



PENNSYLVANIA HIGH COURT SHOULD REVERSE RULING ON PREEMPTION OF LOCAL FRACKING RULES

by
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On July 26, 2012, in a 4-3 decision, the Commonwealth Court of Pennsylvania declared null and void sections of Pennsylvania's 2012 Oil and Gas Act (Act 13), which preempted local zoning ordinances that regulate oil and gas operations. *Robinson Township v. Commonwealth*, __ A.3d __, 2012 WL 3030277 (Pa. Cmwlth., 2012). In a decision of enormous significance, the Court effectively gutted the zoning preemption provisions of Act 13. The new law had been drafted largely in response to the huge amount of drilling activity generated in Pennsylvania resulting from the Marcellus Shale Play. Act 13 also sought to establish uniform siting standards for gas drilling activities while balancing the interests of mineral rights owners and surface owners. The Pennsylvania Supreme Court should reverse the Commonwealth Court because of the lower court's fundamental misapplication of Pennsylvania law.

Background. On February 14, 2012, the General Assembly enacted revisions to the 1984 Oil and Gas Act (referred to as both the 2012 Oil and Gas Act and Act 13). 58 Pa.C.S. §§ 2301 – 3504. Act 13 repealed the 1984 Oil and Gas Act and replaced it with a codified statutory framework regulating oil and gas operations in Pennsylvania. The new law included provisions that levied and distributed impact fees and regulated the operation of gas wells; these provisions supplemented the law in existence prior to Marcellus Shale drilling activities. Additionally, Act 13 preempted local regulation in areas with oil and gas operations, including environmental ordinances and zoning code provisions, except in limited instances regarding setbacks.

On March 29, 2012, a consortium of municipalities, individuals, and environmental interest groups filed a petition for review seeking a declaratory judgment and injunctive relief and requesting that the Commonwealth Court exercise its original jurisdiction to overturn Act 13. The petitioners' primary concern (although not their only concern) was the virtual complete preemption of local zoning and other local regulation of oil and gas activities in municipalities. The petitioners filed a 12-count petition for review alleging, *inter alia*, that Act 13 violated the Pennsylvania and United States Constitutions as an improper exercise of the police power and contravened Pennsylvania's constitutional provisions relating to uses within certain zoning districts. They further claimed that under Act 13, it was impossible for municipalities to follow existing comprehensive plans and zoning ordinances to protect their residents. Petitioners also claimed that Act 13 unconstitutionally delegated the power to the Pennsylvania Department of

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Environmental Protection (DEP) to circumvent zoning requirements without any definitive standards.

The Commonwealth filed preliminary objections and the petitioners sought summary relief.

Counts I-III, Substantive Due Process. The Commonwealth contended that Act 13's requirement that municipal zoning ordinances be amended to include oil and gas operations in all zoning districts, 58 Pa.C.S. § 3304, did not violate the principle of due process of the Pennsylvania and United States constitutions because they have a rational basis and constitute a proper exercise of the Commonwealth's police powers. Commonwealth Court evaluated these claims pursuant to a substantive due process inquiry. Quoting from the Pennsylvania Supreme Court in *In re Realen Valley Forge Greenes Assocs.*, 838 A.2d 718, 728 (Pa. 2003), the Commonwealth Court stated that, "[t]he substantive due process inquiry, involving a balancing of landowners' rights against the public interest sought to be protected by an exercise of the police power, must accord substantial deference to the preservation of rights of property owners." *Robinson, supra*, at 13. While the property owner is obligated to utilize his property in a manner that will not harm others in the use of their property, zoning ordinances may validly protect the interests of neighboring property owners from harm. The court went on to note that community costs and benefits must be balanced. "These considerations have been summarized as requiring that zoning be in conformance with a comprehensive plan for growth and development of the community." *Id.* (emphasis by the court).

