

## MEMORANDUM

TO: Damascus Citizens for Sustainability, Inc.

FROM: Jordan B. Yeager & Vincent J. Magyar, Jr., Curtin & Heefner LLP

DATE: April 7, 2011

RE: Overview of Current Pennsylvania Law Related to Local Ordinances Affecting the Use of Land for Drilling Oil & Gas Wells

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### I. Question Presented

What is the current state of the law in Pennsylvania related to municipal ordinances regulating oil and gas wells?

### II. Analysis

Pennsylvania municipalities are subordinate to the state government and their legislative enactments are subject to authorizations granted to them by the state. Where the state legislature grants municipalities full authority in a particular arena, municipalities are generally free to act within the confines of that statutory regime. Conversely, if the state limits municipal power in favor of the Commonwealth's desire to act within a given field, municipal actions are "preempted" and the municipality must defer to the Commonwealth's authority. This memorandum examines the extent of such preemption of municipal zoning ordinances regulating oil and gas wells in the context of the Municipalities Planning Code and the Oil and Gas Act. As this memorandum explains, municipalities have significant latitude to zone the use of land for oil and gas wells, comparable to their authority to zone other regulated industrial land uses.

#### A. The Pennsylvania Constitution, Municipalities Planning Code and the Oil and Gas Act

The Pennsylvania Constitution expressly provides for the protection of environmental rights, providing:

The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.

Pa. Const., Article I, Section 27 ("Environmental Rights Amendment").

Municipalities are obligated to advance the objectives of the Environmental Rights Amendment. They are agents of the Commonwealth and must exercise their responsibilities to be stewards of public natural resources. See Community College of Delaware County v. Fox, 20

Pa. Commw, 335, 342 A.2d 468 (1975)(governmental agencies share the responsibility to preserve public natural resources under Section 27; municipalities are trustees of the public natural resources). As the Fox court notes, municipalities bear this responsibility, in part, from a series of enactments, such as the Municipalities Planning Code (“MPC”).

The MPC expressly vests municipalities with the authority and responsibility to address matters for environmental protection and preservation. See 53 P.S. § 10603(b)(to the extent not otherwise preempted by other legislation, such as the Pennsylvania Oil and Gas Act, the zoning ordinance may prohibit, permit, regulate, restrict and determine, among other things, protection and preservation of natural resources); 53 P.S. §10603(d)(“zoning ordinances may include provisions regulating the siting, density and design of residential, commercial, industrial and other developments in order to assure the availability of reliable, safe and adequate water supplies to support the intended land uses within the capacity of available water resources); 53 P.S. §10603(g)(2)(“zoning ordinances shall provide for protection of natural and historic features and resources”); 53 P.S. § 10604(1)(among other purposes, zoning ordinances shall be designed to promote, protect and facilitate “the provision of a safe, reliable and adequate water supply for domestic, commercial, agricultural or industrial use,” ... “as well as preservation of natural, scenic and historic values in the environment and preservation of forests, wetlands, aquifers and floodplains”); and 53 P.S. §10604(2)(“to prevent ... loss of health, life or property from fire, flood, panic or other dangers”).

Therefore, strong and clear constitutional and statutory bases exists for municipalities to be active legislators and stewards of the public’s natural resources.

On the other hand, Pennsylvania’s Oil and Gas Act (“Act”), limits municipal power to regulate the operations of oil and gas wells. The Act provides:

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 provisions which impose conditions, requirements or limitations on the same features of oil and gas well operations regulated by this act or that accomplish the same purposes as set forth in this act. The Commonwealth, by this enactment, hereby preempts and supersedes the regulation of oil and gas wells as herein defined.

58 P.S. § 601.602.

Features of oil and gas well operations regulated by the Act include casing requirements for wells, water supply protection requirements, bonding, plugging of wells, certain restrictions related to locations of wells, and well-site restoration.

The identified purposes of the Act are:

- (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 the citizens of the Commonwealth;
- (2) Protect the safety of personnel and facilities employed in the exploration, development, storage and production of natural gas or oil or the mining of coal;
- (3) Protect the safety and property rights of persons residing in areas where such exploration, development, storage or production occurs;
- (4) Protect the natural resources, environmental rights and values secured by the Pennsylvania Constitution.

