

Act 13: The Supreme Court Decision & Property Rights



Particularly among pro-drilling advocates, the “rights” most prominently mentioned in the conversation about fracking are “property rights,” interpreted as the rights of landowners to develop their property as they wish and to profit from any valuable resources that lie beneath said property’s surface. The passage of Act 13 in February 2012 was seen as a boon to such property rights – now landowners could develop the natural gas beneath their property despite local zoning ordinances which previously might have prohibited such activity.

In December 2013, the PA Supreme Court struck down the zoning provisions of Act 13, restoring the authority of local municipalities to zone for natural gas development, allowing it here and prohibiting it there. And on Feb. 21, 2014, the state Supreme Court denied the application for reconsideration of this decision that was filed by the Corbett administration in January. While this may be seen by some as a defeat for personal property rights, the court’s decision actually introduced more prominently into the fracking conversation some other categories of property rights.

In his opinion on the court’s ruling, Republican Chief Justice Ronald D. Castille wrote that Act 13’s zoning rules represented an unprecedented “displacement of prior planning and derivative expectations regarding land use, zoning and enjoyment of property.” The “enjoyment of property” is a right. In the excellent Huffington Post Green article, Stop Gas Drilling – Sue Your Neighbor, author Andrew Reinbach states: “When you bought your house, you didn’t just buy dirt and bricks; you bought what your lawyer calls a bundle of rights. That includes what he or she calls the right of quiet enjoyment.” In

her article Homeowners and Gas Drilling Leases: Boon or Bust? attorney Elisabeth N. Radow further elaborates that this bundle of rights “is attributable to the intangibles that make a house a home, such as peaceful sanctuary, fresh air and a safe, secure haven for budding children. Fracking [near a residence] challenges all of these attributes of home ownership.”

The PA Supreme Court ruling on Act 13 thus posits an “enjoyment of property” right alongside the “make a killing on the drilling” property right, the latter ostensibly including the “right” of pollution (light, noise, air, water and soil), not only of one’s own property, but of adjacent properties as well.

Enter environmental rights.

Heretofore, Article I, Section 27 (a.k.a. The Environmental Rights Amendment) of the Pennsylvania Constitution, which guarantees each citizen the right to “clean air, pure water and the preservation of the natural, scenic, historic and esthetic values of the environment,” was injected into the fracking conversation only by concerned citizens and environmental activists; it was generally ignored, dismissed, or even laughed at by state legislators, municipal leaders and the oil and gas industry. Chief Justice Castille’s writings on the matter have restored the vitality of the state’s 42-year-old Environmental Rights Amendment, which confers constitutional protections to adjoining property owners as well as future generations of Pennsylvanians, not just the current owners of mineral rights on a given piece of property.

Castille writes that those environmental rights are “presumptively on par” with other civil liberties found in Article I’s Declaration of Rights, and the fact that the Constitution declares them “inviolate” “necessarily implies that economic development cannot take place at the expense of an unreasonable degradation of the environment.” The rights given by Article I, Section 27 are “neither meaningless nor merely aspirational,” writes Castille, and “when the government acts, the action must, on balance, reasonably account for the environmental features of the affected locale...”

Further, Chief Justice Castille declares that “by any reasonable account, the

exploitation of the Marcellus Shale Formation will produce a detrimental effect on the environment, on the people, their children, and the future generations...”

Experts anticipate a range of new legal challenges based on alleged violations of the Environmental Rights Amendment that could go well beyond natural gas, running the gamut of mining, landfills, emissions permits, etc. Townships which once feared being sued by drilling companies for restrictive ordinances now face the possibility of being sued by individuals and citizens groups for lax or absent ordinances that fail to protect the rights of residents to clean air, clean water and the enjoyment of their property. The PA DEP may be sued for permitting wells in locations too close to homes and schools and thus violating those rights. New rules for setbacks may be formed based on the actual reach and impacts of pollutants that affect air and water quality, thereby threatening the health of all who live nearby, and of nuisances such as noise and bright lights that disturb the quiet enjoyment of property.

As Jeffrey J. Norton, an Eckert Seamans energy-law expert, wrote, “Previously, [the Environmental Rights Amendment] had been given little force or substance. Under Justice Castille’s opinion, that is all changed.” And Frank Kury, a former state legislator who drafted and championed Article I, Section 27, said of the state Supreme Court’s decision: “In terms of what we intended, [the court] really got it right.”

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