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,

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

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I. SUMMARY OF ARGUMENT

Respondent SWN Production Company, LLC ("SWN" or "Respondent") concedes on briefing that no factual record regarding operational conflicts was developed in the Circuit Court, and that no physical impossibility exists to support implied conflict preemption. Respondent argues that it can meet its burden to prove implied conflict preemption merely by a showing that local law adds conditions, rather than by meeting the standard in established jurisprudence requiring Respondent to pinpoint legislative text that establishes the challenged local law is an obstacle to state law that frustrates the purpose of the law or is an impossible repugnancy to the law. However, the ruling of the West Virginia Intermediate Court of Appeals ("ICA") was based on the implied conflict doctrine developed in federal and state courts, and Respondent did not assign error to the ICA's use of that standard. Even if Respondent could rely on some lesser conflict analysis, this Court's precedential decision in *Longwell v. Hodge* establishes that land use laws are not preempted by state permitting laws under a conflict preemption theory. Other state court decisions confirm this analysis is correct – land use laws and environmental regulatory programs serve different purposes and operate concurrently absent an express preemption clause – which is not present in West Virginia's legislation. A challenger asking a Court to imply preemption has a heavy burden, because Court disfavor creating preemption absent specific legislative text establishing its cope. Respondent cannot meet the burden here, and the ICA decision should be reversed.

Respondent also cross-assigns error in its Response Brief,[1] alleging the ICA should have invalidated land use laws on either an express preemption theory or an implied field preemption

[1] Pursuant to Rule 10 of the West Virginia Rules of Appellate Procedure, "If a timely-filed respondent's brief asserts cross-assignments of error, the applicable page limitation for a reply brief set forth in Rule 38 is extended to forty pages, and the time for filing a reply brief is automatically extended, without need for

theory. The statute relied upon by Respondent contains no express preemption provision. Express preemption provisions contain three common elements: (1) they state that they are superseding or preempting laws, (2) they identify those laws, and (3) they identify the scope of preemption. None of these elements is present in W. Va. Code § 22-6A-6(b), and the ICA properly declined to find express preemption. As demonstrated by this Court's precedent and decisions from other jurisdictions considering preemption challenges based on oil and gas permitting laws, environmental laws and land use laws occupy distinct fields, and the environmental laws do not impliedly preempt the land use laws.

Accordingly, the ICA decision should be reversed based on the absence of support for implied conflict preemption under either the physical impossibility or obstacle standards, or alternately the case should be remanded to the Circuit Court for development of a factual record upon which any conflict may be considered. Respondent's assignments of error must be denied, because the statute at issue contains no express preemption clause and state environmental regulation does not occupy the field of land use law.

II. ARGUMENT

A. Remand is Appropriate to Allow the Circuit Court to Consider Argument Regarding Any Alleged Operational Conflict.

The ICA Opinion relied solely upon implied conflict preemption to invalidate some portions of Weirton's land use laws, apparently on a finding that local setbacks different than state setback requirements met the test for the physical impossibility theory of implied conflict preemption. (ICA Op. at 18-19)[2] The Circuit Court opinion on appeal to the ICA considered a

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further order, until thirty days after the date the respondent's brief containing cross-assignments of error was filed."

[2] The ICA held, "These setback requirements cannot be reconciled and are in direct conflict with each other. Further, to the extent the City's re-enacted UDO has other requirements which conflict with the state statute, it is also preempted under conflict preemption." The ICA explained in a footnote to that holding, "This Court is not

facial challenge to all local land use laws by Respondent, which claimed in part that those laws were expressly preempted by *W. Va. Code* § 22-6A-6(b). (App. 259-262).[3] Because the Circuit Court order reserved any finding on operational conflicts pending the conduct of discovery, consistent with Weirton's arguments in briefing to the Circuit Court (App. 4, 17, 240), the order was not a final, appealable order as to conflict preemption claims and the ICA Opinion should be reversed and the case remanded to the Circuit Court for further proceedings.

Respondent argues that remand to the Circuit Court is not appropriate because the Circuit Court did consider its implied conflict preemption claim, along with its express preemption and implied field preemption claims. (Resp. Br. At 13). First, Respondent argues that it included an implied conflict preemption theory in its Complaint. (Resp. Br. At 13). The cited references use the word conflict, but do not describe an implied conflict preemption theory, though they are certainly sufficient to allow Respondent to pursue an implied conflict preemption claim at a later phase of this case. *Id*. Regardless, these claims miss the mark. At issue is whether the Circuit Court order being appealed was a final, appealable order on implied conflict preemption.

Respondent then argues that it thoroughly briefed conflict preemption in the Circuit Court. (Resp. Br. At 13, FN8). Undoubtedly, Respondent made arguments about disputed facts before the Circuit Court (and the ICA) and argued that those facts created a conflict between the local land use laws and state environmental regulatory laws. At the same time, Weirton pointed out each time that Respondent was arguing disputed facts which were not before the respective Courts. In the Circuit Court, Weirton noted, "SWN includes a lengthy recitation of its

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saying that fees or certain paperwork create a direct conflict, however, to the extent that SWN must go through further hearings or administrative procedures, and/or there are other regulatory requirements that conflict, a direct conflict exists between the City's UDO and the WVDEP's authority to grant permits." *Id*. at FN12.

[3] Respondent raised its claim under *W. Va. Code* § 22-6A-6(b) for the first time in its Reply Brief to the Circuit Court. The Court had stayed all proceedings pending consideration of Respondent's facial challenge alleging land use laws were preempted, and entered a briefing schedule. Respondent's Complaint, Amended Complaint, and opening brief only relied upon West Virginia Code Chapter 22, Article 6. (App. 214-229, 292).

application to begin hydraulic fracturing operations under a prior zoning regulation, its pending administrative appeal of the denial of its application for a conditional use permit under that regulation, and its claims relating to a new zoning regulation that has never been applied to SWN. While the factual assertions are disputed, they are simply not at issue at this stage of litigation. The Court has stayed all proceedings on those actions which would require factual development through discovery, no discovery has been conducted, and no facts have been conclusively established by SWN." (App. 240-1); *see also* App 282, FN5. Before the ICA, Weirton identified the same issue in the Statement of the Case: "[SWN]'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." (App. 357).

The Circuit Court specified that it did not rule on "potential operational conflicts" while stating that it ruled only on Respondent's "facial preemption challenge to all West Virginia zoning laws," and directed the parties to "proceed with discovery on all remaining issues." (App. 4, 17). Just as the Colorado Supreme Court did in *Bowen/Edwards,* the Circuit Court did not rule on potential "operational conflicts" based on a facial challenge and without a factual record, or at least stipulations. *See Board of County Com'rs, La Plata County v. Bowen/Edwards Associates, Inc.*, 830 P.2d 1045, 1056-7 (Colo. 1992) ("There are three basic ways by which a state statute can preempt a county ordinance or regulation: first, the express language of the statute may indicate state preemption of all local authority over the subject matter; second, preemption may be inferred if the state statute impliedly evinces a legislative intent to

completely occupy a given field by reason of a dominant state interest; and third, a local law may be partially preempted where its **operational effect would conflict** with the application of the state statute.") (internal citations omitted, emphasis added). Had the Circuit Court order fully disposed of all Respondent's preemption claims, there would have been no need for discovery. The Order would have simply dismissed Respondent's Amended Complaint with prejudice. The ICA Opinion did rely on the disputed facts[4] alleged by Respondent, and it considered claims related to operational conflicts which were reserved for future proceedings by the Circuit Court. (ICA Op. at 18-19). These were not a part of the final, appealable ruling of the Circuit Court. *W. Va. R. Civ. P.* 54, *W. Va. Code* § 58-5-1(a); *Credit Acceptance Corp. V. Front*, 231 W. Va. 518, 522, 745 S.E.2d 556, 560 (2013). Accordingly, the ICA Opinion should be reversed and the matter remanded to the Circuit Court for further proceedings on Respondent's conflict preemption theory.

