

MEMORANDUM

To: Delaware Riverkeeper Network & Other Interested Parties
From: Jordan B. Yeager & Lauren M. Williams, Curtin & Heefner LLP
Re: Limitations on Local Zoning Authority Under HB 1950 and SB 1100
Date: December 4, 2011

The Senate passed SB 1100 on November 15, 2011, and the House passed HB 1950 two days later on November 17, 2011. Each seeks to create an impact fee, amend the Oil and Gas Act's environmental and preemption provisions, and further address local land use authority over oil and gas operations. The differences between the bills need to be reconciled before a final bill can be voted on and sent to the Governor. The bills significantly limit municipal land use authority. While neither bill expressly preempts all local land use regulations, it is not clear what meaningful role would remain for local governments. Because of ambiguous drafting and the extent of statewide regulations included in the bills, there is a risk that the legislation could be interpreted to occupy the field of oil and gas regulation and thus fully preempt local zoning authority. Further, on their face, the bills take away the most important zoning tool available, which is the ability to identify which zoning districts are appropriate for which activities. Under SB 1100 and HB 1950, each municipality would be required to allow gas drilling operations in *every* zoning district.

I. Overview of SB 1100's Limitations on Local Authority

SB 1100 would revise the current preemption provision of the Oil & Gas Act to preempt local regulation except under the Municipalities Planning Code ("MPC"), the Flood Plain Management Act, and the Second Class City Zoning Law. Regulation under the three listed statutes could not establish "conditions, requirements, or limitations" that are "inconsistent with" the entirety of the Oil & Gas Act as revised by SB 1100. This would appear to include the provisions on the impact fee, natural gas "energy development program," revisions to the current Oil & Gas Act's environmental protection provisions, generally, and a new chapter that would establish requirements for local ordinances that regulate oil and gas operations.

SB 1100's new chapter on local ordinances ("local ordinance chapter") contains specific statewide zoning standards. The local ordinance chapter would set parameters for municipalities that are enacting ordinances that regulate "oil and gas operations," and would specify an ordinance review process through the state Attorney General's office. It also would establish a special process for legal challenges, including circumstances in which the losing party would have to pay reasonable attorney fees and costs associated with the action. The local ordinance chapter also specifies the consequences of enacting or enforcing an ordinance that does not

comply with the provisions of SB1100. The primary consequence is that a municipality would lose access to impact fee funds. These provisions are discussed more completely below. Also discussed is how the lack of clarity in these provisions leaves significant unanswered questions concerning the extent to which municipalities would retain land use authority.

A. What Would The Local Ordinance Chapter Require?

The local ordinance chapter states that all local ordinances regulating “oil and gas operations” could only be enacted under the MPC, the Flood Plain Management Act, and the Second Class City Zoning Law. “Oil and gas operations” is broadly defined, and appears to include *all* aspects of the natural gas drilling and production process, such as seismic testing, well site preparation, well drilling and fracturing, impoundments, pipelines, compressor stations, and processing plants. It also includes “all equipment directly associated with” these and other listed activities, dependent on the proximity of the equipment to the well site, impoundment, pipeline, processing plant or compressor station, and whether the activity is “authorized and permitted.”

In addition, unless otherwise allowed in the local ordinance chapter, ordinances enacted under the three listed statutes could not “conflict with” or “regulate oil and gas operations covered by” either State environmental or public health and welfare statutes, or federal environmental statutes that regulate oil and gas operations. An exception would exist where the statute provides authority to the municipality to regulate.

Further, these ordinances would have to “provide for the reasonable development of minerals within the local government in accordance with . . . Section 603(i) of the MPC” and the local ordinance chapter. (emphasis added). Section 603(i) of the MPC requires that zoning ordinances provide for the reasonable development of minerals. Later, the local ordinance chapter states a slightly different and more expansive requirement, stating that a municipal oil and gas ordinance must provide for “the reasonable development of oil and gas resources in accordance with,”

- (1) the environmental protection provisions of the Oil and Gas Act, as revised by SB1100,
- (2) the MPC,
- (3) “judicial decisions,” and
- (4) the local ordinance chapter.

(Emphasis added).

In addition to these requirements, the local ordinance chapter includes specific requirements with which a municipality would have to comply. There are at least ten factors on the list. Of those, the following appear to have the greatest impact on a municipality's land use authority. They would require that a municipality:

- "allow well and pipeline location assessment operations, including seismic operations and related activities" conducted lawfully "throughout every local government." This could either mean that these activities must be allowed everywhere in the municipality, as in every zoning district, or that the municipality must allow these activities *somewhere* within its boundaries; in other words, a municipality could not ban these activities entirely. The language of this provision is currently unclear.

