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Publications

PA Supreme Court Tacitly Approves Commonwealth Court's ERA Analysis

On May 14, 2019, the Pennsylvania Supreme Court declined to accept an appeal from a Commonwealth Court opinion that defined and limited a municipality's authority to regulate oil and gas development activities. The earlier opinion also rejected the argument that municipalities are obligated under Article I, Section 27 of the Pennsylvania Constitution to enact measures to protect the environment, but it failed to address other threshold questions regarding Article I, Section 27's application to local regulation of land use activities.

As Frost Brown Todd previously advised, the Commonwealth Court of Pennsylvania, in *Frederick v. Allegheny Township*, 196 A.3d 677 (2018), upheld Allegheny Township's ordinance authorizing unconventional oil and gas development in residential and agricultural areas. The Commonwealth Court held that the ordinance did not violate Article I, Section 27 of the Pennsylvania Constitution, commonly referred to as the Environmental Rights Amendment (the ERA). The court rejected the argument that oil and gas development is incompatible with, and must be segregated from, other uses in residential districts. In doing so, it reaffirmed that local governments may regulate where oil and gas activity occurs, but that the state regulates how the activity is to be conducted, particularly as it relates to the environmental oversight conferred to the Department of Environmental Protection. The decision also affirmed that objectors have the burden to present credible non-speculative evidence that the permitted oil and gas activity would harm the objectors or the community if allowed where proposed.

Accordingly, the *Frederick* decision has certain favorable pronouncements on the scope of the ERA and burden of proof, and definitively rejects certain arguments that the ERA imposes broad obligations on municipalities. The decision has some problems, however, as the court in *Frederick* presumed or failed to adequately address certain threshold ERA issues. The Supreme Court's order forecloses, for now, clarification or resolution of those issues, which

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include 1) how adoption and application of local land use ordinances can constitute "Commonwealth" actions that implicate ERA protections; 2) whether and how the "public natural resources" to be conserved and maintained under the ERA can extend to air, water, or natural, scenic, historic and esthetic values that private land development activity could impact; and, 3) how the enactment of an ordinance constitutionally deprives anyone of clean air, pure water, or the enjoyment of the natural, scenic, historic or aesthetic values of the environment, being the rights secured by the ERA.

As a practical matter, the Supreme Court's order leaving the *Frederick* analysis intact should enable operators and land developers facing local opposition to narrow the scope of ordinance and permit appeals to more traditional land use issues. Industries should be able to avoid having to defend in land use appeals the state's regulatory framework governing their activities. Local governments are entitled to rely upon such frameworks and in large part are foreclosed from enacting their own operational regulations.

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