

*STUDENT ESSAY COMPETITION  
WINNER*

FRACTURED PENNSYLVANIA:  
AN ANALYSIS OF HYDRAULIC  
FRACTURING, MUNICIPAL  
ORDINANCES, AND THE PENNSYLVANIA  
OIL AND GAS ACT

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## INTRODUCTION

The use of hydraulic fracturing methods for natural gas extraction in the Marcellus Shale formation in Pennsylvania has sharply divided communities. The Commonwealth of Pennsylvania has embraced drilling opportunities in the Marcellus Shale formation as an economic godsend for its high unemployment woes and dwindling tax base. In contrast, many local townships are concerned about potential contamination of drinking water, farmland, and wilderness reserves. To this end, as of 2010, roughly 120 townships and municipalities had introduced local ordinances to limit or restrict oil and gas drilling in local townships.<sup>1</sup>

These local ordinances, however, may infringe on Pennsylvania state law. In Pennsylvania, the debate about hydraulic fracturing has led to conflicting legislation. At the state level, Pennsylvania has enacted laws and regulations under the Pennsylvania Oil and Gas Act of 1984 that regulate the natural gas industry but generally allow hydraulic fracturing operations.<sup>2</sup> But at the local level, some townships are taking affirmative steps to limit or ban hydraulic fracturing in their communities.<sup>3</sup> Municipalities claim authority to do so under the Municipal Planning Code (MPC), citing the zoning authority, environmental protection power, and the general welfare clauses of the MPC.<sup>4</sup> But mineral and gas leaseholders contend that these zoning ordinances are unconstitutional because they deprive leaseholders of their constitutional property. They also claim that the zoning ordinances are beyond the scope of powers granted to municipalities because the Commonwealth has already reserved authority on this matter via the Pennsylvania Oil and Gas Act. In

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<sup>1</sup> Steve Mocarisky, *Lehman Drilling Limits Urged*, TIMES LEADER (Wilkes-Barre, Pa.) (Oct. 19, 2010, 9:27 PM), <http://www.timesleader.com/stories/Lehman-drilling-limits-urged,98480>.

<sup>2</sup> See Pennsylvania Oil and Gas Act of 1984, 58 PA. STAT. ANN. § 601.101–.605 (West 2010), *repealed by* 58 PA. CONS. STAT. § 3201–74 (2012).

<sup>3</sup> See, e.g., Mari Margil & Ben Price, *Pittsburgh Bans Natural Gas Drilling*, YES! MAGAZINE (Nov. 16, 2010), <http://www.yesmagazine.org/people-power/pittsburg-bans-natural-gas-drilling>.

<sup>4</sup> See 53 PA. STAT. ANN. §§ 10601 (zoning), 10604(1) (general welfare and environmental protection). The MPC, 53 PA. STAT. ANN. §§ 10101–11202, governs all Pennsylvania municipalities except Pittsburgh and Philadelphia, which have home rule charters. See Robert S. Ryan, PENNSYLVANIA ZONING LAW AND PRACTICE § 2.1.4 (2001) (citing same).

2009, the Pennsylvania Supreme Court decided two major cases that provided some guidance on the interplay between the MPC and the Pennsylvania Oil and Gas Act, but the decisions left several questions unanswered.<sup>5</sup>

The central question of this article is whether the local ordinances of Pennsylvania townships and municipalities effectively circumvent the Pennsylvania Oil and Gas Act even though the ordinances effectively control where and how a well can be placed and operated. A brief analysis of the state courts' interpretation of the relevant provisions and subsequent amendments to the Oil and Gas Act will follow.

Part I will describe the basic background of natural gas wells, hydraulic fracturing, and the potential environmental risks associated with the process, which provides an important foundation for understanding the context of the parties' positions and the courts' decisions. Part II will outline the basic rights and responsibilities of landowners and leaseholders as contained in the Pennsylvania Oil and Gas Act, which provide the starting point of analysis for the courts. Part III will discuss the powers granted to local government units under the Pennsylvania MPC, which establishes the local governments' positions and the tension between the mineral rights owners and the local government. Part IV will discuss how the conflicts of law between local ordinances and state laws in Pennsylvania have been resolved in the state courts, how this current conflict of law is likely to be resolved, and the implications of such a decision. Part V will review the legislative changes enacted in February 2012 in order to resolve the tensions between municipalities' environmental concerns and the need to protect constitutional property and mineral rights.

## I. GAS WELL BASICS AND HYDRAULIC FRACTURING IN THE MARCELLUS SHALE

### A. *Hydraulic Fracturing in the United States*

Hydraulic fracturing constitutes a large component of current natural gas drilling and the United States' energy supply.<sup>6</sup>

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<sup>5</sup> See *Huntley & Huntley, Inc. v. Borough Council of Oakmont*, 964 A.2d 855, 862 (Pa. 2009); *Range Res.-Appalachia v. Salem Twp.*, 964 A.2d 869 (Pa. 2009).

<sup>6</sup> GROUND WATER PROT. COUNCIL & ALL CONSULTING, MODERN SHALE GAS DEVELOPMENT IN THE UNITED STATES: A PRIMER (2009), available at

Approximately sixty percent of all natural gas harvested in the U.S. comes from mineral formations that require hydraulic fracturing, and that percentage is expected to increase.<sup>7</sup> Hydraulic fracturing has effectively revitalized the natural gas industry by lowering the cost of gas production and making natural gas a more viable energy source for America.<sup>8</sup> It has especially enjoyed acceptance in Texas and the Rocky Mountain region.<sup>9</sup>

### B. *Fundamental Principles of Natural Gas Drilling*

Natural gas is harvested from conventional and nonconventional rock formations. Conventional formations trap both oil and natural gas that can be harvested using conventional vertical drilling wells. On the other hand, natural gas can also be harvested from shale, sand, and other formations using nonconventional methods, such as hydraulic fracturing. These nonconventional methods were initially cost prohibitive when the price of natural gas was lower; however, the sharp price increase in natural gas during the last hundred years has rendered unconventional sources of natural gas, like the Marcellus Shale formation, commercially viable.

The rise of nonconventional natural gas drilling was largely brought about by the confluence of three important changes in the industry: (1) horizontal drilling, (2) hydraulic fracturing, and (3) the sharp price increase due to greater demand for natural gas.<sup>10</sup> Today, nearly half of the natural gas produced in the U.S. comes from unconventional sources.<sup>11</sup>

### C. *Horizontal Drilling*

Gas wells in the Marcellus Shale most often require a horizontal well and hydraulic fracturing because the Marcellus Shale formation is relatively shallow and wide compared to formations suitable for a conventional vertical well and horizontal

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[http://www.netl.doe.gov/technologies/oil-gas/publications/EPreports/Shale\\_Gas\\_Primer\\_2009.pdf](http://www.netl.doe.gov/technologies/oil-gas/publications/EPreports/Shale_Gas_Primer_2009.pdf) [hereinafter GWPC].

<sup>7</sup> *North American Natural Gas Supply Assessment*, NAVIGANT CONSULTING 10, 18 (July 4, 2008), [http://www.navigant.com/~media/WWW/Site/Insights/Energy/NCI\\_Natural\\_Gas\\_Resource\\_Report.ashx](http://www.navigant.com/~media/WWW/Site/Insights/Energy/NCI_Natural_Gas_Resource_Report.ashx).

<sup>8</sup> See GWPC, *supra* note 6, at 7–8.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 9.

<sup>11</sup> *Id.* at 8.

drilling allows the well to have a much larger bore face touching the formation. The U.S. Department of Energy (DOE) estimates that horizontal drilling can increase well productivity by up to 300% for shallow formations while costing approximately three times as much as a traditional vertical well.<sup>12</sup>

#### D. Hydraulic Fracturing

Hydraulic fracturing is a method used to increase the amount of gas produced from a well by injecting a mixture of water, sand, and chemicals into the well at high pressure. The mixture creates fissures in the shale formation, which unlocks the gas that is trapped within the shale formation.

Yet gains in profits have not come without casualties. Reports of water contamination and environmental mishaps have emerged over the past decade. Anthony Ingraffea, a Cornell University environmental engineering professor, estimates that one in every 150 wells will have an environmental mishap, which, in his opinion, is unacceptably high considering the potential harm of such accidents and the far smaller incident rates in other industries like bridge building and air travel.<sup>13</sup>

Industry experts argue that the hydraulic fracturing process is self-contained and does not pose any threat to water supplies if properly executed because the water table is usually only a few hundred feet below ground level, while hydraulic fracturing takes place at depths between 4000 and 8000 feet.<sup>14</sup> DOE also asserts that the same physical properties that trap oil and gas thousands of feet below the surface can and should also trap the water and chemicals used in the hydraulic fracturing process thousands of feet below the water table.<sup>15</sup>

Yet, in spite of the assertions of hydraulic fracturing proponents, residents in towns like Lenox and Dimock, Pennsylvania have suffered. Lenox residents report that as a result of nearby hydraulic fracturing, their water wells have been contaminated with hazardous chemicals such as barium,

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<sup>12</sup> See *id.* at 47.

<sup>13</sup> See *Council Hears Experts on Marcellus Shale*, WDUQNEWS (Oct. 19, 2010, 9:50 AM), <http://wduqnews.blogspot.com/2010/10/council-hears-experts-on-marcellus.html>.

