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Commonwealth Court continues to reject validity challenges to zoning ordinances authorizing oil and gas development

What is a “substantive validity challenge?”

Under Pennsylvania law, the question of *where* certain uses are permitted to occur is fundamentally a local issue. By delegation of the police power through the Municipalities Planning Code, 53 P.S. §§10101 *et seq.*, local governments are vested with the power to adopt zoning ordinances and zoning maps outlining what uses are allowed in what areas within their boundaries. Zoning ordinances are presumed to be valid, and the decision as to where specific uses are permitted is largely within the discretion of the local governing body.

A party challenging the substance of a zoning ordinance bears a heavy burden of proving the provisions are “arbitrary, and unreasonable, and have no substantial relationship to promoting its public health, safety, and welfare.” When reviewing these types of challenges, courts are required to balance the public interest to be served with the confiscatory or exclusionary impact of the ordinance on individual property rights. Although property owners frequently challenge the substantive validity of ordinances they feel are too confiscatory, objectors

have also challenged ordinances for being too permissive of a certain use — alleging that they fail to have the required connection to public health, safety or welfare.

Act 13, *Robinson II* and challenges under the ERA

In 2012, the Pennsylvania General Assembly enacted Act 13, a comprehensive update to the former Oil and Gas Act. Shortly thereafter, the Pennsylvania Supreme Court was tasked with considering the impact of the Article I, Section 27 of the Pennsylvania Constitution, known as the Environmental Rights Amendment (ERA) on Act 13, in which a plurality of the court ultimately invalidated certain provisions of Act 13 limiting the authority of local governments to regulate oil and gas development.¹

This decision triggered a wave of challenges from objectors arguing local ordinances are substantively invalid because they fail to place sufficient restrictions on oil and gas uses or allow them in allegedly incompatible zoning districts. To date, these types of claims have been consistently rejected by local zoning hearing boards, Common Pleas Courts and the Pennsylvania Commonwealth Court. The body of case law following *Robinson II* makes it clear that—as is the case with any type of use regulated by local zoning—*where* oil and gas development occurs is squarely within the purview of the municipality, while *how* it occurs is a state regulatory matter.

Recently, the Commonwealth Court reiterated these principles in *Murrysville Watch Committee v. Municipality of Murrysville Zoning*

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*Hearing Board.*² On January 24, the court affirmed the decisions of the Westmoreland County Court of Common Pleas and the Murrysville Zoning Hearing Board, denying a challenge to the oil and gas regulations in the municipality's zoning ordinance. On February 23, the objectors filed a petition for allowance of appeal with the Pennsylvania Supreme Court. As we await a decision from the court on whether it will hear the appeal, *Murrysville Watch* offers an opportunity to revisit the courts' treatment of substantive validity challenges to oil and gas zoning ordinances, an issue which they have addressed with remarkable consistency.

Where to permit oil and gas development remains a local issue

As noted above, *Robinson II* opened the door to ERA-type substantive validity challenges, resulting in the Supreme Court's decisions in *Gorsline v. Fairfield Township*³ and *Robinson IV*⁴ and several Commonwealth Court decisions including *Frederick v. Allegheny Township Zoning Hearing Board*,⁵ *Delaware Riverkeeper Network v. Middlesex Township Zoning Hearing Board*⁶ and *Protect PT v. Penn Township*.⁷ A brief overview of the decisions in these cases is helpful in analyzing how courts can be expected to treat these types of challenges moving forward.

A. *Frederick v. Allegheny Township Zoning Hearing Board*:

The ordinance: The zoning ordinance in Allegheny Township, Westmoreland County allowed oil and gas wells as a use by-right in all zoning districts, with some additional requirements. While it did not expressly require any setbacks for oil and gas development, application of the state-mandated 500-foot setback between a well-head and an existing building left less than 50 percent of the township available for development. Objectors brought a validity challenge, arguing the ordinance violated substantive due process and the ERA.

The analysis: The challenge was denied by both the local zoning hearing board and Westmoreland County Common Pleas Court. The *en banc* Commonwealth Court affirmed on appeal. In analyzing the ERA claim, the Commonwealth Court addressed the Supreme Court's 2017 ruling in *Pennsylvania*

Environmental Defense Foundation v. Commonwealth,⁸ in which the Supreme Court held challenges raised under the ERA should be decided in accordance with its text. Noting the precise duties imposed upon local governments by the ERA are unclear, the Commonwealth Court decided the relevant standard to be whether the governmental action "unreasonably impairs" the environmental values implicated. However, it also found the Supreme Court's holding in *Robinson II* did not authorize municipalities to act beyond the scope of their enabling legislation and that they were not authorized to replicate the environmental oversight the General Assembly conferred upon the Department of Environmental Protection or other state agencies.

