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.

RESPONSE BRIEF OF RESPONDENT CITY OF WEIRTON

Arising from the Order of the 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

Petitioner assigns error to the Circuit Court's declaratory judgment that the neither the West Virginia Oil and Gas Act, *W. Va. Code* §§ 22-6-1 et seq. nor the Horizontal Well Control Act, *W. Va. Code* §§ 22-6A-1 et seq., preempt all local zoning regulations in West Virginia. Petitioner argues that *W. Va. Code* § 22-6A-6(b) provides, "the secretary 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." The Circuit Court properly concluded that this language, read in context, vests the secretary with environmental regulatory authority that does not conflict with zoning authority delegated to municipalities by the Land Use Planning Act, *W. Va. Code* § 8A-1-1 *et seq*. Consistent with the established law of this State, and judicial decisions in other states considering similar challenges, the Circuit Court's ruling should be upheld.

II. STATEMENT OF THE CASE

This appeal challenges the Circuit Court's declaratory judgment order denying Petitioner's facial preemption challenge that the Oil and Gas Act – or, as later alleged, the Horizontal Well Control Act – preempts all local zoning laws in West Virginia. (App. 2). Petitioner's recitation of proceedings by the Board of Zoning Appeals of the City of Weirton on its Conditional Use Application regarding a particular site development plan, and its allegations regarding later-enacted development ordinances and their application to that site development plan, are disputed by the parties, are the subject of continued proceedings in the Circuit Court, and are not properly subject of this appeal. (Pet. Br. 2-5). After full briefing on Petitioner's facial preemption challenge, the Circuit Court concluded "that neither the West Virginia Oil and Gas Act, West

Virginia Code§ 22-6-1, et seq. nor the Horizontal Well Control Act, W. Va. Code§ 22-6A-1 et seq. preempts application of the City of Weirton's zoning ordinance to natural gas exploration and drilling activities." (App. 2). In its Order, the Circuit Court specified that it was not issuing a ruling on any updates to the City of Weirton development code, nor on the action of the Board of Zoning Appeals, which are subject of ongoing proceedings on Petitioner's "Petition for Writ of Certiorari" that remains pending before the Circuit Court. (App. 4, at FN3, 4). The claims in Petitioner's "Statement of the Case," Subsection A, entitled "Introduction," to the extent they make representations about the record in the Circuit Court relating to proceedings before the Board of Zoning Appeals and specific ordinance amendments, and Subsection B, entitled "Statement of Facts" are the subject of continued litigation between the parties in the Circuit Court and are not properly subject of this appeal. The Circuit Court's order, and the issue before this Court on appeal, is limited to Petitioner's challenge to the following ruling: the "Court FINDS and CONCLUDES that all West Virginia zoning laws are neither expressly nor impliedly preempted by the Oil and Gas Act per W. Va. Code§ 22-6-1 et seq. and the Natural Gas Horizontal Well Control Act per W. Va. Code§ 22-6A-1 et seq. SWN's Complaint, in so far is it alleges a facial pre-emption challenge to all West Virginia zoning laws, is hereby DISMISSED." (App. 17).

III. SUMMARY OF ARGUMENT

Preemption is disfavored, and Petitioner can only succeed in invalidating all West Virginia zoning laws by showing an express statement in the statute preempting them, or potentially by pinpointing specific evidence of legislative intent. Petitioner fails to do either, as the Circuit Court properly held. First, no state law expressly preempts application of zoning laws to oil and gas uses in municipalities, even while preemption is stated for other uses (e.g. small cells, natural resources *outside* municipalities). Second, extensive authority finds that state environmental regulation of

oil and gas regulates a different field than local zoning and land use planning. Third, and finally, the claim that local zoning law conflicts with issuance of a state permit for a location is a classic "false conflict" that does not preempt zoning.

Petitioner asks this Court to declare that no local land use planning laws in West Virginia apply to any oil and gas use because Petitioner claims that the state Oil and Gas Act, *W. Va. Code* § 22-6-1 *et seq.*, or the Natural Gas Horizontal Well Control Act, *W. Va. Code* §§ 22-6A-1 *et seq.*[1], (collectively, the "Environmental Acts") should be interpreted to preempt local laws enacted under the state Land Use Planning Act, *W. Va. Code* §§ 8A-1-1 *et seq.* No express provision of the Environmental Acts preempts local zoning laws or the Land Use Planning Act. Therefore, Petitioner must argue that the text of the Environmental Acts implies that the legislature intended to void all local land use planning laws related to oil and gas development. In fact, the Legislature has specified its intent in the Land Use Planning Act at *W. Va. Code* § 8A-7-10(c), which provides the limitation on zoning as applied to natural resource development – allowing it within municipalities and urban areas and prohibiting it outside those areas. West Virginia's established case law holds that zoning law coexists with state regulatory permits and there is no conflict between them allowing preemption. *See Longwell v. Hodge*, 171 W. Va. 45, 297 S.E.2d 820 (1982); *Alderson v. City of Huntington*, 132 W. Va. 421, 52 S.E.2d 243 (1949); *see also EQT Production Company v. Wender*, 870 F.3d 322, 334-5 (4th Cir. 2017) ("... possession of a state permit will not preclude all local regulation touching on the licensed activity.").

This appears to be the first claim in West Virginia state courts that state environmental laws preempt land use planning, but these challenges have been brought repeatedly in other states. They have also been denied repeatedly. As other states have done, this Court should find that local

[1] Cited hereinafter as "Horizontal Well Control Act."

zoning regulations protecting health, safety, and wellness of citizens can coexist with a state permitting regime that specifically governs oil and gas operations and environmental impacts. Those decisions uniformly support the role of zoning as compatible with state environmental and safety regulatory authority over oil and gas wells, except where the state law provides express preemption or where a factual record shows a specific conflict between a provision of zoning law and a provision of the state technical standards. *See Wallach v. Dryden*, 23 N.Y.3d 728, 16 N.E.3d 1188 (2014); *Board of County Comm'rs of La Plata County v. Bowen/Edwards Assocs., Inc.*, 830 P.2d 1045, 1057 (Colo.1992); *Huntley & Huntley, Inc. v. Borough Council of Borough of Oakmont*, 600 Pa. 207, 964 A.2d 855 (2009); *Robinson Twp., Washington County v. Commonwealth*, 623 Pa. 564, 83 A.3d 901 (2016).

On Petitioner's facial challenge to zoning laws, the Court should find, consistent with *W. Va. Code* § 8A-7-10(e), our Supreme Court's decisions regarding compatibility of zoning and state permits, and the decisions of other states considering facial preemption challenges, that Petitioner is not entitled to invalidate all West Virginia zoning laws based on the Oil and Gas Act, *W. Va. Code* §§ 22-6-1 *et seq.* or the Horizontal Well Control Act, *W. Va. Code* §§ 22-6A-1 *et seq.*

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

In accordance with Rule 18(a) of the West Virginia Rules of Appellate Procedure, the issue on appeal appears suitable for oral argument under Rule 20(a)(1) and (2) as involving a claim of first impression and one that raises issues of fundamental public importance.

V. ARGUMENT

A. Standard of Review

A circuit court's entry of a declaratory judgment is reviewed *de novo*. Syl. Pt. 3, *Cox v. Amick*, 195 W. Va. 608, 466 S.E.2d 459 (1995).

B. Legal Standard for Preempting All Local Zoning Laws under Petitioner's Facial Challenge.

Pre-emption is disfavored, especially as here where it is not expressly stated in the laws at issue. *Virginia Uranium, Inc. v. Warren*, 139 S. Ct. 1894, 1901 (2019) ("And at least one feature unites them: Invoking some brooding federal interest or appealing to a judicial policy preference should never be enough to win preemption of a state law; a litigant must point specifically to "a constitutional text or a federal statute" that does the displacing or conflicts with state law."). West Virginia's established case law holds that zoning law coexists with state regulatory permits and there is no conflict between them allowing preemption. *See Longwell v. Hodge*, 171 W. Va. 45, 297 S.E.2d 820 (1982); *Alderson v. City of Huntington*, 132 W. Va. 421, 52 S.E.2d 243 (1949); *see also EQT Production Company v. Wender*, 870 F.3d 322, 334-5 (4th Cir. 2017) ("... possession of a state permit will not preclude all local regulation touching on the licensed activity.").

"Where states have traditionally regulated conduct in a given area, field preemption may only be founded on clear and manifest congressional intent to alter that tradition and occupy the field."[2] *Harrison v. 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)). "As a general rule, 'preemption is disfavored in the absence of convincing evidence warranting its application.' *Hartley Marine Corp. v. Mierke*, 196 W.Va. 669, 673, 474 S.E.2d 599, 603 (1996). 'As a result, there is a strong presumption that Congress does not intend to preempt areas of traditional state regulation.' *Chevy Chase Bank v. McCamant*, 204 W.Va. 295, 300, 512 S.E.2d 217, 222 (1998) (citation omitted). Congressional intent to preempt state law may be either express

[2] No decision of the West Virginia courts appears to make a claim of field preemption available to invalidate statutorily-authorized local law, as Petitioner attempts in this appeal. Even if this preemption doctrine is available to Petitioner, it fails to establish the elements required to pinpoint any specific language evidencing legislative intent to alter tradition and preempt all zoning authority only for oil and gas uses.

or implied. *See Chevy Chase Bank*, 204 W.Va. at 300, 512 S.E.2d at 222 (congressional intent "may be manifested by express language in a federal statute or implicit in the structure and purpose of the statute" (citation omitted)). 'To establish a case of express preemption requires proof that Congress, through specific language, preempted the specific field covered by state law.... To prevail on a claim of implied preemption, 'evidence of a congressional intent to pre-empt the specific field covered by state law' must be pinpointed.' *Hartley*, 196 W.Va. at 674, 474 S.E.2d at 604 (citation omitted)." *In re Flood Litig.*, 216 W. Va. 534, 547, 607 S.E.2d 863, 876 (W. Va. 2004).

