for horizontal drilling activities contained in contained in Section 22-6A-6(b).

Even without the benefit of the express preemption provision, the respective courts found that the comprehensive nature of the West Virginia Oil and Gas Act resulted in both conflict preemption and field preemption of local oil and gas regulation. First, in *EQT*, the county regulation at issue prohibited storage of drilling and production wastewater at conventional well sites. *EQT*, 870 F.3d at 335. In finding that the county ordinance was preempted under principles of conflict preemption, the Fourth Circuit explained:

> ***In any event, we agree with the district court that, considered separately, the Ordinance's restriction is inconsistent with the state Oil and Gas Act and thus preempted. 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." W. Va. Code § 22-6-2(c)(12)…***Indeed, in this respect, the Ordinance's storage restriction is in fundamental conflict with the Oil and Gas Act, under which the state has approved EQT's plans for disposal at its in-county UIC well in the course of permitting EQT's conventional wells***…By restricting wastewater storage at conventional well sites—and doing so based on the intent of a well operator to dispose of wastewater at a county UIC well—***the Ordinance creates an inconsistency with the Oil and Gas Act that "must be resolved in favor of the State."*** *Brackman's Inc.*, 27 S.E.2d at 78.

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development of natural gas contained in underground shales and other geologic formations…. 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." *See* W. Va. Code § 22-6A-2(a).

Id. at 336 (emphasis added).

Thus, even in the absence of express preemption, the *EQT* court found that a fundamental conflict with the West Virginia Oil and Gas Act will occur where "the state has approved [an operator's] plans" and a local ordinance purports to nullify the state's approval by denying a local permit. *Id*. Contrary to the City's assertions, this conflict exists whether or not there is a blanket "ban" on the permitted activity. *Id.* [4] Where, as here, the state has expressly approved the location of a horizontal drilling site, principles of conflict preemption prohibit a municipality nullifying that approval through a zoning restriction, or otherwise.[5]

Similarly, in *Northeast Natural Energy*, the Circuit Court found that preemption existed, despite evaluating the challenge to the local ordinance under Chapter 6 of the West Virginia Oil and Gas Act, which does not have the benefit of the Section 22-6A-6(b) express

[4] Furthermore, it bears noting that the City's New UDO actually is an effective ban on oil and gas development within the City. That ordinance limits oil and development to only the industrial districts and then imposes setbacks within those districts that cannot be met.

[5] This is true despite the "Acknowledgement" form cited to by the City and which was signed by SWN as part of the state permitting process. *See* City's Response Brief, a p. 17. The Acknowledgement form merely provides that there are other state and federal programs that may require additional permitting, authority for which has already been delegated to other state agencies, or which are controlled by federal law. Each of the specific outside agencies listed on the Acknowledgment are divisions of WVDEP (WV Division of Water and Waste Management and WV Division of Natural Resources), federal agencies (U.S. Army Corps of Engineers and U.S. Fish and Wildlife Services) or local agencies that have been delegated power under federal law (County Floodplain Coordinator under the National Flood Insurance Program). If WVDEP intended to include local zoning approval, it would have listed municipalities.

Further, WVDEP's form document is not a statute, or even a duly adopted regulation, which would be capable of overriding the clear intent of the WV Oil & Gas Act to preempt the field of oil and gas regulation. This is not to say that the City cannot enact regulations that touch upon the oil and gas activity, such as right-of-way use permits or timbering permits, like the one obtained by SWN in this case. However, those permits cannot have the effect denying the rights and privileges granted in SWN's well work permit. *See Brackman's Inc., v. City of Huntington,* 126 W.Va. 21, 27 S.E.2d 71, 79 (1943) ("[W]hen a [state] license for such purpose is so granted, a municipality may not interfere with the exercise of the privilege vested in the licensee thereunder, by refusing to grant a license or permit therefor.").

preemption language. Again, contrary to the City's assertions, that the regulation passed by the City of Morgantown was a complete ban on horizontal drilling, rather than a zoning ordinance limiting a well's location, was irrelevant to the court's preemption analysis. In finding that the City of Morgantown's ordinance was preempted by principles of field preemption, the court explained:

