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## Commonwealth Court Invalidates Local Ordinances that Attempt to Regulate Oil and Gas Development

In two recent cases – *Great Lakes Energy Partners v. Salem Township*<sup>1</sup> and *Huntley & Huntley, Inc. v. Borough of Oakmont*<sup>2</sup> – the Commonwealth Court of Pennsylvania established binding case law which prevents local governments from regulating on a municipality-by-municipality basis the same “features” of oil and gas development that the Pennsylvania Oil and Gas Act regulates.<sup>3</sup> The Court’s decisions are significant and timely, given the increase in attempts by local townships and municipalities over the past several years to regulate and require permits for natural gas and coalbed methane activities. As natural gas and coalbed methane development in Pennsylvania continues to respond to the increasing demand for valuable energy resources, the Court’s decision helps lift redundant regulatory barriers imposed by individual municipalities in an industry pervasively regulated by the state.

### Pennsylvania Oil and Gas Act

Municipalities often attempt to enact land use ordinances pursuant to the Pennsylvania Municipalities Planning Code (“MPC”)<sup>4</sup> which include restrictions on oil and gas development. Not surprisingly, these restrictions may vary significantly, based on specific local interests. If each municipality regulated oil and gas separately and distinctly, developers could be subject literally to thousands<sup>5</sup> of regulatory regimes throughout the Commonwealth, in addition to the statewide requirements under the Oil and Gas Act.

Section 602 of the Oil and Gas Act<sup>6</sup> seeks to prevent piecemeal regulation of oil and gas development. Section 602 provides that “all local ordinances and enactments purporting to regulate oil and gas well operations regulated by this act are hereby superseded.”<sup>7</sup> In addition, “no ordinances and enactments” adopted pursuant to the MPC “shall contain provisions which impose conditions, requirements or limitations on the same features of oil and gas well operations regulated by this act or that accomplish the same purposes as set forth in this act.”<sup>8</sup>

### Salem Township

In *Salem Township*, an *en banc* panel of the Court, adopting the “well-reasoned analysis” of the Westmoreland County Court of Common Pleas (“trial court”),<sup>9</sup> stated that specific oil and gas provisions of the township’s ordinance “regulated aspects of oil and gas operations

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<sup>1</sup> *Great Lakes Energy Partners v. Salem Township*, \_\_ A.2d \_\_, Docket No. 1866 C.D. 2006, 2007 Pa. Commw. LEXIS 459 (Pa. Cmwlth., August 9, 2007).

<sup>2</sup> *Huntley & Huntley, Inc. v. Borough of Oakmont*, \_\_ A.2d \_\_, Docket No. 2406 C.D. 2006, 2007 Pa. Commw. LEXIS 404 (Pa. Cmwlth., July 27, 2007).

<sup>3</sup> Act of December 19, 1984, P.L. 1140, as amended, 58 P.S. §§ 601.101-601.605.

<sup>4</sup> Act of July 31, 1968, P.L. 805, as amended, 53 P.S. §§ 10101-11202.

<sup>5</sup> See PENNSYLVANIA MANUAL 6-3 (2005) (“Local government in Pennsylvania is a mosaic of 5,148 individual units.... As of 2005, there were 67 counties, 56 cities, 961 boroughs, 1 incorporated town, 1,547 townships (91 first class, 1,456 second class), 501 school districts and 2,015 authorities (active and inactive).”).

<sup>6</sup> 58 P.S. § 601.602.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> See *Great Lakes Energy Partners v. Salem Township*, No. 8126 of 2005, 2006 Pa. D. & C. LEXIS 229 (Pa. Westmoreland Co. C.P., Sept. 8, 2006). Pursuant to Commonwealth Court Internal Operating Procedure 410, the trial court’s opinion will be reported as the opinion of the Commonwealth Court and will therefore have precedential value. See, e.g., *West Goshen Township v. Crater*, 538 A.2d 952, 954 (Pa. Cmwlth. 1988) (“An identical provision was considered by the Delaware County Court of Common Pleas in *Scott v. Fox*, 63 Del. 401 (1976). Since the Commonwealth Court later adopted the trial court’s opinion on appeal in *Scott v. Fox*, 36 Pa. Commonwealth Ct. 88, 387 A.2d 965 (1978), the *Scott* opinion has precedential value before this Court.”).

that are preempted by the state legislation.<sup>10</sup> In this case, oil and gas developers and the trade association to which they belong challenged the township's ordinance in the trial court. The provisions of the ordinance imposed well permitting requirements, slope limitations on access roads, siting limitations, and site restoration deadlines. It also regulated the impact of wells on water quality and quantity and prescribed certain activities after well drilling and abandonment. In comparison, the Oil and Gas Act and the regulations promulgated thereunder by the Pennsylvania Department of Environmental Protection ("DEP") regulate each of these features.<sup>11</sup>

