

ENERGY ALERT

**COMMONWEALTH COURT RULES FOR PETITIONERS
IN ACT 13 CASE**

On July 26, 2012, the Pennsylvania Commonwealth Court handed a major victory to Pennsylvania townships and others opposing Act 13 of 2012. The Court, by a 4-3 decision¹, declared unconstitutional a core provision of Act 13 – the uniformity requirement in 58 Pa. C.S. § 3304 that all zoning ordinances regulating oil and gas operations shall allow for the reasonable development of oil and gas resources, *i.e.*, must authorize oil and gas operations as a permitted use in all zoning districts. The Court majority concluded that this provision violated substantive due process and equal protection rights under federal and state law. The Court, by a 7-0 decision, also invalidated a separate provision, § 3215(b)(4), that authorized the Department of Environmental Protection to waive setback requirements as to well sites. Although the Court dismissed many counts of the Complaint, this is unquestionably a victory for the plaintiffs.²

Underlying the majority's decision was the conclusion that § 3304 improperly destroyed comprehensive zoning efforts and plans by permitting incompatible uses within a zoning district. Quoting from a famous United States Supreme Court zoning decision, the Court majority held that the provision would “allow the proverbial ‘pig in the parlor instead of the barnyard.’” The nub of the dissenting judges' opinion was that § 3304 did not, in fact, “eviscerate local land use planning” nor “give carte blanche to the oil and gas industry to ignore local zoning ordinances

¹ In many respects, the decision ended in 4-4 tie. Commonwealth Court considers the votes of commissioned judges who did not sit for oral argument. Due to a recusal, there was only one such judge – Judge Rene Cohn Jubilerer – and she apparently voted with the minority, creating a tie. Under that circumstance, Commonwealth Court's rules require that only the votes of the justices sitting at oral argument be considered.

² President Judge Dante Pellegrini wrote the majority decision, joined by Judges McGinley, Leadbetter, and McCullough. Judge P. Kevin Brobson wrote the dissenting opinion, joined by Judges Simpson and Covey. Judge Hannah Leavitt, who was not part of the en banc judges who heard oral argument, recused herself.

and engage in oil and gas operations anywhere it wishes.” Even the dissenting judges agreed that the “setback waiver provision” in § 3215(b)(4) was unconstitutional.

Both plaintiffs and defendants can appeal the Commonwealth Court Order now. Any such appeal would go directly to the Pennsylvania Supreme Court. Although the Supreme Court does not hold argument and issue full opinions in all “direct appeals,” it is highly likely for the Court to do so in this case.

Along with setting forth new requirements for the determination, collection and disbursement of impact fees (Chapter 23) and the operations and development of oil and gas resources while protecting the environment (Chapter 32), Act 13 of 2012 requires municipalities to review and amend their zoning ordinances relating to oil and gas operations (Chapter 33) in order to comply with the requirements of 53 Pa. C.S. §3309(b). Chapter 33 provides that all local ordinances purporting to regulate oil and gas operations regulated by Chapter 32 (relating to development) and by environmental acts are preempted. 53 Pa. C.S. §§ 3302,-3303. In addition, §3304 of Chapter 33 required that all local ordinances regulating oil and gas operations “allow for the reasonable development of oil and gas resources.” 58 Pa. C.S. §3304(a). To this end, §3304 imposed specific requirements on zoning ordinances such as not allowing zoning ordinances to increase setback distances already covered by Act 13 (*see* 53 Pa. C.S. §§3215(b)(1)-(3)) and not limiting operations to specific zoning districts. 58 Pa. C.S. §3304(b).

In March of 2012, five Pennsylvania townships, joined by the Delaware Riverkeeper Network (an environmental group focusing on the Delaware River and Basin) and a private family physician, filed a 120 page lawsuit contending that Act 13 of 2012 violated a score of

constitutional provisions and state statutes. The defendants, the Commonwealth and the Departments, and their heads, that have roles in implementing Act 13 — the Public Utility Commission, the Department of Environmental Protection and the Office of Attorney General filed Preliminary Objections challenging the legal sufficiency of the Plaintiffs’ claims, contending that various Plaintiffs lacked legal standing (a concept that generally requires a plaintiff have been harmed by the statute being challenged), and raised various other procedural defenses. The Plaintiffs also filed a Motion for Summary Relief, asking the Court to rule in their favor on the merits of their claims. The Court *en banc* (seven judges instead of the normal three) heard oral argument in early June and issued its opinion on July 26.

After addressing certain preliminary issues, primarily in plaintiffs’ favor, the Court turned to the core argument that §3304’s requirement that municipal zoning ordinances be amended to permit oil and gas operations in all zoning districts violated due process and equal protection principles. The Commonwealth argued that the provision had a rational basis and constituted a proper exercise of the Commonwealth’s police powers to protect public health and welfare. The Court majority disagreed.

Initially, the Court recognized that municipalities have only the authority that the state delegates to them, and that the legislature can amend, alter, or repeal the Municipalities Planning Code. It then noted the limitation to that authority: that the legislative act not be unconstitutional. The constitutional requirement, the Court held, was that zoning “must be directed toward the community as a whole, concerned with the public interest generally, and justified by a *balancing* of community costs and benefits. These considerations have been

summarized as requiring that *zoning be in conformance with a comprehensive plan* for growth and development of the community” (emphasis in Court opinion).