> In W.Va, CODE § 22 W.Va, CODE § 22-66, *et seq*. (1994), the Legislature explicitly set forth a comprehensive framework for the application for oil well permits. The applicant is required to specifically set forth the type of well, the location, the depth, the purpose of the well, fees associated with the well, etc. See W.Va. CODE § 22-6-6(c) (1994). ***The Director is given the sole discretion to authorize or deny the issuance of said permit on the basis of numerous factors***, such as substantial violations of a previously issued permit by the applicant. See W.VA. CODE § 22-6-6(h) & § 22-6-11 (1994). The regulations further state the specific requirements for notice to property owners, the procedure for filing comments, the process for setting hearings upon objections to such drilling, as well as the procedures for an appeal process. See W.VA. CODE §§ 22-6-9 through 22-6-17 (1994). ***The provisions clearly indicate that this area of law is 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***…This Court is mindful that the environmental issues regarding the fracking process are foremost in the public's concern. However, it is also apparent to this Court that the environmental issues are being addressed by our State government…[6]

Northeast Natural Energy, 2011 WL 3584376 at p. 4 (emphasis added).

Again, even without the express preemption provision that was added to Chapter 6A specifically to address horizontal drilling in 2011, the *Northeast Natural Energy* court found that the comprehensive regulatory scheme contained in the West Virginia Oil and Gas Act was sufficient to render the City of Morgantown's ordinance invalid under principles of field

[6] It is significant that *Northeast Natural Energy* was decided on August 12, 2011 and Chapter 6A became effective on December 14, 2011. As the City notes, "the legislature is presumed to know the effect of its actions, and it will generally speak clearly when it intends to pre-empt another law." *See* City's Reponse Brief, at pp. 8-9 (internal citations omitted). Thus, the state legislature was presumably aware of the preemption challenges being made to local ordinances and the effect its new legislation would have on those challenges. Yet, when it enacted Chapter 6A, it did not choose to limit the preemptive effect of the holding in *Northeast Natural Energy*. Rather, it chose to "speak clearly" and make express the field preemption that had already been found by the Circuit Court in *Northeast Natural Energy*.

preemption. That the Morgantown ordinance completely banned hydraulic fracturing, rather than simply regulating its location, is irrelevant. There, as here, "no exception is carved our for any locality or municipality." *Id*. Accordingly, the City's UDO would also be preempted under principles of conflict preemption and field preemption, even if the express preemption provision contained in Section 22-6A-6(b) had not been adopted in 2011.

C. The UDO Attempts to Regulate the Same Subject as the West Virginia Oil and Gas Act

Throughout its Response Brief, the City asserts that "zoning laws serve purposes distinct from state permitting laws" and are thus saved from preemption. *See* City's Response Brief, at pp. 14, 18, 21-22, 24, 27. The City cites to several decisions from other jurisdictions, which the City asserts stand for the proposition that "traditional zoning concerns" are always separate and distinct from the environmental regulation of oil and gas activities, and are therefore not preempted under principles of field or conflict preemption.[7] As discussed below, the extraterritorial cases cited by the City are inapposite for a variety of reasons. But, more fundamentally, the City's own Reponse Brief makes clear that the City's UDO is in fact attempting to regulate almost all of the same subject areas that are exclusively regulated by WVDEP under the West Virginia Oil and Gas Act.

The City argues that its UDO merely regulates "traditional zoning concerns such as traffic, development compatibility with surrounding uses, and noise and light impacts to surrounding properties." *See* City's Response Brief , at p. 19. It further argues that the Land Use Act empowers the City to "prevent oil and gas development in districts where it is not appropriate

[7] The City's attempt to recast its UDO as nothing more than the attempt to zone where oil and gas may be located is somewhat laughable considering the Brownlee Site at issue in this case was zoned as an appropriate area for oil and gas development at the time SWN made its conditional use application.

[,] adopt performance standards that ensure compatible uses, such as establishing conditions for lighting and noise reduction, [and] regulate property access points…to lessen congestion and regulate traffic flow so community members can travel effectively." *Id.* The zoning ordinance must also "promote…general public welfare, health, safety, comfort and morals' and provide a plan so that adequate light, air, convenience of access and safety from fire, flood and other danger is secured." *Id. citing* W. Va. Code § 8A-7-2(a). Thus, the City argues that its UDO is not preempted because the West Virginia Oil and Gas Act does not attempt to regulate these areas of "traditional zoning concerns." *See* City's Response Brief , at p. 19.[8]

