

# ADMINISTRATIVE WATCH

## ADDRESSING ENVIRONMENTAL, ENERGY AND NATURAL RESOURCE ISSUES



### Babst Calland Attorneys at Law

[babstcalland.com](http://babstcalland.com)

#### Pittsburgh, PA

Two Gateway Center  
603 Stanwix Street  
Sixth Floor  
Pittsburgh PA 15222  
412-394-5400  
FAX 412-394-6576

#### State College, PA

Suite 302  
330 Innovation Blvd.  
State College, PA 16803  
814-867-8055  
FAX 814-867-8051

#### Charleston, WV

Suite 1000  
300 Summers Street  
Charleston, WV 25301  
681-205-8888  
FAX 681-205-8814

#### Canton, OH

3711 Whipple Avenue NW  
Canton, OH 44718  
234-352-1650  
FAX 234-352-1640

#### Sewell, NJ

380-A Tylers Mill Road  
Sewell, NJ 08080  
856-256-2495  
FAX 412-586-1082

### Commonwealth Court Reverses Controversial Lycoming County Decision; Rules that Gas Well Development Compatible with Agricultural Zoning

On September 14, 2015, the Commonwealth Court of Pennsylvania issued a much-anticipated ruling that overturned a decision of the Lycoming County Court of Common Pleas which found the development of a natural gas well pad in a Residential Agriculture zoning district not to be similar and compatible with other uses in that zoning district. The decision in *Gorsline v. Board of Supervisors of Fairfield Township, 1735 C.D. 2014* addressed the compatibility of natural gas development in a zoning district consisting of mixed residential and agriculture uses. This ruling is significant because of the amount of natural gas development in the Commonwealth that takes place in similarly situated zoning districts.

In 2013, Inflection Energy, LLC submitted a conditional use application to the Board of Supervisors of Fairfield Township seeking to locate and construct a natural gas well site on the land of Donald and Eleanor Shaheen in the Township's Residential Agriculture (RA) zoning district. The Township's zoning ordinance does not specifically address oil and natural gas development, but does contain a "savings clause" that permits a property owner to apply for conditional use approval for a use that is similar to and compatible with other uses within the zoning district. After two nights of hearings on Inflection's application, the Township granted the application subject to 14 additional conditions.

Neighboring landowners Brian and Dawn Gorsline and Paul and Michele Batkowski appealed the Township's approval, arguing, among other things, that a natural gas well site is an industrial activity which is not compatible with the uses allowed in the RA zoning district and that a natural gas well site should only be permitted in the Township's industrial zoning district. After argument and briefing, and without taking any additional evidence, the lower court granted the landowners' appeal, thereby invalidating the Township's conditional use approval. Judge Marc Lovecchio rejected the Township's conclusion that Inflection's natural gas well site is similar to and compatible with the other uses permitted in the RA zoning district. Inflection subsequently appealed Judge Lovecchio's decision to the Commonwealth Court.

The Commonwealth Court's decision in *Gorsline* is significant for several reasons. First, the Court found that the lower court erred by substituting its findings of incompatibility for the Township's finding that Inflection's use is similar to a permitted public service facility. The Court also noted that the Township already permitted four gas well pads within the RA zoning district which demonstrates that the use is compatible with other uses in the zoning district. In doing so, the Court rejected the objectors' arguments that a natural gas well site is industrial in nature and can only be located in the Township's industrial zoning district.

Second, the Commonwealth Court rejected the lower court's conclusion that the objectors had presented evidence that the natural gas well site would present a detriment to the health and safety of the surrounding neighborhood. The Court cited previous zoning decisions which held that mere comment and speculation from objectors does not rise to the level of probative evidence in a zoning hearing. The Court specifically found that although the objectors in this instance raised various concerns about drilling and construction activities, their concerns were speculative only and the objectors failed to present any evidence substantiating their concerns.

Third, the Court found the lower court erred in focusing on truck deliveries during the construction phase of the project. Importantly, the Court noted that zoning regulates the use of land, which in this case is the production of natural gas, and not the particulars of the construction and development of the use, such as truck traffic.

Finally, the Commonwealth Court explained, in a footnote to the decision, that the objectors' constitutional claim that Inflection's proposed use violated their rights under Article I, Section 27 of the Pennsylvania Constitution had no merit. The Court noted that such a claim presumed that Inflection's use is not compatible with the permitted uses in the RA zoning district and would cause environmental harm. The Court found that such a presumption did not apply, as the hearing record supported the Township's conclusion that Inflection's use was compatible with the permitted uses in the RA zoning district and the objectors failed to present any evidence to the contrary.

In rendering its decision, the Commonwealth Court reaffirmed several well-established zoning principles brought into question by the lower court's decision and confirmed that natural gas operations will not be treated differently than other types of development despite the arguments to the contrary raised by industry opponents. The decision also offers direction to municipalities in dealing with objectors and their myriad of concerns. As a result, the decision has provided guidance in the application of traditional zoning law to natural gas development brought into question by the Pennsylvania Supreme Court's plurality decision in *Robinson Township v. Commonwealth of Pennsylvania*.

Babst Calland attorneys represented Inflection in this case following Judge Lovecchio's decision. Timothy A. Schoonover joined with Susan J. Smith of Camp Hill to brief the case for the Commonwealth Court. Kevin K. Douglass and Robert Max Junker submitted an amicus brief on behalf of the Marcellus Shale Coalition. If you have questions regarding this case or zoning issues in general, please contact Timothy A. Schoonover at (814) 235-8423 or [tschoonover@babstcalland.com](mailto:tschoonover@babstcalland.com) or Robert Max Junker at (412) 773-8722 or [rjunker@babstcalland.com](mailto:rjunker@babstcalland.com).