

I have summarized articles from several sources regarding the Gorsline case which was recently won at the Supreme Court level. What it all means will continue to be discussed; as we receive analyses from other sources, I will share the information . jan

Gorsline Opinion Summary

Gorsline-PennFuture

June 1, 2018 (PHILADELPHIA, Pa.) –The PA State Supreme Court announced today a long-awaited victory for two families in Lycoming County who challenged a decision that allowed an industrial shale gas development to be located in their residential zoned neighborhood.

The case, Gorsline et al. v. Board of Supervisors of Fairfield Township v. Inflection Energy LLC et al., completes a multi-year journey by PennFuture, Brian and Dawn Gorsline, and their neighbors, Paul and Michele Batkowski. PennFuture began representing the two families in January 2014, when it filed an appeal on their behalf of the Township’s issuance of a conditional use permit for the proposed well pad, which was to be located within a few thousand feet of their homes. Judge Marc Lovecchio of Lycoming County Court of Common Pleas sided with the local residents and overturned the Township’s decision, but the Township and Inflection sought review of that Court’s decision before Commonwealth Court. After the Commonwealth Court issued its decision, PennFuture sought review of the case before the Pennsylvania Supreme Court.

“The Court’s decision makes clear that shale gas development is an industrial land use, and that local government must rigorously consider what other land uses it is compatible with before allowing it to occur in districts designed for incompatible uses, such as a district designed to foster a quiet residential environment,” said PennFuture Vice President of Legal Affairs George Jugovic, Jr., who argued the case before the PA State Supreme Court in March 2017.

The ruling **overturns a Commonwealth Court decision that had held that industrial shale gas development was similar to a “public service facility,” and therefore could be located in virtually any zoned district that allowed for public services,** such as sewage water facilities, including in the R-A District at issue in this case.

The Court today squarely rejected that analysis, stating that industrial shale gas development was not “in any material respect” similar to any of the uses allowed in Fairfield Township’s R-A District.

Gorsline Opinion- Business Times

Jun 1, 2018, 2:23pm

Fairfield Township zoning law doesn't specifically allow drilling but the **supervisors believed its use was allowed because it was "similar to" other uses,** a decision that was later backed in a ruling by the Commonwealth Court.

Friday's 4-3 ruling reversed the Commonwealth Court's decision.

"Because the Ordinance does not expressly authorize a gas well's use in any of the Township's three zoning districts, such a use cannot enjoy any presumption of being 'similar to' uses that are permitted in those districts," said the ruling by Associate Justice Christine L. Donohue.

Donohue's ruling noted that the drilling was not automatically off-limits a residential district, but that **the municipality needed to amend its zoning to permit drilling with whatever limitations it wanted.**

"What a governing body may not do, however, and what the Fairfield Township Board of Supervisors did **in this case, is to permit oil and gas development in residential/agricultural districts without first enacting the necessary amendments,**" she wrote.

A dissent by Associate Supreme Court Justice Kevin **Dougherty said he believed Fairfield Township's Board of Supervisors had properly allowed the conditional use of the drilling. Dougherty said the majority ruling was too restrictive.**

"The board is authorized to consider all the possible uses allowed in the district either as permitted uses or conditional uses," Dougherty wrote.

Gorsline Opinion-- Marcellus Drilling News

"In some respects, the Supreme Court decision is a win for anti-fossil fuelers who are dead set against any Marcellus drilling. But in other, very important respects, it was not a victory for antis. Yes, it's a bit more difficult for drillers to simply rely on and use the principle of "conditional use" to get a permit. However, the fight now goes local. **If localities pass new zoning laws, or tweaks to existing laws, that specifically allow shale drilling in residential/agricultural districts, then antis have no place left to go to challenge permits granted under those revised regulations. It's now over for them.**

Antis' only hope now is to agitate locals into opposing revisions to zoning laws, which is much more difficult for them to do in counties like Lycoming. In that respect, that once zoning has been tweaked antis can't do anything about it, this is a "win" for drillers. We now have certainty that antis can't forever tie us up in courts with frivolous zoning claims."

