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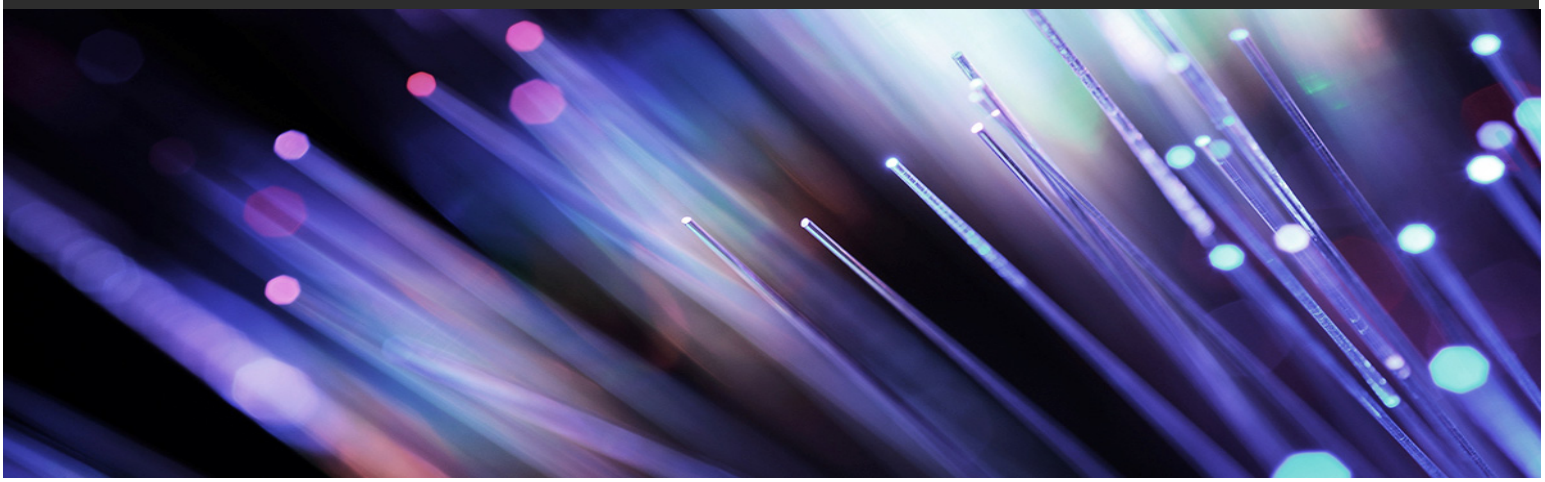
Significant Environmental Cases in Pa. Courts During 2018 (Part 1)



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By David G. Mandelbaum| January 17, 2019 | The Legal Intelligencer

Editor's note: This is the first in a two-part series.

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Environmental Rights Amendment

Several opinions from the Commonwealth Court addressed the implications of Article I, Section 27, of the Pennsylvania Constitution (ERA) for exactly how local land use regulation ought to proceed. That court appears to have a narrow view of the ERA, but it is not yet clear how all the court's rulings fit together. In *Delaware Riverkeeper Network v. Sunoco Pipeline*, 179 A.3d 670 (Pa. Commw. Ct. 2018), the environmental group sought to require Sunoco to comply with a local land use ordinance in construction of the Mariner East 2 pipeline project. Sunoco is, for that purpose, a public utility subject to regulation by the Public Utility Commission, pre-empting local regulation. The court held, among other things, that the statutory pre-emption of local regulation by the PUC does not violate the ERA; a municipality need not have every conceivable regulatory power, and the principle that public utility regulation pre-empts local land use ordinances long preceded adoption of the ERA.

Protect PT v. Penn Township Zoning Hearing Board, No. 39 CD 2018 (Pa. Commw. Ct. Nov. 8, 2018), considered neighbors' objections to natural gas wells approved by special exception, including an objection that the zoning hearing board (ZHB) had not engaged in a separate assessment of environmental impacts under the ERA. However, the ordinance permitted natural gas wells, it called for an application to address issues appropriate for an ERA inquiry, and objectors offered no evidence that the ZHB credited to the effect that these wells would pose more impact than a typical well. Accordingly, the objections failed. The opinion implies that the ERA challenge should have been brought, if at all, to the ordinance, not to the issuance of the special exception. *Smith v. Board of Supervisors*, No. 873 CD 2017 (Pa. Commw. Ct. Dec. 19, 2018)(unreported), considered a series of procedural objections by neighbors to rezoning from residential to industrial so as to accommodate a logistics center. However, their objection that the supervisors had failed to undertake an ERA investigation was substantive, and the Commonwealth Court would not consider it.

