IN THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA
DIVISION NO. 1

NORTHEAST NATURAL ENERGY, LLC,
and ENROUT PROPERTIES, LLC,
West Virginia Limited Liability Companies,

Plaintiffs,

v. **CIVIL ACTION NO. 11-C-411**
(Judge Susan B. Tucker)

THE CITY OF MORGANTOWN,
WEST VIRGINIA, a Municipal
Corporation,

Defendant.

ORDER

INTRODUCTION

This lawsuit challenges the adoption by Morgantown City Council of a ban of hydraulic fracturing of Marcellus Shale within the City of Morgantown [hereinafter the City] and including the areas one mile outside of the Morgantown corporate limits.[1] The Plaintiffs, Northeast Natural Energy, LLC, and Enrout Properties, LLC, [hereinafter Northeast, and Enrout, respectively] claim that the City violated their Constitutional rights by adopting a regulation in derogation of West Virginia's State laws which regulate natural gas extraction.

The Plaintiffs contend that the regulations promulgated by the West Virginia Department of Environmental Protection [hereinafter WVDEP] *via* W.VA. CODE § 22-1-1, *et seq.* (1994), preempt the City's Ordinance and thus preclude its enforcement.

[1] Morgantown, W.Va., Ordinance 721.01, *et seq.* (June 21, 2011).

The City contends that it has the authority to enact, and enforce, the Ordinance pursuant to the rights given to the City by the "Home Rule" provisions, W.VA. CODE § 8-12-2 (1969), characterizing the hydraulic fracturing process as a nuisance.

PROCEDURAL HISTORY

This matter came before the Court by way of Northeast filing a Motion for Temporary Restraining Order on June 23, 2011. Enrout filed a Motion to Intervene. The hearing on both Motions was heard before the Honorable Chief Judge Russell M. Clawges, Jr., on June 24, 2011. Enrout was permitted to join as a Plaintiff. Judge Clawges ruled that, ". . . there is no need for a temporary restraining order, because, based on all the pleadings and representations here today, they're not going to reach the fracking stage of this operation until two months from now."[2]

Thereafter the case was assigned pursuant to regular rotation to the undersigned Judge.

On July 20, 2011, this Court held a Status/Scheduling hearing to establish time frames within which this matter would be litigated. The final hearing on the injunction was scheduled for August 17th through the 19th, 2011. Thereafter, by mutual agreement, the parties requested to submit briefs regarding the issue of preemption for the Court's consideration and decision in advance of the final hearing.

FINDINGS OF FACT

Enrout is the owner of property in the Morgantown Industrial Park, located west of the Monongahela River, outside the corporate limits of the City. Northeast entered

[2] TRO Hr'g. Tr. 64:11-14, June 24, 2011.

into lease agreements with Enrout for the right to drill, develop and extract natural gas from the Marcellus Shale[3] located under the surface of the property.[4]

Subsequent to the signing of the lease agreements, Northeast applied to the WVDEP for permits for wells to be used in the drilling process. In March 2011 the WVDEP found Northeast to be in compliance with its requirements and issued permits to create two (2) wells on the Morgantown Industrial park site, neither of which are located within the corporate limits of the City.

Sometime in May 2011, after the permits had been issued by WVDEP, the Morgantown Utility Board, [hereinafter MUB], questioned certain aspects of the permits as to wells' impact on the Monongahela River, specifically as to spill containment, spill prevention, well integrity, waste disposal, and fracking fluid containment. *See* John Aff. ¶10, July 7, 2011. Subsequently, Northeast agreed to comply with MUB's requests for additional applicable safeguards, and Northeast's WVDEP permits were modified to include the requested safeguards. *See Id.* ¶11.

On June 7, 2011, the City began the process of enacting an Ordinance completely prohibiting "[d]rilling a well for the purpose of extracting or storing oil or gas using horizontal drilling with fracturing or fracking methods within the limits of the City of

[3] Marcellus Shale is a sedimentary rock formation deposited in the Appalachian Mountains. This shale contains significant amounts of natural gas. *See* William M. Kappel and Daniel J. Soeder, U.S. Department of the Interior, U.S. Geological Survey, *Water Resources and Natural Gas Production from the Marcellus Shale, Fact Sheet 2009-3032* (May 2009) (available at <http://pubs.usgs.gov/fs/2009/3032/pdf/FS2009-3032.pdf.>).

[4] This Court acknowledges that the issue of fracking or hydraulic fracturing, "which has been practiced by the oil and gas industry for many years. The process of creating these artificial fractures is known as hydraulic fracturing or 'fracking.' Horizontal drilling in conjunction with fracking has opened up the avenues for extracting natural gas from tight shale formations such as Marcellus Shale." Randy M. Awdish, *Wolverine Gold Rush? A Primer On The Utica/Collingwood Share and Gas Lease Issues*, 38 Mich. Real Prop. Rev. 64, 66 (Summer 2011).

Morgantown or within one mile of the corporate limits of the City of Morgantown." *See* Morgantown, W.Va., Ordinance 721.01, *et seq.* (June 21, 2011).