<sup>14</sup> See GWPC, *supra* note 6, at 51–52 (illustrating how the well casings form a barrier isolating the frack water in the well from groundwater).

<sup>15</sup> *Id.* at 67–68.

manganese, and strontium, causing physical illness, diminished property values, and high costs for alternative sources of water.<sup>16</sup> At least one resident has neurological symptoms consistent with toxic exposure to heavy metals.<sup>17</sup>

While the exact cause of the contamination is contested, the drilling industry cannot deny that accidents with significant environmental consequences have occurred. For example, an estimated 8000 gallons of drilling fluid spilled into a creek near Dimock, Pennsylvania in September 2009, causing a major fish kill in the area.<sup>18</sup> More recently, a truck leaving Dimock leaked an undetermined amount of frack fluid along a thirty-five to forty mile stretch near Hughesville, Pennsylvania.<sup>19</sup> Regardless of whether the leaks occurred because of faulty equipment, human negligence, or other reasons, the consequences have been significant. Lawsuits are emerging against drilling companies and will likely continue to escalate the conflict between drilling companies and local communities.<sup>20</sup>

In an effort to respond to the concerns of their constituents, local governments are seeking to enact laws that will shield citizens from the potential harms of hydraulic fracturing operations without running afoul of Pennsylvania state law. An examination of the property interests in mineral rights under the Pennsylvania Constitution and the Pennsylvania Oil and Gas Act will clarify the nature of those rights and the potential avenues for local governments to act.

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<sup>16</sup> LexisNexis Litig. Res. Cmty. Staff, *Lawsuit Filed In Pennsylvania Over Hydraulic Fracturing* (Sept 15, 2010), <http://www.lexisnexis.com/community/litigationresourcecenter/blogs/newlawsuitfilings/archive/2010/09/15/lawsuit-filed-in-pennsylvania-over-hydraulic-fracturing.aspx>.

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

<sup>18</sup> Betsey Piette, *35-Mile Fluid Leak: Another Fracking Accident*, WORKERS WORLD (Oct. 15, 2010, 10:10 PM), [http://www.workers.org/2010/us/fracking\\_1021/](http://www.workers.org/2010/us/fracking_1021/).

<sup>19</sup> *Id.*

<sup>20</sup> See, e.g., *Parker Waichman Alonso LLP and its Partner Law Firms Continue to Investigate Water and Other Contamination Associated with Hydraulic Fracturing and Other Natural Gas Drilling Operations*, WEBWIRE (Nov. 17, 2010), <http://www.webwire.com/ViewPressRel.asp?ald=126888> [hereinafter WEBWIRE] (citing, among others, a complaint brought on behalf of residents of Lenox, Pennsylvania alleging that the fracking fluid used in drilling operations includes hazardous chemicals that are toxic and have contaminated residents' water wells).

## II. MINERAL OWNERS' RIGHTS AND RESPONSIBILITIES UNDER THE OIL AND GAS ACT

The property interests in mineral rights are generally guaranteed under Article I, Section 1 of the Pennsylvania Constitution, which states, "All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness."<sup>21</sup>

An individual's right to the enjoyment and use of property, however, has never been absolute.<sup>22</sup> The right to enjoy property cannot be used to cause injury to others.<sup>23</sup> And while Article I, Section 27 of the Pennsylvania Constitution protects Pennsylvania's public natural resources, it also creates an affirmative duty to protect every citizen's right to clean air and pure water, which is a potential issue in this dispute.<sup>24</sup>

Thus, while mineral rights owners have a right to the minerals attached to their property, they may not exercise those rights in a way that harms another person's property interest. A prime example of the limitation on an individual's or corporation's right to enjoyment of property can be seen in a recent batch of lawsuits against drilling companies for harm to residents and neighboring property holders caused by the companies' efforts to harvest their mineral rights.<sup>25</sup> A drilling company's right to fully enjoy its oil and gas rights is limited by the rights of residents and neighboring property holders to nuisance-free enjoyment of their own property.

### A. *The Pennsylvania Oil and Gas Act*<sup>26</sup>

Pennsylvania's broad constitutional provisions shaped the legislative acts that would follow. In an effort to better balance

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21 PA. CONST. art. I, § 1.

22 JOHN BORDEUA, 6 SUMMARY PA. JUR. 2D *Property* § 1:3 (West 2012).

23 *Id.*

24 PA. CONST. art. I, § 27.

25 *See, e.g.,* WEBWIRE, *supra* note 20.

26 The Pennsylvania Oil and Gas Act of 1984 was amended on February 8, 2012 by House Bill 1950. The Act was re-codified as Title 58, Chapter 32 of the Pennsylvania Consolidated Statutes. *See* H.B. 1950, 2012 Gen. Assemb., Reg. Sess. (Pa. 2012), available at <http://www.legis.state.pa.us/WU01/LI/LI/US/HTM/2012/0/0013..HTM>. As many of the court cases in this article cite the original statute, both citations will be provided in this article.

individual mineral interests and protect public natural resources, Pennsylvania passed the Oil and Gas Act in 1984. The Act regulated the exploration, development, and production of oil and gas interests for both private and public mineral rights. The Act granted broad rights to enjoy and benefit from the mineral rights owned, but operations were required to meet the specified standards listed in the Act that aimed to protect the environment.<sup>27</sup>

The broad purposes of the Act permit the optimal development of oil and gas resources consistent with the protection of the health and safety of: (1) the environment; (2) property; (3) personnel and facilities employed in natural gas and mining operations; (4) property rights of persons residing in areas where operations occur; and (5) the natural resources, environmental rights, and values secured by the Pennsylvania Constitution.<sup>28</sup>

In an effort to protect those property and environmental rights, the Commonwealth has enacted regulations including registration requirements and restrictions on the entire process of discovery, exploration, operations, and abandonment of wells. The Act sets forth the general provisions for obtaining permission to drill or modify a well;<sup>29</sup> gives detailed rules governing the operations of a well, from exploration through abandonment;<sup>30</sup>

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<sup>27</sup> See, e.g., 58 PA. STAT. ANN. § 601.201 (West 2010), *repealed by* 58 PA. CONS. STAT. § 3211 (2012) (requirements for well permits); *id.* § 601.205, *repealed by* 58 PA. CONS. STAT. § 3215 (2012) (well location restrictions); *id.* § 601.206, *repealed by* 58 PA. CONS. STAT. § 3216 (2012) (site restoration); *id.* § 601.207, *repealed by* 58 PA. CONS. STAT. § 3217 (2012) (casing requirements for groundwater protection); *id.* § 601.210, *repealed by* 58 PA. CONS. STAT. § 3220 (2012) (plugging requirements); *id.* § 601.215, *repealed by* 58 PA. CONS. STAT. § 3225 (2012) (bonding requirements).

<sup>28</sup> *Id.* § 601.102, *repealed by* 58 PA. CONS. STAT. § 3202 (2012).

<sup>29</sup> *Id.* § 601.201, *repealed by* 58 PA. CONS. STAT. § 3211 (2012).

<sup>30</sup> *Id.* Some of the key provisions are described below. In order to drill or modify a current well, an individual must: (1) obtain a permit from the Department of Environmental Protection and the Bureau of Oil and Gas Management, (2) pay a fee, and (3) submit a detailed report concerning the proposed well to the Bureau, landowners, and nearby landowners. The Bureau generally grants the right to drill unless the applicant is currently violating the Oil and Gas Act or any other related statute administered by the Department of Environmental Protection. The Act also specifically addresses the use, management, and disposal of hydraulic fracturing fluids (also called brines). Section 601.207 (recodified at 58 PA. CONS. STAT. § 3217 (2012)) requires the well operator to maintain control of all brines and fluids, and dispose of them in accordance with The Clean Streams Act. This section also requires specific casing requirements for wells that penetrate any freshwater-bearing strata, and requires proper vents, packers-ins, and other requirements as directed by the

and, most importantly, bars any other local or state law from regulating the same subject matter.<sup>31</sup>

The supremacy of the Oil and Gas Act over other attempts to regulate hydraulic fracturing wells is explicitly stated.<sup>32</sup> The Act supersedes “all local ordinances and enactments purporting to regulate oil and gas well operations regulated by this act,” with an exception for the Municipal Planning Code and the Flood Plain Management Act.<sup>33</sup> Initially, this exception would have allowed municipalities to substantially impact the scope of oil operations. However, in 1992, the Pennsylvania Legislature added the following language to the statute to limit the power of the local government to interfere with areas of state law: “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.”<sup>34</sup> This amendment limits the scope of municipal authority under the MPC to regulate oil and gas operations. Before the amendment, it is likely that municipalities would have had authority to limit or even ban hydraulic drilling within city limits under the auspices of the MPC.

The language of the amendment is important because it provides the two tests that courts have used to determine whether a local ordinance infringes upon the authority of the Act. First, does the local ordinance impose conditions that impact operations already regulated by the Act? Second, does the local ordinance appear to accomplish the same purposes as set forth in the Act?<sup>35</sup> The amendment also provides an important clarification on the

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Bureau of Oil and Gas Management. Section 601.208 (recodified at 58 PA. CONS. STAT. § 3218) governs a well operator’s responsibilities in the event of a leak or contamination of water supply. Operators must “restore or replace the affected supply with an alternate source of water adequate in quantity or quality for the purposes served by the supply.” In addition, the statute puts the burden on the well operators to prove that the drilling operation was not the source of contamination, and recommends that operators conduct pre-well testing of water supplies within 1000 feet of the well site. *Id.* § 601.208, *repealed by* 58 PA. CONS. STAT. § 3218(c) (2012).

