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Pennsylvania's Oil and Gas Act Amended to Require "Uniformity" with Respect to Municipal Ordinances Regulating Oil and Gas Operations

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On February 8, 2012, the Pennsylvania General Assembly passed House Bill 1950, which makes a series of reforms to the Commonwealth's Oil and Gas Act, 58 P.S. §§ 601.101 *et seq.* Among the reforms to the Act are provisions attempting to supply "uniformity" with respect to local municipal ordinances relating to oil and gas operations and to further clarify the scope of preemption under the Act. This alert discusses the uniformity reforms, and related provisions, in House Bill 1950.

Background - Preemption Under the Oil and Gas Act.

Currently, Section 602 of the Oil and Gas Act, 58 P.S. § 601.602, preempts local ordinances that attempt to regulate oil and gas wells *except* for ordinances adopted pursuant to the Municipalities Planning Code (the "MPC") or Flood Plain Management Act ("FPMA"). Even ordinances adopted pursuant to the MPC or FPMA have significant limitations. An ordinance adopted pursuant to the MPC or FPMA is preempted if (1) the ordinance "contain[s] provisions ... that accomplish the same purposes as set forth in" the Act; or (2) the ordinance "contain[s] provisions which impose conditions, requirements or limitations on the same features of oil and gas well operations regulated by" the Act.

The Pennsylvania Supreme Court, in a series of cases decided in 2009, concluded that municipal ordinances will be preempted by Section 602 of the Act when they comprehensively regulate oil and gas development, when they have the same "purposes" as the Act or when they impose conditions, requirements or operations on the same "features" of oil and gas operations as does the Act. *See Huntley & Huntley, Inc. v. Borough Council of the Borough of Oakmont*, 964 A.2d 855 (Pa. 2009), and *Range Resources – Appalachia, LLC v. Salem Township*, 964 A.2d 569 (Pa. 2009).

While *Huntley* and *Range* provided some guidance to industry and municipalities regarding the scope of preemption under Section 602 of the Act, the decisions also left many questions unanswered. Since those decisions, there has been a proliferation of inconsistent and varying "zoning" ordinances adopted by municipalities across the Commonwealth directed specifically at oil and gas development, many of which are overtly hostile to such development. Those ordinances, in turn, have spawned additional litigation over the scope and effect of Section 602 of the Act and, in some cases, have impeded oil and gas development in certain municipalities in the Commonwealth.

House Bill 1950 and Local Ordinances Relating to Oil and Gas Development.

Sections 3301 through 3309 of House Bill 1950 contain extensive revisions to the municipal ordinance provisions of the Oil and Gas Act. Notably, and explained further below, the legislation requires municipalities to allow drilling in *all* zoning districts, with one exception: municipalities can preclude siting of a gas well in a residential zone if a well site cannot be placed so that the wellhead is at least 500 feet from any existing building. The legislation also makes the Pennsylvania Public

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Utility Commission ("PUC") the arbiter of whether a local zoning ordinance is "reasonable." Prior iterations of the legislation had the Attorney General's office in that role.

The new legislation contains an expansive definition of "oil and gas operations," which include the following:

- well location assessment, including seismic operations, well site preparation, construction, drilling, hydraulic fracturing and site restoration associated with an oil or gas well of any depth;
- water and other fluid storage or impoundment areas used exclusively for oil and gas operations;
- construction, installation, use, maintenance and repair of: (i) oil and gas pipelines; (ii) natural gas compressor stations; and (iii) natural gas processing plants or facilities performing equivalent functions; and
- construction, installation, use, maintenance and repair of all equipment directly associated with the foregoing to the extent that: (i) the equipment is necessarily located at or immediately adjacent to a well site, impoundment area, oil and gas pipeline, natural gas compressor station or natural gas processing plant; and (ii) the activities are authorized and permitted under the authority of a federal or Commonwealth agency.

See House Bill 1950, § 3301.

Section 3302 of House Bill 1950 preserves the language of current Section 602 of the Act, 58 P.S. § 601.602, discussed above, and the preemption of local ordinances afforded thereby. Section 3303 of the Bill, however, adds an additional, and broad, preemption provision to the Act with respect to oil and gas operations regulated by environmental acts:

Notwithstanding any other law to the contrary, environmental acts are of Statewide concern and, to the extent that they regulate oil and gas operations, occupy the entire field of regulation, to the exclusion of all local ordinances. The Commonwealth by this section, preempts and supersedes the local regulation of oil and gas operations regulated by the environmental acts, as provided in this chapter.