The legislature has granted general authority for zoning laws to create districts that allow compatible land uses, and made an express exception that they may not limit natural resource development *outside of* municipalities or urban areas. *W. Va. Code* § 8A-7-10(e)[3]. Within urban areas, no such restriction exists, so the general grant of zoning power extends to cover natural resource development such as oil and gas development. *Id.*; Syl. Pt. 7, *Progressive Max Insurance Company v. Brehm*, 246 W. Va. 328, 873 S.E.2d 859 (2022). Our Supreme Court has found that the allegation that a state permit to conduct a regulated business at a particular location in a municipality preempts zoning law is a "false conflict." *Longwell v. Hodge*, 171 W. Va. 45, 50, 297 S.E.2d 820, 825.

Zoning law is conduct traditionally regulated by municipalities: "[I]n zoning a city into various use districts there must be a dividing line somewhere. The selection of such a line involves

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[3] *W. Va. Code* § 8A-7-10(e) provides in full:

(e) **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.

Id. (emphasis supplied).

the exercise of the legislative power and is a problem peculiarly within the power of the legislative body of a municipality. It involves a high degree of legislative discretion and an acute knowledge of existing conditions and circumstances." *Par Mar v. City of Parkersburg*, 183 W. Va. 706, 711, 398 S.E.2d 532, 537 (1990) (*quoting City of Miami Beach v. Wiesen*, 86 So.2d 442 (Fla.1956)).

C. Local Governments Have Express Authority to Enact Zoning Laws that Apply to Oil and Gas Development Activity, and Neither the Oil and Gas Act nor the Horizontal Well Control Act Preempt All Zoning Laws.

Petitioner argues that the Circuit Court erred by concluding that the Environmental Acts do not expressly preempt local zoning in West Virginia, nor do they imply it. The starting point for preemption analysis is the express authority delegated to local governments to enact the challenged laws, which are entitled to a presumption of validity. State law grants specific authority to cities to adopt zoning laws. *W. Va. Code* § 8A-7-1. The legislature found that local authority to plan land development is "vitally important" to a community. *W. Va. Code* § 8A-1-1(a)(1). To preserve those vital interests, municipal governing bodies are authorized to enact a zoning ordinance. *W. Va. Code* § 8A-7-1(a)(3). The zoning ordinance *must* 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." *W. Va. Code* § 8A-7-2(a). The zoning ordinance also must plan to lessen congestion, promote attractiveness and convenience, and promote orderly development. *Id.* The legislature has granted local government very specific authorities for zoning codes. They may designate or prohibit specific land uses; divide the land into districts allowing certain uses and establish performance standards for those uses; regulate height, area, bulk, use and architectural features of buildings; and regulate traffic flow and access. *W. Va. Code* § 8A-7-2(b).

These specific grants of authority describe the local regulations Petitioner seeks to invalidate here. Respondent may establish zoning districts and prevent oil and gas development in districts where it is not appropriate – for instance, with residential homes or downtown businesses. Respondent may adopt performance standards that ensure compatible uses, such as establishing conditions for lighting and noise reduction that preserve adequate light and air for neighboring properties. Respondent may regulate property access points (or permitted uses in a district) to lessen congestion and regulate traffic flow so community members can travel effectively.

There is no provision of the Land Use Planning Act that exempts oil and gas development from zoning laws. The legislature is well aware of how to preempt zoning law when it intends to do so. Its has made express preemptions within the Land Use Planning Act for other uses: group residential facilities must be permitted in all residential districts, pursuant to *W. Va. Code* § 8A-11-2. Zoning laws must treat factory-built homes in the same manner as constructed homes, pursuant to *W. Va. Code* § 8A-11-1. Essential utilities and equipment are a permitted use in any zoning district, by mandate under *W. Va. Code* § 8A-7-3(e). Separately, the Small Wireless Facilities Act expressly preempts zoning of small cells except in single-family residential zones, but not their support structures. W. Va. Code §§ 31H-2-2(b); 31H-2-4.[4] These examples prove the general rule that the legislature is presumed to know the effect of its actions, and it will

[4] 31H-2-2(b): "Small wireless facilities that meet the requirements of § 31H-2-1(f) through § 31H-2-1(j) of this code shall be classified as permitted uses and not subject to zoning review or approval if they are collocated: (1) In the right-of-way in any zone; or (2) Outside the right-of-way in property not zoned exclusively for single-family residential use."; 31H-2-4(d):"Subject to the provisions of this chapter and applicable federal law, an authority may continue to exercise zoning, land use, planning, and permitting authority within its territorial boundaries with respect to wireless support structures and utility poles; no authority shall have or exercise any jurisdiction or authority over the design, engineering, construction, installation, or operation of any small wireless facility located in an interior structure or upon the site of any campus, stadium, or athletic facility not owned or controlled by the authority, other than to comply with applicable codes; and an authority shall evaluate the structure classification for wireless support structures under the latest version of ANSI/TIA-222. Nothing in this chapter authorizes the state or any political subdivision, including an authority, to require wireless facility deployment or to regulate wireless services."

generally speak clearly when it intends to pre-empt another law. *See Virginia Uranium, Inc. v. Warren*, 139 S.Ct. 1894, 1901-2 (2019); *Davis Memorial Hospital v. West Virginia State Tax Com'r*, 222 W. Va. 677, 685-6, 671 S.E.2d 682, 690-91 (2008).

The legislature did address zoning's application to oil and gas development specifically within the Land Use Planning Act, and it chose not to prohibit zoning for these uses. *W. Va. Code* § 8A-7-10(e). The legislature struck a balance, directing that zoning may not prevent full development of oil and gas resources *outside of* municipalities or urban areas, stating, "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." Within municipalities, zoning laws are generally authorized to regulate the use of natural resources by the owner.

Because the legislature already addressed this topic in *W. Va. Code* § 8A-7-10(e) and the Land Use Planning Act generally, there is no need to engage in a conflict preemption analysis or a search for implicit local authority to enact zoning laws, as the Petitioner asks the Court to do now.

Pre-emption is disfavored, especially as here where it is not expressly stated in the laws at issue. *Virginia Uranium, Inc. v. Warren*, 139 S. Ct. 1894, 1901 (2019) ("And at least one feature unites them: Invoking some brooding federal interest or appealing to a judicial policy preference should never be enough to win preemption of a state law; a litigant must point specifically to 'a constitutional text or a federal statute' that does the displacing or conflicts with state law."). State law expresses no interest in denying a local community the power to protect general welfare through zoning laws that apply generally to oil and gas development as they do to other uses.

State law specifically authorizes municipalities like Respondent to enact zoning ordinances to promote general welfare, preserve light and air, regulate traffic, and group compatible uses. The same law prohibits zoning that limits developing natural resources – such as oil and gas production – outside of municipalities, leaving in place the authority to apply zoning to oil and gas production within municipalities. These laws provide specific authority for Respondent's zoning ordinance to regulate oil and gas development, and accordingly Petitioner's claim to exemption from the law fails.

1. Neither the Oil and Gas Act nor the Horizontal Well Control Act Contains Any Express Preemption of All Zoning Law.

Despite the express delegation of zoning power to Respondent in the Land Use Planning Act, Petitioner asks this Court to invalidate all zoning regulations as they apply to oil and gas development by relying on *W. Va. Code* § 22-6A-6(b). (Pet. Br. At 11, § C.1.). The legislature has granted general authority for zoning laws to create districts that allow compatible land uses, and made an express exception that they may not limit natural resource development *outside of* municipalities or urban areas. *W. Va. Code* § 8A-7-10(c). Within urban areas, no such restriction exists, so the general grant of zoning power extends to cover natural resource development such as oil and gas development. *Id.*; Syl. Pt. 7, *Progressive Max Insurance Company* v. *Brehm*, 246 W. Va. 328, 873 S.E.2d 859 (2022).

Petitioner nonetheless claims that the Horizontal Well Control Act expressly preempts all West Virginia zoning laws because *W. Va. Code* § 22-6A-6(b) provides the following:

> "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 pursuant to article nine, chapter twenty-two-c of this code, the secretary 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 (emphasis added). The Circuit Court properly found that this provision relates to the DEP secretary's authority over "'drilling and production processes,' not to a local municipality's authority to provide for compatible land uses under Chapter 8A." (App. 10).

Unlike the Small Wireless Facilities Act, or the preemptions for Factory-Built Homes, Group Residential Homes, Utilities, and Natural Resources Development *outside of municipalities*, this section of the statute does not contain any express preemption of local zoning laws. *See W. Va. Code* §§ 31H-2-2(b); 8A-11-2, 8A-11-1, 8A-7-3(e). Accordingly, Petitioner's express preemption claim fails.