B. Respondent Fails to Establish Implied Conflict Preemption Under Either the Physical Impossibility or Obstacle Prongs.

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

[4] That reliance created errors in the ruling – a determination that a nonapplicable setback created a conflict with state law – as well as serious uncertainty regarding the confines of the ruling. As an example of the difficulties posed by the lack of a factual record, Respondent contends in this Court that "there are a number of reasons why [horizontal well] development would never occur in a residential district[.]" (Resp. Br. At 15, FN10). Yet the BZA heard evidence that Respondent's proposed horizontal well site is adjacent to a residential mixed-use development that was under construction at the time of Respondent's permit application. That information is not part of the record before this Court because it was not considered during the Circuit Court ruling on Respondent's facial challenge to land use laws. Respondent also offers no theory as to why its claim that the "sole and exclusive" language in *W. Va. Code* § 22-6A-6(b) applies to preempt permit requirements under land use laws but not building codes, fire codes, or other state and local regulation. (*Compare* Weirton's Opening Br. At 14 *with* Resp. Br. At 31 FN22). The scope of the ICA Opinion's preemption ruling is uncertain in part because it relies on Respondent's factual allegations rather than a determination by the Circuit Court.

conflict preemption. *In re Flood Litigation*, 216 W. Va. 534, 547, 607 S.E.2d 863, 876 (2004). Respondent objects that Weirton's Opening Brief includes a dissertation on the physical impossibility prong of the implied conflict preemption standard, but it offers no support for impossibility preemption. (Resp. Br. 24, FN16). The ICA Opinion relies on the implied conflict preemption standard as stated in *In re Flood Litigation*. (ICA Op. at 15, *quoting Metro Tristate, Inc. v. Pub. Serv. Comm'n of W. Va.*, 245 W. Va. 495, 504, 859 S.E.2d 438, 447 (2021); *Boggs v. Boggs*, 520 U.S. 833, 844 (1997)).[5] . Impossibility preemption is not established when one set of laws restricts or conditions an activity permitted by another. *Merck Sharp & Dohme Corp. v. Albrecht*, 587 U.S. 299, 314; 81A C.J.S. States § 55. Thus, impossibility is not established by issuance of a permit by the WVDEP Secretary, simply because Respondent must also comply with other generally applicable laws such as building permits or zoning permits. Accordingly, the ICA Opinion cannot be upheld on an impossibility theory.

Respondent argues in part that it met the "obstacle" prong of the implied conflict standard (separately arguing that it can succeed on some lesser standard, addressed *infra* at §II.C.). Respondent argues that *W. Va. Code* § 22-6A-6(b) "cannot be reconciled" with the Land Use Planning Act by arguing that (1) the words "sole and exclusive" in the statute indicate that any concurrent regulation frustrates its purpose, and (2) that *Metro Tristate* involves the same situation as presented in this case. (Resp. Br. At 25). Neither contention can be supported.

The delegation of sole and exclusive authority to the WVDEP Secretary falls within the purpose of Chapter 22 of the West Virginia Code to "consolidate environmental regulatory programs in a single state agency[.]" ICA Op. at 8.[6] No legislative text indicates the WVDEP

[5] The portion of the standard quoted in this portion of the ICA Opinion omits the "physical impossibility" prong and recites only the "obstacle" prong. *Id*.

[6] The context for delegation of environmental regulatory authority to the WVDEP Secretary by *W. Va. Code* § 22-6A-6(b), including the limitations on the scope of the Secretary's review of horizontal well permit applications and

Secretary has any authority to consider land use planning, nor that the land use planning authority delegated to counties and cities in Chapter 8A is preempted or repealed.

The *Metro Tristate* decision applies to the "unique facts" involving a federal government agency's interest in using a contractor it selects for non-emergency medical transport of veterans. 245 W. Va. at 499, 859 S.E.2d 442. In this case, the State of West Virginia has not selected Respondent to perform any duties on behalf of the state, and the regulations at issue do not relate to the same purpose (in *Metro Tristate*, qualifications to safely transport passengers over state roads). Local land use laws are specifically authorized by Chapter 8A of the West Virginia Code to plan orderly development and ensure "the needs of agriculture, residential areas, industry and business be recognized in future growth[.]" *W. Va. Code* § 8A-1-1 *et seq*. They do not frustrate the purpose of Chapter 22 to consolidate state environmental regulatory programs into a single agency, including the purpose of the Horizontal Well Control Act to adopt technical safety regulations to address new drilling technology. *See Virginia Uranium, Inc. v. Warren*, 587 U.S. ___, 139 S. Ct. 1894; *Longwell*, 171 W. Va. At 49, 297 S.E.2d at 824; *Bowen/Edwards Assocs., Inc.*, 830 P.2d 1045 (Colo. 1992). As discussed more thoroughly below, this conclusion is supported under the established framework for considering implied conflict preemption under the "obstacle" prong, whether under federal or state law.

C. State Law Principles Under *Longwell v. Hodge* Only Support Authority for Concurrent Legislation in Land Use and State Permitting.

Respondent argues for a separate state law preemption standard that is more lenient than the established standard governing implied conflict preemption. (Resp. Br. At 9, 15). The ICA relied on established state preemption decisions, which hold that "conflict preemption is

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the distinct authoriy delegated to local governing bodies under the Land Use Planning Act, is discussed more thoroughly in Section II.C., *infra*.

triggered only when it is 'impossible to reconcile both state and federal laws or when the state law frustrates the purpose of federal law.'" *Metro Tristate,* at 245 W. Va. 508, 859 S.E.2d 451.

In the Circuit Court, Respondent noted that the federal district court for the Southern District of West Virginia has found that a West Virginia court will apply preemption "between state and local governments substantially in the same way it does between the states and the federal government." (App. 263; *citing EQT Prod. Co. v. Wender*, 191 F. Supp. 3d 583, 595-6 (S.D. W. Va. 2016), aff'd 870 F.3d 322 (4th Cir. 2017). Respondent also cited state law in support of the claim, reciting, "For just as federal law will displace state law when the two meet, so, too, is state law superior to local law." *Id*. (*citing Vector Co. v. Bd. of Zoning Appeals*, 155 W. Va. 362, 267, 184 S.E.2d 301 (1971)).

Now, Respondent argues that preemption should be found under some lesser obstacle standard. (Resp. Br. At 24). Respondent's argument faces two problems: (1) the ICA Opinion relied on the same implied conflict preemption standard established in federal court decisions and this Court's decisions regarding preemption; and (2) the state law decisions applicable to Respondent's claims – *Brackman's, Inc. v. City of Huntington* and *Longwell v. Hodge* – establish that there is no conflict between state permitting regimes and local land use laws.

