

# Obligations of Municipalities Stemming from Article I Section 27

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Environmental Law Forum 2019

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## Oil & Gas Preemption

### Pre-Act 13 Preemption

- Oil and Gas Act Preemption (Section 602)
  - MPC/Floodplain Act ordinance
  - Not same features or purposes
- *Range Resources v. Salem Township* (Pa. 2009)
  - Can't have "comprehensive regulatory scheme."
  - Can't single out oil and gas.
- *Huntley & Huntley v. Oakmont Borough* (Pa. 2009)
  - Where v. how.
  - Designation of zoning districts in which O&G can/cannot be located not preempted.

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# Oil & Gas Preemption

## Act 13 Preemption (2012)

- Section 3302 – Update of Section 602
- Section 3303 – Environmental Acts
- Section 3304 – Reasonable Development of Oil and Gas

## *Robinson Twp. v. Commonwealth* (Pa. 2013)

- Sections 3303 and 3304 invalid
- 3 Justices – Environmental Rights Amendment
- Justice Baer – Due Process

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# PEDF

## • *Pa. Env'tl. Def. Fund v. Com.* (Pa. 2017)

- Constitutionality of statutes related to disposition of funds generated by leasing of state forest and park lands for oil and gas.
- Rejects *Payne v. Kassab*.
- Applies text of Article 1, Section 27 and principles of trust law.
- Funds must be used for conservation and maintenance of natural resources.

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## PEDF

- Footnote 22: Second sentence of ERA applies to “resources not owned by the Commonwealth, which involve a public interest.”
- Footnote 23: Trustee obligations apply to all agencies, state and local.
- **THE QUESTION:** How do these principles apply to state or local agency permitting?

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## PEDF – Impact on Permitting?

- *Center for Coalfield Justice and Sierra Club v. DEP* (EHB)
  - Appeal of longwall permits.
  - ERA imposes obligations beyond statutes.
  - Environmental permitting contemplates some amount of environmental impact.
  - Did DEP “consider the environmental effect of its permitting action”?
  - Is the permitting action likely to cause “the unreasonable degradation or deterioration of the waters of the Commonwealth”?
  - One permit violates statutes and ERA; second permit does not.
  - Appeal filed and withdrawn.

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## PEDF – Impact on Permitting?

- *Friends of Lackawanna v. DEP and Keystone Landfill (EHB)*
  - Appeal of landfill permit renewal.
  - Contends did not meet ERA obligations because of adverse effects on groundwater.
  - Did DEP consider environmental effects in its permitting action?
  - Was degradation, diminution, depletion or deterioration of the environment reasonable or unreasonable?
  - Issuing permit without imposing a condition addressing groundwater contamination was unreasonable.
  - Groundwater is a public natural resource.
  - Permit amended to require submission of groundwater assessment plan.
  - No appeal filed.

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## PEDF – Impact on Permitting?

- *Delaware Riverkeeper Network v. DEP and R.E. Gas Development*
  - Appeal of well permits and renewals.
  - Contends permit issuance violated Oil and Gas Act, Clean Streams Law and Administrative Code, and DEP did not meet ERA obligations.
  - Alleged concerns of groundwater contamination and air and noise nuisances.
  - Did DEP consider the environmental effects of its actions?

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## PEDF – Impact on Permitting?

- *Delaware Riverkeeper Network v. DEP and R.E. Gas Development*
  - Did DEP correctly determine that its action will not result in unreasonable degradation, diminution, depletion or deterioration of the environment?
  - Did DEP satisfy its trustee duties by acting with prudence, loyalty and impartiality with respect to the beneficiaries of the natural resources impacted by the DEP decision?
  - EHB finds no statutory or ERA violations.
  - No appeal filed.

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## Post-Robinson Challenges

*Post-Robinson Township*: Challenges to local ordinances and decisions claiming ERA violations because:

- Permitting O&G operations an “industrial” activity incompatible in agricultural and other non-industrial districts.
- Failing to undertake investigation into health and safety effects.

Cases becoming “battle of experts.”

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## Conditional Use Decision

- *Gorsline v. Bd. of Supervisors of Fairfield Twp.* (Pa. 2018)
  - Conditional use for well pad approved under “savings” clause for uses similar to and compatible with other uses in R-A District.
  - Objectors asserted gas well site is an industrial use incompatible with uses allowed in R-A District and violative of ERA and *Robinson*.
  - Common Pleas Court reversed; Commonwealth Court reinstated approval; Supreme Court reversed in 4-3 decision.