That assertion is incorrect. Almost all of the "traditional zoning concerns" recited by the City are in fact the specific subject of regulation under the plain language of the West Virginia Oil and Gas Act. As the City notes in its Response Brief, the West Virginia Oil and Gas Act provides that WVDEP may not issue a drilling permit if it determines that: (1) the proposed well work will constitute a hazard to the safety of persons; (2) the plan for soil erosion and sediment control is not adequate or effective; (3) damage would occur to property; or (4) 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). The act also provides the Secretary of WVDEP must consider "rules establishing guidelines and procedures regarding reasonable levels

[8] The City continues to rely on Section 8A-7-10(e) of the Land Use Act, which the City contends saves the UDO from preemption and allows municipalities to regulate "natural resources" within municipal borders, but not outside of them. However, even if this Section applied to oil and gas (which is not clear from the vague reference to "natural resources"), it would still be defeated by the express preemption contained in Section 22-6A-6(b), which was adopted after the Land Use Act, and which expressly preempts any local regulation purporting to regulate the location of oil and gas wells. *See Wiley v. Toppings*, 210 W.Va. 173, 175, 556 S.E.2d 818, 820 (2001) ("When faced with two conflicting enactments, this Court and courts generally follow the black-letter principle that effect should always be given to the latest expression of the legislative will.") (internal citations omitted).

of noise, light, dust and volatile organic compounds relating to drilling horizontal wells, including reasonable means of mitigating such factors, if necessary. *See* W. Va. Code § 22-6A-12(e). Finally, WVDEP is also tasked with promptly reviewing and considering all comments raised by the public. *See* W. Va. Code § 22-6A-8(f).

Because the West Virginia Oil and Gas Act is so broad and comprehensive, it is beyond doubt that local zoning ordinances, including the City's UDO at issue here, do in fact purport to regulate the same areas of the oil and gas industry as the West Virginia Oil and Gas Act. Accordingly, the Legislature's express delegation of "sole and exclusive authority" to regulate the "permitting" and "location" of oil and gas wells to WVDEP preempts any attempt by a municipality to determine the final location of a horizontal oil and gas well, whether under a zoning ordinance or otherwise.

Thus, the City's reliance on *Longwell v. Hodge*, 171 W. Va. 45, 297 S.E.2d 820 (1982) and *EQT* to support its proposition that local regulation may "coincidentally" "touch upon" the same areas regulated by the state without violating principles of preemption, is misplaced in this case. As noted by the City, in *Longwell*, the court held that:

> ***Although the risks of briefly summarizing a large body of law are great,*** one can safely conclude that, by and large, municipal zoning regulations interfering with state regulation in other areas will be upheld ***to the extent that the interference is the coincidental by-product of the municipal zoning board's legitimate pursuit of its delegated goals***. Or, to put it another way, that the conflict between state and municipality is "false."

Longwell, 297 S.E.2d at 825. However, in that same decision, the court also qualified its "risky" summary of the law by noting that a local regulation *would* be preempted if there was a "direct, explicit attempt by the city to regulate an area that the State has preempted." *Id*. (internal citation omitted). Similarly, the City also relies on a passage on *EQT*, where the Fourth Circuit noted the general principal that "possession of a state permit will not preclude all local regulation ***touching on the licensed activity***." *See* City's Response Brief, at pp. 3, 5 & 34 (emphasis added). However,

citing *Brackman's*, the court also clearly stated that "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." *EQT*, 87 F.3d at 333 (internal citation omitted).

Here, the City's attempt to regulate the location of oil and gas wells through its UDO is not "merely the coincidental by-product of the municipal zoning board's legitimate pursuit of its delated goals." *Longwell*, 297 S.E.2d at 825. Rather, the City's UDO explicitly identifies oil and gas uses and attempts to regulate their "location" within certain zoning districts in the City. The City's UDO does not merely "touch" upon the same subject as the state's comprehensive oil and gas regulatory scheme.[9] Rather, the UDO directly and explicitly targets the "permitting" and "location" of horizontal oil and gas wells, which is within the sole and exclusive jurisdiction of WVDEP under Section 22-6A-6(b) of the West Virginia Oil and Gas Act. Therefore, this Court should not "infer a right [by the City] to nullify" SWN's state issued well-work permit merely because the City has enacted a zoning ordinance of general applicability. *EQT*, 87 F.3d at 333.