1. Implied Conflict Preemption Standards For All Jurisdictions Support Upholding the Land Use Planning Act.

Case law considering preemption claims in the state law – municipal law context follows the same analysis as in the federal law – state law context.[7] *Hines v. Davidowitz,* 312 U.S. 52 (1941). The Supreme Court initially described the obstacle preemption principle as follows,

[7] While it is correct that states have police powers reserved to them by the 10th Amendment to the U.S. Constitution while West Virginia municipalities must have such powers delegated to them by statute, it is undisputed that the West Virginia legislature has enacted Chapter 8A, the West Virginia Land Use Planning Act, and that the Act delegates authority to municipalities to adopt local land use laws such as those challenged by Respondent. Accordingly, any distinction in the analysis regarding whether such powers are traditionally exercised by a state or municipality is inapplicable in this case.

"Our primary function is to determine whether, under the circumstances of this particular case, [state] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). It has also explained, "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. The development of case law – state and federal – in this area has continued to provide more specific guidance about what may be a sufficient obstacle to find preemption, taking into account that preemption is disfavored. The Supreme Court's most recent application of preemption rules came in 2019, where it stated, "The Supremacy Clause supplies a rule of priority. It provides that the "Constitution, and the Laws of the United States which shall be made in Pursuance thereof," are "the supreme Law of the Land ... any Thing in the Constitution or Laws of any state to the Contrary notwithstanding." Art. VI, cl. 2. This Court has sometimes used different labels to describe the different ways in which federal statutes may displace state laws—speaking, for example, of express, field, and conflict preemption. But these categories 'are not rigidly distinct.'" *Virginia Uranium, Inc. v. Warren*, 587 U.S. 761, 767 (2019) (*quoting Crosby*, 530 U.S. 363, 372, n.6).

In *Virginia Uranium*, the challenger argued, "Virginia's mining law stands as an impermissible 'obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' [alleging that] Congress sought to capture the benefits of developing nuclear power while mitigating its safety and environmental costs [and] Virginia's moratorium disrupts the delicate 'balance' Congress sought to achieve between these benefits and costs." *Id*. at 776 (internal citations omitted). The Court summarized its argument as, "Maybe the text of the AEA doesn't touch on mining in so many words, but its authority to regulate later stages of the nuclear

fuel life cycle would be effectively undermined if mining laws like Virginia's were allowed." *Id*. at 776. The Court denied the preemption claim because the legislative text did not address the state mining law, stating, "A sound preemption analysis cannot be as simplistic as that … 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.'" *Id*. at 778 (*quoting CSX Transp., Inc. v. Easterwood*, 507 U. S. 658, 664, (1993)). The Court explained its rationale in being careful when finding implied preemption as follows:

> **Efforts to ascribe unenacted purposes and objectives to a federal statute face many of the same challenges as inquiries into state legislative intent. Trying to discern what motivates legislators individually and collectively invites speculation and risks overlooking the reality that individual Members of Congress often pursue multiple and competing purposes**, many of which are compromised to secure a law's passage and few of which are fully realized in the final product.

Id. (emphasis added).

This Court recently addressed the same concern, holding "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.' The requirement that, in order to be preempted by federal law, a state law must be one that 'frustrates the purpose of federal law' or as we stated above, 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress[,]' is a significant burden to meet. **This burden must be distinguished from a state law that merely differs from or adds additional requirements to a federal statute**." *Metro Tristate, Inc. v. Public Service Com'n of West Virginia*, 245 W. Va. 495, 509, 859 S.E.2d 438, 452 (2021) (internal citations omitted) (emphasis added).

Just as federal-state preemption proceeds from the Supremacy Clause of the U.S. Constitution, so state-municipal preemption proceeds from the supremacy of state over local law.

As this Court stated in *Vector Co. v. Board of Zoning Appeals of City of Martinsburg*, "That municipal ordinances are inferior in status and subordinate to legislative acts is a principle so fundamental that citation of authorities is unnecessary. Equally fundamental is the legal principle that where an ordinance is in conflict with a state law the former is invalid." 155 W. Va. 362, 367, 185 S.E.2d 301, 304 (1971). *Vector Co.* considered whether a provision of a special municipal charter was in conflict with the state land use enabling legislation, then codified at Chapter 8, Article 24. *Id*. State law authorized zoning boards to act by majority of the members, while local law required approval by four out of five members. *Id*. Local law was preempted because it regulated the same subject as the state regulation: how many votes were required to act. *Id*. Not all cases of conflict are so clear, however.

In *Brackman's Inc. v. City of Huntington*, the Court also considered a claim that a local special charter provision was preempted by state law. 126 W. Va. 21, 27 S.E.2d 71 (1943). Specifically, it considered whether the City of Huntington could refuse to issue a business license to sell nonintoxicating beer to a business licensed by the state to sell nonintoxicating beer. *Id*. at 126 W. Va. __, 27 S.E.2d 72-3. The Court described the preemption principles involved as follows: "[Municipalities'] power rests upon grants of power made by the Legislature, and the Legislature may at its pleasure modify or withdraw the power so granted. It may, if it chooses, repeal any charter, or any law under which municipalities may be created, and destroy any municipal corporation at its will and pleasure. There is a further general principle that municipalities may only exercise powers not in conflict with general law, unless the power to do so is plainly and specifically granted." *Id*. The Court examined the law to determine whether the State Legislature had withdrawn the local authority, or whether the powers exercised

were in conflict with general law. It found that authority to deny a business license had been withdrawn by state legislation:

> "The Legislature at its 1919 session, Chapter 102, **made a radical change** in the State's policy in respect to the issuance of licenses. By Section 1 of the Act, it classified businesses and occupations requiring a state license under twenty-five heads, and then amended the existing act as to Section 10 as quoted above, to read as follows: "The state licenses mentioned in section one, **shall be issued** by the clerk of the county court upon proper application filed with him, as provided in the next succeeding section." Thus it will be seen that **the power of county courts and municipalities to exercise any control, or in any way restrain the issuance of state licenses ended; but the right of municipalities to require licenses for businesses and occupations licensed by the state and to impose a tax thereon remained unimpaired** and has continued until this day.

Id. at 126 W. Va. ___, 27 S.E.2d 74 (emphases added). The Court also explained how a separate grant of legislative authority to municipalities operates by addressing a law authorizing municipal licensing, stating,

> At its Regular Session, the Legislature of 1921 by Chapter 143 amended Section 28 of Chapter 47 of the Code as it then existed, and **authorized municipalities "to license, or prohibit**, the operation of pool and billiard rooms and maintaining for hire of pool and billiard tables"; so that notwithstanding the provisions of Section 10, quoted above, **municipalities became empowered to prohibit the operation of pool rooms** and billiard tables within a municipality.

Id. The first enactment, radically changing state law and withdrawing the local power to withhold a business license, led the Court to find that the local action to deny a business license was preempted:

> We think the act of 1919, as it has been construed and applied by this Court, justifies our present conclusion and holding that **the State by said act resumed its original control over the issuance of licenses, unhampered by any general law giving to the county courts, or to municipalities, any voice or control over the same,** while at the same time saving municipalities the right to require permits or licenses, and to impose a tax thereon.

Id. (emphasis added). Thus, in *Brackman's*, local denial of a business license was preempted because state law changed to remove the authority to deny a license. The *Brackman's* Court

nonetheless noted that the local government retained power to concurrently regulate the conduct of the business that it must license:

> **The right to impose such regulations, not contrary to general law, as might be necessary to require the business or occupation so licensed to be conducted in an orderly manner, has never been abrogated**, but aside from these local police powers, applying to all businesses and occupations, the rights of a municipality as to licenses are in their nature fiscal, and designed only to secure the collection of such tax thereon as they may impose.