- not "impose conditions, requirements or limitations on oil and gas operations" that are more stringent than the standards for "construction activities for other land development" in the zoning district where the oil and gas operations are located.

- not set "conditions, requirements or limitations" for the "height of permanent structures," property line setbacks, screening, fencing, lighting, and noise that are more stringent for oil and gas operations (1) than for other industrial uses, (2) than what the particular zoning district allows,¹ or (3) than what state statutes or regulations dealing with oil and gas operations specify. The breadth of (3) suggests that a municipality will not be able to exert land use authority on these issues to the same extent it currently can.

- allow "oil and gas operations" — except for impoundment areas, compressor stations, and processing plants — as a permitted use *in all districts*. **This provision would take away each municipality's ability to determine which zoning districts are appropriate for gas drilling and which are not.** In residential districts a municipality could establish a conditional use standard that limits well sites where the "wellhead is at least 500 feet from any existing building." In residential districts, a well site could not be placed such "that the outer edge of the well pad is closer than 300 feet from an existing building;" however, oil and gas pipelines, water pipelines, access roads, security structures and fencing may be within 300 feet of an existing building.

- allow "impoundment areas" as a permitted use in all zoning districts so long as the perimeter of the impoundment area is not "closer than 300 feet from an existing building."

- allow compressor stations as permitted uses in both agricultural and industrial districts, and as conditional uses in all other districts if the compressor station meets noise

¹ This could effectively wipe out municipal efforts to use overlay districts to protect fragile natural, historic, cultural and other important community resources.

standards and certain property or lot line setback requirements (or has a waiver from the property or building owner).

- allow natural gas processing plants as a permitted use in industrial zoning districts, and as a conditional use in agricultural districts if the plant satisfies noise standards and property or lot line setback requirements (or has a waiver from the property or building owner).

- not set “limits or conditions on . . . hours of operation.”

Other requirements include no more than a 30 day review period for “complete applications,” a maximum 120 day review period for conditional use applications, a provision on the authority available to a municipality to restrict overweight vehicle routes, and a prohibition on limiting “subterranean operations.”

B. Attorney General’s Office Review

Both an owner or operator of oil and gas operations, and a person with the right to receive royalties from an oil or gas lease would be allowed to request that the state Attorney General’s office review a local ordinance for whether it allows for the reasonable development of oil and gas resources. Also, a local government could seek a similar review prior to enacting an ordinance. The Attorney General’s office would have 120 days to review and issue a decision, and would be required to provide both the requester *and* the municipality a copy of its decision. The office’s final decision would become part of the factual record that a court could review should the municipality be sued based on the ordinance.

C. What Happens After The Review?

Although SB1100 indicates specific implications of an unfavorable review by the Attorney General’s office, uncertainty exists as to the effect of an unfavorable decision and a municipality’s right to seek review of the office’s decision where no one sues the local government.

If the Attorney General’s office determines that the ordinance does not provide for the “reasonable development of oil and gas resources,” several consequences could result. First, the Attorney General or the private party would be permitted to sue to either overturn the ordinance, or to enjoin or stop enforcement of the ordinance. The Attorney General could do so where the ordinance “does not allow for the reasonable development of oil and gas resources.” Based on SB1100, this would appear to mean that the ordinance does not comply with the environmental provisions of the Oil and Gas Act, the MPC including Section 603(i), judicial decisions, or the local ordinance chapter, including the specific factors described above.

In contrast, a private party—such as an oil and gas operator—who is “aggrieved” or affected by the ordinance could also sue the municipality, but on the grounds that the ordinance does not allow reasonable development of oil and gas resources as prescribed by the Oil and Gas Act’s preemption provision, as revised by SB 1100. This language appears to differ from the Attorney General’s right to sue, and so would introduce some uncertainty as to whether the private party would have an increased or decreased ability to bring suit against the municipality. What is clearer is that a private party would be able to sue a municipality without seeking the Attorney General’s review first. The private party could also sue after seeking review, if the ordinance is noncompliant and the Attorney General does not bring an action against the municipality. SB 1100 does not appear to provide an explicit mechanism for challenges by neighbors who would suffer adverse impacts from expansive gas drilling operations.

A second and related consequence of the Attorney General’s decision could be the monetary implications of a court decision against the municipality. If the reviewing court finds that the municipality “enacted or enforced a local ordinance with willful or reckless disregard for” the limits on its authority, the court would have the option of requiring the municipality to pay the plaintiff’s reasonable attorneys’ fees and reasonable costs. (Emphasis added).

If a plaintiff brings a “frivolous” action or one “without substantial justification” challenging a municipal ordinance, the court could similarly require that the plaintiff pay the reasonable attorneys’ fees and costs incurred by the municipality for the action.