58 P.S. § 601.202.

*B. Summary of the Scope of Preemption*

While municipalities may not directly regulate features of oil and gas operations regulated by the Oil and Gas Act or that accomplish the same purposes as the Act, municipalities may enact zoning ordinances or flood plain management ordinances that regulate certain aspects of the use of land for oil and gas development.

In particular, municipalities may impose restrictions related to the “location” of oil and gas wells in various zoning districts, pursuant to their powers under the Municipalities Planning Code. Prohibiting the location of wells within a municipality, such as prohibiting them from a residential zoning district, is a perfectly acceptable type of regulation, as this does not constitute a “feature of operation” of the well.

Municipalities are authorized to restrict the location of gas wells in the interest of preserving the health, safety and welfare of the community, maintaining uniform zoning regulations, maintaining the character of the community and the development objectives of the municipality. Moreover, municipalities may establish gas drilling as a use that is permitted as of right, as a conditional use, or as a special exception.

For conditional uses and special exceptions, a municipality must be sure that the conditions it adopts to grant such conditional use or special exception pertain to the legitimate purposes and objectives of zoning in the municipality, do not grant unfettered discretion to deny the permit to the municipality or zoning hearing board and do not venture into regulation of features of the operation of wells or the purposes of the Act.

*C. Complete Ban on Drilling*

A complete ban on drilling throughout a municipality would almost certainly be subject to a legal challenge asserting that the ban violates substantive due process rights under the U.S. and Pennsylvania constitutions, and that it frustrates the purposes of the Oil and Gas Act.

Further, a provision of the MPC requires that municipal zoning ordinances “provide for the reasonable development of minerals.” M.P.C. §603(i). An open question exists, however, as to whether a municipality can meet its obligations under the MPC while excluding certain types of mineral extraction. If choosing to enact an outright ban, a municipality should be prepared to prove that the total exclusion is justified because the use at issue (e.g., deep horizontal drilling using toxic chemicals as part of hydraulic fracturing) would be injurious to public health, welfare, and safety.

As the court found in General Battery Corp. v. Zoning Hearing Board of Alsace Township, 29 Pa. Commw. 498, 371 A.2d 1030 (1977), a party challenging the validity of zoning ordinance overcomes the presumed validity of the ordinance by showing that the ordinance totally excludes an otherwise legitimate use. A “legitimate use” is one which “is not so particularly objectionable and undesirable that its prohibition appears prima facie to be designed to protect the public interest.” General Battery Corp., 29 Pa. Commw. at 501, 371 A.2d at 1032. The court in General Battery Corp. held that the “total exclusion of industrial waste disposal facilities in Alsace Township shifts the burden of proof to the municipality” and, since such industry was heavily regulated by the Commonwealth, the municipality was found not to have met its burden.

In Beaver Gasoline Co. v. Zoning Hearing Board of Osborne, 445 Pa. 571, 574, 285 A.2d 501, 503 (1971), the court held that, “a zoning ordinance which totally excludes a particular business from an entire municipality must bear a more substantial relationship to the public health, safety, morals and general welfare than an ordinance which merely confined that business to a certain area in the municipality.” Such a substantial relationship might be established if the municipality can show that the use is one that is “... generally known to give off noxious odors, disturb the tranquility of a large area by making loud noises, [or has] the obvious potential of poisoning the air or the water of the area, or similarly [has] clear deleterious effects upon the general public....” Id., 445 Pa. at 576, 285 A.2d at 504.

#### *D. Recent Zoning Case Law Interpreting the MPC and the Oil and Gas Act*

Pennsylvania courts have recently evaluated local zoning ordinances that sought to regulate gas drilling. The leading cases on the question of preemption under the Oil and Gas Act are companion Pennsylvania Supreme Court cases decided in 2009, Huntley & Huntley, Inc. v. Borough of Oakmont, 600 Pa. 207, 964 A.2d 855 (2009), and Range Resources – Appalachia, LLC v. Salem Township, 600 Pa. 231, 964 A.2d 869 (2009).

