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Commonwealth Court reverses controversial Lycoming County decision

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

Pertinent background

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 pad on property owned by Donald and Eleanor Shaheen in the township’s Residential Agriculture (RA) zoning district. The township’s zoning ordinance does not specifically regulate 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 permitted within the zoning district. Inflection followed the same process for four previous well pad applications.

Residents opposed to the development appeared at the public hearing to question Inflection’s witnesses and state their general concerns to the Board of Supervisors. After two nights of hearings on Inflection’s application, the township granted the application subject to 14 conditions intended to address the residents’ concerns. In making this decision, the township concluded that Inflection established that the natural gas well pad in no way was in conflict with the general purposes of the zoning ordinance and that it was similar to and compatible with other permitted uses within the RA zoning district.

Lycoming County court decision

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 findings and conclusions that Inflection’s natural gas well site was similar to and compatible with the other uses permitted in the RA zoning district. Judge Lovecchio also credited the landowners with raising specific issues regarding compatibility and that their concerns went beyond mere speculation, bald assertions, personal opinions or perceptions.

Anti-industry activists trumpeted Judge Lovecchio’s decision throughout the Commonwealth. Attorneys and activists regularly cited the decision in zoning ordinance challenges and other zoning proceedings as support for their argument that unconventional natural gas well sites are presumptively incompatible with agricultural and residential uses. Judge Lovecchio’s decision was one of the first court opinions to be rendered after the Supreme Court’s *Robinson Township v. Commonwealth of Pennsylvania* decision. Many opponents were of the belief that they only need to utter the phrase “Robinson Township” in a public hearing, and they would be automatically successful in opposing a natural gas development application. According to many industry opponents’ interpretation of *Robinson Township*, Judge Lovecchio’s decision stood for the proposition that unconventional natural gas well sites are industrial uses that are inappropriate for agricultural and residential areas and can only operate in industrial zoning districts.

Thus, Inflection was faced not only with the practical problem that the approval granted by the township had been

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reversed, but also with the larger problem that Judge Lovecchio's decision had an impact far beyond this particular well site. Inflection subsequently appealed Judge Lovecchio's decision to the Commonwealth Court. Recognizing the importance of this case, the Marcellus Shale Coalition filed an *amicus* brief in support of Inflection's position and highlighted Pennsylvania's long history with oil and natural gas. The Delaware Riverkeeper Network filed an *amicus* brief arguing that the *Robinson Township* decision required local officials to consider the Environmental Rights Amendment to the Pennsylvania Constitution in every zoning matter involving natural gas development. The Commonwealth Court held oral argument on June 15 before judges Mary Hannah Leavitt, Patricia A. McCullough and Anne E. Covey.

Commonwealth Court decision

The Commonwealth Court's unanimous 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 natural 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' main argument that a natural gas well site is industrial in nature and can be located only 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. This portion of the opinion will be useful to counter the typical opposition focus on construction and development activities during a public hearing.

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 landowners had argued that Article I, Section 27 imposes a duty on government agencies to "inform themselves of the potential environmental effects of land use approvals to seek relevant information from a permit applicant, and, if the information is not forthcoming, to deny that person's application." The court noted that a constitutional 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.

Looking ahead

Attorneys for the neighboring landowners have already indicated that they are going to seek permission to appeal to the Supreme Court. Anti-industry opponents also have pointed to this case as requiring residents to appear at hearings with counsel and detailed evidence in order to sustain their burden of proof that a particular use in a particular location will be detrimental to the health, safety and welfare of the neighborhood. Therefore, the industry can expect public hearings to become more technical in nature and to require more preparation by industry applicants than before.

But the positives of this case far outweigh the negatives. This case is particularly important in municipalities that do not expressly regulate oil and natural gas developments such as well pads and midstream facilities, and instead rely on a "savings clause" to regulate the location and restrictions on novel uses. The *Gorsline* opinion joins with the Commonwealth Court's earlier decision in *MarkWest Liberty Midstream & Resources, LLC v. Cecil Township Zoning Hearing Board*, 102 A.3d 549 (Pa. Cmwlth. 2014) to establish a skeptical view of treating natural gas cases differently from other zoning cases.

The case also has highlighted the contradictory approach of anti-industry activists with regard to zoning issues related to oil and natural gas development. On the one hand, opponents of Act 13 in *Robinson Township* argued that it was improper to limit the zoning powers of local officials and replace them with a statewide scheme that dictated where development could occur throughout Pennsylvania. In cases like *Gorsline*, industry opponents, through their Article I, Section 27 arguments, have advocated stripping local officials of their zoning powers and dictating that oil and gas development solely be governed by Pennsylvania's Environmental Rights Amendment.

In rendering its decision, the Commonwealth Court reaffirmed the application of several well-established zoning principles brought into question by the lower court's decision. The court 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, based on their interpretation of the Pennsylvania Supreme Court's plurality decision in *Robinson Township v. Commonwealth of Pennsylvania*. The *Gorsline* decision also offers guidance to both municipalities and industry applicants in dealing with objectors and their myriad concerns.

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, contact Schoonover at 814-235-8423 or tschoonover@babstcalland.com or Junker at 412-773-8722 or rjunker@babstcalland.com.