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## Oil and Gas Regulation at the Municipal Level: Preserved or Preempted? The Pennsylvania Supreme Court Upholds Preemption of Township Regulation of Oil and Gas Activity

On February 19, 2009, the Supreme Court of Pennsylvania rendered its decision in a key case litigated by K&L Gates LLP (“K&L Gates”), the matter of *Independent Oil and Gas Association of Pennsylvania, et al v Salem Township, Commonwealth of Pennsylvania*, No. 29 WAP 2008 (“*Salem Opinion*”). In this matter, a group of oil and gas producers and a trade association of such producers represented by Walter A. Bunt, Jr., George A. Bibikos, Kenneth S. Komoroski and Michael J. Ross of K&L Gates challenged the validity of a local oil and gas ordinance enacted by Salem Township, Pennsylvania in late 2005.<sup>1</sup>

The case focused on the interplay between the Salem Township ordinance and the Pennsylvania Oil and Gas Act of Dec. 19, 1984, P.L. 1140, No. 223, *as amended*, 58 P.S. § 601.101 *et seq.* (the “Act”), which in pertinent part provides as follows:

Except with respect to ordinances adopted pursuant to the act of July 31, 1968 (P.L. 805, No. 247), known as the Pennsylvania Municipalities Planning Code, and the act of October 4, 1978 (P.L. 851, No. 166), known as the Flood Plain Management Act, all local ordinances and enactments purporting to regulate oil and gas well operations regulated by this act are hereby superseded. No ordinances or enactments adopted pursuant to the aforementioned acts 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. The Commonwealth, by this enactment, hereby preempts and supersedes the regulation of oil and gas wells as herein defined.  
58 P.S. § 601.602.

The oil and gas producers argued throughout the litigation and before the Supreme Court that Salem Township’s ordinance, which was adopted pursuant to the Pennsylvania Municipalities Planning Code (“MPC”), contravened this clear language because it attempted to regulate the same features of oil and gas operations regulated by the Act and accomplish the same regulatory purposes already accomplished by the Act. *See Salem Opinion*, page 8. The producers pointed out that the challenged ordinance was, in essence, a miniature Oil and Gas Act applicable within the bounds of the municipality. *Id.* It regulated such matters as well site construction, use, and restoration; well head construction and plugging; and water treatment and waste disposal, among a number of other areas clearly regulated by the Act. *See id.*, page 3. It further applied a local permitting scheme to oil and gas development in the Township, and it enforced its provisions with penalties

including fines and possible imprisonment. *Id.* The producers argued that in light of such provisions and the fact that the ordinance was directed solely at the oil and gas industry (in other words, it was not an ordinance of general applicability that happened to apply to the oil and gas industry, among others), the Salem ordinance clearly sought to accomplish the same purposes as the Act.<sup>2</sup> *See id.*, pages 8-9.

Salem Township argued, on the other hand, that its ordinance was a permissible exercise of the municipal power, and that, in spite of the language above, the Act preempts only local regulations of a “technical” nature and only after a three-step preemption analysis. *See id.*, pages 6-7. As the Court noted, the Township did not argue that its ordinance sought to achieve some purpose other than those already achieved by the Act. *Id.*, page 13.

The position of the oil and gas producers prevailed in the Court of Common Pleas of Westmoreland County, where the producers won summary judgment, and during the ensuing appeal in the Commonwealth Court, where that court unanimously upheld the trial court’s entry of summary judgment. The Supreme Court’s decision in the *Salem* matter, along with its simultaneously issued decision in the case of *Huntley & Huntley, Inc. v. Borough Council of the Borough of Oakmont*, No. 30 WAP 2008 (“*Huntley Opinion*”), represents the first time the Court has had to consider the scope of preemption under the Act.

By a unanimous vote, the Supreme Court’s opinion in the *Salem* matter favored the oil and gas producers. It agreed with the producers’ argument that the scope of preemption under the Act is much broader than the interpretation advanced by Salem Township (embracing far more than local regulation of a “technical” nature), agreed that the Township ordinance fell within this scope by overlapping the Act in both regulatory subject matter and purpose,<sup>3</sup> and held the Township oil and gas ordinance preempted and invalid in its entirety. *See Salem Opinion*, pages 10-14. The Supreme Court decision, authored by Mr. Justice Saylor, described the challenged ordinance as an impermissible “attempt by the Township to enact a comprehensive regulatory scheme relative to oil and gas development within the municipality.” *Id.*, page 10. The Court explained that the ordinance overlapped

the provisions of the Act and, in some instances, actually imposed requirements more stringent than the regulations included in the Act, thus acting as an “obstacle to the legislative purposes underlying the Act.”<sup>4</sup> *Id.*, page 14. For all of these reasons, and a number of others,<sup>5</sup> the Supreme Court held the Salem Township ordinance invalid and upheld the ruling of the Commonwealth Court. *Id.*, page 14.

