



# The PIOGA press

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## Zoning ordinance validity challenges persist in the wake of the *Robinson Township* plurality opinion

In a somewhat ironic twist, anti-industry residents and environmental groups have been relying on their victory in *Robinson Township v. Commonwealth*, 83 A.3d 901 (2013), which invalidated the statewide standardized land use control set forth in Act 13 and restored local land use control over oil and gas operations, to challenge local zoning ordinances that regulate oil and gas development. The challengers in these validity actions generally argue that, per the plurality's expansion of the Pennsylvania Constitution's Environmental Rights Amendment (ERA) in *Robinson Township*<sup>1</sup>, each municipality must engage in substantial environmental and safety analysis prior to enacting oil and gas regulations or issuing permits thereunder. According to the challengers, an ordinance enactment process or permit review process that does not satisfy these requirements is invalid.

Capitalizing on the *Robinson* plurality's opinion that the ERA imposes on municipalities a duty to protect public natural resources, residents and environmental groups have challenged local zoning ordinances in five municipalities. One common argument is that the local governing body did not engage in sufficient environmental due diligence prior to enacting oil and gas land use regulations to satisfy its duty under the ERA and *Robinson*. According to some challengers, the ERA and *Robinson* require that a municipality conduct various types of environmental analysis, such as hydrogeological testing and air modeling, to inform the ordinance drafting process. However, given the ambiguity in the *Robinson* plurality opinion, there is not consistency among the challenging parties as to the scope of pre-enactment due diligence necessary to satisfy the ERA.

The challengers also frequently argue that the challenged regulations are inadequate to protect natural resources and the environment, and that the ERA and *Robinson* require municipalities to engage in their own environmental analysis on an application-by-application basis to ensure adequate environmental protection. The challengers making this argument generally view the local regulations in a vacuum, disregarding extensive state and federal regulatory, permitting and enforcement regimes. Several challengers also take the

position that oil and gas development is necessarily incompatible with residential and agricultural uses and, based on this premise, conclude that allowing the disparate uses to coexist within a single zoning district is tantamount to illegal spot zoning. Depending on the contents of the challenged ordinance, some challengers also argue that any incorporation of or similarity to the stricken provisions of Act 13 (e.g., minimum setback requirements) are necessarily invalid.

It is noteworthy that all of the challengers appear to be maintaining their respective positions despite the Commonwealth Court's clear statement in its *en banc* opinion in *Pennsylvania Environmental Defense Foundation v. Commonwealth*, 108 A.3d 140, fn. 37 (2015) that the *Robinson* decision is not binding precedent, but merely persuasive authority "to the extent it is consistent with binding precedent from [the Commonwealth] Court and the Supreme Court on the same subject."

The following is a brief update on the five post-*Robinson* zoning ordinance validity challenges:

■ **New Sewickley Township, Beaver County.** In September 2014, following New Sewickley Township's approval of a conditional use application for a compressor station next to their property, organic farmers Donald and Rebecca Kretschmann and Kretschmann Farm LLC challenged the validity of the township's zoning ordinance. Penn Energy Resources, LLC, Cardinal PA Midstream, LLC and a group of farmers intervened in the action. During the first night of the zoning hearing board hearing, held in October 2014, the challengers presented several witnesses, including calling, on cross-examination the chairman of the board of supervisors and a member of the planning commission, who testified about the process the township followed when drafting its oil and gas regulations. Challenger Donald Kretschmann also testified. The challengers withdrew their case the following day before the intervenors presented their cases, under objection from the intervenors. This matter is no longer pending.

■ **Robinson Township, Washington County.** In September 2014, six residents filed a facial validity challenge

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(as opposed to a challenge to the ordinance as applied to a specific request) to Robinson Township's newly-enacted zoning ordinance. The challenged ordinance is less industry-antagonistic than the previous ordinance, as two of the three members of the board of supervisors that brought the original *Robinson Act 13* challenge were voted out of office in 2013. The zoning hearing board hearing on the validity challenge opened in October 2014, and Range Resources-Appalachia, LLC, MarkWest Liberty Midstream and Resources, LLC and Robinson PROUD participated in the proceedings. The township and Range Resources moved for dismissal of the challenge as unripe and because the challengers lacked standing. The challengers then filed a second, as-applied validity challenge, adding to its previous claims a challenge to the township's approval of a Range Resources well pad under the challenged ordinance. The hearing resumed in January 2015 and the parties presented argument on the standing and ripeness issues. The zoning hearing board then voted to deny and dismiss both the facial and as-applied challenges. The challengers appealed both cases to the Washington County Court of Common Pleas in February 2015 and the matters are currently pending there.

