



# Issues Affecting Pennsylvania Energy Operations

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# Welcome



# Today's Presenters



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# Introduction

- Working with Municipalities
- Scope of Municipal Authority
- Recent Pennsylvania Case Law Developments





# Working with Municipalities

- Classifications
  - Townships
    - Second Class
      - Board of Supervisors generally limited to three
      - May have a home rule charter allowing a mayor/council plan
    - First Class
      - Board of Commissioners
  - Boroughs
    - Borough Council
    - Mayor



# Working with Municipalities

- Cities
  - First Class (Philadelphia)
  - Second Class (Pittsburgh and Scranton)
  - Third Class
    - Three different plans of government
      - Commission
      - Mayor-council
      - Council-manager



# Working with Municipalities

- Strategic Negotiation and Legal Rights
  - Participation in political process
  - Community involvement
  - Dissemination of information



# Working with Municipalities

- Strategic Negotiations and Legal Rights
  - Administrative law process
  - Appeal adverse governmental actions to Commonwealth Court





# Working with Municipalities

- Factors to consider

- What type of project?

- Permanent or transient?

- Is the operator (entity negotiating with municipality) regulated by a governmental entity?

- PA PUC
- FERC

- Timing of construction or completion?



# Working with Municipalities

- Considering these factors:
  - the operator must make decisions that will affect future activities in the municipality
  - the scope of authority each municipality possesses and its limitations



# Scope of Municipal Authority

- Police Power
  - Power to adopt ordinances as a reasonable exercise of police power
    - This legislative power rests with the council
  - Police power is plenary
    - Except as limited by the State or Federal Constitution



# Scope of Municipal Authority

- Challenging a municipal ordinance
  - Ordinance cannot be arbitrary or unreasonable
  - Must have a substantial relationship to promotion of the:
    - Public Health
    - Safety
    - Morals
    - General Welfare
  - The goal of the ordinance cannot be based on an arbitrary desire to:
    - resist natural operation of economic laws or
    - for “purely aesthetic” considerations



# Scope of Municipal Authority

- Consider Zoning
  - Zoning ordinances regulate the “use” of property in a geographic area, or zone
  - Zoning ordinances are to be construed expansively
    - Must afford the landowner “the broadest possible use and enjoyment of their land.”
  - In addition to the uses allowed, zoning ordinances may allow “conditional uses” or “special exceptions”





# Scope of Municipal Authority

- Conditional Use



- If a use is a “conditional use” under the applicable zoning ordinance, the applicant must establish compliance with the specific requirements of the ordinance
- The proposed use enjoys a presumption that it is consistent with municipal planning objectives and with the public health, safety and welfare
- Board can attach conditions and safeguards in addition to those expressed in the ordinance

# Scope of Municipal Authority

- Special Exception



- A special exception is a use that is expressly permitted by the zoning ordinance, absent a showing of detrimental effect on the community
- Board can attach conditions and safeguards in addition to those expressed in the ordinance



# Scope of Municipal Authority

- MarkWest Liberty Midstream & Resources, LLC v. Cecil Township Zoning Hearing Board, 102 A.3d 549 (Pa. Commw. 2014)
  - Centered on an application for a special exception
  - Cecil Township’s Zoning Hearing Board (“ZHB”) denied the application
  - The Court of Common Pleas affirmed



# Scope of Municipal Authority

- Commonwealth Court considered (among other things)

**Whether Cecil Township’s Zoning Hearing Board (“ZHB”) abused its discretion by denying MarkWest’s special exception application to build a natural gas compressor station?**



# Scope of Municipal Authority

- Key Issue

Whether a natural gas compressor station had the “same general character” as an “essential service” such as “the erection, construction, alteration, or maintenance of gas, electrical, and communication facilities”?

- ZHB held that MarkWest’s natural gas compressor station should be an expressly excluded use because:

- the use is comparable to “cellular communications facilities” even though “natural gas compressor station” is defined in the ordinance





# Scope of Municipal Authority

- Commonwealth Court:
  - Found the ZHB’s interpretation and application of the ordinance to be unreasonable and “without basis in fact or law”
  - The Court reversed the trial court’s order upholding the ZHB’s denial of the special exception application



# Recent Pennsylvania Case Law Developments

- **Robinson Township v. Commonwealth**, 83 A.3d 901 (2013)
- **Pennsylvania Environmental Defense Foundation v. Commonwealth**, 161 A.3d 911 (Pa. 2017)
- **Gorsline v. Board of Supervisors of Fairfield Township**, 123 A.3d 1142 (Pa. Commw. Ct. 2015) (Currently under review by PA Supreme Court)





# *Robinson Township v. Commonwealth*

- Pennsylvania's General Assembly passed a revised Oil and Gas Act in 2012 ("Act 13")
  - Limited how local governments and municipalities could regulate oil and gas operations
  - Gave PA PUC authority over local zoning ordinances
  - Statewide zoning as it relates to oil and gas operations

# *Robinson Township v. Commonwealth*

- The Court invalidated portions of Act 13 that limited local government's power to regulate oil and gas operations
- A plurality of the Court did so through the ERA
- A plurality of the Court found that the Commonwealth had a fiduciary obligation to comply with the terms of the "trust" established under the ERA





# *Robinson Township v. Commonwealth*

- Pa. Const. art. I, § 27:

**The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.**



# *Robinson Township v. Commonwealth*

- What test will be used to determine the constitutionality of Commonwealth actions?
- What role do municipalities have, if any, to act as a trustee?