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## Conditional Use Decision

- *Gorsline v. Bd. of Supervisors of Fairfield Twp.* (Pa. 2018)
  - Majority:
    - Use not similar to other uses in district.
    - ERA issue not directly addressed, but . . . .
    - Municipality empowered to “permit oil and gas development in any or all of its zoning districts”.
    - Holding “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.”

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## Conditional Use Decision

- *Gorsline v. Bd. of Supervisors of Fairfield Twp. (Pa. 2018)*
  - Dissent:
    - Use similar.
    - Use not incompatible.
    - Clean and Green Act.
    - Agricultural Area Security Law.

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## Ordinance Validity Challenges

- *Frederick v. Allegheny Twp. Zoning Hearing Bd. (Pa. Commw. Ct. 2018)*
  - Validity challenge to zoning ordinance based on ERA, substantive due process and MPC.
  - Ordinance:
    - O&G wells permitted use by right in all zoning districts.
    - No setbacks beyond state requirements.
  - ZHB rejected challenge; Common Pleas Court affirmed; Commonwealth Court affirmed in 5-2 decision.
  - Petition for allowance of appeal pending.

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## Ordinance Validity Challenges

- *Frederick v. Allegheny Twp. Zoning Hearing Bd.* (Pa. Commw. Ct. 2018)
  - Majority:
    - No significance in use of term “industrial”.
    - Drilling, like farming, is not a heavy industrial use, traditionally occurs in agricultural areas and contains temporary components of an industrial use.
    - Under *PEDF*, the “precise duties imposed upon local governments by the first sentence of the [ERA] are by no means clear.”
    - Standard is whether the ordinance “unreasonably impairs” the environmental values implicated by the ERA. Majority found it did not.

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## Ordinance Validity Challenges

- *Frederick v. Allegheny Twp. Zoning Hearing Bd.* (Pa. Commw. Ct. 2018)
  - Majority:
    - Municipalities can’t act beyond enabling legislation; Oil and Gas Act preempts regulating the “how” versus “where”.
    - Record established natural gas development has safely coexisted in rural communities and can support agricultural uses.
    - Ordinance does not violate substantive due process or MPC.

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## Ordinance Validity Challenges

- *Frederick v. Allegheny Twp. Zoning Hearing Bd.* (Pa. Commw. Ct. 2018)
  - Dissents:
    - McCullough: Remand to ZHB to receive additional evidence on compatibility issue and apply strict scrutiny test.
    - Ceisler: Ordinance facially violates ERA.

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## Ordinance Validity Challenges

- *Delaware Riverkeeper Network v. Middlesex Twp. Zoning Hearing Bd.* (Pa. Commw. Ct.) (Pending)
  - Validity challenge to zoning ordinance based on ERA, substantive due process and MPC.
  - Ordinance:
    - O&G wells permitted use by right in some districts, conditional use in others, not permitted in others.
  - ZHB rejected challenge; Common Pleas Court affirmed.

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## Ordinance Validity Challenges

- *Delaware Riverkeeper Network v. Middlesex Twp. Zoning Hearing Bd.* (Pa. Commw. Ct.) (Pending)
  - Unreported 2017 Commonwealth Court decision.
    - Affirmed.
    - Applied *Payne v. Kassab*.
  - Two weeks later: *PEDF* rejects *Payne v. Kassab*.
  - August 2018: Supreme Court vacates and remands for reconsideration in light of *PEDF* and *Gorsline*.
  - Oral argument June 2019.

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## Ordinance Validity Challenges

- *Protect PT v. Penn Twp. Zoning Hearing Bd.* (Pa. Commw. Ct.) (Pending)
  - Validity challenge to zoning ordinance based on ERA, substantive due process and MPC.
  - Ordinance
    - O&G wells special exception in overlay district.
    - Overlay covered 55% of Township.
    - 600-foot protected structure setback.
    - 200-foot property line setback.
    - Applying setbacks – 9% of Township available for drilling.

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## Ordinance Validity Challenges

- *Protect PT v. Penn Twp. Zoning Hearing Bd.* (Pa. Commw. Ct.) (Pending)
  - ZHB didn't schedule hearing—deemed denial.
  - Appeal heard *de novo* in Common Pleas Court.
  - Court affirmed ordinance validity.
  - Commonwealth Court appeal pending.

