

# Land use regulations and validity challenges to zoning ordinances persist

This article is an excerpt of **The 2020 Babst Calland Report**, which represents the collective legal perspective of Babst Calland's energy attorneys addressing the most current business and regulatory issues facing the oil and natural gas industry. A full copy of the Report is available by writing [info@babstcalland.com](mailto:info@babstcalland.com).

Increasing industry headwinds have resulted in a slowdown of new permitting activity and an increase in ordinance restrictions on oil and gas development. Substantive validity challenges to zoning ordinances seeking to limit development to industrial areas have continued despite Pennsylvania Commonwealth Court's clear pronouncements that local considerations control legislative decisions as to the location of development. Pennsylvania courts have also dealt with issues such as the legal standing and the timing of ordinance challenges.

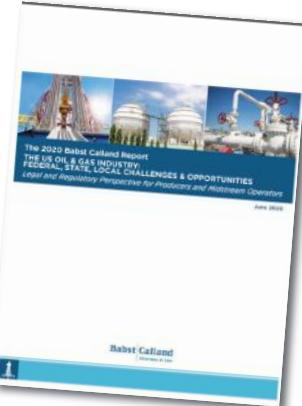
Of course, industry activity has been upended by the COVID-19 pandemic even though oil and gas extraction was permitted to proceed in Pennsylvania as a life-sustaining business. Municipal meetings were cancelled or curtailed throughout March and April. The General Assembly responded to the challenges facing municipalities by enacting Act 15. This legislation loosened the requirements for public meetings and hearings by allowing them to be conducted via telecommunications devices during the pendency of the governor's emergency declaration. Act 15 also tolled the statutory time limits placed upon local governments to hear and act upon land use applications between March 6 through May 20, 2020.

Cooperation between operators and local government will become even more essential in the coming months given that municipal finances, dependent on property and income taxes, are now in a precarious state.

## Frederick's aftermath: Commonwealth Court continues to deny challenges to zoning ordinances permitting oil and gas drilling

As we discussed in detail in last year's Report, in *Frederick v. Allegheny Township Zoning Hearing Board* the Commonwealth Court upheld the validity of a zoning ordinance permitting natural gas development in all zoning districts as a use permitted by right. Significantly, the Pennsylvania Supreme Court declined to accept an appeal of that case, and the *Frederick* ruling continues to provide the legal basis for the denial of similar challenges.

In June 2019, the Commonwealth Court affirmed the Middlesex Township, Butler County, zoning hearing board's denial of an ordinance validity challenge



brought by several residents and non-governmental organizations. The challenged ordinance permitted oil and gas wells as either a use by-right or a conditional use in designated rural, residential and commercial districts, but not in all districts.

In its decision, the board noted the history of oil and gas production in the township, found that the ordinance credibly balanced residential and oil and gas interests, and determined that acceptance of challengers' arguments would render the zoning ordinance exclusionary.

On appeal, the Commonwealth Court, relying on *Frederick*, rejected the objectors' arguments that the zoning ordinance violated substantive due process and the Pennsylvania Constitution's Environmental Right Amendment (ERA). The Pennsylvania Supreme Court declined to hear an appeal of the case.

Since last year's Report, Protect PT has continued its substantive validity challenge to the Penn Township, Westmoreland County, zoning ordinance, appealing the Court of Common Pleas' denial of the challenge to the Commonwealth Court. The challenged ordinance permits oil and gas operations in the township's mineral extraction overlay (MEO) district, which encompasses portions of the rural resource and industrial/commercial zoning districts. In November 2019, the Commonwealth Court affirmed the lower court's denial of the challenge, relying heavily on its decisions in *Frederick* and *Middlesex*. The court rejected Protect PT's contention that oil and gas drilling was incompatible with the purpose of the underlying zoning district and that the township's MEO district was inconsistent with the township's comprehensive plan and the expectations of the district's residents. The court likewise dismissed the objectors' ERA and substantive due process arguments, concluding that they had failed to establish that natural gas development posed any substantial risk to the environment or health of township residents. The Supreme Court also declined to hear the appeal of this case.