# ***PEDF v. Commonwealth***

- **What test will be used to determine the constitutionality of Commonwealth actions?**
  - Since 1973, Pennsylvania courts applied a three-part test announced in *Payne v. Kassab* to determine whether such statutes or regulations violated the ERA



# *PEDF v. Commonwealth*

- Under the *Payne* test, the court asked
  - (1) Was there compliance with all applicable statutes and regulations relevant to the protection of the Commonwealth's public natural resources?
  - (2) Does the record demonstrate a reasonable effort to reduce the environmental incursion to a minimum?
  - (3) Does the environmental harm which will result from the challenged decision or action so clearly outweigh the benefits to be derived therefrom that to proceed further would be an abuse of discretion?



## *PEDF v. Commonwealth*

- Court rejected *Payne* Test in favor of utilizing the language of the ERA, itself, and private trust principals
- *PEDF* recognized what had been a plurality in *Robinson Township*
  - The concurring and dissenting opinion noted, however, that private trust principals are inflexible and burdensome on the Court's sister branches of government
  - **Note:** the Commonwealth Court declined to extend *PEDF* in *Delaware Riverkeeper Network v. Sunoco Pipeline LP*, No. 952 CD 2017 (2018 WL 943041 - Pa. Commw. Ct.)



# ***Gorsline v. Board of Supervisors of Fairfield Township***

- The Commonwealth Court reversed an order by the Court of Common Pleas denying Inflection Energy LLC's application to drill and operate a natural gas well in Fairfield Township, Lycoming County's Residential Agricultural District
- Under review by the Supreme Court of Pennsylvania
  - The Court *may* find a way to address whether local governments have an obligation to act under the ERA to protect environmental rights of their citizens





# *Gorsline v. Board of Supervisors of Fairfield Township*

- The Township’s zoning ordinance does not specifically authorize natural gas wells
- Inflection applied for a conditional use permit under the ordinance’s “savings clause”
  - Allows the Board of Supervisors to grant a conditional use where a proposed use is not specifically authorized anywhere in the Township
- Neighbors challenged the application

# *Gorsline v. Board of Supervisors of Fairfield Township*

- Inflection argued the use was similar to that of a “public service facility” which was a permitted use
- Trial court disagreed, finding the proposed use was dissimilar





# *Gorsline v. Board of Supervisors of Fairfield Township*

- The Commonwealth Court held that the trial court erred
  - The proposed conditional use met the requirements set forth in the Township's zoning ordinance
  - The evidence before the Court showed that the proposed use did not present a present detriment to the health and safety of the community.

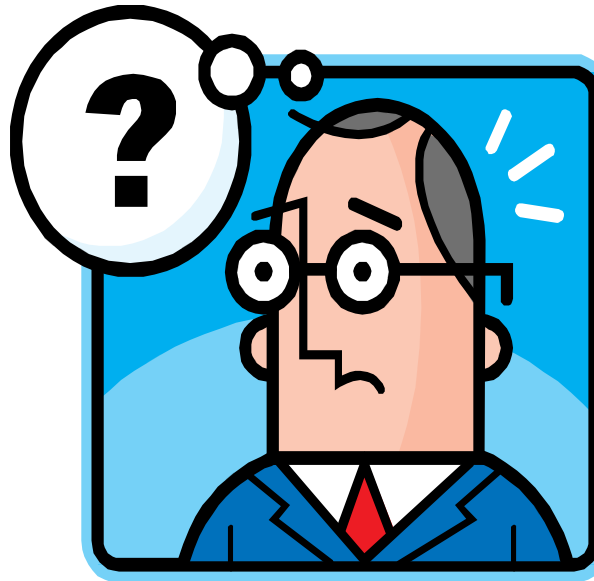
# *Gorsline v. Board of Supervisors of Fairfield Township*

- Oral arguments held on March 8, 2017
- Court considering whether the Township's permitting decision comports with *Robinson Township*
- At issue is whether zoning decisions must be made at the local level
  - A decision could subject operators to varied requirements and regulations in each municipality





# QUESTIONS?





# *Coming Up...*

## *Steptoe & Johnson Midstream Series*

- **April 26** - Midstream Cybersecurity Concerns And Emergency Response
- **May 9** - Land Issues In Midstream Development
- **June 13** - FERC and the Trump Administration/Regulatory Issues
- **July 11** - Eminent Domain

*Watch Your Inbox for Your Invitation!*

# Thank You!



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