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.

RESPONSE BRIEF OF RESPONDENT, SWN PRODUCTION COMPANY, LLC WITH CROSS-ASSIGNMENT OF ERROR

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ASSIGNMENTS OF ERROR

Petitioners herein, City of Weirton ("City") and City of Weirton Board of Zoning Appeals ("BZA"), assign error to the West Virginia Intermediate Court of Appeals' ("ICA") November 1, 2023 opinion ("ICA Opinion"), which held that both the City's Unified Development Ordinance ("UDO") and New Unified Development Ordinance, which has now been repealed ("NUDO"),[1] are preempted by the Oil and Gas Act, W. Va. Code §§ 26-6-1, *et seq.*, as amended and supplemented by the Horizontal Well Control Act, W.Va. Code §§ 22-6A-1 *et seq*. (collectively, the "Oil & Gas Act"), under the principles of implied conflict preemption. Specifically, Petitioners contend that: (1) the ICA erred by holding that the City Zoning Regulations are preempted under the principles of implied conflict preemption, where the Circuit Court's decision was allegedly confined to Respondent SWN Production Company, LLC's ("SWN") challenge to the City Zoning Regulations under theories of express preemption and implied field preemption; and (2) the ICA erred by holding that the City Zoning Regulations were preempted under an implied conflict preemption theory, whether applying the impossibility or obstacle theories of conflict preemption. SWN opposes Petitioners' appeal and asserts that the City Zoning Regulations are preempted under the theory of implied conflict preemption, which was an issue properly considered by the ICA.

In addition, as set forth in SWN's Cross-Assignment of Error, SWN asserts that the City Zoning Regulations are also preempted under the principles of express preemption and implied field preemption.

[1] The UDO and NUDO are sometimes collectively referred to herein as the "City Zoning Regulations."

STATEMENT OF THE CASE

I. Introduction

This case arises from the City's unlawful attempts to regulate SWN's state-authorized natural gas development within its borders. At its core, this appeal presents a rather simple question: whether a municipality is permitted to regulate the permitting and location of horizontal gas wells where the state Legislature has expressly delegated "sole" and "exclusive" authority over the "permitting" and "location" of horizontal gas wells to the West Virginia Department of Environmental Protection ("WVDEP").

As a matter of law, and consistent with the ICA Opinion, the Oil & Gas Act preempts the local regulation of oil and gas drilling locations under the principles of implied conflict preemption. Furthermore, the City Zoning Regulations are also preempted under the principles of express preemption and implied field conflict preemption.

In its Opening Brief, the City resorts to distorting the plain meaning of the Oil & Gas Act's express preemption provision in an effort to avoid its unambiguous mandate: WVDEP has sole and exclusive authority to regulate the location of horizontal oil and gas wells in West Virginia. There is no exception made for local zoning authorities. The City further attempts to recast this case as a matter of preserving the rights of municipalities to adopt "traditional zoning" regulations concerning the mere location of oil and gas development. The City cites to cases in West Virginia and other jurisdictions in support of its argument that "traditional zoning" does not interfere with the state permitting of oil and gas development. The cases cited to by the City do not support its argument. Rather, those cases bolster the conclusion that the City's Zoning Regulations attempts to regulate precisely the same subject matter that is covered by the Oil & Gas Act. Further, the City's attempt to recast this matter as nothing more than its attempt to zone where oil and gas may

be located rings hollow, considering the well site at issue in this case was zoned as an appropriate area for oil and gas development at the time of SWN's application.

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

II. Statement of Facts

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

Hydraulic fracturing, sometimes known as "fracking," has been used to safely stimulate wells and recover oil and natural gas in the United States since the 1940s. (Appendix Record ("App.") at 18, 105). In fact, fracking is used in nearly all oil and gas wells drilled in the United States today. *Id*.

The WVDEP regulates all oil and gas drilling and extraction activities in West Virginia, including fracking and horizontal drilling. *See* W. Va. Code §§ 22-6-2; 22-6A-6. On October 18, 2021, SWN applied to WVDEP for permits to drill for and develop natural gas at a well site located on a large vacant parcel in the outskirts of the City ("Brownlee Site") (App. 3, 19, 106).[2] With its application, SWN provided WVDEP with an array of technical data and information, including a detailed erosion and sediment control plan that met or exceeded the requirements of the West Virginia Erosion and Sediment Control Manual as adopted pursuant to the control program established through Section 208 of the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. § 1288. (App. 148, 162-198).

[2] SWN is the lessee of record for the Brownlee Site totaling 301.83 acres in the City, which is located off of Park Drive on property owned by Brownlee Land Ventures L.P., Tax Parcel Identification Number 05-06-00W3-0004-0000. (App. 85). Pursuant to the lease, SWN has the right to drill and operate for and produce oil and natural gas from the Brownlee Site. (App. 88).

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

B. SWN's Conditional Use Application

On June 11, 2021, SWN submitted an application for a conditional use permit ("Application") to the City in order to obtain local zoning approval for the Brownlee Site pursuant to the terms of the City's then existing UDO. (App. 152, 204). Despite state preemption of the UDO, SWN submitted the Application because it desired to be a good corporate neighbor and engage in a positive working relationship with the City moving forward. (App. 148). The UDO contained only two objective standards for the oil and gas use activities: "(a) No well may be located closer than two hundred (200) feet to any residential use"; and "(b) all oil and gas exploration shall be subject to the [Oil & Gas Act], and the rules and regulations of the [WVDEP]." *See* UDO § 9.6(24); (App. 152).

On August 3, 2021 and September 7, 2021, the BZA held hearings to consider SWN's Application. (App. 152, 205). SWN presented its case through a series of professional engineers, noise, traffic and hydrogeology experts. *Id*. In support of its Application, SWN also submitted more than 240 pages of technical studies and reports, which demonstrated that the Brownlee Site would not be detrimental to the health, safety or welfare of City residents. *Id*. During the hearings, the City complained at length that SWN should not be permitted to introduce additional evidence to support its Application at the hearings. (App. 152). The BZA repeatedly violated SWN's due process rights by refusing to allow SWN the opportunity provide rebuttal testimony to the lay opposition testimony provided by the City. (App. 153). Despite SWN's submission of a complete application and its compliance with the objective requirements of the UDO, the BZA, over SWN's

objections, voted to deny the Application at the conclusion of the hearings on September 7, 2021. (App. 153, 205). The BZA further issued a written decision supporting its denial on October 1, 2021. Among its reasons for denial, the BZA found that "SWN has failed to prove that the requested conditional use will not be adverse in any respect to the public health, safety and welfare." *Id.*

C. The New Unified Development Ordinance

Prior to submitting the Application, SWN had approached the City earlier in 2021 to discuss the City's permitting process for oil and gas development. (App. 153, 206). After the City became aware of SWN's plans, unbeknownst to SWN, the City worked to adopt a new ordinance that would prohibit SWN's development of the Brownlee Site. *Id.*

On June 7, 2021, the City voted to enact the NUDO to become effective on July 7, 2021. *Id.* The NUDO purported to place a new 2,500' setback requirement on all drilling activities from residential, church or school uses. The setback requirement in the NUDO was a 1,250% percent increase from the 200' setback requirement contained in the original UDO. *Id.* In addition, the NUDO rezoned the Brownlee Site and removed oil and gas extraction as a permitted conditional use from the zoning district where the Brownlee Site is located.[3] (App. 153-54, 206).

Despite the City's best efforts to rush passage of the NUDO, SWN submitted its Application to the City prior to the effective date of the NUDO. (App. 154, 206). However, as described above, the BZA nevertheless denied the Application. (App. 153, 205). If SWN were to have submitted an application under the NUDO, SWN's oil and gas development would no longer

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

be permitted as a conditional use under the NUDO. (App. 154, 206). This is precisely the type of local interference with oil and gas development that the West Virginia Legislature sought to prevent when it delegated sole and exclusive authority to the WVDEP over the location and permitting of all oil and gas development to WVDEP.