##### 1. Huntley & Huntley, Inc. v. Borough of Oakmont

In Huntley & Huntley, a drilling company entered into a lease with property owners for the purpose of extracting natural gas from the owners’ properties located in an “R-1 (single family) residential” zoning district in the Borough. Subsequently, the Pennsylvania Department of Environmental Protection (“DEP”) issued a well permit to the drilling company. The drilling company approached the Borough about drilling at the proposed sites and was informed by the Borough that drilling for natural gas was the extraction of minerals under the Borough zoning code and, in the R-1 zone, was permitted only as a conditional use. Conditional uses are uses

which are only permitted upon application to and approval of the governing board of the Borough. After hearings before the Borough Council, the case ultimately reached the Pennsylvania Supreme Court, which considered, in part, “whether the Oil and Gas Act precludes municipalities from exercising their zoning powers to regulate the location of oil and gas wells...”

The Court looked to whether the ordinance either: 1) contained provisions which impose conditions, requirements or limitations on the *same features of oil and gas well operations regulated by the Oil and Gas Act*; or 2) accomplished the *same purposes as set forth in the Act*.

The court first considered whether the location of a well in a particular zoning district constitutes a “feature” of the natural gas well operation that is regulated by the Act. The Act provides that wells may not be drilled within a certain distance from existing buildings or water wells nor within a certain distance from any stream, spring, certain bodies of water or certain wetlands. See Section 205. Furthermore, the Pennsylvania Department of Environmental Resources may consider impacts of the proposed well on public resources, such as parks, forests, game and wildlife lands, National and State scenic rivers, National natural landmarks habitats of rare or endangered plant or wildlife, historical and archaeological sites on Federal or State lists of historic places. *Id.* Noting this, the Court observed that the Act’s imposition of certain location restrictions on well placement does not represent a feature of the well’s operation.

Looking to dictionary definitions, the court wrote that a “feature” is a characteristic of something and “operation” is a process or manner of function. While location of a well may be one of its “features” generally, it does not constitute a feature of the well’s “operation.” Moreover, the location is not a characteristic of the well’s creation, functioning, maintenance, cessation of functioning or it capping. In turn, the court found that the reference in Section 602 to “‘features of oil and gas operations regulated by this act’ pertains to technical aspects of well functioning and matters ancillary thereto (such as registration, bonding, and well site restoration), rather than the well’s location.” As a result, the court held that the location restriction imposed by the zoning ordinance was not preempted by the Act as regulating “the same features of oil and gas well operations regulated by this act.”

The Court then turned its attention to whether the Borough ordinance regulates the same purposes “as set forth in the Act.” The Court determined that the phrase “as set forth in the Act” indicates that the Court should evaluate the purposes specifically stated in Section 202 of the Act. The Court specifically rejected any “attempt to glean the Act’s objectives from its substantive provisions.”

In its analysis, the Court observed that zoning controls do not address matters of state-wide concern. Rather, the zoning regulation addresses the attributes and community development objectives within the municipality. Furthermore, the subject matters of zoning regulations are land uses and community development objectives in the municipality generally, not oil and gas wells only. While some overlap between the Act’s and the Ordinance’s goals may occur -- such as protection of human health and safety -- the fundamental aims of the legislative enactments are quite different. State regulation of oil and gas operations requires special knowledge and expertise of the appropriate state agency to ensure uniform, state-wide

regulations. Local zoning regulations, meanwhile, draw upon the local government’s knowledge and experience “to designate where different uses should be permitted in a manner that accounts for the community’s development objectives, its character, and the ‘suitabilities and special nature of particular parts of the community.’” In sum, the court held that the ordinance and Act served different purposes and therefore the ordinance’s restrictions on oil and gas wells in the R-1 zoning district were not preempted.

In upholding the Borough of Oakmont ordinance, the court cautioned that its decision is not intended to be a determination that any ordinance under the MPC that regulates oil and gas wells will avoid preemption. As an example, the court suggested that a municipality could not permit drilling in a particular zoning class, but make permission conditioned upon complying with features of oil and gas operations regulated by the Oil and Gas Act.

## 2. Range Resources – Appalachia, LLC v. Salem Township.

The Salem Township case also considered the preemption issue. Salem Township enacted a subdivision and land development ordinance which represented a comprehensive regulatory scheme related to oil and gas development in the Township. Much of the language in the Township ordinance mirrored that of the Act. In fact, the ordinance imposed various local regulations on permitting procedures, pre-drilling bonding requirements, well-head and capping regulations, and site restoration post-drilling, features of the Act which are expressly preempted by Section 602. Considering the term “features” in Section 602, the Court stated that the term is “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.”

