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PREEMPITON - WEST VIRGINIA

SWN Production Company, LLC v. City of Weirton

West Virginia Intermediate Court of Appeals - November 1, 2023 - S.E.2d - 2023 WL 7178284

Natural gas exploration and production company filed petition for writ of certiorari seeking review of city board of zoning appeals' denial of its application for conditional use permit to operate a drilling site within city, and separately filed complaint seeking declaration that West Virginia Oil and Gas Act or Natural Gas Horizontal Well Control Act preempted city zoning ordinances that regulated location of oil and gas drilling sites.

After the two matters were consolidated, the Circuit Court entered order dismissing the preemption claim. Company appealed.

The Intermediate Court of Appeals held that:

- Appeal was not rendered moot by city's repeal of ordinance;
- Ordinances were not expressly preempted;
- Repealed ordinance was subject to implied preemption; and
- Horizontal Well Act preempted city's drilling permit approval scheme under ordinance that regulated location of oil and gas drilling sites.

City's repeal of development ordinance that increased drilling site setback from 200 feet to 2,500 feet from any residential, church, or school use and removed oil and gas extraction as permitted conditional use anywhere in city except industrial-zoned districts did not moot natural gas exploration and production company's appeal of circuit court's dismissal of its claim that the ordinance and the previous development ordinance were preempted by the Oil and Gas Act or the Horizontal Well Act, even though the repealed ordinance appeared to have eliminated the primary setback requirement at issue in the case, where there were still additional steps and regulatory requirements under re-enacted previous development ordinance before company could proceed with drilling.

City zoning ordinances that regulated site location for oil and gas development were not expressly preempted by Oil and Gas Act or Horizontal Well Act, where there was no provision in Land Use Planning Act, which gave municipalities ordinances authority to enact zoning ordinances, that exempted oil and gas development from zoning laws, while it did contain express preemptions for other uses, such as group residential facilities and essential utilities and equipment.

Under repealed city zoning ordinance regulating oil and gas development, there was direct conflict with Horizontal Well Act and thus, ordinance was subject to implied preemption, where ordinance's and state statute's setback requirements could not be reconciled, as ordinance imposed setback requirement on drilling sites that was 2,500 feet, while the state statute only required setback requirement of 625 feet.

City's drilling permit approval scheme under zoning ordinance which regulated location of oil and

gas drilling sites could not be reconciled with language of state's Horizontal Well Act, which vested West Virginia Department of Environmental Protection (WVDEP) with sole and exclusive authority to regulate permitting and location of horizontal gas wells, and thus, conflict preemption applied to city's zoning approval scheme, so that city could not hinder natural gas exploration and production company's ability to begin drilling after WVDEP approved a permit under state's permitting program.

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