III. Procedural Background

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

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

On March 29, 2022, SWN filed its First Amended Verified Complaint, which amended the Verified Complaint to include a copy of the State Permit for the Brownlee Site. (App. 147-199). On April 18, 2022, the City filed its Answer to the First Amended Verified Complaint. (App. 200-214). On August 23, 2022, after considering the parties' briefs on the matter, the Circuit Court issued its decision ("Circuit Court Decision") holding that the Oil & Gas Act does not preempt the

local zoning regulation of oil and gas. (App. 1-17). The Circuit Court's Decision stated that "[t]his Court considers this to be a final appealable order." (App. 17).[4]

On September 7, 2022, SWN filed a Notice of Appeal with the ICA seeking to overturn the Circuit Court Decision. On September 14, 2022, SWN filed a Motion for Direct Review of the Decision to this Court, which was refused on October 25, 2022. On September 15, 2023 (a mere four days before the ICA oral argument date), the City filed a Notice of Additional Authority, which notified the ICA that the City had repealed the NUDO. The City did not state why the NUDO had been repealed, but as noted by the ICA, it is readily apparent that the City was attempting to moot SWN's preemption arguments.

On November 1, 2023, the ICA issued the ICA Opinion, which found that the City Zoning Regulations were preempted based upon SWN's argument regarding implied conflict preemption. On December 22, 2023, the City filed a Notice of Appeal of the ICA Opinion with this Court.

SUMMARY OF ARGUMENT

Neither the Constitution of West Virginia nor the Legislature have conferred or delegated any oil and gas regulatory functions upon or to any West Virginia municipalities. Rather, all oil and gas regulatory programs in West Virginia - including those relating to the permitting and location of horizontal gas wells - are regulated by WVDEP. In such instances, where the Legislature has comprehensively regulated an entire industry, the West Virginia Constitution requires that conflicting municipal regulations be declared invalid and void. Here, the City Zoning Regulations are in direct conflict with the Oil & Gas Act because they purport to prohibit exactly

[4] After the Circuit Court entered the final order dismissing the Preemption Action at issue here, the Circuit Court denied the Defensive Appeal, which SWN timely appealed to the ICA at Docket No. 23-ICA-405. After the matter was fully briefed by the parties, on April 22, 2024, the ICA dismissed SWN's appeal for lack of subject matter jurisdiction. On May 17, 2024, SWN filed an appeal of the dismissal of the fully briefed appeal with the Supreme Court of Appeals.

what the state law permits – the oil and gas drilling development on the Brownlee Site. Therefore, the City Zoning Regulations are invalid because they conflict with the Oil & Gas Act.

The Circuit Court considered and ruled upon SWN's implied conflict preemption claim and the ICA reversed the Circuit Court Decision on that same issue. Accordingly, the issue of implied conflict preemption is properly before this court and no remand is required or necessary.

On the merits, the ICA correctly found that the City Zoning Regulations are preempted under the implied conflict preemption standard under the West Virginia Constitution and state law. Notwithstanding the simple state law analysis at issue here, the City invites this Court to reverse the ICA based on the implied conflict preemption principles for a federal/state preemption analysis under the United States Constitution and federal law. Although that analysis is not necessary here, the City Zoning Regulations are also preempted under this standard.

Despite the City's contentions, the City Zoning Regulations do not merely and incidentally "touch upon" areas regulated by the Oil & Gas Act, such that they should be saved from preemption. Rather, the City Zoning Regulations attempt to regulate most of the same areas, including (and dispositively with respect to this case) the location and permitting of natural gas wells. Thus, the City Zoning Regulations are plainly preempted under the principles of implied conflict preemption.

Finally, SWN asserts a Cross-Assignment of Error, wherein it asserts that the ICA could have determined that the City Zoning Regulations are also preempted under the theories of express preemption and implied conflict preemption.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

SWN agrees with the City that, in accordance with Rule 18(a) of the West Virginia Rules of Appellate Procedure, the issue on appeal is suitable for oral argument under Rule 20(a)(1) and

Rule 20(a)(2) because it involves and issue of first impression and an issue of fundamental public importance.

ARGUMENT

I. Standard of Review

Where an appeal involves a question of law regarding preemption, this Court has stated: "Our standard of review is simple: 'Preemption is a question of law reviewed *de novo.*'" *Metro Tristate, Inc. v. Pub. Serv. Comm'n of W. Virginia,* 245 W.Va. 495, 501, 859 S.E.2d 438, 444 (2021) (citing Syl. pt. 1, *Morgan v. Ford Motor Co.,* 224 W. Va. 62, 680 S.E.2d 77 (2009)).

II. The Implied Conflict Preemption Standards

A. The West Virginia State/Municipal Conflict Preemption Standard

Unlike states, which have inherent sovereign powers, a West Virginia "municipal corporation is a creature of the State, and can only perform such functions of government as may have been conferred by the constitution, or delegated to it by the law-making authority of the State. It has no inherent powers, and only such implied powers as are necessary to carry into effect those expressly granted." Syl. pt. 1, *Toler v. City of Huntington,* 153 W.Va. 313, 168 S.E.2d 551 (1969) (citing Syl. pt. 1, *Brackman's, Inc.* v. *City of Huntington,* 126 W.Va. 21, 27 S.E.2d 71 (1943)). "Attached to every statute, every charter, every ordinance or resolution affecting, or adopted by, a municipality, is the implied condition that the same must yield to the predominant power of the State, when that power has been exercised. To hold otherwise would lead to serious confusion, and at times absurd results." Syl. Pt. 4, *Delardas* v. *Morgantown Water Comm'n,* 148 W.Va. 776, 137 S.E.2d 426 (1964).

When a conflict arises between a local ordinance and a state statute, the state statute will always prevail. "That municipal ordinances are inferior to in status and subordinate to legislative acts is a principle so fundamental that citation of authorities is unnecessary. Equally fundamental

is the legal principle that ***where an ordinance is in conflict with a state law*** the former is invalid." *American Tower Corp.* v. *Common Council of the City of Beckley,* 210 W.Va. 345, 349, 557 S.E.2d 752, 756 (W. Va. 2001) (emphasis added) (citing *Vector Co.* v. *Board of Zoning Appeals,* 155 W.Va. 362, 367, 184 S.E.2d 301, 304 (1971)). "There is a…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. This principle has always prevailed, but is established beyond question by Section 39(a) of Article VI of our Constitution, known as the Municipal Home Rule Amendment, ratified by the voters of the State in the general election held in 1936[,]" *Brackman's Inc.,* 126 W.Va. 21, 27 S.E.2d 71, 73 (emphasis added).

Section 39(a) of Article VI provides that, any municipal ordinance or charter "***shall be invalid and void if inconsistent or in conflict with*** this Constitution or the ***general laws of the State*** then in effect, or thereafter, from time to time enacted." W. Va. Const, art. 6, §39(a) (emphasis added). Thus, this Court has held that "where both the State and a municipality enact legislation on the same subject matter, it is generally held that if there are inconsistencies, the municipal ordinance must yield." *Davidson v. Shoney's Big Boy Restaurant*, 181 W.Va. 65 at 68, 380 S.E.2d 232 at 235 (1989).[5]

[5] In his preeminent treatise on municipal government, Eugene McQuillan succinctly explained the relationship between the laws of municipalities and state legislatures:

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

B. The Federal/State Conflict Preemption Standard

The concept of federal preemption of state law derives originally from the Supremacy Clause of the United States Constitution.[6] "[The Supreme Court of Appeals] has interpreted the doctrine of preemption to mean that "[t]he Supremacy Clause of the United States Constitution, Article VI, Clause 2, invalidates ***state laws*** that interfere with or are contrary to ***federal law***." *Metro Tristate, Inc. v. Pub. Serv. Comm'n of W. Virginia*, 245 W.Va. 495, 503, 859 S.E.2d 438, 446 (2021) (emphasis added). "Although there can be no crystal-clear, distinctly-marked formula for determining whether a ***state statute*** is preempted, there are two ways in which preemption may be accomplished: expressly or impliedly." Syl. pt. 5, *Morgan*, 224 W. Va. at 65, 680 S.E.2d at 80. "There are two types of implied preemption: field preemption and conflict preemption." *Id*., Syl. pt. 7.

This Court has held that the implied conflict preemption by a federal law of state law "is triggered only when it is 'impossible to reconcile both state and federal laws" ***or*** when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress…" *Metro Tristate,* 245 W.Va. at 509, 859 S.E.2d at 452 (emphasis added). "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*

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local governments lack the authority to craft their own exceptions to general state laws.

