Between *Huntley* and *Salem*: The Current State of Municipal Authority in Pennsylvania to Affect Gas Drilling through Zoning

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NOTE

BETWEEN HUNTLEY AND SALEM: THE CURRENT STATE OF MUNICIPAL AUTHORITY IN PENNSYLVANIA TO AFFECT GAS DRILLING THROUGH ZONING

Dan Raichel*

This article examines the scope of Pennsylvania’s preemption of municipal authority to zone natural gas drilling activities in light of two relatively recent Pennsylvania Supreme Court decisions interpreting the Pennsylvania Oil and Gas Act and its local ordinance preemption provision. Although these cases define outer boundaries of permissible municipal regulation along the spectrum of possible zoning controls – i.e. what types of ordinance provisions would be either definitively permitted or preempted – substantial questions remain as to what extent a municipality may use traditional zoning power to zone gas drilling activities. This paper explores those grey areas, and attempts to assess the preemption risk of various types of zoning controls.

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INTRODUCTION

The recent explosion of gas drilling activity in the Marcellus Shale has brought a wave of public health and welfare concerns to Pennsylvania citizens. Far from the city lights of Pittsburgh or Philadelphia, rural residents are dealing on a daily basis with a host of environmental issues, ranging from water contamination to increased vehicle traffic to air and noise pollution. As these concerns mount, more municipalities are trying to take matters into their own hands by passing local zoning ordinances that attempt to mitigate some of the most noxious elements of the new drilling activities. Unfortunately, municipal ability to regulate modern hydraulic fracturing is severely circumscribed by the Pennsylvania Oil and Gas Act (“OGA”), passed long before the advent of hydraulic fracturing, which specifically preempts municipal authority to regulate gas drilling.

This article will focus specifically on the explicit preemption clause of the OGA, how the Supreme Court of Pennsylvania has interpreted that clause, and the three ways in which a municipal zoning ordinance, either in whole or in part, may be preempted by the OGA. This article also will outline a two-part test for evaluating the risk of preemption for a particular ordinance, including a spectrum of risk that specific ordinance provisions may be preempted.

1 Several months after the Symposium in March, 2011, legislation was proposed in the Pennsylvania House in response to the Huntley and Salem decisions. The bill, known as Act 13, was signed into law on February 14, 2012, and will dramatically alter municipal zoning authority over gas drilling if and when it takes effect. The validity of major portions of the act are currently being challenged in the Pennsylvania Commonwealth Court, and the provisions of the act relating to municipal authority have been enjoined from taking effect until next winter at the earliest. In the interim, the Huntley and Salem cases remain good law, and will also be useful in the future in interpreting ambiguities in Act 13 as well as municipal preemption provisions of oil and gas laws in other states.

2 For an explanation of how the term “ordinance” is used in this article, see infra note 27.

3 This article focuses mainly on OGA preemption of zoning ordinances passed under the authority of the MPC, and not on laws promulgated under other legislative grants of authority. It is the opinion of this author, however, that the preemption analysis for ordinances passed under other grants of authority would be heavily influenced by the preemption analysis applicable to zoning ordinances.
I. Preemption of Local Authority Under the OGA

In Pennsylvania, municipalities derive their local law-making powers from specific grants of authority by the state government. As such, the state also has the ability to limit that authority. This relationship is illustrated in the interaction between the Municipalities Planning Code ("MPC") and the OGA. The local zoning authority that the state granted in the MPC is partially undermined by Section 602 of the OGA, the Act’s explicit preemption provision. Under Section 602, most local ordinances "purporting" to regulate gas drilling are unequivocally preempted, but there is a thin exemption for ordinances promulgated under the MPC, i.e., zoning ordinances:

Except with respect to ordinances adopted pursuant to . . . the Municipalities Planning Code, and the . . . Flood Plain Management Act, all local ordinances and enactments purporting to regulate oil and gas well operations regulated by this Act are hereby superseded. No ordinances or enactments adopted pursuant to the aforementioned acts shall contain provisions which impose conditions, requirements or limitations on the same features of oil and gas well operations regulated by this Act or that accomplish the same purposes as set forth in this Act. The Commonwealth, by this enactment, hereby preempts and supersedes the regulation of oil and gas wells as herein defined.

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4 "Municipality" is defined by the MPC as "any city of the second class A or third class, borough, incorporated town, township of the first or second class, county of the second class through eighth class, home rule municipality, or any similar general purpose unit of government which shall hereafter be created by the General Assembly." 53 Pa. Cons. Stat. § 10107 (2011).

5 Id. §§ 101, 601 (2011).

While zoning ordinances relating to gas drilling are not wholly preempted, they still cannot: (1) regulate a “feature” of gas drilling or (2) attempt to “accomplish the same purposes” as set forth in the OGA. Although this language is not convoluted, it is brief and uses ambiguous terms not elsewhere defined in the Act. What constitutes a “feature” of gas drilling? How should the purpose of a local ordinance be determined, and how will that purpose be compared to those of the OGA? These types of questions may have received little attention before the hydraulic fracturing boom, but are now highly contentious and litigated issues.

II. The Two Ends of the Spectrum: The Pennsylvania Supreme Court’s Decisions in the Huntley and Salem Cases

In 2009, the Pennsylvania Supreme Court attempted to dispel some of the ambiguity in the language of Section 602 in two decisions released on the same day – the Huntley and Salem decisions. These cases are, to date, the only cases in which this court has squarely addressed the issue of preemption of municipal authority under Section 602. Although the cases clarify some aspects of Section 602 and outline the types of preemption an ordinance might face, the two ordinances challenged in these cases represent the extremes in their approaches to the regulation of gas drilling: at one end, regulation of drilling by either inclusion or exclusion from a particular zone, and at the other, a purposeful and comprehensive scheme to regulate gas drilling. Understanding these two extremes helps to determine what types of zoning provisions are, or are not, definitively preempted. However, it is still unclear how courts should interpret challenged ordinances that do not lie between these extremes. To understand the

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8 For example, neither “feature” nor “oil and gas well operations” are defined in the OGA. Id. § 601.103.
10 Huntley, 964 A.2d at 855; Salem, 964 A.2d at 869.
gray area that remains between these two cases, it is helpful first to examine the cases themselves.

