

We Meant What We Said: Pa. Supreme Court Issues Latest Decision in *Robinson Township*

Author:

Joel R. Burcat

SUMMARY

On September 28, 2016, the Pennsylvania Supreme Court issued its latest decision in *Robinson Township v. Commonwealth*. (<http://tinyurl.com/RobinsonDecision>) This latest iteration of *Robinson Township* (referred to by the Court as *Robinson Township IV*) focused on issues that were remanded by the Supreme Court to Commonwealth Court for further review. The original challenge in *Robinson Township* was over significant portions of the then-new 2012 Oil and Gas Act (Act 13). Act 13 was enacted after the boom in Marcellus Shale drilling to deal with a plethora of issues that had not been adequately addressed under the previous law. The main challenge in the initial Supreme Court decision (called by the Court, *Robinson Township II*) concerned the constitutionality of provisions of Act 13 that preempted local land use planning. A plurality of the Court found the preemption provisions to be unconstitutional and in violation of Pennsylvania's Environmental Rights Amendment, Article I, Section 27 of the Constitution. Also, the Court found that certain mandated setback provisions were unconstitutional.

In this most recent decision, a clear majority of the Court issued a ruling that affirmed many of the principles laid out in the Court's 2013 plurality decision in *Robinson Township II*, and answered at least one question that had pundits wondering aloud—how would the three recently-elected Justices vote? All voted in favor of the majority opinion, written by Justice Todd (Justices Donohue, Dougherty and Wecht joined the opinion; Chief Justice Saylor and Justice Baer filed separate concurring and dissenting opinions).

Top Takeaways

1. The Public Utility Commission (PUC) has no authority to review municipal land use determinations to determine consistency with the requirements of Act 13.
2. Medical professionals cannot be prevented from obtaining any and all information concerning fluids used in hydraulic fracturing in order to treat patients. Medical professionals cannot be required to enter into confidentiality agreements and cannot be prevented from sharing information learned with others to assist in the treatment of a patient or to advance medical science.
3. The Pennsylvania Department of Environmental Protection (DEP) cannot be limited to providing notice of spills only to *public* well owners, excluding private well owners from receiving this information. Since the Court cannot legislate, it stayed its overturning of the provision to provide the General Assembly time to craft legislation to cure the defect.

4. The provisions of Act 13 that provide eminent domain authority to companies that seek to construct underground gas storage fields are unconstitutional. Such authority violates both the federal and Pennsylvania constitutions.

Provisions Under Review:

1. **PUC review of municipal land use regulations is overturned.** The Commonwealth Court evaluated whether the provisions that permitted review by the PUC of municipal land use regulations, 58 Pa. C.S. §§ 3305 – 3309, remained valid in light of the prior determination that other related provisions were unconstitutional. 58 Pa. C.S. §§ 3303, 3304. The Supreme Court noted that it found the “primary purpose” of Act 13 was “to provide a maximally favorable environment for industry operators to exploit Pennsylvania’s oil and natural gas resource, including those in the Marcellus Shale Formation.” The Court added that “Act 13 endeavored to accomplish this purpose by effectuating a fundamental transformation of the division and scope of regulatory authority over oil and gas extraction activities between the Commonwealth and its municipal governments.” The Court found that to achieve this objective, Act 13 “attempted to entirely foreclose the ability of municipalities to afford their residents environmental protections, via the enactment of any zoning ordinances tailored to address unique local environmental needs and conditions, whenever those ordinances ‘might be perceived as affecting oil and gas operations.’”

The Supreme Court noted that it had previously struck sections 3303 and 3304 (as well as the Commonwealth Court’s striking of a portion of section 3302), and this “has now irrevocably altered the nature of this [PUC] review.” Since the PUC’s review is “no longer capable of being executed in accordance with the original intent of the General Assembly” the provisions were found to be unconstitutional as they were no longer necessary and could not be severed from the other provisions that previously were found to be unconstitutional.

2. **Act 13 impermissibly prohibited disclosure of information concerning hydraulic fracturing fluids to medical professionals.** The Court evaluated the provisions of Act 13 that limit the disclosure of information to and by health professionals. 58 Pa. C.S. §§ 3222.1(b)(10) and (b)(11). Commonwealth Court found that these provisions

were not unconstitutional. (Some refer to these provisions as the “Medical Gag Rule.”)

The Supreme Court evaluated these provisions and, agreeing with the lower court, first found that these provisions did not violate the Pennsylvania Constitution’s Single Subject bill mandate. It went on to find, however, that the “primary purpose” of the provisions “appears to be the maintenance of trade secret protections for the chemicals used in the fracking process by placing limits on disclosures of their identity by those in possession of such information.” The Court could find no particular reason “which warrants granting [the oil and gas industry] the special treatment conferred by Sections 3222.1(b)(10) and (b)(11) and so we hold that these statutory provisions violate Article III, Section 32’s prohibition against the enactment of special laws.”

3. **Act 13’s silence on notice to private well owners when there is a spill results in the Court overturning the provision on notice to public well owners and mandating that the General Assembly come up with a legislative solution within 180 days.** Act 13’s section 3218.1 requires DEP, in the event of a spill of chemicals, waste, or other substances associated with the fracking process, to notify only *public* drinking water facilities that could be affected, but imposed no requirement for that agency to notify owners of *private* wells which supply drinking water. This provision was found to be constitutional by the Commonwealth Court. While the lower court did not find the provision unconstitutional, it did state that it assumed DEP would use its “best efforts” to notify private well owners. The Supreme Court dismissed this as “sweeping aspirational commentary.”

