

## **SUPREME COURT ISSUES SPLIT DECISIONS ON THE MUNICIPAL REGULATION OF OIL AND GAS DRILLING**

Terry W. Clemons, the Firm's lead counsel in the Municipal Law area is Solicitor to the Bucks County Association of Township Officials ("BCATO"). He filed *amicus curiae* (Friend of the Court) briefs on behalf of BCATO in companion cases before the Pennsylvania Supreme Court that address to what extent a municipality can regulate oil and gas drilling.

The Lower Court had ruled in both cases that municipalities have no authority to determine where oil and gas drilling can occur within their boundaries and cannot regulate operational aspects of drilling activities. It held that all such regulations relate to the "features" of oil and gas drilling and are preempted by the Oil and Gas Act.

In the first case, involving Oakmont Borough, the Pennsylvania Supreme Court overruled the Lower Court. It confirmed a municipality's right under the Pennsylvania Municipalities Planning Code ("MPC") to establish Zoning Districts where uses can be permitted or prohibited. A municipality has the right to prohibit oil and gas drilling in Zoning Districts where it determines this use is inappropriate. (However, it cannot prohibit oil and gas drilling Township-wide). BCATO argued in its Friend of the Court Briefs that the right to determine in what Zoning Districts land uses are permitted is fundamental to the zoning powers authorized by the MPC. The Supreme Court agreed.

However, in the second case which involved Salem Township, the Supreme Court held that an ordinance which regulated the operational aspects of oil and gas drilling is invalid and preempted by the Oil and Gas Act. Because the Oil and Gas Act regulates all of the operational aspects of drilling, the Court held that this Act has "occupied the field" and local regulation is preempted.

The Supreme Court did not address the case where a Zoning Ordinance regulates **both** the Zoning District where oil and gas drilling is permitted **and** contains operational requirements. Is such an ordinance valid as to the Zoning District determinations and

invalid as to the operational regulations? However, in an earlier decision, the H.R. Miller case, the Pennsylvania Supreme Court did address the issue of partial invalidity. This case involved a curative amendment challenging the quarry regulations of a Township Zoning Ordinance which permitted quarrying but required setbacks of 500 feet from all property boundaries. The challenger's property was not in the quarry Zoning District. The Supreme Court held that the zoning regulation prohibiting extraction within 500 feet of a property boundary is unreasonable and invalid. However, it refused to grant the successful challenger "definitive relief" – the right to establish a quarry on its property which is outside the quarry district. Therefore there is a strong legal basis for the argument that even if the operational regulations are determined to be invalid, the portion of the Ordinance establishing in what zoning district the use is permitted is not. The H.R. Miller Co. case should be carefully read by municipal solicitors whose Township Zoning Ordinance limits drilling operations to a specific Zoning District but also contains regulations concerning the operational aspects.

**Our Firm has successfully defended validity challenges to municipal zoning ordinances in a number of important cases, two of which were decided favorably by the Pa. Supreme Court. As a result we are often asked to serve as special counsel in litigation matters involving land use issues and are available to discuss a strategy for addressing them with anyone having a concern about defending a municipal zoning ordinance.**

Townships considering a Zoning Ordinance amendment addressing oil and gas drilling should determine in what Zoning District this use is appropriate and permit it by right, subject to the applicant demonstrating compliance with Pennsylvania Department of Environmental Protection regulations and other applicable governmental regulations. This will avoid costly litigation **and** the prospect of the Court "throwing out the baby with the bathwater"-- that is, invalidating the ordinance in its entirety as an effort to regulate operational aspects under the guise of zoning.

**We have prepared legally defensible zoning ordinance amendments addressing oil and gas drilling for our municipal clients and are available to assist other municipalities who may need to address this important issue.**

One final note: Both Supreme Court decisions dealing with the Oil and Gas Act repeatedly state that the Act "as currently written" permits a Township to determine in what Zoning Districts oil and gas operations are permitted. It appears as though the Supreme Court is saying to the oil and gas industry "If you want the ability to zone entirely preempted, you should go to the legislature". Townships should be alert to the possibility that such legislation may be introduced.

Terry W. Clemons, Esquire  
BCATO Solicitor