**A. The Huntley Decision – The Inapplicability of Feature and Purpose Preemption to Certain Location-Based Regulations**

In *Huntley*, the Supreme Court of Pennsylvania upheld the authority of a municipality to include or exclude gas drilling as a conditional use within an area zoned as residential. The case began when Huntley and Huntley, Inc., an engineering company, applied for a conditional use permit for two leased parcels of land in the Borough of Oakmont zoned R-1, in which “extraction of minerals” was only allowed as a conditional use. The Borough Council denied the permit on the grounds that natural gas was not a mineral within the meaning of the zoning ordinance and that the OGA “did not preempt the Borough’s power to restrict the location of gas drilling and wellheads.”

Disagreeing with both grounds, the Pennsylvania Commonwealth Court held that the ordinance preempted municipal power as applied to the placement of gas wells. In reversing the commonwealth court, the Pennsylvania Supreme Court looked to both explicit types of preemption mentioned in Section 602: “feature” preemption and “purpose” preemption. More specifically, the court examined whether (1) the exclusion of oil and gas activities from a particular zone constituted regulation of a “feature” of oil and gas drilling operations, and (2) whether the municipality’s purpose behind regulating the location of oil and gas wells through the use of zoning impermissibly overlapped with those enumerated in the OGA.

Using dictionary definitions of “feature,” (a “prominent or conspicuous characteristic”), and “operation,” (“a process or manner of functioning”), the court found that the placement of a well by either inclusion or exclusion from a particular zone was not a “feature” as defined by the Act because “it is not a characteristic of the manner or process by which the well is created, functions,
is maintained, ceases to function, or is ultimately destroyed or capped.”

Features regulated by the OGA only pertain to “technical aspects of well function and matters ancillary thereto (such as registration, bonding, and well site restoration),” whereas a well’s location is one of its features only “in a general sense.”

To determine whether the ordinance accomplishes the same purposes “as set forth” by the Act, the court compared the objectives of the ordinance to the enumerated purposes of the Act, which are to:

(1) Permit the optimal development of the oil and gas resources of Pennsylvania consistent with the protection of the health, safety, environment and property of the citizens of the Commonwealth.

(2) Protect the safety of personnel and facilities employed in the exploration, development, storage and production of natural gas or oil or the mining of coal.

(3) Protect the safety and property rights of persons residing in areas where such exploration, development, storage or production occurs.

(4) Protect the natural resources, environmental rights and values secured by the Pennsylvania Constitution.

Given that much of zoning regulation deals with “safety and property rights,” and, to a lesser degree, environmental values, a broad reading of Section 602’s preemption clause likely would preempt most, if not all, zoning regulation of gas drilling. The court, however, declined to read Section 602 this broadly. Although the court did find some overlap between the purposes of the ordinance and the OGA, “the most salient objectives” of the Borough were “preserving the character of residential neighborhoods” and

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14 Id. at 864.
15 Id.
“encouraging ‘beneficial and compatible land uses,’” both enumerated in the purpose section of the Borough of Oakmont’s Zoning Ordinance (“BOZO”).

There are a few things to note about the court’s treatment of both “feature” and “purpose” preemption from Section 602. First, while the court did limit “features” to only technical aspects of gas drilling, it also broadened the term beyond the actual drilling of the well to include all “matters ancillary thereto,” which includes “registration, bonding, and well site restoration.” Second, even though the court generally held that location-based restrictions did not regulate a “feature” of gas drilling, the court was still hesitant to extend a municipality’s ability to restrict the location of a well through the use of setbacks. In footnote ten of the opinion, the court cautioned that their opinion did not “say that an ordinance would be enforceable to the extent it sought to increase specific setback requirements contained in the Act.”

Although setbacks were not at issue in the case, the footnote reveals the court’s extreme hesitance to allow a municipality to regulate an aspect of gas drilling specifically covered by the OGA. Additionally, with regard to purpose preemption, it is important to note that the court did not scrutinize whether there is any overlap between a challenged ordinance and the OGA, but instead scrutinized whether the most salient purposes of an ordinance overlap with the enumerated purposes of the OGA. Here, the court compared the fourteen enumerated purposes of the BOZO to those of the OGA, but only selected two of those fourteen as the most salient. What criteria the court used to select these purposes as the most salient remains a mystery, as does the issue of whether these purposes are meant to be exclusively permissible or whether other

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17 Huntley, 964 A.2d at 865 (citing to Borough of Oakmont, Pa., Code §§ 205-3(A)(7), 305-3(A)(10) (1994)).
18 Id. at 864.
19 Id. at 864 n.10.
20 Setbacks are covered in Section 205 of the OGA. Two specific setback requirements for wells are provided: (a) 200ft. from any existing building or water well without consent of the owner, and (b) 100ft. from any stream, spring, body of water, or wetlands larger than one acre in size. Pa. Oil and Gas Act, 58 Pa. Cons. Stat. § 601.205 (2011).
traditional zoning purposes also are permissible. Even if it is the former, it seems that the court is willing to tolerate some overlap with the OGA because the purposes of “preserving the character of residential neighborhoods” and “encouraging beneficial and compatible land uses” do have some intersection with the safety, environmental, and property rights concerns addressed by purposes three and four of the OGA.21

B. The Salem Decision – Common Law Conflict Preemption of a Comprehensive Scheme to Regulate Oil and Gas Drilling

In contrast to the mere location-based restrictions of the BOZO, the recently promulgated appendix to the Salem Township’s Subdivision and Land Development Ordinance (“SALDO,” “SALDO Appendix,” or “Appendix”) at issue in the Salem case was vastly more directed and forceful in its approach to gas drilling. The Appendix: (1) required a permit for all drilling-related activities; (2) imposed bonding requirements before drilling could begin; (3) regulated the location, design, and construction of access roads, gas transmission lines, and water treatment facilities for gas drilling; (4) regulated the construction and plugging of well heads; (5) established requirements for site access and restoration; and (6) provided that any violation of the SALDO Appendix can trigger fines and/or imprisonment.22 In striking down the Appendix as preempted, the court found that many elements of the ordinance were preempted by the express feature and purpose preemptions identified in the Huntley case. Many Appendix provisions, such as those related to well-capping and site restoration, regulated technical aspects of gas drilling, and the Appendix’s “stated purposes overlap[ped] substantially with the goals as set forth in the OGA.”23 Importantly, the court also identified a third basis for preemption outside of Section 602 – common law conflict preemption. Conflict preemption maintains that “a local ordinance may not stand as an obstacle to the execution of the full purposes and objectives of the

21 Id. § 601.102.
23 Id. at 877.
Because the SALDO Appendix was so extensive and focused on gas drilling, it also triggered this type of preemption. The court found the Appendix as a whole to be “an attempt by the township to enact a comprehensive regulatory scheme relative to oil and gas development within the municipality” at odds with the OGA. Therefore, the Appendix was preempted as a whole by conflict preemption.

