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## COURT WEIGHS IN ON NATURAL GAS OPERATIONS IN THE MARCELLUS SHALE

By Kaitlyn R. Maxwell | June 14, 2018 | *The Legal Intelligencer*

The Supreme Court of Pennsylvania issued two decisions on June 1 relating to the operation of natural gas wells in Pennsylvania. This article focuses on one of those decisions: *Gorsline v. Board of Supervisors of Fairfield Township*, No. 67 MAP 2016 (Pa. June 1). The Supreme Court of Pennsylvania issued two decisions on June 1 relating to the operation of natural gas wells in Pennsylvania. This article focuses on one of those decisions: *Gorsline v. Board of Supervisors of Fairfield Township*, No. 67 MAP 2016 (Pa. June 1). The court (4-3) determined a zoning board erred in granting a conditional use permit for drilling and operation of gas wells in a residential-agricultural district. Yet, the court acknowledged the ability of a local governing body to amend zoning ordinances to allow drilling in any or all districts. The court also made it clear that drilling may be allowed as a conditional use (without amendment to an ordinance) in residential or agricultural areas if the zoning board decision is supported by the evidentiary record. On the same day, the court (6-1) upheld, for the most part, a preliminary injunction preventing enforcement of new rules concerning the operation of unconventional gas wells in Pennsylvania while a petition challenging the validity of the regulations remains pending, see *The Marcellus Shale Coalition v. Department of Environmental Protection of the Commonwealth of Pennsylvania*, No. 115 MAP 2016 (June 1) (affirming in part and reversing in part grant of preliminary injunctive relief).

In *Gorsline*, Inflection Energy, LLC (the applicant) submitted a permit application to the Board of Supervisors of Fairfield Township (the board) to obtain permission for "drilling, completion, production and operation of multiple gas wells" on approximately 60 acres that were zoned residential-agricultural (R-A). The zoning officer referred the application to the board for further consideration because the township zoning ordinance did not identify the requested use as a "permitted use" or a "conditional use" in the R-A district. The "savings clause" in the ordinance allows the board to permit a "conditional use" only if the use is "similar to and compatible with the other uses permitted in the zone," is "not permitted in any other zone," and "in no way is in conflict with the general purposes of the ordinance." This appeal examined whether the board erred in finding, and the Commonwealth Court erred in affirming, that the applicant met its burden of demonstrating the proposed use was "similar to" other uses allowed in the R-A district.

The board granted the applicant a conditional use permit for the proposed gas wells so long as the applicant complied with certain conditions. Local residents appealed the grant of the permit to the Lycoming County Court of Common Pleas (the trial court) and the trial court reversed. The applicant attempted to demonstrate the proposed use could be considered a "public service facility"-which is allowed as a conditional use in the R-A district-to satisfy the similarity requirement. The trial court determined that the board failed to offer an explanation on why the proposed use was "similar to" a "public service facility" and the record indicated that the wells were not being constructed to furnish natural gas to local residents. The applicant appealed.

The Commonwealth Court reversed, finding the board provided detailed findings of fact and the applicant met its burden of proof on demonstrating the proposed use was similar to other permitted uses in the R-A district. The Commonwealth Court relied on a 2014 decision in which a different applicant

sought a special exception-under a different zoning ordinance in a different county-to operate a natural gas compressor station in a "light industrial district." No fracking was at issue in that case. The Commonwealth Court ultimately concluded there that the proposed use for a natural gas compressor station was sufficiently similar to an "essential service use and/or public service facility." The Commonwealth Court made a similar finding in this case, which the Supreme Court ultimately rejected.

The Supreme Court concluded the board's decision was not supported by substantial evidence because the board failed to make any findings of fact and made no credibility determinations on which the Commonwealth Court could rely. The record did not establish that the applicant's proposed gas wells were of the "same general character" as any allowed use in the R-A district. Under the ordinance, the public nature of a "public service facility" and "essential services" is "inherently local in nature." Specific to these facts, the proposed activity would not fall within that category to satisfy the "similar to" requirement.

