

## Oil & Gas: Preemption of Local Regulation

With the recent surge of drilling into Pennsylvania's Marcellus Shale as a source of natural gas production, local governments are looking for guidance on the issue of what they can and cannot regulate with regard to oil and gas drilling.

Municipalities are granted certain authority to regulate zoning and subdivision and land development pursuant to the Municipalities Planning Code (MPC), but how far does that power extend with respect to oil and gas? The MPC does not specifically address oil and gas regulation, but does broadly address "minerals" as follows: "Zoning ordinances shall provide for the reasonable development of minerals in each municipality." 53 P.S. § 10603(i). The term "minerals" is defined in the MPC as being "any aggregate or mass of mineral matter, whether or not coherent" including "crude oil and natural gas." *Id.* at § 10107.

Express language on the issue of zoning preemption is found in the Oil and Gas Act (OGA), as follows:

*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all local ordinances and enactments purporting to regulate oil and gas well operations regulated by this act are hereby superseded.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 (emphasis added).

To date, only two Pennsylvania Supreme Court decisions issued on the same date, February 19, 2009, have addressed this language: *Huntley & Huntley v. Borough Council of the Borough of Oakmont*, 964 A.2d 855 (Pa. 2009) and *Range Resources – Appalachia, LLC v. Salem Twp.*, 964 A.2d 869 (Pa. 2009). The Court interpreted this language as only preempting MPC-enabled ordinances to the extent they 1) contain provisions which impose conditions, requirements or limitations on the same features of oil and gas well operations regulated by the OGA or 2) accomplish the same purposes as set forth in the OGA. *Huntley*, 964 A.2d at 863. If an ordinance enacted pursuant to the MPC meets either of these two standards, it will be considered preempted by the OGA.

*Huntley* is very clear that municipalities may prohibit the location of wells in residential zoning districts. See *Huntley*, 964 A.2d at 866. Additionally, the Commonwealth Court has held where a municipality permits the location of oil and gas wells within a district by special exception only, the municipality may attach additional conditions in order to protect the public's health, safety and welfare, including but not limited to additional setback requirements. *Penneco Oil Co. v. County of Fayette*, 4 A.3d 722, 730 (Pa. Commw. Ct. 2010). Furthermore, the Commonwealth Court has established that local governments may require parties interested in land development to submit a request to the municipality for a zoning certificate, as this was determined to be different than the requirement for a

well permit, which would be considered preempted by the OGA. *See id.* at 731-32.

In *Range*, a comprehensive attempt at regulating oil and gas operations through the subdivision and land development process was struck down as preempted. Restrictions invalidated in *Range* included the establishment of permitting procedures specifically for oil and gas wells, the imposition of bonding requirements before drilling could commence, and the regulation of the location, design and construction of access roads, gas transmission lines, water treatment facilities within the framework of an ordinance specifically directed to oil and gas well operations. The Court in *Range* also determined that municipalities may not establish a procedure for residents to file complaints regarding surface and ground water, nor may municipalities declare drilling a public nuisance and revoke or suspend a permit. Lastly, provisions in the ordinance regulating well site access or restoration were also found to be preempted. *Range Resources*, 964 A.2d at 875-77. Outside of prohibiting oil and gas operations in a residential zoning district, an ordinance focusing solely on the regulation of oil and gas development rather than on zoning or the regulation of commercial or industrial development generally, stands an increased chance of being preempted by the OGA.

One of the most common questions regarding municipal regulation of oil and gas drilling is “Can a municipality ban drilling?” A total ban on conducting a legitimate business, including drilling, within municipal boundaries will most likely be considered invalid as exclusionary, unless a case can be made that physical conditions do not provide any location where drilling is feasible. *See Exton Quarries, Inc. v. Zoning Bd. of Adjustment*, 228 A.2d 169, 179 (Pa. 1967).

Many municipalities have ordinances requiring parties interested in land development to secure grading permits and to comply with municipal grading and excavation standards. However, when applied to oil and gas well operations, would these ordinances be interpreted as regulating the same oil and gas well operations that are regulated by the OGA? Little guidance has been provided on this issue. In *Commonwealth v. Whiteford*, 884 A.2d 364, 365 (Pa. Commw. Ct. 2005), the Pennsylvania Commonwealth Court held that a grading ordinance was not preempted by the OGA. However, this was a direct result of the driller’s failure to offer any evidence to show that the grading ordinance had infringed on any area subject to enforcement under the OGA. Therefore, without more useful facts and an analysis of the preemption issue, this case offers little insight on the issue of grading.

Additionally, courts have stated in dicta that the regulation of “site restoration” would be preempted by the OGA because it is a “feature of oil and gas well operations.” *See e.g. Huntley*, 964 A.2d at 864; *Penneco Oil Co., Inc.*, 4 A.3d at 725. As a local grading ordinance would be applicable to site restoration, it is possible that a grading ordinance in this context would be preempted by the OGA. Furthermore, in *Range*, the Pennsylvania Supreme Court found that an ordinance regulating the grading of access roads was preempted by the OGA. 964 A.2d at 871, 877. These are all useful points if making the argument for preemption.