There are two important points to note about conflict preemption with respect to gas drilling. First, this sort of preemption is, to a degree, bound up with the two express types of preemption under 602. A profusion of provisions regulating the features of gas drilling or a clear purpose to do the same may be evidence of a comprehensive scheme. Second, there is a possible important distinction with respect to the consequence of a “comprehensive scheme” determination. Once an ordinance is determined to be a comprehensive scheme, wholesale invalidation of the ordinance may be appropriate, even when the ordinance contains provisions that are not expressly preempted by the OGA:

While the [t]ownship may be correct in arguing that there are some aspects of the [Appendix] that are not expressly covered directly by the Act, even these are bound up with the overall regulatory scheme which includes strict permitting and penalty provisions, and phrased in such general terms – e.g., “the most direct and feasible means,” “shall not unreasonably restrict access,” etc. – as to provide the [t]ownship with virtually unbridled discretion to deny permission to drill. This is in stark contrast to, and in conflict with, the Act’s more permissive approach.

As will be discussed in the next section, severability may still be an option for ordinances that are not determined to be comprehensive schemes, but it appears that once this threshold is

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25 Salem, 964 A.2d at 875–77.
26 Id. at 876.
crossed a court will be extremely reluctant to salvage any piece of the ordinance. In other words, if the ordinance looks rotten, a court will not bother to cut out the mold.

C. Unanswered Questions After Huntley and Salem

The Huntley and Salem cases provide us with a pretty clear idea of what is likely to occur when an ordinance is challenged if that ordinance either regulates gas drilling by excluding drilling as a permitted use in a residential zone (municipality wins) or if it attempts to create a comprehensive scheme to regulate gas drilling (municipality loses). What would happen, however, to an otherwise permissible ordinance with only two or three provisions expressly preempted by the OGA? What would happen if an ordinance not directed at gas drilling, such as fencing or aesthetic requirements for all structures in a particular zone, nevertheless affects the oil and gas industry? In other words, what would happen if a challenged ordinance fell in between the two extremes of the Huntley and Salem cases?

From this larger question, important specific questions arise. First is the question of severability. Huntley dealt with an ordinance that faced no express or conflict preemption; Salem dealt with an ordinance that was so expressly preempted in every aspect, and so expansive, that it was discarded as a whole. If a challenge arose to an ordinance that was largely permissible, but contained only a few expressly preempted provisions, what should a court do? Although the court did not address the possibility of excising only offending provisions from an ordinance, it seems like a reasonable solution under these circumstances. Throwing out such an ordinance in its entirety seems disrespectful to the municipality’s legislative authority granted by the MPC and specifically recognized by the OGA; upholding the ordinance as a whole would not accord with Section 602. Although severability is still an open question, it is assumed later in this article that if a court encountered an ordinance as described in this paragraph, it would sever or invalidate, as applied to gas drilling, only the offending provisions.27

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27Here it helps to clarify what is meant by use of the term “ordinance” with regard
Another question is the extent to which a municipality can place conditions on gas drilling when it is included in a zone either as a conditional or permitted use. Although the court in *Huntley* upheld the ability of a municipality to exclude gas drilling from a residential zone, the court also held that gas drilling was permitted as a conditional use on the property in question because natural gas met the definition of “mineral” under the language of the BOZO.\(^8\) The fact that the court allowed gas drilling to be listed as a conditional use seems to imply that at least *some* conditions may be placed on gas drilling, although it offers little guidance on what form those conditions may take.

The third question is the extent to which a municipality can, using either its authority under the MPC or another state statute, issue an ordinance of general applicability (for example, a township-wide noise ordinance), not explicitly directed at gas drilling, but that has effects on gas drilling? In a footnote in the *Salem* decision, the court, in talking about municipal authority under the Pennsylvania Storm Water Management Act, declared that “[the court’s] holding here should not be construed to preclude local regulations duly enacted pursuant to other state laws that *incidentally* affect oil and gas development.”\(^29\) What is the test to determine whether the effect of an ordinance is incidental? Is it enough that the ordinance or provision is not directed, either explicitly or covertly, at gas drilling? Or will a regulation of general applicability become invalid or cease to apply to gas drilling when its interference with gas drilling activities reaches a certain magnitude?

to severability. While the larger zoning code of a municipality is commonly called an “ordinance,” the term here refers to the discrete section of the larger code that addresses or affects gas drilling. Given that many municipalities are legislatively addressing gas drilling issues, “ordinance” usually refers to those pieces of legislation as a whole. For example, the SALDO Appendix was originally an ordinance that amended the Salem Township Subdivision and Land Development Ordinance. Although the court did remove this appendix from the larger code, it did not sever any portion of the original amending ordinance.

\(^8\) As the ordinance did not define “mineral,” the use of the MPC definition of the term was upheld. *Salem*, 964 A.2d at 867.

\(^29\) *Id.* at 876 n.8 (emphasis added).
With respect to all of these questions, the ordinance’s purpose also remains important. The Huntley court selected two purposes out of the fourteen enumerated purposes of the BOZO — the preservation of the character of residential neighborhoods and the encouragement of beneficial and compatible land uses — as the most salient purposes of that ordinance. The court failed, however, to explain how it came to that decision, or if other purposes would have been considered permissible if they were found to be the most salient. The court similarly gave little guidance as to how to glean the purpose of an ordinance that does not have an explicit purpose section. Additionally, there is the issue of how the ordinance is implemented. Could an otherwise permissible ordinance of general applicability that is applied in a discriminatory manner toward gas drilling nonetheless be considered to have an impermissible purpose?

