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Natural Gas and Zoning: The Commonwealth Court's Act 13 Decision

On July 26, the Commonwealth Court decided *Robinson Township v. Pennsylvania Public Utility Comm'n*, No. 284 M.D. 2012, invalidating portions of the Oil and Gas Act amendments of 2012 (known as Act 13). Specifically, Robinson Township struck down the provisions of Act 13 constraining the application of local land use controls to oil and gas facilities and sustained others.

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Commentary

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Both the commonwealth and several of the municipalities have already filed petitions for allowance of appeal in the Supreme Court.

Robinson Township arises in the context of shale gas development, but it addresses a general theme that I have raised before in these columns. If there are trade-offs to be made between competing environmental values (or between environmental and economic values) in deciding whether to promote or to impede a certain kind of development, who decides?

Earlier this year, the General Assembly amended and codified the Oil and Gas Act, Pa. Stat. Ann. tit. 58, §§601.101 to .605 (repealed), by passing Act 13, 58 Pa. Cons. Stat. §§2301-3504. Act 13 addresses all oil and gas development activity, but, of course, its motivation and focus arise from the current development of natural gas from shale formations such as the Marcellus and Utica shales. The new statute therefore includes provisions directed specifically at "unconventional" natural gas development.

Some of the new and amended provisions elaborate or amplify the commonwealth's ability to regulate natural gas facilities — wells, gathering systems, processing facilities and so forth. The more controversial provisions of Act 13, however, have to do with municipalities.

Act 13 establishes an impact fee to be paid by natural gas producers. Unlike a severance tax, the fee does not go to the commonwealth's general revenue, but instead primarily goes to the municipalities and the counties in which the developer drills its wells.

However, in order to participate in distribution of the impact fee, municipalities and counties must not regulate natural gas development in a manner prohibited by Act 13. Even before adoption of Act 13, the Oil and Gas Act pre-empted inconsistent local regulation of oil and gas operations regulated by the state statute.

New Section 3302 largely replicates that provision. However, Section 3302 does not pre-empt local ordinances adopted under the Municipalities Planning Code, Pa. Stat. Ann. tit. 53, §§10101-11202, or the Flood Plain Management Act, Pa. Stat. Ann. tit. 32, §§679.101 to .604. Thus, a zoning ordinance or a subdivision and land development ordinance adopted under the MPC would not be pre-empted explicitly by Section 3302.

The courts have determined that the former Oil and Gas Act's pre-emption of zoning or subdivision and land development ordinances allowed local regulation only of "where" natural gas activities occurred, but not "how" they occurred unless the "how" regulation applied generally to all similar industrial land uses. See, e.g., *Range Resources v. Salem Township*, 964 A.2d 869 (Pa. 2009); *Huntley & Huntley v. Borough Council of Oakmont*, 964 A.2d 855 (Pa. 2009).

Thus, municipalities opposed to natural gas development have attempted to craft ordinances that thread the pre-emption needle and allow the local government to regulate (or to prohibit) natural gas development without running afoul of the former Oil and Gas Act's pre-emption provision.

In reaction to this dynamic, Act 13 broadened pre-emption in two ways. Section 3303 pre-empts all local regulation of "oil and gas operations" to the extent they are regulated by the "environmental acts." "Environmental acts" is defined to include any state or federal statute "relating to the protection of the environment or the protection of public health, safety and welfare."

That definition seems to cover every state police power regulation and so may not exactly mean what it says, but Section 3301 calls out specifically any program administered by the Department of Environmental Protection as an "environmental act."

Finally, Section 3304 of Act 13 requires all local ordinances — including land use ordinances — to "allow for the reasonable development of oil and gas resources." Subsection (b) goes on to enumerate limitations on what a local ordinance may or may not require, and most of the enumerated provisions would ordinarily be found in a zoning ordinance. Oil and gas operations other than compressor stations, processing plants and impoundments have to be permitted uses in all zones, and those uses have to be permitted either as of right or as conditional uses. Height, setback and other restrictions can be no more restrictive than as set out in Section 3304(b).

