

“What keeps you up at night?”

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Court limits – But did it preclude? – municipal regulation of natural gas drilling operations

By George Asimos

In a companion case to the recently-reported *Huntley v. Borough of Oakmont*, the Pennsylvania Supreme Court has limited the scope of municipal regulation of the natural gas drilling projects, giving this burgeoning Pennsylvania industry some salve to heal the wounds of *Huntley*. In *Range Resources-Appalachia, LLC v. Salem Township*, the Court held that a comprehensive scheme of municipal regulation of activities related to gas well drilling, though not all regulating the well drilling itself, contained in the Township’s Subdivision and Land Development Ordinance, was preempted by the Pennsylvania Oil and Gas Act.

In *Huntley*, decided the same day, the Court concluded that “the Act’s preemptive scope is not total in the sense that it does not prohibit municipalities from enacting traditional zoning regulations that identify which uses are permitted in different areas of the locality, even if such regulations preclude oil and gas drilling in certain zones.” However, municipal zoning, subdivision and land development ordinances regulate much more than just the location of uses within zoning districts, thus leaving open the question of what components of a gas well drilling project might be subject to municipal regulation. The Court warned in *Huntley* that a municipality could not permit drilling with one hand but then, with the other hand, “make that permission subject to conditions addressed to features of well operations regulated by the Act.” But many questions on the scope of municipal control still remained unanswered.

Salem Township’s subdivision and land development ordinance (SALDO) covered the following subjects, among others:

- permitting procedures specifically for oil and gas wells;
- bonding requirements before drilling can begin;
- regulation of well heads, including the capping of the same once they are no longer in use;
- site restoration after drilling operations cease;

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- a requirement of restoring nearby streets to their pre-drilling conditions regardless of whether the wear and tear on such roadways was caused by vehicles associated with drilling activities;
- pre-operation water testing of all water sources within 1,000 feet of a well site;
- pipeline depth and marking;
- slope and construction of access roads and tire cleaning areas; and
- the location of water cleaning facilities.

Further, and quite important to the outcome of the case, the ordinance did not guarantee issuance of a permit — even if the applicant complied with all requirements — stating expressly that it reflects only the “minimum terms acceptable” and that, upon compliance, a conditional permit “may” be issued by the Township, “subject to final approval by the Board of Supervisors at a public meeting.”

The Court found the regulations to be, in some respects, “a regulatory apparatus parallel to the one established by the [Oil and Gas] Act and implemented by the Department [of Environmental Protection]” and, in other respects, directly in conflict with, or even more stringent than, the PaDEP regulations under the Act. In this respect, the Court embraced PaDEP’s position in its amicus brief.

Given the vast array of municipal regulatory approaches and the boundless creativity of officials and solicitors, one must wonder how fully this case will fend off municipal regulation of drilling and drilling-related activities. In that regard, it is worth considering this statement by the Court:

While the Township may be correct in arguing that there are some aspects of the Ordinance that are not expressly covered directly by the Act, even these are bound up with the overall regulatory scheme which includes strict permitting and penalty provisions, and phrased in such general terms— e.g., “the most direct and feasible means,” “shall not unreasonably restrict access,” etc.—as to provide the Township with virtually unbridled discretion to deny permission to drill. This is in stark contrast to, and in conflict with, the Act’s more permissive approach.

It would appear that the Salem Township ordinance fell in large part because of its unveiled attempt to create a parallel or overlapping regulatory scheme to that imposed by PaDEP under the Act. However, it is difficult to predict from this fact alone how the Court will address certain likely scenarios:

1. the applicability of restrictions specifically addressed to gas well drilling but imposed under less comprehensive schemes of regulation and not specifically overlapping PaDEP regulations;
2. the applicability of regulations that are plainly, or at least superficially, drafted to be applicable to all land uses and not specifically addressed to gas well drilling and related activities;
3. the applicability of the general municipal land development plan approval process to the well drilling permitting process (the challenged ordinance was part of the SALDO, but for procedural reasons the Court did not address whether the well drilling project was either a subdivision or a land development—if it is not, then a SALDO is not applicable regardless of what it says).

A hint to answering these questions may lie, in part, in this further comment by the Court with respect to the Salem ordinance:

Similarly, the Ordinance focuses, not on zoning or the regulation of commercial or industrial development generally, but solely on regulating oil and gas development, with specific objectives that include “enabling continuing oil and gas drilling operations ... while ensuring the orderly development of property through the location of access ways, transportation lines and treatment facilities necessarily associated with the same.”

Would the ordinance have been valid if it appeared to be focused on regulating commercial or industrial development generally? Also, the Court seemed to view with approval the Township’s contention that municipal regulation of the gas well drilling activities adopted under the Municipalities Planning Code (MPC) were only preempted “to the degree they address the technical, operational aspects of oil and gas drilling, but that they are permissible otherwise so long as their provisions are consistent with ordinary

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zoning principles.” The Court confirmed that this is consistent with its holding in *Huntley*, but how far will the Court extend the meaning of “technical, operation aspects of drilling?” Will it include access roads, storm water control, street maintenance, steep slope protection, and the like, if presented in a regulation unlike Salem’s comprehensive scheme? Interestingly, due to the “comprehensive” scheme issue, the Court declined to address the validity of individual regulations contained within the Township’s drilling ordinance. As the Court stated:

In sum, not only does the Ordinance purport to police many of the same aspects of oil and gas extraction activities that are addressed by the Act, but the comprehensive and restrictive nature of its regulatory scheme represents an obstacle to the legislative purposes underlying the Act, thus implicating principles of conflict preemption. * * * Furthermore, its stated purposes overlap substantially with the goals as set forth in the Oil and Gas Act, thus implicating the second statutory basis for express preemption of MPC-enabled local ordinances. In view of the Ordinance’s focus solely on regulating oil and gas drilling operations, together with the broad preemptive scope of Section 602 of the Act with regard to such directed local regulations, we agree with the common pleas court’s conclusion that each of the oil and gas regulations challenged in Appellees’ complaint is preempted by the Oil and Gas Act and its associated administrative regulations.

The *Range Resources* case certainly calls into question all manner of potential municipal regulation of natural gas drilling operations,

particularly any ordinance that has the appearance of a comprehensive scheme of regulation rivaling the purpose and scope of the PaDEP regulations under the Act, but does not finally address the question of the applicability of particular “all purpose” regulations, even perhaps some quite similar to those struck down in *Range Resources*.

We have not seen the last of the *Range Resources* case.

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 or 610.251.5076, or visit us at www.GasAndOilLawyers.com. This publication has been prepared by the Oil and Gas Practice Group for information purposes only.

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