## ERA-based challenges to zoning ordinances continue

In 2011, the Municipality of Murrysville, Westmoreland County, amended its zoning ordinance to create an Oil and Gas Overlay district in which industry development was authorized as a conditional use. In 2017, Murrysville again amended the ordinance to increase setback requirements within the district to 750 feet from the edge of the well pad to protected structures. The overlay district comprises 37 percent of the municipality's land mass, and, with application of the setback requirements, less than 5 percent of the municipality is available for oil and gas development.

Despite the restrictive nature of the ordinance, a

# 2020 Babst Calland Report highlights legal and regulatory challenges

## Oversupply and pandemic bring on need to adapt to a changing market

Babst Calland has published its 10th annual energy industry report: *The 2020 Babst Calland Report – The U.S. Oil & Gas Industry: Federal, State, Local Challenges & Opportunities; Legal and Regulatory Perspective for Producers and Midstream Operators.*

The *Babst Calland Report* is an annual review of the issues and trends at the federal, state and local level in the oil and gas industry over the past year. In this *Report* more than 50 energy attorneys provide perspective on the current state of the U.S. natural gas and oil production industry and its growth to historic highs due to more than a decade of advances in on-shore horizontal drilling and high-volume hydraulic fracturing. It asserts that despite current challenges, a maturing shale industry is poised for future growth as natural gas and oil producers have driven down the costs of production. Transportation options for moving these natural resources from growing areas of production to customers continue to be built, even with new hurdles from regulators and other stakeholders.

The 102-page interactive *Report* covers a range of topics from the industry's business outlook, regulatory enforcement and rulemaking to developments in pipeline safety and litigation trends. The firm's collective legal experience and perspectives on these and related business developments are highlighted in this *Report*, including those summarized below:

- Long-term, U.S. energy production appears poised to continue to outstrip domestic consumption due in some measure to increased consumption efficiency, along with the obvious ramifications from the natural gas revolution.
- The regulatory environment is focused on climate change, reducing emissions, water quality developments and enforcement. Increased volumes of written agency guidance, enforcement and penalties continue to challenge the industry.
- Citizens groups continue to actively challenge federal and state initiatives designed to expand natural gas and oil development, creating delays and uncertainties.
- Land use and zoning challenges continue at the local level. Increasing industry headwinds have resulted in a slowdown of new permitting activity amid ongoing challenges and ordinance restrictions.
- Public interest in pipeline safety has grown amid opposition

community organization filed a substantive validity challenge. The Murrysville appeal asserted the same types of legal theories espoused in the cases discussed previously. The municipality's zoning hearing board dismissed the challenge in August 2019, finding an appropriate balance existed between the public health, welfare, safety and the environment with the unconventional oil and gas use, and that the objector failed to prove that the development was incompatible with existing or permitted uses. The Court of Common Pleas of Westmoreland County denied the objector's appeal in May 2020.

### Operator's ordinance validity challenge denied

Historically most challenges to the substantive validi-

ty and new rules from the Pipeline and Hazardous Materials Safety Administration in response to increased public and congressional pressure to initiate and finalize new or revised pipeline safety regulations. Operators seek to install new or replace existing pipelines throughout the U.S. while advocacy groups aggressively oppose many pipeline projects.

- Title legislation and court decisions vary by state and basin. In Pennsylvania, for example, Act 85 took effect in January 2020 and defines the conditions in which oil and gas producers may drill a lateral wellbore that crosses between two or more pooled units.

- Although 2019 saw renewed claims of adverse health effects allegedly related to oil and gas development, support for such claims continues to be limited, as now noted by numerous publications.

- Unmanned aircraft systems (UAS) take hold in the energy sector. Despite the pandemic and its impacts, UAS have emerged as essential tools for the energy industry for conducting complex inspection and monitoring of difficult to access infrastructure and locations.

- From a workforce standpoint, COVID-19 conditions and other wage and hour regulations, amendments to the Family Medical Leave Act, and expanded unemployment benefits under the CARES Act have had an impact on companies across the country.

The natural gas and oil industry continues to expand its reach and impact on U.S. energy supply and independence. Each company has its own set of opportunities and challenges to navigate based on its financing, debt, shareholder goals, and operations and infrastructure footprint. Nonetheless, the United States' plentiful supply of natural gas and oil is expected to continue to fuel the country's economic future and support national security.