From the Industry site---Marcellus Drilling News

Gorsline Opinion PennLive

"The language of ordinances matters, as does the quality of the evidence that applicants must present and that boards must rely upon when rendering decisions," Sanko said.

A split state Supreme Court decision should send a signal to municipalities to carefully review the language of their zoning ordinances, especially sections dealing with conditional uses, the head of the state township supervisors' organization says.

The court's majority pointed out the township zoning ordinance does not identify drilling, production and operation of multiple gas wells as a permitted or conditional use in a residential-agricultural district.

That obstacle could be overcome if the applicant *develops an evidentiary record to establish its proposal is similar to a permitted use in that zoning district,* the opinion states. That record was lacking in this case, it found.

The majority opinion written by Justice Christine Donohue stated the supervisors' decision **contained no findings that Inflection's extraction of natural gas is for the benefit of the residents in the R-A district**, the township or Lycoming County.

It went on **to state Inflection is clearly not a municipality, government agency or public utility but rather a private, for-profit commercial business.**

Inflection's proposed use is intended solely for its own commercial benefits and "not in any respect for the benefit of furthering the expressed goals of Fairfield Twp.'s R-A district," the majority concluded.

Gorsline Opinion Post Gazette, Don Hopy

<http://www.post-gazette.com/news/environment/2018/06/02/Gas-wells-incompatible-use-with-homes/stories/201806010169>

The case, Gorsline v. Board of Supervisors of Fairfield Township v. Inflection Energy, is important because of its potential application to, and influence on, shale gas development in non-industrially zoned areas throughout the state.

"The decision means that shale gas development has to be recognized as an industrial land use that has impacts and must be located with other uses with which it is compatible," said George Jugovic Jr., chief counsel for PennFuture who represented the four Fairfield Township residents that brought the case.

He said the court rejected an argument by the township that it granted Inflection Energy a conditional use permit on the basis that shale gas development is a "public services" use that benefits residents and is allowed under the township's zoning ordinance. The court ruled that the board failed to show that the proposed natural gas drilling "is in any respect for the benefit of the (local) residents. . ."

The 24-page opinion, written by Justice Christine Donohue, states that Inflection Energy and the township's supervisors **failed to satisfy "its burden of proving that its proposed use was similar to a permitted use in an R-A (residential-agriculture) district. . ."**

But the ruling also emphasized that it "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-agricultural uses."

Gorsline Opinion Times Tribune

<http://www.thetimes-tribune.com/opinion/court-again-saves-towns-from-legislature-1.2348240>

"It ruled against Fairfield Twp., in Lycoming County, which had approved a variance for drilling in a residential/agricultural zone. The court said that governments that want to approve drilling **must designate the targeted drilling zones as industrial.**

The ruling will require local governments to plan for drilling decisions based on the overall community rather than in response to drillers' desires alone. It's the correct decision. **Unfortunately, it's another case of residents having to rely on the courts after their elected local officials and state legislators served the industry first."**

Gorsline Opinion- Chris Papa

<http://christopherpapa.com/wordpress1/2018/06/14/my-quick-take-and-tea-leaf-reading-the-pa-supreme-courts-gorsline-opinion/>

My Quick Take and “Tea Leaf Reading” the Pa Supreme Court’s Gorsline Opinion

Posted on June 14, 2018

The Supreme Court’s long-awaited decision in *Gorsline v. Bd. of Supervisors of Fairfield Twp.* regarding unconventional oil and gas development in residential and agricultural zones issued on June 1, 2018. The opinion, as I personally have long anticipated, was a narrow decision that turned on the unique and strange details of the local ordinance.

This ordinance has a “savings clause” which states generally that if a use is not specifically permitted in the Residential-Agricultural zone, it can still be permitted as a conditional use if it’s similar and compatible with other permitted uses in the R-A zone and would not be detrimental to public health safety and welfare. The ordinance also clearly states that the burden of proof lies with the applicant to prove the above. The Supreme Court found that the zoning board below failed to provide findings of fact regarding the similarity of use and thus disallowed this development in the R-A zone under the terms of the ordinance.

