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ALERT
ENERGY & NATURAL RESOURCES

Commonwealth Court Upholds Validity of Ordinance Allowing Shale Gas Drilling in All Zoning Districts

Court Refuses to Adopt a "One Size Fits All" Approach that Would Prohibit Municipalities from Permitting Shale Drilling in Rural Residential and Agricultural Zoning Districts

On October 26, 2018, the Pennsylvania Commonwealth Court published an *en banc* opinion in *Frederick v. Allegheny Township Zoning Hearing Board, et al.*, No. 2295 C.D. 2015, 2018 WL 5303462 (Pa. Cmwlth. Oct. 26, 2018) rejecting a challenge to the validity of the Allegheny Township, Westmoreland County (Township) zoning ordinance. The Court addressed the contention of oil and gas industry opponents that an unconventional natural gas well pad can only be permitted in an industrial zoning district. After reviewing the detailed record developed in the substantive validity challenge decided by the Township Zoning Hearing Board (Board) and addressing recent Pennsylvania Supreme Court decisions on shale gas drilling, the Court, in a 5-2 decision, rejected this "one size fits all" proposition. It found that state law empowers municipalities to determine where well sites are appropriate and compatible with other land uses within their boundaries.

Background

In 2010, the Township Board of Supervisors enacted a zoning ordinance amendment that allowed oil and gas well operations in all zoning districts as a use permitted "as of right," provided the applicant satisfied numerous specified standards to protect the public health, safety, and welfare (2010 Ordinance). A use permitted "as of right" requires administrative approval; it does not require public notice or a hearing.

In 2014, CNX Gas Company, LLC (CNX) applied to the Township for a zoning permit to develop an unconventional well pad (Porter Pad) in the R-2 Agricultural / Residential Zoning District and submitted all the information required by the 2010 Ordinance. Once CNX received the zoning permit, three nearby individuals, Dolores Frederick, Patricia Hagaman, and Beverly Taylor (Objectors) appealed to the Board. They challenged the granting of the permit and raised a substantive validity challenge to the 2010 Ordinance. The Objectors claimed that based on the Pennsylvania Supreme Court's decision in *Robinson Township v. Commonwealth*, 83 A.3d 901 (Pa. 2013) (*Robinson Township II*), the 2010 Ordinance violated substantive due process and Article 1, Section 27 of the Pennsylvania Constitution, commonly known as the Environmental Rights Amendment (ERA), because it allowed an allegedly industrial use in a residential/agricultural zoning district.

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During three nights of hearings before the Board, the Objectors presented Dr. John Stoltz and Steven Victor as expert witnesses. The Board found that neither expert was credible. CNX and land owners presented testimony and called Professor Ross Pifer as an expert on the interplay between the oil and gas industry and agricultural and rural communities in the Commonwealth of Pennsylvania. The Board found Professor Pifer credible.

The Board's written decision contained numerous findings of fact related to the qualities and characteristics of the Township, its long history of oil and natural gas development, and the specific operations that would take place as the Porter Pad is developed. The Board rejected the Objectors' claims that the Porter Pad would have an adverse effect on public health, safety, welfare or the environment. The Board likewise rejected the Objectors' reading of *Robinson Township II*, ultimately concluding that the 2010 Ordinance is valid. On appeal to the Westmoreland County Court of Common Pleas, President Judge Richard McCormick affirmed the Board's decision.

The Commonwealth Court *En Banc* Opinion

President Judge Mary Hannah Leavitt authored the majority opinion, joined by Judge Renee Cohn Jubelirer, Judge P. Kevin Brobson, Judge Anne E. Covey, and Judge Michael H. Wojcik. Judge Patricia A. McCullough and Judge Ellen Ceisler authored separate dissents.

The Court majority first addressed the Objectors' substantive due process claim. Judge Leavitt acknowledged that the Objectors did not challenge the Board's detailed findings of fact as being unsupported by substantial evidence, and that the Board's credibility determinations were binding on the Court. The Court pointed out that although the Objectors advanced various concerns about natural gas development in their brief, they had not presented credible evidence to substantiate these claims before the Board. Instead, the Objectors merely expressed generalized and speculative concerns about the construction and operation of the Porter Pad. Reviewing its recent decisions in *Gorsline v. Board of Supervisors of Fairfield Township*, 123 A.3d 1142 (Pa. Cmwlth. 2015), *reversed on other grounds*, 186 A.3d 375 (Pa. 2018) and *EQT Production Company v. Borough of Jefferson Hills*, 162 A.3d 554 (Pa. Cmwlth. 2017), *petition for allowance of appeal granted in part*, 179 A.3d 454 (Pa. 2018), the Court reiterated that objections to construction activities and mere speculation of possible harm are insufficient to sustain an objector's burden.

