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Gas Well Construction Effects Only 'Temporary,' Court Says

By **Matthew Santoni**

Law360 (November 14, 2019, 5:23 PM EST) -- A western Pennsylvania town didn't have to give extra weight to the "temporary" effects of building and drilling hydraulically fractured gas wells when considering its zoning laws, a state appellate court said Thursday.

As Penn Township crafted its "mineral extraction overlay" district covering half the municipality, where fracking could be allowed after a site-by-site review, it didn't have to consider shale gas wells a heavy industrial use because the construction and drilling on a well site was brief compared to the overall life of the well, the Commonwealth Court panel said. In addition, a Westmoreland County Court of Common Pleas judge did not have to consider that temporary use as grounds to send the zoning rules back to the drawing board, the panel said.

"Evidence of stage duration and of modest impacts during long-term production provides a sufficient factual basis upon which to distinguish the temporary industrial-type impacts during the much shorter pre-production stages from the incremental impacts during the majority lifespan of an [unconventional] well," Senior Judge Robert Simpson wrote for the panel. "There is no abuse of discretion in affording less weight to evidence of temporary impacts."

The Commonwealth Court affirmed the trial court's ruling that a local environmental group, Protect PT, could not challenge the zoning rule's validity on the grounds that gas wells were a heavy industrial activity incompatible with the town's increasingly suburban character and could potentially pollute residents' air and water.

Protect PT had sought to have the township reconsider and narrow the overlay district, but the Court of Common Pleas held a hearing with competing experts from pro- and anti-drilling perspectives and denied Protect PT's challenge.

In **appellate arguments** in early October, the environmental group claimed the lower court had erred in considering only the finished wells in weighing the compatibility of unconventional natural gas development, or UNGD, with surrounding development, and said the overlay was too broad in its conditions and in how much of the township it covered.

An attorney for intervenors Huntley & Huntley Energy Exploration LLC — now known as Olympus Energy — countered that state and local rules for how far well heads must be located from neighbors and buildings meant that actual drilling could take place only in about 10% of the community.

The Commonwealth Court panel said there could be some consideration of the construction phase — which Protect PT said could be repeated throughout the life of a site whenever a new well is drilled from the same pad or an existing well is "stimulated" with additional fracturing — but it wasn't enough to deem fracking a heavy industrial use or overturn the trial court's determination that such effects were temporary.

"We question whether impacts from pre-production stages of UNGD can never be taken into consideration in a substantive validity challenge," the panel said. "The better jurisprudential articulation is that impacts from any stage can be taken into consideration by the fact-finder in a substantive validity analysis. However, no reversible error is evident here."


A footnote to the opinion said one of Protect PT's own experts testified that drilling a shale well typically takes about 30 days for the initial construction of a pad, two to three weeks for the actual drilling and fracturing, and about 10 days for completing the well.

Ryan Hamilton of Fair Shake Environmental Legal Services, representing Protect PT, said the court seemed to side with the group on whether construction's impact could be taken into account, but then said it was fine for the trial court to skip over that evidence.

"It's a disappointing decision," he told Law360 on Thursday. "It seems like the court agreed that all parts of unconventional gas development should be considered in a substantive validity analysis ... but then failed to take that into consideration in affirming the trial court's decision."

Hamilton said he did not know yet whether Protect PT would appeal to the Supreme Court of Pennsylvania.

The Commonwealth Court rejected Protect PT's other arguments that the overlay district was enacted in violation of residents' rights to due process or a clean environment, noting that the trial court largely sided with the intervenor gas drillers' experts on the history of gas drilling in the region, its interaction with residential and farming uses, and its environmental effects.

The panel largely pointed back to its **2018 decision** in **Frederick v. Allegheny Township Zoning Hearing Board** , which said that regulating the environmental effects of shale wells was up to the state, such drilling can be compatible with other uses of land, and zoning for drilling is not barred by the Pennsylvania Constitution's Environmental Rights Amendment, which guarantees residents' rights to clean air and water.

"As we noted in Frederick, a substantive due process analysis requires a balancing of the public interest served by the zoning ordinance against the confiscatory or exclusionary impact of regulation on individual rights. Here, Protect PT essentially relies upon expert testimony rejected by the fact-finder," the panel said. "The trial court accepted testimony from Huntley's expert ... that UNGD is compatible with the rural and agricultural uses in the [Rural] Resource District. Consequently, the trial court properly determined that the zoning ordinance ... which permits UNGD in specific and targeted areas of the Resource District that are rural and not densely populated, did not violate substantive due process."

Apex Energy LLC, one of the other intervenors, supported the decision.

"Apex Energy is pleased with the well-reasoned opinion of the Commonwealth Court affirming the trial court's judgment," said the company's attorney Jeffrey Wilhelm of Reed Smith.

Olympus also expressed support for the decision, noting that the trial court sided with its experts' opinions that shale drilling would not affect drinking water or create air pollution that would cause public health concerns.

"Penn Township's ordinance was thoughtfully developed for the community's needs," said company representative Kimberly Price. "The court's ruling is a win for Olympus Energy's landowners as we move forward with development plans in Penn Township and beyond."

Attorneys for the township did not immediately respond to requests for comment Thursday.

Senior Judge Robert Simpson and Judges P. Kevin Brobson and Christine Fizzano Cannon sat on the panel for the Commonwealth Court.

Protect PT is represented by Ryan E. Hamilton of Fair Shake Environmental Legal Services.

Penn Township is represented by Michael T. Kornis II of Maiello Brungo & Maiello LLP.

Huntley & Huntley is represented by Blaine A. Lucas of Babst Calland Clements & Zomnir PC.

Apex Energy is represented by Jeffrey G. Wilhelm of Reed Smith LLP.

The case is Protect PT v. Penn Township Zoning Hearing Board, case number 1632 CD 2018, in the Commonwealth Court of Pennsylvania.

--Editing by Bruce Goldman.

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