On the other hand, *Frederick v. Allegheny Township*, No. 2995 CD 2015 (Pa. Commw. Ct. Oct. 26, 2018), an opinion discussed in the December column, was also a challenge to a zoning ordinance that allowed natural gas activity in every zone. The court held that the ERA does not require an environmental assessment of every proposed use. The constitution does not enlarge the powers of a municipality under the Municipalities Planning Code or its own ordinances, instead the intensive environmental review will be done by the Department of Environmental Protection (DEP).

The court seems more comfortable considering imposition of substantive or procedural obligations on the DEP under the ERA than on municipalities. *Delaware Riverkeeper Network v. DEP*, No, 525 MD 2017 (Pa. Commw. Ct. July 25, 2018) (unreported), denies preliminary objections to an environmental group's complaint seeking an order compelling the DEP to take enforcement action under the Hazardous Sites Cleanup Act or the Clean Streams Law to procure cleanup of a site that had been first identified in 1981. While cleanup enforcement is discretionary, doing "virtually nothing" might violate the ERA. See also *Pennsylvania Manufacturers' Association Insurance v. Johnson Matthey,*188 A.3d 396 (Pa. 2018) (insurance coverage case for another responsible party at the same site); *O'Neill v. van Rossum*, No. 3066 EDA 2017 (Pa. Super. Ct. Sept. 6, 2018) (DRN is immune under *Noerr-Pennington* doctrine for leaflets opposing rezoning of the same site). But, to be fair, the *Marcellus Shale Coalition* litigation discussed below raises real issues about whether the ERA authorizes the Environmental Quality Board to enlarge the DEP's regulatory powers beyond the authorizing statute.

A challenge to a public utility's exercise of eminent domain for a pipeline easement raised the question whether a private entity granted taken power becomes "the commonwealth" for purposes of the ERA. *Clean Air Council v. Sunoco Pipeline,* 185 A.3d 478 (Pa. Commw. Ct. 2018). Were that correct, reasoned the court, the Court of Common Pleas, where the case was brought—would not have jurisdiction; the suit would have to have been brought in the Commonwealth Court, and therefore the ERA theory conflicted with CAC's assertion of jurisdiction.

Although not strictly an ERA case, *Rachel Carson Trails Conservancy v. Department of Conservation and Natural Resources, (DCNR)* No. 77 MD 2018 (Pa. Commw. Ct. Dec. 31, 2018), addresses the ability of private citizens (the conservancy) to seek to impose an easement by prescription in favor of "the public" for a trail across both private land and two parcels owned by DCNR. One cannot obtain rights by prescription against the commonwealth, so DCNR was dismissed, defeating jurisdiction in the Commonwealth Court, leaving unanswered the question of whether this claim is possible against the private landowners.

Pre-emption of Local Regulation

By statute, the PUC's certificate of public convenience preempted local land use regulation in *Delaware Riverkeeper* mentioned above. Several environmental programs pre-empt local regulation, particularly as it affects agricultural activities. -The Nutrient Management Act pre-empts local regulation of concentrated animal operations (CAOs) or concentration animal feeding operations (CAFOs) subject to nutrient management plans. In *Berner v. Montour Township Zoning Hearing Board*, 176 A.3d 1058 (Pa. Commw. Ct. 2018), a swine nursery was neither, so regulation was not pre-empted. In that context, although not in the land use context, one may wish to note *Burlingame v. Dagostin*, 183 A.3d 462 (Pa. Super. Ct. 2018), in which the Right to Farm Act barred claims against a hog CAFO.

