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Robinson Township Revisited: The Pennsylvania Supreme Court Addresses Remaining Challenges to Act 13

The Pennsylvania Supreme Court declared the last remaining challenged sections of Act 13 of 2012 to be invalid in an opinion issued September 28, 2016 in the *Robinson Township v. Commonwealth* line of cases ("*Robinson IV*"). The Supreme Court agreed with the Commonwealth Court that the portions of Act 13 giving the Public Utility Commission ("PUC") and the Commonwealth Court jurisdiction to (1) review local zoning ordinances, (2) withhold impact fee payments and (3) award attorneys' fees against municipalities were not "severable" from the sections of Act 13 imposing statewide zoning standards for oil and natural gas development previously invalidated by the Supreme Court in December 2013 ("*Robinson II*").

Regarding Chapter 32 of Act 13, the Supreme Court reversed the Commonwealth Court and held that Act 13's provisions for the disclosure of hydraulic fracturing additives in a medical context and notice of spills to public drinking water suppliers but not to owners of private wells were unconstitutional "special laws." Finally, the Supreme Court reversed the Commonwealth Court and held that the grant of eminent domain powers to companies for gas storage purposes violated the constitutional prohibitions against takings in the Fifth Amendment of the U.S. Constitution and Article I, Section 10 of the Pennsylvania Constitution.

With respect to the plurality opinion in *Robinson II*, the PUC asked the Court to disavow its analysis of Article I, Section 27 of the Pennsylvania Constitution, commonly known as the Environmental Rights Amendment ("ERA"), as not precedential and "out of step" with the wisdom of prior existing law. Because the question had not been preserved, the Court declined to consider it.

In its discussion of the questions presented by the PUC appeal, the Supreme Court also addressed the viability of Section 3215, which has been the subject of both controversy and litigation with the Department of Environmental Protection ("DEP"). Among other things, Section 3215(e) granted the Environmental Quality Board the authority to develop regulations for DEP to condition well permits related to impacts to public resources. In *Robinson IV*, the Court confirmed that Sections 3215(c)-(e) were enjoined by the Court in *Robinson II* in 2013, contrary to a recent decision by the Commonwealth Court in *PIOGA v. DEP*, issued on September 1, 2016. PIOGA appealed the Commonwealth Court's decision on September 29, 2016.

Background

An overview of the Supreme Court's 2013 decision in *Robinson II* can be found in our December 2013 Administrative Watch, available **here**. The Commonwealth Court's subsequent opinion on remand ("*Robinson III*") is detailed in our July 2014 Administrative Watch, available **here**. In *Robinson IV*, Justice Debra McCloskey Todd authored the

majority opinion joined by Justice Christine Donohue, Justice Kevin M. Dougherty and Justice David N. Wecht. Chief Justice Thomas J. Saylor filed a concurring and dissenting opinion, as did Justice Max Baer. Former Justice J. Michael Eakin did not participate in the consideration or decision of the case.

Local Governmental Control - Severability of Sections 3305-3309

In *Robinson II*, the Supreme Court invalidated two sections of Act 13 which had placed limits on the authority of local governments to regulate oil and gas operations. Section 3303 provided that "environmental acts" are of statewide concern and preempt local regulation of oil and gas operations regulated by these acts. Section 3304 mandated that all local ordinances provide for the "reasonable development of oil and gas resources" and placed a number of specific limits on what restrictions municipalities could impose, probably the most notable being a requirement that most oil and gas operations be authorized as permitted uses in all zoning districts. In *Robinson II*, four of the six justices participating in that case held that these two sections were unconstitutional. Three justices, in an opinion authored by then Chief Justice Ronald D. Castille, concluded that the challenged provisions violated the ERA. A fourth justice opined that the two sections violated Constitutional substantive due process protections. Two justices dissented.

Act 13 also contained a number of procedural provisions related to challenges to the validity of municipal zoning ordinances regulating oil and gas operations, specifically Sections 3305 through Section 3309, which gave the PUC and the Commonwealth Court jurisdiction to review local zoning ordinances with regard to compliance with the Municipalities Planning Code ("MPC"), or Chapter 32 or Chapter 33 of Act 13, and authorized the withholding of impact fee payments and the award of attorneys' fees against municipalities which violated those regulations. In *Robinson II*, the Supreme Court remanded the case to the Commonwealth Court to determine whether those sections were so intertwined with stricken Sections 3303 and 3304 that they also should be invalidated. On remand, in *Robinson III* the Commonwealth Court held that they were so linked to the invalidated sections that they could not be severed and also were invalid.

In *Robinson IV*, the Supreme Court agreed with the Commonwealth Court's conclusion that these sections were not severable and were therefore invalid because they enforced the substantive portions of Chapter 33 that had been invalidated by the Supreme Court in *Robinson II*. All six justices joined in this portion of the ruling. The majority found that the legislative objective behind Sections 3305 and 3306 was to speed and simplify the local ordinance review process, and the objective behind Sections 3307, 3308, and 3309 was to impose specific financial penalties on municipalities if the local ordinance review processes determined that a municipality contravened the statewide standards set by Act 13. The Supreme Court held that the penalty provisions were inextricably linked to the review provisions which were in turn inextricably linked to the statewide standards that the Court invalidated in *Robinson II*. Thus, the review and penalty provisions could not be severed and could not stand alone because they were no longer capable of being executed in accordance with the original intent of the General Assembly once the statewide standards had been invalidated.