**Request a copy of the Report.** Babst Calland's Energy and Natural Resources attorneys support oil and gas companies operating in multiple locations throughout the nation. To request a copy of the *Report*, contact [info@babstcalland.com](mailto:info@babstcalland.com).

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ty of Pennsylvania zoning ordinances have been asserted by property owners claiming that those ordinances illegally restrict the uses they wish to undertake. A recent challenge to the City of Saint Marys, Elk County's zoning ordinance by an oil and gas operator falls in this traditional category.

In 2016, the city adopted an amendment to its zoning ordinance imposing setbacks for well pads and setting noise standards. An oil and gas operator filed a substantive validity challenge to the ordinance, asserting that the ordinance illegally restricted its development activities. That challenge was dismissed by the city zoning hearing board in February 2017. Almost three years later, the Court of Common Pleas of Elk County dismissed the operator's appeal, rejecting a number of

arguments including that the ordinance exceeds the City's authority under the state Municipalities Planning Code (MPC), is preempted by the Oil and Gas Act, results in a de facto taking, violates due process rights, is exclusionary, fails to allow for reasonable development of oil and gas, is unduly restrictive, results in disparate treatment, is otherwise unreasonable and arbitrary, and creates an unlawful floating zone. The operator appealed the decision to Commonwealth Court, where it is pending.

### **Commonwealth Court denies citizen standing due to lack of substantial, direct and immediate interest**

In *Worthington v. Mount Pleasant Township*, the Commonwealth Court addressed the standards for determining whether an individual possesses the requisite legal standing to challenge a land use application. In that case, an individual requested party status at a hearing before the Mount Pleasant Township, Washington County, Board of Supervisors on an operator's well pad conditional use application. The individual asserted that she had standing because her granddaughter attended a school approximately 3,840 feet from the well pad. The board denied the grandmother party status. After the hearing closed, the board granted the conditional use application. The grandmother appealed to the Court of Common Pleas of Washington County, which affirmed the board's decision, including its determination as to her standing.

On further appeal, the Commonwealth Court affirmed. The court applied the long-recognized test enunciated by the Supreme Court in *William Penn Parking Garage, Inc. v. City of Pittsburgh* as to whether a person is "aggrieved"—does the person have a "substantial, direct and immediate interest in the claim sought to be litigated."

The court first addressed whether the grandmother had a substantial interest, defined as "one in which there is some discernable adverse effect to some interest other than an abstract interest that all citizens have." As grandparent standing is not automatic, and without proof of her legal guardianship or other responsibility for the child, the court found that her interest was not substantial. The court also concluded that she did not establish that her interest was direct, as she failed to show a causal connection between her alleged benzene exposure concerns and adjudication of the conditional use application. For similar reasons, the court also found that her interest was not immediate.

### **Robinson Township remains the epicenter of challenges to local regulation of natural gas development**

Robinson Township, a rural community in Washington County, has been at the epicenter of the debate over the scope of local control of oil and natural gas development in Pennsylvania since 2012, when it became the lead

party in the Act 13 litigation bearing its name—*Robinson II*. Although the township and the other petitioners asserted that Act 13 improperly attempted to impose a "one size fits all" approach to zoning, anti-industry advocates have turned the *Robinson II* ruling on its head and challenged local ordinances permitting oil and gas development, asserting that industry activity must be limited to industrial zoning districts. As discussed in this and previous *Reports*, this argument has been repeatedly rejected by local zoning hearing boards, trial courts and the Commonwealth Court.

Ironically, Robinson Township has not been immune from these same challenges. Opponents of the oil and gas industry, with the backing of the Washington, D.C.-based Environmental Integrity Project (EIP), have filed a series of challenges to the township's zoning ordinance. That ordinance authorizes oil and gas development as a permitted use in some zoning districts and as a conditional use in others. It also prohibits oil and gas development in certain other zoning districts. To date, these cases have been litigated solely on procedural issues.

**Lodge.** Shortly after its most recent amendment in 2014, a group of residents filed a procedural validity challenge to the township zoning ordinance in the Court of Common Pleas of Washington County and a substantive validity challenge before the township's zoning hearing board.

In their initial substantive validity challenge filing, the objectors failed to identify any pending oil and gas development application. They later filed a second challenge and identified a well site that had been approved under the ordinance. The zoning hearing board denied the first challenge because it was not ripe (as no application was pending when it was filed) and the second challenge because the MPC prohibits multiple challenges at the same time. The objectors appealed both decisions to the Court of Common Pleas. However, they took no action to pursue these appeals or the procedural validity challenge for three years.