Finally, there are questions concerning comprehensive scheme preemption. As mentioned in the Salem case summary above, it is not clear what triggers this sort of preemption, especially when dealing with an ordinance not as broad-ranging as the SALDO Appendix. The court found it significant that the SALDO Appendix’s “stated purposes overlap[ped] substantially with the goals as set forth in the OGA.” But how important is a gas-drilling related purpose section to finding a comprehensive scheme? Does purpose matter to comprehensive scheme preemption, or is the test instead whether an ordinance gives a township “virtually unbridled discretion to deny permission to drill?”

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30 Id. at 877.
31 Id. at 876. Consider what would happen if a township changed its zoning map so that every zone in the township became a residential zone. Given the court’s holding in Huntley that municipalities may exclude gas drilling from residential zones, would this not also give the township “unbridled discretion to deny” gas drilling? Whether or not this type of ordinance may be considered a “comprehensive scheme” will be addressed, infra, in the “Note on Complete Exclusion of Gas Drilling” section.
III. An Examination of the Zoning Provisions Found in the Borough of Oakmont Ordinance and the Salem Township Ordinances at Issue in the Huntley and Salem Cases

To help shed some light on the questions posed above, it is useful to examine the actual ordinances at issue in the Huntley and Salem cases. Specifically, the conditional use provisions of the BOZO may illuminate what sort of conditions may be placed on gas drilling as a conditional use, and the SALDO Appendix might provide insight into the trigger for comprehensive scheme preemption.

A. The Borough of Oakmont Ordinance at Issue in Huntley

Although not discussed by the court in Huntley, all conditional uses, including “mineral extraction,” are subject to certain automatic conditions under the BOZO. Specifically, Article X of the BOZO imposes performance standards on all conditional uses, which include, among others, restrictions on noise, vibration, glare, smoke emissions, odors, air pollution, and liquid and hazardous waste. The standards target both issues generally within the province of local regulation, such as the prevention of common nuisances, as well as larger environmental issues often regulated at the state and national level. For instance, Article X requires that “objectionable” noise be “muffled or otherwise controlled,” but also that “no... forms of air pollution shall be permitted which can cause any damage to the health of persons, to animals, vegetation or other property.”

All of the environmental performance standards set forth in Article

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32 BOROUGH OF OAKMONT CODE, PA., § 205–45 (2005), available at http://www.ecode360.com/8795037 (emphasis added) (relevantly: “(B) The conditional use shall not involve any element or cause any condition that may be dangerous, injurious or noxious to any other property or persons and shall comply with the performance standards in Article X herein. . . . (D) The developer shall have the burden of providing evidence to Oakmont of compliance with the general requirements of this section and the specific requirements of this article.”)

33 Id. § 205–45.

34 Id. § 205(105)-(111).
X are general and brief, such as the air pollution standard, and most reference state environmental standards, often requiring compliance with those standards.\textsuperscript{35}

The *Huntley* court did not mention Article X because plaintiffs never challenged its provisions. The court determined that the location-based restrictions were not preempted by the OGA, and held that natural gas drilling met the definition of mineral extraction as used in the BOZO, contrary to the Borough Council’s interpretation.\textsuperscript{36} After reversing the decision of the Borough Council to refuse a conditional use permit, the court omitted any discussion of the automatic conditions of Article X, even in dicta. Although Article X of the BOZO may merely have escaped the court’s notice, it seems that if a municipality had no power to place conditions on gas drilling once the decision was made to include it in a particular zone, the court would have indicated as such. The omission of any discussion of the clearly applicable conditions of Article X supports at least the possibility that, at minimum, a municipality may place restrictions on gas drilling that prevent common nuisance effects of gas drilling, and, at maximum, impose some more broad-ranging environmental conditions.

The permissibility of conditions relating to common nuisance effects and environmental effects is further supported by the overall reasoning of the opinion. Common nuisances, such as noise, odor, glare, and visible smoke, are all instantly perceptible and have the ability to greatly disrupt the harmony of residential living. Controlling these types of nuisances is consistent with preserving the character of residential neighborhoods and is, indeed,

\textsuperscript{35} See, e.g., *id.* (regulating liquid waste or sewage: “No discharge shall be permitted into a reservoir, sewage or storm disposal system, river or stream, open body of water or into the ground of any materials in such a way or of such nature or temperature as could contaminate any water supply or otherwise cause the emission of dangerous or objectionable elements. Such objectionable contaminants or emissions must be treated so that insoluble substances (oils, grease, acids, alkalis or other chemicals) are in accordance with the standards as approved by appropriate agencies of the Department of Environmental Protection and the regulations of the Borough.”)

at the historical heart of traditional zoning purposes. Additionally, compliance with general standards may require the modification of technical aspects of well operation, but no “features” of gas drilling are explicitly addressed by Article X. Even the less traditional, environmentally-based general standards of Article X, such as those dealing with air pollution or liquid waste, are supported by the court’s opinion. Presumably, these provisions were also designed to safeguard residential communities against potentially incompatible uses, and their general scope steers clear of any feature of gas drilling. Furthermore, the Huntley court cited with approval to a Colorado Supreme Court decision recognizing that a municipality’s “interest in land-use control . . . is one of orderly development and use of land in a manner consistent with local demographic and environmental concerns.”

Despite this apparent support, however, the issue of permissible purpose is still unclear. In addition to Article X, the Huntley court also ignored some important aspects of Article I, specifically, twelve of the fourteen enumerated purposes listed in the “Community Development Objectives” section. While most of those purposes are very similar to the preservation of the character of residential neighborhoods and the encouragement of beneficial and compatible uses, there are some purposes that have stronger crossover with the enumerated purposes of the OGA. For example, purpose four deals with the “stewardship of our natural resources and setting” and purpose two proposes to “ensure the health, safety, and welfare of Oakmont Borough residents through effective planning.” These purposes seem closer to the enumerated purposes of the OGA, calling for the protection of natural resources and resident safety, than those chosen as the “most salient” by the court, yet this crossover was ignored. This could mean either that the court

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37See Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 394 (1926) (recognizing that one of the valid purposes of zoning is to “decrease noise and other conditions which produce or intensify nervous disorders, preserve a more favorable environment in which to rear children, etc. . . .”).


is willing to ignore impermissible purposes where there are “more salient” permissible purposes, or that environmental, public health, and safety purposes are permissible only to a degree. This distinction is significant, as the former would support only conditions designed to eliminate more traditional nuisances, while the latter would support the use of generally applicable environmental conditions as well.