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

[6] The Supremacy Clause provides that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. Art. VI, cl. 2.

Council, 530 U.S. 363 373 (2000). "Under an implied conflict preemption analysis, federal statutory or policy language explicitly signaling an intent to preempt state law is not necessary." *Metro Tristate.*, 245 W.Va. at 509, 859 S.E.2d at 452.

III. The Oil & Gas Act Preemption Provision

Section 22-6A-6(b) of the Oil & Gas Act provides that:

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

W. Va. Code § 22-6A-6(b) (emphasis added).[7]

IV. The Circuit Court Considered SWN's Conflict Preemption Challenge and the ICA Properly Ruled on the Same

Indicative as to the strength of its arguments on the merits of SWN's preemption claims, the City leads off its Opening Brief by arguing that the ICA Opinion should be reversed because "[t]he 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…" *See* Pet. Br., at pp. 10-11. The City further asserts that SWN never raised the issue of implied conflict preemption until its briefs were filed with the ICA. Both of the City's contentions are false.

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

To the contrary, SWN's preemption challenge to the City Zoning Regulations included the theory of implied conflict preemption in its Complaint. *See* Verified Complaint (App. 25-26) ("When a conflict arises between a local ordinance and a state statute, the state statute will always prevail.") *Id.* ("A municipal ordinance conflicts with a state statute if it espouses a view that is irreconcilable with that contained in a State statute."); (App. 26) ("The City's ordinances, which effectively prohibit drilling in the City, are in conflict with the West Virginia Oil and Gas Act…").[8]

Similarly, the City cannot credibly argue that the Circuit Court declined to address the issue of implied conflict preemption in the Circuit Court Decision. The Circuit Court specifically discussed the conflict preemption standard, stating that "[w]here a law does not expressly preempt other laws, it may still operate to preempt them if it is intended to occupy the entire regulatory field or if there exists a conflict between the laws such that compliance with both is impossible." (App. 9) (citing *Morgan*, 224 W. Va. at 62, 680 S.E.2d at 85, at fn. 8). The Circuit Court further held that "[a]ny perceived 'conflict' between the City of Weirton's authority under Chapter 8A

[8] Additionally, implied conflict preemption was thoroughly briefed by SWN at the Circuit Court. *See* (App. 220) ("In such instances, where the Legislature has comprehensively regulated an entire industry, the West Virginia Constitution requires that conflicting municipal regulations be declared invalid and void."); (App. 221) ("That municipal ordinances are inferior to in status and subordinate to legislative acts is a principle so fundamental that citation of authorities is unnecessary. Equally fundamental is the legal principle that where an ordinance is in conflict with a state law the former is invalid."); (App. 227) ("Perhaps most importantly, both of the ordinances vest final discretionary approval power for natural gas wells in the City's Board of Zoning Appeals, and not the Director of the WVDEP, as is required in the Oil and Gas Act."); (App. 259) ("As such, the City's oil and gas regulations are also preempted under the principles of implied field preemption and conflict preemption."); (App. 266) ("[E]ven more compelling is the fundamental conflict between the Oil & Gas Act and all local zoning laws, each of which purport to vest final approval of well locations in a body other than WVDEP."). Thus, the City's contention that SWN did not raise the issue of conflict preemption until its appeal to the ICA is simply false.

and the DEP's authority under Chapters 6 and/or 6A is a "false conflict." (App. 11) (*citing to Longwell v. Hodge*, 171 W. Va. 45, 297 S.E.2d 820 (1982)).[9]

The City further suggests that the Circuit Court could not have made a determination with respect to conflict preemption because there is not an evidentiary record. *See* Pet. Br, at p. 11. However, SWN's conflict preemption challenge to the City Zoning Regulations does not require an evidentiary record beyond that which is already established. Here, it is undisputed that WVDEP issued a permit for the location of the Brownlee Site. It is undisputed that the City denied a permit for the location of the Brownlee Site. Section 22-6A-6(b) of the Oil & Gas Act vests "sole" and "exclusive" authority over the location and permitting of horizontal gas wells with WVDEP. It is also undisputed that the City Zoning Regulations vest final discretionary approval power for the location of natural gas well pads in the BZA, and not the WVDEP. These are the only essential facts necessary for this Court to decide the question of law in this case.

The ICA succinctly explained the fundamental conflict, which does not require any further development of the record in this case as follows:

> 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 processes of oil and gas wells and production operations within the state. *See* W. Va. Code § 22-6A-6(b)…Once the WVDEP issued a permit, the City cannot hinder SWN's ability to begin drilling. The City's approval scheme is in direct conflict with the Horizontal Well Act which vests WVDEP with 'sole and exclusive authority' to regulate the 'permitting' and 'location' of horizontal gas wells. *See* W. Va. Code § 22-6A-8(b). This language cannot be reconciled with the City's position that a municipality retains the authority to

[9] In its Opening Brief, the City cites to *Longwell v. Hodge* at least 20 times (and to the concept of a "false conflict" set forth therein at least 6 times) for the proposition the City Zoning Regulations are not preempted under a theory of conflict preemption. Yet, the City still disingenuously argues that the Circuit Court did not make a ruling on conflict preemption, despite specifically finding that the City Zoning Regulations create a "false conflict" under *Longwell v. Hodge*.

require zoning approval for an oil or gas well that has already been approved under the state's permitting program.

(App. 443-44). The conflict between the Oil & Gas Act and the City Zoning Regulations is apparent on their faces. The issue before this Court is a matter of law and is ripe for this Court's determination.

V. The City Zoning Regulations Are Preempted Under the Principles of Conflict Preemption

A. The Oil & Gas Act Preempts The City Zoning Regulations Because The Ordinances Directly Conflict With The Same Matters Regulated By The Act

As this Court has long held, "municipalities may only exercise powers not in conflict with general law, unless the power to do so is plainly and specifically granted." *Brackman's Inc.,* 126 W. Va. 21, 27 S.E.2d 71, 73. This principle of conflict preemption has been enshrined in the West Virginia Constitution, which provides that any municipal ordinance or charter "***shall be invalid and void if inconsistent or in conflict with*** this Constitution or the ***general laws of the State*** then in effect, or thereafter, from time to time enacted." W. Va. Const, art. 6, §39(a) (emphasis added).

Here, the objective terms of the Oil & Gas Act directly conflict with the specific requirements of the City Zoning Regulations. For example, the Oil & Gas Act provides that "the center of well pads may not be located within ***six hundred twenty-five feet of an occupied dwelling structure***." *See* W. Va. Code § 22-6A-12 (emphasis added).[10] In contrast, the now repealed NUDO, which only permitted oil and gas extraction in the City's industrial districts, provided that

[10] The City has erroneously argued that if SWN's preemption theory were accepted "natural gas well pads in every residential area within the state." (App. 250). That is simply false. Although there are a number of reasons why development would never occur in a residential district, the Oil & Gas Act expressly prohibits ***any*** development within 625 feet of a structure. *See* W. Va. Code § 22-6A-12. Thus, so long as a well is located more than 625 feet from an occupied dwelling, it can be located anywhere in a municipality, regardless of the zoning district, so long as WVDEP has issued a permit. Here, the Brownlee Site is located more than **1,200** feet from the closest residential structure. (App. 273).

"[n]o well may be located closer than ***two thousand five hundred (2,500) feet*** to any residential, church or school use." *See* NUDO § 9.6.20(A). The City's original and now current again UDO provides that "[n]o well may be located closer ***than two hundred (200) feet*** to any residential use. *See* UDO § 9.6(24); (App. 152).[11] Because these local requirements are in direct conflict with the Oil & Gas Act, they must necessarily yield to state law and be declared invalid. W. Va. Const, art. 6, §39(a).

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

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

The City argues that because it is generally empowered by the Land Use Planning Act, W. Va. Code §§ 8A-7-1 *et seq*., to enact traditional zoning laws, and the Land Use Planning Act does

[11] The City's repeal of the NUDO and reinstatement of the UDO on the eve of the ICA oral argument is illustrative of the City's overall candor in this matter. However, it should be noted that the UDO's lesser 200' setback is also in direct conflict with the Oil & Gas Act's setback. Under the same preemption principles, the WVDEP would not allow a gas well pad within 200' of an occupied structure because it is allowed in the local jurisdiction.

not specifically limit the City's ability to regulate oil and gas, it retains the power to do so. The City takes the position, even where a state permit has been approved authorizing a proposed well in a specific location. The City's contention directly contradicts this Court's holding in *Brackman's Inc*, *supra*, as well other cases decided by state and federal courts considering the preemptive effect of the Oil & Gas Act.

