

Section 2 - What Municipalities Can Do

The ability of local governments to regulate gas development varies from state to state. In Pennsylvania, while municipalities face difficulty in their ability to completely ban gas drilling and in their ability to regulate certain features of gas well operations that are already regulated by the state, *municipalities can use their zoning authority to regulate the use of land for gas development.*

Citizens must understand the genuine tools available to local governments, so they can answer industry talking points and reassure fair-minded local officials who are concerned about the industry's misrepresentations and threats.

In the sections that follow, we will discuss: 1) current limits on local regulatory authority; 2) municipal authority to regulate gas development; 3) zoning ordinance provisions to protect against adverse impacts of gas development; and 4) the role of municipal resolutions.

Municipalities should keep in mind that the law in this area is in a state of frequent change. Community leaders should consult with legal counsel and planning experts to help enact ordinance provisions that are consistent with current law, local considerations, and local preferences for balancing potential risks and benefits.



Current Limits on Local Regulatory Authority

It is important to understand the current limits on local regulatory authority. Current state law limits a municipality's ability to completely ban gas drilling and to regulate features of gas well operations that are already regulated by the state.

1. Complete Bans

Municipalities in Pennsylvania are limited in their ability to completely ban any particular land uses. Whenever a municipality completely prohibits a particular land use, developers will assert that the ban violates substantive due process rights under the U.S. and Pennsylvania Constitutions.

Further, with gas drilling in particular, a provision of the Municipalities Planning Code ("MPC") requires that municipal zoning ordinances "provide for the reasonable development of minerals." M.P.C. §603(i).

Despite these apparent legal road blocks, we recognize that there are good faith reasons for pursuing a complete ban. A community might attempt to prove that, based on current practices, the dangers associated with unconventional deep horizontal drilling and hydraulic fracturing are unreasonable. It is possible that a community with limited land for drilling and fragile natural resources might be able to overcome the current limits in the law and defend an outright ban. It is important to note, however, that similar efforts to ban other industrial land uses have been struck down, particularly for industries that, like gas drilling, are already regulated by the Commonwealth. (See General Battery Corp. v. Zoning Hearing Board of Alsace Township, 29 Pa. Commw. 498, 371 A.2d 1030 (1977)).

Any community considering an outright ban must weigh the risks associated with defeat. Under Pennsylvania law, when a municipality loses a challenge to the validity of its zoning ordinance, the court can order very drastic remedies. For example, if a municipality completely bans gas drilling and a drilling company wins a challenge to the validity of the ordinance, the court could order that the municipality must allow the drilling company to *drill throughout the municipality*, even in the most environmentally sensitive and most-populated zones. In other words, an attempt to impose a complete ban can lead to drilling happening everywhere in the municipality. While certain communities may be prepared to take such a risk, the risk that drilling could be allowed throughout the municipality must be weighed carefully, particularly if there are important resources in the municipality that are vital to protect.

2. Regulation of Features of Oil and Gas Operations Already Regulated by the State

After *Robinson Township*, Act 13 of 2012 generally retains the “where” versus “how” distinction that was in place before Act 13. The remains of Section 3302 of Act 13 of 2012 (“Act 13”) after *Robinson Township* still address limitations on municipal power to regulate features of “oil and gas operations” that are already regulated by Chapter 32 of Act 13. (58 Pa.C.S. § 3302). Chapter 32 of Act 13 generally reflects many provisions of the former 1984 Oil and Gas Act. “Oil and gas operations” are defined as follows:

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;
- (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.¹

¹ 58 Pa. Cons. Stat. § 3301.

Thus, features of “oil and gas operations” regulated by Chapter 32 include well casing requirements, water supply replacement, bonding, plugging of wells, and well-site restoration. Chapter 32, like the 1984 Oil and Gas Act, still focuses almost exclusively on wells. As a result, although Section 3302 discusses other gas development operations such as compressor stations and seismic testing, Chapter 32 generally contain no technical or operational “features” that are regulated to the same extent as wells.

3. Municipal Resolutions

Resolutions are adopted by local government for various purposes, including making a statement of policy. For example, as stated in the Borough Code, 8 Pa. C.S. § 3301.1

“(c) Resolutions.--Council shall adopt resolutions in accordance with this part and the laws of this Commonwealth. Resolutions may be adopted for any purpose, including, but not limited to, the following:

- (1) Ceremonial or congratulatory expressions of the good will of the council.
- (2) Statements of public policy of the council.
- (3) Approval of formal agreements of the borough, except for agreements arising under an established purchasing system of the borough.
- (4) Approval, if required, of administrative rules, regulations and bylaws arising under State statutes or borough ordinances.
- (5) The filling of borough-appointed positions and of vacancies of elected officials, except as otherwise provided.

See *Section 4 - Municipal Strategies: Adopting a Resolution.*



