

# “What keeps you up at night?”

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## Pennsylvania Supreme Court decision opens valves to zoning power over natural gas production

By George Asimos

In a much-awaited decision that is likely to reverberate through the Pennsylvania Marcellus Shale fields for a long time, and probably put some planned drilling projects in temporary or permanent jeopardy, the Pennsylvania Supreme Court ruled last Thursday that municipal governments may exclude from some zoning districts the surface use of land for natural gas production. In *Huntley & Huntley v. Borough Council of the Borough of Oakmont*, the Court ruled that, although the Pennsylvania Department of Environmental Protection (PaDEP) regulates the location of wells in relation to such features as buildings, water wells, wetlands, and bodies of water, the preemption provisions of the Oil and Gas Act (OGA) do not disable local government’s “core municipal function,” under the Municipalities Planning Code (MPC), of designating districts in which land uses may occur.

*In effect, every single well drilled in a Pennsylvania municipality or county that has adopted a zoning ordinance must be placed only in a zoning district where it is allowed under that zoning ordinance.*

Forced to decide between two potentially competing legislative schemes—the OGA and the MPC—the Court observed that while there is “some overlap” between the goals and the purposes of these two laws, such as the protection of public health and safety, the MPC is distinct in its delegation of authority to municipalities to address objectives “pertaining to preserving the character of residential neighborhoods.” Further, the Court noted that municipalities had “unique expertise . . . to designate where different uses should be permitted in a manner that accounts for the community’s development objectives, its character, and the ‘suitabilities and special nature of particular parts of the community.’” Over the industry’s objection, the Court ruled that the community planning objective overrides the purpose of the Oil and Gas Act to “permit the optimal development of the oil and gas resources of Pennsylvania consistent with the protection of the health, safety, environment and property of the citizens of the Commonwealth.”

The Court viewed the regulations on well placement imposed by the PaDEP as being *different in character* from the municipal regulations designating where activities can occur within a municipality, based on zoning district. The industry had argued that since both types of

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regulation address the same subject—location—the state regulation should prevail and supersede municipal zoning. The position adopted by the Court was supported by the PaDEP in its amicus brief.

Upon concluding its analysis, the Court ruled that the **“overall restriction on oil and gas wells in R-1 districts is not preempted”** by the Oil and Gas Act.

The Court’s carefully chosen words, “in R-1 districts,” may presage an onslaught of disputes and appeals as municipal governments throughout the Marcellus Shale region begin to assert their zoning jurisdictions. For instance, two means of challenging a zoning regulation under the MPC are the “substantive validity challenge” and its close cousin, the “curative amendment.” What will be the outcome of a challenge if natural gas production is prohibited in a commercial district, an industrial district, or a multi-family residential district, and not an R-1 district as in *Huntley*? What will be the outcome if the **only** area in which wells are allowed in a zoning ordinance does not correspond to the location of the gas, or the ability to use the surface of the land due to slopes or wetlands, or the availability of land for lease? Will this justify variance relief? Will natural gas production be treated more favorably in the courts on these points than other mineral extraction industries? Each case will have to be examined independently, and litigated before municipal boards and beyond where necessary, applying the facts to the law.

And, all this will be occurring in the current political/legal environment where support for Pennsylvania local governments engaged in community planning is certainly at a historic high.

It is also notable that *Huntley* involved the permission to allow production as a “conditional use.” The conditional use process, for those not familiar with it, requires hearings in which the applicant must demonstrate that his proposed use is among the permitted uses allowed in the applicable district and that his proposal complies with the specific ordinance requirements for that use. The conditional use process allows objectors to defeat the proposed use if they can prove with certainty (as judged by the local governing body) that the specific proposal would have an adverse effect on public health, safety or welfare, in a manner not normally

associated with the proposed use. Municipalities are not required to restrict gas production to conditional uses, but where they do—and clearly they now can—these hearings can be extensive, expensive and have an uncertain outcome. And, the municipal body hearing the case can attach to any approval “reasonable conditions and safeguards” that are “in addition to those expressed in the ordinance, as it may deem necessary to implement the purposes of this act in the ordinance.” The scope and extent of such conditions are frequently the subject of negotiation, dispute and appeal. This is not the sort of control nor the sort of process to which the industry has been accustomed.

The Pennsylvania zoning process does have defined procedures and rights that can and will, with careful site selection and effective advocacy, prevail in many instances. We have handled hundreds of such applications. However, all of this will escalate investment cost and risk for production companies.

In our next Alert, the companion case by the Supreme Court will be addressed. It did place some limits on the zoning power to regulate natural gas production.

The *Huntley* decision, however, will surely stand out as the beginning of a period of great uncertainty in the pace, predictability and expense of Marcellus Shale production in Pennsylvania.

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This Alert was written by George Asimos, a Partner in Saul Ewing’s Oil and Gas Practice Group. If you have questions or wish to discuss the contents of this Alert, please feel free to contact Mr. Asimos at [gasimos@saul.com](mailto:gasimos@saul.com) or 610.251.5076, or visit us at [www.GasAndOilLawyers.com](http://www.GasAndOilLawyers.com). This publication has been prepared by the Oil and Gas Practice Group for information purposes only.

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