IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 23-753

CITY OF WEIRTON and
CITY OF WEIRTON BOARD OF ZONING APPEALS,
Respondents below, Petitioners,

v.

SWN PRODUCTION COMPANY, LLC,
Petitioner below, Respondent,

OPENING BRIEF OF PETITIONERS CITY OF WEIRTON and CITY OF WEIRTON BOARD OF ZONING APPEALS

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I. ASSIGNMENTS OF ERROR

(1) The West Virginia Intermediate Court of Appeals ("ICA") erred by reversing the Circuit Court decision on an implied conflict preemption theory when the Circuit Court decision was confined to review of Respondent SWN Production Company, LLC's ("Respondent" or "SWN") facial challenge to the City of Weirton's ("Weirton" or "Petitioner") zoning laws enacted pursuant to *W. Va. Code* §§ 8A-1-1 *et seq*. on express preemption and implied field preemption theories.

(2) The ICA erred by finding that Weirton's zoning laws, or some of them, are preempted under *W. Va. Code* § 22-6A-6(b) on an implied conflict preemption theory, whether applying the impossibility or obstacle theories of conflict preemption.[1]

II. STATEMENT OF THE CASE

This case considers Respondent's claim that the zoning laws enacted by the City of Weirton pursuant to the West Virginia Land Use Planning Act are preempted by *W. Va. Code* § 22-6A4-6(b), or, as initially plead, by *W. Va. Code* §§ 22-6-1. (App. 5). Respondent initially applied to the City of Weirton Board of Zoning Appeals ("BZA") on June 11, 2021, for a Conditional Use Permit for a "mineral extraction" use under Weirton's zoning laws. (App. 3). After the BZA denied the permit, Respondent filed two actions with the Circuit Court of Brooke County on October 29, 2021: (1) a petition for writ of certiorari seeking review of the BZA decision under *W. Va. Code*

[1] Weirton included within its Notice of Appeal assignments of error challenging preemption of the zoning laws on express preemption and implied field preemption theories. However, the ICA confined its ruling specifically to an implied conflict preemption theory and issued no ruling on Respondent's express preemption or implied field preemption claims. Respondent has not filed a cross-appeal assigning error to the ICA's decision not to address those theories. Accordingly, this Opening Brief addresses only the ICA's specific holding that the Circuit Court order should be reversed and some portion of the zoning laws invalidated based on an implied conflict preemption theory.

§§ 8A-9-1 *et seq*., designated Civil Action No. 21-P-35; and (2) a complaint alleging that state environmental laws governing natural gas horizontal wells preempt local zoning laws enacted under the Land Use Planning Act, in which Respondent sought to enjoin Weirton from enforcing its laws, recover damages against Weirton, and require Weirton to pay Respondent for alleged taking of its property without just compensation by enactment of the zoning laws, designated Civil Action No. 21-C-71. (App. 1, 20).

On March 15, 2022, the two lawsuits were consolidated, and the Circuit Court stayed further proceedings pending resolution of the preemption issues raised by Petitioner in Civil Action No. 21-C-71. (App. 1). Respondent filed an Amended Complaint on March 29, 2022, and Weirton filed its Answer on April 18, 2022. (App. 147, 200).

Respondent filed its Opening Brief on its preemption claims on June 10, 2022. (App. 2). Weirton filed its Response Brief on July 22, 2022, and Respondent filed its Reply on August 5, 2022. (App. 2). Because Respondent raised a new issue in its Reply, alleging that *W. Va. Code* § 22-6A-1 *et seq*. was the source of its preemption claim, the Circuit Court ordered Weirton to file a surreply. (App. 2, 5). Weirton filed its Surreply on August 16, 2022. (App. 2). No discovery was conducted and no evidentiary hearings were held during consideration of Respondent's preemption claim. (App. 4).

After submission of the parties' briefs, the Circuit Court entered its "Order Regarding Pre-Emption" on August 23, 2022 (the "Circuit Court Order") (App. 1-17). The Circuit Court held that Respondent failed to establish its express preemption or implied preemption claims. (App. 17).

The Circuit Court specifically noted, "No discovery has been conducted in this matter and there is no record before this Court as to potential operational conflicts between the local zoning

regulations and the West Virginia Oil and Gas Act at the Brownlee Site." (App. 4). The Circuit Court Order noted Weirton's position that, while it can be conclusively determined that there is no express or implied preemption based on Respondent's facial challenge, "it is premature for this Court to determine whether its zoning regulations interfere with any State environmental regulations inasmuch as no discovery has been conducted and no factual record exists for this Court to consider the application of the factors[,]" (App. 5).

The Circuit Court Order reviewed the text of both West Virginia Code Chapter 22, entitled "Environmental Resources," including both Article 6, (the "Oil and Gas Act") and West Virginia Code Chapter 22, Article 6A (the "Natural Gas Horizontal Well Control Act.").[2] (App. 6-7). It found that the purpose of Chapter 22 is "carry[ing] out the environmental functions of government in the most efficient and cost effective manner, to protect human health and safety and, to the greatest degree practicable, to prevent injury to plant, animal and aquatic life, improve and maintain the qualify of life of our citizens, and promote economic development consistent with environmental goals and standards." (App. 6; *W. Va. Code* § 22-1-1(a)(5)). The Circuit Court also found that the Legislature established state policy in Chapter 22, "in cooperation with other governmental agencies" and private actors, to "use all practicable means and measures to prevent or eliminate harm to the environment and biosphere, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic and other requirements of present and future generations." *Id*. The Court found the purpose of Chapter 22 to include "consolidat[ing] environmental regulatory programs in a single state agency[.]" (App. 6; *W. Va. Code* § 22-1-1(b)).

[2] For ease of reference, *W. Va. Code* § 22-6A-1 *et seq*. is hereinafter referred to as the "Horizontal Well Control Act").