Eventually, in mid-2019, the court addressed all three appeals. It dismissed the procedural validity challenge, ruling that the township was not required to provide personal notice of the proposed ordinance to every property owner. The court also denied the second sub-

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stantive validity challenge based on the MPC prohibition. With respect to the first substantive validity challenge, the court held that the case was still proceeding when the objectors identified a specific well site application, and thus that appeal was "ripe." However, the court concluded that the record was unclear as to whether any of the named objectors were in close enough proximity to the well site in order to possess the necessary standing to challenge the ordinance. Rather than remand the case back to the zoning hearing board, the court conducted a hearing on the issue of standing in January 2020. A decision on the standing issue was pending at the time of publication of this *Report*.

**Brockman.** In 2017, a different set of objectors, represented by the same legal counsel as those in *Lodge*, filed yet another challenge to the Robinson Township zoning ordinance, generally averring that oil and gas operations are incompatible with several township zoning districts where the use is permitted by right or by conditional use. At the time the new objectors filed their challenge, no permits for oil and gas uses were pending or had been recently issued under the challenged ordinance. Consequently, the township zoning hearing board dismissed the challenge for lack of ripeness and lack of standing.

The objectors appealed the board's decision to the Court of Common Pleas. The court affirmed, rejecting the objectors' argument that the township's past approvals of oil and gas development were sufficient to ripen the challenge. The court held that the challenge to the validity of the zoning ordinance was not ripe because of the absence of any pending land use applications. Likewise, the court rejected the objectors' contention that their mere proximity to or residence in zoning districts where oil and gas operations were permitted by right or conditional use, without more, was sufficient to constitute "aggrieved status" to confer standing.

The objectors appealed the lower court's decision to the Commonwealth Court. After the parties filed their briefs, the objectors filed an application to discontinue the appeal, which the Court granted on May 6, 2020.

### Trends in local ordinances

Since last year's *Report*, municipalities in Pennsylvania continue to adopt ordinances impacting oil and gas activities. While most are zoning ordinances, others, including road weight, noise or street opening ordinances, may also impact industry operations to varying degrees. Many of the more aggressive ordinances have originated with or are supported by anti-industry groups.

Increased well bore and well pad setbacks, often of 1,000 feet or more have recently been proposed or implemented in municipalities in Allegheny, Washington, Bradford and Schuylkill counties. In addition, anti-industry and environmental groups have become increasingly involved in the ordinance review process. For example, in Cecil Township, Washington County, the Center for Coalfield Justice and the EIP both advocated for increased restrictions on oil and gas operations, includ-

ing suggested minimum setbacks of 1,700 and 3,281 feet, respectively. In recent years, Food and Water Watch has been involved with ordinances in Oakmont Borough and the Municipality of Monroeville in Allegheny County.

Increased application requirements involving environmental testing have also become more prevalent, particularly in Allegheny County. For example, Aleppo Township has advertised its intent to adopt an oil and gas zoning amendment which would require submission of a traffic impact study, noise management plan, water withdrawal plan, disposal plan, and a community and environmental impact analysis, as well as pre- and post-drilling testing of private freshwater wells within 2,000 feet of the drilling site. The ordinance also would mandate environmental impairment and control of well insurance coverage.

Other notable trends include the establishment of multi-municipal zoning, and the creation of oil and gas overlay districts. In Schuylkill County, the Eastern Schuylkill Regional Planning Commission (including Rush, Walker and Schuylkill townships and Tamaqua Borough) was established to jointly zone the participating municipalities. Oil and gas overlay districts intended to provide for oil and gas development while avoiding densely populated residential areas have been established in Penn Township and Murrysville in Westmoreland County, as well as in Cecil Township, Washington County. As discussed earlier in this *Report*, the Murrysville ordinance is currently the subject of a citizen group's substantive validity challenge.