<sup>31</sup> *Id.* § 601.602, *repealed by* 58 PA. CONS. STAT. § 3302 (2012).

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *See id.* For a more detailed discussion of these two points, *see infra* Part IV.A.

Pennsylvania General Assembly's intent concerning both the preemption power and the exceptions allowable under the Municipal Planning Code. As will be seen in the analysis below, the courts have relied heavily on this language in determining the boundaries of local government entities' authority to block hydraulic fracturing under the MPC exception.<sup>36</sup>

The Oil and Gas Act was further amended in 2012 to include many reforms and changes aimed at improving the environmental safeguards as well as provide greater consistency and uniformity in application.<sup>37</sup> A more detailed discussion of this amendment and its implications follows in Part V.

### III. POWERS OF LOCAL GOVERNMENT ENTITIES UNDER THE OIL AND GAS ACT AND THE MUNICIPAL PLANNING CODE

To better understand the scope of the MPC exception granted in the Oil and Gas Act, a brief overview of the MPC is helpful. The MPC provides the bulk of municipal planning authority to local government entities, such as townships, boroughs, commonwealths, and counties,<sup>38</sup> and its purposes are quite broad.<sup>39</sup> While the MPC's purposes could provide sufficient support for local ordinances restricting hydraulic fracturing, many local powers are subservient to state interests. However, the ability to establish zoning ordinances under the MPC allows municipalities to wield a great deal of power to meet the needs and interests of the local community.

One of the broadest sources of power for municipalities is the zoning ordinance authority. Pennsylvania municipalities derive their authority to enact local zoning ordinances from section 10603 of the MPC, which states that ordinances "should reflect the policy goals of the statement of community development objectives . . . and give consideration to: (1) the character of the municipality, (2)

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<sup>36</sup> See *infra* Part IV.

<sup>37</sup> See H.B. 1950, 2012 Gen. Assemb., Reg. Sess. (Pa. 2012), available at <http://www.legis.state.pa.us/WU01/LI/LI/US/HTM/2012/0/0013..HTM>.

<sup>38</sup> See 53 PA. STAT. ANN. § 10107 (West 2010).

<sup>39</sup> *Id.* § 10105 (stating that the purposes of the MPC are, among others, to "protect and promote safety, health and morals . . . to provide for the general welfare . . . to guide uses of land and structures . . . to ensure that municipalities adopt zoning ordinances which are generally consistent with the municipality's comprehensive plan . . . [and] to promote, encourage, require or authorize governing bodies to protect, preserve or conserve open land . . .").

the needs of the citizens and (3) the suitabilities and special nature of particular parts of the municipality.”<sup>40</sup> However, this authority is curtailed by a long list of Commonwealth laws, including the Oil and Gas Act and any other federal or state laws that preempt local law.<sup>41</sup>

Nevertheless, municipalities do have a clear right to enact zoning “provisions for special exceptions and variances administered by the zoning hearing board,” and “provisions for conditional uses to be allowed or denied by the governing body after recommendations by the planning agency and hearing.”<sup>42</sup> The statute further provides that, “in allowing a conditional use, the governing body may attach such reasonable conditions and safeguards . . . as it may deem necessary to implement the purposes of this act and the zoning ordinance.”<sup>43</sup> Thus, municipalities may attach conditions on hydraulic fracturing and horizontal drilling if such conditions further the purposes of the MPC and the zoning ordinance, but such conditions must not contravene state law.

The municipalities’ privilege to enact ordinances that touch on oil and gas is unique because it received an express exception in the Oil and Gas Act preemption clause. Aside from the MPC and the Flood Plain Management Act, all other laws are superseded by the Oil and Gas Act.<sup>44</sup> Thus, the Municipal Planning Code maintains a modicum of power to influence, albeit indirectly, the scope and outcomes associated with the Oil and Gas Act. It is important to realize that but for the preemption clause, the various ordinances enacted by local townships to preserve the public safety, health, and general welfare from threats associated with hydraulic fracturing and drilling operations would clearly be within the powers and authority granted unto them by the MPC. However, as the subsequent analysis demonstrates, the preemption clause in the Oil and Gas Act severely limits the amount of authority and discretion of municipalities that disagree with the direction and scope of the Oil and Gas Act. In the following Part, the discussion of recent case law in Pennsylvania courts reveals

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40 *Id.* § 10603(a).

41 *See id.* § 10603(b).

42 *Id.* § 10603(c)(1)–(2).

43 *Id.*

44 *See supra* note 33 and accompanying text.

that the courts grant deference to the Commonwealth's power to regulate the oil and gas industry.

#### IV. CONFLICT OF LAWS ANALYSIS

While several municipalities have flirted with the idea of banning all hydraulic fracturing operations within the city limits under the authority of the MPC, most have not gone that far for fear of instigating a protracted and costly legal battle.<sup>45</sup> In Lehman, Pennsylvania, environmental advocates blasted the township council for failing to vote for an ordinance banning the use of frack water within township limits; however, the township consultants and solicitors rightly pointed out that the proposed ordinances violated the Oil and Gas Act because they imposed additional restrictions on oil and gas operations, and would likely be struck down by the courts.<sup>46</sup>

Knowing that a direct ban on hydraulic fracturing will not be defensible, townships are seeking more indirect alternatives that may limit drilling operations without overtly banning them. One such alternative is the use of local zoning ordinances to regulate where drilling can occur. The Pennsylvania Supreme Court recently decided two cases on this issue. These cases provide the general framework for determining whether a local law contravenes the Oil and Gas Act, but leave some gray area regarding the exact point at which a local ordinance contravenes state law.

##### A. *Huntley & Huntley v. Borough Council of Oakmont*

The Borough of Oakmont, Pennsylvania enacted a law that limited gas well sites to certain zoning districts to discourage drilling and hydraulic fracturing in Oakmont. A gas well operator, Huntley & Huntley, Inc., filed suit when the borough refused to grant a zoning variance for a well site.<sup>47</sup> The Commonwealth Court held that the zoning ordinance was preempted by the Pennsylvania Oil and Gas Act.<sup>48</sup>

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<sup>45</sup> Elizabeth Skrapits, *Lehman Twp. Supervisors Take No Action on Drilling Ordinance*, CITIZENS' VOICE (Oct. 19, 2010), <http://citizensvoice.com/news/lehman-twp-supervisors-take-no-action-on-drilling-ordinance-1.1050817>.

<sup>46</sup> *Id.*

<sup>47</sup> See *Huntley & Huntley, Inc. v. Borough Council of Oakmont*, 929 A.2d 1252, 1253 (Pa. Commw. Ct. 2007).

<sup>48</sup> *Id.* at 1257.

In deciding *Huntley*, the Pennsylvania Supreme Court set forth the basic rules for determining whether a local ordinance contravenes the Pennsylvania Oil and Gas Act. First, “municipalities are creatures of the state and thus have no inherent power beyond those powers expressly granted by the State government.”<sup>49</sup> Furthermore, any powers granted to the municipality are preempted by state powers if the state has enacted law in that field.<sup>50</sup>

This doctrine of preemption provides a hierarchy for potentially conflicting laws that governs when broad local powers like the police power come in conflict with more specific state powers like the Oil and Gas Act. In such cases, “local legislation cannot permit what a state statute or regulation forbids or prohibit what state enactments allow.”<sup>51</sup> Municipalities are also prohibited from enacting ordinances that become obstacles to the execution of the full purposes and objectives of a state law.<sup>52</sup>

While this preemption may be implicit in all state policies,<sup>53</sup> the Pennsylvania Oil and Gas Act also contains express language prohibiting the exercise of local authority over the subject matter of the Act—except for local ordinances adopted pursuant to the Municipal Planning Code and the Flood Plain Management Act.<sup>54</sup> The text of the Act’s preemption clause shows that even these exceptions do not allow municipalities full authority in the field. The Act states:

Except with respect to ordinances adopted pursuant to . . . the Pennsylvania Municipalities Planning Code and 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

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<sup>49</sup> *Huntley & Huntley, Inc. v. Borough Council of Oakmont*, 964 A.2d 855, 862 (Pa. 2009) (citing *City of Philadelphia v. Schweiker*, 858 A.2d 75, 84 (Pa. 2004)).

<sup>50</sup> *Id.* (citing *United Tavern Owners of Phila. v. Phila. Sch. Dist.*, 272 A.2d 868, 870 (Pa. 1971)).

<sup>51</sup> *Id.* (citing *Liverpool Twp. v. Stephens*, 900 A.2d 1030, 1037 (Pa. Commw. Ct. 2006)).

<sup>52</sup> *Id.* at 863; *see also Krentz v. Consol. Rail Corp.*, 910 A.2d 20, 32 (Pa. 2006).

<sup>53</sup> *See Huntley*, 964 A.2d at 862; *Krentz*, 910 A.2d at 32; *see also Commonwealth v. Wilsbach Distrib.*, 519 A.2d 397, 402 (Pa. 1986).

<sup>54</sup> 58 PA. STAT. ANN. § 601.602 (West 2010), *repealed by* 58 PA. CONS. STAT. § 3302 (2012).