DISCUSSION

Summary Judgment

When ruling on a motion for summary judgment pursuant to Rule 56(c) of the West Virginia Rules of Procedure, the Court must determine whether there is a "genuine issue as to any material fact" and if "the moving party is entitled to a judgment as a matter of law." The standard for granting summary judgment is well established and the law was reiterated in Syllabus Point 1 of *Andrick v. Town of Buckhannon*, 187 W.Va. 706, 421 S.E.2d 247 (1992):

> "A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." Syl. Pt. 3, *Aetna Casualty & Surety Co. v. Federal Insurance Co. of New York*, 148 W.Va. 160, 133 S.E.2d 770 (1963).

In determining whether there is no genuine issue as to any material fact, which must be found before the moving party is entitled to summary judgment as a matter of law, the Court should consider "the pleadings, depositions, and admissions of file, together with the affidavits, if any. . ." W.Va. Civ. P. 56(c). If the motion "is documented with such clarity as to leave no room for controversy, the non-moving party must take the initiative and by affirmative evidence demonstrate that a genuine issue of fact exists." *Williams v. Precision Coil, Inc.*, 194 W.Va. 52 at 58, 459 S.E.2d 329 at 335 (1995).

This Circuit Court must determine only if there is a genuine issue of material fact that should be determined at trial. The circuit court is not to weigh the evidence and determine the truth of the matters asserted. *Anderson v. Liberty Lobby, Inc.*, 447 U.S. 242, 206 S. Ct. 2505, 91 L.Ed.2d 202 (1986); *Painter v. Peavy,* 192 W.Va. 189, 451 S.E.2d 755 (1994); and *Williams*, 194 W.Va. at 52, 459 S.E.2d at 336. Consequently, all permissible inferences that can be drawn from the underlying facts must always be considered in the light most favorable to the party opposing the motion. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S. Ct. 1348, 89 L.Ed.2d 538 (1986); *Williams*, 194 W.Va. at 52, 459 S.E.2d at 336; *Painter*, 192 W.Va. at 192, 451 S.E.2d at 758; *Masinter v. WEBCO Co.*, 164 W.Va. 241, 262 S.E.2d 433 (1980); *Andrick*, 187 W.Va. at 708, 421 S.E.2d at 249.

Perhaps the most succinct summary of the Court's focus when ruling upon a motion for summary judgment is set forth in *Williams*, 194 W.Va. at 61, 459 S.E.2d at 338:

> "The essence of the inquiry the court must make is 'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" *Anderson*, 477 U.S. at 251-252, 106 S. Ct. at 2512, 91 L.Ed.2d at 214.

Preemption

The issue presented to this Court is whether the City of Morgantown had the authority to enact an Ordinance banning fracking within the municipal limits and one mile outside the municipal limits.

As previously stated, the Plaintiffs contend that the regulations promulgated by the WVDEP preempt the City's Ordinance and thus preclude its enforcement.

The Legislative purpose of the WVDEP is clearly set forth in Chapter 22, which declares, "[t]he state has the primary responsibility for protecting the environment; other governmental entities, public and private organizations and our citizens have the primary responsibility of supporting the state in its role as protector of the environment." W.VA. CODE § 22-1-1(a)(2) (1994). Additionally, the purpose of the WVDEP is to "consolidate environmental regulatory programs in a single state agency, while also providing a comprehensive program for the conservation, protection, exploration, development, enjoyment and use of the natural resources of the state of West Virginia." W.VA. CODE § 22-1-1(b)(2)-(3) (1994). The Director of the WVDEP is required to maintain an office of oil and gas which under the supervision of the Director is charged with the duty of administering and enforcing the provisions of W.VA. CODE §§ 22-6 through 22-10, *et seq.* (1994), also referenced as the West Virginia Oil and Gas Act. The regulatory scheme further indicates that it is within the sole discretion of the WVDEP to perform all duties as related to the exploration, development, production, storage and recovery of this State's oil and gas. W.VA. CODE § 22-6-2 (c)(12) (1994). Thus the legislation sets forth a comprehensive regulatory scheme with no exception carved out for a municipal corporation to act in conjunction with the WVDEP pursuant to the Home rule provision. In fact, as set forth in the Legislative statement of policy and purpose governmental entities are required to supplement and complement the efforts of the State by coordinating their programs with those of the State. *See* W.VA. CODE § 22-1-1(b)(4) (1994).

The doctrine of preemption is applicable law when the State has assumed control of a particular subject of regulation, and a local government has enacted an ordinance in

the same field. *See* 62 C.J.S. *Municipal Corporations* § 141 (2011). When a state law fully occupies a particular area of legislation, indicated by the State's comprehensive regulatory scheme, no local ordinances will be permitted to contravene it.[5]

The City contends that pursuant to a 1936 amendment to the West Virginia Constitution, adding § 39(a) to Art. 6, "Home Rule for Municipalities," the City was given the full right of self-government in both local and municipal matters.

