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Pennsylvania Commonwealth Court Upholds Fayette County Ordinance Affecting Oil and Gas Development

On July 22, 2010, the Pennsylvania Commonwealth Court upheld a lower court determination that a county zoning ordinance that allowed oil and gas development as a permitted use in some areas but required special exception approval in other areas within Fayette County was not pre-empted by the Pennsylvania Oil and Gas Act (the "Act"). See *Penneco Oil Co., Inc. v. County of Fayette, Pennsylvania*, -- A.2d --, Docket No. 18 C.D. 2010 (Pa. Commw. Ct. June 22, 2010).

In May of 2008, Penneco Oil Company, Inc., Range Resources-Appalachia, LLC, and the Independent Oil & Gas Association of Pennsylvania filed a lawsuit against Fayette County and the county agency responsible for zoning administration claiming that the Fayette County zoning code provisions applicable to oil and gas development were preempted by the Act. Both sets of parties (plaintiffs and defendants) filed motions with the trial court seeking judgment in their favor. The trial court issued its two-and-a-half-page opinion and one-page order in December of last year granting the motion by the defendants and finding that the ordinance was not preempted by the Act. The plaintiffs filed an appeal to the Commonwealth Court.

According to the Commonwealth Court, the Fayette County ordinance allowed oil and gas wells as of right in two of the six zoning districts in the county. In the other four zoning districts, oil and gas wells were permitted as special exceptions. In order to obtain that special exception, an oil and gas developer was required to comply with the ordinance's general requirements for special exceptions (cited but not identified in the Court's decision) and four requirements applicable only to oil and gas wells: (1) wells may not be located within the flight path of an airport runway; (2) wells may not be located closer than 200 feet of a residence or 50 feet of a property line or right-of-way; (3) fencing and shrubbery must surround the pump head and support frame; and (4) the zoning hearing board may attach additional conditions to protect the public's health, safety, and welfare, which conditions could include, but not be limited to, increased setbacks. Furthermore, the ordinance required any developer to obtain a zoning certificate from the zoning officer prior to commencement of development of a structure or building.

The gas operator plaintiffs claimed on appeal that the ordinance was preempted for five reasons: (1) the ordinance allows oil and gas wells only by special exception in some zoning districts where surface or deep mining is permitted as of right; (2) the ordinance gives the zoning hearing board discretion to impose conditions for oil and gas wells that are preempted by the Act; (3) the ordinance requires a costly well permit, something also addressed by the Act; (4) the ordinance does not guarantee issuance of a special exception permit even if a developer meets all of the special exception requirements; and (5) the purposes of the ordinance are the same as the purposes of the Act. According to plaintiffs, any one of the forgoing five reasons was sufficient to find the ordinance to be preempted. The Court disagreed.

Addressing the first and second arguments together, the Court rejected the plaintiffs' arguments, finding that the county's decision to make oil and gas wells a special exception use in some districts was appropriate because, in the court's view, the specific special exception requirements were not directed at technical aspects of well functioning or matters ancillary thereto. Citing to the Pennsylvania Supreme Court's *Oakmont Borough* decision (*Huntley & Huntley, Inc. v. Borough Council of the Borough of Oakmont*, 964 A.2d 855 (Pa. 2009)), the Commonwealth Court then held that the restrictions merely apply to a well's location within the county and "preserve[e] the character of residential neighborhoods, and encourage[e] beneficial and compatible land uses." *County of Fayette*, at p. 15.

The Court similarly turned aside the fourth argument advanced by plaintiffs. According to the Court, the fact that the zoning hearing board may impose additional conditions on an oil and gas developer is not equivalent to the ordinance in the *Salem Township* case (*Range Resources-Appalachia, LLC v. Salem Twp.*, 964 A.2d 869 (Pa. 2009)) because the Fayette County ordinance does not set up the specified requirements as the "minimum terms acceptable" or expressly state that the zoning hearing board "may" issue the permit once the requirements are met, leaving discretion not to issue that permit. The Court then went further and found that this 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 after compliance with the applicable zoning regulations." *County of Fayette*, at p. 15.

Likewise, the Court rejected plaintiffs' argument that the costly requirement to obtain a zoning certificate was a duplication of, or preempted by, the

Act's permitting process. After noting that there was nothing in the record regarding the cost for the certificate, the Court rejected this argument on the basis that the certificate is a general requirement applicable to all development in the county. "The effect of [the certification process] is ... clearly to control the orderly development and use of land in a manner consistent with the Zoning Ordinance's requirements." *Id.*, at p. 17.

Finally, the Court rejected the plaintiffs' preemption claim that the purposes of the ordinance duplicated those of the Act. Even though plaintiffs pointed to several provisions of the ordinance that were identical or nearly identical to the purposes of the Act, the Court determined the "overlap" in purpose not to be fatal to the application of the ordinance to oil and gas development. Distilling the "salient objectives" from the text of the ordinance, the Court found that the zoning ordinance's "restrictions" on oil and gas development are "preserving the character of residential neighborhoods, as well as each zoning district, and encouraging beneficial and compatible land uses." *Id.*, at p. 18. Based on that distillation, the Court then concluded that the restrictions "do not accomplish the same purposes as set forth in" the Act. *Id.*, at p. 19. In concluding its decision, the Court stated that the Fayette County ordinance is one of general applicability and not a comprehensive regulatory scheme directed solely to the oil and gas industry.

As both sides still have time to seek rehearing in the Commonwealth Court or file a petition for review with the Supreme Court, it is too early to say whether this decision will stand or what implications it will have, if any, for oil and gas development within the Commonwealth.

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