Section 3215(b) establishes certain statewide setbacks for oil and gas wells from water resources, including wetlands. Section 3215(b)(4), however, permits the Department of Environmental Protection to waive those requirements when the well developer proposes "additional measures, facilities or practices ... necessary to protect the waters of this commonwealth." That is, the department may substitute a site-specific determination for the setbacks imposed by Sections 3215(b)(1)-(3).

The Commonwealth Court determined in Robinson Township that Section 3304 of Act 13 — the uniform zoning provision — failed a substantive due process challenge under Article I, Section 1 of the Pennsylvania Constitution.

Municipal zoning, the court held, must rationally separate uses, excluding "the pig from the parlor." By enacting Section 3304, the court held that the General Assembly required municipalities to allow the pig to enter the parlor. Section 3304 mandates irrational zoning, reasoned the court, and therefore it was unconstitutional.

The court characterized oil and gas activities under Act 13 as a "spot use."

Substantive due process prohibits "spot zoning." One parcel cannot be singled out from within a zone for special treatment. So, in the case cited by the Commonwealth Court, Realen Valley Forge Greenes Associates, 838 A.2d 718 (Pa. 2003), Upper Merion Township gradually changed the land use in the vicinity of the King of Prussia Mall so that a golf course was the last remaining undeveloped parcel. The township then sought to preserve that parcel in open space use. That was unconstitutional spot zoning under Article I, Section 1.

The Commonwealth Court analogized natural gas development because Section 3304 of Act 13 singles it out for special treatment, allowing gas development in every zone.

The Commonwealth Court held that that "spot use" treatment by the commonwealth would unconstitutionally disrupt any municipality's zoning. There are other uses treated specially by the MPC or the constitution from airports to landfills to churches. However, the Commonwealth Court found the treatment of oil and gas operations in Act 13 to be too special to meet constitutional muster.

The court's decision does not turn on a finding that any specific municipal zoning scheme would be rendered unconstitutional with the Act 13 overlay. The Commonwealth Court appears to assume that if municipalities cannot freely regulate location, setback and similar features of natural gas uses, it must be unconstitutionally disconnected from the purpose of keeping the pig in the barnyard and not the parlor.

Recall that nothing requires a municipality to enact a zoning or a subdivision and land development ordinance. If it does so, nothing requires that enactment faithfully to implement the municipality's comprehensive plan. Section 303(c) of the MPC makes clear that an ordinance may not be invalidated for inconsistency with the plan.

However, if a municipality decides to do so, Robinson Township stands for the proposition that substantive due process imposes limits on the General Assembly's ability to constrain the municipality's exercise of regulatory authority. Article I, Section 1 of the Pennsylvania Constitution does not relieve municipalities of any oversight — the MPC contains quite a number of limits on the zoning or subdivision ordinance — but Act 13 went too far, evidently.

The Commonwealth Court insisted that the municipality, not the commonwealth, had to have the ability to make judgments about which uses are pigs and where the parlor begins and ends. That limitation derives from Article I, Section 1, due process. Interestingly, the environmental rights amendment, Article I, Section 27 of the Constitution, imposes no such limitation. Section 27 requires a municipality to consider the environmental costs and benefits of any action it takes when it regulates.

However, the Commonwealth Court held that the General Assembly could withdraw the power to do so by statute, placing that obligation on the Department of Environmental Protection.

Robinson Township represents a defeat for Governor Tom Corbett and the natural gas industry in that both wanted uniform local regulation to facilitate natural gas development.

In broader focus, the decision leaves unclear who can make decisions about whether certain development or uses should be permitted. Sometimes, the commonwealth can withdraw discretion from municipalities. It can more easily withdraw discretion to consider environmental concerns — whatever they are — as distinct from other neighborhood issues; Section 27 is less protective of municipalities than Section 1. However, sometimes the commonwealth may not withdraw municipal discretion.

Robinson Township offers very few guideposts to help determine when municipalities may exercise independent discretion. Land use policy is fairly local. Environmental policy is regional or global. Uncertainty over which government can regulate what makes for poor environmental policymaking.

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