In reaching its ruling, the Supreme Court discussed at length and drew heavily from the well-reasoned and comprehensive opinion written by President Judge Daniel J. Ackerman of the Court of Common Pleas of Westmoreland County when he ruled on the parties’ motions for summary judgment during the trial court proceedings. Like Judge Ackerman, the Commonwealth’s highest court noted that Salem Township’s regulatory goals may be “laudable ends, but they are addressed by the Act,” *id.*, page 14, and thus preempted.

In the *Huntley* matter, the Court focused on the narrow question of whether a locality may designate zones in which oil and gas production may occur, or whether such action is barred by the Act. The zoning ordinance at issue in the *Huntley* matter, at least according to the enacting locality’s interpretation, did not permit oil gas development in R-1 residential zoning districts without prior approval by the local zoning hearing board. *See, e.g., Huntley Opinion*, pages 4-5. In *Huntley*, as in *Salem*, the Court requested that DEP file a brief stating its position on the issues involved. Although DEP strongly opposed the aggressive regulation of Salem Township’s ordinance, in the *Huntley* matter it voiced the opinion that the designation of location of wells within zoning districts is not a subject falling within the purview of the Act and thus not a matter preempted by the Act. *Id.*, page 16. The Supreme Court largely agreed with DEP’s position, noting that an administrative agency is entitled to some deference in interpreting the statutes it is charged with enforcing. *Id.* The *Huntley* Court was careful to state, however, that its holding was a narrow one. The Court did not mean to suggest that a municipality “could permit drilling in a particular district but then make that permission subject to conditions addressed to features of well operations regulated by the Act.” *Huntley Opinion*, page 19 n.11. The Court also expressed in its decision precisely the view expressed in its *Salem* decision –

that the Act's preemptive scope is "quite broad."<sup>6</sup> *Id.*, page 14.

Throughout the course of the litigation, Salem Township and various other parties expressed the hope that the Supreme Court would provide further guidance to municipalities as to what is and is not preempted by the Act. The Court appears to have done so. Pursuant to the language of the Act and the Supreme Court's recent decisions construing it, municipalities clearly may not seek to adopt and apply an oil and gas regulatory program. To do so is potentially to seek to achieve the same purposes as

the Act. MPC-adopted regulations that share the purposes of the Act are preempted according to the language of the Act and the Court's construction of it. Further, local regulations should not be applied to oil and gas development to the extent they overlap the features of oil and gas operations that are subject to regulation under the Commonwealth's Oil and Gas Act.<sup>7</sup> Such regulations bearing on the features of oil and gas development regulated by the Act should be preempted under the second test for preemption set forth in the Act.

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<sup>1</sup> K&L Gates represented the oil and gas producers at every stage of this litigation, from trial court to Supreme Court.

<sup>2</sup> The Pennsylvania Department of Environmental Protection ("DEP"), the administrative agency with the responsibility of implementing the Act and overseeing oil and gas production in the Commonwealth, was asked by the Court to file a brief in the *Salem* matter setting forth its position on the issues involved. The DEP's position with respect to Salem Township's ordinance largely duplicated that of the producers. See *id.*, pages 9-10.

<sup>3</sup> See also *Huntley Opinion*, page 14 (holding the Act preempts MPC-adopted ordinances overlapping the Act in purpose or subject matter – the Act contains "two independent proscriptive components, both of which must be given effect").

<sup>4</sup> This direct conflict between the Salem Township ordinance and the Act established an entirely independent basis for the preemption of the ordinance. As the Court explained at length in the *Huntley* decision, preemption may be express in a law, implied by a law, or by conflict (if a local enactment conflicts with a state law). See *Huntley Opinion*, pages 13-14. The Act provides a basis for express preemption because the law itself states that certain local ordinances are invalidated by it. *Id.* Salem's ordinance was preempted on this basis, and also because, as the Court noted, it ran into direct conflict with the provisions of the Act.

<sup>5</sup> The Court seemed particularly concerned that Salem Township's ordinance gave the Township "virtually unbridled discretion" to deny would-be oil and gas producers the right to develop in Salem Township, even though the Act itself clearly seeks to encourage such development. See *Salem Opinion*, page 12.

<sup>6</sup> The *Huntley* decision is also notable for clarifying that an earlier Commonwealth Court decision which read the then-existing Act's preemption provision to preserve much local regulation of oil and gas operations, *Nalbone v. Borough of Youngsville*, 522 A.2d 1173 (Pa. CmLth. 1987), is no longer the prevailing law. The Court held that the current preemption language of the Act, which was amended following the *Nalbone* decision to take the form noted above, "substantially curtailed" the permissibility of local regulation of the oil and gas industry. See *Huntley Opinion*, pages 14-15, n.8.

<sup>7</sup> The Court noted in its *Salem* decision that simply because a type of regulation is applied to non-oil and gas industries does not mean that it may equally be applied to the oil and gas industry in light of the specific preemption provision of the Act. See *Salem Opinion*, page 10 n.6, page 12 n.8.