In denying Respondent's field preemption claim, the Circuit Court held that under *Solid Waste Services of West Virginia v. Public Service Com'n*, "all environmental programs in West Virginia are to be regulated by the Division of Environmental Protection" but that even assuming this grant of authority to WVDEP "wholly occup[ies] the realm of environmental regulation in West Virginia," it could not conclude these policy statements are evidence of legislative intent to occupy fields of law outside of environmental regulation. (App. 6-7). As to Respondent's express preemption claim, the Circuit Court found, "SWN cites no specific pre-emption language within Chapter 22, Article 6 or 6A." (App. 9).

The Circuit Court order denied Respondent's express preemption claim because it failed to identify any statutory language identifying laws preempted or the scope of preemption. (App. 9). Moreover, it found that the Legislature's specific text addressing the application of local zoning laws to natural resources such as gas production authorized application of those laws within municipalities. (App. 15); *W. Va. Code* § 8A-7-10(e). Relying on this Court's precedent in *Longwell v. Hodge*, as well as a series of decisions from other state courts considering claims that state environmental regulation of gas wells preempts local land use planning, the Circuit Court found that Respondent also failed to establish its implied field preemption claim because environmental laws and local land use laws occupy distinct fields and have different purposes. (App. 11-13, 16); *Longwell v. Hodge*, 171 W. Va. 45, 297 S.E.2d 820 (1982).

Respondent appealed the Circuit Court Order to the ICA, assigning error to the Circuit Court determination that "municipal zoning regulations are neither expressly nor impliedly preempted by the [Oil and Gas Act or the Horizontal Well Control Act] [*W. Va. Code* § 22-6A-6(b)] delegates 'sole and exclusive authority' over all aspects of the permitting and location of oil and gas exploration and production activities to the [WVDEP Secretary]." (App. 317).

Respondent relied on certain disputed factual allegations in support of its appeal (App. 324-327), and Weirton noted the claims were disputed and not before the ICA on appeal. (App. 357-8).

On November 1, 2023, the ICA entered its opinion in Docket No. 22-ICA-83 (the "ICA Opinion" or "ICA Op.") reversing the Circuit Court Order and finding that Weirton's zoning laws, or some of them, are preempted under an implied conflict preemption theory. (ICA Op. 12-19). The ICA Opinion did not address the Circuit Court's express preemption ruling as the ICA found "it unnecessary to engage in a more exhaustive express preemption analysis because, in this case, West Virginia Code § 22-6-1 *et seq*., and § 22-6A-6 *et seq*. clearly preempt the City's NUDO (which has been repealed) and UDO under implied conflict preemption." (ICA Op. at 12-13). The ICA also did not address the Circuit Court's implied field preemption claim because it found "that implied conflict preemption resolves the matter before us, [so] we will not engage in an analysis of implied field preemption." (ICA Op. at 13, FN 8). The ICA held, "Even absent express preemption, the City's ordinance is in direct conflict with the state's Horizontal Well Act, where the Legislature has vested in the WVDEP sole and exclusive authority to regulate the permitting, location, and any and all other drilling and productions (*sic*) processes of oil and gas wells and production operations within the state." (ICA Op. at 18). This appeal follows.

III. SUMMARY OF ARGUMENT

Respondents claim, and the ICA held, that application of West Virginia Code Chapter 8A, the Land Use Planning Act, to oil and gas drilling is preempted by the portion of *W. Va. Code* § 22-6A-6(b) that grants environmental regulatory authority to the WVDEP secretary over horizontal gas wells which is "sole and exclusive." Preemption of duly enacted laws is disfavored, and it is never sufficient to invoke some "brooding [state] interest" in support of preemption. Rather, the

challenger must identify specific constitutional or statutory text identifying the laws preempted and the scope of preemption.

The ICA Opinion holds that implied conflict preemption invalidates Weirton's zoning laws to the extent it includes authority to decide whether drilling will occur at a particular site where WVDEP has issued a "well work permit" for horizontal drilling. The ICA Opinion must be reversed because it decided this conflict issue before it was considered by the Circuit Court and without an evidentiary record. The ICA should have upheld the Circuit Court decision and found that Respondent fails to establish express preemption where *W. Va. Code* § 22-6A-6(b) does not specify any laws preempted or the extent of preemption, Respondent fails to establish implied field preemption where *W. Va. Code* § 22-6A-1 *et seq*. establishes statewide environmental regulation and West Virginia Code Chapter 8A authorizes the distinct field or local land use planning; and that determination of whether Respondent can establish implied conflict preemption must be deferred until a factual record is developed before the trial court.

If the Court nonetheless considers Respondent's implied conflict preemption claim, it should review the claim under applicable law defining the two prongs of conflict preemption: impossibility preemption and obstacle preemption. Under impossibility preemption, Respondent cannot establish impossibility simply by arguing that one law permits what another restricts. Under obstacle preemption, Respondent cannot identify any clear legislative intent to preempt local land use laws, and comparison of the state environmental regulations and local land use regulations establishes that they serve different purposes. Accordingly, the Court should find that Respondent cannot establish conflict preemption, especially when *W. Va. Code* § 8A-7-10(e) specifies that land use regulations apply to natural resource development within municipalities, and the ICA Opinion should be reversed.

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

i. *De Novo* Review of ICA Opinion

Interpretation of a statute presents a question of law subject to *de novo* review. *Hartley Marine Corp. v. Mierke*, 196 W. Va. 669, 673, 474 S.E.2d 599, 603 (1996).

ii. Express Preemption Standard

"To establish a case of express preemption requires proof that Congress, through specific and plain language, acted within constitutional limits and explicitly intended to preempt the specific field covered by state law." *Morgan v. Ford Motor Co.*, 224 W. Va. 62, 69, 680 S.E.2d 77, 84 (2009) (*citing Hillsborough County, Fla. v. Automated Medical Labs., Inc*., 471 U.S. 707, 715–16 (1985)).

iii. Implied Field Preemption Standard

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 Marine Corp. v. Mierke*, 196 W. Va. At 674, 474 S.E.2d at 604 (*quoting Wardair Canada, Inc. v. Florida Dep't of Revenue*, 477 U.S. 1, 6, and syl. pt. 1, in part (1986)). "[F]ield pre-emption[ ] [occurs] where the scheme of federal regulation is 'so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it[.]'" *In re Flood Litigation*, 216 W. Va. 534, 547, 607 S.E.2d 863,

