

# ADMINISTRATIVE WATCH

## ADDRESSING ENVIRONMENTAL, ENERGY AND NATURAL RESOURCE ISSUES

### Court Upholds Zoning Ordinance Permitting Oil and Gas Well Development in Agricultural/Residential Zoning District



On October 21, 2015, Judge Richard McCormick, President Judge of the Westmoreland County Court of Common Pleas, issued a decision and order upholding the validity of Allegheny Township's zoning ordinance, which permits oil and gas well development in the Township's R2 Agricultural/Residential Zoning District. The decision in *Frederick v. Allegheny Township Zoning Hearing Board*, No. 1898 of 2015 (Com. Pl. Westmoreland Co. Oct. 21, 2015), affirms a previous decision of the Township's Zoning Hearing Board. Babst Calland represented CNX Gas Company LLC (CNX), an intervenor in the case, before both the Common Pleas Court and the Zoning Hearing Board.

CNX applied for and received a zoning compliance permit to develop an unconventional gas well pad in the Township's R2 District, in which oil and gas well development is permitted as a use by right. Neighboring property owners Dolores Frederick, Beverly Taylor, and Patricia Hagaman appealed to the Zoning Hearing Board, challenging both the issuance of the permit and the validity of the Township's zoning ordinance, alleging that permitting oil and gas well development in the R2 District violated the Pennsylvania Supreme Court's plurality decision in *Robinson Township v. Commonwealth of Pennsylvania*. Following several nights of hearings and oral argument, the Zoning Hearing Board ruled that the zoning ordinance was valid and upheld the issuance of the zoning compliance permit. Objectors then appealed to Common Pleas Court.

Since the *Robinson* decision, zoning ordinances authorizing oil and gas development have been challenged in several municipalities, with objectors essentially arguing that those ordinances are invalid because they are not strict enough. In most of these cases, the objectors have asserted that the zoning ordinance violated the Pennsylvania Environmental Rights Amendment (as interpreted by the *Robinson* plurality) because it permitted oil and gas development, a use they characterize as "industrial," in agricultural, residential and other non-industrial districts. To date, all of those challenges have been rejected by local zoning hearing boards, although several of those decisions have been appealed to Common Pleas Court. *Frederick* is significant in that it is the first case in which a court has addressed a *Robinson*-based ordinance validity challenge. This case is precedential in Westmoreland County and is instructive to courts in the other counties of the Commonwealth.

In *Frederick*, Judge McCormick first observed that *Robinson* was not binding precedent because it was only a plurality decision. The Court also pointed out that that *Robinson* did not address the constitutionality of a local ordinance, but instead involved a statute of statewide application (Act 13) that was invalidated because it

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interfered with the right of municipalities to make local zoning determinations. In any event, the Court went on to conclude that the Allegheny Township zoning ordinance was consistent with the *Robinson* plurality. Significantly, citing the extensive record developed before the Zoning Hearing Board, Judge McCormick expressly rejected the objectors' contention that the zoning ordinance's authorization of oil and gas uses "is inconsistent with the agricultural and residential character of the Township." That record established that (1) there was a long history of oil and gas development in the Township, including a number of wells and a pipeline in close proximity of the objectors' properties, (2) in the R2 District approximately 75 percent of the land mass is leased to oil and gas operators, (3) having the well pad on his property enabled the surface owner to continue actively farming his property instead of developing it for a residential subdivision, and (4) permitting oil and gas operations in the R2 District enhances the Township's ability to maintain its rural character. The Court also cited to expert testimony which concluded that oil and gas operations have safely coexisted within rural communities throughout the Commonwealth.

Judge McCormick also rejected several of the objectors' related arguments. Specifically, the Court ruled that the Township zoning ordinance did not constitute illegal "spot" zoning and did not violate sections 604 and 605 of the Pennsylvania Municipalities Planning Code. In so concluding, the Court stated that the Township's "legislative body sought to further the general welfare of its citizens by permitting them to benefit economically from oil and gas resources and royalties, and enabling them to retain the agricultural use and rural setting of their land." Finally, the Court found that the authorization of oil and gas development did not violate the community development objectives of the Township zoning ordinance.

If you have questions regarding this decision, please contact Blaine A. Lucas at (412) 394-5657 or [blucas@babstcalland.com](mailto:blucas@babstcalland.com), Steven B. Silverman at (412) 253-8818 or [ssilverman@babstcalland.com](mailto:ssilverman@babstcalland.com), or Lawrence H. Baumiller at (412) 394-5490 or [lbaumiller@babstcalland.com](mailto:lbaumiller@babstcalland.com).