The court held that "by requiring municipalities to violate their comprehensive plans for growth and development, [Section 3304] violates substantive due process because it does not protect the interests of neighborhoods and makes irrational classifications." *Id.* at 15. The court further held that any municipal action required by Act 13 violates substantive due process "[b]ecause the changes required by [Section 3304] do not serve the police power purpose of local zoning ordinances, relating to consistent and compatible uses in the enumerated districts of a comprehensive zoning plan." *Id.*

Count VIII—Violation of Non-Delegation Doctrine. The petitioners also contended that Section 3215(b)(4) of Act 13, "violates the basic principles that the legislation must contain adequate standards that will guide and restrain the exercise of the delegated administrative functions because the statutory language fails to contain adequate standards or constrains DEP's discretion when it administers mandatory waivers from water body and wetland setbacks." *Robinson, supra*, at 20. In particular, the municipalities complained that the provision of section 3215(b)(4), which permitted DEP to "waive the distance restrictions upon submission of a plan identifying additional measures, facilities or practices to be employed during well site construction, drilling and operations necessary to protect the waters of this Commonwealth," was an impermissible delegation to an administrative agency by the General Assembly.

The court noted that the Pennsylvania Constitution, "prohibits delegation of the legislative function" to administrative agencies. *Id.* at 21. The legislature, however, "may confer authority and discretion upon another body in connection with the exercise of a law but that 'legislation must contain adequate safeguards which will guide and restrain the exercise of delegated administrative functions.'" *Id.*, quoting *Eagle Envtl. II, L.P. v. Comm.*, 584 Pa. 494, 884 A.2d 867, 880 (2005)(emphasis by the court). The court went on to note that "although the Legislature may delegate the power to determine some fact or state of things upon that the law makes or intends to make its own action depend, it cannot empower an administrative agency to create the conditions which constitute the fact." *Id.* The court concluded this analysis by stating, "[b]asic policy choices must be made by the General Assembly." *Id.*

The court determined that Section 3215(b)(4) "gives no guidance to DEP that guide and constrain its discretion to decide to waive the distance requirements from water body and wetland setbacks. Moreover, it does not provide how DEP is to evaluate an operator's 'plan identifying additional measures, facilities or practices to be employed...necessary to protect the waters of this Commonwealth'."

Thus, the court held that Section 3215(b)(4) was unconstitutional because "it gives DEP the power to make legislative policy judgments otherwise reserved for the General Assembly." The court went on to note that the General Assembly could cure this defect "by subsequent amendment that provides sufficient standards." *Id.* at 22.

Dissent. Judge P. Kevin Brobson, joined by two other judges, dissented from some of the majority's conclusions. The dissent noted that the analysis by the majority ignored the fact that:

the natural resources of this Commonwealth exist where they are, without regard to any municipality's comprehensive plan. Oil and gas deposits can exist in a residential district just as easily as they might exist in the industrial district. What a local municipality allows, through its comprehensive plan, to be built above ground does not negate the existence and value of what lies beneath.

Id. at 24. The dissent also countered the notion that the local ordinances somehow trumped the statute as follows:

Although the inclusion of one incompatible use within a zoning district of otherwise compatible uses might be bad planning, it does not itself render the ordinance, or law, constitutionally infirm. 'A local ordinance may not stand as an obstacle to the execution of the full purposes and objectives of the legislature.' This is exactly what the majority has done in this case by deferring to the locally-enacted comprehensive plans and zoning ordinances over the will of the General Assembly as expressed in section 3304 of Act 13.

Id. at 25, quoting *Huntley & Huntley, Inc. v. Bor. Council of Bor. of Oakmont*, 964 A.2d 855, 865 (Pa. 2009).

Finally, the dissent noted that any doubts regarding the constitutionality of the legislation, "are to be resolved in favor of a finding of constitutionality." *Id.* at 26. The dissent would have found Section 3304 of Act 13 to be a valid exercise of the police power.

Observations. The court's decision in *Robinson Township* gave certain (but far from all) municipalities and anti-drilling advocates cause for cheer. At the same time the industry, not surprisingly, was distressed at this determination. Industry advocates had looked at the preemption provisions as providing a degree of certainty regarding the siting of facilities in a state with over 2,500 municipalities, each with zoning power.

Bearing in mind that municipalities' zoning powers are a creature of the legislature in Pennsylvania, the court effectively ruled that the General Assembly was without power to restrict or define that right. Essentially, the court ruled that the municipalities' zoning power was protected by substantive due process from the General Assembly's power to limit it. This is contrary to the rulings of the Pennsylvania Supreme Court which has long held that the power to zone is derived from the General Assembly and it is the municipalities' power that is limited, not the other way around:

Municipalities are not sovereigns; they have no original or fundamental power of legislation; a municipal or councilmanic body can enact only the ordinances and exercise only the zoning powers which are authorized by the Legislature, and the Legislature can delegate or grant only those legislative and zoning powers which are Constitutionally permitted.