D. A Finding of Preemption Would Not Result in the Dire Consequences Advanced by the City

The City attempts to mischaracterize SWN's express preemption argument in this case by stating that, if successful, SWN would effectively "invalidate all West Virginia zoning laws." *See* City's Response Brief, at p. 6. Not so. SWN has consistently argued that local zoning laws are merely preempted "to the extent they attempt to regulate oil and gas exploration activities." *See* SWN's Opening Brief, at p. 26. If the Court were to rule in SWN's favor, the City's zoning laws will remain in effect with respect to all uses not preempted by state law.

[9] Again, as noted above, SWN does not contend that certain local regulation may not "touch upon" oil and gas activities, such as timbering permits, right of way use permits, building permits, etc. However, that regulation cannot have the effect denying the rights and privileges granted in SWN's well work permit or directly regulating an area of oil and gas production (including "location") that are exclusively delegated to WVDEP. *See Brackman's Inc.* 27 S.E.2d at 79.

In fact, if preemption is found here, only the placement of oil and gas well sites would no longer be subject to the City's local regulation. However, all of the comprehensive safeguards contained in the West Virginia Oil and Gas Act would remain enforceable by WVDEP. As discussed at length above, WVDEP's regulation of oil and gas wells includes, among many others, protections related to the site location, noise, light, dust, hazard to the safety of persons, soil erosion and sediment control, damage to property and fresh water sources. *See* W. Va. Code §§ 22-6A-8(d); 22-6A-8(e); 22-6A-12(e); 22-6A-8(f). All of these considerations cover the same subjects that the City's UDO purports to protect. Accordingly, the City's concerns are unfounded, given the comprehensive nature of the West Virginia Oil and Gas Act and the myriad of protections contained therein.

The City further argues that if SWN's preemption theory were accepted natural gas well pads in "all residential area throughout the state." *See* City's Response Brief at 39. That is simply false. The WV Oil and Gas Act expressly prohibits ***any*** development within 625 feet of an occupied residential structure for horizontal wells. *See* W. Va. Code §22-6A-12(a).[10] It would be nearly impossible for an operator to meet the setback requirement in a residential area. As a concrete example of the type of site typically sought for unconventional drilling, the Brownlee Site at issue here is approximately 301.83 acres of vacant and wooded land. The well pad is located more than **1,200** feet from the closest residential structure. (App. 273).

Finally, the City continues to contend that "[t]o accept Petitioner's argument that exclusive permitting authority in the secretary preempts all West Virginia zoning laws would also

[10] Again, contrary to the City's assertion, the West Virginia Oil and Gas does contain a 200 foot setback requirements for conventional wells. *See* W. Va. Code § 22-6-21; City's Reponse Brief, at p. 39 ("These wells are not subject to the same environmental regulatory setback requirements…"). In any event, approval for conventional wells would involve the same intense scrutiny from WVDEP as for horizontal well permit approval described above.

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), underground storage tanks (W. Va. Code § 22-17-5), and hazardous waste (W. Va. Code § 22-18-5)." SWN addressed this argument in its Opening Brief, but the City now claims that "in each instance, the secretary is given similarly broad authority encompassing 'all aspects' of permitting surface coal mines or 'exclusive authority' to permit aboveground storage tanks." The City's assertion is simply false. As set forth at length in SWN's Opening Brief, none of the statutes referenced by the City contain any express language whatsoever granting the WVDEP the "sole and exclusive authority" to regulate the site location and permitting of the geothermal facilities, above ground storage tanks, underground storage tanks, or hazardous waste sites. Indeed, the other statutes merely give WVDEP the exclusive general authority to administer those articles, not specific and exclusive authority to determine the location of permitted sites. As set forth at length in SWN's Opening Brief, 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.

Accordingly, the City's arguments relating to the consequences of a finding state preemption of oil and gas regulation are vastly overblown.

E. Neighboring States' Oil & Gas Act Statutes and State Supreme Court Cases

As previously addressed, the West Virginia Oil and Gas Act expressly preempts local zoning authority without exception. As such, the City's canvass of preemption challenges under other statewide oil and gas statutes is entirely irrelevant. Moreover, none of the oil and gas

regulatory schemes from other states referenced by the City contain any language granting their respective enforcement agencies "sole and exclusive power" to regulate the permitting or specific location of oil and gas wells. That being said, an examination of how West Virginia's neighboring states' highest courts and legislatures have addressed the preemption of local zoning actually underscores the preemptive force of West Virginia Oil and Gas Act.

