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ENERGY & NATURAL RESOURCES

Pennsylvania Supreme Court Reverses Approval of Oil and Gas Well on Narrow Grounds

In *Gorsline*, Court Declines to Rule on Broader Issue of Compatibility With Uses in Residential and Agricultural Zoning Districts, but Suggests that Municipalities May Permit Unconventional Natural Gas Drilling in any and all Zoning Districts

The Pennsylvania Supreme Court published its long-awaited opinion in *Gorsline v. Board of Supervisors of Fairfield Township* on June 1, 2018. Although the majority reversed the Commonwealth Court's decision affirming the granting of a conditional use for an unconventional natural gas well pad, it did so in a narrow holding, finding that Inflection Energy, LLC (Inflection) did not present enough evidence before the Fairfield Township (Township) Board of Supervisors (Board) establishing that its proposed unconventional gas well pad was similar to other uses allowed in the Township's Residential-Agricultural Zoning District (R-A District). Unlike most zoning ordinances, the Township's zoning ordinance did not specifically authorize oil and gas wells. Instead, Inflection had relied upon a "savings clause," which allowed uses "similar to" the other uses specifically allowed in the R-A District.

Despite headlines and press releases touting the *Gorsline* decision as a wholesale rejection of oil and gas development in residential and agricultural zoning districts, its ruling was much more limited. In fact, language in both the *Gorsline* majority and dissenting opinions largely rejects the post-*Robinson Township* assertion of many shale gas opponents that natural gas wells must be relegated to industrial zoning districts and are fundamentally incompatible with residential or agricultural zoning districts.

Background

Babst Calland's overview of the Commonwealth Court's September 14, 2015 decision can be found here. For the Supreme Court, Justice Christine Donohue authored the majority opinion joined by Chief Justice Thomas J. Saylor, Justice David N. Wecht, and Justice Debra McCloskey Todd. Justice Kevin M. Dougherty authored a dissenting opinion joined by Justice Max Baer and Justice Sallie Updyke Mundy.

The majority opinion

Despite all the attention the *Gorsline* case garnered leading up to the Supreme Court's decision, the actual holding is that the Board erred in granting a conditional use

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permit under the Township zoning ordinance's savings clause because of differences between the proposed well pad and those uses expressly allowed in the Township's R-A District and Inflection's failure to address these perceived differences through the development of a factual record.

Following the Board's approval of Inflection's application, the Lycoming County Court of Common Pleas reversed, finding the Board's decision that the proposed well pad was similar to and compatible with other permitted uses in the R-A District was not supported by substantial evidence. The Commonwealth Court reversed the Common Pleas Court and agreed with the Board's decision, finding that Inflection's proposed well pad was similar to and compatible with a "public service facility" use and an "essential service" use, based on its decision in *MarkWest Liberty Midstream & Resources, LLC v. Cecil Township Zoning Hearing Board*. The Commonwealth Court also noted that the Township already permitted four gas well pads within the R-A District, which demonstrated that the use was compatible with other uses in the zoning district.

In reversing the Commonwealth Court, the majority found that the Board's decision did not contain findings of fact with respect to similarity of use. The majority also disagreed with the Commonwealth Court's determination that the Board had made witness credibility determinations, and instead found that there was no substantial evidence presented by Inflection to support the Board's conclusion that Inflection satisfied its burden of proof.

The majority took no issue with the decision in *MarkWest*, a case where the Commonwealth Court determined that a compressor station was of the same general character as an "essential service" permitted by Cecil Township's unified development ordinance. However, the majority found that the Commonwealth Court's reliance on *MarkWest* was error. Instead, the majority reviewed the record developed before the Board and the text of the Township's zoning ordinance, and faulted the Board for approving the application on a "clearly inadequate evidentiary record" with "no meaningful interpretive analysis of the language of its existing zoning laws."

In analyzing the non-residential uses permitted in the R-A District, the majority looked at features that complemented and served the other residents within the district and the public nature of such features and activities. In the majority's view, the well pad was intended solely for Inflection's own commercial benefit and did not provide services to the residential and agricultural development in the Township. Notably absent from the majority's analysis is any discussion of the bonus payments and royalty streams that accrue to residents within the unit or the impact fees received by the Township.

The majority also disagreed with the Commonwealth Court's reliance on the fact that the Board had already approved four other well pads in the R-A District. The majority again faulted the lack of information about these other well pads in the record and explained that the only inquiry under a savings clause should be about the uses permitted by the zoning ordinance. To decide otherwise would elevate a single approval into a zone-wide amendment of the "savings clause" language.

Due to the determination that Inflection did not meet its burden of proof and that the Board should not have approved Inflection's application, the majority declined to address the closely-watched constitutional question in its allowance of appeal—objectors' claimed violations of substantive due process rights and the Environmental Rights Amendment based on their interpretation of *Robinson Township*. However, the majority opinion concluded with strong language rejecting the objectors' position and 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 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."

The dissenting opinion

Justice Dougherty's dissent opened by questioning why the majority avoided the important question on the applicability and scope of *Robinson Township* to the facts of the case and instead engaged in mere error review when

the constitutional question was the sole issue of first impression accepted by the Court. In the dissent's view, this constitutional question is answered by finding no conflict between the Commonwealth Court's decision and *Robinson Township*.

The dissent took issue with the majority's statement that oil and gas development is a "purely industrial use." Justice Dougherty acknowledged that the actual use of a producing well pad is a passive use, and that any industrial-like activities during construction and drilling are only temporary and do not make a well pad an industrial use of property. The dissent viewed the majority's reading of the "savings clause" as unduly restrictive, and stated that the majority misapprehended the object of the "similar to" requirement. The dissent would have affirmed the Commonwealth Court's determination that the Board correctly granted Inflection's application.

On the *Robinson Township* question of whether natural gas development is inherently incompatible with residential and agricultural uses, the dissent cited the Agricultural Area Security Law and the Farmland and Forest Land Assessment Act ("Clean and Green") as an acknowledgement by the General Assembly that oil and gas development is not per se incompatible with agricultural uses. The dissent also cited the Court's decision in *Huntley & Huntley, Inc. v. Borough Council of the Borough of Oakmont* as evidence that the Court has not ruled that natural gas development is always inherently incompatible with residential uses. The dissent faulted the objectors for reading *Robinson Township* too broadly when they claim that natural gas development is inherently incompatible with residential uses, and its impacts can never be mitigated through imposition of conditions.

Impact on current and future cases

The Supreme Court did not give anti-shale activists the bright-line rule they were hoping for in *Gorsline*, and, to the contrary, criticized the absolutist position advocated by those who read *Robinson Township* as mandating that oil and gas development be restricted to industrial zoning districts. The next step for the Supreme Court will be to address the Commonwealth Court's decision in *Delaware Riverkeeper Network v. Middlesex Township Zoning Hearing Board*, a substantive validity challenge to a township's zoning ordinance. The Commonwealth Court affirmed the rulings by the local zoning hearing board and Butler County Common Pleas Court, which found that oil and gas development was compatible with residential and agricultural zoning districts. In November 2017, the Supreme Court ordered that the petition for allowance of appeal filed in that case be placed on hold pending disposition of *Gorsline*. The Commonwealth Court also will have the opportunity to address *Gorsline* in the pending appeal of *Frederick v. Allegheny Township*, a substantive validity challenge to a local zoning ordinance heard by the court *en banc* on February 7, 2018.

Babst Calland will continue tracking developments related to *Gorsline* and local zoning ordinances. For more information regarding issues relating to land use and municipal implications of the Supreme 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.