Id. (emphasis added). Huntington also asserted in *Brackman's* that its charter was approved by the legislature and also operated as a legislative grant of authority, sustaining its power to license nonintoxicating beer specifically.

This Court used almost the same language for this conflict preemption analysis as is used currently in federal-state preemption analysis, stating, "It cannot be doubted that **inconsistency exists**, as between the statutes we have discussed above, and the provisions of the Charter of the City of Huntington. It may be that an **irreconcilable repugnancy** exists, requiring us to resort to general principles of law in determining which shall prevail." *Id*. at 126 W. Va. ___, 27 S.E.2d 76. The Court reviewed the Nonintoxicating Beer Act, and found, "Section 17 of the Nonintoxicating Beer Act provides that municipalities may adopt ordinances for the enforcement of the Act in conformity with the provisions of the same. One of the provisions of the Act is that the State Tax Commissioner may issue state license, and no other official, state or municipal, is therein granted a like power." *Id*. Based on that legislation, the Court found that the city's claim to authority to deny a nonintoxicating beer license under its charter was in irreconcilable conflict with the general law. The Court again noted, however, that, "Of course [the municipality] 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 78-9.

When a similar challenge arose, seeking to invalidate specifically delegated local land use authority, this Court had occasion to consider how state and local regulations can operate concurrently. *Longwell v. Hodge*, 171 W. Va. 45, 297 S.E.2d 820 (1982). When *Brackman's* was decided, West Virginia had not enacted land use enabling legislation; but by the time *Longwell v. Hodge* was decided in 1982, the state had adopted Chapter 8, Article 24, delegating local land use planning authority to counties, municipalities, and their established planning commissions and boards of zoning appeals. *See id*. at 171 W. Va. 47, 297 S.E.2d 822. 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.

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 Court held that absent express preemption, local land use laws enacted pursuant to enabling legislation will be upheld:

> [T]he exercise of its delegated zoning authority by the Bridgeport Board of Zoning Appeals does not in this case conflict with the purpose of the State beer licensing system. **We expressly hold that in the absence of a statute that explicitly preempts for the State the right exclusively to control whether and where beer will be sold, the possession of a State beer license is merely a necessary, but not a sufficient, condition for its sale in municipalities whose properly enacted zoning ordinances regulate the whereabouts of beer-selling restaurants**.

Id. at 171 W. Va. 50, 297 S.E.2d 825. In this case, the ICA found implied conflict preemption of local land use laws based on its determination that requiring a local land use approval for a site where a state permit has issued[8] creates a conflict. (ICA Op. at 18-19). That conclusion is contrary to this Court's holding in *Longwell*, and it must be reversed.

Respondent argues that, despite its conflict with *Longwell*, the ICA Opinion can be supported by finding that the State has a distinct "positive interest" in operating its horizontal gas well that is not covered by *Longwell*. (Resp. Br. At 22). The separate positive interest described by the *Longwell* Court, however, is specifically in "operation of taverns or

[8] As noted in Weirton's Opening Brief, Respondent's entitlement to operate a horizontal well or series of wells is a factual determination not reached by the Circuit Court and not properly before the ICA.

restaurants selling beer." *Id*. This positive interest is equivalent to the federal government's interest in using its own selected contractor to transport veterans in need of medical assistance under *Metro Tristate*, but it is distinct from the state's interest in consolidating environmental regulatory authority under *W. Va. Code* §§ 22-6A-1 *et seq*. Respondent seeks to find a positive interest in *W. Va. Code* § 22-6A-2, which state the purpose of "allowing the responsible development of our state's natural gas resources will enhance the economy of our state and the quality of life for our citizens while assuring the long term protection of the environment" and that a new regulatory scheme is adopted – specifically "to address new and advanced natural gas development technologies and drilling practices" – should be done in a manner that protects the environment and our economy. (Resp. Br. At 23). These purpose statements are the same as contained in environmental regulatory legislation in other states which has not been held to preempt local land use laws absent an express preemption clause,[9,10] and Respondent cites no authority for its claim that these purpose statements create

[9] The Colorado Supreme Court considered the argument advanced by Respondent that reference to economic purposes in the state environmental law creates a positive interest in the state in producing wells, and explained that where no statutory text states that land use laws are preempted, they continue to operate because the purpose of oil and gas laws is to consolidate environmental regulatory in a state agency:

It is a long-standing principle of statutory construction that a statute be interpreted in a manner that gives effect to legislative intent or purpose. Colorado State Bd. of Land Comm'rs, 809 P.2d at 983; Woodsmall v. Regional Transp. Dist., 800 P.2d 63, 67 (Colo.1990); Griffin v. S.W. Devanney & Co., Inc., 775 P.2d 555, 559 (Colo.1989).

The predominant legislative concern in enacting section 34–60–106(11) was to grant the Oil and Gas Conservation Commission adequate rulemaking authority in order to protect the general public from accidents caused by gas leaks and "blowouts" or explosions that might accidentally result from the pumping of oil and gas from subterranean depths. See Transcript of Preliminary Discussion of Senate Committee on Agriculture, Natural Resources and Energy, January 10, 1985, pp. 14, 21. The effect of section 34–60–106(11), therefore, is to vest the commission with the authority and responsibility for developing adequate technical safeguards calculated to minimize the risk of injury to the public from oil and gas drilling and production operations. In a very broad sense section 34–60–106(11) furthers one of the primary legislative purposes of the Oil and Gas Conservation Act—i.e., to permit each oil and gas pool to achieve an efficient rate of production subject to the prohibition of waste—and nothing in the

an interest of the state in operating its proposed horizontal well that allows an inference of preemption. (*See* Resp. Br. 23).

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 WVDEP 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 concurrent authority for local land use laws.

2. The Land Use Planning Act and the Environmental Resources Chapter Serve Concurrent Purposes.

Respondent cannot meet its burden to prove that *W. Va. Code* § 22-6A-6(b) preempts the Land Use Planning Act in part because state legislation establishes that these enactments serve concurrent purposes. The Environmental Resources Chapter generally, and the Horizontal Well

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statutory text of section 34–60–106(11), or for that matter, in the legislative history underlying the enactment of that section, evinces a legislative intent to preempt all aspects of a county's land-use authority over land that might be subject to oil and gas development or operations.

Furthermore, we find no basis in section 34–60–106(4) for a contrary conclusion. That section, on which the court of appeals also relied, merely states that the grant of any specific power or authority to the Oil and Gas Conservation Commission must not be construed in derogation of any of the commission's general powers and authority. In short, we find nothing in the statutory text of either section 34–60–106(11) or section 34–60–106(4) to support the total preemption of a county's authority to enact land-use regulations applicable to oil and gas development and operational activities within the county.

Bd. of Cnty. Com'rs, La Plata Cnty. v. Bowen/Edwards Associates, Inc., 830 P.2d 1045, 1059 (Colo. 1992).

[10] *Wallach v. Town of Dryden*, 23 N.Y.3d 728, 744, 16 N.E.3d 1188, 1195 (2014). (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)).