### West Virginia: Legislature requires consent by targets of municipal annexation

In response to concerns of those affected by municipal expansion through "minor boundary adjustments," the West Virginia Legislature modified the statutory provisions appearing in West Virginia Code §§8-6-4a and 8-6-5 through passage of SB 209. The bill became law on March 5, 2020. Prior to 2020, the consent or objection of persons located in territory proposed for municipal annexation was among several factors considered by county commissions when evaluating applications for minor boundary adjustments, but commissions could approve an adjustment even over the objection of persons in the area to be annexed. The current law now requires applications to include either an affidavit from each person or business in the area proposed for annexation reflecting their consent, or proof that sufficient efforts were made to contact them and no response was received. The revised statute also mandates denial of applications if the county commission determines that annexation could be accomplished in a



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cost-effective and efficient manner through other authorized annexation methods, such as a petition by landowners or an election. If a county commission denies an application, the municipality must wait at least two years before re-applying unless denial of the application is overturned through an appeal by the municipality.

### **Ohio: Federal court finds Lake Erie Bill Of Rights unconstitutional**

As discussed in last year's *Report*, in February 2019, pursuant to a special election ballot initiative, the City of Toledo, Ohio, amended its charter to include the Lake Erie Bill of Rights (LEBOR), establishing certain rights within the city's charter for the Lake Erie Ecosystem "to

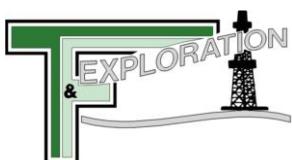
exist, flourish and naturally evolve" as well as mechanisms for enforcing those rights, and stated that "[n]o permit, license, privilege...issued to a corporation, by any state or federal entity, that would violate...this law..." shall be deemed valid...." LEBOR also provided that the city or any resident has the right to enforce its provisions and "[g]overnments and corporations engaged in activities that violate the rights of the Lake Erie Ecosystem... shall be strictly liable for all harms and rights violations resulting from those activities." The constitutionality of LEBOR was challenged one day after its passage in the U.S. District Court for the Northern District of Ohio by a family-owned farm located in the Lake Erie watershed. The plaintiff alleged that LEBOR was invalid as it violated its constitutional rights,

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attempted to preempt federal and state law, unlawfully created private causes of action, and usurped Ohio state court jurisdiction. The State of Ohio intervened and filed a complaint for declaratory judgment and injunctive relief.

On February 27, 2020, the court struck down LEBOR, finding that its environmental and "self-government" rights clauses were unconstitutionally vague and violative of the Fourteenth Amendment right to due process. The court questioned how any prosecutor, judge or jury could determine what conduct infringes on the right of the lake to "exist, flourish, and naturally evolve" or the right of Toledo residents to a "clean and healthy environment," and held that the language was void for vagueness. In addition, the right to "local self-government" was found to be unconstitutionally vague and "an aspirational statement, not a rule of law." Furthermore, the court found that, despite the inclusion of a severability clause, the remainder of the LEBOR could not be saved because once the three vague rights were stripped away, the "remainder is meaningless." Finally, the court noted that several other provisions failed on their own merits, and that "LEBOR's attempt to invalidate Ohio law in the name of environmental protection is a textbook example of what municipal government cannot do." The court concluded by stating that the authors of the LEBOR "ignored basic legal principles and constitutional limitations, and its invalidation should come as no surprise." An appeal to the Sixth Circuit Court of Appeals was filed on March 27, 2020, but sub-

sequently voluntarily dismissed on April 14, 2020.

### **Federal case law: First Circuit holds Massachusetts ordinance to be preempted by the Natural Gas Act**

In *Algonquin Gas Transmission, LLC v. Town of Weymouth*, a natural gas operator challenged local wetlands and zoning ordinances preventing the installation of a compressor station. After obtaining a certificate of public convenience and necessity from the Federal Energy Regulatory Commission, the operator sought and was approved for a Chapter 91 license from the Massachusetts Department of Environmental Protection to construct the compressor station. The municipality appealed the state's decision, asserting that the state approval was prematurely issued because the operator had not received approval under the town's wetlands and zoning ordinances, and further that it would not receive such approval because the proposed compressor station violated the ordinances. The operator filed a declaratory judgment action in the United States District Court for the District of Massachusetts, seeking a declaration that the local ordinances were preempted by the federal Natural Gas Act. The court granted the operator's motion for summary judgment, holding that the local ordinances were federally preempted. On appeal, the United States Court of Appeals for the First Circuit affirmed the district court's grant of summary judgment. ■



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