Even considering Petitioner's argument that express preemption exists without express preemption language, Petitioner fails to prove its claim. To claim this paragraph at *W. Va. Code* § 22-6A-6(b) preempts all zoning law is to take it wholly out of context. 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-1 *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. West Virginia Code § 22-6A-8(d) specifies the scope of the DEP secretary's review when considering whether to issue a well permit. A permit may be denied or conditioned based on the following:

> The permit may not be issued, or may be conditioned including conditions with respect to the location of the well and access roads prior to issuance if the director 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 publicly owned lands or resources; or (4) The proposed well work fails to protect fresh water sources or supplies.

Id. The legislative findings in the Horizontal Well Control Act likewise explicitly state that the Act is concerned with "new and existing technologies and drilling practices" and that the DEP secretary's authority is limited to the ordinary matters considered under Chapter 22 (Environmental Resources) of the West Virginia Code. *W. Va. Code* § 22-6A-2(a)(1), (5).[5]

The Environmental Resources Chapter, and the Horizontal Well Control Act, provide for technical, safety, and environmental regulation of oil and gas development (among many other environmental resources). The import of the statutory grant of authority to the DEP secretary cannot be stripped of that context. Under the principle of *noscitur a sociis*, "statutory language cannot be construed in a vacuum," but rather "words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809, 109 S.Ct. 1500, 103 L.Ed.2d 891 (1989); *see also F.D.A. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133, 120 S.Ct. 1291, 146 L.Ed.2d 121 (2000) (internal quotation marks and citation omitted) ("A court must therefore interpret the statute as a symmetrical and coherent regulatory scheme."); *F.T.C. v. Mandel Brothers, Inc.*, 359 U.S. 385, 389, 79 S.Ct. 818, 3 L.Ed.2d 893 (1959) (stating that courts must try "to fit, if possible, all parts [of a statute] into an harmonious whole"). Further, statutes should be read *in pari materia* because "identical words used in different parts of the same act are intended to have the same meaning." *Atlantic Cleaners & Dyers v. United States*, 286 U.S. 427, 433, 52 S.Ct. 607, 76 L.Ed. 1204 (1932) (quoted by *Gustafson v. Alloyd Co.*, 513 U.S. 561, 570, 115 S.Ct. 1061, 131 L.Ed.2d 1 (1995)); *see also Erlenbaugh v. United States*, 409 U.S. 239, 243, 93 S.Ct. 477, 34 L.Ed.2d 446 (1972) ("[A] legislative body generally uses a particular word with a consistent meaning in a given

[5] This Section provides: "The secretary should have broad authority to condition the issuance of well work permits when, in the secretary's discretion, it is necessary to protect the safety of persons, to prevent inadequate or ineffective erosion and sediment control plans, to prevent damage to publicly owned lands or resources, to protect fresh water sources or supplies or to otherwise protect the environment."

context."). 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. (Pet. Br. At 13, 24). There is no support for this claim. 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." *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809, 109 S.Ct. 1500, 103 L.Ed.2d 891 (1989). As the Circuit Court properly found, the DEP secretary has authority over location of well drilling for purposes of environmental regulation.

The DEP secretary's authority to regulate all oil and gas drilling and production processes applies to all state regulation of environmental resources (and for that reason specifically exempts the shallow gas well review board, the coalbed methane review board, and the oil and gas conservation commission). To accept Petitioner'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), underground storage tanks (*W. Va. Code* § 22-17-5), and hazardous waste (*W. Va. Code* § 22-18-5). Petitioner attempts to avoid this outcome by arguing that the granting language to the DEP secretary differs. (Pet. Br. At 13-14, FN 7). The claimed distinctions are not persuasive – 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. *Id.* More importantly, this argument deviates from Petitioner's own theory of the case that the authority to grant a state permit preempts adjacent local authority over areas like zoning (or building permits, or stormwater, etc.). Each of these Acts grants

environmental regulatory power to the DEP secretary over a particular natural resource; and each Act also coexists with the delegation of local zoning authority in the Land Use Planning Act.

2. Local Zoning Laws Serve Purposes Distinct From State Permitting Laws.

Zoning laws do not regulate "environmental programs," they regulate all land use in communities to promote compatible, orderly development. *W. Va. Code* § 8A-1-1. Despite established West Virginia precedent holding that local zoning provisions are not preempted by state permitting regimes, and despite a considerable body of case law establishing the same principle specifically with respect to oil and gas drilling from other states, Petitioner argues on appeal that *W. Va. Code* § 22-6A-6(b) establishes legislative intent to preempt the entire field of local zoning regulation, without any express language supporting the claim. (Pet. Br. At 15).

a. Implied field preemption has not been used to invalidate specifically delegated local laws like zoning based on other state laws.

As a preliminary matter, West Virginia decisions have not applied the "field preemption" principles Petitioner asserts to invalidate local laws, and this Court should decline Petitioner's invitation to establish a preemption theory here. *See In re Flood Litig.*, 216 W. Va. 534, 547, 607 S.E.2d 863, 876 (W. Va. 2004). Pre-emption is disfavored, and duly-enacted local laws enjoy a presumption of validity. Syl. Pt. 3, *G-M Realty Inc. v. City of Wheeling*, 146 W. Va. 360, 361, 120 S.E.2d 249, 250 (1961). West Virginia law has allowed preemption of duly enacted local laws when there is an actual conflict between local law and a governing state law. *See, e.g. Longwell v. Hodge*, 171 W. Va. 45, 297 S.E.2d 820 (1982); *McCallister v. Nelson*, 186 W. Va. 131, 411 S.E.2d 456 (1991); *W. Va. Const.* Art. VI, §39(a). [6]

[6] Petitioner repeatedly cites a portion of the Municipal Home Rule Amendment to the State Constitution in support of its preemption argument. As its title indicates, this Constitutional provision states that municipalities "may pass all

b. Petitioner's cited cases do not support implied field preemption in this claim.

Petitioner notes that a reviewing court may only find field preemption "upon clear and manifest intention of [Congress] to occupy the field." (Pet. Br. 13) (*citing Harrison v. Skyline Corp.*, 224 W. Va. 505, 512, 686 S.E.2d 735, 742 (2009)). Because there is no express preemption, the challenger must "pinpoint" evidence of Congressional intent to preempt the challenged law or regulation. *Id.* In *Flood Litigation*, cited by Petitioner, the Court found state law was not preempted by federal law and regulations governing "extraction and removal of natural resources on its property." and therefore a cause of action under state law was available to plaintiffs. 216 W. Va. 534, 547, 607 S.E.2d 863, 876. No preemptive intent was found in part because state regulation of adjacent areas of law (there, surface coal mining reclamation) was authorized. *Id.* Similarly here state law separately authorizes environmental regulation by the DEP secretary and land use planning by municipalities. In *Hartley Marine*, challengers alleged federal regulation of inland navigable waterways preempted state imposition of a fuel use tax for traveling those waterways. 196 W. Va. 669, 675, 474 S.E.2d 599, 605. The Court found no implied preemption from the claims that the federal government historically maintained and regulated the waterways and imposed a federal excise tax, and the opinion allowed the parallel state fuel use tax to stand. *Id.* Petitioner cannot make the required demonstration to "pinpoint" specific legislative intent to preempt the entire field of zoning regulation as it applies to oil and gas development, and it offers no case law making such a finding. Petitioner simply argues that "the complex and comprehensive permitting scheme" provided by *W. Va. Code* § 22-6A-8 is sufficient. (Pet. Br. At 16). As addressed in Section C.1., *supra*, the factors considered by the secretary in evaluating well work

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laws and ordinances relating to its municipal affairs" and requires general laws to restrict municipal powers. The portion of the amendment cited by Petitioner is a proviso to the general grant of authority.

permits focus on technical and environmental regulation – as they should. They do not address orderly development of land in a community governed by the Land Use Planning Act.

c. West Virginia cases defining the scope of state permitting authority and local zoning authority do not support implied field preemption in this claim.

The Supreme Court of Appeals of West Virginia rejected Petitioner's claim that a state permitting regime preempts application of general local zoning laws, even without express preemption language. *Longwell v. Hodge*, 171 W. Va. At 49, 297 S.E.2d at 824 (rejecting petitioner's claim "that the State's approval of their application for a beer license is effectively overruled by the Board of Zoning Appeals' denial of permission to the appellants to sell beer at this restaurant."). In support of its implied field preemption claim, Petitioner relies on a state Circuit Court decision invalidating a complete ban on hydraulic fracturing within a mile of city limits, and a Fourth Circuit decision invalidating a county public nuisance law completely banning storage of hydraulic fracturing waste materials. (Pet. Br. At 19). These opinions suggest that a complete prohibition on hydraulic fracturing is preempted by the Oil and Gas Act. *EQT Production Company v. Wender*, 870 F.3d 322 (4th Cir. 2017); *Northeast Natural Energy, LLC v. The City of Morgantown*, No. 11-C-411 (August 12, 2011) *available at* 2011 WL 3584376. West Virginia law was already clear that cities may not entirely prohibit activities that are permitted by the state. *Brackmans, Inc. v. City of Huntington*, 126 W. Va. 21, 27 S.E.2d 71 (1943) (city may not deny license to sell beer when state has granted license). The law is just as clear that "possession of a state permit will not preclude all local regulation touching on the licensed activity[.]" *EQT Production Company v. Wender*, 870 F.3d 322 (4th Cir. 2017) (citing *Alderson v. City of Huntington*, 132 W. Va. 421, 428, 52 S.E.2d 243, 247 (1949)). The regulations challenged in *Wender* and *Northeast Natural Energy* were both (i) total bans on production or storage, and

(ii) enacted under public nuisance authority. They did not involve challenges to "authority ... to regulate matters that are only related to or associated with a state-permitted activity." *EQT v. Wender*, at 870 F.3d 332.[7]

In *EQT v. Wender*, the Fourth Circuit Court of Appeals described the activity at issue this way:

> [T]he extraction process at conventional wells generates 'wastewater' as a byproduct, which may contain dissolved waste materials—including carcinogenic chemicals and heavy metals like arsenic and mercury—that are harmful to human health. The storage and disposal of that wastewater also is regulated under the Oil and Gas Act, which charges the DEP specifically with protecting against water pollution arising from oil and gas production. W. Va. Code § 22-6-7. In order to operate a "disposal well for the injection or reinjection underground of any pollutant"—like EQT's injection well—a separate DEP water-pollution control permit is required. Id. § 22-6-7(b)(6). Disposal well permits come with regulatory conditions that protect against the contamination of water sources, including monitoring and testing requirements to ensure against leaks.