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

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

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

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

> 'It is safe to assume that the Legislature meant to deal fairly with those to whom it granted licenses,' and 'difficult to believe that it was ever intended' that a locality would be empowered by the legislature to deny the effective use of state-issued permits. Absent 'express' language clearly 'vest[ing] in [localities] what may be termed the veto power against the issuance of particular licenses,' the court concluded, it would not infer a right to 'nullify' state permits—***not from a general grant of authority to a locality***, and ***not even from a grant of power covering licensing itself***. *Id.; see also Davidson*, 380 S.E.2d at 235 (unless state law 'plainly and specifically' authorizes inconsistent state and local regulation, it would be 'illogical' to assume that result).

EQT, 870 F.3d at 334 *citing Brackman's Inc, supra* (emphasis added). Accordingly, the court found that the county's ordinance was preempted by both the Water Pollution Control Act[12] and the Oil & Gas Act.

[12] The court also found the ordinance to be preempted under the Water Pollution Control Act, even though it contained a "savings" clause, which provided that "[N]othing herein contained shall abridge or alter rights of action or remedies ..., nor shall any provisions ... be construed as estopping the state, municipalities, public health officers, or persons ... in the exercise of their rights to suppress nuisances or to abate any pollution..." As noted by the court, the Oil & Gas Act

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

Despite recognizing that Morgantown plainly "has an interest in the control of its land within its municipal borders," the Circuit Court in *Northeast Natural Energy* concluded that the "provisions [of the Oil & Gas Act] clearly indicate that this area of law is exclusively in the hands of the WVDEP. No exception is carved out for any locality or municipality. In fact throughout the regulation it is explicit that all authority lies solely within the hands of the Director [of WVDEP]." *Id* at *4. Therefore, the Circuit Court struck down the ordinance as preempted by the Oil & Gas Act. *Id.* at *4-5. In striking down Morgantown's ordinance, the court further explained:

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

Id (emphasis added).[13]

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does not contain a "savings" clause reserving any power whatsoever to local governments. Thus, it was also found to preempt the local regulations. *Id*.

[13] It is significant that *Northeast Natural Energy* was decided on August 12, 2011 and Chapter 6A became effective on December 14, 2011. As the City has previously noted, "the legislature is presumed to know the effect of its actions, and it will generally speak clearly when it intends to pre-empt another law." *See* (App. 395) *citing Virginia Uranium, Inc. v. Warren*, 139

Here, nothing in the Oil & Gas Act "plainly and specifically" authorizes municipalities to take actions inconsistent with state issued permits. *EQT*, 870 F.3d at 334. To the contrary, the Oil & Gas Act contains no savings clause or exception that authorizes municipalities to exercise any regulatory authority whatsoever over the permitting of oil and gas wells. *Northeast Natural Energy*, at *4. Thus, it would be "illogical" to assume that result, even where a municipality has authority to enact other laws of general applicability, such as zoning laws. Under the principles set forth in *Brackman's Inc., EQT and Northeast Natural Energy*, it is clear that the City Zoning Regulations are preempted by the Oil & Gas Act.[14]

Despite the cases cited above by SWN demonstrating that the general authority of a municipality to protect the health, safety and welfare of the community do not trump the clear preemptive intent of the Oil & Gas Act, the City argues that it has broad authority to enact zoning regulations under the Land Use Planning Act. (App. 14-16). Specifically, the City cites to Section 8A-7-10 of the Land Use Planning Act, which provides as follows:

S.Ct. 1894, 1901-2 (2019); *Davis Memorial Hospital v. West Virginia State Tax Com'r*, 222 W. Va. 677, 685-6, 671 S.E.2d 682, 690-91 (2008)." Thus, the state legislature was presumably aware of the preemption challenges being made to local ordinances and the effect its new legislation would have on those challenges. Yet, when it enacted Chapter 6A, it did not choose to limit the preemptive effect of the holding in *Northeast Natural Energy*. Rather, it chose to "speak clearly" and make express the preemption that had already been found by the Circuit Court in *Northeast Natural Energy*.

[14] Throughout this case, the City's has contended that *EQT* and *Northeast Natural Energy* should simply be disregarded because they involved complete bans on an activity, rather than lesser regulation. However, in both cases, the courts' holdings rested on the fact that the Oil & Gas Act delegated sole authority for the regulation of oil and gas to WVDEP, not on the fact there was a complete ban. *See EQT*, 870 F.3d at 336 ("Under the Oil and Gas Act, the legislature has vested in the state DEP the exclusive authority over regulation of the state's oil and gas resources, including in 'all matters' related to the 'development, production, storage and recovery of this state's oil and gas.'"); *Northeast Natural Energy*, 2011 WL 3584376 at *4 ("This area of law is exclusively in the hands of the WVDEP. No exception is carved out for any locality or municipality. In fact throughout the regulation it is explicit that all authority lies solely within the hands of the Director [of WVDEP].").

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

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

However, the Land Use Planning Act does not define "natural resources" and makes no reference to oil and gas extraction specifically. Nor does it define what constitutes "complete use" or an "urban area." If the Legislature had intended to allow for zoning regulation of oil and gas extraction in "urban areas" and municipalities, it would have done so specifically. *See* Syllabus Point 1, *UMWA by Trumka v. Kingdon*, 174 W.Va. 330, 325 S.E.2d 120 (1984) ("The general rule of statutory construction requires that a specific statute be given precedence over a general statute relating to the same subject matter."); *Bowers v. Wurzburg*, 205 W.Va. 450, 462, 519 S.E.2d 148, 160 (1999) ("Typically, when two statutes govern a particular scenario, one being specific and one being general, the specific provision prevails."); *Daily Gazette Co., Inc. v. Caryl*, 181 W.Va. 42, 45, 380 S.E.2d 209, 212 (1989) ("The rules of statutory construction require that a specific statute will control over a general statute[.]").

Here, the Oil & Gas Act *specifically* provides that WVDEP shall have the "sole and exclusive authority" to regulate all aspects of the oil and gas industry, including the location of natural gas wells. W. Va. Code § 22-6A-6(b). While the Land Use Planning Act *generally* provides that it does not authorize zoning ordinances that have the effect the denying "complete use" of "natural resources" outside of municipalities and urban areas, it never grants municipalities

specific authority to adopt zoning ordinances that purport to regulate any aspect of the oil and gas industry. Accordingly, the general grant of authority to enact zoning ordinances affecting "natural resources" must necessarily yield to the preemption provision of Section 22-6A-6(b) of the Oil & Gas Act, which specifically provides WVDEP the sole and exclusive authority to regulate the location of natural gas wells.

C. There is No "False Conflict" Between the Oil & Gas Act and the City's Authority to Adopt Zoning Regulations

The City's assertion that the conflict here presents a "false conflict" akin to the one found by this Court in *Longwell v. Hodge* is *Longwell v. Hodge*, 171 W. Va. 45, 297 S.E.2d 820 (1982), is misplaced. In that case, this Court found that there was a "false conflict" between the Legislature's licensing regime for non-intoxicating beverages and the municipality's zoning ordinance because "[t]he State, by licensing the sale of beer, neither acquires, nor seeks to acquire, ***any positive interest*** in the operation of taverns or restaurants selling beer at particular locations within municipalities. Rather, ***the State's interest is defensive***, to assure that beer is not sold by an 'unsuitable person" or in an 'unsuitable place' *See*, W. Va. Code, 11–16–12 [1972]." *Id*. (emphasis added). Specifically, the express legislative intent of the Nonintoxicating Beer Act provides:

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

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

Here, however, the State's interest in oil and gas regulation is not merely "defensive." The Oil & Gas Act's express legislative findings also include positive interests relating the well-being of the West Virginia economy:

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

W. Va. Code § 22-6A-2(a)(8) & (b). Thus, the Oil & Gas Act does not merely purport to defensively protect against the environmental impacts of oil and gas activities. Rather, it also seeks to safely promote oil and gas development throughout the state for the economic benefit of the citizens of West Virginia, and it vests sole and exclusive authority in WVDEP to effectuate that purpose. Accordingly, the holding in *Longwell* does not apply here.[15]

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

D. The City Zoning Regulations Are Preempted Because They Are An Obstacle To The WDVEP's Permitting of Oil Gas Development Locations

In its Opening Brief, the City asserts that SWN cannot demonstrate that the City Zoning Regulations are preempted by the Oil & Gas Act because SWN has not met the standard to demonstrate whether a *state* law is preempted by a *federal* law under principles of conflict preemption. In doing so, the City argues that this Court should apply the impossibility preemption[16] and obstacle preemption standards with respect to the conflict preemption analysis.

