

UTILITIES AND TELECOMMUNICATIONS ALERT

PA. SUPREME COURT STRIKES KEY PROVISIONS OF ACT 13 AS UNCONSTITUTIONAL

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The Pennsylvania Supreme Court ruled on December 19, 2013 that several provisions of Act 13 of 2012¹ are unconstitutional. The invalidated provisions are primarily those requiring municipalities to adopt zoning ordinances that would allow drilling in all zoning districts and instruct localities as to what they are required to permit in terms of approval of drilling projects, as contained in the Act.² This landmark decision, under a best-case scenario, will result in more efforts by the drilling industry to work closely with state legislators and municipal groups to find creative solutions for a clear set of rules with a predictable framework for oil and gas development projects throughout the Commonwealth.

The Opinion Summary

In summary, the Supreme Court specifically held that:

1. Certain elected officials as individual landowners and residents, certain municipalities and the Delaware Riverkeeper Network had standing and stated justiciable claims.³
2. A private physician, Dr. Mehernosh Khan, who treated patients in an area with drilling operations and objected to the restrictions Act 13 places upon medical professionals as to the use of confidential information on the chemical composition of fracking fluids also stated a justiciable claim.⁴
3. Section 3215(b)(4), 3215(d) (involving the granting of well permits or setback waivers), 3303 (oil and gas operations regulated by environmental acts) and 3304 (uniformity of local ordinances) violated the Pennsylvania “Environmental Rights Amendment,” (3 justices) and the Due Process Clause (one justice) and thus enforcement of these sections are enjoined.
4. Section 3215(b) (limitation on well location restrictions) is enjoined in its entirety and the application and enforcement of Sections 3215(c) (impact of well on permits) and (e) and 3305 (advisory opinions) and 3309 (applicability of enforcement of local ordinances) are enjoined.
5. The matter is remanded, in limited respect, to Commonwealth Court for further proceedings to determine whether certain sections violated the prohibition of the Pennsylvania Constitution against the enactment of “special laws.”⁵ The citizens’ had challenged Sections 3218.1 (protection of water supplies), 3304-3307 (uniformity of local ordinances, advisory opinions, civil actions and fees and costs) and Act 13 globally on that basis.

¹ 58 Pa.C.S. §§ 2301–3504.

² 58 Pa.C.S. , §§ 3303 - 3304.

³ The Commonwealth Court’s decision on those questions was, therefore, affirmed in part and reversed in part.

⁴ The Supreme Court reversed the Commonwealth Court’s decision on this issue and remanded Dr. Khan’s claim for resolution on the merits.

⁵ Article III. Section 32 of the PA Constitution.

6. The issue of the severability of certain Act 13 provisions the Court had found unconstitutional was also remanded to the Commonwealth Court “⁶

7. Justice Baer filed a Concurring Opinion while Justices Saylor and Eakin filed Dissenting Opinions.⁷

A Plurality Opinion

Three Justices, led by Chief Justice Castille, held that Sections 3303 (oil and gas operations regulated by environmental acts) and 3304 (uniformity of local ordinances) violated the Commonwealth’s duties as trustee of Pennsylvania’s public natural resources under the “Environmental Rights Amendment,” Article 1, Section 27, to the Pennsylvania Constitution. A fourth justice disagreed with that conclusion but held that the challenged provisions violated substantive due process. Accordingly, the Supreme Court generally affirmed the Commonwealth Court’s earlier decision that these provisions were unconstitutional. Because a majority of justices did not agree on the legal theory to invalidate the provisions, Justice Castille’s Opinion is technically referred to as a “plurality opinion” or an “Opinion Announcing the Judgment of the Court.” Under established principles, that Plurality Opinion does not create a binding precedent.⁸ That means the principles guiding the legislature, should it choose to try again to legislate in this area, or that will govern challenges to other analogous statutes, remain unclear.

Justice Castille’s Opinion, although it does not set a precedent, is particularly interesting. Justice Castille gave life to, and primarily relied on, the Environmental Rights Amendment. Previously, this Amendment had been given little force or substance. Under Justice Castille’s Opinion, that is all changed. Justice Castille described the case as centering:

... upon an asserted vindication of citizens’ rights to quality of life on their properties and in their hometowns, insofar as Act 13 threatens degradation of air and water, and of natural, scenic, and esthetic values of the environment, with attendant effects on health, safety, and the owners’ continued enjoyment of their private property.⁹

Justice Castille gave a history lesson, noting that, “Pennsylvania has a notable history of what appears retrospectively to have been a shortsighted exploitation of its bounteous environment, affecting its minerals, its

⁶ Opinion at p. 160. Justice Castille stated that several provisions of Act 13 “appear relatively independent of other parts of Act 13....Our holding that Sections 3215(b)(4) and (d), 3303 and 3304 violate the Environmental Rights Amendment does not automatically require finding Act 13 unconstitutional in its entirety.” (Opinion at p. 158). The presumption is that the provisions of every statute shall be severable. *Id.* “[F]urther inquiry into the continued viability of the entire statute or of discrete provisions, ... is salutary and necessary.” (Opinion at p. 160).