Id. At 870 F.3d at 326. The purpose of the permit program was "to ensure that injection wells will not present a significant risk of harm to the public or to the environment." *Id.* EQT's wells, and wastewater storage locations, were already operating when the County Commission "became concerned that two UIC wells, operated not by EQT but by a third party, were leaking wastewater

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[7] While Petitioner argues that "all oil and gas regulatory and environmental protection programs in West Virginia - including those relating to horizontal drilling and fracking operations - are regulated by WVDEP," (App. 220), it specifically acknowledged when applying for well work permits that other regulations apply, and other approvals are needed, in order to drill and operate a gas well. (App. 87) (listing other required agency approvals). DEP's application required Petitioner to sign an "Acknowledgement of Possible Permitting/Approval in Addition to the Office of Oil and Gas." *Id.* Petitioner signed that acknowledgement, which states, "The permit applicant for the proposed well work addressed in this application hereby acknowledges the possibility of the need for permits and/or approvals from **local**, state, or federal entities in addition to the DEP, Office of Oil and Gas[.]" *Id.* (emphasis added). The DEP application specifically notes that the approval of the "County Floodplain Coordinator" may be required and also warns applicants that the list of additional approvals is not exclusive. *Id.* DEP's upfront advice to Petitioner clearly stated that the DEP permit, if issued, "in no way **overrides, replaces, or nullifies the need for other permits/approvals that may be necessary.**" *Id.* (emphasis added). Petitioner signed the acknowledgement stating that it "affirms that all needed permits/approvals should be acquired from the appropriate authority before the affected activity is initiated." *Id.* Petitioner argues that by virtue of obtaining a well work permit from DEP, it can void any local regulation that it believes keeps it from performing work authorized by the permit. (App. 266-7). However, just as the permit application specifically notes, permits authorize work but do not exempt the work from meeting other requirements.

into local waterways. And although there was no concern about contamination from EQT's UIC well, the County responded with a blanket ban on all permanent disposal of wastewater within County lines." *Id.* At 327. This is distinct from the present case because the motivation for the legislation was *environmental contamination*, which is specifically regulated by DEP, and because the legislative action was a ban on permitted activity rather than exercise of specifically delegated authority to orderly plan community development for compatible uses. The County Commission relied only on its general authority to abate public nuisances under *W. Va. Code* § 7-1-3kk. The Court noted the District Court's finding that "in enacting the Oil and Gas Act, the court determined, the state legislature had reserved to the state, acting through the DEP, complete authority over all aspects of oil and gas production **including the effects of such production on the environment and water sources** and, more specifically, storage activity at drilling sites." *Id.* At 329 (emphasis added). The Court upheld the finding that the county law was "on the same subject" and must yield to the Oil and Gas Act. *Id.* The law was on the same subject because it attempted to regulate *environmental contamination*. The Fourth Circuit cautioned that "This case does not require us to consider, in other words, the authority of a county to regulate matters that are only related to or associated with a state-permitted activity." *Id.* At 332. Instead, the Court limited its opinion, stating, "We need only determine whether a West Virginia county is authorized to take aim at the permitted activity itself, enacting a blanket prohibition on conduct specifically licensed by the state." The Court answered that it could not, which is consistent with established West Virginia law, and also consistent with the maintenance of zoning regulations that "are only related to or associated with a state-permitted activity." *Id*; *see Longwell v. Hodge*, 171 W. Va. At 49, 297 S.E.2d at 824.

The issue in *Northeast Natural Energy* was the same. (Monongalia Co. Cir. Ct. No. 11-C-411), Not reported in S.E.2d, available at 2011 WL 3484376. The city enacted a total ban on hydraulic fracturing within one mile of the city limits and relied on its general authority to abate public nuisances. *Id.* It "liken[ed] fracking to the nuisance complained of in *Sharon Steel Corp., v. City of Fairmont*," that is, *an environmental hazard*. *Id.* In its brief order, the Circuit Court found, "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." As in *EQT*, the Court found a total ban based on environmental concerns was preempted by the state law on the same subject. As in *EQT*, the Court did not consider the maintenance of zoning regulations related to or associated with the activity and did not consider or purport to overrule *Longwell v. Hodge*.

The zoning regulations at issue are adopted under specific authority, and requirements, of the Land Use Planning Act, and they make no attempt to regulate the operation of oil and gas wells governed by Chapter 22, Article 6. Instead, they regulate traditional zoning concerns such as traffic, development compatibility with surrounding uses, and noise and light impacts to surrounding properties. As discussed more thoroughly in the review of other state court decisions below, and in the discussion of *Longwell v. Hodge* in § V.C.3., these separate concerns occupy different fields. West Virginia law already establishes that zoning coexists with state permitting regulation and is not preempted by Petitioner's implied field preemption theory. *Longwell*, 171 W. Va. At 49, 297 S.E.2d at 824. Petitioner's proposed authority is inapposite.

In the Circuit Court, Petitioner relied on *Solid Waste Services of West Virginia v. Public Service Com'n* for its claim that "the West Virginia Supreme Court of Appeals has already concluded that the State intended to wholly occupy the realm of environmental regulation in West

Virginia." (App. 224). 188 W. Va. 117, 422 S.E.2d 839 (1992). While Petitioner cited Section II of the opinion in *Solid Waste Services*, the holding does not support its position. There, the Court stated, "[T]he Legislature has made it clear in passing W. Va. Code § 22-1-1 *et seq.* (1991) that all environmental programs in West Virginia are to be regulated by the Division of Environmental Protection." *Id.* at 188 W. Va. 122, 422 S.E.2d 844. The case involved a challenge to Public Service Commission (PSC) proceedings for transfer of motor carrier permits. *Id.* The Court found, consistent with longstanding precedent, that PSC's role in transfer proceedings is limited to determining whether "the acquiring party can[] meet the current level of service[.]" *Id.* at 119, 841. The Court reversed PSC denial of transfer because it found PSC improperly inquired into matters beyond this scope, including complaints about disposal of out of state garbage in the Wetzel County landfill – an operation regulated by the West Virginia Department of Environmental Protection ("DEP"). *Id.* The *Solid Waste Services* opinion contains no discussion of DEP's regulation of landfills, but affirms that landfills are not regulated by PSC. *Id.* Read in its entirety, *Solid Waste Services* shows that the Court has supported – rather than denied – the compatibility of different regulatory programs for different concerns. In *Solid Waste Services*, the Court did not invalidate PSC's regulatory jurisdiction to transfer motor carrier permits because the transfer impacted landfill operations regulated by DEP. The Court simply held that PSC's jurisdiction is limited to the areas delegated to it by law – determining whether a motor carrier will perform the necessary public service. In the same way, zoning regulations may operate within the proper scope delegated by the Land Use Planning Act. These legislative grants of authority are not invalidated by the separate grant to DEP to regulate environmental concerns attendant to oil and gas development.

d. Cases in other states hold that state environmental regulation and local land use planning occupy different fields.

As noted in Section C.1., *supra*, the Environmental Resources Chapter, and the Horizontal Well Control Act, provide for technical, safety, and environmental regulation of oil and gas development (among many other environmental resources); they do not address compatibility of land uses governed by the Land Use Planning Act. The import of the statutory grant of authority to the DEP secretary cannot be stripped of that context. West Virginia Courts have addressed this argument in different contexts specifically state control of alcohol distribution and local zoning law – finding that there is no conflict between state permitting and local land use regulation. *See Longwell v. Hodge*, 171 W. Va. 45, 297 S.E.2d 820 (1982); § C.3., *infra*. Courts in other jurisdictions have reached the same conclusion specifically with respect to claims that oil and gas permits preempt local zoning authority.

The Colorado Supreme Court explained the different roles that state environmental permits and local zoning laws play in serving the public, when it denied a facial preemption challenge from oil and gas developers:

> While the governmental interests involved in oil and gas development and in land-use control at times may overlap, **the core interests in these legitimate governmental functions are quite distinct. The state's interest in oil and gas development is centered primarily on the efficient production and utilization of the natural resources in the state. A county's interest in land-use control, in contrast, is one of orderly development and use of land in a manner consistent with local demographic and environmental concerns**. Given the rather distinct nature of these interests, we reasonably may expect that any legislative intent to prohibit a county from exercising its land-use authority over those areas of the county in which oil development or operations are taking place or are contemplated would be clearly and unequivocally stated. We, however, find no such clear and unequivocal statement of legislative intent in the Oil and Gas Conservation Act.

