



The PIOGA press

The monthly newsletter of the Pennsylvania Independent Oil & Gas Association

May 2016

Robinson Township arguments continue to reverberate

Three years after the Pennsylvania Supreme Court rendered its controversial decision in *Robinson Township v. Commonwealth*, the plurality opinion is still front-and-center in battles over local regulation of oil and gas activities. The 2013 *Robinson Township* case, in which a three-justice plurality of the Supreme Court relied on a new and much more extensive interpretation of the Pennsylvania Environmental Rights Amendment (ERA) to invalidate certain provisions of Act 13, made its way back to the Supreme Court for consideration of new issues in 2016. In the intervening time, the Commonwealth Court, county courts of common pleas and local zoning hearing boards grappled with the meaning of the 2013 decision and its impact on local zoning authority. These cases continue to work their way through the appeals process.

Robinson Township Returns to the Pennsylvania Supreme Court

In March 2016 the Supreme Court heard argument in the *Robinson Township* challenge to Act 13, the General Assembly's 2012 comprehensive update to the former Oil and Gas Act. When it first decided the case in 2013, a three-justice plurality of the Supreme Court relied on a novel and broad interpretation of the ERA (i.e. that the ERA imposes on the Commonwealth and its municipalities a fiduciary duty to "conserve and maintain" natural resources) to invalidate several sections of Act 13, including two key sections of Chapter 33 which placed limits on local government authority to regulate the oil and gas industry.

The Court remanded several undecided issues to the Commonwealth Court, including whether the remaining local government provisions of Act 13 could stand alone as "severable" from the invalidated ones, or whether they must fail alongside them. The remanded sections address the conferral upon the Pennsylvania Public Utility Commission (PAPUC) and Commonwealth Court of original jurisdiction to review local ordinances regulating the industry (as opposed to having such challenges filed with local zoning hearing boards or governing bodies), the imposition of attorney's fees to prevailing parties in ordinance challenges in certain instances, and a municipality's loss of its Act 13 impact fees if its ordinance was invalidated. The Supreme Court also remanded the issues of: (1) whether notice by the Pennsylvania Department of Environmental Protection (DEP) to only owners of public drinking water

systems, but not of private water supplies, following a drilling-related spill was unconstitutional; (2) whether prohibiting disclosure of the identity and amount of hydraulic fracturing additives claimed to be proprietary information was unconstitutional; and (3) whether Act 13 unconstitutionally conferred the power of eminent domain for gas storage or reservoir protective areas on a private party for a private purpose.

The Commonwealth Court rendered its decision in July 2014, invalidating the balance of the Chapter 33 local government provisions, with limited exceptions.¹ The definitions in Section 3301 and general preemption language in Section 3302, which essentially preserved the preemption language of Section 602 of the former Oil and Gas Act, appear to remain in effect. The Court upheld the remaining non-

local government provisions of Act 13. The PAPUC and the participating municipalities appealed the decision to the Supreme Court, where the case is currently pending.

Supreme Court Considers Arguments Based on 2013 Robinson Township Plurality Opinion in Pennsylvania Environmental Defense Foundation v. Commonwealth

Pennsylvania Environmental Defense Foundation v. Commonwealth (PEDF) presents the Supreme Court with its first opportunity to interpret and apply the 2013 *Robinson Township* decision. PEDF had challenged Fiscal Code amendments that permitted the transfer of monies from the Oil and Gas Lease Fund, which is traditionally used to maintain and conserve public natural resources, to fund the Pennsylvania Department of Conservation and Natural Resources' operations, the Treasury, and the General Appropriations Act of 2014. After the *Robinson Township* decision, PEDF added an argument that these amendments violated the ERA because they fail to fulfill the duty to conserve and maintain the public natural resources for the benefit of the people.

Authors:



Krista-Ann Staley, Esq.



Blaine A. Lucas, Esq.

Babst Calland
Attorneys at Law

¹ *Robinson Township v. Commonwealth*, 96 A.3d 1104 (Pa. Commw. Ct. 2014).

The Commonwealth Court rejected PEDF's constitutional challenges and clarified the legal weight to be given to the *Robinson Township* plurality decision.² In a critical footnote, the Commonwealth Court stated that the *Robinson Township* decision is not binding precedent, but merely persuasive authority. The Court also acknowledged the remaining legitimacy of the pre-existing test for constitutionality under the ERA established by the Commonwealth Court in *Payne v. Kassab*.³ *Payne* emphasized the need for the Commonwealth to balance its duties under the ERA against other duties owed by the Commonwealth to its citizens and acknowledged that the protections of the ERA are not absolute. PEDF appealed the decision to the Pennsylvania Supreme Court.

Commonwealth Court Rejects *Robinson Township*-based Argument that Oil and Gas Uses are Incompatible with Agriculture, Upholds Approval of Compressor Station in Agricultural District

In January 2016, the Pennsylvania Commonwealth Court in *Kretschmann Farm, LLC v. Township of New Sewickley* upheld the conditional use approval of a Cardinal PA Midstream, LLC natural gas compressor station located in New Sewickley Township's A-1 Agricultural District.⁴ Owners of an adjacent organic farm objected to the application and appealed its approval to both the trial court and Commonwealth Court.