B. The Salem Township Ordinance at Issue in Salem

Unlike the BOZO, the SALDO Appendix was not a comprehensive township zoning ordinance, although it was found to be “a comprehensive regulatory scheme relative to oil and gas development.” While the Salem court announced no concrete rule for determining the trigger for “comprehensive scheme” preemption, it did identify a number of provisions in the Appendix that ran afoul of the OGA. As these provisions also were found to be expressly preempted by the purpose and feature preemptions of Section 602, the SALDO Appendix provides insight into all three bases for preemption. The following is an analysis of the relevant aspects of the SALDO Appendix and their relation to these types of preemption.

1. SALDO Appendix Purpose & Comprehensiveness

The SALDO’s explicit purpose section mentions gas drilling, which describes the SALDO as enacted to “[enable] continuing oil and gas drilling . . . while ensuring the orderly development of property through the location of access ways, transportation lines, and treatment facilities necessarily associated with same,” was central to the finding that the SALDO Appendix was preempted under both purpose and comprehensive scheme preemption. The Salem court found this language demonstrated that the ordinance’s most salient purposes overlapped inappropriately

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41 Salem Township, Pa., SALDO Appendix B, Preamble (Sept. 2005) [hereinafter “SALDO” or “SALDO Appendix”].
with those of the OGA because it focused “solely on regulating oil and gas development,” rather than on zoning or land development generally.\textsuperscript{42} The goals of the ordinance also “subsume[d] protecting the development of neighboring properties . . . and protecting natural resources.”\textsuperscript{43}

Apart from the particular goals set out in the SALDO, the breadth of the ordinance also caused concern. The court disapproved of the “comprehensive and restrictive nature of [the Ordinance’s] regulatory scheme,”\textsuperscript{44} finding that it covered “the full panoply of issues relating to oil and gas drilling.”\textsuperscript{45} This analysis focuses on the aggregate effect of the ordinance as opposed to the impermissibility of any individual provisions. Because both the SALDO’s regulatory scheme and general purpose overlapped with those established by the OGA, the SALDO was found to be preempted both on a purpose and comprehensive scheme rationale.

2. Provisions Relating to Aspects of Gas Drilling Explicitly Regulated by the OGA or Imposing Excessive Costs: Permitting, Capping, and Site Restoration

The SALDO Appendix regulated a number of aspects of gas drilling that were already explicitly regulated by the OGA. Most notably, the Appendix established a permitting scheme for gas drilling. Permit applicants were required to submit copies of their DEP drilling permit application and development plan; copies of water flow tests for all wells on property in use for private residences; quality tests on all wells, springs and surface waters within 1,000 feet of a well site or treatment facility; and an application fee of $150.\textsuperscript{46} Even with these submissions, the application requirements were only minimum requirements and did not guarantee the award

\textsuperscript{42} Salem, 964 A.3d at 876.
\textsuperscript{43} Id. at 877. Note that the court also mentions natural resources here, implying that protection of natural resources may be a permissible zoning motive.
\textsuperscript{44} Id.
\textsuperscript{45} Id. at 875.
\textsuperscript{46} SALDO Appendix, Art. I § II(B)(1)-(5), Art. III § I (Sept. 2005).
of a permit. Furthermore, the Township was empowered to revoke or suspend permits under certain conditions.

Given that the OGA establishes its own well permitting requirements, the SALDO Appendix’s permitting scheme was held to be explicitly preempted. This was not only because the Appendix was duplicative, but also because it contained greater restrictions and broader powers to deny permits than the more “permissive” OGA. For example, the OGA does not require a well operator to conduct pre-drilling water testing, though an operator may conduct such testing to defend against a presumption of responsibility for contamination of nearby water supplies. Coupled with the fact that the SALDO gave the Township “unbridled discretion to deny” permit applications, these types of restrictions enabled the township to “prohibit what [the OGA] allow[ed].”

Although the court also mentioned in Huntley that “local legislation cannot . . . prohibit what state enactments allow” without being preempted, this cannot be a sufficient basis for preemption. For example, well sites allowed as conditional uses are still subject to a conditional use application process with different requirements from those of the OGA, and that process was at least implicitly approved of in Huntley. A township should be able to deny an operator who fails to tender a proper conditional use application the permission

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47 Salem, 964 A.2d at 876 (citing SALDO Appendix, Art. I, §2(C)).
48 Specifically, the conditions that could result in revocation where the DEP taking, or requiring the operator to take, remedial action due to a deficiency in the water quality or water quantity on the property. SALDO Appendix, Art. I § III(E) (3)-(4).
50 It is presumed that “a well operator is responsible for the pollution of a water supply that is within 1,000 feet of the oil or gas well, where the pollution occurred within six months after the completion of drilling or alteration of such well,” unless rebutted by one of the five defenses in subsection (d). The first two of these defenses require pre-drilling water testing. Pa. Oil and Gas Act, 58 PA. CONS. STAT. § 601.208(c)-(e) (2011).
51 Salem, 964 A.2d at 876.
52 Id. at 875 n.7 (citing to Huntley & Huntley, Inc. v. Borough of Oakmont, 964 A.2d, 855, 862 (Pa. 2009)).
53 Huntley, 964 A.2d at 862.
to drill, even though the OGA would otherwise allow it. It is clear, however, that the court found a difference between conditional use requirements and supplemental requirements related to gas drilling. The permit process in the SALDO Appendix purposefully targeted the technical aspect of gas drilling without discernible limits on Salem’s discretion to deny permits, thereby making it susceptible to all three types of preemption.