Board of County Comm'rs of La Plata County v. Bowen/Edwards Assocs., Inc., 830 P.2d 1045, 1057 (Colo.1992).

The Pennsylvania Supreme Court found the same distinct purposes for these two types of laws in *Huntley & Huntley*, refusing a facial preemption challenge under the state's oil and gas act:

> By way of comparison, the purposes of zoning controls are both broader and narrower in scope. They are narrower because they ordinarily do not relate to matters of statewide concern, but pertain only to the specific attributes and developmental objectives of the locality in question. However, they are broader in terms of subject matter, as they deal with all potential land uses and generally incorporate an overall statement of community development objectives that is not limited solely to energy development.

Huntley & Huntley, Inc. v. Borough Council of Borough of Oakmont, 600 Pa. 207, 964 A.2d 855, 864 (2009).

Most recently, in New York, the Court of Appeals considered whether the state's Oil and Gas Solution Mining Law (OGSML) preempted local zoning under this provision: "The provisions of this article [i.e., the OGSML] shall supersede all local laws or ordinances relating to the regulation of the oil, gas and solution mining industries; but shall not supersede local government jurisdiction over local roads or the rights of local governments under the real property tax law" (ECL 23–0303[2] [emphasis added]." 23 N.Y.3d 728, 744, 16 N.E.3d 1188, 1195 (2014). The Court reviewed the OGSML, which contains essentially parallel authorities to those in West Virginia's Horizontal Well Control Act, and found:

> [I]t is readily apparent that the OGSML is concerned with the Department's regulation and authority regarding the safety, technical and operational aspects of oil and gas activities across the State. The supersession clause in ECL 23–0303(2) fits comfortably within this legislative framework since it invalidates local laws that would intrude on the Department's regulatory oversight of the industry's operations, thereby ensuring uniform exploratory and extraction processes related to oil and gas production. Similar to the scope of the MLRL in Frew Run, we perceive nothing in the various provisions of the OGSML indicating that the supersession clause was meant to be broader than required to preempt conflicting local laws directed at the technical operations of the industry.

Id. at 750, 1199. The Court found "no inconsistency between the preservation of local zoning authority and the OGSML's policies of preventing "waste" and promoting a "greater ultimate recovery of oil and gas" (ECL 23–0301), or the statute's spacing provisions for wells (see ECL 23–0501, 23 -0503)" and it held that local zoning authority was preserved. *Id.*

Petitioner does not address these decisions in its Opening brief, but in the Circuit Court it relied on a Pennsylvania law, since invalidated in *Robinson Twp.*, for its argument that other state oil and gas laws preempt all zoning regulations. (Reply Brief at 15); *Robinson Twp., Washington County v. Commonwealth*, 623 Pa. 564, 83 A.3d 901 (2016). But Pennsylvania law permits cities to ban gas drilling by hydraulic fracturing Pittsburgh has done so since 2010.[8] South Fayette Township, Pennsylvania has regulated, but not prohibited, hydraulic fracturing well operations by zoning laws.[9] As the *Huntley* decision recognizes, a state oil and gas law that permits wellpad locations – without an express preemption of local zoning law – is compatible with, rather than in conflict with, at least some local zoning regulations. *Huntley & Huntley, Inc. v. Borough Council of Borough of Oakmont*, 600 Pa. 207, 964 A.2d 855 (2009).

As our Supreme Court recognized in *Longwell v. Hodge*, other jurisdictions apply the same rule allowing zoning regulations to operate in conjunction with state-level permitting. 171 W. Va. at 50, 297 S.E.2d 825 (citing *Desert Turf Club v. Board of Supervisors*, 141 Cal.App.2d 446, 296 P.2d 882 (1956); *Plaza Recreation Center v. Sioux City*, 253 Iowa 246, 111 N.W.2d 758 (1961); *Messengale v. City of Copperas Cove*, 520 S.W.2d 824, 829 (1975)). Courts in other jurisdictions

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[8] Codified Ordinances of City of Pittsburgh, Chapter 618, available at https://library.municode.com/pa/pittsburgh/codes/code_of_ordinances?nodeId=COOR_TITSIXCO_ARTIRERIAC_CH618MASIINAGADR (last visited August 15, 2022).

[9] See Codified Ordinances of Township of South Fayette, Pennsylvania § 240-57B.(1)(f) (available at https://ecode360.com/11616216) (last visited August 15, 2022); "Oil and Gas Well Ordinance," Township of South Fayette, Pennsylvania, available at https://www.southfayettepa.com/DocumentCenter/View/1545/Ordinance-2016-6-Oil-and-Gas-PDF?bidId= (last visited August 15, 2022).

have found that some regulation of natural gas production by local zoning or health and safety regulations was permissible despite the adoption of statewide law regulating natural gas production. *See Arbor Resources LLC v. Nockamixon Tp.*, 973 A.2d 1036 (Pa. Commw. Ct. 2009); *Wallach v. Town of Dryden*, 23 N.Y.3d 728, 992 N.Y.S.2d 710, 16 N.E.3d 1188, 181 O.G.R. 1166 (2014); *Osborne v. Leroy Township*, 2014-Ohio-5774, *available at* 2014 WL 7457065 (Ohio Ct. App. 11th Dist. Lake County 2014); *Town of Frederick v. North American Resources Co.*, 60 P.3d 758, 157 O.G.R. 716 (Colo. App. 2002).

In the Circuit Court, Petitioner argued for disregarding these holdings because after development of a factual record certain aspects of zoning ordinances were found to be preempted. (App. 270). As noted above, the issue currently presented to the Court is Petitioner's facial challenge to zoning laws claiming that all zoning laws are preempted when applied to oil and gas development. Any ruling on the specific application of Respondent's zoning regulations to Petitioner's proposed use would have to be based on development of a factual record in the Circuit Court. As these decisions demonstrate, challenges like Petitioner's, attempting to preempt all zoning laws, fail because zoning laws and environmental laws regulate distinct areas.

In the Circuit Court, Petitioner relied on *State ex rel Morrison v. Beck Energy Corp.*, 37 N.E.3d 128 (Ohio 2015) for the proposition that a state regulatory permit for oil and gas development preempts all local zoning authority. (App. 274). In *Beck*, the Ohio Court reviewed a state law in which "the General Assembly amended that chapter to provide 'uniform statewide regulation' of oil and gas production within Ohio and **to repeal 'all provisions of law that granted or alluded to the authority of local governments to adopt concurrent requirements with the state.'**" *Id.* at 131. Neither the West Virginia Oil and Gas Act nor the Horizontal Well Control Act have such a "repealer" provision. *W. Va. Code* § 22-6-1 *et seq.*; *W. Va. Code* § 22-

6A-1 *et seq.* The Ohio law separately preserved certain specific local powers and also "expressly prohibits a local government from exercising those powers 'in a manner that discriminates against, unfairly impedes, or obstructs oil and gas activities and operations regulated under [R.C. Chapter 1509].'" *Id.* Neither the West Virginia Oil and Gas Act nor the Horizontal Well Control Act have such a "discrimination" provision. *W. Va. Code* § 22-6-1 *et seq.*; *W. Va. Code* § 22-6A-1 *et seq.* The Ohio law additionally authorizes permit conditions for "Municipal Wellhead Protection Area" and "Urbanized Areas," neither of which is present in West Virginia law. *W. Va. Code* § 22-6-1 *et seq.*; *W. Va. Code* § 22-6A-1 *et seq.*[10]

The decision in *Beck* relies on an analysis of the competing authority of the city's general "home rule powers" against the specific repealer and anti-discrimination provisions of the oil and gas act. *Id.* at 133-4.[11] The *Beck* Court found that the zoning provisions were preempted because they were not among the powers reserved to cities and thus conflicted with state law. *Id.* The situation in this case is different. Respondent is granted express authority to enact local zoning regulations by the Land Use Planning Act, and the WVDEP Secretary is granted regulatory authority over well permits under the Oil and Gas Act or Horizontal Well Control Act, neither of which expressly repeals the Land Use Planning Act.

The Ohio courts have recognized that as to matters not specifically controlled by R.C. 1509.02, local zoning authority remains effective. *Osborne v. Leroy Township*, 2014-Ohio-5774,

[10] These excepted permit areas do have similarities to *W. Va. Code* § 8A-7-10(e), which prohibits zoning from limiting natural resource development outside of "municipalities" and "urban areas" and leaves zoning authority in place within those areas.

[11] The Ohio Supreme Court in *Beck* also appears to apply different standards to challenges relating to its cities' home rule authorities against general laws of the state than do West Virginia's Courts, as demonstrated in *Longwell v. Hodge*, and to that extent the analysis employed is not instructive as to the outcome of a preemption challenge under West Virginia law.

available at 2014 WL 7457065 (Ohio Ct. App. 11th Dist. Lake County 2014).[12] Just as West Virginia courts have done, the Ohio court in *Osborne* found that where a zoning regulation applies to a matter not specifically addressed in the state regulatory statute, no implied conflict exists to preempt the zoning regulation. *Id.* ("As there is no conflict between appellee's zoning resolution and the state statutory scheme governing gas and oil wells, the trial court did not err in declaring that storage of debris is prohibited."); *see Longwell v. Hodge*, 171 W. Va. at 50, 297 S.E.2d 825.

