

Legal Brief



Growing Gas Industry Tests Limits on Local Government Regulation of Drilling

While the Marcellus Shale gas industry is booming across Pennsylvania, local governments are wrestling with how, and to what extent, they can regulate the growing drilling and production activities within their boundaries.

The governor's Marcellus Shale Advisory Commission Report, released on July 22, 2011, indicates that more than 800 municipalities and counties in the Marcellus Shale region have adopted various zoning regulations or ordinances. Many of those municipalities have attempted to restrict oil and gas operations through local ordinances that provide for disparate treatment of the drilling industry.

Local governments are limited, however, in regulating the oil and gas industry under Pennsylvania's Oil and Gas Act ("Act"). The Act "preempts and supersedes the [local] regulation of oil and gas wells," subject to certain exceptions. The unclear scope of that preemption, and the increasing tension between local municipalities and the oil and gas industry, has resulted in a number of lawsuits across the state regarding such local regulations.

In two leading cases, the Pennsylvania Supreme Court has provided guidance as to which types of ordinances are invalid under the Act. In *Huntley & Huntley, Inc. v. Borough Council of the Borough of Oakmont*, the Court upheld a zoning ordinance that placed restrictions on drilling in a residential zoning district, finding the ordinance was not preempted by the Act. The Huntley decision recognized that the Act "totally preempts local regulation of oil and gas development" with the exception of ordinances adopted under the Municipalities Planning Code ("MPC") or the Flood Plain Management Act ("FPMA"). The Court then concluded that even ordinances

adopted under the MPC or the FPMA may be preempted if either: (1) the ordinances "impose conditions, requirements or limitations on the same features of oil and gas well operations regulated by 'the Act'" (meaning the "technical aspects of well functioning . . . rather than the well's location"); or (2) the ordinances "accomplish the same purposes as set forth in" the Act. Consequently, the zoning ordinance in Huntley restricting well drilling in residential areas was upheld.

In *Range Resources-Appalachia, LLC v. Salem Township*, the Court ruled that a local ordinance that established a comprehensive regulatory scheme of oil and gas development was preempted both because it attempted to regulate the same aspects of oil and gas development addressed by the Act, and because its stated purpose overlapped with the stated goals and purposes of the Act. In *Range*, the invalidated ordinance attempted to, among other things: require permitting procedures specifically for oil and gas wells; impose bonding requirements on well drilling; regulate well heads and capping of unused wells; and regulate site restoration. The *Range* decision indicates that a local ordinance that specifically targets oil and gas operations may be invalid, especially if it gives a municipality "virtually unbridled discretion to deny permission to drill."

Following those decisions, in *Penneco Oil Co., Inc. v. County of Fayette*, the Pennsylvania Commonwealth Court ruled that a local zoning ordinance was not preempted despite containing specific regulations on the location and appearance of oil and gas wells, because those provisions were directed at protecting the public's health, safety and welfare, and the ordinance did not provide the county with "arbitrary authority to deny permission to drill."

The Court also held that the ordinance's requirement that a zoning certificate be obtained before drilling commenced was not preempted because that requirement applied to all development.

A number of other lawsuits challenging various local oil and gas ordinances are now pending at various stages in Pennsylvania. In addition, proposed legislation was introduced this year in the Pennsylvania Senate (Senate Bill 1100) seeking to create a model municipal ordinance to provide uniform zoning and other municipal planning regulations regarding oil and gas operations. In the absence of such legislation, the contours of the scope of preemption under the Act and local governments' regulatory powers will likely continue to be defined by the courts on a case-by-case basis. ☆

For more information on regulations relating to oil and gas development, contact Russell S. Warner at MacDonald, Illig, Jones & Britton LLP at 814/870-7759 or rwarn@mjib.com.

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