Two other areas where the SALDO Appendix specifically regulated an area of gas drilling addressed in the OGA are wellhead capping or plugging, and well site restoration. The Appendix required that wellheads be capped “immediately” after cessation of drilling, and all aboveground machinery be “immediately” removed. In contrast, the OGA contains no timeframe for capping. The Appendix also required that operators “remove all access roads . . . and re-grade and restore the surface to its natural pre-construction condition” within sixty days of cessation of drilling, whereas the OGA allows nine months after plugging in which to remove equipment. The court noted that the requirements of the Appendix, like the ones requiring road restoration to pre-drilling conditions “appear[ed] to impose excess costs on entities engaged in oil and gas drilling.”

Here, the court offers a possible separate rationale for finding preemption. Regulations that impose excess costs on drilling may not purposely target gas drilling or its features, but may nonetheless impose high costs on the industry, thereby preventing what the OGA allows. Regulations that create excess costs may not be related to gas drilling, but they are by definition more onerous than traditional conditional use application processes. Whether an excess cost rationale is truly a separate basis for preemption or whether it merely factors in the analysis of the other three types of preemption is debatable. Regardless, this rationale was one factor in

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54 SALDO Appendix, Art. I § III (D)(1)-(2), Art. II § I (A) (Sept. 2005).
55 Id. Art. I § III (D)(1)-(2).
59 Salem, 964 A.2d at 876–77.
the determination that the SALDO Appendix was a comprehensive scheme.

3. Provisions Regulating Similar Areas as Those Found in the OGA: Road and Surface Bonding

The SALDO Appendix also contained provisions regulating areas similar to those regulated in the OGA. For example, the Appendix required well operators to post a bond with the township to cover removal of site access roads and the restoration of the surface of abandoned access ways. Although the OGA contains no road bonding provision, the Salem court pointed out that the OGA contained a “parallel” requirement that operators post a bond conditioned on their compliance with the OGA’s water supply replacement, restoration and plugging requirements. The OGA also requires operators to “restore the land surface within the area disturbed in siting, drilling, completing and producing the well.” Because the court found that the Appendix’s “permitting and bonding procedures constitute a regulatory apparatus parallel to the one established by the [OGA],” they were held to be preempted in their entirety.


The SALDO Appendix also imposed requirements on gas drilling that are not regulated by the OGA, but that the court nonetheless held to be preempted. For example, the ordinance imposes width, slope and other requirements for access roads servicing drilling sites; depth and casing requirements for transmission lines carrying oil and gas; and location and bonding requirements for water treatment facilities used to treat waste products of drilling operations. The

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61 Salem, 964 A.2d at 875 (citing 58 Pa. CONS. STAT. § 601.215).
63 Salem, 964 A.2d at 875.
court admitted that these provisions are not specifically addressed by the OGA, but it describes these provisions as “control[ling] ancillary features of oil and gas operations,” thereby implying that they were preempted by the explicit feature preemption of Section 602, which encompasses ancillary matters. Presumably, these provisions were also indicative of a comprehensive scheme to regulate gas drilling. Remember, under a comprehensive scheme rationale, the fact that the provisions regulate aspects of gas drilling not covered by the OGA makes them more likely to be preempted. Supplemental requirements related to gas drilling are likely to be seen as regulations that prohibit what the OGA permits.

IV. RECENT DEVELOPMENTS – THE PENNECO CASE AND GREATER SYMPATHY FOR MUNICIPAL AUTHORITY

Since the Huntley and Salem decisions, there has been only one case that squarely deals with the preemptive effect of Section 602 as interpreted by the Pennsylvania Supreme Court—Penneco Oil Co. v. The County of Fayette. Similar to those cases, Penneco dealt with a challenge to the validity of the Fayette County Zoning Ordinance (“FCZO”) as it related to gas drilling activity within the County. What makes the case significant is that the Pennsylvania

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65 Salem, 964 A.2d at 877. It is worth noting here that the court mentioned that these provisions were preempted under the last sentence of Section 602 of the OGA, which “preempts and supersedes the regulation of oil and gas wells as herein defined.” 58 Pa. CONS. STAT. § 601.602 (2011). As such, this last sentence could present a possible third basis for explicit preemption. As it is vague, however, and because it is nowhere else mentioned in the opinions, it is more logical to presume that these provisions were preempted as regulating ancillary “features” of gas drilling.

66 As will be discussed later, the Arbor Resources case, a Pennsylvania Commonwealth Court decision argued and decided after the Huntley and Salem decisions, also deals with the preemptive effect of Section 602, but without any reference to relevant Pennsylvania Supreme Court precedent on the subject. The Blaine case deals with Section 602 as well, and references the Huntley and Salem decisions, but, as also will be discussed later, that case dealt with ordinances not promulgated under the MPC, implicating a type of express preemption not interpreted by the Pennsylvania Supreme Court.

Commonwealth Court upheld the ordinance in its entirety despite the fact that the ordinance allowed for regulation of gas drilling beyond mere locational determinations. This indicates that the Pennsylvania lower courts may be willing to read the *Huntley* and *Salem* decisions generously in favor of municipalities when confronted with an ordinance that falls somewhere between the extremes of the BOZO and the SALDO Appendix.

In terms of the comprehensiveness of its regulation of gas drilling, the FCZO is much closer to the BOZO than it is to the SALDO Appendix, but still allows for more targeted regulation of gas drilling. The ordinance defines “Oil and Gas Well” as a distinct use, allowing it as-of-right in agricultural/rural and conservation districts and otherwise as a special exception use in all levels of residential and industrial zones. Like the BOZO, the FCZO imposes some general requirements on all special exception uses: applications are required, including submission of a “land development plan” and an application fee, and general performance standards apply. All structures permitted as-of-right, including gas wells, also are required to obtain a “zoning certificate” from the municipal “Zoning Officer” to ensure consistency with the zoning code. In addition to the generally applicable requirements, however, there are specific

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68 In this paper the terms “special exception” and “conditional use” are used interchangeably. Under the MPC, a special exception is a use that needs approval by the zoning hearing board, and a conditional use is a use that is approved of by the municipal governing body according to criteria set forth in the zoning ordinance. 53 PA. CONS. STAT. § 603(c) (2011). As the “special exception” uses in the FCZO included express conditions, and as the preemption analysis would be the same either way, the special exception uses may also be described as conditional uses in this article.