The *Gorsline* appeal has been closely watched, in part, due to one question posed by the residents on appeal: whether the Commonwealth's decision-that industrial shale development is similar to and compatible with use expressly permitted in the R-A district-conflicts with the Supreme Court's prior decision in *Robinson Township v. Commonwealth*, 83 A.3d 901 (Pa. 2013). Amicus curiae briefs were filed in support of each party's position. As discussed in this column previously, the *Robinson Township* plurality decision struck down several provisions of the Oil and Gas Act Amendments of 2012 (Act 13) and departed from the longstanding three-prong test for evaluating actions of executive agencies and decisions of municipalities under Article I, Section 27 of the Pennsylvania Constitution (the Environmental Rights Amendment). A majority of the court subsequently endorsed the *Robinson Township* plurality approach to the Environmental Rights Amendment in *Pennsylvania Environmental Defense Foundation v. Wolf*, 161 A.3d 911 (Pa. 2017). Despite additional decisions by the lower courts, uncertainty remains about implementation of the Environmental Rights Amendment. Some thought this appeal would give the Supreme Court the opportunity to provide further clarification, but the court left the question for another day.

Over the objection of Justice Kevin Dougherty (whose dissent was joined by Justices Max Baer and Sallie Mundy), the majority (Justice Christine Donohue, joined by Chief Justice Thomas G. Saylor and Justices Debra Todd and David Wecht) declined to consider whether the Commonwealth Court's decision conflicted with the court's decision in *Robinson Township* because the court was able to resolve the matter on nonconstitutional grounds. In the dissent's view, the appeal did not ask the court to rule on the constitutionality of a statute, ordinance, or regulation, but instead, to apply the *Robinson Township* holding to the facts of the case. That question, the dissent noted, "was the sole issue of first impression accepted by the court;" whereas the issues decided by the majority involved "mere error review," generally not the function of the Supreme Court. The dissent rejected the appellants' argument that *Robinson Township* should be read to mean natural gas development is inherently incompatible with residential use; that conclusion would frustrate the purpose of the Municipalities Planning Code. Local ordinances already allow natural gas development-whether as a permitted use, a conditional use, or a special exception-in residential and mixed use zones. The dissent would find no conflict between the Commonwealth Court's decision and *Robinson Township*.

The majority did not reach this question, but highlighted that the decision was highly fact-specific, curtailing the potential reach of the decision. "In so ruling, this decision should not be misconstrued as an indication that oil and gas development is never permitted in residential/agricultural districts, or that it is fundamentally incompatible with residential or agricultural uses." The court went on to acknowledge, as stated by the dissent, that the court's plurality decision in *Robinson Township*, "recognized that the protection of environmental values is a 'quintessential local issue that must be tailored to local conditions.'" Most importantly, the court recognized that the Municipalities Planning Code permits the governing body of a municipality to amend its zoning ordinances to allow oil and gas development in any or all zoning districts.

So there was no confusion, the court further stated that it is not the court's position that oil and gas drilling or development may not occur absent an amendment to a township's zoning ordinance. Applicants still may seek a conditional use permit for oil and gas drilling if the grant of that use is supported by an evidentiary record. In this case, there were "stark differences" between the proposed use and those uses allowed in the R-A district and the record did not support the Board's grant of a conditional use permit.

The court left the door open for other applicants to show, potentially, that a proposed oil and gas use is similar to other uses permitted within a zoning district, even in a residential or agricultural district. That means, two options remain to allow oil and gas use in residential or agricultural districts: amendment of the ordinances; or conditional use permits (with the right set of facts).

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***About the Author:***

***[Kaitlyn R Maxwell](#) practices in the environmental group of Greenberg Traurig. Her principal office is in Philadelphia. She was educated at Dickinson College and Boston University School of Law.***

*The question of where gas wells can be drilled in Pennsylvania and who makes that decision is now clearer. In some instances, zoning Boards must look at details if wells are to be drilled in a residential-agricultural district and there has to be an evidentiary record. We will keep you informed of further updates in the RT Review.*

*- Justin Lauterbach, Q.E.P.  
Vice President  
[jlauterbach@rtenv.com](mailto:jlauterbach@rtenv.com)*



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510 Heron Drive, P.O. Box 521  
Bridgeport, NJ 08014  
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**Southwest Pennsylvania  
591 East Maiden Street  
Washington, PA 15301**

Phone: (724) 206-0348 / FAX: (724) 206-0380

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(856) 467-3476

*Southwest Pennsylvania*

591 East Maiden Street  
Washington, PA 15301  
Phone: (724) 206-0348  
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E-mail: [RTENV@AOL.COM](mailto:RTENV@AOL.COM) / World Wide Web: [HTTP://RTENV.COM](http://RTENV.COM)  
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RT Environmental Services, Inc., 215 W. Church Road, King of Prussia, PA 19406

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