See House Bill 1950, § 3303.¹ For purposes of Section 3303, "environmental acts" means "[a]ll statutes enacted by the Commonwealth relating to the protection of the environment or the protection of public health, safety and welfare, that are administered and enforced by [the Pennsylvania Department of Environmental Protection] or by another Commonwealth agency, including an independent agency, and all Federal statutes relating to the protection of the environment, to the extent those statutes regulate oil and gas operations."

In addition to both preserving and expanding the scope of preemption of local ordinances purporting to regulate "oil and gas operations," House Bill 1950 contains additional provisions mandating uniformity among municipal ordinances regulating such activities. Building upon, and consistent with, Section 603(i) of the MPC, 53 P.S. § 10603(i), House Bill 1950 requires that all local ordinances regulating oil and gas operations allow for the "reasonable development" of oil and gas resources. *See* House Bill 1950, § 3304. To that end, House Bill 1950 mandates that local ordinances regulating oil and gas operations:

¹For purposes of these provisions of the Act, a "local ordinance" is any ordinance or other enactment, *including* a provision of a home rule charter, adopted by a municipality that regulates oil and gas operations. *See* House Bill 1950, § 3301.

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- must allow well and pipeline location assessment operations, including seismic operations and related activities conducted in accordance with applicable federal and state laws and regulations relating to the storage and use of explosives;
- may not impose conditions, requirements or limitations on the construction of oil and gas operations that are more stringent than those imposed on construction activities for other industrial uses within the municipality;
- may not impose conditions, requirements or limitations on the heights of structures, screening and fencing, lighting or noise relating to permanent oil and gas operations that are more stringent than those imposed on other industrial uses or other land development within the zoning district where the oil and gas operations are located;
- must have a review period for permitted uses that does not exceed 30 days for complete submissions or that does not exceed 120 days for conditional uses;²
- must authorize oil and gas operations, other than activities at impoundment areas, compressor stations and processing plants, as *a permitted use in all zoning districts*. A municipality can, however, prohibit, or permit only as a conditional use, wells or well sites located in a *residential district* if the well site cannot be placed so that the wellhead is at least 500 feet from any existing building. Additionally, in a *residential district*, the following limitations apply: (i) a well site may not be located so that the outer edge of the well pad is closer than 300 feet from an existing building; *and* (ii) oil and gas operations, other than the placement, use and repair of oil and gas pipelines, water pipelines, access roads or security facilities, may not take place within 300 feet of an existing building;
- must authorize impoundment areas used for oil and gas operations as a permitted use in all zoning districts, subject to the limitation that the edge of any impoundment area may not be located closer than 300 feet from an existing building;
- must authorize natural gas compressor stations as a permitted use in agricultural and industrial zoning districts and as a conditional use in all other zoning districts, *if* the natural gas compressor building meets the following standards: (i) the building is located 750 feet or more from the nearest existing building or 200 feet from the nearest lot line, whichever is greater, unless waived by the owner of the building or adjoining lot; *and* (ii) the noise level does not exceed a noise standard of 60dbA at the nearest property line or the applicable standard imposed by federal law, whichever is less;
- must authorize natural gas processing plants as a permitted use in an industrial zoning district and as a conditional use in agricultural zoning districts *if* the natural gas processing plant building meets the same requirements applicable to natural gas compressor buildings, above;
- may impose restrictions on vehicular access routs for overweight vehicles *only* as authorized under 75 Pa.C.S. (relating to vehicles) or the MPC;

² As defined in House Bill 1950, a "permitted use" is a "use which, upon submission of a written notice to and receipt of a permit issued by a zoning officer or equivalent official, is authorized to be conducted without restrictions other than those set forth in [Section 3304 of House Bill 1950, relating to uniformity of local ordinances.]" See House Bill 1950, § 3301. In short, a "permitted use" is a use permitted by right in a zoning district, as opposed to a use permitted by a conditional use or special exception approval process. A zoning district typically provides for certain uses by right. Other uses are provided by special exception or conditional use. The uses permitted by special exception or by conditional use, while they are permissible and legitimate uses within the district, require additional scrutiny by the body granting their approval.