The City cites several times to an intermediate appellate Pennsylvania court decision, *Arbor Resources LLC v. Nockamixon Twp*., 973 A.2d 1036 (Pa. Commw. Ct. 2009), for the proposition that a zoning ordinance provision concerning the location of an oil and gas drilling use was not preempted by the since repealed Pennsylvania Oil & Gas Act ("Prior PA Oil & Gas Act"), 58 P.S. § 601.101 *et seq*. Unlike the West Virginia Oil and Gas Act, the Prior PA Oil & Gas Act explicitly preserved, to a very limited extent, local zoning ordinances adopted pursuant to the Pennsylvania Municipalities Planning Code[11] ("MPC Exception"). Section 602 of the Prior PA Oil and Gas Act specifically provided:

> ***Except with respect to ordinances adopted pursuant*** to the act of July 31, 1968 (P.L. 805, No. 247), known as ***the Pennsylvania Municipalities Planning Code***, and the act of October 4, 1978 (P.L. 851, No. 166), known as the Flood Plain Management Act,[12] all local ordinances and enactments purporting to regulate oil and gas well operations regulated by this act are hereby superseded. ***No ordinances or enactments adopted pursuant to the aforementioned acts shall contain provisions which impose conditions, requirements or limitations on the same features of oil and gas well operations regulated by this act or that accomplish the same purposes as set forth in this act.*** The Commonwealth, by this

[11] The Pennsylvania Municipalities Planning Code ("MPC") is the planning enabling statute governing the land-use powers of all Pennsylvania municipalities. It is the Pennsylvania equivalent of the Land Use Act.

[12] The Prior PA Oil & Gas Act also preserved authority under the Flood Plain Management Act, a comprehensive and coordinated program of flood plain management that is based on the National Flood Insurance Program ("NFIP"), 42 U.S.C. § 4011 *et.seq*. All oil and gas development throughout the United States must comply with these Flood Plain requirements. This is the reason the "County Floodplain Coordinator" is the only listed permitting authority that is not a federal or state agency in the WVDEP "Acknowledgment." *See* City's Response Brief at p. 17.

enactment, hereby preempts and supersedes the regulation of oil and gas wells as herein defined.

58 P.S. § 601.602 (emphasis added).

In two companion Pennsylvania Supreme Court cases, *Huntley & Huntley, Inc. v. Borough Council of Borough of Oakmont*, 964 A.2d 861 (Pa. 2009) and *Range Resources Appalachia, LLC v. Salem Twp*., 964 A.2d 869, 872 (Pa. 2009), the Pennsylvania Supreme Court considered the preemptive scope of Section 602 and the extent of local zoning authority under the MPC Exception.[13] The Supreme Court also invited the Pennsylvania Department of Environmental Protection ("PaDEP") to file an amicus brief articulating its view of whether the Prior PA Oil & Gas Act and its associated administrative regulations preempted the local regulations at issue.[14] *Range Resources,* 964 A.2d at 872.

In *Huntley & Huntley,* the Pennsylvania Supreme Court concluded that the Prior PA Oil & Gas Act's preemptive scope was not total in the sense that it did not prohibit municipalities from enacting traditional zoning regulations that identify which uses are permitted in different areas of the locality, even if such regulations precluded oil and gas drilling in certain zones. *See Huntley & Huntley*, 964 A.2d at 865.[15] In *Range Resources*, the Pennsylvania Supreme

[13] In *Huntley & Huntley,* the Supreme Court considered the appeal of an intermediate appellate court decision that there was no zoning authority preserved under the MPC Exception in light of the second sentence of Section 602. The ordinance at issue in *Range Resources* provided for local operational provisions (which included traffic and noise) and locational requirements on oil and gas development that were similar to or overlapped with state regulations.

[14] In *Huntley & Huntley,* the PaDEP agreed with the borough's position that the first sentence of Section 602 allowed for some level of zoning authority under the rules of statutory construction. The PaDEP opined that traditional zoning limited to the designation of zoning districts was not preempted under the Prior PA Oil & Gas Act. In all of other respects, the PaDEP advocated for the need for statewide uniformity in the regulation of the oil and gas industry. *See Range Resources,* 964 A.2d at 874.