Cleaver v. Board of Adjustment of Tredyffrin Tp., 414 Pa. 367, 373, 200 A.2d 408, 412 (1964).

Furthermore, the same case Commonwealth Court cited as supporting a portion of its position specifies that the zoning power is derived from the enactments of the General Assembly: "The Township, as a municipal entity possessing only those powers expressly delegated by the Commonwealth, derives its zoning power from the Pennsylvania Municipalities Planning Code." *In re Realen Valley Forge Greenes Associates*, 576 Pa. 115, 132-33, 838 A.2d 718, 729 (2003).

Commonwealth Court has effectively ruled that a municipality's zoning power is exalted over the General Assembly's right to enact legislation that regulates that power. When one considers that all municipalities are creatures of the Commonwealth, created and regulated by the Commonwealth, it is astonishing that the court views the power vested in those municipalities as somehow greater than the authority of the entity that created them (i.e. the Commonwealth). One would think that since the zoning power is derived from state law (the Municipalities Planning Code), that the General Assembly would have

the power to increase or reduce that power. The Commonwealth Court apparently does not believe that is the case, but logic and the law should dictate otherwise. The Pennsylvania Supreme Court should reverse the lower court.

On the issue of delegation, the Supreme Court has previously ruled that, “Appellants have a heavy burden of persuasion for there is a strong presumption that acts of the General Assembly are constitutional, and this Court will not declare such acts unconstitutional unless they ‘clearly, palpably, and plainly’ violate the constitution.” *Eagle Environmental II, L.P.*, 884 A.2d at 880. Further, while the legislature is permitted to make basic policy decisions, administrative agencies are not:

It is axiomatic that the Legislature cannot constitutionally delegate the power to make law to any other branch of government or to any other body or authority. It may, however, confer authority and discretion in connection with the execution of the law; it may establish primary standards and impose upon others the duty to carry out the declared legislative policy in accordance with the general provisions of the act. The principal limitations on this power are twofold: (1) the basic policy choices must be made by the Legislature; and (2) the legislation must contain adequate standards which will guide and restrain the exercise of the delegated administrative functions. This does not mean, however, that all details of administration must be precisely or separately enumerated in the statute.

Id., quoting, *Gilligan v. Pennsylvania Horse Racing Comm.*, 492 Pa. 92, 422 A.2d 487, 489 (1980).

The General Assembly has made a clear policy choice with respect to distance restrictions. 58 Pa.C.S. § 3215(b)(4). Commonwealth Court’s concern, essentially, is that the General Assembly directs DEP to “protect the waters of the Commonwealth,” without significantly more guidance. That is exactly the power given DEP by the General Assembly in The Clean Streams Law. 35 P.S. § 691.1 *et seq.* The definition of “pollution” under The Clean Streams Law explicitly states, “[t]he department shall determine when a discharge constitutes pollution, as herein defined, and shall establish standards whereby and wherefrom it can be ascertained and determined whether any such discharge does or does not constitute pollution as herein defined.” *Id.* § 691.1 (emphasis added). Over sixty years ago the Pennsylvania Supreme Court ruled that the determination, by DEP’s predecessor agency, of when a discharge constitutes pollution is a separate power from the establishment of standards under the Act. *Commonwealth v. New York & Penna. Co.*, 367 Pa. 40, 79 A.2d 439, 446, 447 (1951). Further, it would seem that giving the Department more guidance would entail the General Assembly micro-managing the Department’s activities. Who better than DEP to determine how best to “protect the waters of the Commonwealth,” than the agency charged with that responsibility?

Marcellus gas industry representatives and the Commonwealth promised an appeal to the Supreme Court. On July 30, 2012, four days after the Commonwealth Court’s decision, the Commonwealth appealed the decision to the Pennsylvania Supreme Court and both the Commonwealth and the petitioners have requested expedited review. *Robinson Township v. Commonwealth*, 63 MAP 2012 (direct appeal filed July 30, 2012). Since the case originated in the Commonwealth Court’s original jurisdiction, the appeal is as of right. Despite the request for an expedited review, a decision from the Supreme Court is not expected until late 2012 or 2013.