876 (2004) (*quoting Hartley Marine*, 196 W. Va. At 674, 474 S.E.2d at 604; *Gade v. National Solid Waste Management Ass'n*, 505 U.S. 88, 95 (1992))

iv. Implied Conflict Preemption Standard

"[C]onflict pre-emption[ ] [occurs] where "compliance with both federal and state regulations is a physical impossibility," or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress[.]" *In re Flood Litigation*, 216 W. Va. 534, 547, 607 S.E.2d 863, 876 (2004) (*quoting Hartley Marine*, 196 W. Va. At 674, 474 S.E.2d at 604; *Gade v. National Solid Waste Management Ass'n*, 505 U.S. 88, 95 (1992)). "Preemption may be implied when state law actually conflicts with federal law. The repugnance or conflict should be direct and positive so that the two acts cannot be reconciled or consistently stand together. Conflict preemption, in turn, has two forms: obstacle and impossibility preemption." 81A *C.J.S. States* § 53.

A. Impossibility Preemption

"Impossibility preemption exists where a party cannot independently do under federal law what state law requires of it. Such preemption requires a comparison of the conflicts between state and federal duties to determine whether the private party could independently do under federal law what state law requires of it." 81A C.J.S. States § 55; *Merck Sharp & Dohme Corp. v. Albrecht*, 587 U.S. 299 (2019). Impossibility preemption is a demanding standard to meet, and showing "the possibility of impossibility" is not enough. *Id*. At 314 (*quoting PLIVA, Inc. v. Mensing*, 564 U.S. 604, at 625, n. 8 (2011)). Impossibility preemption must be supported by clear evidence in the record. *Id*. Impossibility preemption is not established when one set of laws restricts an activity permitted by another. *Id*.; *see also Virginia Uranium, Inc. v. Warren*, 587 U.S. ___, 139 S. Ct. 1894 (2019). The Supreme Court has "refused to find clear evidence of such impossibility

where the laws of one sovereign permit an activity that the laws of the other sovereign restrict or even prohibit. *Id*. (*citing Wyeth v. Levine*, 555 U.S. 555 (2009)).

B. Obstacle Preemption

Obstacle preemption applies where the challenged state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Arizona v. United States*, 567 U.S. 387 (2012). "What is a sufficient obstacle is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects." *Crosby v. National Foreign Trade Council*, 530 U.S. 363 373 (2000). "Obstacle preemption questions are to be resolved by examining the federal law to ascertain its purposes and intended effects, examining the state statute to determine its effects, and comparing the results to determine whether the latter statute in some way obstructs the accomplishment of the objectives that have been identified with respect to the former statute." 81A C.J.S. States § 54. "State law is displaced under obstacle preemption only to the extent that it actually conflicts with federal law. Federal law does not preempt state law under an obstacle preemption analysis unless the repugnance or conflict is so direct and positive that the two acts cannot be reconciled or consistently stand together." 81A C.J.S. States § 54; *Virginia Uranium, Inc. v. Warren*, 587 U.S. ___, 139 S. Ct. 1894 (2019). When considering obstacle preemption claims, "any '[e]vidence of pre-emptive purpose,' whether express or implied, must therefore be 'sought in the text and structure of the statute at issue." *Virginia Uranium* at 139 S. Ct. 1907 (*quoting CSX Transp., Inc. v. Easterwood*, 507 U. S. 658, 664 (1993)).

"[M]unicipal 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, … the conflict between

state and municipality is 'false.'" *Longwell v. Hodge*, 171 W. Va. 45, 50, 297 S.E.2d 820, 825 (1982).

b. Conflict Preemption Analysis is Premature Under Respondent's Facial Challenge to West Virginia Land Use Planning Law and the Limits of the Circuit Court Decision.

The Circuit Court's "Order Regarding Pre-Emption" was not a final, appealable order under *W. Va. Code* § 58-5-1(a) on Respondent's conflict preemption theory. The ICA Opinion finding conflict preemption should be reversed, and the case remanded to the Circuit Court for further proceedings on Respondent's conflict preemption claim.

Under *W. Va. Code* § 58-5-1(a), "A party to a civil action may appeal to the Supreme Court of Appeals from a final judgment of any circuit court or from an order of any circuit court constituting a final judgment as to one or more but fewer than all claims or parties upon an express determination by the circuit court that there is no just reason for delay and upon an express direction for the entry of judgment as to such claims or parties[.]" Where the parties disagree about whether an order resolving some but not all issues in the case is final, and factual disputes remain between the parties, the order does not conclusively determine the disputed controversy. *See National Union Fire Insurance Company of Pittsburgh, PA v. Westlake Chemical Corporation*, ___ W. Va. ___, ___ S.E.2d ___ (January 25, 2024), *available at* 2024 WL 313433, at *8.

In this case, the Circuit Court stayed all proceedings following the pleadings to address Respondent's facial challenge to Weirton's zoning laws. In its "Order Regarding Pre-Emption," the Circuit Court specified that, "No discovery has been conducted in this matter and there is no record before this Court as to potential operational conflicts between the local zoning regulations and the West Virginia Oil and Gas Act at the Brownlee Site." (App. 4). The Circuit Court concluded, "SWN's Complaint, in so far as it alleges a facial pre-emption challenge to all West

Virginia zoning laws, is hereby DISMISSED. This Court considers this to be a final appealable order. This Court FURTHER ORDERS its previous STAY TO BE LIFTED and the parties are permitted to proceed with discovery on all other remaining issues." (App. 17). The Circuit Court Order finally resolved only the facial challenge to all zoning laws under express preemption and implied field preemption theories. *See* App. 7-8 (discussing whether *W. Va. Code* §§ 22-6-1 *et seq.* or 22-6A-1 *et seq.* occupied the field of oil and gas well regulation under an implied field preemption theory) and 16 ("there has been no express, clear, and unequivocal statement" preempting local zoning laws). The Circuit Court did not address conflict preemption. Respondent SWN raised a conflict preemption theory on appeal to the ICA under various headings, in addition to its main express preemption and implied field preemption claims. (App. 338-346). Weirton noted in response that the factual issues alleged by SWN in its Opening Brief were disputed and not developed before the Circuit Court. (App. 357-8; App. 394). The ICA Opinion, however, reversed the Circuit Court exclusively on an implied conflict preemption theory. (ICA Op. at 12-13, FN 8).