Petitioner also relied in the Circuit Court on the Pennsylvania decision in *Huntley & Huntley, Inc. v. Borough Council of Borough of Oakmont*, 600 Pa. 207, 964 A.2d 855 (2009) and later-enacted Pennsylvania oil and gas legislation in support of its claim that zoning ordinances are preempted by state-level oil and gas permitting requirements. *Huntley* involved a company's attempt to drill and operate a gas well on residential property. The Court concluded that local zoning was not preempted by the oil and gas act because the two laws serve different purposes: "By way of comparison, **the purposes of zoning controls are both broader and narrower in scope. They are narrower because they ordinarily do not relate to matters of statewide concern, but pertain only to the specific attributes and developmental objectives of the locality in question. However, they are broader in terms of subject matter, as they deal with all potential land uses and generally incorporate an overall statement of community development objectives that is not limited solely to energy development.** See 53 P.S. § 10606; see also id., § 10603(b) (reflecting that, under the MPC zoning ordinances are permitted to restrict

[12] "Nevertheless, while the department of natural resources obviously has the power to dictate the kinds of materials to be used in the construction and maintenance of the access road, there is no language in the two cited provisions indicating that the extent of this authority extends to the storage of the road materials. Until such materials are actually used in the construction or maintenance of the road, they cannot be said to be associated with the production of the oil and gas. Accordingly, since R.C. 1509.02 and 1509.01(AA) do not address the issue of storage of concrete and asphalt debris, a township is not barred from controlling the storage of the debris through its zoning laws. Section 29.01 of the Leroy Township Zoning Resolution does not forbid an act, i.e., the on-site storage of road materials, which is under the sole jurisdiction of the department of natural resources." *Id.*

or regulate such things as the structures built upon land and watercourses and the density of the population in different areas)." *Id.* at 864 (emphasis added). The *Huntley* Court noted that the zoning regulations' main purpose was to "preserve the character of residential neighborhoods" and preserve beneficial and compatible land uses, while the oil and gas law preemption language "pertains to features of well operations and the Act's stated purposes."[13] *Id.* Because of those distinct purposes, the Court held, "Accordingly, and again, absent further legislative guidance, we conclude that the Ordinance serves different purposes from those enumerated in the Oil and Gas Act, and hence, that its overall restriction on oil and gas wells in R-1 districts is not preempted by that enactment." *Id.* Petitioner conceded in its Reply Brief to the Circuit Court that Pennsylvania law only prohibited local zoning by specific provisions in a law enacted after *Huntley* that expressly required zoning regulations to permit oil and gas drilling in all districts. (Reply Brief at 15); 58 Pa. *C.S.* §§ 3302-04. These cited provisions were found violative of the Pennsylvania constitution and municipal authority in *Robinson Twp., Washington County v. Commonwealth*, 623 Pa. 564, 83 A.3d 901 (2016). Similar to the Ohio courts, Pennsylvania courts have found that local zoning and state environmental regulation serve distinct purposes and can coexist absent an express preemption of zoning. *See also Arbor Resources LLC v. Nockamixon Twp.*, 973 A.2d 1036 (Pa. Cmmw. Ct. 2009).

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[13] The Court cited with approval the Colorado decision in *Bowen/Edwards*, addressed *infra*, as follows:
"While the governmental interests involved in oil and gas development and in land-use control at times may overlap, the core interests in these legitimate governmental functions are quite distinct. The state's interest in oil and gas development is centered primarily on the efficient production and utilization of the natural resources in the state. A county's interest in land-use control, in contrast, is one of orderly development and use of land in a manner consistent with local demographic and environmental concerns. Given the rather distinct nature of these interests, we reasonably may expect that any legislative intent to prohibit a county from exercising its land-use authority over those areas of the county in which oil development or operations are taking place or are contemplated would be clearly and unequivocally stated. We, however, find no such clear and unequivocal statement of legislative intent in the Oil and Gas Conservation Act."
Board of County Comm'rs of La Plata County v. Bowen/Edwards Assocs., Inc., 830 P.2d 1045, 1057 (Colo.1992).

Other states have also recognized the compatibility of local zoning law with state regulation of natural resources. In the New York decision of *Wallach v. Town of Dryden*, drilling companies challenged the validity of two New York towns' zoning laws, each arguing that section 23-0303(2) of the Environmental Conservation Law (N.Y. Envtl. Conserv. Law § 23-0303 (McKinney)), also known as the supersession clause of the OGSML, preempted the local ordinances prohibiting fracking. The supersession clause states that: "The provisions of this article shall supersede all local laws or ordinances relating to the regulation of the oil, gas and solution mining industries; but shall not supersede local government jurisdiction over local roads or the rights of local governments under the real property tax law." 23 N.Y.3d 728, 16 N.E.3d 1188 (2014).

Although less comprehensive than West Virginia's Land Use Planning Act, New York law also granted towns the power to enact zoning ordinances and emphasized the vital importance of zoning to communities. *Id.* at 1194.[14] Just as in West Virginia, the *Wallach* Court recognized that local laws are preempted by state law if they conflict, but that preemption is not to be presumed. *Id.*[15] The *Wallach* Court held that local zoning laws were not preempted by the supersession clause because it "is most naturally read as preempting only local laws that purport to regulate the actual operations of oil and gas activities, not zoning ordinances that restrict or prohibit certain land uses

[14] The Court recited the purposes as follows: "The legislature likewise authorized towns to enact zoning laws for the purpose of fostering "the health, safety, morals, or the general welfare of the community" (Town Law § 261; see also Statute of Local Governments § 10[6] [granting towns "the power to adopt, amend and repeal zoning regulations"]). As a fundamental precept, the legislature has recognized that the local regulation of land use is "[a]mong the most important powers and duties granted ... to a town government" (Town Law § 272–a [1][b])."

[15] On preemption, the Court stated, "...that being said, as a political subdivision of the State, a town may not enact ordinances that conflict with the State Constitution or any general law (see Municipal Home Rule Law § 10 [1][i], [ii]). Under the preemption doctrine, a local law promulgated under a municipality's home rule authority must yield to an inconsistent state law as a consequence of "the untrammeled primacy of the Legislature to act with respect to matters of State concern" (*Albany Area Bldrs. Assn. v. Town of Guilderland*, 74 N.Y.2d 372, 377, 547 N.Y.S.2d 627, 546 N.E.2d 920 [1989] [internal quotation marks, ellipses and citation omitted]). But we do not lightly presume preemption where the preeminent power of a locality to regulate land use is at stake. Rather, we will invalidate a zoning law only where there is a "clear expression of legislative intent to preempt local control over land use" (*Gernatt*, 87 N.Y.2d at 682, 642 N.Y.S.2d 164, 664 N.E.2d 1226)."

within town boundaries. Plainly, the zoning laws in these cases are directed at regulating land use generally and do not attempt to govern the details, procedures or operations of the oil and gas industries." *Id.*

The *Wallach* Court also evaluated the purposes of the OGSML, which are essentially the same as and contain parallel authorities to – those in West Virginia's Horizontal Well Control Act. *Id.*[16] The Court found that, "Based on these provisions, it is readily apparent that the OGSML is concerned with the Department's regulation and authority regarding the safety, technical and operational aspects of oil and gas activities across the State." *Id.* The ruling specifically upheld the lower court's finding that OGSML regulated technical aspects of drilling separate from local zoning concerns:

> [T]he well-spacing provisions of the OGSML concern technical, operational aspects of drilling and are separate and distinct from a municipality's zoning authority, such that the two do not conflict, but rather, may harmoniously coexist; the zoning law will dictate in which, if any, districts drilling may occur, while the OGSML instructs operators as to the proper spacing of the units within those districts in order to prevent waste.

Id. This explanation relies on the same logic employed by the Supreme Court of Appeals of West Virginia in *Longwell v. Hodge*, noting that zoning laws have different purposes than state permitting regulations and there is only a "false conflict" between them.

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[16] *Compare Wallach* "In furtherance of these goals, the OGSML sets forth a detailed regime under which the New York State Department of Environmental Conservation is entrusted to regulate oil, gas and solution mining activities and to promulgate and enforce appropriate rules. In particular, the Department is empowered to "[r]equire the drilling, casing, operation, plugging and replugging of wells and reclamation of surrounding land in accordance with the rules and regulations of the department" (ECL 23–0305[8][d]); enter and plug or replug abandoned wells when the owner has violated Department regulations (ECL 23–0305[8][e]); compel operators to furnish the Department with a bond to ensure compliance (ECL 23–0305[8][k]); order the immediate suspension of drilling operations that are in violation of Department regulations (ECL 23–0305[8][g]); require operators to file well logs and samples with the Department (ECL 23–0305[8][i]); grant well permits for oil and gas drilling (ECL 23–0501); issue orders governing the appropriate spacing between oil and gas wells to promote efficient drilling and prevent waste (ECL 23–0503); oversee the integration of oil and gas fields to prevent waste (ECL 23–0701, 23–0901)"); *with W. Va. Code* §§ 22-6A-7 (require permits), -12 (well spacing), -13 (plugging wells), -14 (reclamation requirements), -15 (performance bonds).