Other Local Land Use Regulation Issues

Not every environmental case in 2018 involving land use regulations was constitutional. In *Gorsline v. Board of Supervisors*, 186 A.3d 375 (Pa. 2018), the township granted conditional use approvals for oil and gas activity in a residential zone, applying the analysis generally called for by the Oil and Gas Act Amendments (Act 13). However, the ordinance did not explicitly authorize oil and gas activity, as it did in, for example, *Protect PT*. The ordinance did not permit any use "like" oil and gas activity as a conditional use, and therefore the neighbors' appeal was granted. On the other hand, the ordinance in *MarkWest Liberty Midstream & Resources v. Cecil Township Zoning Hearing Board*, 184 A.3d 1048 (Pa. Commw. Ct. 2018), *did* authorize natural case compression stations by special exception. The ZHB therefore abused its discretion when it imposed conditions on that use without any supporting evidence and no more than general policy statements.

Appeal of Azoulay, No. 1177 CD 2017 (Pa. Commw. Ct. Sept. 7, 2018), was a neighborhood association challenge to grant of zoning permits by the Philadelphia Zoning Board of Adjustment, notwithstanding the applicant's planned construction involving impervious surface within 200 feet of a surface water in the Wissahickon watershed overlay zone. The ZBA pointed to other environmentally friendly features of the proposal, including some pervious pavement and a green roof. The court read the ordinance not to give the ZBA this ability to take mitigation or offset into account. Similarly, the court denied a first-party appeal from a zoning enforcement order calling for removal of a shed from a floodway, see *DiPaolo v. Zoning Hearing Board*, No. 1815 CD 2016 (Pa. Commw. Ct. July 18, 2018)(unreported). A zoning officer's testimony sufficed to delineate the floodway.

Environmental impacts like odors or increased birds (and their droppings) can seem less substantial than the immediate neighborhood impacts that ordinarily confer standing to appeal a land use decision granted to someone else. However, in *Friends of Lackawanna v. Dunmore Borough Zoning Hearing Board*, 186 A.3d 525 (Pa. Commw. Ct. 2018), the court reversed the ZHB's holding that neighbors a half mile from a large landfill expansion had no standing. *Ankiewicz v. Benton Township*, No. 1287 CD 2017 (Pa. Commw. Ct. Oct. 22, 2018)(unreported), was an appeal by neighbors from the grant of a conditional use—subject to conditions—for a junkyard, which the court of common pleas then modified to add additional conditions. The ordinance authorized a junkyard as a conditional use, the conditions mitigate any adverse impacts including the risk of contamination and noise, and even though the ordinance permitted the supervisors to require an environmental impact study they did not abuse their discretion by not doing so.

Sewage Facilities Act (Act 537)

Two townships—Hubley and Hegins—entered into a joint Act 537 Plan to build a new sewer and treatment facility. After citizens appealed to the Environmental Hearing Board, Hegins changed its mind, but never adopted a resolution withdrawing its approval. The EHB erred by assuming sua sponte that Hegins would not meet its commitments under the plan, see *Hubley Township v. Wetzel*, No. 899 CD 2017 (Pa. Commw. Ct. May 22, 2018)(unreported). In *Sugar Grove Township v. Byler*, No. 937 CD 2017 (Pa. Commw. Ct. July

20, 2018), the township had a privy ordinance as part of its implementation of Act 537. Byler appealed an enforcement action against her. Among other things, the court remanded for consideration of whether refusing Byler a variance on religious grounds would violate Article I, Section 3, of the Pennsylvania Constitution.

Stormwater, Earth Disturbance and Stream Encroachment

Upgrading a mile of roadway to permit oil and gas activity is subject to regulation under the Stormwater Management Act, the local stormwater ordinance, the stormwater discharge permit requirement of 25 Pa. Code chap. 102, and the earth disturbance requirements of chapter 105; a neighbor who is damaged may sue, see *Cogan House Township v. Lenhart*, No. 1899 CD 2017 (Pa. Commw. Ct. Nov. 15, 2018). The contracts over stormwater management facilities spawned complicated litigation in *Carlino E. Brandywine v. Brandywine Village Association*, No. 3388 EDA 2017 (Pa. Super. Ct. Oct. 16, 2018).

In next week's column, I will discuss cases involving enforcement, the Oil and Gas Act and valuation.

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