Weirton recognizes that the categories of preemption "are not rigidly distinct." *Virginia Uranium*, 139 S. Ct. at 1901 (*quoting Crosby v. National Foreign Trade Council*, 530 U.S. 363, 373, n. 6 (2000)). However, in this case, the Circuit Court confined its order to a facial challenge to all zoning laws and did not consider any alleged "operational conflicts" between state law and local law. (App. 4, 16). When other states have considered challenges that state environmental regulation of oil and gas wells preempts local land use law, they have undertaken the conflict preemption analysis based on a fully-developed evidentiary record. *See Board of Commissioners of La Plata County v. Bowen/Edwards Associates, Inc.*, 830 P.2d 1045 (Colo. 1992).[3] The ICA

[3] In *Bowen/Edwards*, the Colorado Supreme Court stated, "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*

Opinion itself demonstrates the importance of a factual record to conflict preemption analysis, as the only specific conflict identified is a setback provision that never applied to Respondent SWN and is no longer in force. (ICA Op. at 18). Because no factual record was developed, the additional preemption findings only state that "other requirements that conflict with the state statute" are preempted. *Id*. The ambiguity, or inaccuracy, in these holdings results from the absence of specific evidence before the Circuit Court and ICA and the lack of a final order of the Circuit Court addressing conflict preemption.

Under *W. Va. R. Civ. P.* 54 and *W. Va. Code* §58-5-1(a), the Circuit Court did not issue a final, appealable ruling on conflict preemption. *See Credit Acceptance Corp. v. Front,* 231 W. Va. 518, 522, 745 S.E.2d 556, 560 (2013) (*citing Coleman v. Sopher,* 194 W. Va. 90, 94, 459 S.E.2d 367, 371 (1995)) ("The usual prerequisite for our appellate jurisdiction is a final judgment, final in respect that it ends the case."). Therefore, the ICA Opinion should be reversed and the matter remanded to the Circuit Court for further proceedings on Respondent's conflict preemption theory.

c. Reversal of the Conflict Preemption Holding is Required Because West Virginia Precedent And Similar State Jurisprudence Holds There Is No Conflict Between State Permitting Regulation and Local Zoning Laws.

If the Court agrees to reach the merits of Respondent's conflict preemption claim, it should reverse the ICA decision because it is not physically impossible for Respondent to comply with both state environmental law and local land use law, and because a comparison of the object and purpose of the state environmental laws and the local land use laws demonstrates that they serve compatible purposes. That these laws coexist is established in West Virginia by this Court's decision in *Longwell v. Hodge*, as well as by longstanding practice since adoption of West Virginia

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* at 1068-69.

Code Chapter 22 in 1994. The compatibility of the laws is consistent with other states' decisions on claims that environmental laws regulating gas drilling preempt local land use law. *See, e.g., Wallach v. Town of Dryden*, 23 N.Y.3d 728, 16 N.E.3d 1188 (2014). Accordingly, the Court should reverse the ICA Opinion, uphold established West Virginia law, consistent with the decisions of other state courts, and find that *W. Va. Code* §§ 22-6-1 *et seq*. and 22-6A-1 *et seq*. do not preempt local land use regulations authorized by *W. Va. Code* § 8A-1-1 *et seq*.

i. The ICA Holding on Conflict Preemption Creates Uncertainty in Application of the Law.

The ICA Opinion specifically limits its reversal of the Circuit Court to a conflict preemption theory. (ICA Op. at 14). The ICA Opinion appears to rely on contested factual matters, including a reference that WVDEP has permitted this project[4] and reliance on a finding of the Weirton Board of Zoning Appeals,[5] and it defines a conflict based on a zoning code setback provision that never applied to Respondent. (ICA Op. at 18). Ultimately, the ICA holds that "the City's ordinance is in direct conflict with the state's Horizontal Well Act" without identifying any provision of the zoning ordinance applied to Respondent, or the zoning ordinance now in effect, that conflicts with any provision of the Horizontal Well Control Act. (ICA Op. at 18). The ICA also holds, "Further, to the extent that the City's re-enacted UDO has other requirements which conflict with the state statute, it is also preempted under conflict preemption." (ICA Opinion at 18). The ICA suggests that "fees or certain paperwork" may not create a conflict but if there are "hearings or administrative procedures, and/or there are other regulatory requirements that

[4] While Respondent included a well permit as an attachment to its Amended Complaint, the parties have not conducted any discovery in this case. Even assuming the permit is in force, there is no evidence whether additional required regulatory approvals have been issued or sought. These approvals include the County Floodplain Coordinator, West Virginia Department of Natural Resources, and others. (App. 182).

[5] The findings of the BZA are subject of a separate challenge by Respondent, using the writ of certiorari process pursuant to *W. Va. Code* §§ 8A-9-1 *et seq*. That challenge is ongoing. The finality of BZA findings, or availability of a Conditional Use Permit, has not been determined.

conflict, a direct conflict exists between the City's UDO and the WVDEP's authority to grant permits." *Id*. It is unclear which provisions of Weirton's zoning laws (or other laws) may be preempted and which may be allowable, because no factual record has been developed.