In *Board of Commissioners of La Plata County v. Bowen/Edwards Associates, Inc.*, the Colorado Supreme Court likewise made the distinction between state regulation of technical aspects of drilling and local authority to make zoning decisions, explaining:

> Moreover, our interpretation of section 34 60 105(1) finds support in the stated purposes of the Oil and Gas Conservation Act, which include the prevention of waste and the efficient and fair development and production of oil and gas resources. A unitary source of regulatory authority at the state level of government over the technical aspects of oil and gas development and production serves to prevent waste and to protect the correlative rights of common-source owners and producers to a fair share of production profits. To read into the statute anything more than a legislative effort to consolidate regulatory authority that otherwise might be shared by different state agencies into one and only one administrative body -namely, the Oil and Gas Conservation Commission—would rest on nothing but speculation. We thus conclude that the Oil and Gas Conservation Act does not expressly preempt any and all aspects of a county's land-use authority over those areas of a county in which oil and gas activities are occurring or are planned.

830 P.2d 1045, 1058–59 (Colo. 1992). The *Bowen* Court also considered the separate claim that a conflict between state law and the specific zoning provisions invalidated local zoning laws, but found that the zoning law's purposes did not establish a conflict and that any decision about such claims must be based on established facts:

> On the basis of the limited record before us, we are unable to determine whether an operational conflict exists between La Plata County's Oil and Gas Regulations and the Oil and Gas Conservation Act. The purpose of the county regulations is to 'facilitate the development of oil and gas resources within the unincorporated area of La Plata County while mitigating potential land-use conflicts between such development and existing, as well as planned, land uses.' County Regulations, § 6.103. This statement of purpose evinces an obvious intent to regulate in a manner that does not hinder the achievement of the state's interest in fostering the efficient development, production, and utilization of oil and gas resources in the state. See section 34 60 102(1), 14 C.R.S. (1984). **The county regulations thus appear to be designed to harmonize oil and gas developmental and operational activities with the county's overall plan for land-use and with the state's interest in those developmental and operational activities.**

Id. (emphasis added). The Colorado Supreme Court in *Bowen/Edwards* found that statewide regulatory permitting and local zoning serve different purposes, and in general they coexist.[17]

Other Colorado decisions follow the same rationale. In *Voss v. Lundvall Brothers*, the Colorado Supreme Court held,

> **If a home-rule city, instead of imposing a total ban on all drilling within the city, enacts land-use regulations applicable to various aspects of oil and gas development and operations within the city, and if such regulations do not frustrate and can be harmonized with the development and production of oil and gas in a manner consistent with the stated goals of the Oil and Gas Conservation Act, the city's regulations should be given effect**. We thus do not conclude, as did the court of appeals, that there is no room whatever for local land-use control over those areas of a home-rule city where drilling for oil, gas, or hydrocarbon wells is about to take place.

830 P.2d 1061, 1068–69 (Colo. 1992). In *Town of Frederick v. N. Amer. Resources Co.*, the Colorado Court of Appeals held that while the state oil and gas act may preempt technical regulation of drilling, other zoning ordinance provisions were not preempted. 60 P.3d 758, 763 (Colo. App. 2002).[18]

These decisions recognize the "vital importance" of zoning to local communities, and they respect that zoning decisions are "a problem peculiarly within the power of the legislative body of a municipality" that "involve[] a high degree of legislative discretion and an acute knowledge of existing conditions and circumstances." *W. Va. Code* § 8A-1-1(a)(1); *Par Mar v. City of Parkersburg*, 183 W. Va. 706, 711, 398 S.E.2d 532, 537 (1990) (*quoting City of Miami Beach v.*

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[17] As to the factual claims of a specific conflict between application of zoning regulation to a particular permitted site, the Court held: "Any determination that there exists an operational conflict between the county regulations and the state statute or regulatory scheme, however, must be resolved on an ad-hoc basis under a fully developed evidentiary record. Due to the trial court's dismissal of the complaint on the pleadings, such a record is not before us in this case." *Id.*

[18] The opinion states, "As discussed below, certain provisions of the Town's ordinance do regulate technical aspects of drilling and related activities and thus could not be enforced. However, other provisions of the ordinance, such as those governing access roads and fire protection plans, do not purport to regulate technical aspects of oil and gas operations, even though they may give rise to operational conflicts with a state regulation addressing the same subject and thus be preempted for that reason."

Wiesen, 86 So.2d 442 (Fla.1956) (*en banc*)). They are consistent with our state law and with decisions throughout the country, which find that local zoning is compatible with state regulation of oil and gas. These holdings consistently and thoroughly express the same principle espoused by our Supreme Court in *Longwell v. Hodge* – local zoning serves purposes distinct from state permitting systems.

Petitioner fails to meet its burden to pinpoint any intention in *W. Va. Code* §§ 22-6A-6 or -8 to preempt all local zoning regulation of oil and gas uses, and it cites no authority for the proposition that it has done so. The Circuit Court properly found that "under *Longwell* the mere existence of a comprehensive state permitting system for a licensed activity is not sufficient to preempt local zoning regulations." (App. 12).

3. Petitioner's Claim that Zoning Conflicts with a State Permit is a Classic False Conflict.

Because no express preemption language is found in the Oil and Gas Act or the Horizontal Well Control Act, and no legislative intent for either act to preempt the field of zoning regulation can be pinpointed, Petitioner also contends that Respondent's zoning laws, and all zoning laws, are in direct conflict with both the Oil and Gas Act and the Horizontal Well Control Act. (Pet. Br. At 16-17). In doing so, Petitioner claims an authority for the DEP secretary that exists nowhere in statute, arguing that there is a "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." (Pet. Br. At 17). Petitioner does not cite any provision of *W. Va. Code* §§ 22-6-1 *et seq.* or 22-6A-1 *et seq.* for its claim that DEP has "final" approval over all well locations, and none exists.

The alleged conflict between the authority expressly delegated to Respondent under the Land Use Planning Act and the authority delegated to the Secretary of WVDEP under the Horizontal Well Control Act is a false conflict – general zoning does not encroach on environmental regulation. *See Longwell v. Hodge*, 171 W. Va. 45, 297 S.E.2d 820 (1982). Petitioner relies on *Brackman's, Inc. v. City of Huntington*, a case of two specifically conflicting business licensing regulations, but fails to address *Longwell v. Hodge*, where the Supreme Court noted that zoning regulations do not conflict with a state permit issued for a particular location, and *W. Va. Code* § 8A-7-10(e), where the legislature addressed application of zoning laws to natural resource production.

In *Brackman's*, both the State and the city claimed authority to issue business licenses for nonintoxicating beer sales. 126 W. Va. 21, 27 S.E.2d 71 (1943). The city's claim to authority was based on the nonintoxicating beer act that gave the State Tax Commissioner licensing power, or its general charter authority – no zoning or other general police power was involved. The Court held: "We hold, therefore, that the power to grant licenses for the sale of non-intoxicating beer is the sole prerogative of the State Tax Commissioner; that when a 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; that the power of the City of Huntington goes no farther than to levy a license tax on the privilege granted by the State, and to adopt and enforce such ordinances and resolutions as it may deem advisable for the enforcement of the statute under which the State has acted, and in conformity therewith. Of course it also has the power to enact such ordinances respecting the orderly conduct of the business as might be applied to any other character of business requiring local police regulations, being carried on in the city." *Id.* At 126 W. Va. ___, 27 S.E.2d 78-79. West Virginia law is clear that cities may not

entirely prohibit activities that are permitted by the state. *Brackmans, Inc. v. City of Huntington*, 126 W. Va. 21, 27 S.E.2d 71 (1943) (city may not deny license to sell beer when state has granted license). It is just as clear that "possession of a state permit will not preclude all local regulation touching on the licensed activity[.]" *EQT Production Company v. Wender*, 870 F.3d 322 (4th Cir. 2017) (citing *Alderson v. City of Huntington*, 132 W. Va. 421, 428, 52 S.E.2d 243, 247 (1949)).

The zoning regulations at issue make no attempt to regulate the operation of oil and gas wells governed by Chapter 22, Article 6. Consistent with *Brackman's*, but directly addressing the question whether local zoning authority conflicts with state licensing authority, the Supreme Court in *Longwell v. Hodge* held that a state licensee must still comply with local zoning regulations, as do other businesses. The license holders in *Longwell* made the same argument that SWN makes in this case, claiming "that the State's approval of their application for a beer license is effectively overruled by the Board of Zoning Appeals' denial of permission to the appellants to sell beer at this restaurant." *Id.* at 171 W. Va. 49, 297 S.E.2d 824.

The Court considered this argument and found that the allegation was a "false conflict." reasoning:

> "What we have here is the perfect example of a "false conflict." The 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]. **Thus, to the extent that a municipality is not seeking to encroach on the licensing or taxing authority the State holds unto itself, the municipality may zone either to allow or not allow beer-selling restaurants just as it may zone other land uses."**

Id. (emphasis added).