[15] In so holding, the Pennsylvania Supreme Court noted that increased setbacks were not permitted. *See Id* at 865 f.n. 10 *citing St. Croix, Ltd. v. Bath Township*, 118 Ohio App.3d 438, 693 N.E.2d 297 (1997) (holding that, where the state oil and gas statute prescribed a specific setback

Court concluded that, pursuant to the principles of conflict preemption and the broad express preemption provision in the Prior PA Oil & Gas Act, the local ordinance at issue was preempted. *Range Resources*, 964 A.2d at 876. Thus, the status of local zoning authority over oil and gas operations at the time of the *Arbor Resources* case was limited to the location of oil and gas development in certain zoning districts.[16] That was all that was permitted under the Prior PA Oil & Gas Act's MPC Exception. If the MPC was not expressly referenced in the statute, there would have been no local zoning authority over the location of oil and gas operations in Pennsylvania. Here, no such analysis is necessary because there is no "Land Use Act" exception or local municipal exception in the West Virginia Oil and Gas Act.

Further, the City ignores that in response to the *Huntley & Huntley* decision, the Pennsylvania General Assembly repealed the Prior PA Oil & Gas Act in 2012 and adopted the Unconventional Gas Well Impact Fee Act ("New PA Oil & Gas Act"). The New PA Oil & Gas Act maintained the MPC Exception but required municipalities that adopted zoning ordinances to

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distance for oil wells relative to habitable structures, localities were precluded from increasing those distances through zoning). In the new Unified Development Ordinance that became effective after the Application was filed, the setback was increased to 2,500 feet from any residential, church or school uses.

[16] Although a "traditional zoning" analysis as the one addressed in *Huntley & Huntley* is not necessary here, it is worth noting that the Unified Development Ordinance that was in effect when SWN made its Application permitted "Oil/ Gas Extraction" uses by conditional use in the zoning district where the Brownlee site is located so long as it was not "closer than two hundred (200) feet to any residential use" and the use complied with the WV Oil & Gas Act. *See* UDO § 9.6(24). As such, the City made the "traditional zoning" determination that oil and gas development was an appropriate use in this area. As provided for in SWN's appeal of the conditional use application denial, there is no question that this is the most appropriate area for oil and gas development within the City. The Brownlee Site is 301.83 acres of vacant and wooded land. The Well Pad is located more than 1,200 feet from the closest residential structure. The pad will not be visible once it is in production. Given the topography, the drilling and completions operations will also be largely obscured from view.

permit oil and gas drilling in **all** zoning districts and expressly preempted all other local regulations. *See* 58 Pa. C.S. §§ 3302-04.[17]

The City also cites to an unreported district court case, *Osborne v. Leroy Township*, 2014-Ohio-5774, at 2014 WL 7457065 (Ohio Ct. App. 11th Dist. Lake County 2014), for the proposition that local zoning regulations were not preempted by the Ohio state statute ("OH Oil & Gas Act"). That case concerned the storage of debris and the installation of signage on a property upon which there was an existing gas well. The case did not concern the zoning authority related to the existing gas well.[18]

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[17] In its Reponse Brief, the City cites to *Robinson Twp., Washington County v. Commonwealth*, 83 A.3d 901 (Pa. 2016) for the assertion that some of these provisions were found by the Pennsylvania Supreme Court to violate the Pennsylvania constitution. That is true, but entirely irrelevant here. The Supreme Court found that they violated the Environmental Rights Amendment to the Pennsylvania Constitution. There is no similar constitutional provision in West Virginia. Furthermore, the several cases on preemption since *Robinson* have reverted to the MPC Exception analysis addressed in *Huntley & Huntley*. Both the Prior and New PA Oil & Gas Act's had and have the MPC Exception. There is no Land Use Act exception in the West Virginia Oil and Gas Act.

Further, the City cites to several other cases and ordinances in its Response Brief and editorializes without end as to their purported meaning. *See* City's Response Brief at 20-28. For example, the City cites to a City of Pittsburgh Ordinance banning drilling for the proposition that Pennsylvania law does not preempt zoning. That ordinance would be found invalid if challenged. *See In re Charlestown Outdoor*, LLC, 280 A.3d 948, 958 (Pa. 2022) ("A zoning ordinance that excludes a legitimate use of land may be found unconstitutionally exclusionary."). Given the urban nature of Pittsburgh, it is not feasible to develop oil and gas interests there (as with most of Weirton). As such, no producer has asserted a challenge to the Pittsburgh ordinance notwithstanding that it would be struck down.