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.<sup>55</sup>

The Pennsylvania Supreme Court noted that its interpretive task in *Huntley* was to “examine the particular wording of this provision, together with any other relevant aspect of the statute, in order to determine whether the Legislature intended to leave room for [municipalities] to designate certain zoning districts where oil and gas wells may be prohibited as a general matter.”<sup>56</sup>

The language of the statute provides two separate prongs for preemption analysis. First, provisions that impose conditions, requirements, or limitations on the same features of oil and gas well operations regulated by the Act are preempted.<sup>57</sup> Second, provisions that “accomplish the same purposes as set forth in the Act” are also preempted.<sup>58</sup>

On the first prong of the analysis in *Huntley*, the Court held that the location of the well (specifically the setback requirements designed to protect property and environmental interests) was not technically part of the operations, “because it is not a characteristic of the manner or process by which the well is created, functions, is maintained, ceases to function, or is ultimately destroyed or capped.”<sup>59</sup> The court further concluded that without further legislative guidance, the reference to “features of oil and gas well operations” includes the technical aspects of well operations and ancillary matters (such as registration, bonding, and site restoration), but not the well’s location.<sup>60</sup> However, courts may deem an ordinance unenforceable if it aims to increase specific setback requirements contained in the Act.<sup>61</sup>

On the second prong of analysis, an ordinance would be deemed unenforceable if it accomplishes the same purposes as set forth in the Act. The enumerated purposes in the Oil and Gas Act

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<sup>55</sup> *Id.* (emphasis added).

<sup>56</sup> *Huntley*, 964 A.2d at 863.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 864.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

are to: (1) permit the optimal development of the oil and gas resources of Pennsylvania consistent with the protection of the health, safety, environment, and property of citizens of the Commonwealth; (2) protect the safety of the personnel and facilities employed in the exploration, development, storage, and production of natural gas; (3) protect the safety and property rights of persons residing in areas where such exploration, development, storage, or production occurs; and (4) protect the natural resources, environmental rights, and values secured by the Pennsylvania Constitution.<sup>62</sup>

The court noted that the purpose of local zoning ordinances is to organize community development in order to best utilize the land within a municipality and discharge the responsibilities associated with the police power.<sup>63</sup> There are some areas of overlap between the purposes of the Oil and Gas Act and municipal powers, particularly between the municipal police power and the Act's aim to protect health, safety, environment, and property.<sup>64</sup> But the court also noted that the purposes of zoning ordinances are both narrower and broader in scope because they do not relate to statewide matters, yet they apply to a broad number of subject matters.<sup>65</sup> This narrow scope across a broad range of subject matters creates a potential conflict of laws for a local law that purports to regulate zoning issues for police power purposes, but effectively accomplishes the same purpose as another state law such as the Oil and Gas Act.<sup>66</sup>

Despite this potential conflict, the Pennsylvania Supreme Court ruled that the primary objectives of the ordinance in this case were focused on "preserving the character of residential neighborhoods, and encouraging 'beneficial and compatible land uses.'"<sup>67</sup> The court reached this decision because the express preemptive language in the Act specifically refers to the features of well operations and the stated purposes of the Act.<sup>68</sup> The Court

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<sup>62</sup> *Id.* at 864–65 (quoting 58 PA. STAT. ANN. §601.102 (West 2010), *repealed by* PA. CONS. STAT. § 3202 (2012)).

<sup>63</sup> *Id.* at 865.

<sup>64</sup> *Id.*; *see also* 58 PA. STAT. ANN. § 601.602, *repealed by* 58 PA. CONS. STAT. § 3302 (2012).

<sup>65</sup> *Huntley*, 964 A.2d at 865.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* (quoting the zoning ordinance at issue).

<sup>68</sup> *Id.*

also found the reasoning of the Colorado Supreme Court in a similar case very persuasive and quoted it extensively.<sup>69</sup>

The Colorado Supreme Court noted that state and local governmental interests, while overlapping at times, are distinct at their core: the state's interest in oil and gas development is focused on the efficient production and utilization of natural resources, while local governments' interests lie in "orderly development and use of land in a manner consistent with local demographic and environmental concerns."<sup>70</sup> The Colorado Supreme Court went further to clarify that if a state oil and gas statute seeks to exert overt control over land use issues, the statute must explicitly say so, through clear and unequivocal statements of legislative intent.<sup>71</sup>

In *Huntley*, the Pennsylvania Supreme Court ruled that if such express language is lacking in the statute, then the court will generally allow local laws on land use to remain in force because those laws serve a purpose that is distinct from the state statutes regulating oil and gas.<sup>72</sup> The court, however, took great pains to emphasize that this holding does not imply that any and all regulation of oil and gas development under the guise of a land use ordinance would be permissible simply because it is a zoning regulation enacted under the authority of the MPC.<sup>73</sup> As an example, the court cautioned that a zoning regulation would still be preempted by the Oil and Gas Act if it permitted drilling in a particular district, but made that permission conditional upon specific features of well operations that are already regulated by the Oil and Gas Act.<sup>74</sup>

Thus, the Pennsylvania Supreme Court reversed the lower court's judgment that the Oil and Gas Act preempted the zoning ordinance because it found that the well's location was not a feature of gas well operations and the zoning ordinance had a distinct, separate purpose from the enumerated purposes of the Act.<sup>75</sup> This precedent grants an important power to municipalities

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<sup>69</sup> *Id.* (citing *Bd. of Cnty. Comm'rs v. Bowen/Edwards Assocs., Inc.*, 830 P.2d 1045, 1057 (Colo. 1992)).

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 866.

<sup>73</sup> *Id.* at 866 n.11.

<sup>74</sup> *Id.* at 868.

<sup>75</sup> *Id.*

because it allows local government units to control where natural gas wells and hydraulic fracturing wells can be sited. Nonetheless, this precedent does not extend *carte blanche* authority to municipalities to control drilling operations.

#### B. Range Resources-Appalachia v. Salem Township

On the same day that *Huntley* was decided, the Pennsylvania Supreme Court struck down an ordinance that heavily regulated oil and gas operations, providing an upper bound on the ability of local government units to control hydraulic fracturing operations within municipalities.<sup>76</sup>

In *Range Resources-Appalachia v. Salem Township*, a township enacted a local ordinance that aimed to regulate surface and land development associated with oil and gas drilling. The Pennsylvania Supreme Court determined that the ordinance reflected, “an attempt by the Township to enact a comprehensive regulatory scheme relative to oil and gas development within the municipality.”<sup>77</sup>

In contrast to the local ordinance in *Huntley*, which regulated only the location of the well, and did not regulate any oil and gas operations, the language of this local ordinance extensively and directly encroached on several aspects of oil and gas well operations expressly governed in the Oil and Gas Act. Among other things, the ordinance regulated site restoration, well capping, and the location and grading of gas transmission lines, and mandated testing of potable water supplies.<sup>78</sup>

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<sup>76</sup> *Range Res.-Appalachia, LLC v. Salem Twp.*, 964 A.2d 869 (Pa. 2009).

<sup>77</sup> *Id.* at 875.

<sup>78</sup> *Id.* at 873 n.3. According to the court’s opinion, the ordinance required or regulated the following: (1) the location and grading of access roads from public roads to well sites; (2) the creation of tire cleaning areas along access roads where they intersect with public roads; (3) the slope of access roads for storm water management purposes; (4) the construction of cross pipes under access roads for storm water management purposes; (5) the entry of excess maintenance agreements requiring operators to repair public roads damaged by heavy equipment; (6) the location and grading of gas transmission lines running from the well heads to ensure and maximize surface development; (7) a minimum depth at which transmission lines should be located to ensure that they do not interfere with farming or other surface development; (8) the installation of marking ribbons on transmission lines for easy identification to ensure [that] they are not subject to damage or disruption by excavation in the area; (9) mandatory testing of potable water supplies; (10) the location of water cleaning facilities associated with coal bed methane operations; (11) special township permitting

The Pennsylvania Supreme Court used the same two-prong analysis as it did in *Huntley* to reach its conclusion. Under the first prong, provisions that impose conditions, requirements, or limitations on the same features of oil and gas well operations regulated by the Act are preempted.<sup>79</sup> In this case, numerous aspects of the ordinance imposed conditions, requirements, and limitations on the features of oil and gas well operations already regulated by the Oil and Gas Act and in several cases were “even more stringent,” leading the court to rule that the ordinance was preempted by the Oil and Gas Act.<sup>80</sup>

Under the second prong, an ordinance is deemed unenforceable if it is designed to accomplish the same purposes as those set forth in the Act.<sup>81</sup> The main purposes of the Oil and Gas Act are to optimize oil and gas development, ensure safety of personnel and facilities, protect property rights of neighboring landowners, and preserve the natural environment.<sup>82</sup> The specific objectives of the local ordinance included “enabling continuing oil and gas drilling operations . . . while ensuring the orderly development of property through the location of access ways, transportation lines and treatment facilities necessarily associated with the same;” protecting the development of neighboring properties; and protecting natural resources.<sup>83</sup> The substantial overlap of purpose between the Act and the Salem ordinance left the court no option but to hold that the Salem ordinance was preempted.