A third and final implication is the “sanction” for noncompliance. If the Attorney General finds that an ordinance does not provide for the reasonable development of oil and gas resources, the municipality would immediately lose access to impact fee funds. The same result would occur where a reviewing court — specifically the Commonwealth Court or Pennsylvania Supreme Court — finds that the ordinance is noncompliant. The municipality would not be able to receive impact fee funds until it amends or repeals the ordinance to be in compliance with the local ordinance chapter.

The uncertainty in this circumstance is whether a municipality could ask a court to review an unfavorable decision by the Attorney General’s office where neither the office nor a private party sues the municipality. SB1100 does not appear to address this issue. A similar uncertainty arises if a municipality seeks pre-enactment review and receives an unfavorable decision. It is unclear what the impact of that review would be on the municipality’s ability to continue receiving impact fee funds.

II. How Does HB 1950 Differ?

Although HB 1950 now contains a chapter similar to SB1100's local ordinance chapter, slight differences in wording in the House's local ordinance chapter, as well as the bill's more extensive environmental amendments leave uncertainty regarding the breadth of HB 1950's preemptive effect.

While HB 1950 contains a local ordinance chapter that resembles SB1100's, there are differences. As an example, SB 1100 would allow oil and gas operators, royalty recipients, and municipalities to seek review of an ordinance along four lines: compliance with 1) the local ordinance chapter; 2) the environmental provisions of the Oil and Gas Act as revised; 3) the MPC; and 4) state court decisions. HB 1950 does not contain this same language. In HB 1950's local ordinance chapter, *an oil and gas owner or operator, or royalty recipient* could request review of a local ordinance for whether the ordinance has provided for the reasonable development of oil and gas resources as specified by (1) the local ordinance chapter, (2) the MPC, and (3) state court decisions. However, *a municipality* could seek pre-enactment review only based on (1) the environmental protections provisions of the Oil and Gas Act, as revised by HB 1950, (2) the MPC, and (3) state court decisions. It is unclear if this is a mistake in drafting, or if the municipality could not receive pre-enactment review of its compliance with HB 1950's local ordinance chapter as it would be able to do under SB1100's local ordinance chapter.

Further, HB 1950's revised preemption provision is not consistent with its local ordinance chapter as currently drafted. HB 1950's preemption provision would preempt regulation under the Second Class City Zoning Law, despite the fact HB 1950's local ordinance chapter would allow a Second Class City to enact regulations under that law.

Also, HB 1950 would revise the express preemption provision of the Oil and Gas Act to require that ordinances enacted under the MPC and the Flood Plain Management Act be consistent only with the Act's environmental protection provisions, as revised by HB 1950. SB 1100 has a much wider scope.

Nonetheless, HB 1950's other revisions to the Oil & Gas Act impact the preemptive effect of the law. For instance, HB 1950 would introduce a broad definition of "[o]il and gas operations," which includes the "[s]iting and locating of oil and gas wells;" "treatment [and] storage," among other activities, "of fresh water, wastewater, wastes, chemicals and other materials directly associated with" oil and gas well drilling, fracturing, and completion; "[c]ompression . . . of oil or gas;" and even the "[c]onstruction and use of drilling rigs and pipelines." The "[c]onstruction and use of access roads, well sites, . . . impoundments" and other "structures" would also be included. These are only some of the activities specified, and a full reading of the definition reveals that it would include practically all aspects of natural gas

drilling from well construction and hydraulic fracturing to gas processing, compression, and transmission.

This broad definition could lead to an argument that the Oil and Gas Act extends its reach to areas where municipalities currently have greater control. For example, while HB 1950 only expressly mentions location when dealing with wells, because of the breadth of the Act, an argument might be made that the Act should be read to include the locational decisionmaking process for all gas drilling components including compressor stations and gathering lines.

HB 1950 also contains more extensive specifications regarding security fencing, warning signs, and lighting requirements, as well as provisions on noise and odors. It also would more extensively regulate the siting of operations in floodplains and similar areas. These revisions would change the Act to regulate certain parts of the drilling process that a municipality can currently control through land use regulation. As a result, drilling companies might argue that state authority in these areas is comprehensive and implicitly preempts local land use authority.

Further, in contrast to SB1100, HB 1950 appears to strike a much different balance between environmental protections and oil and gas development. This raises further concerns given the bill's unclear preemptive scope. HB 1950 would expressly require the Environmental Quality Board ("EQB") to issue regulations specifying "criteria" that the PADEP would use to "condition[] a well permit based on its impact to the public resources identified under subsection (c),"² and "for ensuring optimal development of oil and gas resources and respecting property rights of oil and gas owners." The EQB would also have to issue regulatory criteria governing appeals of these permit conditions to the Environmental Hearing Board. These appeals criteria would have to mandate that the PADEP "has the burden of proving by clear and convincing evidence that the conditions were necessary to protect against a probable harmful impact of the public resources."

