

Pennsylvania Supreme Court Reverses Approval of Gas Well Pad on Narrow Grounds, But Suggests that Municipalities May Permit Unconventional Natural Gas Drilling in any and all Zoning Districts

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Robinson Township Revisited

The parameters of Pennsylvania local government regulation of the oil and gas industry continue to be refined and left uncertain by the ongoing judicial fallout from the Pennsylvania Supreme Court’s 2013 decision in *Robinson Township v. Commonwealth*.¹ In *Robinson Township*, the Court invalidated two sections of Pennsylvania’s updated Oil and Gas Act (Act 13) limiting the authority of local governments to regulate oil and gas operations. The three-Justice plurality decision was based on a reinvigorated interpretation and application of the Article I, Section 27 of the Pennsylvania Constitution, commonly known as the Environmental Rights Amendment (ERA), which states:

The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania’s public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.

A fourth Justice found those sections of Act 13 to be invalid based on due process grounds. In reaching its conclusion, the plurality questioned the long-standing three-part balancing test applied to determine when Commonwealth actions violate the ERA. That test originally had been adopted by the Pennsylvania Commonwealth Court in its 1973 decision in *Payne v. Kassab*.² Under *Payne*, Commonwealth actions were measured under the following standard:

- (1) Was there compliance with all applicable statutes and regulations relevant to the protection of the Commonwealth’s public natural resources?
- (2) Does the record demonstrate a reasonable effort to reduce the environmental incursion to a minimum?
- (3) Does the environmental harm which will result from the challenged decision or action so clearly outweigh the benefits to be derived therefrom that to proceed further would be an abuse of discretion?

PEDF: The ERA and State Leasing

Because the part of the *Robinson Township* addressing *Payne* was only a plurality decision, it was not binding precedent. However, in 2017 the Pennsylvania Supreme Court rendered a decision in *Pennsylvania Environmental Defense Foundation v. Commonwealth*,³ in which a majority of the

¹ 83 A.3d 901 (Pa. 2013).

² 312 A.2d 86 (Pa. Commw. Ct. 1973).

³ 161 A.3d 911 (Pa. 2017).

Court definitively rejected the *Payne* balancing test. The *PEDF* case did not deal with local, or even state, regulatory authority, but instead involved a challenge to the disposition of revenues obtained by the Commonwealth in conjunction with its lease of oil and gas rights in Pennsylvania state parks and forests. The court found that the ERA grants citizens the right to “clean air and pure water, and to the preservation of natural, scenic, historic and esthetic values of the environment” and the right of “common ownership by the people, including future generations, of Pennsylvania’s public natural resources.” While it remains unclear how the appellate courts will analyze these rights, the Pennsylvania Environmental Hearing Board has analyzed this standard in several Department of Environmental Protection permitting actions, finding that the ERA does not permit unreasonable degradation, diminution, depletion or deterioration of the environment.⁴

Gorsline: Applicability of the ERA to Local Land Use Permitting?

The ramifications of *Robinson Township* again were considered by the Pennsylvania Commonwealth Court in *Gorsline v. Fairfield Township Zoning Hearing Board*.⁵ There, the Commonwealth Court upheld a township’s conditional use approval of an oil and gas well in a Residential Agriculture (R-A) zoning district. The township zoning ordinance did not expressly authorize oil and gas wells; however, the ordinance contained a “savings clause”, which authorized similar and compatible uses in that district as conditional uses. The Commonwealth Court found that the proposed well was similar to and compatible with other uses permitted in that district and rejected *Robinson Township*-ERA based arguments to the contrary. Although there was no automatic appeal by right, the Supreme Court agreed to take the case and address four issues, including whether “the Commonwealth Court’s decision below, that an industrial shale gas development is similar to and compatible with uses expressly permitted in an R-A District, conflicts with this Court’s decision in *Robinson Township*.”⁶

On June 1, 2018, the Supreme Court published its long-awaited *Gorsline* opinion.⁷ In a 4-3 decision, the majority reversed the Commonwealth Court’s ruling affirming the granting of a conditional use approval for the well pad, but it did so in a narrow holding, finding that the operator there did not present enough evidence before the township establishing that the well pad was “similar to” other uses allowed in the township’s R-A District under the ordinance’s savings clause.