As the application of the two-prong test was very

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procedures (beyond the Oil and Gas Act permit requirements) for oil and gas wells; (12) additional bonding requirements before drilling can begin; (13) regulation of well heads, including the capping of well heads once they are no longer in use; and (14) regulation of site restoration after drilling operations cease. *Id.* at 873 n.3, 875. *Cf.* 58 PA. STAT. ANN. § 601.215 (West 2010), *repealed by* 58 PA. CONS. STAT. § 3225 (2012) (relating to well bonding); *id.* §§ 601.201–.202, *repealed by* 58 PA. CONS. STAT. §§ 3211–12 (2012) (relating to drilling permits); *id.* § 601.203, *repealed by* 58 PA. CONS. STAT. § 3213 (2012) (relating to well registration); *id.* § 601.204, *repealed by* 58 PA. CONS. STAT. § 3214 (2012) (relating to inactive wells); *id.* § 601.206, *repealed by* 58 PA. CONS. STAT. § 3216 (2012) (relating to site restoration); *id.* §§ 601.207–.210, *repealed by* 58 PA. CONS. STAT. §§ 3217, 3220 (2012) (relating to well casing and plugging requirements upon cessation of use).

<sup>79</sup> *Huntley*, 964 A.2d at 865; *Range Res.*, 964 A.2d at 875.

<sup>80</sup> *Range Res.*, 964 A.2d at 875.

<sup>81</sup> *Huntley*, 964 A.2d at 863.

<sup>82</sup> *Range Res.*, 964 A.2d at 876 (citing *Huntley*, 964 A.2d at 865).

<sup>83</sup> *Id.* at 876–77 (quoting the ordinance at issue).

straightforward in *Range Resources-Appalachia v. Salem Township*, perhaps the more interesting analysis occurs in the Pennsylvania Supreme Court's rejection of the Township's arguments. The Township used some of the same arguments made by the Borough of Oakmont in *Huntley*, but provided two new arguments for the court to address. First, the Township proffered an additional prong as part of the preemption analysis. In addition to the two prongs discussed above, the Township would have added that "surface activity ancillary to oil and gas drilling should only be deemed preempted if the activity: (a) relates to the technical operations of the oil and gas industry, (b) flows directly from the operation [of] an oil or gas well, and (c) is unique to the oil and gas industry."<sup>84</sup> According to the Township, this would allow it to retain all regulations pertaining to site plans, storm water management plans, erosion and sediment control plans, grading of access roads, and road bonding requirements, among other things.<sup>85</sup>

The Pennsylvania Supreme Court held that this third prong argument was "divorced from the language of the Act and unreasonably narrow."<sup>86</sup> The language of the statute broadly states that "no feature of oil and gas well operations may be subject to any further conditions, requirements, or limitations by MPC-enabled local legislation . . . [which is therefore] potentially broad enough to include items that flow both directly and indirectly from the operation of an oil or gas well, as well as features that are shared by other industries."<sup>87</sup>

Second, the Township argued that it was "affirmatively required or permitted to enact some of these regulations under . . . state enactments such as the Storm Water Management Act, and the Dam Safety and Encroachments Act," and that the Oil and Gas Act should be consistent with the shared state and local responsibilities to uphold the constitutional guarantees for the right to "clean air, pure water, and the preservation of the natural, scenic, historic, and esthetic values of the environment."<sup>88</sup> This argument is intriguing because it claims authority from state law

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<sup>84</sup> *Id.* at 873.

<sup>85</sup> *Id.* at 875 n.6 (quoting Brief for Appellees at 33, *Range Res.-Appalachia, LLC v. Salem Twp.*, 964 A.2d 869 (Pa. 2009) (No. 29 WAP 2008)).

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 873 (quoting PA. CONST. art. I, § 27).

and constitutional authority instead of tracing authority for the ordinance to the Municipal Planning Code.

However, the Pennsylvania Supreme Court did not find this argument persuasive. The court explained that while the laws mentioned “may encourage local management of certain environmental problems, [the Township has] not shown that [the laws] authorize implementation of administrative controls specifically targeted at the oil and gas industry.”<sup>89</sup> Thus, even though these state laws may provide some general support for the ordinance, laws of general relevance are always superseded by laws with special, explicit provisions governing the same topic when the two come in conflict.<sup>90</sup> The court was quick to point out that this holding should not be interpreted to mean that local regulations enacted under other state laws that incidentally affect oil and gas development will be automatically preempted by the Oil and Gas Act.<sup>91</sup> The court will continue to evaluate each regulation according to the tests outlined above and apply the law to the facts of the individual case.

These cautionary statements from the Pennsylvania Supreme Court appear to be an effort to narrow the scope of these rulings specifically to the contexts of the facts, rather than establishing a sweeping precedent that would preempt virtually any local regulation touching oil and gas operations, thereby giving oil and gas companies free reign and immunity from local regulation under the Oil and Gas Act. Local government units seeking to limit hydraulic fracturing will have to be less direct in their efforts to regulate drilling, notwithstanding the affirmative powers granted in the MPC to protect the environment and the public welfare.

### C. *Huntley and Range Resources Applied*

The rules set forth in *Huntley & Huntley, Inc. v. Borough Council of Oakmont* and *Range Resources-Appalachia v. Salem Township* have already been applied in the Pennsylvania Commonwealth Court and even the U.S. District Court for the Western District of Pennsylvania, further clarifying the limits of local authority.<sup>92</sup> In *Penneco Oil Co. v. County of Fayette*, the

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<sup>89</sup> *Id.* at 876 n.8.

<sup>90</sup> *Id.* (citing 1 PA. CONS. STAT. § 1933 (2012)).

<sup>91</sup> *Id.* at 876 n.8.

<sup>92</sup> *Penneco Oil Co. v. Cnty. of Fayette*, 4 A.3d 722 (Pa. Commw. Ct. 2010);

commonwealth court affirmed that a Fayette County zoning ordinance requiring oil and gas well operators to apply for a special exception permit in certain zoning districts as well as obtain an additional zoning certificate before commencing operations did “not reflect an attempt . . . to enact a comprehensive regulatory scheme . . . but . . . [was] clearly a zoning ordinance of general applicability like the ordinance in *Huntley*.”<sup>93</sup>

The objective criteria for the special exception and the zoning certificate were clearly set forth in the ordinance, leading the court to rule that these ordinances did not provide Fayette County with “virtually unbridled discretion to deny permission to drill an oil and gas well even after compliance with the applicable zoning regulations.”<sup>94</sup> The court also determined that the distinct zoning purposes and the minimal discretion involved with the additional requirements to protect the public health, safety, and welfare did not create arbitrary authority to deny permission or substantially overlap with the purposes of the Oil and Gas Act.<sup>95</sup>

In *Range Resources-Appalachia v. Blaine Township*,<sup>96</sup> Blaine Township enacted a series of laws to discourage businesses like Range Resources-Appalachia from operating within its borders. Range Resources filed suit on several grounds, including a violation of the preemption clause of the Oil and Gas Act.<sup>97</sup> Range Resources alleged that the Township’s disclosure ordinance, which allowed the Township to “prevent [Range Resources] from drilling for natural gas if [it] or any of its affiliates has three or more violations of any law, no matter how unrelated to its proposed operations in the Township,” violated the Oil and Gas Act because it gave the Township power to regulate drilling unilaterally, even if Range Resources was in full compliance with the Oil and Gas Act

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Range Res.-Appalachia, LLC v. Blaine Twp., 2009 WL 3515845, \*11–12 (W.D. Pa. 2009).

<sup>93</sup> *Penneco*, 4 A.3d at 733.

<sup>94</sup> *Id.* at 731.

<sup>95</sup> *Id.* at 726, 730–31.

<sup>96</sup> *Blaine Twp.*, 2009 WL 3515845.

<sup>97</sup> The names of the three ordinances were “An Ordinance . . . of Blaine Township . . . Eliminating Legal Powers and Privileges from Corporations Doing Business Within Blaine Township to Vindicate the Right to Democratic Self-Governance,” “Blaine Township Corporate Disclosure and Environmental Protection Ordinance,” and “A Resolution of the Blaine Township Board of Supervisors to Enact a \$300.00 Permit Fee for Each Temporary Structure, Storage or Office Trailer Used at All Work Sites.” *Id.* at \*3–7.

and the Pennsylvania Department of Environmental Protection's regulations.<sup>98</sup> The court held that Blaine Township's actions were similar to Salem Township's actions, which gave the Township "almost unbridled discretion to deny permission to drill." Furthermore, the court held that the broad preemption language of the Oil and Gas Act clearly expressed the intent of the state to be the exclusive regulator of oil and gas development, with only limited exceptions for the MPC and Flood Plain Management Act.<sup>99</sup>

The analysis provided by these two courts reveals that the twin cases of *Huntley* and *Range Resources-Appalachia v. Salem Township* create an upper and lower boundary for determining whether a local ordinance is preempted by the Oil and Gas Act. For example, in *Penneco*, the court framed the issue at hand as follows:

We begin by reviewing the provisions of the Fayette County Zoning Ordinance in order to determine whether the provisions thereof reflect an attempt by Fayette County to enact a comprehensive regulatory scheme relative to the oil and gas development within the county as in *Range Resources/Salem Township* or the provisions thereof are merely traditional zoning regulations that identify which uses are permitted in different areas of the locality, even if such regulations preclude drilling in certain zones as in *Huntley*.<sup>100</sup>

This statement demonstrates that a mere zoning regulation that happens to impact a natural gas operation, but serves a distinct, valuable purpose under the MPC (or Flood Plain Management Act) does not create a conflict of laws under the Oil and Gas Act. However, if the local ordinance reflects an attempt to create a comprehensive regulatory scheme regarding oil and gas development, then the local government entity has clearly overstepped its authority and its ordinance will be preempted by state law.