In overturning the Commonwealth Court’s approval of unconventional drilling in the R-A Zone, the Supreme Court stated:

Because we may decide this case on nonconstitutional grounds, we decline to decide Objectors’ first issue, relating to this Court’s decision in *Robinson I* based on a claimed violation of substantive due process rights and the Environmental Rights Amendment of the Pennsylvania Constitution (Article I, Section 27). See *Blake v. State Civil Serv. Comm’n*, 166 A.3d 292, 297 (Pa. 2017) (recognizing that constitutional questions should not be decided if the case can be resolved on alternative, non-constitutional grounds).

Gorsline v. Bd. of Supervisors of Fairfield Twp., 2018 Pa . LEXIS 2781, *14-15, 48 ELR 20089. The court has thus understandably and in accordance with sound principals of judicial review left many in the dark a bit and explicitly reserved the constitutional issues for future pending cases where the need to rule on these questions is essential to resolve the case.

Did the Supreme Court, however, make any statement that could bolster such pending constitutional challenges? I believe they did. First, the heated battle regarding whether unconventional oil and gas development is an industrial use or merely construction activities related to a non-industrial use (like building a house) appears to be finally and clearly decided and settled in favor of unconventional drilling being itself an industrial use. The Supreme Court, favorably quoting the *Robinson Case* in footnote one states that:

The natural gas wells in this case were being constructed to extract natural gas from Marcellus Shale. This is done by hydraulic fracturing, more commonly known as “fracking.” As we previously explained in *Robinson Twp. v. Commonwealth*, 637 Pa. 239, 147 A.3d 536 (Pa.2016) (“*Robinson II*”), fracking involves “pumping at high pressure into the rock formation a mixture of sand and freshwater treated with a gel friction reducer, until the rock cracks, resulting in greater gas mobility.” *Id.* at 543 n.4 (quoting *Robinson Twp. v. Commonwealth*, 623 Pa. 564, 83 A.3d 901, 914-15 (Pa. 2013) (plurality) (“*Robinson I*”). In *Robinson [*2]* I, a plurality of this Court described fracking operations as an industrial use involving “air, water, and soil pollution; persistent noise, lighting, and heavy vehicle traffic; and the building of facilities incongruous with the surrounding landscape.” *Robinson I*, 83 A.3d at 979. In a concurring opinion, Justice Baer was even more descriptive, explaining that “these industrial-like operations include blasting of rock and other material, noise from the running of diesel engines, sometimes nonstop for days, traffic from construction vehicles, tankers, and other heavy-duty machinery, the storage of hazardous materials, constant bright lighting at night, and the potential for life-and property-threatening explosions and gas well blowouts.” *Id.* at 1005 (Baer, J., concurring).

Gorsline v. Bd. of Supervisors of Fairfield Twp., 2018 Pa . LEXIS 2781, *1-2. The Court in the final page of its opinion quotes the Municipalities Planning Code and states on the bigger constitutional issues that, “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”. I think we need to go into the weeds and “count the angels on the head of the pin” on this statement. In making

this statement, notice that the court states, “oil and gas development” not industrial unconventional oil and gas development. This is a big factual distinction given that shallow well, traditional oil and gas development is a much less intensive and historic Pennsylvania use as many including our office have successfully shown in other cases. Further, the court is clearly not stating the inverse of this statement that unconventional oil and gas development is compatible in Residential and Agricultural Zones. The court in this factual setting is simply taking a pass on this issue. I would still contend that looking to the 2012 Commonwealth Court opinion in Robinson is the soundest logic for always incompatible in residential zones.

The Court then appears to impose a **requirement that, “the governing body must, however, actually amend its zoning ordinances to permit drilling in designated areas, setting forth whatever limitations and conditions it decides are appropriate for the protection of its citizenry”**. **Gorsline v. Bd. of Supervisors of Fairfield Twp., 2018 Pa . LEXIS 2781, *28, 48. These proposed amendments, however, obviously must also pass constitutional muster, specifically regarding substantive due process rights and the Environmental Rights Amendment, thus bringing us full circle back to the big unanswered questions.** I think, though, that the law is narrowing in favor traditional zoning advocates in segregating unlike industrial uses from compatible residential and agricultural uses. To be continued... :-)

The case: http://www.pacourts.us/assets/opinions/Supreme/out/majority_opinion_reversed_10356604138003191.pdf