This case involves West Virginia state preemption of local municipal regulations, for which this Court has never employed the federal/state "impossibility" or "obstacle" standard. The correct standard for demonstrating state versus local conflict preemption under West Virginia law derives itself the West Virgina Constitution, and not the Supremacy Clause of the United States Constitution. Thus, while SWN submits that it has in fact satisfied the federal "obstacle" standard and that such standard provides helpful guidance, it should not be applied "rigidly" to this case, which does not involve federal preemption of state law. *See Morgan,* 224 W.Va. at 69, S.E.2d at 84 ("[T]here can be no one crystal-clear, distinctly-marked formula for determining whether a [statute or ordinance] is preempted.") (internal citation omitted).

[16] The City devotes almost 5 pages of its brief to a dissertation on why SWN has failed to demonstrate conflict preemption through the "physical impossibility" standard. Even if viewed under a federal/state conflict analysis, it is not necessary to show that the state law makes it impossible to comply with a federal law *and* stands as an obstacle to complying with the federal law. That standard is met by showing that the state law is an added obstacle to accomplishing the objectives of the legislature. *See* ICA Opinion (App. 440) ("Conflict preemption arises where a state statute and municipal ordinance are in direct conflict, where a municipal ordinance stands as an ***added obstacle*** to an already enacted legislative statute. *See Metro Tristate, Inc. v. Pub. Serv. Comm'n of W. Va*., 245 W. Va. 495, 504, 859 S.E.2d 438, 447 (2021) ("Conflict preemption arises from a direct clash between state and federal law, and 'conventional conflict pre-emption principles require pre-emption "where […] ***state law stands as an obstacle*** to the accomplishment and execution of the full purposes and objectives of Congress."') (emphasis added).

As discussed by this Court in *Metro Tristate,* a state law is preempted by a federal law in the event that the state law is one that "frustrates the purpose of federal law" or "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *See Metro Tristate, Inc.,* 245 W.Va. at 509, 859 S.E.2d at 452. Here, the West Virginia Legislature could not have been any clearer in the text of Section 22-6A-6(b) that its purpose and objective with respect to the location and permitting of horizontal gas wells was to vest "sole" and "exclusive" authority in WVDEP. W. Va. Code § 22-6A-6(b) (emphasis added). As the ICA aptly stated, this clear objective "cannot be reconciled with the City's position that a municipality retains the authority to require zoning approval for an oil or gas well that has already been approved under the state's permitting program." (App. 444). Thus, the City Zoning Regulations undoubtedly "frustrate" and provide an "obstacle" to the Legislature's express objective to vest "sole" and "exclusive" authority over the permitting and location of horizontal gas wells. [17]

And, although the City attempts to distinguish *Metro Tristate* from the case at hand, that case directly supports the ICA's determination regarding obstacle conflict preemption. Despite

[17] It is clear under the rules of statutory construction that the Legislature intended to preempt local zoning authority in W. Va. Code § 22-6A-6(b) because the Legislature specifically excepted the shallow gas well review board, the coalbed methane review board and the oil and gas conservation commission but *not* municipalities or the Land Use Planning Act. *See Manchin v. Dunfee*, 174 W.Va. 532, 535, 327 S.E.2d 710, 713 (1984) ("In the interpretation of statutory provisions the familiar maxim *expression unius est exclusion alterius,* the express mention of one thing implies the exclusion of another, applies."); *Christopher J. v. Ames*, 241 W.Va. 822, 832, 828 S.E.2d 884, 894 (2019) ("We have long recognized that '[t]his doctrine informs courts to exclude from operation those items not included in the list of elements that are given effect expressly by statutory language.'"); *Young v. Apogee Coal Co., LLC*, 232 W. Va. 554, 562, 753 S.E.2d 52, 60 (2013) ("Critically, we have found that [t]he *expressio unius* maxim is premised upon an assumption that certain omissions from a statute by the Legislature are intentional."); *Banker v. Banker*, 196 W. Va. 535, 546-47, 474 S.E.2d 465, 476-77 (1996) ("It is not for this Court arbitrarily to read into [a statute] that which it does not say. Just as courts are not to eliminate through judicial interpretation words that were purposely included, we are obliged not to add to statutes something the Legislature purposely omitted.").

the City's rather bald contention that the "unique facts" in the *Metro* case "do not apply to preemption claims that state environmental regulations invalidate local land use laws" the factual scenario in *Metro* is almost directly analogous to this case. *See* Pet. Br, at p. 17. The appeal in *Metro* involved a statute enacted by Congress, 38 U.S.C. § 8127, which sets forth the specific criteria and process through which the United States Department of Veterans Affairs ("VA") must approve contractors and award them contracts for "non-emergency medical transportation" for covered veterans. However, West Virginia law prohibits common carriers and contract carriers from operating on West Virginia's roads without meeting various requirements and obtaining a certificate to operate from the West Virginia Public Service Commission ("PSC"). *Id.* Thus, the question before this Court was whether the PSC's authority to "regulate [], 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." Ultimately, this Court found that the PSC was preempted under a conflict preemption theory from requiring the VA approved contractor to obtain an additional state-issued certificate, reasoning that:

> The conflict preemption principle guiding our decision is, therefore, that when a federal agency determines that a contractor meets some federal contract or procurement qualification set by Congress***, a state agency may not exercise its authority and impose additional state-law qualifications that stand as an obstacle to that federal agency determination and, more specifically, to the qualifications set by Congress***. If a contractor chosen by 'the United States must desist from performance of their duties until they satisfy a state officer of their competence, ***qualifications are added to those which the federal government has pronounced sufficient***.' *Elec. Const. Co. v. Flickinger*, 107 Ariz. 222, 485 P.2d 547, 549 (1971). ***Hence, a State is barred from imposing additional qualifications not contemplated by Congress*** upon an entity operating solely as a federal contractor, particularly when those qualifications will compromise the federal agency's choice of that entity to complete a federal contract.

Metro Tristate, 245 W.Va. 495 at 507, 859 S.E.2d at 450 (emphasis added).

Precisely as with the federal statute in *Metro Tristate*, the Oil & Gas Act at issue here sets forth detailed and specific criteria that the WVDEP must consider in approving a permit for a natural gas well. Indeed, the Oil & Gas Act's qualifications and approval criteria for a natural gas well work permit are arguably more extensive than those required by Congress for federal transportation contractors in *Metro Tristate*.[18] And, like the VA in *Metro Tristate*, WVDEP is vested with sole authority to determine compliance with those criteria. Here, the City is attempting to do precisely what was found to be preempted in *Metro Tristate*: "exercise its authority and impose additional…qualifications that stand as an obstacle to [a state] agency determination." 245 W.Va. at 507, 859 S.E.2d at 450. And, like the state agency in *Metro Tristate*, the City here should be "barred from imposing additional qualifications not contemplated by [the Legislature]." *Id*.

Thus, even under the "significant burden" imposed by the state/federal "obstacle" preemption standard in *Metro Tristate*, the City Zoning Regulations are preempted under the principle of implied conflict preemption.