The court also noted that many of the ordinance’s restrictions were far more stringent than the corresponding provisions contained in the Act, in some circumstances imposing excess costs on entities engaged in oil and gas drilling, such as road restoration and repair. The comprehensive nature of the ordinance presented itself as an obstacle to the legislative purposes of the Act.

Additionally, the ordinance did not guarantee issuance of a permit even if the applicant complies with all requirements, stating that a conditional use permit “may” be issued subject to final approval of the Board of Supervisors at a public meeting. The Township’s attempted comprehensive regulatory scheme granted nearly unbridled discretion to the Township to deny the drilling permit, in stark contrast to the more permissive nature of the permitting regime contained in the Act.

In the end, the ordinance was found to focus “not on zoning or the regulation of commercial or industrial development generally, but solely on regulating oil and gas development, with specific objectives that include ‘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.’” Hence, in addition to the improper focus on features of operations of oil and gas operations which are addressed in the Act, the purposes of this particular ordinance impermissibly overlapped with the purposes of the Act. The court also noted that, while certain provisions of the ordinance were

not specifically addressed in the Act, the fact that the ordinance directly aimed at regulating oil and gas well operations contributed to the conclusion that the ordinance was invalid.

### 3. Penneco Oil Company, Inc. v. County of Fayette.

More recently, the Pennsylvania Commonwealth Court considered another preemption challenge related to a zoning ordinance in Penneco Oil Company, Inc. v. County of Fayette, 4 A.3d 722 (Pa. Commw. 2010).

Fayette County enacted a zoning ordinance in which certain activities, such as surface and deep mining, were permitted as of right in certain zoning districts, while oil and gas operations in the same zoning districts were only permitted by special exception. The ordinance also included particular conditions and standards related to oil and gas wells which must be met in order to qualify for a special exemption. These criteria related to the physical location of the well, fencing and shrubbery around the well.

The court found these conditions were permissible, as they did not address the technical aspects of well functioning and matters ancillary thereto. Rather, the court observed that the aim of the County with these regulations was to address the location of the well, preserve the character of residential neighborhoods and encourage beneficial and compatible land uses.

The court also considered and upheld a provision in the ordinance that authorized the zoning hearing board to attach additional conditions to a grant of special exception to ensure protection of the community's health, safety and welfare.

Furthermore, the Fayette County ordinance provided for the issuance of a zoning certificate which is required prior to the commencement of a use or the erection, construction, or alteration of a structure of building. The court upheld this provision because the certificate requirement was general in scope and applied to all development within the County, not solely oil and gas wells.

### 4. Key Lessons

Taken together, these cases provide a framework within which a municipality may operate in order to enact meaningful ordinances while limiting the risk of validity challenges:

- Municipalities may regulate the location of oil and gas wells within their zoning powers;
- Municipalities should avoid ordinance provisions that seek to regulate features of oil and gas operations regulated by the Oil and Gas Act, such as pre-drilling bonding requirements, casing requirements for wells, plugging of wells, well-head and capping regulations, and site restoration;
- Municipalities should avoid establishing a regulatory regime that clearly tracks that of the Oil and Gas Act;

- Municipalities may impose additional conditions for approval of special exceptions or conditional uses, provided such additional conditions are within the regular purposes of zoning and do not preclude issuance of a zoning permit if the conditions are achieved by the applicant;
- Municipalities should utilize overlay ordinances that protect significant natural resources, wherever they are found in the municipality;
- To the extent that municipalities seek to address concerns about the impacts of industrial and mineral extraction activities, it should do so in a manner that addresses all similar uses, rather than singling out gas drilling for special regulations;
- Zoning ordinances should minimize provisions that treat gas drilling differently than other industrial or mineral extraction uses; and
- All ordinances should contain a severability clause and should be drafted with discrete sections, so that if any section is found invalid it minimizes the risk that the entire ordinance will be invalidated.

While this memorandum provides an overview of the current state of the law, please note that the law in this area is complex and frequently changing. Each municipality should consult with its solicitor and/or special counsel before taking any action.

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