These cases also reveal that one of the key issues in the preemption question is determining whether the ordinance provides arbitrary, unilateral authority to deny (constructively or actually) the right to drill. The courts will not allow a local government entity to enact an ordinance that gives itself power to

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98 *Id.* at \*8.

99 *Id.*

100 *Penneco*, 4 A.3d. at 729–30.

determine drilling rights. So far, the only ordinances to survive preemption challenges have dealt strictly with zoning regulations, which include the zoning designations (e.g., as a matter of right, conditional, or special exception requirement), setback provisions, and other minor provisions aimed at protecting the public safety, health, and welfare. Beyond these limited ends, the courts have been inclined to enforce the preemption clause.

This interpretation of the law aligns well with the express intent of the Pennsylvania Legislature, Department of Environmental Protection (DEP), and the Office of Oil and Gas Management (OOGM). The purposes listed in the Oil and Gas Act show strong support for maximizing the revenue and economic benefit of the natural gas resources contained in the Marcellus Shale formation while protecting the environment and community.<sup>101</sup> The DEP and its subsidiary the OOGM have provided numerous informational resources to educate the public on the benefits and risks of gas drilling as well as the precautionary measures currently in place to ensure safe drilling.<sup>102</sup> Pennsylvania's pro-mining past and current economic condition have also strongly influenced its support for the Oil and Gas Act's largely permissive framework.<sup>103</sup>

#### D. *Other Local Acts*

Even with the clear intent of the Pennsylvania legislature and agencies and the recent court decisions, the exact line between a local ordinance that fits within the MPC exception and an ordinance that exceeds the scope of that exception is still unclear. Future case law will likely be required to provide greater analysis as to what constitutes an "attempt . . . to enact a comprehensive regulatory scheme."<sup>104</sup> The courts have provided a few hypothetical situations, such as a local zoning ordinance that permits natural gas drilling, subject to additional restrictions

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<sup>101</sup> See 58 PA. STAT. ANN. § 601.102 (West 2010), *repealed by* 58 PA. CONS. STAT. § 3202 (2012).

<sup>102</sup> See *Marcellus Shale*, PA. DEP'T OF ENVTL. PROT., [www.depweb.state.pa.us/portal/server.pt/community/oil\\_gas/6003](http://www.depweb.state.pa.us/portal/server.pt/community/oil_gas/6003) (last visited January 30, 2013).

<sup>103</sup> See PA. DEP'T OF ENVTL. PROT., OIL AND GAS WELL DRILLING AND PRODUCTION IN PENNSYLVANIA 5500-FS-DEP2018 (2011), *available at* <http://www.eLibrary.dep.state.pa.us/dsweb/Get/Document-83620/5500-FS-DEP2018.pdf>.

<sup>104</sup> *Penneco*, 4 A.3d at 729.

(beyond those provided in the Oil and Gas Act) on technical aspects of the well head operations.<sup>105</sup>

Until the specific instances arise, however, local government units may be able to delay drilling operations within their borders. For example, ordinances in Pennsylvania municipalities like Bethel Park and Upper St. Clair contain provisions that may raise the preemption question in a new light.<sup>106</sup> Bethel Park's ordinance requires drilling companies to obtain insurance bonds for any damage to local roads from heavy equipment, coordinate annual meetings with emergency responders during drilling operations, and provide on-site orientations.<sup>107</sup> The ordinance also requires security fences, caution signs, and a twenty-four-hour security guard for drilling operations within 1000 feet of homes, commercial developments, or public buildings.<sup>108</sup> The ordinance also imposes noise pollution limits that prohibit pre-drilling construction between the hours of 10 p.m. and 7 a.m. and limit the noise from construction, drilling, or hydraulic fracturing, in some cases, to only ten decibels above the existing ambient noise levels.<sup>109</sup> The ordinance in Upper St. Clair adds a ban on drilling in low-intensity residential areas such as parks or steep hills.<sup>110</sup> Any one of these restrictions, or the effect of these restrictions taken as a whole, may be comprehensive enough to trigger the preemption clause. However, the final decision will rest with the courts.

Based on the reasoning provided in *Huntley and Range Resources-Appalachia v. Salem Township*, it is likely that these ordinances would be found to violate the preemption clause of the Oil and Gas Act. It seems the aggregate number of ordinances demonstrates an effort to impose regulations, limitations, or conditions on the operation of gas wells. The cities would have a compelling argument that their ordinances do not actually interfere with the operations; they merely aim to protect the general welfare

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<sup>105</sup> See *Huntley & Huntley, Inc. v. Borough Council of Oakmont*, 964 A.2d 855, 866 (Pa. 2009).

<sup>106</sup> See Matthew Santoni, *Bethel Park Proposal Prepares for Possible Gas Boom*, PITTSBURGH TRIB.-REV. (Sept. 16, 2010) [http://triblive.com/x/pittsburghtrib/news/pittsburgh/s\\_699478.html#axzz2JUuqCvvI](http://triblive.com/x/pittsburghtrib/news/pittsburgh/s_699478.html#axzz2JUuqCvvI).

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

of the city and still allow for the drilling to occur. Nonetheless, even if a court finds that the ordinances do not impose limits or regulations on the operation of gas wells, it is likely to find that the overall purpose of such ordinances is covered in the Oil and Gas Act, which also aims to protect the interests of the citizens while allowing for the development of oil and gas resources within the Commonwealth. In the end, a court may pick one or more of the specific ordinance features that it finds particularly burdensome in order to limit the scope of its precedential value. Or a court may decide that the ordinance, when viewed in its totality, violates the statute, but decline to give a specific reason for violation.

#### E. *Additional Factors*

One factor that may change the tone and scope of the court rulings is the fact that at least some of the gas drilling companies filed suit before actually seeking any conditional approval or special exception as allowed under the local law.<sup>111</sup> The Pennsylvania courts appear reluctant to make broad, sweeping rulings about zoning ordinances that set forth conditional approval procedures for drilling in certain zones. However, if drilling companies were to apply for these exceptions and be denied, as was the case in *Huntley*, the courts may be more likely to invoke the power of the preemption clause. This approach is logical for the courts, especially given their explicit statements that any ruling preempting or allowing a specific ordinance or ordinance type does not automatically approve or preempt a similar ordinance. The courts appear very interested in looking to the intent and the actions of the specific local government entities to determine whether a certain ordinance preempts the Oil and Gas Act.

This interest reveals that the actual line for preemption is not solely dependent on the plain language of the text, but also on the application of the law and its impact on the interests of mineral rights owners.<sup>112</sup> This is significant because it means that a local government entity may be able to craft an ordinance so that it does

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<sup>111</sup> See, e.g., *Arbor Res., LLC v. Nockamixon Twp.*, 973 A.2d 1036 (Pa. Commw. Ct. 2009) (reversing and remanding Arbor Resources' complaint because it failed to appeal the zoning hearing board's preliminary decision before applying directly to the state court).

<sup>112</sup> See, e.g., *Huntley & Huntley, Inc. v. Borough Council of Oakmont*, 964 A.2d 855 (Pa. 2009); *Range Res.-Appalachia, LLC v. Blaine Twp.*, 2009 WL 3515845 (W.D. Pa. Oct. 29, 2009).

not immediately trigger the preemption clause of the Oil and Gas Act, but over time, the local government's application of that rule may reveal an underlying intent to frustrate and limit the rights of mineral rights owners.

Such an approach would probably have unintended consequences for both municipalities and mineral rights holders. For example, municipalities may win initial victories in court based on the language of the local ordinance, but then be required to pay damages if their actions create a disparate impact. While the courts have generally decided the current set of cases on other grounds to avoid such problems, the issue of regulatory taking may have to be addressed at some point in the future.

Conversely, mineral rights holders should also show that they intend to drill responsibly or face significant costs. This is especially important for mineral rights holders because of the significant initial investment costs of starting a well operation. There are significant costs associated with performing preliminary site analyses, obtaining the necessary mineral rights leases, and securing DEP approval. If a company decides to drill despite a local ordinance, it may face far greater litigation costs, as well as damages (both actual and punitive) for purposefully ignoring the ordinance. These costs would be even higher if a blow-out or environmental disaster occurred.

There are also costs associated with the lost time, goodwill, and strained or broken relationships that would undoubtedly occur in a protracted battle. Given that much of the gas drilling in Pennsylvania is handled by a few dozen drilling companies, these companies can ill afford to destroy goodwill and relationships with local government entities. Moreover, fighting a dozen or more legal battles in various townships will also take its toll on a company's cash flows and operational focus.

Local governments also face this dilemma. Supervisor Chairman of Lehman Township David Sutton admitted that he is scared that an ordinance banning hydraulic fracturing could financially ruin the township because it is "not a rich municipality" and would struggle to pay for a legal conflict against the county, let alone the state.<sup>113</sup> And despite the tenor of the ordinances, most of the municipalities are heavily reliant on the local tax revenues that the oil and drilling companies provide.

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<sup>113</sup> Skrapits, *supra* note 45.