E. The City Zoning Regulations Attempt to Regulate the Same Subject as the Oil & Gas Act

Throughout its Opening Brief, the City asserts that "Weirton's zoning laws serve the purposes established by the Land Use Act," as opposed to the Chapter 22 environmental regulations, and are thus saved from preemption. *See* Pet. Br, at pp. 22-26. The City cites to

[18] The Oil & Gas Act provides specific requirements for every conceivable aspect of drilling as it relates to human health, safety, location and the environment, including, but not limited to: the issuance of permits for water pollution control; notice to and comments by property owners affected by the drilling; review of well work applications by the director of the WVDEP; the requirement of plats prior to drilling; the requirement of plats prior to introducing liquids or waste into wells; objections to drilling by affected parties; the required filing of a "well log"; the prescription of methods of abandonment, plugging, and reclamation of a well; the rights of adjacent property owners; the procedural stance of courts as to fresh water contamination near wells; offenses and penalties under the Article; and the WVDEP's ability to enjoin any violator or would-be violator of the Oil & Gas Act. *See* W. Va. Code §§ 22-6-7 through 41; W. Va. Code §§ 22-6A-7 through 9.

several decisions from other jurisdictions, which the City asserts stand for the proposition that traditional zoning concerns are always separate and distinct from the environmental regulation of oil and gas activities and are therefore not preempted under principles of field or conflict preemption.[19] As discussed below, the extraterritorial cases cited by the City are inapposite for a variety of reasons. But, more fundamentally, the City's own briefs before this Court and the ICA make clear that the City Zoning Regulations are in fact attempting to regulate almost all of the same subject areas that are exclusively regulated by WVDEP under the Oil & Gas Act.

In support of its position to the ICA, the City made the argument that the City Zoning Regulations regulate "traditional zoning concerns such as traffic, development compatibility with surrounding uses, and noise and light impacts to surrounding properties." (App. 250). It further argued that the Land Use Planning Act empowers the City to "prevent oil and gas development in districts where it is not appropriate [,] adopt performance standards that ensure compatible uses, such as establishing conditions for lighting and noise reduction, [and] regulate property access points…to lessen congestion and regulate traffic flow so community members can travel effectively." (App. 245). As admitted by the City, the zoning ordinance must also "promote…***general public welfare, health, safety***, comfort and morals" and provide a plan so that adequate ***light, air***, convenience of access and safety from ***fire, flood*** and ***other danger*** is secured." *Id. citing* W. Va. Code § 8A-7-2(a) (emphasis added).

[19] The City's attempt to recast its UDO as nothing more than the attempt to zone where oil and gas may be located is somewhat laughable considering the Brownlee Site at issue in this case is zoned under the UDO as an appropriate area for oil and gas development. Indeed, oil and gas extraction is permitted by conditional use in the PDD – Planned Development District where the Subject Property is located. *See In re Skeen*, 190 W.Va. 649, 651, 441 S.E.2d 370, 372 (1994) ("[T]he right to a…conditional use automatically exists if the [BZA] finds compliance with the standards or requisites set forth in the ordinance").

However, in its brief to this Court, the City now cherry-picks portions of the Land Use Planning Act to make it appear that the Land Use Planning Act governs entirely different areas of law, mainly arguing that the purposes of the City Zoning Regulations are merely for "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." *See* Pet. Br., at p. 23.[20] Thus, the City argues that its UDO is not preempted because the Oil & Gas Act "relates to…the authority to regulate any and all...drilling and production processes, not to local authority to provide for compatible land uses under the Land Use Planning Act." *See* Pet. Br., at p. 24.

That assertion is incorrect. Almost all of the "traditional zoning concerns" recited by the City (and set forth expressly in Section 1.4 of the UDO) are in fact the subject of specific regulation under the plain language of the Oil & Gas Act. As the City notes in its Opening Brief, the Oil & Gas Act provides that WVDEP may not issue a drilling permit if it determines that: (1) the proposed well work will constitute a hazard to the safety of persons; (2) the plan for soil erosion and sediment control is not adequate or effective; (3) damage would occur to property; or (4) the proposed well work fails to protect fresh water sources or supplies. *See* W. Va. Code §§ 22-6A-8(d), 22-6A-8(e). Further, WVDEP must confirm that all well location restrictions set forth in the

[20] While the City may make characterizations as to the purpose of the UDO through the enabling provisions of the Land Use Act, Section 1.4 of the UDO speaks for itself: "This [UDO] is enacted pursuant to the Comprehensive Plan of the City of Weirton to ***protect and promote the health, safety***, comfort, morals and ***general public welfare*** of the City through the regulation and restriction by means of zoning and subdivision regulations***, the height and size of buildings and other structures***, the appearance of developments, the percentage of lots that may be covered or occupied, ***the dimensions of setbacks***, the size of open spaces, the density of population, ***and the location, use and design*** of landscaping, ***buildings, structures, and land*** for residential, commercial, industrial, institutional, recreational, and other purposes." (emphasis added). The full UDO is available at: https://www.cityofweirton.com/DocumentCenter/View/2381/2005-UDO---Revised (Last Visited May 20, 2024).

Oil & Gas Act have been satisfied. *See* W. Va. Code §§ 22-6A-8(e). Specifically, W. Va. Code §§ 22-6A-12 provides that no well may be drilled within: (1) 625 feet of an occupied dwelling or structures; (2) 2,500 feet of a structure used to house dairy cattle or poultry; (3) 250 feet of a an existing water well or spring; or (4) 1,000 feet of a public water supply intake. The Act also provides the Secretary of WVDEP must consider "rules establishing guidelines and procedures regarding reasonable levels of noise, light, dust and volatile organic compounds relating to drilling horizontal wells, including reasonable means of mitigating such factors, if necessary. *See* W. Va. Code § 22-6A-12(e). Finally, WVDEP is also tasked with promptly reviewing and considering all comments raised by the public. *See* W. Va. Code § 22-6A-8(f).

Because the Oil & Gas Act is so broad and comprehensive, it is beyond question that local zoning ordinances, including the City's UDO at issue here, do in fact purport to regulate the same areas of the oil and gas industry as the Oil & Gas Act.[21] Accordingly, the Legislature's express delegation of "sole and exclusive authority" to regulate the "permitting" and "location" of oil and gas wells to WVDEP preempts any attempt by a municipality to determine the final location of a horizontal oil and gas well, whether under a zoning ordinance or otherwise.

Thus, the City's reliance on *Longwell* and *EQT* to support its proposition that local regulation may "coincidentally" "touch upon" the same areas regulated by the state without violating principles of preemption, is misplaced in this case. As noted by the City, in *Longwell*, the court held that:

> ***Although the risks of briefly summarizing a large body of law are great,*** one can safely conclude that, by and large, municipal zoning regulations interfering with state regulation in other areas will be upheld ***to the extent that the interference is the coincidental by-product of the municipal zoning board's legitimate pursuit of***

[21] As discussed above, those common areas of regulation include, but are not limited to human health, safety, noise, light, well location, height and size of well pad structures, setback dimensions, and the location and design of related buildings and structures.

> ***its delegated goals***. Or, to put it another way, that the conflict between state and municipality is "false."

Longwell, 297 S.E.2d at 825. However, in that same decision, the court also qualified its "risky" summary of the law by noting that a local regulation *would* be preempted if there was a "direct, explicit attempt by the city to regulate an area that the State has preempted." *Id*. (internal citation omitted). Similarly, the City also relies on a passage on *EQT*, where the Fourth Circuit noted the general principal that "possession of a state permit will not preclude all local regulation ***touching on the licensed activity***." *See* Pet. Br., pp. 29-30 (emphasis added). However, citing *Brackman's*, the court in *EQT* also clearly stated that "it would not infer a right to 'nullify' state permits—not from a general grant of authority to a locality [*e.g*., the Land Use Planning Act], and not even from a grant of power covering licensing itself." *EQT*, 87 F.3d at 333 (internal citation omitted).