The ICA Opinion may be read to hold that conflict preemption is found based on the commitment of the "sole and exclusive authority" of the WVDEP Secretary to exercise regulatory authority over "permitting," "siting," or "location" of horizontal gas wells, and thus invalidate any restriction of horizontal gas well uses to a particular zoning district or classification within the City of Weirton. Under that reading, however, it is not clear whether the City of Weirton may require Respondent to obtain building permits and obtain a Certificate of Occupancy as required by the State Building Code. *See W. Va. Code* § 8-12-13; West Virginia Code of State Rules Title 87, Article 4, entitled "State Building Code," 2018 International Building Code, Sections 105 "Permits" and 111 "Certificate of Occupancy" *available at* https://codes.iccsafe.org/content/IBC2018P6. (last visited March 29, 2024). The Horizontal Well Control Act likewise gives the WVDEP Secretary sole and exclusive authority over "permitting" of horizontal gas wells. Reading this grant of regulatory authority in context resolves this issue, properly confining the WVDEP Secretary's authority over permitting, siting, and location to environmental regulatory matters. If the ICA Opinion is read to preempt any "permitting" laws outside the scope of environmental regulation by the state, the same issues with respect to the scope of preemption exist with respect to application of the State Fire Code (*W. Va. C.S.R.* §§ 87-1-1 *et seq*.), and local safety requirements such as grading permits, timbering permits, or stormwater permits.

The conclusion of the ICA Opinion demonstrates the problems with applying conflict preemption principles to analyze a facial challenge to the Land Use Planning Act. The ICA

concludes, “Once the WVDEP issued a permit, the City cannot hinder SWN’s ability to begin drilling[,]” and holds, “[T]he City’s ordinance is in direct conflict with the state’s Horizontal Well Act, where the Legislature has vested in the WVDEP sole and exclusive authority to regulate the permitting, location, and any and all other drilling and productions (*sic*) processes of oil and gas wells and production operations within the state.”[6] (ICA Op. at 18). The holding in the ICA Opinion does not identify which generally applicable laws “hinder” drilling and are purportedly preempted based on a “direct conflict” with state laws. Nor does the opinion address whether compliance with the Horizontal Well Control Act (or Oil and Gas Act) and the local zoning regulations is physically impossible, or whether Respondent has established, after review of both sets of laws, that there is an irreconcilable conflict between the two by which the local land use regulations prevent accomplishment of the state legislative purpose established in the text of the law.

ii. Conflict Preemption Requires Establishment of Physical Impossibility or Irreconcilable Conflict.

A challenger must establish either that “compliance with both federal and state regulations is a physical impossibility,” or that state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress” in order to prove conflict preemption. *In re Flood Litigation*, 216 W. Va. 534, 547, 607 S.E.2d 863, 876 (2004). In *Flood Litigation,* 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

[6] The well permit itself includes specific acknowledgement of permitting and approval requirements in addition to permitting by WVDEP. (App. 182). The permit specifies that the applicant acknowledges “the possibility of the need for permit and/or approvals from local, state, or federal entities in addition to the DEP[.]” A nonexhaustive list of those potential agencies with permitting or approval authority includes the County Floodplain Coordinator, the WV Division of Natural Resources, and the WV Division of Highways. *Id*. The well permit itself “in no way overrides, replaces, or nullifies the need for other permits/approvals that may be necessary[.]” *Id*.

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 WVDEP 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.*

The ICA Opinion relies on *Metro Tristate, Inc. v. Public Service Commission of West Virginia*, 245 W. Va. 495, 859 S.E.2d 438 (2021) and *Boggs v. Boggs*, 520 U.S. 833, 844 (1997) for the conflict preemption standard applied in this case. (ICA Op. at 15). *Metro Tristate* considered whether a contractor meeting U.S. Department of Veterans Affairs qualifications under 38 *U.S.C.* § 8127 was also subject to West Virginia Public Service Commission qualifications to travel state roads. *Id*. At Syl. Pt. 6. The dispute "concern[ed] a contract for 'non-emergency medical transportation' of passengers over the highways of this State on behalf of a federal agency, the United States Department of Veterans Affairs." *Id*. At 245 W. Va. 499, 859 S.E.2d 442. In *Metro Tristate*, the Court addressed a single question: "Did the Commission err when it determined its authority to regulate CPC, a small business owned by a service-disabled veteran, was preempted because the act of regulation would serve as an obstacle to and interfere with congressional goals, namely to encourage the VA to contract with small businesses owned by service-disabled veterans?" This Court found conflict preemption because the congressional goals established by statute were to provide opportunities for service-disabled veterans, but also because the federal

government has a long-established right to determine the qualifications of its own contractors. *Metro Tristate*, 245 W. Va. 507, 859 S.E.2d 450. The VA was required by federal law to award the contract to a small business owned by veterans with service-connected disabilities, and the Petitioner Metro Tristate, Inc. was not such a business. *Id*. at 245 W. Va. 508, 859 S.E.2d 451. The Court specifically held, based on that evidentiary record, that PSC jurisdiction to require a motor carrier permit was preempted where the federal contract was awarded under specific requirements of federal law, including a determination that the carrier was qualified to perform the contract and would do so at a fair and reasonable price that offers the best value to the United States, and that to impose additional state qualifications would stop the performance of the contractor's duties for the federal government. *Id*. At 245 W. Va. 509, 859 S.E.2d 452. The Court was careful to limit application of its implied preemption holding, stating, "Our decision reaffirms the standard that conflict preemption is triggered only when it is 'impossible to reconcile both state and federal laws or when the state law frustrates the purpose of federal law.'" *Id*. (*quoting Lafferty Enterprises, Inc. v. Commonwealth*, 572 S.W.3d 85, 91 (Ky. App. 2019). The Opinion also cautioned, "Our decision should be viewed under the prism of these unique facts and not be seen as embracing far-reaching preemption powers in the broader sense." *Id*. At 245 W. Va. 510, 859 S.E.2d 453. Those unique facts do not apply to preemption claims that state environmental regulations invalidate local land use laws. Several state court decisions, including West Virginia's, do consider the circumstances of whether a state regulatory permitting system invalidates local land use laws, and find that they coexist.

iii. Respondent Cannot Establish Impossibility Conflict Preemption

Under a conflict preemption theory, impossibility is not established merely where one law restricts something permitted by another. *Wyeth v. Levine*, 555 U.S. 555, 568 (2009). The Supreme Court has explained, "the "possibility of impossibility [is] not enough." *PLIVA, Inc. v. Mensing*, 564 U. S. 604, 625, n. 8, (2011) (internal quotation marks omitted). Consequently, we have refused to find clear evidence of such impossibility where the laws of one sovereign permit an activity that the laws of the other sovereign restrict or even prohibit." *Merck Sharp & Dohme Corp. v. Albrecht*, 587 U.S. at 314.