69 FAYETTE COUNTY, PA., ZONING ORDINANCE §§ 1000-203 (2006) [hereinafter FCZO] (Table 1).

70 *Id.* §§ 1000-800,1000-500.

71 *Id.* §1000-203(A). It is unclear whether a zoning certificate is required for other special exception uses as well. The text of § 1000-203 does not mention this requirement for special exceptions, but the definition of “Zoning Certificate” would imply that it is necessary for all construction: “ZONING CERTIFICATE – A document signed by the Zoning Officer which is required by this Chapter prior to the commencement of a use or the erection, construction, reconstruction, alteration, conversion or installation of a structure or building.” *Id.* §1000-108(B).
requirements that relate to gas wells as special exceptions:

A. An oil or gas well shall not be located within the flight path of a runway facility of an airport.

B. An oil or gas well shall not be located closer than two-hundred (200) feet from residential dwelling or fifty (50) feet from any property line or right-of-way.

C. An oil or gas well shall provide fencing and shrubbery around perimeter of the pump head and support frame.

D. The Zoning Hearing Board may attach additional conditions pursuant to this section, in order to protect the public’s health, safety, and welfare. These conditions may include but are not limited to increased setbacks.\(^7\)

The first condition listed above is location based and seems so unobjectionable that it would be hard to imagine a court invalidating it on preemption grounds. The other three conditions, however, lie somewhere in the gray area between the \textit{Huntley} and \textit{Salem} decisions. The most salient motive of the fencing and shrubbery condition, for example, seems consistent with traditional zoning purposes, rather than a purpose to regulate gas drilling. However, the provision nonetheless directly and intentionally impacts operations at a well site. Condition B also seems on uncertain ground given the Pennsylvania Supreme Court’s aside in footnote ten of \textit{Huntley}, where it opined that provisions increasing the setback requirements prescribed in the OGA may be preempted.\(^7\) The requirement that wells be set back two hundred feet from residential dwellings is arguably in conflict with the OGA, which prohibits wells to be drilled within two hundred feet of any existing building \textit{without consent of the owner}.\(^7\) Condition B also imposes setbacks of fifty feet from any property line or right of way, a type of setback that does not appear in

\(^7\) \textit{Id.} \S 1000-851.

\(^7\) \textit{Huntley \& Huntley, Inc. v. Borough of Oakmont, 964 A.2d, 855, 864 n.10. (Pa. 2009).}

\(^7\) \textit{Pa. Oil and Gas Act, 58 PA. CONS. STAT. \S 601.205(a) (2011).}
Lastly, Condition D allows for the Zoning Hearing Board to attach *any* additional conditions “in order to protect the public’s health, safety, and welfare,” including increased setbacks. Not only might this provision conflict with the OGA setback provisions, it conceivably gives the County plenary power to regulate gas drilling on an ad hoc basis. Regardless, despite the potential preemption problems, the Pennsylvania Commonwealth Court upheld the ordinance in its entirety as it applied to gas drilling. As such, this decision begins to fill in the gray area left between location-based and comprehensive-scheme regulation after the *Huntley* and *Salem* decision in a manner favorable to municipalities. First, the decision validates the ability of a municipality to apply its as-of-right and conditional use application requirements to gas drilling activities as implied in *Huntley*, even though those requirements are supplemental to those found in the OGA. The court rejected the idea that subjecting construction for gas drilling activities to a municipal approval process is preempted, as long as that process applies to all development in the municipality. Going one step further, the court also approved a conditional use section directed specifically at gas drilling, provided that the section was not directed at a feature of gas drilling and had a “traditional” zoning purpose.

More specific information may be gleaned by looking at the conditions that relate to gas drilling. Although Condition C was not specifically discussed, we can assume the court considered fencing and shrubbery requirements to fall within the ambit of traditional zoning purposes without implicating a feature of gas drilling.

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75 *Id.*

76 FCZO § 1000-851(D) (2006).

77 Penneco Oil Co. v. Cnty. of Fayette, 4 A.3d 722, 731 (Pa. Commw. Ct. 2010) (“Penneco’s characterization of a zoning certificate as a well permit is misleading as Section 1000-1004 is clearly general in scope and directed at all development within Fayette County.”).

78 *Id.* at 730 (“[Referring to the conditional use provisions directed at gas drilling] these provisions do not pertain to technical aspects of well-functioning and matters ancillary thereto (such as registration, bonding, and well site restoration). To the contrary, the foregoing zoning provisions pertain to an oil and gas well’s location within Fayette County, preserving the character of residential neighborhoods, and encouraging beneficial and compatible land uses.”).
Condition B, relating to setbacks, was likewise not discussed, but the court’s tacit approval of this condition is less clear. The lack of discussion of Conditions B and C could mean the court simply ignored footnote ten in *Huntley* and considered setbacks to be purely location-based regulation, despite the fact that they are also regulated in the OGA. It also could mean that municipalities are not free to increase numerical setbacks found in the OGA, but are able to create setbacks of a different *type* than those found in the Act. The most likely explanation, however, is that the court overlooked this condition (either intentionally or inadvertently) because of its *de minimus* nature. This highlights the fact that a provision’s actual predicted impact on gas drilling might be as, or even more, important than whether or not it regulates a “feature” of gas drilling.

Condition D, arguably the Ordinance’s most controversial condition, was directly addressed by the court, and it is here that the court most strongly supports a municipality’s ability to regulate gas drilling:

> the fact that the zoning hearing board may attach additional conditions to a grant of a special exception in order to protect the public’s health, safety, and welfare or the Zoning Ordinance does not specifically guarantee issuance of a permit, does not result in the conclusion that the Zoning Ordinance provides arbitrary authority to deny permission to drill.\(^8\)

Although Condition D appears to place few restrictions, if any, on the County’s ability to impose additional conditions on gas drilling, the Pennsylvania Commonwealth Court distinguished the FCZO from the SALDO Appendix, stating that “the discretion to attach additional conditions in order to protect the public’s health, safety, and welfare . . . is not unfettered.”\(^8\) This is compared to the Appendix, where “a permit ‘may’ be issued by the zoning

\(^79\) As mentioned above, the OGA refers to setbacks from structures, but does not mention setbacks from property lines.