Here, the City's attempt to regulate the location of oil and gas wells through the City Zoning Regulations is not "merely the coincidental by-product of the municipal zoning board's legitimate pursuit of its delated goals." *Longwell*, 297 S.E.2d at 825. Rather, the City's UDO explicitly identifies oil and gas uses and attempts to regulate their "location" within certain zoning districts in the City. The City's UDO does not merely "touch" upon the same subject as the state's comprehensive oil and gas regulatory scheme.[22] Rather, the UDO directly and explicitly targets

[22] SWN does not contend that certain local regulation may not permissibly "touch upon" oil and gas activities, such as timbering permits, right of way use permits, building permits, fire permits etc. However, that regulation cannot contain regulations that have the effect denying the rights and privileges granted in SWN's State Permit (*i.e*., regulations that conflict with express terms of the Oil & Gas Act, including "location" requirements) that are exclusively delegated to WVDEP. *See Brackman's Inc.* 27 S.E.2d at 79. The City's concern that a finding of preemption here would lead to "uncertainty" with respect to the City's authority to administer building codes and fire codes is entirely unfounded. Under West Virginia law, if a municipality chooses to enforce building and fire code regulations, each municipality must adopt the West Virginia State Building Code (or portion thereof) that is "promulgated by the State Fire Commission" and not the local municipality. *See* W. Va. Code § 8-12-13(b)-(c). Thus, building and fire codes do not create a question of conflict preemption with the Oil & Gas Act because the substantive requirements for each law have been determined by the Legislature. Unlike in the zoning context, a municipality's

the "permitting" and "location" of horizontal oil and gas wells, which is within the sole and exclusive jurisdiction of WVDEP under Section 22-6A-6(b) of the Oil & Gas Act. Therefore, this Court should not "infer a right [by the City] to nullify" SWN's state issued well-work permit merely because the City has enacted a zoning ordinance of general applicability. *EQT*, 87 F.3d at 333.[23]

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ability to deny a building or fire code permitted is limited to non-compliance with the stated promulgated West Virginia State Building Code.

[23] As support for its argument the City Zoning Regulations should not be found preempted where they incidentally touch upon the same areas as the Oil & Gas Act, the City has continually advanced the red herring argument that "[t]o 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." Pet. Br, at p. 25.

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

F. Neighboring States' Oil & Gas Act Statutes and State Supreme Court Cases Support a Determination of Preemption

As addressed in SWN's Cross-Assignment of Error below, the Oil & Gas Act expressly preempts local zoning authority without exception. As such, the City's canvass of preemption challenges under other statewide oil and gas statutes is entirely irrelevant. Moreover, none of the oil and gas regulatory schemes in states where preemption was not found contain any language granting their respective enforcement agencies "sole and exclusive power" to regulate the permitting or specific location of oil and gas wells. That being said, an examination of how West Virginia's neighboring states' highest courts and legislatures have addressed the preemption of local zoning actually underscores the preemptive force of Oil & Gas Act.

The City cites to an intermediate appellate Pennsylvania court decision, *Arbor Resources LLC v. Nockamixon Twp.*, 973 A.2d 1036 (Pa. Commw. Ct. 2009), for the proposition that a zoning ordinance provision concerning the location of an oil and gas drilling use was not preempted by the since repealed Pennsylvania Oil & Gas Act ("Prior PA Oil & Gas Act"), 58 P.S. § 601.101 *et seq*. Unlike the Oil & Gas Act, the Prior PA Oil & Gas Act explicitly preserved, to a very limited extent, local zoning ordinances adopted pursuant to the Pennsylvania Municipalities Planning Code[24] ("MPC Exception"). Section 602 of the Prior PA Oil and Gas Act specifically provided:

> ***Except with respect to ordinances adopted pursuant*** to the act of July 31, 1968 (P.L. 805, No. 247), known as ***the Pennsylvania Municipalities Planning Code***, and the act of October 4, 1978 (P.L. 851, No. 166), known as the Flood Plain Management Act,[25] all local ordinances and enactments purporting to regulate oil

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

[25] The Prior PA Oil & Gas Act also preserved authority under the Flood Plain Management Act, a comprehensive and coordinated program of flood plain management that is based on the National Flood Insurance Program ("NFIP"), 42 U.S.C. § 4011 *et.seq*. All oil and gas development throughout the United States must comply with these Flood Plain requirements. This is the reason

> 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.

58 P.S. § 601.602 (emphasis added).

In two companion Pennsylvania Supreme Court cases, *Huntley & Huntley, Inc. v. Borough Council of Borough of Oakmont*, 964 A.2d 861 (Pa. 2009) and *Range Resources Appalachia, LLC v. Salem Twp*., 964 A.2d 869, 872 (Pa. 2009), the Pennsylvania Supreme Court considered the preemptive scope of Section 602 and the extent of local zoning authority under the MPC Exception.[26] The Supreme Court also invited the Pennsylvania Department of Environmental Protection ("PaDEP") to file an amicus brief articulating its view of whether the Prior PA Oil & Gas Act and its associated administrative regulations preempted the local regulations at issue.[27] *Range Resources*, 964 A.2d at 872.

In *Huntley & Huntley*, the Pennsylvania Supreme Court concluded that the Prior PA Oil & Gas Act's preemptive scope was not total in the sense that it did not prohibit municipalities from

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the "County Floodplain Coordinator" is the only listed permitting authority that is not a federal or state agency in the WVDEP form permit "Acknowledgment." *See* Pet. Br., at pp. 13, 14 at fn. 6.

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

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

enacting traditional zoning regulations that identify which uses are permitted in different areas of the locality, even if such regulations precluded oil and gas drilling in certain zones. *See Huntley & Huntley*, 964 A.2d at 865.[28] In *Range Resources*, the Pennsylvania Supreme Court concluded that, pursuant to the principles of conflict preemption and the broad express preemption provision in the Prior PA Oil & Gas Act, the local ordinance at issue was preempted. *Range Resources*, 964 A.2d at 876. Thus, the status of local zoning authority over oil and gas operations at the time of the *Arbor Resources* case was limited to the location of oil and gas development in certain zoning districts.[29] That was all that was permitted under the Prior PA Oil & Gas Act's MPC Exception. If the MPC was not expressly referenced in the statute, there would have been no local zoning authority over the location of oil and gas operations in Pennsylvania. Here, no such analysis is necessary because there is no "Land Use Planning Act" exception or local municipal exception in the Oil & Gas Act.

[28] In so holding, the Pennsylvania Supreme Court noted that increased setbacks were not permitted. *See Id* at 865 f.n. 10 *citing St. Croix, Ltd. v. Bath Township*, 118 Ohio App.3d 438, 693 N.E.2d 297 (1997) (holding that, where the state oil and gas statute prescribed a specific setback distance for oil wells relative to habitable structures, localities were precluded from increasing those distances through zoning). In the new NUDO that became effective after the Application was filed, the setback was increased to 2,500 feet from any residential, church or school uses.

[29] Although a "traditional zoning" analysis as the one addressed in *Huntley & Huntley* is not necessary here, it is worth noting that the UDO that was in effect when SWN made its Application permitted "Oil/ Gas Extraction" uses by conditional use in the zoning district where the Brownlee site is located so long as it was not "closer than two hundred (200) feet to any residential use" and the use complied with the Oil & Gas Act. *See* UDO § 9.6(24). As such, the City made the "traditional zoning" determination that oil and gas development was an appropriate use in this area. As provided for in SWN's appeal of the conditional use application denial, there is no question that this is the most appropriate area for oil and gas development within the City. The Brownlee Site is 301.83 acres of vacant and wooded land. (App. 85). The well pad is located more than 1,200 feet from the closest residential structure. (App. 82). The pad will not be visible once it is in production. Given the topography, the drilling and completions operations will also be largely obscured from view.

Further, the City ignores that in response to the *Huntley & Huntley* decision, the Pennsylvania General Assembly repealed the Prior PA Oil & Gas Act in 2012 and adopted the Unconventional Gas Well Impact Fee Act ("New PA Oil & Gas Act"). The New PA Oil & Gas Act maintained the MPC Exception but required municipalities that adopted zoning ordinances to permit oil and gas drilling in **all** zoning districts and expressly preempted all other local regulations. *See* 58 Pa. C.S. §§ 3302-04.[30]

The City also cites to an unreported district court case, *Osborne v. Leroy Township*, 2014-Ohio-5774, at 2014 WL 7457065 (Ohio Ct. App. 11th Dist. Lake County 2014), for the proposition that local zoning regulations were not preempted by the Ohio state statute ("OH Oil & Gas Act"). That case concerned the storage of debris and the installation of signage on a property upon which there was an existing gas well. The case did not concern the zoning authority related to the existing gas well.[31]

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

Further, in its Opening Brief to this Court the City makes the blatantly false claim that "Pennsylvania law permits cities to ban gas drilling by hydraulic fracturing." Pet. Br, at p. 34. To contrary, Pennsylvania law requires that all municipalities must provide for all legitimate uses somewhere in the municipality, including oil and gas exploration and production. *See LaRock v. Board of Supervisors of Sugarloaf Twp*., 866 A.2d 1208 (Pa. Cmwlth. 2005). *Id*. If a use is not provided for, it results in unconstitutional exclusionary zoning. *Id.*