Yet the townships are also under significant pressure from local residents to protect their water supply. On more than one occasion, municipalities have received extreme ordinance proposals from local grassroots advocacy groups. In Lehman, the Gas Drilling Awareness Coalition has proposed the Community Water Rights and Self-Government Ordinance, which would ban any corporation from drilling in the township or from extracting water for drilling. The proposed ordinance also seeks to assert the Township's autonomy, which, as Lehman's Planning and Zoning Solicitor pointed out, could lead to secession from state or federal control.<sup>114</sup> This extreme position proffered by advocacy groups has not gained full traction with the city as its legal experts have recognized the inherent challenges of successfully advocating such a position.<sup>115</sup> Yet, some advocates believe and hope that a consistent barrage of local ordinance cases could lead courts to soften or even change their position on the law and overturn prior precedent.<sup>116</sup>

At the very least, some local ordinances are delaying the drilling process until the courts can resolve some of the issues. This is an environmental victory in and of itself. However, these minor victories are only temporary, and do not create permanent solutions.

It is important for the courts and both sides to recognize that if the drilling companies are not allowed to use hydraulic fracturing for natural gas extraction, the wells will be shut down, which might make it more difficult to meet the current demand for energy. Likewise, unrestrained drilling with minimal concern for public health and safety may force an unacceptable amount of externalities to be absorbed by communities.

#### V. THE 2012 AMENDMENTS TO THE OIL & GAS ACT

In light of the challenges and ambiguities discussed above, the Pennsylvania General Assembly took action. The Commonwealth had been actively researching, monitoring, and adapting its policies and regulations on natural gas drilling to improve drilling's safety and reduce its risk of environmental harms for several years. And in May 2010, the Pennsylvania DEP

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114 *Id.*

115 *See* WDUQNEWS, *supra* note 13.

116 *Id.*

volunteered to have its hydraulic fracturing program reviewed by a non-profit, multi-stakeholder organization called the State Review of Natural Gas Environmental Regulations (STRONGER).<sup>117</sup>

This organization independently prepared guidelines for hydraulic fracturing regulations and then used voluntary responses from the DEP and BOGM to compare its model regulations with Pennsylvania's current program.<sup>118</sup> Based on STRONGER's report, Pennsylvania's current strengths are its: (1) comprehensive water planning process; (2) robust baseline water sampling and groundwater studies; (3) mandatory prevention, preparedness, and contingency plans (PPC) for operators; (4) waste identification, tracking, and treatment reporting processes; and (5) significant increases in staffing levels.<sup>119</sup>

STRONGER also made the following recommendations to strengthen Pennsylvania's hydraulic fracturing program: (1) enact legislation to require casing and cementing plans, cement job logs, and emergency blow-out prevention plans and requirements; (2) require more comprehensive baseline services be provided to the landowner and DEP; (3) require operators to list the chemicals or additives utilized and the different wastes generated during hydraulic fracturing, including Material Safety Data Sheets (MSDS), cleanup procedures, toxicological data and waste chemical characteristics, and approximate quantities of each material and the method of storage (sack, barrels, tanks, etc.); (4) require notification prior to hydraulic fracturing operations and allow the DEP the opportunity to conduct inspections at critical stages, including during hydraulic fracturing and flowback; and (5) institute procedures for inspecting pit construction, or a certification process for pit construction, that includes pit bottom preparation, liner placement, and secondary containment requirements.<sup>120</sup>

The Pennsylvania legislature took these recommendations into consideration and incorporated many of the STRONGER

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<sup>117</sup> STATE REVIEW OF OIL & NATURAL GAS ENVTL. REGULATION, PENNSYLVANIA HYDRAULIC FRACTURING STATE REVIEW 2 (2010), available at <http://www.strongerinc.org/documents/PA%20HF%20Review%20Print%20Version.pdf>.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at 4–6.

<sup>120</sup> *Id.* at 7–9.

recommendations into House Bill 1950.<sup>121</sup> The bill was approved by the Pennsylvania legislature on February 8, 2012 and signed into law on February 14, 2012.<sup>122</sup>

#### A. *Key Reforms to Oil and Gas Operations*

While the new Oil and Gas Act largely retains the same language and features of the old Act, many of the rules were updated and revised, especially those relating to unconventional wells.<sup>123</sup> The major revisions affecting natural gas operators cover the following areas: (1) well permit approval procedures, exceptions, and planning requirements; (2) setbacks and well placement restrictions; (3) protection of the water supply; (4) chemical disclosure and reporting; (5) bonding requirements; and (6) enforcement mechanisms.<sup>124</sup>

##### 1. *Well Permit Approvals, Exceptions, and Planning Requirements*

The new Act sets forth a number of new notice, permit, and plan requirements for operators, most notably, a notice of application, containment plans, and water management plans.<sup>125</sup> When potential unconventional well operators file their applications, they must also provide notice of their application to all surface landowners and water purveyors whose water supplies are within 3000 feet of the vertical well bore, as well as to all storage operators within 3000 feet.<sup>126</sup> Operators intending to use water to hydraulically fracture an unconventional well must submit a water management plan to the DEP for approval.<sup>127</sup> In addition, operators must submit a comprehensive containment plan consistent with the requirements and practices set forth by the new Act, subject to future regulations as set forth by the state Environmental Quality Board.<sup>128</sup>

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<sup>121</sup> H.B. 1950, 2012 Gen. Assemb., Reg. Sess. (Pa. 2012), available at <http://www.legis.state.pa.us/WU01/LI/LI/US/HTM/2012/0/0013..HTM>.

<sup>122</sup> *Id.*

<sup>123</sup> Compare 58 PA. STAT. ANN. §§ 601.101–605 (West 2010), repealed by 58 PA. CONS. STAT. §§ 3200–74 (2012), with 58 PA. CONS. STAT. §§ 3200–74 (2012).

<sup>124</sup> *Id.*

<sup>125</sup> 58 PA. CONS. STAT. §§ 3211, 3218.2 (2012).

<sup>126</sup> *Id.* § 3211(b).

<sup>127</sup> *Id.* § 3211(m).

<sup>128</sup> *Id.* § 3218.2.

In addition, the new Act provides the DEP with additional authority and discretion when reviewing a permit application. The DEP may consider written comments by the municipality in which the unconventional well is located, written comments from storage well operators within 3000 feet of the proposed site, and regulations set forth by the Environmental Quality Board aimed at protecting public resources.<sup>129</sup> These provisions provide for greater input in the approval process from the communities affected by the drill operations.

### 2. *Setbacks and Well Placement Restrictions*

The new Act increases the required setbacks from buildings, water wells, surface water intakes, reservoirs, other water supply extraction points, streams, springs, wetlands, and other bodies of water.<sup>130</sup> The old Act required setbacks ranging from 0 to 200 feet from the well (or well site), while the new Act requires setbacks ranging from 100 to 1000 feet.<sup>131</sup> The new Act also increases protection of floodplains, banning wastewater pits or impoundments within the 100-year floodplain and banning any tanks containing hazardous materials within the floodways.<sup>132</sup> The new Act still allows operators to file a request for variance, but clarifies that variances will only be granted if the operator complies with measures set forth by the DEP.<sup>133</sup>

### 3. *Protection of Water Supplies*

The new Act adds additional protections to water supplies, including a strengthened rebuttable presumption that a well operator is responsible for pollution of a water supply,<sup>134</sup> a water contamination hotline, public notification and publication of contamination to public drinking water facilities, stricter regulation of wastewater treatment facilities that apply for a National Pollution Discharge Elimination System permit,<sup>135</sup> and increased

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<sup>129</sup> *Id.* § 3215(d), (e).

<sup>130</sup> *Id.* § 3215.

<sup>131</sup> Compare 58 PA. STAT. ANN. § 601.205 (West 2010), *repealed by* 58 PA. CONS. STAT. § 3215 (2012), with 58 PA. CONS. STAT. § 3215 (2012).

<sup>132</sup> 58 PA. CONS. STAT. § 3215(f).

<sup>133</sup> *Id.* § 3215(a).

<sup>134</sup> *Id.* § 3218(c) (increasing qualifying time frame from six to twelve months, and distance from well site from 1000 to 2500 feet for unconventional wells).

<sup>135</sup> *Id.* § 3218.

wastewater fluid recordkeeping (for the past five years).<sup>136</sup> These requirements are aimed at preventing contamination and holding operators accountable for any contamination caused by improper disposal of wastewater.

#### 4. *Chemical Disclosure*

Following STRONGER's recommendation, the new Act adds disclosure requirements calling for operators to disclose the chemicals included in their fracturing fluids.<sup>137</sup> Though the regulations have not yet been promulgated, the mandatory chemical disclosure rules will require operators to disclose the contents of their fracturing fluids, while allowing operators to assert trade secret and confidential proprietary information claims.<sup>138</sup> DEP will attempt to make the chemical disclosure registry available in a searchable format, sortable by geographic area, time periods, operator, chemical ingredient, and chemical abstract service number.<sup>139</sup>

#### 5. *Bonding Requirements*

The new Act also increases the bonding requirements levied on operators according to their number of wells and the length of the well bore.<sup>140</sup> The specific requirements will be reviewed and adjusted by the Environmental Quality Board to match the projected cost to the Commonwealth of plugging the well in the case of abandonment.<sup>141</sup>

#### 6. *Enforcement Mechanisms*

The new Act more than triples civil and criminal sanctions for violations of the Act and regulations promulgated under it. These stiffer penalties underscore Pennsylvania's efforts to protect its environmental resources while still allowing operators to continue drilling operations.

