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Local Fracking Ordinances and the Environmental Rights Act

Frederick v. Allegheny Twp. Zoning Hearing Bd., 2018 Pa. Commw. LEXIS 593 (Commw. Ct. Oct. 26, 2018)

In 2010, Allegheny Township enacted Zoning Ordinance 01-2010, which made oil and gas development a permitted use in all zoning districts within the Township, subject to various conditions and standards. In 2014, the Township issued a “zoning compliance permit” to CNX to develop an unconventional gas well on a 330-acre farm, which was met by local residents filing a substantive validity challenge to the Ordinance arguing that the well is incompatible with an agricultural-residential use.

After testimony from residents and experts, the Zoning Board rejected the challenge as it was based solely on the premise that the Ordinance was invalid. The Zoning Board not only concluded that the Ordinance did not violate substantive due process, but that it promoted the public health, safety, and welfare of the Township. The Objectors appealed to the trial court, which affirmed the Zoning Board’s decision finding that the Objectors did not meet their burden to show that Ordinance was unreasonable, arbitrary, or not substantially related to the police power or interests that it purports to serve. The residents appealed to the Commonwealth Court.

On appeal, the Objectors raised three issues, being whether: (1) the Ordinance violates substantive due process; (2) the permit to develop an unconventional gas well violates the Environmental Rights Amendment ("ERA"); and (3) permitting oil and gas development in every zoning district violates Pennsylvania’s Municipal Planning Code ("MPC"). Ultimately, the Court affirmed the order of the Zoning Board, the validity of the Ordinance and that CNX complied with the Ordinance.

The Commonwealth Court concluded that the Objectors failed to establish that the Ordinance violated substantive due process as they presumed without supporting evidence that drilling operations, by their very nature, adversely affected their property rights. Conversely, the Court found that the Ordinance “preserved the protected ‘rights of property owners’ to realize the value of their mineral deposits but without causing cognizable injury to their neighbors.”

Next, the Court concluded that the Ordinance does not violate the ERA which provides that “the people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment” and that the “Commonwealth shall preserve and maintain them for the benefit of all the people.”

The Court went on to elaborate that “[i]t is axiomatic that a zoning ordinance must balance the public interests of the community with the due process rights of private property owners”; however, the Township is under no obligation to enact land use regulations and it can only exercise powers that have been expressly conferred upon it by the MPC and Township Code. As such, the Township lacks “the power to replicate the environmental oversight that the General Assembly has conferred upon the DEP and other state agencies.” Ultimately, the Court summarized that the Township may only use zoning powers to regulate *where* mineral extraction takes place, but not *how* it is done as drilling activity does not unreasonably impair rights under the Environmental Protection Agency ("EPA") and is under the purview of the Commonwealth to regulate. Consequentially, local government decisions concerning where oil and gas operations take place must be affirmed unless clearly arbitrary and unreasonable.

Finally, the Court concluded that the Objectors did not demonstrate that the Ordinance violated the MPC. The Objectors claimed that the MPC required the Township to undertake environmental, health, and safety studies to satisfy its duties under the ERA; however, the Court determined that this assertion is without foundation.

Judge McCullough and Judge Ceisler each authored dissenting opinions. Judge McCullough called for remand as the trial court erroneously dismissed the principles set forth in *Robinson Township v. Commonwealth*, 623 Pa. 564, 83 A.3d 901 (Pa. 2013), and set forth that the burden should be on the Township to prove that the Ordinance is “narrowly tailored to effectuate its economic interests” and “achieve the objective without an unreasonable degradation of the environment.” Whereas, Judge Ceisler ultimately disagreed with the majority’s conclusion that the Ordinance does not violate the ERA as it fails to comport with the Township’s duties as environmental trustee.

While this decision provides some clarity as to what test a court should apply in deciding whether local government action violates the ERA, the Court’s fact-specific analysis leaves questions as to how to apply the decision going forward. Further, based upon the strength of the dissents, the Pennsylvania Supreme Court may ultimately take up this issue.



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