In *Wyeth v. Levine*, the challenger asserted that "state-law claims are pre-empted because it is impossible for it to comply with both the state-law duties underlying those claims and its federal labeling duties." *Id*. However, the manufacturer was responsible for submitting proposed content for its FDA-approved label and had the opportunity to alert FDA of new information and request changes. *Id*. At 571-2. Thus, while the manufacturer met federal labeling requirements, it remained subject to state law failure-to-warn claims. *Id*. The Supreme Court noted that, "Impossibility pre-emption is a demanding defense. On the record before us, Wyeth has failed to demonstrate that it was impossible for it to comply with both federal and state requirements. The CBE regulation permitted Wyeth to unilaterally strengthen its warning, and the mere fact that the FDA approved Phenergan's label does not establish that it would have prohibited such a change." *Id*. At 573.

Just as in *Wyeth*, Respondent here has the ability to comply with both state and local laws, and has the option and responsibility in the first instance of selecting how it will do so. In *Wyeth*, the drug manufacturer obtained information about risks associated with its product and advised FDA of those risks along with proposing an appropriate label for approval. *Id*; *see also GenBioPro, Inc. v. Sorsaia,* No. CV 3:23-0058, (S.D.W. Va. Aug. 24, 2023)*, available at* 2023 WL 5490179 at

*7 („, the Court finds that the UCPA and abortion restrictions do not pose an "unacceptable obstacle to the accomplishment and execution of the full purposes and objectives of Congress.") (*quoting Wyeth,* 555 U.S. at 563-64). Here, Respondent selected and acquired the site of its proposed gas wells with knowledge of the local land use regulations, and applied to WVDEP for a permit at the location while in possession of that knowledge. Under established jurisprudence on implied conflict preemption, the mere possibility that local land use regulations also apply to the site does not constitute "physical impossibility" of complying with both sets of laws.

The ICA Opinion does not specify which prong of conflict preemption it applies, but it appears to conclude that conflict preemption exists based on the impossibility standard where a WVDEP well work permit issues for a particular site that is also subject to local permitting. (ICA Op. at 18). Under established law, impossibility is not established merely where one law restricts something permitted by another, and this theory cannot support the ICA decision.

iv. State Environmental Regulation Does Not Establish Obstacle Conflict Preemption of the Land Use Planning Act.

The original decision describing obstacle preemption as a subpart of conflict preemption was *Hines v. Davidowitz,* 312 U.S. 52 (1941). There, the Court considered Pennsylvania's laws regulating aliens, and announced the obstacle preemption principle as follows, "Our primary function is to determine whether, under the circumstances of this particular case, Pennsylvania's law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* At 67. The Court found the state law was preempted, based on its determination that "Legal imposition of distinct, unusual and extraordinary burdens and obligations upon aliens—such as subjecting them alone, though perfectly law-abiding, to indiscriminate and repeated interception and interrogation by public officials—thus bears an inseparable relationship

to the welfare and tranquillity of all the states, and not merely to the welfare and tranquillity of one." *Id*. At 65-6.

The Supreme Court has since established more formal standards for conflict preemption claims, including obstacle preemption, recited in *Arizona v. United States,* where the Court stated the standard as follows: "[S]tate laws are preempted when they conflict with federal law. This includes cases where 'compliance with both federal and state regulations is a physical impossibility,' *Florida Lime & Avocado Growers, Inc. v. Paul,* 373 U.S. 132, 142–143, (1963), and those instances where the challenged state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,' *Hines,* 312 U.S., at 67; *see also Crosby, supra,* at 373, ("What is a sufficient obstacle is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects"). In preemption analysis, courts should assume that 'the historic police powers of the States' are not superseded 'unless that was the clear and manifest purpose of Congress.' *Rice, supra,* at 230; see *Wyeth v. Levine,* 555 U.S. 555, 565, (2009)." 567 U.S. 387 (2012).

In *Arizona,* the Court again considered state-imposed laws affecting aliens in context of a claim that federal Constitutional or legislative authority of immigration law preempted it, finding that Congress's occupation of the field of immigration law, and its relation to foreign relations, preempted Arizona's law. *Id*. At 400-1.

The Supreme Court most recently addressed conflict preemption in *Virginia Uranium, Inc. v. Warren.* 139 S. Ct. 1894. In *Virginia Uranium,* the Court considered a claim that the federal Atomic Energy Act preempted Virginia state law prohibiting uranium mines on private property. *Id*. The Court found no conflict preemption where the AEA regulates the production of atomic energy as a federal objective, and regulates uranium mine tailings and storage, but does not

specifically regulate uranium mining. *Id*. At 1908. The Court explained that the source of conflict preemption must be found in the statutory text:

> So it may be that Congress meant the AEA to promote the development of nuclear power. It may be that Congress meant the AEA to balance that goal against various safety concerns. But it also may be that Members of Congress held many other disparate or conflicting goals in mind when they voted to enact and amend the AEA, and many different views on exactly how to manage the competing costs and benefits. If polled, they might have reached very different assessments, as well, about the consistency of Virginia's law with their own purposes and objectives. The only thing a court can be sure of is what can be found in the law itself. And every indication in the law before us suggests that Congress elected to leave mining regulation on private land to the States and grant the NRC regulatory authority only after uranium is removed from the earth.

Id. *Virginia Uranium* is the closest federal court decision to the claim presented in this case, where a comprehensive law regulating a certain type of energy production was found not to preempt ancillary regulations that touch upon the energy production but do not directly regulate areas covered by the federal law.