The Alcohol Beverage Control commissioner is granted the same type of duties with respect to alcohol licensing, with similar exceptions related to the jurisdiction of other state

agencies, under current law as Petitioner relies on to claim the DEP Secretary has sole authority for zoning regulations applicable to oil and gas development. *See W. Va. Code* § 11-16-4(a).[19] As shown in *Longwell*, that sole responsibility included issuing permits for operation of bars at specific locations. And that sole permitting authority did not conflict with the parallel authority for local zoning ordinances.

Petitioner argues on appeal that the Commissioner's interest in alcohol distribution is merely "defensive" and cannot be compared to regulation of oil and gas. (Pet. Br. At 24). While the state regulation system, and the public interest, for alcohol and nonintoxicating beer is much more complex than that[20], the issue of whether the state interest in environmental regulation of oil and gas resources is distinct from communities' interest in orderly land development is thoroughly addressed by the cases reviewed in Section C.2., *supra*. As the Circuit Court put it, "While the governmental interests involved in oil and gas development and in land-use control at times may overlap, the core interests in these legitimate governmental functions are quite distinct." (App. 12) (*quoting Bowen/Edwards Assocs., Inc.*, 830 P.2d 1045 (Colo. 1992).

In *Longwell*, the Court distinguished between the purposes of a state licensing regime and a local zoning ordinance. Where the laws at issue served different purposes, the local zoning

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[19] This Section provides, "The alcohol beverage control commissioner described under the provisions of article two, chapter sixty of this code shall have sole responsibility for the administration of this article, except for those responsibilities expressly vested in the tax commissioner under sections thirteen, fourteen and fifteen of this article."

[20] *See W. Va. Code* § 60-1-1 ("The purpose of this chapter is to give effect to the mandate of the people expressed in the repeal of the state prohibition amendment: and it is hereby found by the Legislature and declared to be the public policy of this state to regulate and control the manufacture, sale, distribution, transportation, storage and consumption of alcoholic liquors and at the same time to assure the greatest degree of personal freedom consistent with the health, safety, welfare, peace and good morals of the people of this state."); *W. Va. Code* § 11-16-1 ("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.").

ordinance was not preempted. The *Longwell* Court analyzed the "false conflict" issue this way: "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.' *See generally, Rathkopf, Law of Zoning and Planning*, 4th ed., Vol. 2, Chap. 31 (1977); Annot., 9 A.L.R.2d 877 (1950)." *Id.* at 171 W. Va. at 50, 297 S.E.2d 825 (emphasis added). Under *Longwell*, the existence of a comprehensive state permitting system for a licensed activity is not sufficient to preempt local zoning regulations.

D. Local Governments Have Express Authority to Apply General Zoning Laws to Oil and Gas Activities.

Petitioner adds a section to the Opening Brief arguing that the Land Use Planning Act does not "preclude preemption." (Pet. Br. At 18). The argument misstates the law applied to preemption claims. Preemption of laws is disfavored, and duly-enacted zoning laws are entitled to every presumption in favor of their validity. Syl. Pt. 3, *G-M Realty, Inc. v. Wheeling*, 146 W. Va. 360, 120 S.E.2d 249 (1961). The Land Use Planning Act provides specific authority for Respondent to enact zoning laws, and Petitioner must meet its burden to show they are expressly preempted by some superior law. As fully addressed in Section V.C.1., *supra*, Petitioner relies on *W. Va. Code* § 22-6A-6 to prove express preemption, but no language within that statute section expressly preempts zoning laws enacted under the Land Use Planning Act.

In addition to Supreme Court precedent, the legislative text that is on point states that zoning law applies to development of natural resources like Petitioner's proposed oil and gas production. *W. Va. Code* § 8A-7-10(e). Section 8A-7-10(e) provides, in relevant part, "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[.]" *Id.* Petitioner attempts to avoid application of *W. Va. Code* § 8A-7-10(e) to its claims, arguing, "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.'" (Pet. Br. At 22). These definitional quibbles are easy to resolve, and the terms apply to Petitioner's planned operation. Natural resources include oil and gas, and production of oil and gas includes "drilling [and] well-stimulation[.]" *W. Va. Code* § 11-15-2(b)(14)(B); *see Mt. State Bit Service, Inc. v. State, Dept. of Tax and Revenue*, 217 W. Va. 141, 617 S.E.2d 491 (2005). Municipality "is a word of art and shall mean and include any Class I, Class II, and Class III city, and any Class IV town or village, heretofore or hereafter incorporated as a municipal corporation under the laws of this state" including the Respondent, City of Weirton. *W. Va. Code* § 8-1-2(a)(1). There is no need to define urban area, because the law Petitioner seeks to preempt is within a municipality, and there is likewise no need to define "complete use" because within a municipality zoning regulations are permitted to limit the complete use of natural resources. *W. Va. Code* § 8A-7-10(e). The challenged laws operate within a municipality and apply to natural resources. Under *W. Va. Code* § 8A-7-10(e), they are permitted to limit the complete use of the natural resources.

E. There is No Conflict Between the Oil and Gas Act or the Horizontal Well Control Act and All Local Zoning Laws.

As with its express preemption claim re-argued in Section V.D., *supra*. Petitioner adds a section arguing that there is a conflict between zoning laws and the Oil and Gas Act and Horizontal Well Control Act that is not a "false conflict" as determined in *Longwell v. Hodge*. (Pet. Br. At 23). Petitioner's conflict claim is the same as its preemption claim already addressed in Section

V.C.3., *supra* – there is no conflict between all zoning laws and a state environmental regulatory structure for oil and gas production. *See supra*, § V.C.1 – 3. Petitioner's main argument here is that it has obtained a well work permit from DEP, and it has not obtained a Conditional Use Permit from the Board of Zoning Appeals of the City of Weirton for the site covered by the well work permit, so (it is alleged) there is a conflict between state and local law. (Pet. Br. At 23). In addition to improperly arguing a factual matter not yet resolved in the Circuit Court[21], this argument section rehashes prior misunderstandings of preemption analysis and the separate roles played by state environmental regulation and local zoning regulation under the Land Use Planning Act.

In this iteration of the conflict argument, Petitioner claims the DEP secretary has "final approval" of all well locations – a term not found in the statute, and which would have substantial negative externalities if accepted by the Court. Petitioner's claim sweeps broadly. It argues that, by applying the same zoning laws to oil and gas development that are applied to other businesses and activities, West Virginia counties and cities are "impermissibly attempting to regulate oil and gas activities that are exclusively regulated by the State of West Virginia, and, in so doing, ... unlawfully taking the property rights of every person with an interest in the natural gas underlying the [counties and cities] without any form of compensation." (App. 214). West Virginia's Land Use Planning Act, Oil and Gas Act, and Horizontal Well Control Act have been coexisting for decades, but Petitioner argues that this Court should rule that an unlimited scope of takings claims is available against local governments that have been neutrally applying their zoning laws to all activities in their jurisdictions. Petitioner also admits that its theory would allow hydraulic fracturing wellpads in all neighborhoods in West Virginia: "so long as [the center of] a well[pad]

[21] As noted above, the issue currently presented to the Court is SWN's facial challenge to zoning laws claiming that all zoning laws are preempted when applied to oil and gas development. Any ruling on the specific application of Weirton's zoning regulations to SWN's proposed use would have to be based on development of a factual record.

is located more than 650 (*sic*) 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." (App. 265). SWN diminishes the threat of preempting all West Virginia zoning – which would allow oil and gas wells in all residential districts throughout the state – suggesting that the 625-foot setback from the *center of wellpads* to occupied structures specified in our environmental resources laws can adequately protect all the community interests served by zoning. (App. 265, FN4). Petitioner fails to address, however, that its theory would also apply to conventional gas wells, and other activities for which the DEP secretary issues permits. *See EQT Prod. Co. v. Wender*, 870 F.3d 322, 325 (4th Cir. 2017) ("...the DEP issues permits for the drilling of conventional oil and gas wells, id. § 22-6-6, and monitors wells in operation, see, e.g., W. Va. Code R. § 35-4-11."). These wells are not subject to the same environmental regulatory setback requirements and also, according to Petitioner's theory, would have to be permitted in all residential districts without any kind of planning to address their impacts on neighbors.

The impacts of an oil and gas well, particularly a hydraulic fracturing operation at a horizontal well, are not felt only by residents of surrounding buildings. Communities have many spaces in residential districts that are large enough to present the opportunity for a wellpad next to residents' homes – school grounds, churches, golf courses, and parks are often cornerstones of our neighborhoods that also occupy enough space that a well could be permitted at the property. The community must deal with the truck traffic serving the operation, the noise and light generated at the well, and the concerns of residents, businesses, and visitors about those impacts on their neighborhoods and businesses. Local zoning allows communities to address those impacts in an orderly fashion, while still permitting all lawful uses to operate within their boundaries. These

purposes are not addressed by the state environmental permitting laws, and this Court should reject the invitation to preempt local law without express direction to do so from the legislature.

VI. CONCLUSION

The laws of the State of West Virginia place sole responsibility for the adoption of local zoning ordinances with local governments, and within municipalities those zoning ordinances apply to natural resource production. No express provision of the Oil and Gas Act or the Horizontal Well Control Act preempts all local zoning laws, and established law dictates that local zoning coexists with state permit systems. Accordingly, the Circuit Court properly concluded that Petitioner failed to meet its burden to prove that a duly-enacted local law, authorized by state statute, is preempted. Respondent, the City of Weirton, respectfully requests that the Court affirm the Circuit Court decision.

City of Weirton,
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