The portion of the *Robinson II* opinion that may have broader implications is the Supreme Court's discussion of the proper scope and role of local governmental control of oil and gas operations. The majority opinion expounded at great length upon the "locally tailored policy goals" and the factors that vary from "municipality to municipality depending on local conditions and the needs of residents." The Court opined that local zoning hearing boards and the governing bodies are best suited to sit as triers of fact and to make land use determinations based on unique local conditions or needs. This was the structure that the General Assembly sought to replace in the enactment of the Act 13 provisions that imposed statewide standards, created a new review process for local ordinances, and penalized municipalities. The Court observed that as a result of its ruling in *Robinson II*, "municipalities may again, as they did prior to the passage of Act 13, regulate the environmental impact, setback distances, and the siting of oil and gas wells in land use districts through local ordinances enacted in accordance with provisions of the MPC or the Flood Plain Management Act, provided that such ordinances do not impose conditions on the features of well operations, which

the remaining valid provisions of Act 13 regulate." The quoted language is in reference to Section 3302 of Act 13, the updated version of the preemption provision contained in the former Oil and Gas Act, the interpretation of which was the subject of the Supreme Court's 2009 bookend decisions in *Huntley & Huntley v. Borough Council of Oakmont* and *Range Resources v. Salem Township*. Although not directly at issue in *Robinson IV*, the Supreme Court appears to be signaling a return to the preemption jurisprudence existing pre-Act 13.

Disclosure of Hydraulic Fracturing Fluids- Sections 3222.1(b)(10) and (b)(11)[1]

Sections 3222.1(b)10 and (b)(11) required the disclosure of hydraulic fracturing fluids to health professionals if the health professional executed a confidentiality agreement and provided a statement of need for the information, and further provided that in emergencies, the information must be immediately disclosed upon verbal acknowledgement that the information would not be used for other than the health needs asserted. Addressing what the challengers have called a "gag rule" since *Robinson I*, the Supreme Court enjoined both Sections 3222.1(b)10 and (b)(11) as "special laws" that violate Article III, Section 32 of the Pennsylvania Constitution.[2] These challenged provisions in Section 3222.1 were among new obligations for the disclosure of hydraulic fracturing fluids, and had required the disclosure of chemicals to health professionals even where claims of trade secrets or confidentiality have been made.

The Court's analysis focused on the evil of preferential treatment meant to be remedied by the constitutional prohibition against special laws. The Court concluded that "the sweeping breadth of the restrictions imposed . . . on health professionals" conferred special treatment on the oil and gas industry without a legitimate state interest or reasonable basis for such treatment.

Construing the provisions as a "gag rule," however, focuses only on the obligations of health professionals to maintain confidentiality once the information has been obtained, and ignores the affirmative obligation created for the initial disclosure of the information to the health professional. Sections 3222.1 (b)(10) and (b)(11) had required disclosure of information that would otherwise be protected, an obligation that has now been stricken.

Spill Notification for Public Drinking Water Facilities – Section 3218.1

The Supreme Court next struggled with the appropriate remedy when it determined that Section 3218.1 also violated the Pennsylvania Constitution's prohibition against special laws. Section 3218.1 required DEP to provide notice to public drinking water facilities if the facility could be affected by a spill related to oil and gas operations. The Court construed the new notice requirement as an "express exclusion" of notice to owners of private water sources, even though there is no such exclusion expressly made in the language of the statute. Considering the provision to be an exclusion rather than an affirmative duty, the Court found no legitimate state interest or reason to create a classification that treats public and private water supply owners differently. The Court did not consider whether a special obligation imposed on DEP to report spills related to oil and gas operations was invalid on the basis that the classification itself was a special law.

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[1] Defendants in the case, the DEP, the PUC, and the Attorney General, briefed and argued various positions in defense of the statute. The courts had not allowed industry representatives to intervene because they determined that the Commonwealth adequately represented the interests of industry. The Commonwealth's ability to represent the interests of the oil and gas industry in these proceedings is the subject of some debate, but the outcome of this decision, which further invalidated significant portions of legislation that had been drafted and adopted to balance a variety of interest and concerns, is a statute that is undeniably less balanced than the drafters intended.

[2] The Court considered, but agreed with the Commonwealth Court, that the provisions did not violate the single subject rule because they were germane to Act 13's overall purpose to regulate the oil and gas industry.

Simply striking the requirement for DEP to provide notice of spills to public drinking water facilities, however, could not address the Court's concern that DEP should be required to provide such notice to private water supply owners. Recognizing that the Court cannot add language to a statute, it stayed enforcement of its injunction for 180 days, in the hope that the legislature will "devise a legislative solution." In the absence of such legislation, DEP will no longer be required to provide notice to public water supply facilities that could be affected by a spill.

Condemnation for Storage of Natural or Manufactured Gas – Section 3241

Finally, the Court reviewed Section 3241, a provision for the appropriation of subsurface spaces for gas storage that was unchanged from Section 401 of the prior act, the 1984 Oil and Gas Act. Considering the Fifth Amendment of the U.S. Constitution and Article I, Section 10 of the Pennsylvania Constitution to be coextensive for purposes of the analysis, the Court agreed with the Petitioners that the power of eminent domain granted under this provision was not clearly limited to public utilities, which have "long been permitted the right to exercise power of eminent domain." According to the Court, the provision conferred broad powers on private corporations to take private property for private purposes. The Court reversed the Commonwealth Court and enjoined the section from further application and enforcement.

For more information regarding issues relating to land use and municipal implications of the Commonwealth Court's ruling, 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.

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