[31] The City also cited *Town of Frederick v. North American Resources Co*., 60 P.3d 758, (Colo. App. 2002), for the proposition that the Colorado's state oil and gas act, the Colorado Oil & Gas Conservation Act ("CO Oil & Gas Act"), does not preempt all local zoning regulations. First of all, that statue is more permissive than the "sole and exclusive authority" the Oil & Gas Act vested in the WVDEP. *See* Colo. Rev. Stat. § 34-60-106(2)(a) ("The [Colorado Oil and Gas

Similar to the Oil & Gas Act and WVDEP, the Ohio Legislature enacted legislation that placed sole and exclusive responsibility for regulating oil and gas operations in the Ohio Department of Natural Resources ("Ohio DNR"). The governing statute, R.C. 1509.02, provides, in pertinent, that: "[t]he [Ohio DNR] has ***sole and exclusive authority to regulate the permitting, location, and spacing of oil and gas wells within the state***. . ." Ohio Rev. Code Ann. § 1509.02 (emphasis added). In *State ex rel. Morrison v. Beck Energy Corp*., 37 N.E.3d 128 (2015), the Supreme Court of Ohio considered a challenge to a number of ordinances that regulated oil and gas operations. *Id*. at 134. The ordinances required a conditional use zoning certificate, public notice and a hearing, the payment of a fee, the filing of a performance bond, a hearing at least three weeks prior to the commencement of drilling, and prohibited drilling a well until such time as a conditional zoning certificate had been granted for one year. *Id*. The court found that the challenged ordinances conflicted with R.C. 1509.02 and were thus preempted by the OH Oil & Gas Act. In so concluding, the court expressly rejected the same argument that the City advances here that the challenged ordinances were not conflict preempted because the "statute and the ordinances 'regulate two different things.'" *Id*. at 136.

Contrary to the City's assertions in its Opening Brief, the Ohio Supreme Court's decision did not rely "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." Pet. Br, at p. 36. To be sure, the Ohio Supreme Court discussed the repealer provision, but it was not

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Conservation Commission] ***may*** regulate . . .the producing, and plugging of wells and all other operations for the production of oil or gas.") (emphasis added). Notwithstanding the more permissive statute, the Colorado Court of Appeals nonetheless struck ordinance provisions related to ***setbacks***, ***location***, ***noise*** mitigation, visual impacts and aesthetics and other operational regulations as conflicting with the CO Oil & Gas Act. *Id*. at 760-766 (emphasis added). These are the very matters the City argues are "traditional zoning" regulations that are not preempted.

dispositive to its holding. Rather, like this Court in *Brackman's Inc.,* the Ohio Supreme Court applied a state constitutional conflict preemption provision to the "sole" and "exclusive" permitting authority granted to Ohio DNR and determined that "[b]ecause Beck Energy obtained a valid state permit in accordance with R.C. Chapter 1509, the city cannot extinguish privileges arising thereunder through the enforcement of zoning regulations." *Beck Energy*, 37 N.E.3d at 136.

The states and cases the City cites to do not support its claim that traditional zoning authority is preserved. Unlike Pennsylvania, there is no statutory exception or savings clause for the Land Use Planning Act, which renders any locational vs. operational analysis irrelevant. Indeed, given the substantial similarities between the Oil & Gas Act and OH Oil & Gas Act, it is clear that there is no local zoning authority to regulate the location of oil and gas operations that was reserved for municipalities in West Virginia.[32]

CROSS-ASSIGNMENT OF ERROR

I. The City Zoning Regulations Are Preempted by the Oil & Gas Act Under Principles of Express Preemption and Implied Field Preemption

In the ICA Opinion, the ICA found it unnecessary to reach a conclusion on SWN's arguments regarding express preemption and implied field preemption because of its finding regarding implied conflict preemption. Nevertheless, the ICA could have also found that the City Zoning Regulations are preempted under those two theories.

To establish a case of express preemption requires proof that the legislature, through specific and plain language in the statute, preempted the specific field covered by local law.

[32] The City also cites to cites *Wallach v. Town of Dryden*, 23 N.Y.3d 728, 743, 16 N.E.3d 1188 (2014). In that case, the New York Court of Appeals found that the state's Oil and Gas Solution Mining Law ("OGSML") did not preempt local zoning authority. Again, however, nothing in the OGSML contains language similar to that contained in the Oil & Gas Act granting the New York State Department of Environmental Conservation the "sole and exclusive" authority to determine the location of oil and gas wells.

Morgan, 224 W. Va. at 69–70, 680 S.E.2d at 84–85. Here, the legislature's intent to entirely preempt the local regulation of the oil and gas industry could not be clearer. Contrary to the City's assertions, the Oil & Gas Act unambiguously provides that WVDEP has "***sole and exclusive authority*** to regulate the ***permitting*** [and] ***location***…" of horizontal oil and gas wells within the state. *See* W. Va. Code § 22-6A-6(b) (emphasis added). Thus, the legislature has plainly and expressly stated its intent to preempt the entire field of oil and gas regulation, even in those areas that are traditionally left to local zoning ordinances, such as setbacks and site location. Fundamentally, the Legislature could not have intended municipalities to have *any* authority to regulate the location oil and gas wells, even through a zoning ordinance enacted pursuant to the Land Use Planning Act, where it granted "sole and exclusive authority" to WVDEP to regulate the same subject. *Id.*

In addition to express preemption, W. Va. Code § 22-6A-6(b), when viewed in the context of the entire Oil & Gas Act, also demonstrates that local zoning authority is preempted under an implied field preemption analysis. Implied field preemption occurs where the scheme of state regulation is so pervasive that it is reasonable to infer that the legislature left no room for the states to supplement it. *In re Flood Litig*., 216 W. Va. 534, 547, 607 S.E.2d 863, 876 (2004). Field preemption may only be founded upon clear and manifest intent of the legislature to occupy the field. *Harrison v. Skyline Corp*., 224 W. Va. 505, 512, 686 S.E.2d 735, 742 (2009) (citing *English v. General Electric Co.*, 496 U.S. 72, 79, 110 S.Ct. 2270, 110 L.Ed.2d 65 (1990)). "To prevail on a claim of implied preemption, evidence of [] intent to pre-empt the specific field covered by [local] law must be pinpointed." *In re Flood Litig*., 607 S.E.2d at 876 *citing Hartley Marine Corp. v. Mierke,* 196 W. Va. 669, 673, 474 S.E.2d 599, 603 (1996).

Here, the Legislature's intent to completely preempt and occupy the field of unconventional oil and gas activities can be "pinpointed" to the express statutory grant of "sole and exclusive authority" to WVDEP to regulate all aspects of drilling in the state. *See* W. Va. Code § 22-6A-6(b). Furthermore, even in the absence of this provision, the Oil & Gas Act proceeds to regulate every conceivable aspect of drilling as it relates to human health and safety and the environment. *See* fn. 18, *supra*. Indeed, the courts in *EQT* and *Northeast Natural Energy* found that the ordinances at issue were preempted under principles of implied field and conflict preemption, even prior to the adoption of W. Va. Code § 22-6A-6(b).

As illustrated by the complex and comprehensive permitting scheme it adopted, the legislature has clearly demonstrated its intent to preempt the entire field of oil and gas regulation. Indeed, by the plain terms of the Oil & Gas Act, the WVDEP cannot issue a drilling permit unless is has evaluated each and every one of the considerations listed in Chapter 22, Article 6A. For these reasons, the City's Zoning Regulations are also preempted by the Oil & Gas Act under the principles of implied field preemption.

CONCLUSION

WHEREFORE, for the foregoing reasons, SWN respectfully requests that this honorable Court affirm the ICA Opinion and enjoin enforcement of the City's Zoning Regulations.

Respectfully submitted,

Dated: May, 20 2024

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CITY OF WEIRTON and CITY OF WEIRTON BOARD OF ZONING APPEALS, *Respondents Below, Petitioners.* v. SWN PRODUCTION COMPANY, LLC, *Petitioner Below, Respondent.*	: : : : : : : : : : :	No. 23-753

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of May 2024, I served the foregoing ***Response Brief Respondent*** upon the Petitioners' counsel via the West Virginia E-Filing System (File & Serve Express), to the following:

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