# MUNICIPAL IMPACTS OF OIL & GAS DEVELOPMENT

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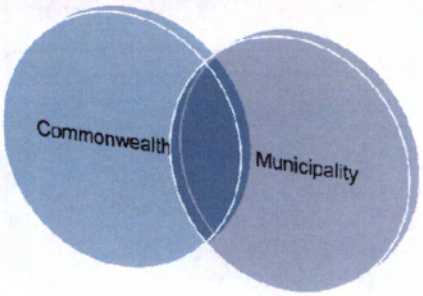
## Dillon's Rule

- No inherent authority
- Exercise only the following powers:
  - Express powers
  - Implied or incidental powers
  - Essential powers
- When in doubt, power is denied.

## Enabling Statutes

- Municipal Codes
  - First Class Township Code, 53 P.S. § 55101 et seq.
  - Second Class Township Code, 53 P.S. § 65101 et seq.
  - Borough Code, 53 P.S. § 45101 et seq.
  - Etc.
- Pennsylvania Municipalities Planning Code, 53 P.S. § 10101 et seq.

## Preemption vs. Lack of Authority




## Types of Preemption

- Express or Explicit Preemption
- Conflict Preemption
- Field Preemption

## Express or Explicit Preemption

- Statute expressly forbids municipal regulation
- Statute's language indicates that it should not be supplemented by local regulation

## Conflict Preemption

- Local enactment irreconcilably conflicts with or stands as an obstacle to the execution of the full purposes of the statute
- Irreconcilable conflict exists when simultaneous compliance with both the local ordinance and state statue is impossible

## Conflict Preemption (cont'd)

- Statute expressly states that municipalities may enact ordinances that are not inconsistent with the statute
- May be explicit or implicit

## Conflict Preemption (cont'd)

Example: Nutrient Management Act, 3 Pa. C.S. §§ 501-522

...Nothing in this chapter shall prevent a political subdivision or home rule municipality from adopting and enforcing ordinances or regulations which are *consistent with and no more stringent than* the requirements of this chapter and the regulations or guidelines promulgated under this chapter. No penalty shall be assessed under any such local ordinance or regulation under this subsection for any violation for which a penalty has been assessed under this chapter.

## Field or Implied Preemption

- Statute does not expressly preempt local regulation
- But preemption is inferred because the statute indicates an intention that it should not be supplemented

## Preemption Test

- Does the ordinance conflict with the state statute, either because of conflicting policies or operational effect?
- Was the state statute intended to expressly or impliedly be exclusive in the field?

## Preemption Test

- Does the subject matter reflect a need for uniformity?
- Is the state scheme so pervasive or comprehensive that it precludes coexistence of municipal regulation?
- Does the ordinance stand as an obstacle to the accomplishment and execution of the full purposes and objectives of the legislature?

## Total Preemption

- Exception and not the rule
- Three instances in Pennsylvania:
  - Alcoholic Beverages
  - Anthracite Coal Mining
  - Banking
- How vs. Where distinction

## Oil and Gas Act (Pre-Act 13 of 2012)

58 P.S. § 601.101 – 601.605

- Non-MPC Ordinance
- Non-Flood Plain Management Act Ordinance
- Same features of oil and gas well operation
- Same purposes as set forth in Oil and Gas Act

## Oil and Gas Act (Pre-Act 13 of 2012)

58 P.S. § 601.101 – 601.605

No Preemption

- Designating zoning districts whereoil and gas wells are permitted or prohibited
- Addressing traditional zoningconcerns, such as location and size
- Requiring a special exceptionor conditional use for oil and gas wells

## Oil and Gas Act (Pre-Act 13 of 2012)

58 P.S. § 601.101 – 601.605

Preemption

- Comprehensive regulatory scheme relative to oil and gas development
- *Range Resources – Appalachia, LLC v. Salem Twp.*, 964 A.2d 869 (Pa. 2009)

## Oil and Gas Act – Act 13 of 2012

§3302 – Revised Preemption Section

Except with respect to local ordinances adopted pursuant to the MPC and the Flood Plain Management Act, all local ordinances purporting to regulate oil and gas operations regulated by Chapter 32 (relating to development) are hereby superseded.

No local ordinance adopted pursuant to the MPC or the Flood Plain Management Act shall contain provisions which impose conditions, requirements or limitations on the *same features* of oil and gas operations regulated by Chapter 32 or that accomplish the *same purposes* as set forth in Chapter 32. The Commonwealth, by this section, preempts and supersedes the regulation of oil and gas operations as provided in this chapter.

