

Commonwealth Court of Pennsylvania Strikes Down Zoning and Setback Waiver Provisions Of “Act 13” Oil and Gas Legislation

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A Pennsylvania Commonwealth Court ruling has struck down a cornerstone of Act 13, which set forth that municipalities must adopt uniform zoning provisions for the development of natural gas as a prerequisite to the receipt of funds collected from natural gas well “impact fees.” This recently passed oil and gas legislation was seen by many in the natural gas industry as vital to successful production and midstream activities in the region, because it brought some order to the dizzying patchwork of inconsistent and regularly changing local zoning ordinances throughout the Marcellus region, which had previously led to litigation, as well as added production and development costs. Additionally, the court overturned the Act 13 portions authorizing the Department of Environmental Protection to grant a waiver of certain setback requirements from water bodies and wetlands, further complicating natural gas well development issues.

This ruling is extremely important to those involved in the production of the Marcellus shale in Pennsylvania, including energy producers, utilities, pipeline companies, investors or financiers of the natural gas industry, since local zoning and setback issues can have ramifications on the cost, timing, planning and potential feasibility of all phases of natural gas production.

Majority Opinion Overturning the Statute’s Zoning Provisions

On July 26, 2012, a divided Commonwealth Court of Pennsylvania judicial panel struck down the Act 13 provisions that created statewide uniform zoning for purposes of oil and natural gas development in Pennsylvania as unconstitutional by a vote of 4 – 3. See Order. Under the ruling, captioned as *Robinson Township, et al v. Commonwealth of Pennsylvania, et al*, No. 284 M.D. 2012, the court held that “the Commonwealth is permanently enjoined from enforcing 58 P.S. § 3304 and its provisions,” including any remaining provisions of Act 13 that otherwise enforce § 3304. See *id.*

The court's rationale was that Act 13's uniform zoning provisions are unconstitutional, because they "do not serve the police power of local zoning ordinances, relating to consistent and compatible uses in the enumerated districts of a comprehensive zoning plan[.]" Opinion, at p. 35.

In the majority opinion's view, "[b]ecause 58 Pa. C.S. §3304 requires all oil and gas operations in all zoning districts, including residential districts, as a matter of law, [it] violates [constitutional] substantive due process because it allows incompatible uses in zoning districts and does not protect the interests of neighboring property owners from harm, alters the character of the neighborhood, and makes irrational classifications." *Id.*

Based on this analysis, the court granted the Petitioners' Motion for Summary Relief, declared 58 Pa C.S. §3304 unconstitutional and null and void, and permanently enjoined the Commonwealth from enforcing it. *Id.* at 36.

Dissenting Opinion Contesting the Overturning of the Statute's Zoning Provisions

The dissenting opinion, which could serve as the template for future oppositions to this ruling, vehemently disagreed with the majority's legal conclusions, as well its characterizations of issues relating to zoning of the oil and gas industry as a whole.

First, purportedly "incompatible uses" are contemplated and allowable within a comprehensive zoning framework. *See generally, id.* at PKB 2 – 5. Thus, it explained, if the majority's holding were "accepted, such a rule of law would call into question, if not sound the death knell for, zoning practices that heretofore have recognized the validity of incompatible uses—*e.g.*, the allowance of a pre-existing nonconforming use and authority of municipalities to grant a use variance." *Id.*, at PKB-5.

The dissent also attacked the majority's attempt to tie its ruling to constitutional substantive due process protections. Specifically, "the desire to organize a municipality into zones made up of compatible uses is a goal, or objective, of comprehensive planning. . . . But it is not an inflexible constitutional edict." *Id.* at PKB-5 -6 (internal citations omitted). It further explained that "Section 3304 of Act 13 is, in essence, a zoning ordinance. Substantive due process cases addressed to local zoning ordinances tend to involve challenges to ordinances as too restrictive of the citizenry's right to use their property." In contrast, the petitioners were challenging the law as not

being restrictive enough of the use of property rights, which is inconsistent with the larger body of constitutional zoning precedent.

Additional Holding – the Entire Judicial Panel Overturns the Statute’s Provisions Permitting the Waiver of Setback Requirements

The court also held that Section 3215(b)(4) of Act 13, which authorized the DEP to grant a waiver of certain setback requirements from water bodies and wetlands, is null and void, due to a lack of sufficient guidance by the General Assembly to the DEP regarding proper waiver standards. All judges joined in this portion of the ruling without dissent.

The Pending Appeal of the Opinion

Pennsylvania Governor Tom Corbett announced on July 27, 2012 that he has appealed this decision and the appeal will go directly to the Pennsylvania Supreme Court. The state has also filed a motion for expedited review of this appeal by the PA Supreme Court, requesting that they hear this issue during their October term in Pittsburgh. Although the Commonwealth Court prevented the natural gas industry from intervening in the case at this lower level, members of the industry would be able to participate in the Supreme Court appeal process through the filing of amicus briefs. Our attorneys have extensive experience with these forms of advisory, or “friend of the court,” submissions and have found they can be very influential to the Supreme Court during its deliberative processes.

You can access the full opinion [here](#).

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