■ **Middlesex Township, Butler County.** Four residents, the Clean Air Council of Philadelphia and the Delaware Riverkeeper **Network** challenged Middlesex Township's zoning ordinance and issuance of a well permit to R.E. Gas Development (Rex Energy) in October 2014. MarkWest Energy Partners, LP intervened in the matter in opposition to the appeal. The zoning hearing board held the hearing over nine evenings of testimony, beginning in November 2014. The challengers presented 10 witnesses, including a planning professor, a geologist and several residents, and rested their case in February 2015. The township and Rex Energy presented six witnesses, including the township's former manager, a public health and environmental health scientist, a land use attorney, and several residents, and rested their case in March 2015. All parties have presented their closing arguments and the record is closed. The zoning hearing board is scheduled to vote on the challenge on April 29.

■ **Allegheny Township, Westmoreland County.** In November 2014, three residents challenged Allegheny Township's zoning ordinance, as amended in 2010 to address oil and gas development, and the township's issuance of a gas well pad approval to CNX Gas Company LLC. CNX, the surface owner and a group of lessors intervened in the case in opposition to the challenge. The zoning hearing board held the hearing over three evenings in January and February 2015, during which the challengers presented witnesses including a biology professor, a landscape architect and several of the objecting residents. CNX's witnesses included an expert on the relationship between the oil and gas industry and agricultural activities, its general manager of gas permitting, and a senior land agent. The zoning hearing board also heard public comment from residents. The zoning hearing board voted to deny the challenge on March 5 and issued its findings of fact and conclusions of law in support of its decision on March 18. As of the date of this writing, an appeal has not

been filed.

■ **Pulaski Township, Lawrence County.** Four residents challenged Pulaski Township's zoning ordinance in December 2014. Hilcorp Energy Company intervened in opposition to the challenge and the zoning hearing board hearings began in February 2015. The challengers presented a landscape architect and two of the objecting residents as witnesses and rested their case in March 2015. Hilcorp presented an expert on the relationship between the oil and gas industry and agricultural activities, its leasing and project management consultant, and a company engineer who manages local and state permitting. The hearing closed in March 2015. The zoning hearing board is expected to meet and render its decision before the end of April 2015.

No additional *Robinson*-based validity challenges have been filed since this initial rush of cases. It is possible that potential challengers and their legal counsel are waiting to see how local zoning hearing boards and the courts resolve the ERA and *Robinson* arguments before pursuing action on additional fronts. In the meantime, municipalities must continue to navigate regulatory territory where they may be sued based on arguments that their regulations are not strict enough, while also attempting to avoid challenges from the industry that their regulations are preempted by state and federal law. It is likely that at least one of these challenges will find its way up to the Pennsylvania Commonwealth Court, which may provide some much-needed clarity to both municipalities and operators in the area of local regulation of oil and gas development.

*If you would like additional information about local zoning ordinances that regulate oil and gas developments, please contact Krista-Ann Staley (412-394-5406, [kstaley@babstcalland.com](mailto:kstaley@babstcalland.com)) or Blaine A. Lucas (412-394-5657, [blucas@babstcalland.com](mailto:blucas@babstcalland.com)).*

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<sup>1</sup> The three-justice plurality opinion, authored by Chief Justice Ronald D. Castille, greatly expanded the court's previous interpretation and application of the Environmental Rights Amendment (ERA), finding that it imposes on the Commonwealth and its municipalities a fiduciary duty to "conserve and maintain" natural resources. According to the plurality, this "implicates a duty to prevent and remedy the degradation, diminution, or depletion of our public natural resources." The plurality found that this duty is two-fold, comprised of "a duty to refrain from permitting or encouraging the degradation, diminution, or depletion of public natural resources" and a duty "to act affirmatively to protect the environment, via legislative action." As a result, the plurality found that certain provisions of Act 13, including those limiting local regulation of oil and gas development, failed to satisfy these duties.