However, if arguing in the alternative, it would be worth noting that the township ordinance at issue in *Range* was not a grading ordinance of general application, but was rather an ordinance specifically targeting oil and gas drilling and which contained particular requirements for site restoration. Additionally, the Department of Environmental Protection regulations and Oil and Gas Operator’s Manual, which provide direction and guidance on well site restoration, do not appear to regulate grading in detail. Furthermore, the cases where courts have determined that local ordinances were preempted involved regulations specific to oil and gas drilling in particular, rather than a general ordinance containing provisions applicable to all types of activities involving land development.

Are setback requirements pursuant to local zoning ordinances preempted by the OGA? The OGA establishes minimum setback requirements with regard to a well’s placement near an existing building or well and a stream or other body of water. For example, oil and gas wells may not be drilled within 200 feet from any existing building or existing water well without the written consent of the owner of the building or well. 58. P.S. § 601.205(a). However, local ordinances often require more stringent setbacks without reduction by consent. At this point in time, it is unclear as to whether such setbacks are preempted. The Pennsylvania Supreme Court in *Huntley* addressed the issue of setbacks in a footnote, stating as follows:

**This is not to say that an ordinance would be enforceable to the extent it sought to increase specific setback requirements contained in the Act.** *See e.g., St. Croix, Ltd. v. Both Township*, 118 Ohio App. 3d 348, 693 N.E. 2d 297 (Ohio Ct. App. 1997) (holding that, where the state oil and gas statute prescribed a specific setback distance for oil wells relative to habitable structures, localities were precluded from increasing those distances through zoning). The issue here is distinct, however, as it pertains to the

*continued*

permissibility of a zoning-based preclusion of oil and gas wells in residential districts. (Emphasis added).

*Huntley*, 964 A.2d at 864 fn. 10. On its face, the footnote language calls into question the validity of zoning ordinance setbacks. However, the footnote is dicta, as it seems to recognize, and the *St. Croix* case involved an Ohio oil and gas statute which expressly stated that no township shall adopt or enforce any ordinances relative to “the minimum distances from which a new well . . . may be drilled . . .” from various structures, buildings, streets, etc.

The Pennsylvania Supreme Court utilized a line of reasoning in *Miller & Son Paving v. Wrightstorm Township*, 451 A.2d 1002 (Pa. 1982), which would appear to support the argument that ordinances imposing setback requirements are not preempted under the OGA. In *Miller & Son Paving*, the Court upheld an ordinance setback for coal mining, which was greater than the state law setback, stating “[i]f a municipality can create a use zone excluding surface mining altogether, then it must surely be able to impose the lesser burden of requiring setbacks for such use in zones in which it is permitted.” This reasoning was later cited by the Commonwealth Court in a case involving setback requirements with regard to surface mining operations, which is currently on appeal. See *Hoffman Mining Co., Inc. v. Zoning Hearing Board of Adams Twp.*, 958 A.2d 602 (Pa. Commw. Ct. 2008), *allocatur granted*, 981 A.2d 1284

(Pa. 2009). Depending on the pending decision by the Pennsylvania Supreme Court, the outcome of the appeal may provide useful insight regarding the preemption of setback requirements under the OGA.

A bill has been introduced in the Pennsylvania Senate which, if passed, would permit municipalities to adopt a model ordinance pertaining to oil and gas drilling activities and in effect, remove many remaining preemption uncertainties. Pa. Sen. 1100, 2011-2012 Reg. Sess. (Jun. 15, 2011). Pursuant to this bill, the model zoning ordinance would regulate the following: the location of well site development, the location of natural gas compression stations and the location of natural gas processing plants. Additionally, the model zoning ordinance would be prohibited from regulating the hours of operation of drilling operations, imposing limitations on noise, light, height or security or fencing on drilling operations *that are more stringent* than those on other construction activities for other similar land uses, having a permit review period for uses by right that exceed thirty days, and imposing restrictions on vehicular access routes for overweight vehicles except as authorized pursuant to 75 Pa.C.S. or the MPC.

*Reprinted with permission from the July 14, 2011 edition of the Energy Law Supplement of The Legal Intelligencer and Pennsylvania Law Weekly © 2011 ALM Media Properties, LLC. All rights reserved. Further duplication without permission is prohibited.*

### About the Authors:

#### CHARLES M. MEANS, ESQUIRE



Chuck serves as a Solicitor and Special Counsel in the areas of local government including taxation, Right to Know Law, Sunshine Act, State Ethics Act, civil service, employee relations, procurement, cable TV and telecommunications law and building code compliance. He is also a solicitor to water, sewage, and recreation authorities and an expert in authority

board member law and ethics, law counseling and finance.

#### EMILY J. MUELLER, ESQUIRE



As the active Solicitor of Harrison Township, Emily is experienced in all facets of local government, including running public meetings and hearings, assisting clients with zoning and land use issues, property maintenance issues and demolition proceedings. She also has considerable experience with assisting municipal clients with reviewing and responding to requests

for public records under Pennsylvania’s Right-to-Know Law and handling appeals before the Pennsylvania Office of Open Records.



Straightforward Thinking.

[www.grblaw.com](http://www.grblaw.com)

Pittsburgh Office  
Frick Building  
437 Grant Street, 14th Floor  
Pittsburgh, PA 15219  
P: (412) 281-0587  
F: (412) 281-2971

Charles M. Means, Esquire  
[cmeans@grblaw.com](mailto:cmeans@grblaw.com)

Emily J. Mueller, Esquire  
[emueller@grblaw.com](mailto:emueller@grblaw.com)