Control Act specifically, consolidate environmental regulatory programs in a single state agency and establish standards to protect the environment and efficiently develop natural resources in the face of a new technology. *W. Va. Code* § 22-1-1(b); 22-6A-2(a). The Land Use Planning Act 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.

Respondent argues that local land use laws occupy the same field as environmental regulatory laws because the Land Use Planning Act confers authority to legislate for the health, safety, and general welfare of the public. (Resp. Br. 28). Laws enacted to promote health, safety, and general welfare encompass the entirety of state police powers. *Farley v. Graney*, 146 W. Va. 22, 35, 119 S.E.2d 833, 841 (1960) ("The police power … embraces the power of the state to preserve and promote the public welfare and it is concerned with whatever affects the peace, security, morals and general welfare of the community."). Land use laws are among the police powers. *See Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 389 (1926).[11] But land use laws do not regulate safety, technical, and operational aspects of oil and gas drilling. *See Wallach v. Town of Dryden*, 23 N.Y.3d 728, 744, 16 N.E.3d 1188, 1195 (2014). Accepting Respondent's argument that the Land Use Planning Act is invalidated by *W. Va. Code* § 22-6A-6(b) because health, safety, and welfare are among its purposes would invalidate all other state and local laws. *See Farley v. Graney*, 146 W. Va. at 35, 119 S.E.2d at 841. Instead, as courts

[11] In *Euclid*, the Supreme Court specifically addressed zoning as a part of the police power authorized to ensure compatible uses of land among industrial and residential property owners: "If it be a proper exercise of the police power to relegate industrial establishments to localities separated from residential sections, it is not easy to find a sufficient reason for denying the power because the effect of its exercise is to divert an industrial flow from the course which it would follow, to the injury of the residential public, if left alone, to another course where such injury will be obviated."

throughout the county recognize, land use laws and environmental regulation occupy distinct fields of the general police powers, and serve different purposes.

The ICA properly found that it is the purpose of Chapter 22 of the West Virginia Code to "consolidate environmental regulatory programs in a single state agency[.]" ICA Op. at 8. That purpose is the context for the grant of authority to the WVDEP Secretary in W. Va. Code § 22-6A-6(b). All environmental regulatory authority over horizontal well drilling is consolidated in WVDEP, which has "the 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." *Id*. The legislature excepted certain state agencies from this consolidation of state environmental regulatory authority – the shallow gas well review board, the coalbed methane review board, and the oil and gas conservation commission. *Id*.

Each of those state agencies continues to exercise state environmental regulatory authority, based on the exception in *W. Va. Code* § 22-6A-6(b). Under *W. Va. Code* §§ 22C-8-1 *et seq*., the Shallow Gas Well Review Board continues to exercise its authority to "ensure the safe recovery of coal and gas" and "Foster, encourage and promote the fullest practical exploration, development, production, recovery and utilization of this state's coal and gas, where both are produced from beneath the same surface lands, by establishing procedures, including procedures for the establishment of drilling units, for the location of shallow gas wells without substantially affecting the right of the gas operator proposing to drill a shallow gas well to explore for and produce gas[.]" The Coalbed Methane Review Board continues to exercise its authority to "Preserve coal seams for future safe mining; facilitate the expeditious, safe evacuation of coalbed methane from the coalbeds of this state, and maintain the ability and absolute right of coal operators at all times to vent coalbed methane from mine areas" and "Foster, encourage and promote the commercial development of this state's coalbed methane by establishing

procedures for issuing permits and forming drilling units for coalbed methane wells without adversely affecting the safety of mining or the mineability of coal seams." *W. Va. Code* § 22-21-1(b)(1) and (2). And the Oil and Gas Conservation Commission continues to exercise its authority to "Foster, encourage, and promote exploration for and development, production, utilization, and conservation of oil and gas resources" and "Safeguard, protect, and enforce the correlative rights of operators and royalty owners in a pool of oil or gas to the end that each such operator and royalty owner may obtain his or her just and equitable share of production from that pool, unit or unconventional reservoir of oil or gas[.]" *W. Va. Code* § 22C-9-1(a)(1), (4).

It is these types of environmental regulatory authorities that would have been delegated to the WVDEP Secretary by *W. Va. Code* § 22-6A-6(b), but for the specific exception for these three state agencies. Based on the delegation of the sole and exclusive authority of the state in these environmental regulatory matters to the WVDEP Secretary, other agencies may not regulate environmental safety of horizontal wells and balance the state's interest in producing these natural resources to promote economic development with its interest in preserving clean air, land, and water for its citizens.

Conversely, Chapter 8A of the West Virginia Code delegates authority to municipal governing bodies to regulate land use by adopting a zoning ordinance that must serve the purpose of "lessening congestion; preserving historic landmarks, sites, districts and buildings; preserving agricultural land; and promoting the orderly development of land[]" and that may "establish[] design standards and site plan approval procedures" and "divid[e] the land of the governing body into different zone classifications regulating the use of land, establishing performance standards for various land uses when dividing is not desired or any combination of both." *W. Va. Code* § 8A-7-2.

No similar authorities are part of the consolidation of state environmental regulatory authority in the WVDEP Secretary. As Respondent and the ICA highlighted, the WVDEP Secretary's review of horizontal well permits is specifically limited by statute to determining whether "(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." (Resp. Br. At 29, *citing W. Va. Code* § 22-6A-8(d); ICA Op. at 16-17).[12]

In a footnote, the ICA Opinion suggests the Secretary has "sole discretion to authorize or deny the issuance of a permit on the basis of numerous factors," citing *W. Va. Code* §§ 22-6-6(h), and -11. (ICA Op. at 17, FN10). But those sections are part of Article 6, governing oil and gas wells generally, not horizontal wells governed by Article 6A – and the ICA specifically limited its opinion to preemption under Article 6A. (ICA Op. at 7, FN5). Even if we look at those sections, they confer no "sole discretion" on the WVDEP Secretary – they specifically authorize denial of permits on the same four elements listed above and also authorize denial if "the applicant has committed a substantial violation of a previously issued permit, including the erosion and sediment control plan, or a substantial violation of one or more of the rules promulgated hereunder, and has failed to abate or seek review of the violation within the time prescribed by the director[.]" *W. Va. Code* § 22-6-6(h). All of the WVDEP Secretary's authority to deny permits is based on environmental concerns, as would be expected under a statutory regime consolidating the state's environmental regulatory authority in one agency.

[12] The WVDEP Secretary also must determine that well location requirements of *W. Va. Code* § 22-6A-12 (which establishes setback distances from water wells, developed springs, occupied dwelling structures, dairy cattle and poultry, perennial streams, natural or artificial lakes, ponds or reservoirs, wetlands, trout streams, and ground water intakes for public water supplies) have been satisfied or waived, and that a water management plan required by *W. Va. Code* § 22-6A-7(e) has been approved.

The WVDEP Secretary has no authority to consider whether the proposed horizontal well will increase congestion in the town, preserve agricultural land uses and historic sites, or simply put compatible land uses near each other and keep incompatible land uses separated. *See W. Va. Code* § 8A-7-2. Any inconsistency between local land use laws and *W. Va. Code* § 22-6A-6(b) is far from "an **irreconcilable repugnancy**" or "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" in order to prove conflict preemption. *See Brackman's Inc.*, 126 W. Va. ___, 27 S.E.2d 76; *In re Flood Litigation*, 216 W. Va. at 547, 607 S.E.2d at 876. 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 operate concurrently with state environmental permit regulation.