To begin the Court's analysis to determine if the State regulatory scheme preempts the City's Ordinance, the Court must start with some basic propositions, the first being that municipal corporations, such as the City, are creatures of the State. *See Alderson v. City of Huntington*, 132 W.Va. 421, 52 S.E.2d 243 (1949). Secondly, a municipal corporation only has the powers "granted to it by the legislature, and any such power it possesses must be expressly granted or necessarily or fairly implied or essential and indispensable." Syllabus Point 2, *State ex rel. Charleston v. Hutchinson*, 154 W.Va. 585, 176 S.E.2d 691 (1970)., Syllabus Point 1, *City of Fairmont v. Investors Syndicate of America, Inc.*, 172 W.Va. 431, 307 S.E.2d 467 (1983). Municipal corporation powers are so narrowly proscribed that the West Virginia Supreme Court has held that "[i]f any reasonable doubt exists as to whether a municipal corporation has a power, the power must be denied." *See Id.*

Our Supreme Court has further stated that "where both the State and a municipality enact legislation on the same subject matter, it is generally held that if there are

[5] *See American Tower Corp. v. Common Council of City of Beckley*, 210 W.Va. 345, 557 S.E.2d 752 (2001); *City of Clinton v. Sheridan*, 530 N.W.2d 690 (Iowa 1995); *City of Indianapolis v. Fields*, 506 N.E.2d 1128 (Ind. Ct. App. 4th Dist. 1987).

inconsistencies, the municipal ordinance must yield." *Davidson v. Shoney's Big Boy Restaurant, et al.*, 181 W.Va. 65 at 68, 380 S.E.2d 232 at 235 (1989).

The City asserts that under the doctrine of the Home rule provision it has the right to regulate nuisances and likens fracking to the nuisance complained of in *Sharon Steel Corp. v. City of Fairmont, et al.*, 175 W.Va. 479, 334 S.E.2d 616 (1985). The City contends that *via* the Home rule provision, it is granted broad authority to protect its citizens, in this case, from the nuisance perceived to be created by the fracking process. This argument is unpersuasive, however. The applicable state statute in the *Sharon Steel* case carved out an explicit exception permitting the city of Fairmont to legislate the permanent disposal of hazardous wastes identified as a nuisance. The City characterizes fracking as a nuisance which can be regulated under the Home rule provision. However, there is no exception carved out by the WVDEP, whose all inclusive purpose is to regulate the mining of gas and oil.

It is clear that the City has an interest in the control of its land within its municipal borders. Yet, in light of the State's interest in oil and gas development and operations throughout the State, and the all inclusive authority given to the WVDEP to regulate these operations, it is necessary for this Court to examine the City's ban against the State's regulatory scheme to determine if the City's Ordinance encroaches upon the State's all encompassing authority regarding the production and development of oil and gas resources.

In W.VA. CODE § 22-6, *et seq.* (1994), the Legislature explicitly set forth a comprehensive framework for the application for oil well permits. The applicant is required to specifically set forth the type of well, the location, the depth, the purpose of the

well, fees associated with the well, etc. *See* W.VA. CODE § 22-6-6(c) (1994). The Director is given the sole discretion to authorize or deny the issuance of said permit on the basis of numerous factors, such as substantial violations of a previously issued permit by the applicant. *See* W.VA. CODE § 22-6-6(h) & § 22-6-11 (1994). The regulations further state the specific requirements for notice to property owners, the procedure for filing comments, the process for setting hearings upon objections to such drilling, as well as the procedures for an appeal process. *See* W.VA. CODE §§ 22-6-9 through 22-6-17 (1994). The provisions 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.

CONCLUSION

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 § 22-6, *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.

This Court is mindful that the environmental issues regarding the fracking process are foremost in the public's concern. However, it is also apparent to this Court that the environmental issues are being addressed by our State government, as indicated by Governor Tomblin's July 5th, 2011 Executive Order to the Director of the WVDEP,

requesting that the WVDEP take the necessary steps to protect our safety and our environment.[6]

The legal issue in this case is very narrow, and does not permit consideration of any environmental concerns. Based upon the law as it is, this Court **GRANTS** the Motions for Summary Judgment filed by the Plaintiffs, concluding that no genuine issue of material fact exists.

It is hereby **ORDERED** by this Court that the Motions for Summary Judgment filed by the Plaintiffs are **GRANTED.** Accordingly, this Court concludes that the Ordinance passed by the City of Morgantown, is preempted by State legislation, and is invalid.[7]

The Circuit Clerk is hereby ordered to send copies of this Order to all counsel of record.

It is so ORDERED this 12th day of August, 2011.

Susan B. Tucker

The Honorable Judge Susan B. Tucker

[6] The Court also notes that on July 1, 2011, the Legislature enacted the Marcellus Gas and Manufacturing Development Act, W.VA. CODE § 5B-2H-1, *et seq.* (2011), furthering this Court's belief that this issue is of extreme importance to the State government.

[7] Based upon the Court's ruling herein, no further hearing is necessary.