In addressing the Objectors' repeated use of the term "industrial" to describe natural gas wells, the Court observed that the Objectors did not present any evidence to the Board "on what they meant by 'industrial' or the significance of that term." The Court cited to its recent decision in another ordinance validity challenge for the proposition that oil and gas drilling, like farming, is not a heavy industrial use but instead is a use traditionally exercised in agricultural areas, containing temporary components of an industrial use.[1] As a result, the Court agreed with the Board that the 2010 Ordinance does not violate substantive due process.

Next, the Court addressed the Objectors' contention that the 2010 Ordinance violates the ERA, specifically its first sentence, which states that "[t]he people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment." In this regard, the Objectors reiterated the same argument they made under the due process clause – that oil and gas is an incompatible "industrial use" that degrades the local environment. The Objectors also asserted that the Supreme Court's interpretation of the ERA in *Robinson Township II* required the Township to engage in an undefined pre-action environmental impact analysis before enacting the 2010 Ordinance.

In analyzing these ERA claims, the Commonwealth Court acknowledged the Pennsylvania Supreme Court's 2017 ruling in *Pennsylvania Environmental Defense Foundation v. Commonwealth*, 161 A.3d 911 (Pa. 2017) (*PEDF*). In *PEDF*, the Supreme Court rejected the three-part test for measuring compliance with the ERA enunciated by the Commonwealth Court in *Payne v. Kassab*, 312 A.2d 86 (Pa. Cmwlth. 1973)[2] and instead ruled that challenges raised under the ERA should be decided in accordance

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[1] *Delaware Riverkeeper Network v. Middlesex Township Zoning Hearing Board*, Nos. 1229, 1323, and 2609 C.D. 2015, 2017 WL 2458278 (Pa. Cmwlth. June 7, 2017) (unreported), *vacated and remanded*, 190 A. 3d 1126 (Pa. 2018) (*per curiam*). *Delaware Riverkeeper* is discussed in more detail in the last section of this *Energy and Natural Resources Alert*.

[2] Under the *Payne v. Kassab* test, the court reviewing governmental action considers: "(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?"

with its text.[3] Acknowledging that the "precise duties imposed upon local governments by the first sentence of the [ERA] are by no means clear," the Commonwealth Court ascertained the relevant standard, based on *Robinson Township II* and *PEDF*, to be whether the governmental action "unreasonably impairs" the environmental values implicated by the ERA. However, the Commonwealth Court found that *Robinson Township II* "did not give municipalities the power to act beyond the bounds of their enabling legislation" and that "[m]unicipalities lack the power to replicate the environmental oversight that the General Assembly has conferred upon [the Department of Environmental Protection] and other state agencies."

The Court also observed that Section 3302 of the Oil and Gas Act preempts municipalities from regulating "how" drilling takes place, and that a municipality may only use its zoning powers to regulate "where" mineral extraction occurs. The Commonwealth Court concluded the Objectors failed to prove that the Township's legislative decision expressed in the 2010 Ordinance allowing gas wells in all zoning districts "unreasonably impairs" their rights under the ERA, particularly when the record (and the Board's findings) showed how long gas development has safely coexisted within rural communities, how the land can be returned to its original state once the wells are completed, and how energy extraction can support the agricultural use of land.

The Court next addressed the Objectors' claim that the 2010 Ordinance violated several provisions of the state's zoning enabling legislation, i.e. the Pennsylvania Municipalities Planning Code (MPC). Once again, the Court pointed out the conclusory nature of the Objectors' argument that oil and gas drilling is incompatible with rural uses. The MPC sets forth the detailed public process that a municipality must follow when it amends its zoning ordinance. However, the Objectors claimed that *Robinson Township II* added a level of analysis requiring the Township to undertake pre-enactment environmental, health, and safety studies in order to satisfy the Township's obligations under the ERA. The Commonwealth Court rejected this claim and agreed with the Board that such an argument is a novel construction without any foundation under Pennsylvania law.

In its conclusion, the majority opinion recognized that municipalities, if they do elect to utilize their discretion to enact land use regulation in the first place, must balance the interests of landowners in the use and enjoyment of their property with the public health, safety, and welfare. The Objectors' contention that the 2010 Ordinance will result in oil and gas development anywhere and everywhere in the Township is tempered by the significant setback requirements in Act 13 that remain in effect. In fact, the Board found that these requirements eliminated shale gas development from more than 50 percent of the land in the Township. The Court returned to the "where" versus "how" distinction declared by the Supreme Court and noted that a zoning ordinance expressing legislative decisions regarding where a land use can occur must be affirmed unless clearly arbitrary and unreasonable.