3. The Land Use Planning Act Expressly Delegates Authority to Enact Land Use Laws for All Uses, and Section 8A-7-10 Makes an Exception Only for Natural Resource Development Outside of Municipalities.

The only specific legislative enactment that speaks to application of land use laws to oil and gas wells is at *W. Va. Code* § 8A-7-10(e), and it directs that land use laws apply to oil and gas wells in municipalities. *Id*. Respondent 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.'" (Resp. Br. At 20-21). These definitional quibbles are easy to resolve, and the terms apply to Respondent'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 §* 8A7-10(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.

More fundamentally, in its argument about *W. Va. Code* § 8A-7-10, Respondent misunderstands the state's delegation of local land use planning authority in Chapter 8A. Respondent argues that Weirton must rely on some "general authority of a municipality to protect the health, safety and welfare of the community" to avoid preemption. (Resp. Br. At 20). Weirton's authority instead derives from a specific delegation of authority by the state legislature, directing local government bodies to conduct land use planning for their communities, and defining how they will do so. *W. Va. Code* § 8A-1-1 *et seq*.. Section 8A-7-10(e) limits application of land use laws to natural resources *outside of* municipalities. Chapter 8A itself expressly authorizes land use laws. In particular, "The governing body of a municipality or county may regulate land use within its jurisdiction by … [a]dopting a comprehensive plan [and] [e]nacting a zoning ordinance." *W. Va. Code* § 8A-7-1(a). A zoning ordinance shall cover the entire jurisdiction of the municipality. *W. Va. Code* § 8A-7-1(c). The zoning ordinance is specifically authorized to establish design standards and site plan approval procedures, and to divide the land into different zone classifications regulating the use of land. *W. Va. Code* § 8A-7-2. It is these specific delegations of authority that Respondent must overcome by pinpointing legislative text that specifically preempts them. *See 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)). Respondent fails to meet this burden because the text of *W. Va. Code* § 22-6A-6(b) does not address local land use laws planning orderly development, and the context of Chapter 22 demonstrates that its grant of authority to the WVDEP Secretary is the consolidation of environmental regulatory power in a single state agency. The ICA erred by finding that implied conflict preemption was supported merely because the WVDEP Secretary has authority to issue permits for horizontal well locations, because local land use laws operate concurrently with state permitting laws.

D. Other State Courts Also Find that State Environmental Regulatory Laws Do Not Preempt Land Use Enabling Legislation Without an Express Preemption Clause.

Respondent also argues that Ohio and Pennsylvania court decisions support its preemption claim – and it omits discussion of the New York and Colorado authorities. (Resp. Br. 33-38). To the contrary, Ohio law includes a specific legislative finding that all concurrent local authorities regulating oil and gas are repealed, while West Virginia law does not. *State ex rel. Morrison v. Beck Energy Corp.*, 37 N.E.3d at 131[13]. Respondent's recitation of Pennsylvania law likewise misses the mark – Respondent relies on *Range Resources*, 964 A.2d 869 (Pa. 2009), a

[13] The *Morrison* opinion does include a separate discussion of conflict preemption outside of the express preemption language. That discussion of Ohio law appears inconsistent with West Virginia precedent in finding that applying zoning regulations to state-permitted activities "extinguish privileges" arising under Ohio law. *Id*. at 279 (*quoting Westlake v. Mascot Petroleum Co., Inc.*, 61 Ohio St. 3d 161, 573 N.E.2d 1068 (1991). In West Virginia, consistent with other jurisdictions, *Longwell v. Hodge* expressly holds that such a claim is a "false conflict." The *Morrison* opinion was a split decision, including a concurrence that states, "whether a municipality has authority to enact zoning ordinances that affect oil and gas wells within its territory is a question yet to be decided" and three dissents, one stating "I would find that R.C. 1509.02 leaves room for municipalities to employ zoning regulations that do not conflict with the statute" and the second recognizing the centrality of the preemption statement in 1509.02 as well as the absence of conflict with local land use law: "While important in determining whether a statute is a general law, a preemption statement alone has no relevance to the existence or nonexistence of any conflict between local and state regulations. An examination of R.C. Chapter 1509 and regulations governing the drilling of oil and gas wells reveals that there is no explicit reference to local zoning." As this second dissent notes, there appears to also be ample Ohio authority conflicting with the lead opinion, which hews to the general position that land use laws operate concurrently with state environmental permitting. *See Cincinnati v. Hoffman*, 31 Ohio St. 2d 163, 169, 285 N.E.2d 714 (1972); *Cleveland v. State*, 138 Ohio St. 3d 232, 5 N.E.3d 655; *Willott v. Beachwood*, 175 Ohio St. 557, 560, 197 N.E.2d 202 (1964); *Hudson v. Albrecht, Inc.*, 9 Ohio St. 3d 69, 71-2, 458 N.E.2d 852 (1984).

companion case to *Huntley & Huntley*, 964 A.2d 861 (Pa. 2009), where the court considered a law that first expressly preempted local laws then reserved from that preemption local land use laws. West Virginia law lacks the first component – an express preemption of local law. To the extent the case is relevant, it shows that the Pennsylvania legislature, like Ohio, recognized that local land use laws operate concurrently with state environmental regulatory laws, and that they would only be preempted by specific legislation. The companion *Huntley* decision, as noted in Weirton's Opening Brief, does address implied preemption and recognize the different spheres in which land use laws and environmental regulation operate. *Huntley & Huntley*, 964 A.2d 861 (Pa. 2009). Thus, the Ohio and Pennsylvania courts understand preemption in the same way the New York and Colorado courts (and the West Virginia courts) understand it – local land use laws operate concurrently with state environmental regulations and do not on the whole frustrate the purpose of environmental regulations.

Respondent asserts that *State ex rel Morrison v. Beck Energy Corp.,* 37 N.E.3d 128 (Ohio 2015), supports finding the words "sole and exclusive" sufficient to establish preemption. (Resp. Br. At 37). However, the Supreme Court of Ohio did not find preemption based on that phrase – it relied on specific legislative intent expressed in the 2004 law adopting R.C. 1509.02. Specifically, the Court held, "In 2004, the General Assembly amended [Chapter R.C. 1509] 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.' Legislative Service Commission Bill Analysis, Sub.H.B. No. 278 (2004); R.C. 1509.02, Sub.H.B. No. 278, 150 Ohio Laws, Part III, 4157." *State ex rel. Morrison v. Beck Energy Corp.*, 37 N.E.3d at 131. The Ohio Legislature made a specific determination to repeal all provisions of law that granted or alluded to the authority of local

government to adopt concurrent requirements with the state related to oil and gas wells. *Id*. The text of the Ohio statute also contained an express preemption provision prohibiting application of local laws, "in a manner that discriminates against, unfairly impedes, or obstructs oil and gas activities and operations regulated under [R.C. Chapter 1509]." *Id*. at 131-2. The West Virginia legislature has made no such determination to repeal all concurrent local authorities. *W. Va. Code §* 22-6-1 *et seq.; W Va. Code §* 22-6A-1 *et seq.* ; *see also W. Va. Code* § 8A-7-10(e). West Virginia's statutory law likewise contains no express prohibition on application of local laws to oil and gas activities.[14] *Id*. Respondent cites no legislative text or other legislative materials suggesting that it does.