The trial court found that the township's ordinance not only expressed the same purpose of and regulated the same features as the Oil and Gas Act, the ordinance actually imposed more stringent requirements than the Oil and Gas Act. The court therefore invalidated the ordinance as preempted by state law, reasoning "that the comprehensive nature of the statutory scheme regulating oil and gas well operations reflects a need for uniformity so that the purposes of the legislature can be accomplished."<sup>12</sup> The trial court also stated that the Oil and Gas Act preempted similar attempts to regulate coalbed methane development because coalbed methane qualified under the definition of "gas" in the state Act.<sup>13</sup>

On appeal, the Commonwealth Court adopted<sup>14</sup> the trial court's conclusions and reasoning. By adopting the trial court's analysis, Commonwealth Court (derivatively) held that (1) each of the oil and gas regulations in the township's ordinance "transgressed the state regulations concerning the same aspects of oil and gas operations"; and (2) coalbed methane harvesting activities "fall within the purview of the state Act."<sup>15</sup>

## Huntley

In *Huntley*, an *en banc* panel of Commonwealth Court also concluded that the Oil and Gas Act preempted local legislation that attempted to condition the location

of well sites.<sup>16</sup> In this case, the oil and gas developer sought a conditional use permit from the Borough of Oakmont to drill and operate several natural gas wells in a residential zoning district, even though the developer already obtained DEP's approval of a well-drilling permit for the well site. Under the borough's ordinance, developers were required to obtain conditional use approval for the "extraction of minerals" in residential districts. At the hearing, the borough council determined that oil and gas development did not constitute the "extraction of minerals" under the borough ordinance. Therefore, the council "lacked jurisdiction" to grant a conditional use permit and thereby blocked the development of the wells at the site approved by DEP within the borough's corporate limits. Council also concluded that the Oil and Gas Act did not preempt the borough's ordinance. The Court of Common Pleas of Allegheny County agreed.

On appeal, the Commonwealth Court reversed. The Court noted that "if the ordinance in question, adopted by the Borough under the authority of the MPC, does relate to features that the Oil and Gas Act already addresses, then the ordinance would be invalid because of the General Assembly's express preemption."<sup>17</sup> Applying that principle, the Court concluded that the conditional use ordinance, by regulating the location of the well site, addressed the feature of Section 205 of the Oil and Gas Act that specifically regulates the location of wells. The Court noted, however, that the Oil and Gas Act "does not preempt all local regulation,"<sup>18</sup> and that "there may be features of the Oil and Gas Act that do not preempt local regulation under the MPC, but location is not one of those features."<sup>19</sup>

## Impact of the Court's Decisions

Commonwealth Court has now established case law that should prevent duplicative and potentially inconsistent regulation of oil, natural gas, and coalbed methane development in the state. Implicit in the Court's decisions is the recognition that piecemeal regulation by each municipality substantially increases

<sup>10</sup> 2007 Pa. Commw. LEXIS 459, at \*5-7.

<sup>11</sup> See, e.g., 58 P.S. § 601.201(a) (permits); 58 P.S. § 601.206(b) (access roads); 25 Pa. Code § 78.51(c) (impact on water sources); 58 P.S. § 601.210(a) (well construction and plugging); 25 Pa. Code § 78.62(a) (water treatment); 58 P.S. § 601.206(d).

<sup>12</sup> *Salem Township* (trial court opinion), No. 8126 of 2005, 2006 Pa. D. & C. LEXIS 229, at \*11.

<sup>13</sup> *Id.* at \*12-13.

<sup>14</sup> The court clarified an error in the trial court's opinion that did not affect the analysis.

<sup>15</sup> *Salem Township* (Commonwealth Court opinion), \_\_ A.2d \_\_, Docket No. 1866 C.D. 2006, 2007 Pa. Commw. LEXIS 459, at \*6-7.

<sup>16</sup> *Huntley*, \_\_ A.2d \_\_, Docket No. 2406 C.D. 2006, 2007 Pa. Commw. LEXIS 404, at \*9.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at \*8.

<sup>19</sup> *Id.* at \*11.

the cost to produce valuable fossil fuels and makes business planning far more difficult. Also implicit in the Court's ruling is that the General Assembly never intended that oil, natural gas, and coalbed methane developers comply with a great many different programs with uncertain permit review periods and inconsistent interpretations of requirements by local officials and hearing boards.

In response to the Court's opinions, however, local government officials may attempt to draw from the language in *Huntley*, which suggests that not all local ordinances will be preempted by the Oil and Gas Act. The willing municipality may attempt to enact carefully worded ordinances which constitute *de facto* local regulation of oil and gas development even if, on their face, they do not appear to impact the same "features" of oil and gas development that the Oil and Gas Act addresses. Developers should therefore be prepared to challenge these ordinances using *Salem Township* and *Huntley* as authority.

The municipalities have thirty days from the date of their respective orders to file a discretionary appeal with the Supreme Court of Pennsylvania. For more information, contact Walter A. Bunt, Jr., Esq. or Kenneth S. Komoroski, Esq.

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