[18] The City also cited *Town of Frederick v. North American Resources Co*., 60 P.3d 758, Colo. App. 2002), for the proposition that the Colorado's state oil and gas act, the Colorado Oil & Gas Conservation Act ("CO Oil & Gas Act"), does not preempt all local zoning regulations. First of all, that statue is more permissive than the "sole and exclusive authority" the WV Oil and Gas Act vested in the WVDEP. *See* Colo. Rev. Stat. § 34-60-106(2)(a) ("The [Colorado Oil and Gas Conservation Commission] ***may*** regulate . . .the producing, and plugging of wells and all other operations for the production of oil or gas.") (emphasis added). Notwithstanding the more permissive statute, the Colorado Court of Appeals nonetheless struck ordinance provisions related to ***setbacks***, ***location***, ***noise*** mitigation, visual impacts and aesthetics and other operational regulations as conflicting with the CO Oil & Gas Act. *Id*. at 760-766 (emphasis added). These are the very matters the City argues are "traditional zoning" regulations that are not preempted.

Similar to the West Virginia Oil and Gas Act and WVDEP, the Ohio Legislature enacted legislation that placed sole responsibility for regulating oil and gas operations in the Ohio Department of Natural Resources ("Ohio DNR"). The governing statute, R.C. 1509.02, provides, in pertinent, that: "[t]he [Ohio DNR] has ***sole and exclusive authority to regulate the permitting, location, and spacing of oil and gas wells within the state***. . ." Ohio Rev. Code Ann. § 1509.02 (emphasis added). In *State ex rel. Morrison v. Beck Energy Corp*., 37 N.E.3d 128 (2015), the Supreme Court of Ohio considered a challenge to a number of ordinances that regulated oil and gas operations. *Id*. at 134. The ordinances required a conditional use zoning certificate, public notice and a hearing, the payment of a fee, the filing of a performance bond, a hearing at least three weeks prior to the commencement of drilling, and prohibited drilling a well until such time as a conditional zoning certificate had been granted for one year. *Id*. The court found that the challenged ordinances conflicted with R.C. 1509.02 and were thus preempted by the OH Oil & Gas Act. In so concluding, the court expressly rejected the argument that the challenged ordinances regulated "traditional concerns of zoning" as opposed to oil and gas drilling itself. *Id*. at 136.

Contrary to the City's assertions, the states and cases the City cites to do not support its claim that "traditional zoning" authority is preserved. Unlike Pennsylvania, there is no statutory exception or savings clause for the Land Use Act, which renders any locational vs. operational analysis irrelevant. Indeed, given the substantial similarities between the West Virginia Oil and Gas Act and OH Oil & Gas Act, it is clear that there is no local zoning authority to regulate the location of oil and gas operations that was reserved for municipalities in West Virginia.[19]

[19] The City also cites to cites *Wallach v. Town of Dryden*, 23 N.Y.3d 728, 743, 16 N.E.3d 1188 (2014). In that case, the New York Court of Appeals found that the state's Oil and Gas Solution Mining Law ("OGSML") did not preempt local zoning authority. Again, however, nothing in the OGSML contains language similar to that contained in the West Virginia Oil and

III. CONCLUSION

For these reasons, SWN respectfully requests that the Court reverse the Circuit Court's decision.

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Respectfully submitted,

Dated: February 24, 2023

/s/ Shawn N. Gallagher
Shawn N. Gallagher
WV I.D. No. 12853
Kathleen J. Goldman
WV I.D. No. 6917

Buchanan Ingersoll & Rooney LLP
Union Trust Building, Suite 200
501 Grant Street
Pittsburgh, PA 15219
(412) 562-8362

Counsel for Plaintiff

Gas Act granting the New York State Department of Environmental Conservation the "sole and exclusive" authority to determine the location of oil and gas wells.

IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

SWN PRODUCTION COMPANY, LLC,	:	
	:	
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 24th day of February, 2023, I served the foregoing ***Reply Brief of Petitioner*** upon the Respondents' counsel via the West Virginia E-Filing System (File & Serve Express), to the following:

Vincent S. Gurrera, Esq.
Gurrera Law Offices, PLLC
P.O. Box 2308
Weirton, WV 26062

Daniel J. Guida, Esq.
Guida Law Offices
3374 Main Street
Weirton, WV 26062

Ryan P. Simonton, Esq.
Margaret E. Lewis, Esq.
Kay Casto & Chaney, PLLC
150 Clay Street, Suite 100
Morgantown, WV 26505

/s/ Shawn N. Gallagher
Shawn N. Gallagher