

## Section 3 - Municipal Strategies: Ordinances to Address Local Environmental Conditions

In addition to zoning ordinances, municipalities may also consider regulating activities through other ordinances that take into account local environmental conditions and concerns.

While municipal zoning authority over shale gas development has attracted the bulk of attention, municipalities have other types of relevant regulations beyond zoning that may apply not just to gas development, but many other industrial and non-industrial uses also. Examples of these include stormwater management, land development, grading, and floodplain regulations.<sup>1</sup> These other types of rules focus on tailoring the *impact* of an activity to local conditions. Like zoning ordinances, these “generally-applicable local environmental” regulations are key components of the municipal toolbox.

Despite the crucial nature of these components, one aspect of Act 13 that was underappreciated was how thoroughly it would have eliminated these other municipal tools. Specifically, Section 3303 of Act 13 sought to have state law entirely preempt — or supersede — all local efforts to address local environmental concerns or conditions. Under Section 3303, no local conditions would have mattered and there would not have been any room for consideration of local concerns. Municipalities would not have been able to rely on stormwater management ordinances, floodplain ordinances, or any other local environmental regulations. State and federal law would have set a *ceiling* (rather than a floor) for environmental regulations.

A majority of the Pennsylvania Supreme Court found that these attempts to preempt local environmental regulations were unconstitutional. In striking down an effort to impose statewide zoning standards, the Supreme Court plurality recognized that “[p]rotection of environmental values . . . is a quintessential local issue that must be tailored to local conditions.”<sup>2</sup> “[W]hen government acts, the action must, on balance, reasonably account for the environmental features of the affected locale . . . if it is to pass constitutional muster.”<sup>3</sup> In his concurrence, Justice Baer also took issue with the lack of consideration of local conditions, noting “Pennsylvania’s extreme diversity” in landscape and population density. Justice Baer agreed with the plurality that statewide standards could not protect constitutional rights in the face of such diversity, or “give consideration to the character of the municipality, the needs of the citizens[,] and the suitabilities and special nature of particular parts of the municipality.”<sup>4</sup>

As a result of the Pennsylvania Supreme Court’s decision striking down two sections of Act 13 that sought to eliminate consideration of local environmental conditions, any argument that other provisions of state law (whether found in Oil & Gas Act or elsewhere) preempt local ordinances that take into account local environmental conditions would be constitutionally suspect.

A municipality with unique environmental resources or constraints may be able to go further in regulating potentially polluting activities than a municipality without such resources. For example, a municipality with only Exceptional Value and High-Quality streams in its municipality, including in its industrial district, may *need* to go further than state law in addressing environmental risks. For example, in allowing oil and gas activity in an industrial zone with fragile natural resources, a municipality might determine that to protect those resources, the municipality must require containment around frac tanks, or prohibit wastewater impoundments (neither of which are reflected in the state’s regulations, but which are “best practices”). While such an effort

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1 In addition, the Air Pollution Control Act specifically leaves room for local air pollution regulation. 35 P.S. § 4012(a) (stating, in part, “Nothing in this act shall prevent counties, cities, towns, townships or boroughs from enacting ordinances with respect to air pollution which will not be less stringent than the provisions of this act, the Clean Air Act or the rules and regulations promulgated under either this act or the Clean Air Act.”).

2 *Robinson Twp., Delaware Riverkeeper Network, et al. v. Com.*, 83 A.3d 901, 979 (Pa. 2013).

3 *Id.* at 953.

4 *Id.* at 1006 (Baer, J., concurring) (quoting *Hoffman Mining*, 32 A.3d at 603 (quoting 53 P.S. § 10603(a)).

to impose locally-based “best practices” as requirements might face a challenge, this type of effort would find support in the Pennsylvania Supreme Court’s decision in the Act 13 case.

Regardless of what DEP does, the Pennsylvania Constitution obligates municipalities to avoid unduly infringing on citizens’ constitutional environmental and property rights. This concept – that a municipality cannot unduly infringe on citizens’ constitutional rights and cannot escape such obligations – is not new. If a municipality were to ban ownership of guns, it would not take long for a citizen to sue that municipality for violating that citizen’s right to bear arms under Article I, Section 21 of the Pennsylvania Constitution.<sup>5</sup> Similarly, a municipality’s failure to take proper steps to prevent undue local air and water pollution or undue destruction of local historic resources equally puts that municipality at significant risk of violating its citizens’ rights. A state law cannot simply erase an obligation that the Constitution places on a governmental entity. Municipalities must act – regardless of what DEP does or does not do – to protect the local quality of life and environment by tailoring the impacts of heavy industrial or other activities (regardless of whether it is oil and gas activity) to local conditions.

The second reason why it is wrong to focus on whether DEP regulates a particular set of issues (like water) is that there is difference between the statewide standards that DEP administers and municipal standards that address local conditions on the ground where an activity occurs. In other words, DEP standards are a floor (not a ceiling) and local conditions must be addressed in order to ensure that citizens’ rights are protected. When DEP issues a gas well permit, that only means that DEP has determined that, under a narrow reading of the state regulations, the applicant meets the bare minimum requirements for getting a well permit. DEP does not usually account for local conditions in permitting, partly because many of the programs that DEP administers are statewide standards. For example, when DEP reviews a gas well permit, it does not look at local geology or hydrogeology; it does not look at whether it makes sense to put a compressor station next to a school; and it does not generally look at any other considerations relevant to whether a site is really a suitable place for a heavy industrial activity, and what protections are needed based on site-specific conditions. Local governments thus have an important role to play in considering and addressing local environmental conditions and concerns.

So with an understanding that municipalities must account for local conditions, how can a municipality go about doing that? The next section will address some potential strategies.



5 “The right of the citizens to bear arms in defense of themselves and the State shall not be questioned.”