Virginia Uranium is instructive because it involves an environmental safety regime that also includes interest in developing a natural resource efficiently (there, nuclear power). 139 S. Ct. 1894. The Court found that obstacle preemption could not be established, because the federal law included no specific intent to preempt state authority. *Id*. At 1900. The Court explained its holding as follows:

> Virginia Uranium insists that the federal Atomic Energy Act preempts a state law banning uranium mining, but we do not see it. True, the AEA gives the Nuclear Regulatory Commission significant authority over the milling, transfer, use, and disposal of uranium, as well as the construction and operation of nuclear power plants. But Congress conspicuously chose to leave untouched the States' historic authority over the regulation of mining activities on private lands within their borders. Nor do we see anything to suggest that the enforcement of Virginia's law would frustrate the AEA's purposes and objectives. And we are hardly free to extend a federal statute to a sphere Congress was well aware of but chose to leave alone. In this, as in any field of statutory interpretation, it is our duty to respect not only what Congress wrote but, as importantly, what it didn't write.

Id. In this case, Respondent will likely claim that a secondary purpose of Chapter 22's Environmental Protection laws, including the Horizontal Well Control Act, is to efficiently produce natural gas. *Virginia Uranium* considered a similar argument and found it lacking. Supreme Court "precedents have long warned against undertaking potential misadventures into hidden state legislative intentions without a clear statutory mandate for the project." *Virginia Uranium, Inc. v. Warren*, 139 S. Ct. 1906.

Federal court decisions do not appear to have considered preemption claims specifically alleging that environmental regulation of energy production preempts local zoning laws. However, this state has addressed the claim that a comprehensive statewide permitting regime preempts local land use laws in *Longwell v. Hodge*, finding the claim is a "false conflict" and state permitting does not preempt local law. In addition, other states have considered multiple claims that state-level environmental regulations of oil and gas drilling preempt local land use regulations. *See, e.g., Wallach v. Town of Dryden*, 23 N.Y.3d 728, 16 N.E.3d 1188 (2014). These authorities provide guidance regarding the state purpose in permitting regimes and local land use controls, as well as the specific application to oil and gas laws.

A. The Environmental Protection Laws and the Land Use Planning Act Have Distinct Purposes, And the Land Use Planning Act Does Not Frustrate the Health and Safety Purposes of the Environmental Protection Laws.

A challenger claiming obstacle preemption must establish that the challenged law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Arizona v. United States*, 567 U.S. 387. "Federal law does not preempt state law under an obstacle preemption analysis unless the repugnance or conflict is so direct and positive that the two acts cannot be reconciled or consistently stand together." 81A C.J.S. States § 54; *Virginia Uranium, Inc. v. Warren*, 587 U.S. ___, 139 S. Ct. 1894.

Here, West Virginia Code Chapter 22, entitled "Environmental Protection," including the Oil and Gas Act and the Horizontal Well Control Act, serves the central purpose of establishing and enforcing protection of human health and safety. *W. Va. Code* § 22-1-1(a)(5). The primary purpose of Chapter 22 is "Restoring and protecting the environment[.]" *W. Va. Code* § 22-1-1(a)(1). The wise use and conservation of the environment and natural resources are a part of this purpose. *Id*. The Horizontal Well Control Act, in particular, was enacted in response to technical advancements in drilling processes, and provides for different safety regulation of those new processes. *W. Va. Code* § 22-6A-2(a).[7]

The Land Use Planning Act, by contrast, grants local governing bodies authority to plan orderly development of land within their communities so that "the needs of agriculture, residential areas, industry and business be recognized in future growth." *W. Va. Code* § 8A-1-1. The land use planning purpose includes ensuring "that adequate light, air, convenience of access and safety from fire, flood and other danger is secured," "lessening congestion," "promoting the orderly development of land," and "preserving agricultural land[.]" *W. Va. Code* § 8A-7-2(a).

Weirton's zoning laws serve the purposes established by the Land Use Planning Act, promoting orderly development by grouping compatible uses in districts and establishing requirements to address the needs of various land uses while lessening congestion and promoting future growth. *W. Va. Code* §§ 8A-1-1, 8A-7-2. The zoning laws do not encroach into

[7] The text of Section 2 defines the purpose as follows: "The advent and advancement of new and existing technologies and drilling practices have created the opportunity for the efficient development of natural gas contained in underground shales and other geologic formations; These practices have resulted in a new type and scale of natural gas development that utilize horizontal drilling techniques, allow the development of multiple wells from a single surface location, and may involve fracturing processes that use and produce large amounts of water; In some instances these practices may require the construction of large impoundments or pits for the storage of water or wastewater; Existing laws and regulations developed for conventional oil and gas operations do not adequately address these new technologies and practices[.]" *Id*.

environmental standards by attempting to regulate the methods or processes of gas drilling, which are the province of WVDEP under Chapter 22.

The ICA Opinion relies on *W. Va. Code* § 22-6A-6(b) to supply evidence of legislative intent to preempt local land use laws. (ICA Op. at 18). Subsection (b) in its entirety states 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(b). To claim this paragraph at W. *Va. Code §* 22-6A-6(b) preempts all local land use law is to take it wholly out of context. Section 6 grants the WVDEP 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). Subsection (b), relied on by the ICA, 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.

Other provisions of the Horizontal Well Act illustrate the distinct purposes of the laws. West Virginia Code § 22-6A-8(d) specifies the scope of the WVDEP secretary's review when considering whether to issue a well permit, which is limited to personal safety, soil erosion, damage to public lands or natural resources, and protection of water 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 WVDEP 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).[8]

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 WVDEP 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, (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); *F.T.C. v. Mandel Brothers, Inc.,* 359 U.S. 385, 389, (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 (1932). The WVDEP 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 find that Chapter 22's grant of 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), as permitting authority over these operations is also committed to the WVDEP Secretary.

[8] 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."

Consistent with other state laws, discussed *infra*, West Virginia has established in Chapter 22, including Article 6A, statewide environmental regulatory programs which are capable of serving their purpose to "protect the environment" while still applying local land use laws specifically authorized by the Land Use Planning Act.