B. *Delaware Riverkeeper Network v. Middlesex Township Zoning Hearing Board*:

The ordinance: The Middlesex Township, Butler County zoning ordinance allowed oil and gas well site development as a use by-right in some zoning districts and as a conditional use in other zoning districts. However, when other ordinance limitations were applied, less than 30 percent of the township was available for drilling.

The analysis: After a complicated procedural history, the Commonwealth Court, in an unpublished opinion, affirmed the decisions of the zoning hearing board and Common Pleas Court. The Commonwealth Court quoted liberally from its earlier decision in *Frederick*, and similarly concluded that the ordinance violated neither substantive due process nor the ERA.

C. *Protect PT v. Penn Township*:

The ordinance: The Penn Township, Westmoreland County zoning ordinance established an overlay district in which natural gas operations were authorized by special exception. The overlay district covered 55 percent of the township's land mass and, after the application of setbacks, left 9.64 percent of the township available for development. The challengers argued that unconventional natural gas drilling was a heavy industrial use incompatible with the underlying agricultural and residential zoned areas, rendering the zoning ordinance invalid.

The analysis: On appeal, the

Commonwealth Court held the objectors failed to establish that unconventional natural gas development posed any substantial actual risk to the environment or health of township residents. The court found the trial court properly determined that the ordinance, which permitted oil and gas development in specific and targeted areas of the township that are rural and not densely populated, did not violate the ERA or due process.

D. Murrysville Watch Committee v. Municipality of Murrysville Zoning Hearing Board

The ordinance: The Municipality of Murrysville, Westmoreland County zoning ordinance authorized oil and gas wells as a conditional use in an overlay district, which encompassed portions, but not all, of the rural residential zoning district. The ordinance also imposed a setback of 750 feet from the edge of a well pad to “protected structures.” Application of these geographic limitations, along with the ordinance’s steep slope restrictions, left only five percent of Murrysville’s land mass available for unconventional oil and gas development. Objectors argued the ordinance violated substantive due process because unconventional oil and gas drilling allegedly is an industrial land use incompatible with the stated purpose of the underlying residential zoning district. In a related argument, objectors contended that the overlay constituted an unconstitutional spot zone because certain portions of the rural residential zone were included in the overlay, while other portions were not.

The analysis: Relying heavily on both *Frederick* and *Protect PT*, the Commonwealth Court concluded the objectors failed to introduce any evidence of incompatibility and instead observed the municipality, through the multi-year efforts of a task force, had balanced its goal of economic development with its obligation to protect the health, safety and welfare of property owners within the overlay district. The court also noted the ordinance contained extensive additional substantive regulations and review processes applicable to oil and gas development. The court denied the objectors’ ERA claim, looking again to *Frederick* and *Protect PT*, concluding that the objectors did not prove that the challenged ordinance “unreasonably

impairs” citizens’ rights under the ERA. Finally, the objectors asserted that the overlay violated the equal protection rights embodied in Article III, Section 32 of the Pennsylvania Constitution, on the basis that only the oil and gas industry was granted an overlay in residentially zoned areas and that residents of the rural residential district are not treated equally. The court rejected this claim, finding that the municipality had a rational basis for creation of the overlay district, based on available acreage and population density.⁹

Via *Frederick, Delaware Riverkeeper, Protect PT* and *Murrysville Watch*, the Pennsylvania Commonwealth Court has developed a cohesive body of case law affirming the authority of Pennsylvania municipalities to authorize oil and gas development within their boundaries. To date, the Pennsylvania Supreme Court has declined to hear appeals in *Frederick, Delaware Riverkeeper and Protect PT*. The industry would hope to see a similar result from the Supreme Court in *Murrysville Watch*.

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¹ *Robinson Twp. Washington County v. Com.*, 83 A.3d 901 (Pa. 2013)

² No. 579 C.D. 2020 (Jan. 24, 2022)

³ 186 A.3d 375 (Pa. 2018)

⁴ 147 A.3d 536 (Pa. 2016)

⁵ 196 A. 3d 677 (Pa. Cmwlth. 2018)

⁶ No 2609 C.D. 2015, 2019 WL 2605850 (Pa. Cmwlth. 2019)

⁷ *Protect PT v. Penn Twp. Zoning Hearing Bd*, No. 1632 C.D. 2018, 2019 WL 5991755 (Pa. Cmwlth. Nov. 14, 2019)

⁸ 161 A.3d 911 (Pa. 2017).

⁹ The Commonwealth Court also found that the objectors failed to demonstrate the challenged ordinance violated the Pennsylvania Municipalities Planning Code, 53 P.S. §510101 *et seq.*, or that it was inconsistent with the municipality’s comprehensive plan.