

JONES DAY COMMENTARY

PENNSYLVANIA SUPREME COURT LEAVES ROOM FOR LOCAL REGULATION OF OIL AND GAS ACTIVITIES

The Pennsylvania Supreme Court recently addressed, in two concurrent decisions, the scope of local governments' authority to regulate oil and gas activities within their jurisdictions. Questions still remain as to how far local regulators can reach to limit oil and gas activity. Producers must carefully monitor developments from these cases and municipal reaction to them to determine what measure of local restrictions may be subject to challenge.

The Oil and Gas Act (the "Act") governs oil and gas activity in Pennsylvania. 58 P.S. §§ 601.101-601.605. The Act expressly preempts any local restrictions that address issues covered by the Act:

Except with respect to ordinances adopted pursuant to the ... Municipalities Planning Code, and the ... Flood Plain Management Act, all local ordinances and enactments purporting to regulate oil and gas well operations regulated by this act are superseded. No ordinances or enactments adopted pursuant to the aforementioned acts shall contain provisions which

impose conditions, requirements or limitations on the same features of oil and gas well operations regulated by this act or that accomplish the same purposes as set forth in the act. The Commonwealth, by this enactment, hereby preempts and supersedes the regulation of oil and gas wells as herein defined.

58 P.S. § 602.

In *Huntley & Huntley v. Borough Council of the Borough of Oakmont*, the Court considered whether the Act precludes municipalities from exercising their zoning powers to restrict oil and gas well locations. No. 30 WAP 2008, 2009 WL 413723 (Pa. Feb. 19, 2009). The Court concluded that the Act did not preempt traditional zoning powers to determine where oil and gas operations could be located.

After the Department of Environmental Protection (the "Department") issued a permit approving the drilling of a well on a 10-acre residential parcel, the Borough

Council requested the oil and gas developer to submit a conditional use application. The Council then denied the conditional use request because the local zoning ordinance did not specifically identify extraction of natural gas as a conditional use. The Council additionally held that the Act did not preempt its power to restrict the location of gas drilling.

Although the Court of Common Pleas agreed with the Council, the Commonwealth Court reversed. The Commonwealth Court concluded that the Act preempts any zoning ordinance that restricts gas well locations. Alternatively, the Commonwealth Court observed that the Municipal Planning Code, as the enabling statute for local zoning ordinances, classified natural gas as a mineral and that the zoning ordinance therefore permitted the proposed well as a conditional use. The Court remanded to the Council to issue the requested conditional use permit.

The Supreme Court disagreed with the Commonwealth Court about the scope of preemption and concluded that the Legislature did not intend to preempt local zoning ordinances designating locations for oil and gas operations but rather intended to foreclose municipalities from legislating on the technical aspects of well operations. The Court characterized the difference as the “how/where” distinction. Local governments cannot regulate how oil and gas operations are conducted but have the power to determine where those operations may proceed. The Court respected the unique expertise of municipal governing bodies to designate where different uses should be permitted.

The Supreme Court agreed with the Commonwealth Court, however, that the Council improperly denied the conditional use application based upon its after-the-fact restrictive interpretation of its zoning ordinance. Under this decision, where a local conditional use ordinance allows for the extraction of minerals, but the local ordinance does not define minerals, that zoning ordinance should be understood to allow for the extraction of natural gas.

On the same day of the *Huntley* decision, the Pennsylvania Supreme Court issued a second Oil and Gas Act preemption decision. In *Range Resources-Appalachia, LLC v. Salem Township*, the Court determined the Act preempted an ordinance directed toward oil and gas producers, enacted as part of the comprehensive zoning ordinance. No. 29 WAP 2008, 2009 WL 413748 (Pa. Feb. 19, 2009).

The Salem ordinance required permits for all drilling-related activities. The ordinance further regulated access roads, transmission lines, water treatment facilities, well heads, site restoration, and more. The Court observed the Act’s comprehensive regulatory scheme and noted that the ordinance regulated many of the same features of oil and gas well operations. The ordinance also imposed more stringent requirements than the Act. In a declarative action initiated by oil and gas producers, both the Court of Common Pleas and the Commonwealth Court agreed that the Act preempted the ordinance.

Although the Supreme Court concluded in *Huntley* that the preemptive scope of the Act is not total, the Court agreed with appellees that allowing hundreds of local governments to establish their own substantive oil and gas regulations would undermine the Act. As in *Huntley*, the Court applied the “how/where” distinction to determine that the Salem ordinance impermissibly regulated the “how” rather than the “where” of oil and gas operations.

The Department’s amicus brief acknowledged a need for uniform oil and gas regulation across the Commonwealth to optimize oil and gas development and ensure safety of the personnel and facilities used in such development. The Supreme Court agreed and held that the ordinance specifically targeted oil and gas well operations, which plainly constituted prohibited regulation under the express preemption provisions of the Act. As adopted, the ordinance represented an obstacle to the legislative purposes underlying the Act and could not stand.

Reading these cases together, local governments, cities, townships, and boroughs may restrict where oil and gas operations are located but may not dictate the technical aspects of those operations. In *Huntley*, where the Supreme Court agreed that a conditional use permit should be issued, the Council will need to adhere to the “how/where” distinction that the Court adopted and be sure that any conditions imposed do not target the technical operations of oil and gas wells.

Operators may successfully challenge local ordinances that specifically target the oil and gas industry or that disproportionately affect their operations. Operators should monitor closely how municipalities react to the Supreme Court’s recent decisions and consider their various options when faced with potentially restrictive local regulations.

LAWYER CONTACTS

For further information, please contact your principal Firm representative or one of the lawyers listed below. General email messages may be sent using our “Contact Us” form, which can be found at www.jonesday.com.

Mary Beth Deemer

1.412.394.7920

mbdeemer@jonesday.com

Ryan D. Dahl

1.412.394.9529

rddahl@jonesday.com

Jean M. Mosites

1.412.394.9521

jmmosites@jonesday.com

Jones Day publications should not be construed as legal advice on any specific facts or circumstances. The contents are intended for general information purposes only and may not be quoted or referred to in any other publication or proceeding without the prior written consent of the Firm, to be given or withheld at our discretion. To request reprint permission for any of our publications, please use our "Contact Us" form, which can be found on our web site at www.jonesday.com. The mailing of this publication is not intended to create, and receipt of it does not constitute, an attorney-client relationship. The views set forth herein are the personal views of the authors and do not necessarily reflect those of the Firm.