The reforms listed above are only a few of the most notable changes that affect operators; additional changes can be seen

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136 *Id.* § 3218.3.

137 *Id.* § 3222.1.

138 *Id.*

139 *Id.*

140 *Id.* § 3225.

141 *Id.*

throughout Chapter 32 of the new Act. All of these reforms are meant to minimize the negative environmental impacts of oil and gas operations in Pennsylvania while providing consistent, statewide regulation on which operators can rely. The new Act will hopefully address the major concerns of municipalities and reduce their perceived need to craft additional local ordinances which might conflict with the new Act. It should be noted that although many provisions remained substantially the same, the wordings of the many provisions were restyled, which may give rise to new judicial interpretations and further clarification of the reforms made under the new Act.<sup>142</sup>

### B. *Key Reforms to Preemption Clauses*

In order to further address the conflict between local ordinances and state law, the new Act further delineates the relationship between state and local government with respect to oil and gas operations.<sup>143</sup> The primary preemption provision is the same as the old Act's provision,<sup>144</sup> however, the new Act adds an additional preemption provision which states, "Notwithstanding any other law to the contrary . . . the Commonwealth, by this section, preempts and supersedes the local regulation of oil and gas operations regulated by the environmental acts,<sup>145</sup> as provided in this chapter."<sup>146</sup> The Act goes further to provide that "all local ordinances regulating oil and gas operations<sup>147</sup> shall allow for the

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<sup>142</sup> Compare 58 PA. STAT. ANN. §§ 601.101–605, *repealed* by 58 PA. CONS. STAT. §§ 3201–74, with 58 PA. CONS. STAT. §§ 3201–74 (2012).

<sup>143</sup> See 58 PA. CONS. STAT. § 3301–09.

<sup>144</sup> Compare 58 PA. STAT. ANN. § 601.602, *repealed* by 58 PA. CONS. STAT. § 3302 (2012), with 58 PA. CONS. STAT. § 3302.

<sup>145</sup> For the purposes of section 3303, "environmental acts" are defined as: All statutes enacted by the Commonwealth relating to the protection of the environment or the protection of public health, safety and welfare, that are administered and enforced by the department [of Environmental Protection] or by another Commonwealth agency, including an independent agency, and all Federal statutes relating to the protection of the environment, to the extent those statutes regulate oil and gas operations.

*Id.* § 3301.

<sup>146</sup> *Id.* § 3303.

<sup>147</sup> For the purposes of section 3303,

[O]il and gas operations . . . includes the following: (1) well location assessment, including seismic operations, well site preparation, construction, drilling, hydraulic fracturing and site restoration associated with an oil or gas well of any depth; (2) water and other fluid

reasonable development of oil and gas resources.”<sup>148</sup>

The most notable requirements under the Act provide that local ordinances regulating oil and gas operations (1) must authorize oil and gas operations (other than activities at impoundment areas, compressor stations, and processing plants) as a permitted use in all zoning districts;<sup>149</sup> (2) may not impose conditions, requirements or limitations that are more stringent than those imposed on other industrial activities; (3) must have a review period for permitted uses that does not exceed 30 days for complete submissions or exceed 120 days for conditional uses; (4) may not impose restrictions on vehicular access routes for overweight vehicles except as authorized by the MPC; and (5) may not increase setback distances set forth in the new Act.<sup>150</sup>

The Act also names the Pennsylvania Public Utility Commission (instead of the Attorney General’s office) as the arbiter of any dispute about the reasonableness of any local zoning ordinance.<sup>151</sup> The Act also provides procedures for determining whether a local ordinance violates the MPC or the Oil and Gas Act, allowing a municipality to make a written request to the Public Utilities Commission to issue an opinion prior to the enactment of the local ordinance.<sup>152</sup> Additionally, owners, operators, or residents affected by the ordinance can request that the Public Utilities Commission review an ordinance and issue a

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storage or impoundment areas used exclusively for oil and gas operations; (3) construction, installation, use, maintenance and repair of: (i) oil and gas pipelines; (ii) natural gas compressor stations; and (iii) natural gas processing plants or facilities performing equivalent functions; and (4) construction, installation, use, maintenance and repair of all equipment directly associated with [the foregoing] to the extent that: (i) the equipment is necessarily located at or immediately adjacent to a well site, impoundment area, oil and gas pipeline, natural gas compressor station or natural gas processing plant; and (ii) the activities are authorized and permitted under the authority of a federal or Commonwealth agency.

*Id.* § 3301.

<sup>148</sup> *Id.* § 3304(a).

<sup>149</sup> Operations can be restricted or permitted only as a conditional use in residential zones if the wellhead site cannot be placed at least 500 feet from any existing building. Operations in residential areas may not take place within 300 feet of an existing building. *See id.* § 3304(b)(5.1)–(6).

<sup>150</sup> *Id.* § 3304(b).

<sup>151</sup> *See id.* § 3305.

<sup>152</sup> *Id.* § 3305(a). The opinion is advisory and not subject to appeal. *Id.* § 3305(a)(3).

ruling.<sup>153</sup> Aggrieved parties can also file a civil action in state court to invalidate the ordinance or enjoin enforcement.<sup>154</sup>

While the revisions to the Act's operational requirements can be characterized as strengthening the position of the local governments by tightening restrictions on operators, the limitations on local ordinances could be viewed as strengthening the position of the operators by explicitly delineating the limits of a municipality's ability to regulate oil and gas operations. The courts will likely play a significant role in interpreting the provisions provided in the new Act.

### C. *Legal Challenges*

Several municipalities have already challenged the new Act, seeking an injunction to block the provisions of the new Act from pre-empting current local ordinances and filing a complaint that the Act is unconstitutional.<sup>155</sup> The complaint, filed by seven municipalities and the Delaware Riverkeeper Network, asserts that the amended Oil and Gas Act illegally takes from municipalities the right to ensure the health, safety, and values of their communities by depriving local elected officials of their ability to use zoning and community decision-making to protect their municipalities' natural resources.<sup>156</sup> The Pennsylvania Commonwealth Court granted a preliminary injunction and the Pennsylvania Supreme Court heard oral argument on the issue in October 2012.<sup>157</sup>

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<sup>153</sup> *Id.* § 3305(b). The Commission's ruling is subject to de novo review by the state courts. *Id.* § 3305(b)(4).

<sup>154</sup> *Id.* § 3306 (2012).

<sup>155</sup> See *PA Court Issues Injunction to Stop Onset of Portions of Act 13*, ECOWATCH.ORG (Apr. 11, 2012), <http://ecowatch.org/2012/breaking-pennsylvania-court-issues-injunction-to-stop-onset-of-portions-of-act-13/>.

<sup>156</sup> See Motion for Preliminary Injunction at 7–8, *Township of Robinson v. Commonwealth*, No. 284 MD 2012 (Pa. Commw. Ct. 2012), available at <http://www.delawariverkeeper.org/resources/Comments/Act%2013%20filing%204.3.12%20Motion%20for%20Preliminary%20Injunction.pdf>.

<sup>157</sup> See ECOWATCH.ORG, *supra* note 155; Press Release, Del. Riverkeeper Network, Municipalities, Del. Riverkeeper Network, 32 Amici go to Pa. Supreme Court to Defend Commonwealth Court Decision that Act 13 is Unconstitutional (Oct. 17, 2012), available at <http://www.delawariverkeeper.org/resources/PressReleases/press%20release%20Supreme%20Court%20Hearing%2010%2017%202012.pdf>.

## CONCLUSION

The issue of hydraulic fracturing has heavily divided the communities of Pennsylvania. Proponents of both sides of the issue have valid arguments and data to support their respective contentions and neither is likely to be persuaded by the other. The Pennsylvania Oil and Gas Act stands as the primary law governing hydraulic fracturing and municipalities have very limited rights under the MPC to restrict or direct drilling operations beyond the scope of the state law.

It seems that the Pennsylvania Supreme Court has given an upper and lower limit on municipal authority to regulate oil and gas drilling through zoning. The court's analysis and application of its two-prong test in *Huntley & Huntley, Inc. v. Borough Council of Oakmont* and *Range Resources-Appalachia v. Salem Township* indicates that it will allow municipalities to use local zoning ordinances to regulate, to some degree, the placement of gas wells and drilling operations. The court, however, will not allow a municipality to dictate how drilling operations will be conducted within the municipality—and the new Oil and Gas Act has further delineated the boundaries between state and local law.

There is still gray area between these two cases and the new language of the Oil and Gas Act in which future cases will be decided. Municipalities are already seeking creative alternatives to regulate or eliminate hydraulic fracturing within their boundaries and many ordinances attempting to do so will likely be challenged under the Act's preemption clause.

Regardless of the outcome of the pending litigation, Pennsylvania will need to continually evaluate its policies towards mineral exploration and development in order to effectively uphold its constitutional mandate to protect the people's rights to "clean air, pure water, and to the preservation of the natural, scenic, historic, and aesthetic values of the environment" as well as its duty to "conserve and maintain [Pennsylvania's natural resources] for the benefit of all the people."<sup>158</sup>

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158 PA. CONST. art. I, §27.