The penultimate paragraph in the majority's opinion is worth noting here: "Objectors' objectives in this litigation are confounding. Were they to succeed in invalidating [the 2010 Ordinance], then they release oil and gas operators from the ordinance conditions that relate to noise, lighting, hours, security and dust. Absent [the 2010 Ordinance], CNX's permit could be invalidated. However, CNX would no longer need a 'zoning compliance permit' to operate the Porter Pad."

Dissenting Opinions

Judge McCullough dissented and would remand the case back to the Board to receive additional evidence as to how the 2010 Ordinance is compatible with the ERA. Reading *Robinson Township II* in concert with *PEDF*, Judge McCullough believed that if it was unconstitutional for the General Assembly to permit natural gas development in all zoning districts, so too must it be unconstitutional for the Township to do so through its zoning ordinance. Significantly, she would switch the burden of proof in a substantive validity challenge and require the Township to make an evidentiary showing to prove that the 2010 Ordinance did not violate the ERA. She also opined that the ordinance "should be subjected to strict scrutiny and analysis in the same manner that courts provide to other fundamental rights."

Judge Ceisler filed a separate dissent noting that although she agreed with much of the majority's reasoning, she did not agree with the conclusion that the 2010 Ordinance does not violate the ERA. She would find that the 2010 Ordinance facially violates the ERA and does not comport with the Township's duties as the environmental trustee of all the public natural

[3] The Commonwealth Court originally heard oral argument in *Frederick* before a three-Judge panel on November 14, 2016. On January 3, 2018, the Court entered an order directing the parties to file supplemental briefs addressing the impact of *PEDF*. The Court heard oral argument *en banc* on February 7, 2018.

resources within its domain.

What's Next?

The Objectors do not have an automatic right to appeal this decision to the Pennsylvania Supreme Court. However, within 30 days of the Commonwealth Court decision, they can petition the Supreme Court to consider the case. If the Supreme Court declines to take the case, the Commonwealth Court decision will remain as controlling law. If the Supreme Court accepts the appeal, the parties will brief and argue the case before the Court.

On the same day it heard oral argument in *Frederick* (November 14, 2016), the same panel of the Commonwealth Court (Judges Leadbetter, McCullough, and Wojcik) heard argument in *Delaware Riverkeeper Network v. Middlesex Township Zoning Hearing Board* – another substantive validity challenge to a municipality's decision to allow shale drilling in areas beyond industrial zoning districts. On June 7, 2017, the Commonwealth Court decided *Delaware Riverkeeper* in an unreported opinion, affirming the validity of the challenged ordinance. *Delaware Riverkeeper Network v. Middlesex Twp. Zoning Hearing Bd.*, No. 1229 C.D. 2015, 2017 WL 2458278 (Pa. Cmwlth. June 7, 2017). As part of its analysis there, the Commonwealth Court applied the three-part *Payne v. Kassab* test for measuring compliance with the ERA. However, as discussed above, on June 20, 2017 the Supreme Court decided *PEDF*, which rejected *Payne v. Kassab* as the applicable test.

In addition, on June 1, 2018, the Supreme Court issued its opinion in *Gorsline*, referenced above and discussed in greater detail in our *Energy & Natural Resources Alert*, available here. Although the Supreme Court, in a 4-3 decision, reversed Fairfield Township's approval of a conditional use for an unconventional gas well pad, it did so on narrow grounds related to the "savings clause" language of the zoning ordinance there, specifically whether the well pad was "similar" to other uses in the applicable zoning district. However, the *Gorsline* majority concluded with language rejecting the objectors' contention that oil and gas development was "incompatible" with uses in rural and agricultural districts, thus recognizing that zoning decisions are inherently local matters and local municipalities are empowered to "permit oil and gas development in any or all of its zoning districts." In addition, the *Gorsline* majority cautioned that its narrow holding "should not be misconstrued 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." *Gorsline*, 186 A.3d at 389.

On August 3, 2018, Supreme Court vacated and remanded *Delaware Riverkeeper*, directing the Commonwealth Court to reconsider its decision in light of *PEDF* and the above-quoted language in *Gorsline*. A decision from the Commonwealth Court is pending.

Babst Calland represented CNX in this matter. For more information regarding issues relating to land use and municipal implications of the Commonwealth Court's decision, please contact Blaine A. Lucas at 412-394-5657 or blucas@babstcalland.com or Robert Max Junker at 412-773-8722 or rjunker@babstcalland.com.