



Nov 01, 2018

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Commonwealth Court Rejects ERA Challenge, Affirms Ordinance Allowing Unconventional Wells in Residential and Agricultural Areas

On October 26, 2018, the Commonwealth Court of Pennsylvania, in *Frederick v. Allegheny Township* (2295 C.D. 2015, 2018 WL 5303462), upheld Allegheny Township's ordinance authorizing unconventional oil and gas development in residential and agricultural areas. The court's decision is most notable in that it rejected opponents' arguments that the ordinance and permit issued thereunder to drill unconventional wells violated their substantive due process rights or constitutional rights under the Environmental Rights Amendment (ERA) to "clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment."

The decision builds upon prior ERA jurisprudence and clarifies local government roles and responsibilities in regulating oil and gas development activities. The decision resolves, at least until resolution of a likely appeal, several open issues regarding unconventional oil and gas development and the intersection of the Municipalities Planning Code (MPC) and zoning ordinances, constitutionally protected private property rights, the ERA, and the Commonwealth's laws and regulations designed to protect human health and the environment.

In its 5-2 decision, the Commonwealth Court:

- Rejected Appellants' argument that the ERA compels municipalities to enact specific affirmative measures to protect the environment. Municipalities do not have the power under the MPC to "replicate the environmental oversight that the General Assembly has conferred upon the DEP and other state agencies[.]" and prior Pennsylvania Supreme Court jurisprudence¹ did not give municipalities such power.

- Reaffirmed that local governments regulate **where** activity occurs, but the Commonwealth regulates **how** the activity is to be conducted.
- Rejected the argument that oil and gas development is incompatible with, and must segregate from, other uses in residential districts.
- Recognized that ordinances regulating where and under what conditions oil and gas development may occur within a municipality express the will of the residents through their elected representatives and reflect the balancing of landowners' rights against the public interest in protecting neighboring property owners.
- Rejected the argument that *Robinson II* or the ERA required the municipality to undertake "an undefined pre-action environmental impact analysis" before enacting an oil and gas ordinance.
- Distinguished landmark Pennsylvania Supreme Court jurisprudence², which interpreted the ERA in a context concerning publicly owned land and revenue generated therefrom, from the zoning and land use matters at issue in *Allegheny Township*.
- Held that the objectors failed to present credible non-speculative evidence that the permitted oil and gas activity would harm the objectors or the community.
- Held that the objectors failed to prove that the ordinance "unreasonably impairs" rights protected by the ERA.
- Held that the objectors failed to prove that the ordinance does not reasonably account for the natural, scenic, historic, and esthetic values of the township's environment³.

Prior to *Allegheny Township*, municipalities and oil and gas operators faced arguments that all local and state officials had an affirmative duty under the ERA to act to ensure the protection of clean air, pure water and the preservation of environmental features, even if such actions would be duplicative (or possibly contrary to) the actions of other governmental officials, and even if such actions would exceed their authority or experience. *Allegheny*

Township confirms that municipalities may rely upon existing technical regulations and the environmental oversight provided by state agencies such as DEP to regulate proposed activities. It also confirms that the proper focus of municipalities is on the local landscape to balance residents' competing property interests and determine where such activities may occur, subject to appropriate conditions or restrictions. The decision likewise suggests that ERA challenges to how drilling activities will occur, along with assertions regarding the alleged inadequacy of environmental and human health protections, should not be resolved through land use and permit appeals in zoning hearing boards.

¹ *Robinson Township v. Commonwealth*, 83 A.3d 901 (Pa. 2013) (plurality) (*Robinson II*).

² *Pennsylvania Environmental Defense Foundation v. Commonwealth*, 161A.3d 911 (Pa. 2017) (*PEDF II*).

³ Judge McCullough dissented, arguing that the Court should remand the matter, and the Township should be "obligated to prove that the ordinance is narrowly tailored to effectuate its economic interests and that it reflects the least onerous path that can be taken to achieve the objective without an unreasonable degradation of the environment." Judge Ceisler also dissented, arguing that the ordinance on its face violates the ERA and "fails to comport with the Township's duties as environmental trustee of all the public natural resources within its domain..."

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