## Oil and Gas Act – Act 13 of 2012

New Definitions (§ 3301)

- Local Ordinance – An ordinance or other enactment, including a provision of a home rule charter, adopted by a local government that regulates oil and gas operations.
- Oil & Gas Operations – The term includes the following:
  1. Well location assessment, including seismic operations, well site preparation, construction, drilling, hydraulic fracturing and site restoration associated with an oil or gas well of any depth;
  2. Water and other fluid storage or impoundment areas used exclusively for oil and gas operations;

## Oil and Gas Act – Act 13 of 2012

New Definitions (§ 3301) (cont'd)

3. Construction, installation, use, maintenance and repair of:
   I. oil and gas pipelines;
   II. natural gas compressor stations; and
   III. natural gas processing plants or facilities performing equivalent functions; and
4. Construction, installation, use, maintenance and repair of all equipment directly associated with activities specified in paragraphs (1), (2) and (3), to the extent that:
   I. the equipment is necessarily located at or immediately adjacent to a well site, impoundment area, oil and gas pipeline, natural gas compressor station or natural gas processing plant; and
   II. the activities are authorized and permitted under the authority of a Federal or Commonwealth agency.

## Oil and Gas Act – Act 13 of 2012

§3303 – New Preemption Provision

Notwithstanding any other law to the contrary, environmental acts are of *Statewide concern* and, to the extent that they regulate oil and gas operations, *occupy the entire field* of regulation, to the exclusion of all local ordinances. The Commonwealth by this section, *preempts and supersedes* the local regulation of oil and gas operations regulated by the environmental acts, as provided in this chapter.

## Oil and Gas Act – Act 13 of 2012

New Definition (§ 3301)

Environmental Acts – All *statutes enacted by the Commonwealth* relating to the protection of the environment or the protection of public health, safety and welfare, that are administered and enforced by the department or by another Commonwealth agency, including an independent agency, and all *Federal statutes* relating to the protection of the environment, to the extent those statutes regulate oil and gas operations.

## Oil and Gas Act – Act 13 of 2012

- *"[A]ll local ordinances regulating oil and gas operations shall allow for the reasonable development of oil and gas resources."*(§ 3304(a))
- What is "reasonable development?"
  - What local ordinance must do.
  - What local ordinance cannot do.

## Oil and Gas Act – Act 13 of 2012

- "Reasonable Development" – What must the local ordinance do?
  - Well and Pipeline Location Assessment Operations (including seismic operations)
    - Permitted by right in every zoning district.

## Oil and Gas Act – Act 13 of 2012

- "Reasonable Development" – What must the local ordinance do?
  - Oil and Gas Operations (other than activities at impoundment areas, compressor stations and processing plants)
    - Permitted by right in all zoning districts.
  - Exceptions
    - May prohibit or permit only as a conditional use, wells or well sites within a residential district if the well site cannot be placed so that the wellhead is at least 500 feet from any existing building.
    - In residential districts, outer edge of well pad must be at least 300 feet from any existing building.
    - In residential districts, all other oil and gas operations (other than pipelines, access roads and security features) must be at least 300 feet from any existing building.

## Oil and Gas Act – Act 13 of 2012

- "Reasonable Development" – What must the local ordinance do?
  - Natural Gas Compressor Stations
    - Permitted by right in agricultural and industrial zoning districts.
    - Permitted by conditional use in all other zoning districts, if:
      - Located greater of 750 feet from nearest existing building (that is occupied) or 200 feet from nearest lot line (unless waived by owner of the building or adjoining lot).
      - Noise level does not exceed greater of 60dbA at the nearest lot line or the applicable standard imposed by federal law.

## Oil and Gas Act – Act 13 of 2012

- "Reasonable Development" – What must the local ordinance do?
  - Natural Gas Processing Plants
    - Permitted by right in industrial zoning districts.
    - Permitted by conditional use in agricultural zoning districts, if:
      - Located greater of 750 feet from nearest existing building (that is occupied) or 200 feet from nearest lot line (unless waived by owner of the building or adjoining lot).
      - Noise level does not exceed greater of 60dbA at the nearest lot line or the applicable standard imposed by federal law.