In *Range Resources*, relied upon by Respondent, the town enacted oil and gas regulations without having a land development code in place. 600 Pa. 231, 233, 964 A.2d 869, 870-71. While the oil and gas regulations were later rolled into a development code, they purported to require, "a permit for all drilling-related activities; regulates the location, design, and construction of access roads, gas transmission lines, water treatment facilities, and well heads; establishes a procedure for residents to file complaints regarding surface and ground water; allows the Township to declare drilling a public nuisance and to revoke or suspend a permit; establishes requirements for site access and restoration; and provides that any violation of the Ordinance is a summary offense that can trigger fines and/or imprisonment." *Id*. at 600 Pa. 233, 964 A.2d 871. The ordinance at issue in *Range Resources* directly regulated oil and gas drilling processes and environmental safety, and it had no relation to Respondent's claim in this case,

[14] 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.* This statutory scheme which identifies specific laws that are preempted and also establishes specific areas where local regulation is authorized is a hallmark of legislation that does include express preemption clauses, and these provisions are not found within *W. Va. Code* § 22-6A-6(b).

which is that the Land Use Planning Act is wholly preempted and horizontal gas wells cannot be limited to zoning districts or be subject to any other land use regulation specifically authorized by West Virginia Code Chapter 8A.

The Pennsylvania court decisions in *Huntley & Huntley* and *Range Resources* did consider implied conflict preemption, however, because the Pennsylvania law at issue – since repealed – first preempted local laws affecting oil and gas drilling and then preserved local land use laws. *Huntley & Huntley*, 964 A.2d 861 (Pa. 2009); *Range Resources*, 964 A.2d 869 (Pa. 2009). Respondent argues that the cases are inapposite because land use authority was preserved; but the authority only needed to be preserved because the law first contained a specific, express preemption clause stating "all local ordinances and enactments purporting to regulate oil and gas well operations regulated by this act are hereby superseded." 58 P.S. § 601.602 (2012). Laws adopted pursuant to the Municipalities Planning Code were excepted from the preemption, but were also limited by this provision, "No ordinances or enactments adopted pursuant to the aforementioned acts shall contain provisions which impose conditions, requirements or limitations on the same features of oil and gas well operations regulated by this act or that accomplish the same purposes as set forth in this act. The Commonwealth, by this enactment, hereby preempts and supersedes the regulation of oil and gas wells as herein defined." *Id*. Thus, when the Pennsylvania courts decided *Huntley* and *Range Resources*, they had to consider whether the local ordinances regulated the same "purposes" as the state oil and gas laws, or whether instead they concurrently regulated some different local land use interest.[15] That is the

[15] Respondent argues in its Response Brief that a later-enacted Pennsylvania Oil & Gas Act, 58 P.S. §§ 3302-04, required allowance of oil and gas drilling in all zoning districts and expressly preempted other local regulations, and then claimed in a footnote that invalidation of that statute, in *Robinson Twp. v. Commonwealth*, 632 Pa. 564, 83 A.3d 901 (2013), is irrelevant. In the same footnote, Respondent accused Petitioner of making a false claim that Pennsylvania law allows municipalities to prohibit gas drilling by hydraulic fracturing, relying on a 2005 Commonwealth Court case decided prior to *Robinson*.

question in this case. The *Huntley* Court noted that local land use laws "are broader [than state environmental regulation] 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." 600 Pa. at 207, 964 A.2d at 864 (2009). That determination is consistent with decisions in New York and Colorado, which are not addressed in Respondent's Brief.

In the New York decision of *Wallach v. Town of Dryden*, challengers argued that two New York towns' zoning laws were preempted by section 23-0303(2) of the Environmental Conservation Law, also known as the supersession clause of the Oil and Gas Solutions Mining Law ("OGSML"). The supersession clause states: "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[16]. Just as in West Virginia, the *Wallach* Court recognized that

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But *Robinson* did invalidate the law Respondent relies upon, and Pennsylvania municipalities do prohibit gas drilling by hydraulic fracturing. One example is Pittsburgh's published code: https://library.municode.com/pa/pittsburgh/codes/code_of_ordinances?nodeId=COOR_TITSIXCO_ARTIRERIAC_CH618MASHNAGADR. ("It shall be unlawful for any corporation to engage in the extraction of natural gas within the City of Pittsburgh, with the exception of gas wells installed and operating at the time of enactment of this Chapter.") (last visited June 17, 2024). Whether or not Respondent believes it could successfully challenge such a provision based on a Commonwealth Court decision regarding exclusionary zoning is immaterial to the issues in this case. The Supreme Court of Pennsylvania, in *Huntley & Huntley*, recognized that local land use laws and state environmental regulatory laws operate in different spheres. 600 Pa. 207, 964 A.2d 855 (2009). Later-enacted legislation specifying different preemptive scope of oil and gas laws, and the Supreme Court decision invalidating it, do nothing to change that.

[16] 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 laws are preempted by state law if they conflict, but that preemption is not to be presumed. *Id*[17]. 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 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.[18] 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

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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])."

[17] 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)."

[18] *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 "Nequire 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).

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.

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).

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 in other states, 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 serve 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 (2012). Accordingly, the Court should not imply preemption of established law where the legislature has not stated it, because there is no conflict so direct and positive that the two acts cannot be reconciled or consistently stand together.

E. If the Conflict Preemption Holding is Permitted to Stand, It Must Be Limited to Prevent Only Classification of Horizontal Gas Wells Permitted by WVDEP To Certain Zoning Districts.

In West Virginia, local land use law has long existed in consort with state regulatory permitting. *Longwell v. Hodge*, 171 W. Va. 45, 297 S.E.2d 820. Among other states that have addressed this specific preemption challenge, alleging state environmental permitting of horizontal gas wells preempts local zoning, local zoning law also coexists with state environmental regulation. *See, e.g., 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).

If the Court determines that a conflict preemption review is appropriate on appeal of the Circuit Court Order's ruling only on a facial challenge, and without development of a factual record in the trial court, and that any part of Weirton's zoning code may create a conflict with state law such that it is preempted, the preemption must be limited to the conflict specifically

identified by the ICA Opinion: approval authority over allowing a horizontal well use at a site approved by WVDEP well permit. (ICA Op. at 18).

Zoning ordinances contain numerous requirements intended to promote orderly local development and promote residents' health and safety. Among these are lot size, height limitations, aesthetic requirements such as building materials and window (or fenestration) requirements, and parking requirements. The ICA Opinion specifically holds that Weirton's zoning ordinance is in conflict with the Horizontal Well Control Act in its "approval" authority for the site of horizontal wells. (ICA Op. at 18). That approval authority is exercised by separating the city into districts, defining particular uses of land, and permitting or prohibiting the uses by district. Even if the Court determines that a specific conflict exists between state delegation of environmental regulatory authority to the WVDEP Secretary to issue permits for horizontal wells at specific sites, and the parallel authority of municipalities and counties to establish zoning districts where certain uses are permitted or prohibited, preemption must be limited to authorization of a use at a particular site and not be expanded to invalidate other lawful exercises of legislative authority under the Land Use Planning Act.