Section §3304, it concluded, “requires zoning amendments that must be normally justified on the basis that they are in accord with the comprehensive plan” to instead “promote oil and gas operations that are incompatible with the uses by people who have made investment decisions regarding businesses and homes on the assurance that the zoning district would be developed in accordance with comprehensive plan and would only allow compatible uses.” It elaborated on the consequences:

If the Commonwealth-proffered reasons are sufficient, then the Legislature could make similar findings requiring coal portals, tipples, washing plants, limestone and coal strip mines, steel mills, industrial chicken farms, rendering plants and fireworks plants in residential zones for a variety of police power reasons advancing those interests in their development. It would allow the proverbial “pig in the parlor instead of the barnyard.”

The “pig in the parlor instead of the barnyard” reference arises from the famous *City of Euclid* zoning case, the case that upheld the type of use zoning that is now commonplace. The goal of that zoning, the Supreme Court held, was to restrict incompatible uses. The “pig in the parlor instead of the barnyard” has come to symbolize that concept: pigs belong on farms, not in residential neighborhoods.

As to the “setback waiver” requirement in § 3215(b)(4), all judges agreed that the provision failed to provide DEP with sufficient standards to determine when it could issue a waiver. This failure, the Court held, violated the “delegation doctrine,” which generally requires that the legislature, not an administrative agency, set the basic policy rules and standards.

Having ruled in plaintiffs' favor on these two issues, the remainder of the Majority

Opinion sides with the Commonwealth's position. Briefly stated:

- ❖ Act 13 is not a "special law" in violation of Article III, § 32 of the Pennsylvania Constitution because, although it treats the oil and gas industry differently from other extraction industries, the distinction is based on real differences that justify varied classifications for zoning purposes.
- ❖ The claim that Act 13 allows eminent domain for private purposes can only be decided in an eminent domain proceeding.
- ❖ Act 13 does not violate Article 1, §27 of the Pennsylvania Constitution (the "public natural resources" amendment) because Act 13 relieved localities of the responsibility to strike a balance between oil and gas development and environmental concerns balance.
- ❖ The provisions allowing the PUC to issue advisory opinions as to local zoning laws does not violate the separation of powers doctrine because the PUC's opinions are non-binding and there is full court review.
- ❖ The setback, timing and permitting provisions and requirements for municipalities are not unconstitutionally vague because the Act provides sufficient guidance.

What happens next is uncertain at this early juncture. Appeals to the Pennsylvania Supreme Court, probably by both sides, are inevitable. The portions of the Act that were not enjoined will likely go into effect.

What will (or should) the municipalities do with their existing oil and gas ordinances?

The Commonwealth Court explicitly found that Section 3302 and 3303 remain in full force and effect. This means that municipalities are preempted from regulating oil and gas operations regulated under Chapter 32 (relating to development, including well location restrictions) and under the environmental acts. 53 Pa. C.S. §§ 3302, 3303. To avoid conflicts with these preempted areas, municipalities should review and amend their zoning ordinances to eliminate provisions related to these "off-limit" areas.

As of now, the effect of this Opinion and Order on the original deadlines for municipalities under the original language of Act 13 is not 100% clear. Normally, an appeal by a Commonwealth entity provides for an automatic stay as per Rule 1736(b) of the Pa. R.A.P. unless there is a motion to vacate automatic stay of the preliminary injunction. Practically, the PUC has delayed taking final action on Chapter 33 of law due to pending court proceedings. It may be argued that the municipalities have until Monday, December 10, 2012 to amend existing local oil and gas ordinances to comply with Act 13. Section 3309 of Act 13 originally became effective on April 14, 2012 (which is 60 days after the effective date of Act 13). The original existing zoning ordinance compliance deadline was August 12, 2012 which is 120 days from April 14, 2012. Thereafter, on April 11, 2012, Senior Judge Quigley of the Commonwealth Court preliminarily enjoined the effective date of Section 3309 for another 120 days. As a result, from August 12, 2012, the new effective date of Section 3309 and the extended compliance deadline would now be on Monday, December 10, 2012. The extended compliance deadline depended on the viability of the Commonwealth Court's preliminary injunction of Act 13. Now that parts of the injunction are modified, the extended deadline should also be addressed. Although it is unlikely that the Commonwealth Court or Pennsylvania Supreme Court will shorten the original compliance deadline, the Courts or the PUC should provide more guidance on the compliance deadline requirement in a future Order once the current litigation is resolved.

It is likely the earlier preliminary injunction order extending the compliance period for zoning rewrites will, one way or the other, remain in effect.

Conclusion

Eckert Seamans can assist you in understanding this new law and its impact on your operations. Importantly, we can also advise you how to maintain compliance with Act 13 and other applicable laws



and regulations. If you would like more information on the new law or assistance in understanding how your interests may be affected by the Court's actions, please contact Dan Clearfield, Jeff Norton or any one of our other Energy Group attorneys at Eckert Seamans. You may also contact Bob Hoffman, who is one of the Appellate practice attorneys at the firm.

This Energy Alert is intended to keep readers current on matters affecting energy, and is not intended to be legal advice. If you have any questions, please contact one of the attorneys listed above, or any other attorney with whom you have been working.

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