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- may not impose limits or conditions on subterranean operations or hours of operation of compressor stations and processing plants or hours of operation for the drilling of oil and gas wells or the assembly or disassembly of drilling rigs; and
- may not increase the setback distances set forth in the Oil and Gas Act. A municipality may, however, impose setback distances that are not regulated by or set forth in the Act so long as those setbacks are no more stringent than those for other industrial uses within the municipality.

In addition to mandating the uniformity described above, House Bill 1950 provides procedures for determining whether a municipal ordinance violates the MPC or the Oil and Gas Act. First, House Bill 1950 allows a municipality, *prior to the enactment* of a local ordinance, to make a written request to the PUC to review the proposed ordinance and issue an opinion on whether it violates the MPC or the Act. *See* House Bill 1950, § 3305(a). The PUC has 120 days from receipt of such a request to issue its opinion, which is purely “advisory in nature and not subject to appeal.” *Id.*

Second, an owner or operator of an oil and gas operation, or a person residing within the municipality, who is aggrieved by the enactment or enforcement of a local ordinance may request that the PUC review the ordinance and determine whether it violates the MPC or the Act. *See* House Bill 1950, § 3305(b). Participation in the PUC’s review is limited to the foregoing parties and the adopting municipality. Within 120 days of receiving a request for review by an aggrieved owner or operator of an oil and gas operation, or municipal resident, the PUC must issue an order determining whether the challenged ordinance violates the MPC or the Act. The PUC’s order is subject to *de novo* review by the Commonwealth Court. A petition seeking such review must be filed with the Commonwealth Court within 30 days of the date of service of the PUC’s order. *Id.*³

In addition to the PUC ordinance vetting process, House Bill 1950 provides that any person who is aggrieved by the enactment or enforcement of a local ordinance that violates the MPC or the Act may, notwithstanding any provision of 42 Pa.C.S. Chapter 85 (relating to actions against local parties), bring an action directly in Commonwealth Court to invalidate the ordinance or enjoin its enforcement. *See* House Bill 1950, § 3306. An aggrieved person may bring such an action without first obtaining review of the ordinance by the PUC. *Id.* The Commonwealth Court has the power to award attorneys fees and costs in connection with such an action. Specifically, if the Commonwealth Court determines that the local government enacted or enforced a local ordinance with willful or reckless disregard of the MPC or the Act, it may order the local government to pay the plaintiff reasonable attorneys fees and other reasonable costs incurred by the plaintiff in connection with the action. *See* House Bill 1950, § 3307. Alternatively, if the court determines that the action by the plaintiff is frivolous or was brought without substantial justification in claiming that the challenged ordinance is contrary to the MPC or the Act, it may order the plaintiff to pay the local government reasonable attorneys fees and costs incurred by the local government in defending the action. *Id.*

As an incentive for municipalities to review their existing ordinances and legislate accordingly, House Bill 1950 provides that if the PUC, the Commonwealth Court or Supreme Court issues an order that a local ordinance violates the MPC or the Act, the municipality becomes *immediately ineligible* to receive funds collected by the impact fee provisions of House Bill 1950. *See* House Bill 1950, § 3308. The municipality will remain ineligible to receive such funds until it repeals the challenged ordinance or the order is reversed on appeal.

³ House Bill 1950 provides that PUC opinions and orders under the foregoing provisions are not subject to 2 Pa.C.S. Chapter 5, Subchapter A (relating to the practice and procedure of Commonwealth Agencies), 65 Pa.C.S. Chapter 7 (relating to open meetings), or 66 Pa.C.S. Chapter 3, Subchapter B (relating to investigations and hearings.). *See* House Bill 1950, § 3305(c). Additionally, the PUC is given broad authority to hire staff, issue orders and adopt both temporary and permanent regulations to carry out its review functions. *See* House Bill 1950, § 3305(d).

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The provisions of House Bill 1950 apply *retroactively* to the enforcement of any local ordinances existing on the effective date of the Bill. *See* House Bill 1950, § 3309. Municipalities with existing ordinances relating to oil and gas operations are afforded 120 days from the effective date of the Bill to review their ordinances and bring them into compliance with the Act. *Id.*

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