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## Ordinance Validity Challenges

- **Mount Pleasant Township/Washington County**
- **Cecil Township/Washington County (2)**
- **Upper Burrell Township/Westmoreland County**
- **Robinson Township/Washington County (3)**
- **Murrysville/Westmorland County**

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## Ordinance Validity Challenges

- *ACRE – Todd Township/Huntingdon County (Pa. A.G. 2019)*
  - Agricultural Communities and Rural Environment (ACRE) statute.
    - Prohibits ordinances that limit “normal agricultural operations”, where no authority to adopt.
    - Process for complaint to/review by Attorney General.
  - Todd Township
    - No zoning ordinance.
    - Adopts a “Community Bill of Rights”(CBR Ordinance) effectively prohibiting concentrated animal feeding operations (CAFOs).

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## Ordinance Validity Challenges

- *ACRE Review Request – Todd Township/Huntingdon County (Pa. A.G. 2019)*
  - Complaint filed with AG that CBR Ordinance violates ACRE.
  - CBR Ordinance drafted and defended by Community Environmental Legal Defense Fund (CELDF).
- AG Opinion
  - CBR Ordinance violates ACRE.
  - Courts have repeatedly found CBR type ordinances to be invalid
  - Rejects CELDF’s Article I, Section 2 and 25 arguments.

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# Ordinance Validity Challenges

- Rejects ERA argument, noting heavy state regulation of CAFOs.
- Quotes *Funk v. Wolf*, which in turn cites to the overruled *Payne v. Kassab*.
- “When laws and regulations are enacted to govern activities with an environmental impact, the protections of the ERA are satisfied.”
- “The numerous laws and regulations concerning [CAFOs] adequately address the environmental concerns of the ERA”

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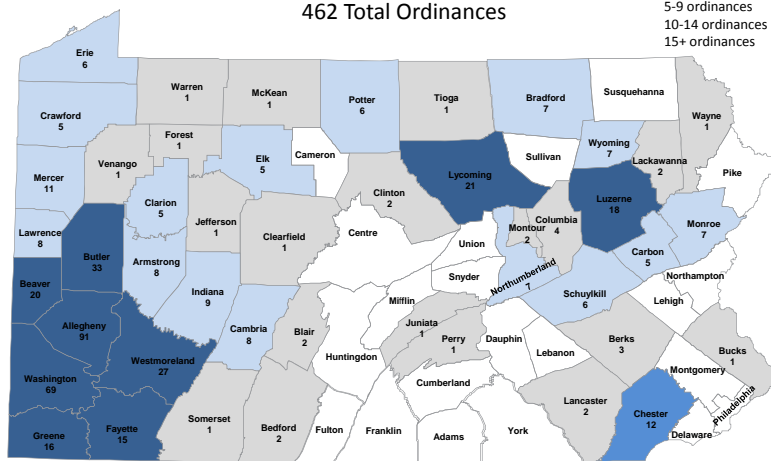
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## Post-Robinson Oil & Gas Ordinance Activity

January 2014–December 2018

462 Total Ordinances

1-4 ordinances  
5-9 ordinances  
10-14 ordinances  
15+ ordinances



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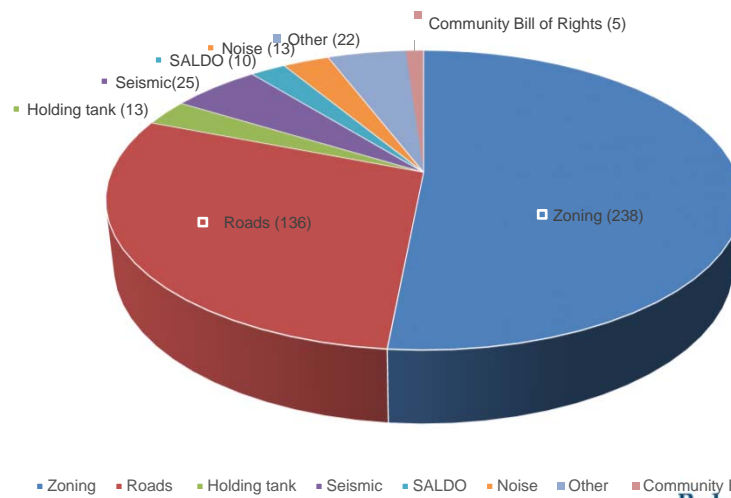
# Adopted Ordinances

- 2014 100
- 2015 113
- 2016 85
- 2017 86
- 2018 78

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# Ordinance Types



■ Zoning ■ Roads ■ Holding tank ■ Seismic ■ SALDO ■ Noise ■ Other ■ Community Bill of Rights  
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