⁷ In a Concurring Opinion, Justice Baer joined in all portions of Justice Castille’s Opinion except that discussing the Environmental Rights Amendment. Instead, he found that the portions of Act 13 overriding local zoning authority violated substantive due process. Justice Saylor criticized Justices Castille’s opinion as making and deciding arguments that as regards the Environmental Rights Amendment were not even raised by the parties. In responding to the argument that Marcellus Shale Development has a negative impact on the environment, Justice Saylor observed that “... every form of industry essential to the Commonwealth’s economic longevity and growth does the same, in some manner and to some degree. Thus, the State’s constitutional obligation to ‘conserve and maintain’ simply cannot mean that Pennsylvania’s natural resources may not be responsibly disturbed and utilized.”(Saylor Dissenting Opinion at 11.)

⁸ *Quinby v. Plumsteadville Family Practice, Inc.*, 907 A.2d 1061, 1073 (Pa. 2006).

⁹ Opinion at p. 57.

water, its air, its flora and fauna, and its people. The lessons learned from that history led directly to the Environmental Rights Amendment, a measure which received overwhelming support from legislators and the voters alike.”¹⁰ In his view, the Amendment was intended to prevent future environmental degradations and the Justice clearly cast Marcellus Shale oil and gas drilling and development in that light. He wrote:

... By any responsible account, the exploitation of the Marcellus Shale Formation will produce a detrimental effect on the environment, on the people, their children, and future generations, and potentially on the public purse, perhaps rivaling the environmental effects of coal extraction.¹¹

Justice Castille added, “Act 13 has the potential to affect the reserved rights of every citizen of this Commonwealth now, and in the future.”¹²

Justice Castille then applied that view of Article 1, Section 27 to the challenged provisions of Act 13. Describing Section 3304 of the legislation, Justice Castille remarked,

Despite this variety in the existing environmental and legislative landscape, Act 13 simply displaces development guidelines, guidelines which offer strict limitations on industrial uses in sensitive zoning districts; instead, Act 13 permits industrial oil and gas operations as a use “of right” in every zoning district throughout the Commonwealth, including in residential, commercial, and agricultural districts.¹³

and

For communities and property owners affected by Act 13, however, the General Assembly has effectively disposed of the regulatory structures upon which citizens and communities made significant financial and quality of life decisions, and has sanctioned a direct and harmful degradation of the environmental quality of life in these communities and zoning districts. In constitutional terms, the Act degrades the corpus of the trust.¹⁴

Then, the Chief Justice remarked, “Act 13’s blunt approach fails to account for this constitutional command at all and, indeed, exacerbates the problem by offering minimal statewide protections while disabling local government from mitigating the impact of oil and gas development at a local level.”¹⁵ Justice Castille then concluded, “we are constrained to hold that the degradation of the corpus of the trust and the disparate impact on some citizens sanctioned by Section 3304 of Act 13 are incompatible with the express command of the Environmental Rights Amendment.”¹⁶ Justice Castille added, “it is apparent that the Article I, Section 27 constitutional commands have been swept aside. Act 13’s unauthorized use of the public trust

¹⁰ Opinion at p. 117.

¹¹ Opinion at p. 118.

¹² Opinion at p. 119.

¹³ Opinion at p. 124.

¹⁴ Opinion at p. 125.

¹⁵ Opinion at p. 126.

¹⁶ Opinion at p. 128.

assets is unprecedented and constitutionally infirm, even assuming that the trustee believes it is acting solely and in good faith to advance the economic interests of the beneficiaries.”¹⁷

What’s Next?

The Supreme Court’s failure to issue a majority and precedential opinion has left certain future decisions as to the municipalities’ authority over oil and gas development without clear guidance. No doubt, the Supreme Court’s decision will create more debate and likely more disputes between municipalities and the industry. Hopefully, the two sides will collaborate to create safe, clean and reliable home-grown energy while fostering economic development in an environmentally responsible manner. This decision may ignite a new set of legislative proposals, revised environmental regulations and municipal ordinances to address the industry’s and public’s needs.

This Utilities and Telecommunications Alert is intended to keep readers current on matters affecting businesses and is not intended to be legal advice. If you have questions, please contact Jeff Norton at 717.237.7192 or Bob Hoffman at 717.237.7182

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¹⁷ Opinion at p. 128-129.