F. Respondent Cannot Establish Express Preemption Because W. Va. Code § 22-6A-6(b) Contains No Preemption Clause

Respondent cross-assigns error to the ICA determination not to invalidate local land use laws on an express preemption theory based on *W. Va. Code* § 22-6A-6(b). (Resp. Br. At 39-40). The City of Weirton has express authority to adopt land use planning laws under West Virginia Code Chapter 8A, and those laws may regulate the use of natural resources by property owners in the municipality. *W. Va. Code* § 8A-7-1, -10(e). Respondent alleges that the clause "sole and exclusive" within a grant of environmental regulatory authority to the WVDEP Secretary is

express preemption of Chapter 8A's Land Use Planning Act. *See W. Va. Code* § 22-6A-6(b). This clause is inconsistent with express preemption legislation, which identifies the laws it preempts and the scope of preemption. West Virginia Code section 22-6A-6(b) does not "state that certain state and local laws shall be preempted," and thus is not express preemption of the Land Use Planning Act. *See Interstate Ass'n, Inc. v. City of Cincinnati, Ohio*, 6 F.3d 1154, 1157 n.3 (6th Cir. 1993). Under longstanding principles disfavoring preemption and avoiding repeal of duly-enacted laws by judicial decision, Respondent's preemption claim must be denied and the established Land Use Planning Act must be upheld. *See Virginia Uranium, Inc. v. Warren*, 139 S. Ct. 1894, 1901-2.

Legislation that expressly preempts other laws is expected to identify the laws preempted and the scope of the preemption. The federal Motor Carrier Safety Act is a typical example. 49 *U.S.C.A.* § 30103(b)(1). As this Court noted in *Morgan v. Ford Motor Co.*, the Motor Carrier Safety Act contains an express preemption provision, which states: "When a motor vehicle safety standard is in effect under this chapter, a State or a political subdivision of a State may prescribe or continue in effect a standard applicable to the same aspect of performance of a motor vehicle or motor vehicle equipment only if the standard is identical to the standard prescribed under this chapter." 224 W. Va. 61, 70-71, 680 S.E.2d 77, 85-6 (2009). Under the Act, any motor vehicle safety standard that is not identical to the federal standard is expressly preempted.

Specific preemption clauses are regularly included in legislation. For instance, the federal Employee Retirement and Income Security Act, provides:

> Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III shall supersede any and all State laws insofar as

> they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title.

29 *U.S.C.* §1144. The Public Health Cigarette Smoking Act, as considered in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), provided:

> (b) No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this Act."

Id. Each law specifies the area where another government cannot legislate: motor vehicle safety standards (other than those identical to FMCSA), covered employee benefit plans, advertising regulations on cigarettes that are based on smoking and health.

The West Virginia Legislature enacts express preemption legislation in the same manner. A typical example is the State Building Code. When adopting the State Building Code, the Legislature expressly preempted local building codes with the following language:

> Notwithstanding the provisions of subsection (a) of this section, all existing municipal building codes are void one year after the promulgation of a state building code by the State Fire Commission as provided under section five-b, article three, chapter twenty-nine of this code. Upon the voidance of the municipality's existing building code, if the municipality votes to adopt a building code, it must be the state building code promulgated under section five-b, article three, chapter twenty-nine of this code.

W. Va. Code § 8-12-13(b). West Virginia has likewise adopted numerous specific preemptions to application of land use laws. Small Wireless Facilities are expressly exempt from most local land use laws by *W. Va. Code* § 31H-2-2(b). Essential utilities must be permitted in all zoning districts pursuant to *W. Va. Code* § 8A-7-3(e). Design standards for factory-built homes must be the same as those for other single-family homes under *W. Va. Code* § 8A-11-1. Group residential homes are permitted uses in all districts and may not be required to obtain a conditional use permit under *W. Va. Code* § 8A-11-2.

Other state laws that preempt or limit application of local land use laws contain express language identifying the laws and stating the scope of limitation. New York's Oil and Gas Solution Mining Law states, "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." N.Y. Env't Conserv. Law § 23-0303 (McKinney).

Former Pennsylvania Code Title 58, Section 601.602, provided, "Except with respect to ordinances adopted pursuant to the act of July 31, 1968 (P.L. 805, No. 247), known as the Pennsylvania Municipalities Planning Code, and the act of October 4, 1978 (P.L. 851, No. 166), known as the Flood Plain Management Act, all local ordinances and enactments purporting to regulate oil and gas well operations regulated by this act are hereby superseded. No ordinances or enactments adopted pursuant to the aforementioned acts shall contain provisions which impose conditions, requirements or limitations on the same features of oil and gas well operations regulated by this act or that accomplish the same purposes as set forth in this act. The Commonwealth, by this enactment, hereby preempts and supersedes the regulation of oil and gas wells as herein defined."

West Virginia Code section 22-6A-6(b) is distinct from the developed express preemption legislation. First, it is a grant of environmental regulatory power to an administrative official, which does not include authority to establish a baseline set of rules (such as, for instance, the State Building Code). Second, it contains no preemption language – no law is identified and made "void" as in the legislation adopting the State Building Code, and no law is identified and permitted only if "identical" to the legislation as in the Motor Carrier Safety Act.

West Virginia Code section 22-6A-6(b) fails to explicitly state that certain state and local laws shall be preempted, and thus is not express preemption legislation. *Hartley Marine Corp. v. Mierke*, 196 W. Va. at 674, 474 S.E.2d at 604; *Interstate Ass'n, Inc. v. City of Cincinnati, Ohio*, 6 F.3d at 1157 n.3 (6th Cir. 1993). Respondent cannot support an express preemption challenge against laws duly enacted under the Land Use Planning Act, and the Circuit Court order must be upheld.

G. Respondent Cannot Establish Implied Field Preemption Because Environmental Regulatory Programs and Land Use Laws Operate in Distinct Fields.

Respondent also cross-assigns error to the ICA's determination not to invalidate local land use laws on an implied field preemption theory. (Resp. Br. At 39-40). 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)).

In *Flood Litigation,* cited by Respondent before the ICA, 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 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.* Petitioner cannot make the required demonstration to "pinpoint" specific legislative intent to preempt the entire field of land use law as it applies to oil and gas development, and it offers no case law making such a finding. Respondent simply argues that "the complex and comprehensive permitting scheme" provided by *W. Va. Code §* 22-6A-8 is sufficient. (Resp. Br. At 40). As addressed in Section II.C., *supra,* the factors considered by the secretary in evaluating well work 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.

While local legislation that attempts the same safety and technical regulations as contained in the Horizontal Well Act would be preempted,[19] West Virginia and other jurisdictions agree that land use laws do not regulate the same field as state permitting regimes. *See Longwell v. Hodge,* 171 W. Va. At 49, 297 S.E.2d at 824; *Bowen/Edwards Associates, Inc.*, 830 P.2d 1045, 1058-59; *Wallach*, 23 N.Y.3d at 744, 16 N.E.3d at 1195. Accordingly, Respondent fails to establish implied field preemption and its assignment of error on that ground must be denied.

[19] *See* Opening Brief of Petitioner City of Weirton, at 30 (*EQT Production Company v. Wender,* 870 F.3d 322, holds that a complete ban on injection wells for hydraulic fracturing fluid, enacted under public nuisance authority and based on concerns that wastewater was leaking into waterways, were preempted; *Northeast Natural Energy v. City of Morgantown* (Monongalia Co. Cir. Ct. No. 11-C411), Not reported in S.E.2d, available at 2011 WL 3484376, holds that a ban on hydraulic fracturing within one mile of city limits, enacted under public nuisance authority and based on concern that drilling method created environmental hazards, was preempted).

III. 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 19th day of June, 2024, I served the **Reply 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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