During the initial public hearing before the Township Board of Supervisors, Cardinal presented evidence of compliance with all ordinance requirements. The owners of the organic farm then expressed concern over potential impacts of the compressor station on their produce, water and air, and the compatibility of natural gas drilling operations with agricultural uses. Township residents also questioned the potential placement of pipelines in the Township, light pollution from flares, the compatibility of compressor stations with uses in residential/agricultural areas, and the potential long-term effects of emissions generated by oil and gas operations.

The Board found that Cardinal complied with all of the zoning ordinance's express standards and criteria. It approved the application subject to 33 conditions, several of which were in response to the farmers' and others' concerns. The adjacent farmers appealed the decision to the trial court, which affirmed the approval, as did the Commonwealth Court.

The adjacent farmers' arguments included one based on the *Robinson Township* plurality opinion, namely that the zoning ordinance violated their constitutional rights by permitting a compressor station in the A-1 District. Specifically, the farmers argued that: (1) the zoning ordinance was not tailored to the local conditions within the community; and (2) the ordinance's 750 foot setback provision was invalid because it is the same as the uniform setback invalidated in Act 13 by *Robinson Township*.

The Commonwealth Court rejected these arguments. The Court noted that the status of the cited *Robinson Township*

opinion as a plurality rendered the opinion binding only on the parties to that case. The Court also explained that the *Robinson Township* decision did not nullify the zoning ordinance's 750 foot setback because the decision invalidated a state law; it did not discuss whether a municipality could choose to adopt a 750 foot setback, as New Sewickley Township did. The Court also found that the adjacent farmers did not follow the procedure necessary to challenge the validity of a zoning ordinance (which the adjacent farmers previously initiated, but later withdrew in a separate action before the Township Zoning Hearing Board). Rather, they incorrectly tried to raise validity arguments in the context of a conditional use appeal. Accordingly, the Commonwealth Court rejected the adjacent farmers' constitutional argument.

The Commonwealth Court found that applicant proved compliance with the zoning ordinance and, therefore, "it established that its proposed use was presumptively consistent with the public welfare."⁵ Although there is no automatic right to appeal, the adjacent farmers have filed a petition for allowance of appeal with the Pennsylvania Supreme Court.

The Commonwealth Court's ruling in *Kretschmann Farm* is consistent with its previous decision in *Gorsline v. Board of Supervisors*,⁶ upholding a local decision to permit oil and gas wells in a Residential Agriculture zoning district. The *Gorsline* case is summarized in the October 2015 issue of the *PIOGA Press*.

Zoning Ordinances Continue to Survive Validity Challenges

Municipal zoning hearing boards in three of the five Pennsylvania municipalities facing *Robinson Township*-based zoning ordinance substantive validity challenges have upheld those ordinances. All of the cases generally rely on the theory that the regulations in the challenged zoning ordinances are insufficient to protect the environment to the extent required by *Robinson Township* and the ERA. Objectors commonly argue that zoning ordinances cannot permit oil and gas uses in agricultural or residential districts and that the municipalities must engage in extensive environmental assessments when enacting regulations.

- In Middlesex Township, Butler County four residents, the Clean Air Council of Philadelphia, and the Delaware Riverkeeper Network challenged the local zoning ordinance and issuance of a well permit. The Middlesex Township Zoning Hearing Board rejected the challenge, and the Butler County Court of Common Pleas upheld that decision on appeal.⁷ This case is currently on appeal before the Commonwealth Court.
- Three residents challenged Allegheny Township, Westmoreland County's zoning ordinance and the issuance of a gas well pad approval. The Allegheny Township Zoning Hearing Board rejected the challenge and the Westmoreland County Court of Common Pleas upheld that

⁵ 2016 Pa. Commw. LEXIS 33 at *28.

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

⁷ *Delaware Riverkeeper Network v. Middlesex Township Zoning Hearing Board*, A.D. No. 15-10429 (Butler County Ct. Comm. Pls., November 19, 2015).

² 108 A.3d 140 (Pa. Commw. Ct. 2015).

³ 312 A.2d 86, 94 (Pa. Commw. Ct. 1973) (en banc), aff'd, 361 A.2d 263 (Pa. 1976).

⁴ 131 A.3d 1044 (Pa. Commw. Ct. 2016).

decision on appeal.⁸ An appeal in this case is pending in the Commonwealth Court.

- Pulaski Township, Lawrence County faced a zoning ordinance validity challenge from four residents, which the Pulaski Township Zoning Hearing Board rejected. An appeal from that decision is currently pending before the Lawrence County Court of Common Pleas.⁹

The remaining two *Robinson Township*-based zoning ordinance validity challenges filed in Pennsylvania have not been decided on the merits at the local level. As referenced with respect to the *Kretschmann Farms* summary above, objectors in New Sewickley Township, Beaver County withdrew their case after presenting their witnesses, and before ordinance proponents presented their cases. A validity challenge filed in Robinson Township, Washington County is pending in the Court of Common Pleas, on appeal from the Robinson Township Zoning Hearing Board's dismissal of the case on standing and ripeness grounds.

If you would like additional information about developments in this article, please contact Krista Staley at (412) 394-5406 or kstaley@babstcalland.com, or Blaine Lucas at (412) 394-5657 or blucas@babstcalland.com.

⁸ *Frederick v. Allegheny Township Zoning Hearing Board*, Civil Division No. 1898 of 2015 (C.P. Westmoreland Cnty., October 21, 2015).

⁹ *Chito v. Pulaski Township Zoning Hearing Board*, Civil Division No 10467 of 2015 (Lawrence County Ct. Comm. Pls.).