The Supreme Court dismissed the DEP’s allegations of practical burden to determine the location of impacted private wells. It also dismissed the lack of any previous regulatory duty on the part of DEP as lacking a “fair and substantial relationship” to the health and safety requirements of Act 13. The Court took judicial notice of a study that claimed over three million Pennsylvania residents get their drinking water from private wells—“roughly a quarter of our population.” The Court expressed concern that “their health, or even their property, may be at risk as the result of a spill that has potentially jeopardized the safety of the water they consume.” This health and property concern outweighed

the administrative burden on DEP. The Court noted that it could not merely strike language from Act 13 as there was no language in the law to replace it that would protect private well owners. Further, it did not possess the authority to add language to the law. Thus, it struck the entire provision (including notice to public well owners) and enjoined the provision. It stayed its mandate for 180 days to allow the General Assembly time to devise a legislative solution.

4. **Act 13 unconstitutionally confers on private companies the power to condemn land to be used for underground gas storage fields.** A hold-over provision from the prior 1984 Oil and Gas Act was a provision that allowed companies to condemn land to be used for underground natural gas or manufactured gas storage. 58 Pa. C.S. § 3241. Such facilities are important to the gas industry as geological formations in Pennsylvania support such features and they provide storage capacity for gas for use during high use winter months. According to DEP, in 2014 “approximately” 60 underground gas storage fields existed in 26 counties in Pennsylvania. Both the geology of Pennsylvania and its proximity to large eastern markets makes Pennsylvania an ideal location for such facilities. In finding Section 3241 constitutional, Commonwealth Court evaluated the provision and viewed it in conjunction with the provisions of Pennsylvania law which confer on public utilities (which have obtained the necessary certificate of public convenience) the power of eminent domain. Thus, the court did not find that the provision violated federal and state constitutional provisions prohibiting the taking of private property for the benefit of a private party.

The Supreme Court, however, did not see any connection between Section 3241 and the PUC certificate of public convenience mandates. The plain language of the law did not require any certificate of public convenience. Thus, the Court found that Section 3241 unquestionably deprived the landowner of his private property—a de facto taking—for a solely private purpose. As the provision violated both the federal and Pennsylvania constitutions, the Court found the provision “repugnant” to both the Fifth Amendment to the U.S. Constitution and Article I, Section 10 of the Pennsylvania Constitution, and enjoined its application.

What the Court Did Not Say:

The Court specifically did not evaluate the Article I, Section 27 analysis employed by the plurality on *Robinson Township II*. While one of the appellants (the PUC) urged the Court to review the plurality’s analysis, the municipalities and citizens argued that this was not at issue in this appeal. The Court agreed and explicitly did not consider this argument. Perhaps tipping their hand, it may be worth noting that the majority in *Robinson Township IV* referred to Chief Justice Castille’s plurality decision as “a scholarly and comprehensive opinion.”

What Is Next

We expect that the next major issue that will be addressed by the Supreme Court will be the question of the viability of Chief Justice Castille’s analysis under Article I, Section 27, the Environmental Rights Amendment to the Pennsylvania Constitution. This should be determined in *Pennsylvania Environmental Defense Foundation v. Commonwealth*, a case that has already been briefed and argued.

Although the Supreme Court declined to rule on the question of the appropriateness of the plurality’s analysis employed in *Robinson Township II*, all three of Pennsylvania’s newest Justices were in the majority in *Robinson Township IV*.

It remains to be seen how the General Assembly will react to the Court’s mandate that it revise Act 13’s Section 3218.1 on notice to public well owners. To our knowledge this may be the first time in recent memory (if at all) that the Supreme Court has issued a call to the General Assembly to “fix this.” Time will tell how it responds.

This Alert was written by Joel R. Burcat, Chair of the firm’s Energy Extraction Practice. Joel can be reached at 717.257.7506 or jburcat@saul.com. This publication has been prepared by the Energy Extraction Practice for information purposes only.

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Baltimore, MD
 500 East Pratt St.
 Charles O. Monk, II
 410.332.8668

Boston, MA
 131 Dartmouth St.
 Richard D. Gass
 617.723.3300

Chesterbrook, PA
 1200 Liberty
 Ridge Dr.
 Michael S. Burg
 610.251.5750
 Nathaniel Metz
 610.251.5099

Harrisburg, PA
 2 North Second St.
 Joel C. Hopkins
 717.257.7525

Newark, NJ
 One Riverfront Plaza
 Stephen B. Genzer
 973.286.6712

New York, NY
 555 Fifth Ave.
 212.980.7200

Philadelphia, PA
 1500 Market St.
 Bruce D. Armon
 215.972.7985

Pittsburgh, PA
 One PPG Place
 David R. Berk
 412.209.2511
 Charles Kelly
 412.209.2532

Princeton, NJ
 650 College Rd. E
 Marc A. Citron
 609.452.3105

Washington, DC
 1919 Pennsylvania
 Ave. NW
 Mark L. Gruhin
 202.342.3444
 Andrew F. Palmieri
 202.295.6674

Wilmington, DE
 222 Delaware Ave.
 William E. Manning
 302.421.6868
 Wendie C. Stabler
 302.421.6865