Beyond comparing the purposes of the two laws, the Court can review the legislature's specific determination with respect to the application of local land use laws to natural resource extraction such as gas drilling. *W. Va. Code* § 8A-7-10(e). The law states, "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[.]" The legislature made a specific determination that outside of municipalities, land use laws cannot prevent or limit complete use of natural resources by the owner. Within municipalities, such as the City of Weirton, those land use laws do apply to use of natural resources just as they apply to other property uses.

B. Distinct Purposes of State Regulation and Land Use Planning Are Recognized by Supreme Court Opinions.

Implied preemption of local laws by state laws is governed by this Court's decision in *Longwell v. Hodge*, 171 W. Va. 45, 297 S.E.2d 820. Under *Longwell*, a local zoning law does not conflict with a state regulatory law because the two sets of laws regulate distinct fields. *Id*. Federal law – state law preemption cases recognize this same distinction. *See Altria Group, Inc. v. Good*, 555 U.S. 70 (2008) (Federal Cigarette Labeling and Advertising Act did not preempt Maine Unfair Trade Practices Act because the federal law regulated smoking health and the state law regulated deceiving speech).

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 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.

Respondent relied in the ICA on *Brackman's, Inc. v. City of Huntington,* a case of two specifically conflicting business licensing regulations, but failed to address *Longwell v. Hodge,* where this 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. The local land use laws challenged here 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, this Court's subsequent holding in *Longwell v. Hodge* requires 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 Respondent made – and the ICA accepted – in this matter, 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.

This Court considered the 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 Respondent 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) (granting Commissioner "sole responsibility for the administration of this article"); 11-16-8 (giving Commissioner authority to issue licenses). 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.

Respondent argued before the ICA that the Commissioner's interest in alcohol distribution is merely defensive and so 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 more complex than that, 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 *Longwell v. Hodge* and the other state court decisions specific to oil and gas preemption claims reviewed *infra.* 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 the ICA, Respondent argued that local land use laws are preempted by the Horizontal Well Control Act by relying 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. 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. *Brackman's. 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 (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.

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 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 WVDEP, 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 Fourth Circuit 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 WVDEP, 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-C411), 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 local land use laws 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. As discussed more thoroughly in the review of other state court decisions, *infra*, these separate bodies of law serve different purposes. West Virginia law already establishes that zoning coexists with state permitting regulation and is not preempted by Respondent's implied preemption theory. *Longwell,* 171 W. Va. At 49, 297 S.E.2d at 824. 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 — local land use laws do not encroach on state environmental permit regulation.

C. Decisions in Claims that Oil and Gas Laws Preempt Local Land Use Laws Support This Court's Precedent in *Longwell v. Hodge*.

Respondent's claim that the Oil and Gas Act or the Horizontal Well Control Act preempt local land use laws authorized by the Land Use Planning Act is a matter of first impression under West Virginia law. However, these claims have been considered in other states. In general, other states find that state permitting of gas wells does not preempt all local land use regulations because the state laws can serve their purpose of ensuring environmental health and safety while operators also comply with local land use requirements. Courts in other jurisdictions have reached the same

conclusion as this Court reached in the alcohol permitting and local zoning context, 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 preemption challenge relying on oil and gas regulations:

> 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.*

In the Circuit Court, Respondent relied on a Pennsylvania law, since invalidated in *Robinson Twp.,* for its argument that other state oil and gas laws preempt all zoning regulations. *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. 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 this 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 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 Nockamixon Tp.,* 973 A.2d 1036 (Pa. Commw. Ct. 2009); *Wallach v. Town of Dryden,* 23 N.Y.3d 728, 16 N.E.3d 1188 (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 ICA, Respondent 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.*

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. 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 land use laws 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 or limits 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 *available at* 2014 WL 7457065 (Ohio Ct. App. 11 th Dist. Lake County 2014). 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.

While Ohio courts recognized the specific intent of the legislature to repeal any local laws concurrent with gas drilling regulation and to prohibit any discrimination against gas drilling,

general state laws granting exclusive environmental regulatory authority to a state agency are recognized by other state courts as coexisting with local land use laws. In *Board of Commissioners of La Plata County v. Bowen/Edwards Associates, Inc.,* the Colorado Supreme Court encapsulated the reason that local land use law does not pose an obstacle to accomplishing state environmental regulation:

> **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.**

830 P.2d 1045, 1058-59 (Colo. 1992). Notably, the Court specifically considered whether stated purposes of the environmental regulation to conserve and efficiently manage natural resources established a competing purpose to ensure use of sites where zoning would not allow drilling, and it rejected the claim. 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. 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). 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. 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 land use laws are compatible with state environmental regulation of oil and gas. These holdings consistently and thoroughly express the same principle espoused by our Supreme Court in *Longwell v. Hodge* - local land use laws serves purposes distinct from state permitting systems and do not "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of" state environmental permit regulations. *Arizona v. United States*, 567 U.S. 387. Accordingly, the Court should not preempt established law because there is no conflict "so direct and positive that the two

acts cannot be reconciled or consistently stand together." 81A C.J.S. States § 54; *Virginia Uranium, Inc. v. Warren*, 139 S. Ct. 1894.

VI. CONCLUSION

The ICA Opinion must be reversed because it ruled only on an implied conflict preemption theory, without the benefit of a final Circuit Court ruling on the issue or the development of evidence that would establish or delimit any potential conflicts. If the Court nonetheless considers Respondent's implied conflict preemption claim, the ICA Opinion must be reversed because Respondent cannot establish impossibility simply by arguing that one law permits what another restricts, and Respondent cannot establish obstacle preemption where there is no clear legislative intent to preempt local land use laws, and comparison of the state environmental regulations and local land use laws demonstrates there is no obstacle to accomplishment of the purposes of the environmental laws. Accordingly, the Court should find that Respondent cannot establish conflict preemption, and that *W. Va. Code* § 8A-7-10(e) specifies that land use laws apply to natural resource development within municipalities.

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

SWN PRODUCTION COMPANY, LLC

Petitioner,

v. **No. 23-753**

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

Respondents.

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of April 2024, I served the **Opening Brief of Petitioners City of Weirton and City of Weirton Board of Zoning Appeals** upon the Respondent's counsel via the West Virginia E-Filing System, to the following

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