In light of its determination that the operator did not meet its burden of proof on the similar use issue, the majority declined to address the closely-watched constitutional question – objectors’ claimed violations of substantive due process rights and the ERA based on their interpretation of *Robinson Township*. However, the majority opinion concluded with language recognizing that zoning decisions are inherently local matters, and that municipalities are empowered to “permit oil and gas development in any or all of its zoning districts.”⁸ In addition, the majority cautioned that its holding “should not be misconstrued as an indication that oil and gas development is never permitted in residential/agricultural

⁴ *Ctr. for Coalfield Justice and Sierra Club v. DEP*, EHB Dkt. No. 2014-072-B (August 15, 2017); *The Delaware Riverkeeper, et. al. v. DEP and R.E. Gas Development, LLC.*, EHB Dkt. No. 2014-142-B(Consolidated with 2015-157-B)(May 11, 2018).

⁵ 123 A.3d 1142 (Pa. Commw. Ct. 2015).

⁶ *Gorsline v. Fairfield Township Zoning Hearing Board*, 139 A.3d 178 (Pa. 2016).

⁷ 186 A.3d 375 (Pa. 2018).

⁸ *Id.* at 389.

districts, or that it is fundamentally incompatible with residential or agricultural uses.”⁹ The three dissenting Justices would have addressed the *Robinson Township* constitutional question, and faulted the objectors for reading *Robinson Township* too broadly when they claimed that natural gas development is inherently incompatible with residential uses, and that its impacts never can be mitigated through imposition of conditions on approval. Thus, language in both the *Gorsline* majority and dissenting opinions appears to reject the post-*Robinson Township* assertion of many shale gas opponents that unconventional natural gas wells must be relegated to industrial zoning districts and are fundamentally incompatible with residential or agricultural zoning districts.

Ordinance Validity Challenges Based on *Robinson Township*

Although the Supreme Court’s 2013 decision in *Robinson Township* was viewed as a victory for those advocating local regulatory control of oil and gas operations, industry opponents quickly sought to use that decision to attack local ordinances permitting industry activity. They argued that these local ordinances violate the ERA because they do not regulate oil and gas development stringently enough, that ordinances cannot permit oil and gas uses in agricultural or residential districts, and that municipalities must engage in extensive environmental assessments when enacting regulations or considering development applications.

The *Gorsline* decision already has directly impacted one lower court case addressing these types of ordinance validity challenges. In June 2017, the Commonwealth Court, in *Delaware Riverkeeper v. Middlesex Township Zoning Hearing Board*,¹⁰ affirmed the validity of a township zoning ordinance authorizing oil and gas wells in a number of zoning districts, either as uses by right or as conditional uses. In late 2017, the Supreme Court ordered that its consideration of the objectors’ petition for allowance of appeal be placed on hold pending its decision in *Gorsline*. Two months after its decision in *Gorsline*, the Supreme Court entered an order vacating the Commonwealth Court decision in *Delaware Riverkeeper* and remanding the case back to the Commonwealth Court for reconsideration in light of the Supreme Court’s decisions in *Gorsline* and *PEDF*. In doing so, the Supreme Court expressly quoted its passage from *Gorsline* that “this decision should not be construed as an indication that oil and gas development is never permitted in residential/agricultural districts, or that it is fundamentally incompatible with residential or agricultural uses.”¹¹

There is one more appeal pending before the Commonwealth Court raising *Robinson Township*-ERA ordinance validity issues. In *Frederick v. Allegheny Twp. Zoning Hearing Board*,¹² the Westmoreland County Common Pleas Court affirmed a zoning hearing board decision rejecting a challenge to a township zoning ordinance authorizing oil and gas wells as a use by right in all zoning districts. The appeal in that case was argued in November 2016 before the same three-Judge Commonwealth Court panel hearing the *Delaware Riverkeeper* argument. After more than a year of inactivity, the Commonwealth Court in early 2018 ordered supplemental briefs addressing the implications of *PEDF*.¹³ Oral argument was heard before the court *en banc* in February 2018, and a decision is pending.

⁹ *Id.*

¹⁰ 2017 WL 2458278 (Pa. Commw. Ct. 2017)(unpublished).

¹¹ *Delaware Riverkeeper v. Middlesex Twp. Zoning Hearing Bd.*, No. 270 WAL 2017 (Pa. Aug. 3, 2018).

¹² No. 1898 of 2015 (Washington Cnty. Ct. of Common Pleas October 21, 2015).

¹³ No. 2295 CD 2015 (Pa. Commw. Ct. Jan. 3, 2018).

Conclusion

The Pennsylvania Supreme Court gradually is fleshing out the parameters of local government regulatory rights and responsibilities under the ERA in the post-*Robinson Township* world. Decisions by the Commonwealth Court, and perhaps the Supreme Court, in *Delaware Riverkeeper* and *Frederick* are likely to be the next judicial building blocks in this developing jurisprudence. It is critical to note that while virtually all the post *Robinson Township* cases have addressed oil and gas operations, the developing case law will be applicable to virtually all Pennsylvania land development activities, including other extractive industry, commercial and residential uses.