## Oil and Gas Act – Act 13 of 2012

- "Reasonable Development" – What must the local ordinance do?
  - Permitted Use – Review period not to exceed 30 days.
  - Conditional Use – Review period not to exceed 120 days. (Compare with § 913.2(b)(2) of the MPC, which refers to § 908(1.2)).

## Oil and Gas Act – Act 13 of 2012

- "Reasonable Development" – What must the local ordinance do?
  - Impose restrictions on vehicular access routes for overweight vehicles only as authorized under 75 Pa. C.S. (relating to vehicles) or the MPC.

## Oil and Gas Act – Act 13 of 2012

- "Reasonable Development" – What the local ordinance cannot do.
  - Impose conditions, requirements or limitations on the construction of oil and gas operations that are more stringent than on other industrial uses within the geographic boundaries of the local government.

## Oil and Gas Act – Act 13 of 2012

- "Reasonable Development" – What the local ordinance cannot do.
  - Impose conditions, requirements or limitations on the heights of structures, screening and fencing, lighting or noise related to permanent oil and gas operations that are more stringent than on other industrial uses or other land development within that zoning district.

## Oil and Gas Act – Act 13 of 2012

- "Reasonable Development" – What the local ordinance cannot do.
  - Impose limits or conditions on subterranean operations or hours of operation of compressor stations, processing plants, drilling of oil and gas wells or the assembly and disassembly of drilling rigs.

## Oil and Gas Act – Act 13 of 2012

- "Reasonable Development" – What the local ordinance cannot do.
  - Increase setback distances set forth in Chapter 32 or Chapter 33.
  - Local ordinance may impose setback distances that are not regulated by Chapter 32 or Chapter 33, so long as the setbacks are no more stringent than those for other industrial uses within the geographic boundaries of the local government.

## Land Use Implications - Compliance

- Applicability
- Review and Amend Local Ordinances
- Consequences

## Land Use Implications - Compliance

- Applicability
  - All local ordinances enacted before, on or after the effective date of Chapter 33
    - Act 13 approved by Gov. Corbett on February 13, 2012
    - Chapter 33 effective 60 days later (i.e., April 14, 2012)
    - Robinson Twp. – Preliminarily enjoins effective date of Chapter 33 and other provisions of Act 13 to the extent that such provisions preempt pre-existing local ordinances.
  - Any ordinance that regulates oil and gas operations (e.g., zoning, subdivision and land development, stormwater, etc.)

## Land Use Implications - Compliance

- Review and Amend (§ 3309)
  - 120 days from effective date to review and amend local ordinance to comply with Chapter 33
  - Robinson Twp. – Preliminarily enjoins effective date of § 3309 for a period of 120 days
  - August 14, 2012 deadline extended to December 12, 2012

## Land Use Implications - Compliance

- Consequences
  - If local ordinance violates the Chs. 32 & 33 or the MPC → ineligible for local impact fees.
  - Immediately ineligible upon order from PUC, Commonwealth Court or Supreme Court.
  - Remain ineligible until ordinance is repealed or amended in accordance with Chapter 33 (or the order or determination that the ordinance is unlawful is reversed).

## Land Use Implications – Role of the PUC

- Advisory Opinions
- Orders
- Rulemaking

## Land Use Implications – Role of the PUC

- Advisory Opinions
  - Relief valve for local government
  - Written request to PUC to review a proposed ordinance and issue an opinion regarding compliance with Chs. 32 & 33 and the MPC
  - PUC has 120 days to issue written advisory opinion
  - Advisory – not subject to appeal

## Land Use Implications – Role of the PUC

- Orders
  - Relief valve for owners, operators and citizens aggrieved
  - Written request to PUC to review a local ordinance and issue an order regarding compliance with Chs. 32 & 33 and the MPC
  - PUC has 120 days to issue written order
  - Subject to *de novo* review by Commonwealth Court

## Land Use Implications – Role of the PUC

- Rulemaking
  - Until January 1, 2013, PUC can promulgate temporary regulations (expire in two years).
  - Permanent regulations
  - Model ordinance?

## Land Use Implications – Civil Actions

- Commonwealth Court has original jurisdiction
- No need to exhaust administrative remedies
- Attorneys fees
  - Did the local government enact or enforce a local ordinance with *willful or reckless disregard* of the MPC or Chapters 32 or 33?
  - Is the action *frivolous or without substantial justification* in claiming that the local ordinance is contrary to MPC or Chapters 32 or 33?

## Questions?