As a result, drilling companies might argue that the grant of authority to the EQB and the scope of regulations by the PADEP reflect an intention to occupy the field and therefore fully preempt local land use authority.

HB 1950 would further revise the Act to include additional setbacks from certain water sources where an "unconventional well" is involved. For instance, for these types of wells, the revised Act would require a 1,000 foot setback from a water well, a "surface water intake, reservoir or other water supply extraction point used by a water purveyor," where the operator does not have the "written consent of the water purveyor." Under the amendments, a "[w]ater

² Subsection (c) would remain unchanged from the current Act, which requires that the PADEP, "on making a determination on a well permit, consider [its] impact . . . on public resources to include, but not be limited to . . . [p]ublicly owned parks, forests, gamelands, and wildlife areas" as well as "scenic rivers," historic sites, and other features.

purveyor” would include an “owner or operator of a public water system as defined” under the Pennsylvania Safe Drinking Water Act.

However, HB 1950 also would introduce mandatory waiver provisions. Specifically, where a water purveyor does not provide consent to the operator, but the setback “would deprive the owner of the oil and gas rights of the right to produce or share in the oil or gas” under the surface, the well operator must receive a variance once a plan is provided that details additional protective measures. The variance would also have to include whatever terms or requirements the PADEP found necessary for the health and safety of people and property.

HB 1950 would also revise the current Oil and Gas Act’s setback provisions to protect only “solid blue lined streams” on USGS maps, and not springs or other bodies of water such as lakes. Further, although HB 1950 indicates that a 300-foot setback from “any solid blue lined stream” is required for unconventional wells, it also indicates that there need be only a 100-foot setback from the “edge of the disturbed area associated with any unconventional well.” In addition, HB 1950 would require the PADEP to waive these setbacks where a plan is provided indicating additional protective measures and to include conditions it finds necessary to protect “the waters of the Commonwealth.”

Drilling companies might argue that these changes prevent a municipality from specifying certain setbacks from its own reservoirs based on local conditions where it might have otherwise been able to do so under the current Act. Because it is unclear exactly how all of HB 1950’s provisions interact, the full impact of the mandatory waiver provisions and the municipality’s remaining ability to protect its water sources is simply not clear.

Further, unlike SB1100, HB 1950 provides a municipality with an advisory role in the permitting process. However, it does not give the municipality a right to challenge a permitting decision if the PADEP chooses not to follow the municipality’s recommendations. Further, timing provisions in the bill suggest that the municipality’s role in the process would not be meaningful.

In particular, HB 1950 would create a section dealing with municipality comments. Specifically, the revised Act would allow a municipality to “submit written comments to the [PADEP] describing local conditions or circumstances which the municipality has determined should be considered by the department in rendering its determination on the unconventional well permit.” The revisions would specify the time frame in which the municipality has to submit its comments, and this time frame would be keyed to the municipality’s “receipt of the plat” that an operator would be required to provide to the municipality. A municipality would also have to send its comments “to the permit applicant and all other parties entitled to a copy of the plat under section 201(b),” and the applicant and others would then have a certain time frame in which to respond.

However, despite these provisions and the added notice given to a municipality, the proposed changes would not require the PADEP to consider the municipality's comments. HB 1950 would specifically state that the PADEP “may” take the municipality’s comments into account. Also, “[n]otwithstanding any other law, the municipality shall have no right of appeal or other form of review from the department’s decision.” (Emphasis added). Consequently, a municipality could submit comments on local conditions to the PADEP only to have those comments ignored. The municipality would have no right to appeal or to seek review of the PADEP’s decision.

HB 1950’s timing provisions further suggest that a municipality would have a limited role under the revised Act. One provision states that the entire municipality comment process “shall not extend the” permit review process for longer than what the Act specifies. Consequently, although HB 1950 would give the municipality a role in the permitting process, that role would likely not be a meaningful one, limiting the ability of a municipality to ensure that local conditions are accounted for in the permit review process.

III. Conclusion

Although neither bill would expressly preempt the full scope of local land use regulation, each bill would add significant further restrictions on local zoning authority. It is not clear what meaningful local role would remain, if any. Most notably, the bills would require every municipality to allow gas drilling operations in every zoning district. Further, because of ambiguous drafting and the extent of statewide regulations included in the bills, there is a risk that the legislation could be interpreted to occupy the field of oil and gas regulation and thus fully preempt local zoning authority.

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