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## Energy Industry Update

### ***Robinson* Rejected: Zoning Ordinance Permitting Oil and Gas Development in Residential-Agricultural Districts Is Constitutional**

**Action Item: Oil and gas companies and attorneys should have this case at the ready when NGOs and interest groups continue their attempts to invalidate local zoning ordinances allowing for oil and gas development by relying on *Robinson Township*.**

Consistent with a line of recent Commonwealth Court decisions, the Commonwealth Court once again held that a township did not violate the Pennsylvania Constitution by passing an ordinance that allowed oil and gas development in various zoning districts, including residential-agricultural (R-A) districts. In *Delaware Riverkeeper Network, et al. v. Middlesex Township Zoning Hearing Board*, 2017 Pa. Commw. Unpub. LEXIS 415 (Pa. Cmwlth. June 7, 2017), the Court upheld an ordinance and the zoning hearing board's approval of an oil and gas permit in an R-A district over the objections of numerous entities, including the Clean Air Council ("CAC") and the Delaware Riverkeeper Network ("Riverkeepers"), who claimed that the township and/or board actions violated several provisions of the Pennsylvania Constitution. Key takeaways from the decision include:

- The Court reaffirmed its recent decisions in *Markwest Liberty Midstream & Resources, LLC v. Cecil Township Zoning Hearing Board* and *Gorsline v. Board of Supervisors of Fairfield Township* that oil and gas development is permissible (and even desirable) in R-A zoning districts that allow for "public service facilities."
- The ring-fencing of the Pennsylvania Supreme Court's 2013 plurality opinion in *Robinson Township v. Commonwealth* continues. In declining to rely on *Robinson Township*, the Court re-affirmed its position, previously set forth in *Pennsylvania Environmental Defense Foundation v. Commonwealth and Funk v. Wolf*, that the three-part test set forth in the 1973 *Payne v. Kassab* decision still applies to challenges brought pursuant to Article 1, Section 27 of the Pennsylvania Constitution, thus further calling into question the impact of the 2013 *Robinson Township* decision.

In the appeal, the CAC and Riverkeepers challenged: (1) the underlying zoning ordinance as an invalid exercise of police powers and as incompatible with the township’s comprehensive plan in violation of Article 1, Section 1 of the Pennsylvania Constitution, (2) the ordinance and board’s decision as not in compliance with the township’s obligations under Article 1, Section 27 of the Pennsylvania Constitution (which environmental advocacy groups refer to as the “Environmental Rights Amendment”), and (3) some of the board’s evidentiary and credibility determinations. None of the challenges had merit.

As to the first challenge, the Court easily turned it aside by noting that oil and gas usage was similar to the “public utilities, except buildings” zoning category, which was a permitted or conditional use in the relevant zoning districts. The Court found this case to fit within the framework of several recent Commonwealth Court decisions upholding zoning ordinances in similar factual situations. See *Markwest Liberty Midstream & Resources, LLC v. Cecil Township Zoning Hearing Board*, 102 A.3d 549 (Pa. Cmwlth. 2014) and *Gorsline v. Board of Supervisors of Fairfield Township*, 123 A.3d 1142 (Pa. Cmwlth. 2015). The Court also noted the opponents failed to sustain their challenge to the zoning ordinance, which is presumptively valid, by focusing on issues involving the construction and drilling of the wells (“the particulars of development and construction”) instead of the “use” of the land. In the end, the Court found the ordinance was “compatible with the other permitted agricultural and residential uses and [ ] will limit [residential] sprawl and protect agricultural land.” Addressing the challenge related to the comprehensive plan, the Court simply noted that such an objection is not a basis for a legal challenge to an ordinance.

As to the second challenge, the Court rejected CAC and Riverkeepers’ reliance on the Supreme Court’s 2013 *Robinson Township* plurality decision. Instead, the Court reaffirmed the limited impact of that decision, noting, as it previously has, that absent “a majority opinion from the Supreme Court or a decision overruling [*Payne v. Kassab*], that opinion [*Payne*] is still binding on this Court.” Thus, as it has in other cases since *Robinson*

*Township*, the Court here applied the 1973 *Payne v. Kassab* test and concluded that the oil and gas ordinance “meets the Payne three-factor test.” The Court noted the ordinance, which permitted oil and gas development in certain zoning districts and further subdivided the type of development allowed within those districts (i) required compliance with applicable statutes and regulations, (ii) evidenced a rational planning and balancing of interests, and (iii) evidenced action by the township in its role as trustee for future generations by “helping to preserve agricultural resources for future generations ... [by balancing] the benefits of preserving agriculture including utilizing oil and gas use upon agricultural areas encompassing no more than 30% of the Township, and, by limiting suburban growth.”

As to the third challenge, the Court noted both that the board was the sole judge of credibility and that formal rules of evidence do not apply at the board’s hearing. In reviewing the board’s decision, the Court found that decision made the necessary specific factual findings and explained the rationale for the evidentiary and credibility determinations made. As such, there was no error.

In short, the decision will allow townships to preserve their agricultural nature and to keep residential development and can therefore be viewed as a victory for the orderly development of natural gas. Practitioners should be aware of this decision to combat continued attempts by NGOs and interest groups to invalidate local government ordinances and other decisions by relying on *Robinson Township*.

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