

ALERTS AND UPDATES

Wiggle Room for Local Regulation of Marcellus Gas Drilling, or Potentially Reversible Error?

August 10, 2010

On July 22, 2010, the Commonwealth Court of Pennsylvania decided *Penneco Oil Company v. The County of Fayette, Pennsylvania*,¹ holding that a local "zoning" ordinance targeting natural gas drilling is not preempted by Pennsylvania's Oil and Gas Act. At first blush, the Commonwealth Court appears to have merely followed the lead of the recent Pennsylvania Supreme Court decisions in *Huntley & Huntley, Inc. v. Borough Council of the Borough of Oakmont* and *Range Resources v. Salem Township*,² decisions that respect local government authority to restrict, for aesthetic reasons, the locations where natural gas wells can be installed. On closer review, it appears that local governments have been given room, without definite boundaries, to restrict natural gas drilling as they deem necessary in order to "protect the public's health, safety and welfare."

Penneco Oil centers on a challenge by Penneco Oil, Range Resources, and the Independent Oil & Gas Association of Pennsylvania to a 2006 Fayette County ordinance that regulates oil and gas well drilling. After providing that oil and gas wells are a "permitted use" in certain zoning districts, the ordinance goes on to say that in all other zoning districts, an oil or gas well is a "special exception," subject to the following four conditions or standards:

- A. An oil or gas well shall not be located within the flight path of a runway facility of an airport.
- B. An oil or gas well shall not be located closer than 200 feet from residential dwelling or 50 feet from any property line or right-of-way.
- C. An oil or gas well shall provide fencing and shrubbery around perimeter of the pump head and support frame.
- D. The Zoning Hearing Board may attach additional conditions pursuant to this section, in order to protect the public's health, safety and welfare. These conditions may include but are not limited to increased setbacks.

The Commonwealth Court began its analysis by revisiting the principles established by the Pennsylvania Supreme Court in the *Huntley* and *Range Resources* cases. Those principles are that a local ordinance regulating oil and gas well operations is preempted by the Oil and Gas Act, where the purposes of the ordinance go beyond the traditional purposes of zoning. Those traditional purposes are to preserve the character of residential neighborhoods, and encourage beneficial and compatible land uses, by regulating location.

Turning to the Fayette County ordinance, the Commonwealth Court found that the first three conditions/standards are all permissible zoning restrictions (no wells within airport runway flight paths, no wells closer than 200 feet from a residence or 50 feet of a property line, and required screening of well pump heads with shrubbery or fencing). It is the Court's blessing of the fourth standard—which allows the County zoning hearing board to "attach additional conditions pursuant to this section, in order to protect the public's health, safety and welfare"—that warrants further attention.

The Commonwealth Court gave two reasons for accepting the "additional conditions" standard in the Fayette County ordinance, neither of which was accompanied by in-depth analysis, and both of which raise questions:

- First, the Commonwealth Court found that the "additional conditions" provision did not pertain to "technical aspects of well functioning and matters ancillary thereto (such as registration, bonding, and well site restoration)." "To the contrary," said the Commonwealth Court, "the foregoing provisions pertain to an oil and gas well's location within Fayette County, preserving the character of residential neighborhoods, and encouraging beneficial and compatible land uses." Based on this observation, the Court concluded that the ordinance was in line with the Pa. Supreme Court's decision in *Huntley*, and is not preempted. The Commonwealth Court provided no explanation for this conclusion, and one may wonder: How is it that every "additional condition" that might be attached in order to protect "health, safety and welfare" would necessarily *not* pertain to "technical aspects of well functioning" or "matters ancillary thereto" (whatever "matters ancillary thereto" might mean)? Nor did the Court explain how it is that every health, safety or welfare condition would necessarily pertain to an oil or gas well's location, preservation of the character of residential neighborhoods or encouragement of beneficial and compatible land uses. In fact, the Court's conclusion seems incongruous: A "safety" condition would be more likely to pertain to such things as registration with local first responders, than to such things as limiting the visibility of drill rigs or well heads.
- Second, the Court stated that the discretion granted to the zoning hearing board to attach "additional conditions" in order to "protect the public's health, safety and welfare" is "not unfettered." "In other words," said the Court, the ordinance "does not provide Fayette County or its zoning hearing board with virtually unbridled discretion to deny permission to drill an oil and gas well even after compliance with the applicable zoning regulations." A concern raised by this part of the Court's analysis is that even if the zoning hearing board's discretion to attach "additional conditions" is not "unfettered" or "virtually unbridled," such discretion nevertheless would appear to represent authority to regulate in ways that could overlap with the purposes of the Oil and Gas Act. Put another way, it is the nature of the power created by the ordinance (power to protect health, safety and welfare), not its extent (fettered or unfettered), that should be central to the preemption analysis. Yet in *Penneco*, the Commonwealth Court suggests (without explanation) that the extent of the power somehow defines its nature.

It may be that the Commonwealth Court intended to imply that the language of the ordinance giving the zoning hearing board the power to attach "additional conditions . . . [that] . . . may include but are not limited to increased setbacks" is language that would empower the board to attach conditions relating solely to location, neighborhood character, and beneficial and compatible land use. In order to determine if this was the Commonwealth Court's thinking, an appeal to the Commonwealth Court from a Fayette County zoning hearing board action attaching one or more "additional conditions" to a grant of a special exception may have to be awaited. The answer may come sooner if the Commonwealth Court agrees to rehear the case (an application for re-argument was filed on August 5, 2010), or the Pennsylvania Supreme Court grants a petition for allowance of appeal, should one be filed. In the interim, oil and gas companies should be aware that new local government ordinances and regulations could start springing up in Pennsylvania, patterned after this Commonwealth Court-blessed Fayette County ordinance that gives a potentially wide berth to local governments to regulate Marcellus gas well installation and operation in ways that, while not well-defined, appear to go beyond location and aesthetics.

For Further Information

If you have any questions about this Alert or would like more information, please contact [Seth v.d.H. Cooley](#), any [attorney](#) of the [Energy, Environment and Resources Practice Group](#) or the attorney in the firm with whom you are regularly in contact.

Notes

1. *Penneco Oil Company v. The County of Fayette, Pennsylvania*, ___ A.2d ___, Docket No. 18 C.D. 2010 (Pa. Commw. Ct. July 22, 2010).
2. *Huntley & Huntley, Inc. v. Borough Council of the Borough of Oakmont*, 964 A.2d 855 (Pa. 2009); *Range Resources-Appalachia, LLC v. Salem Twp.*, 964 A.2d 869 (Pa. 2009).