\(^80\) *Penneco*, 4 A.3d at 730.

\(^81\) *Id.* at 730–31.
hearing board.” This “health, safety, and welfare” restriction was apparently enough to limit the County from having the “virtually unbridled discretion to deny permission to drill” that was found to be problematic in Salem.

V. TWO ADDITIONAL CASES – BLAINE AND ARBOR RESOURCES

Since the Huntley and Salem decisions there have been two other cases in Pennsylvania that have dealt with OGA preemption of a municipal ordinance, and they deserve brief mention here. The first is a federal district court case, Range Resources v. Blaine Township. Blaine dealt with a municipal corporate disclosure ordinance not promulgated under the MPC. Although the ordinance was of general applicability to all corporations operating in the township, the court held that it had used the ordinance to discriminate against energy companies from mining and drilling in a way that “forbids what the Oil and Gas Act permits.” Therefore, it held the ordinance preempted.

Because the case involved an ordinance not promulgated under the MPC, the purpose or feature preemptions interpreted in the Huntley and Salem decisions were not directly applicable. Rather, the issue in the case was whether the ordinance “purport[ed] to regulate oil and gas well operations.” As a federal district case that did not involve a zoning provision, this case may not shed much light on what a state court might think of a municipality exercising its authority under the MPC to enact a zoning ordinance of general applicability. At the same time, the case is instructive, in that the actual application of an ordinance can be used to determine its true purpose, despite its facial neutrality. When a municipality uses a generally applicable ordinance as an opportunity to discriminate

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82 Id.
85 Id.
86 Id. at *22–24.
87 Pa. Oil and Gas Act, 58 PA. CONS. STAT. § 601.602 (2011) (preemption for local ordinances not promulgated under the OGA).
against gas drilling, that ordinance may face preemption.

The second case is *Arbor Resources, LLC v. Nockamixon Township*, a decision argued and decided shortly after the *Huntley* and *Salem* cases, which did involve an ordinance promulgated under the MPC that contained specific restrictions on gas drilling.\(^{88}\) Given that *Arbor Resources* had failed to follow the appeals process for opposing non-operational zoning regulations outlined in the MPC, the Pennsylvania Commonwealth Court decided not to discuss the preemptions outlined in *Huntley* or *Salem*, choosing to dismiss the case for lack of jurisdiction.\(^{89}\) As the court’s discussion of operational versus location-based regulations occurred in the context of whether the court could exercise equity jurisdiction in the case, this analysis is not directly relevant to this article. The case does, however, enforce the idea that ordinance provisions deemed to be location-based, as opposed to “operational,” may need to be challenged in front of a zoning hearing board before they may be challenged in court.

**VI. Two Step Test for OGA Preemption of Zoning Ordinances and Risk Spectrum for Particular Zoning Provisions**

After review of the ordinances involved in the *Huntley* and *Salem* cases, and in light of the recent decision in *Penneco*, the gray area between mere location-based regulations and a comprehensive gas drilling regulation scheme comes into slightly sharper focus. Although there is still no definitive guidance regarding ordinances that fall in the middle of the two regulatory extremes, it is possible to determine what kinds of ordinance provisions will face a greater or lesser likelihood of preemption by the OGA – in other words, a spectrum exists for the risk of preemption. Before looking at whether a provision is likely to be preempted, however, one first must consider whether the ordinance as a whole is a comprehensive scheme to regulate gas drilling. This inquiry can be conceptualized as a two-step test:

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\(^{89}\) *Id.* at 1047.
1. Does the ordinance as a whole represent a comprehensive scheme to regulate gas drilling in direct conflict with the OGA?

2. If not, to what extent do specific provisions of the ordinance (1) regulate the “features” of oil and gas operations or (2) attempt to accomplish the same purposes as those enumerated in the OGA (i.e., where do they stand on the preemption risk spectrum described below)?

If the answer at step one is “yes,” the entire ordinance is likely to be preempted by the OGA. As with the SALDO Appendix in Salem, ordinances containing zoning provisions that might otherwise be permissible will be preempted if they are bound up in a broad and blatant attempt to regulate gas drilling. While it is still unclear exactly what triggers this type of preemption, there are a few obvious catalyzing factors. The first factor would be a purpose section declaring the ordinance’s intent to regulate gas drilling. Nothing underscores the fact that an ordinance is a comprehensive scheme to regulate gas drilling like statutory language confirming this purpose. Even without an explicit purpose related to gas drilling, a critical mass of provisions targeting technical or operational aspects of gas drilling would likewise imply an impermissible scheme. Chief among these provisions would be any language attempting to establish a permitting scheme for gas drilling distinct from an as-of-right or conditional use construction permit scheme already applicable to all development. On the whole, generally applicable ordinances will fare better than those singling out gas drilling. However, as was hinted at in the Salem decision, a scheme that does not mention gas drilling may still be preempted if it imposes “excess costs.”

When the answer at step one is “no,” it is then helpful to look at the ordinance provision-by-provision to determine if any provisions might be preempted. As mentioned earlier in the Unanswered Questions section, although all of the aforementioned case law deals either with a court striking down or upholding an ordinance in its
entirety,\textsuperscript{90} it is assumed that, if presented with a largely permissible ordinance containing only a few preempted provisions, a court would equitably sever those portions or invalidate them as applied to gas drilling while “saving” the rest of the ordinance as valid. The preemption risk spectrum for individual provisions is as follows:

A. Near Certain Preemption

Zoning provisions or conditions that explicitly regulate the technical features of oil and gas drilling operations, or obviously overlap with the provisions of the OGA, will almost certainly be preempted. The Salem court emphasized the inappropriateness of Salem Township’s drilling permit requirements, wellhead construction and plugging regulations, and site restoration requirements. All of these requirements regulated technical features of oil and gas drilling, and were thereby explicitly regulated by the OGA. Provisions regulating aspects of gas drilling not explicitly regulated by the OGA, but nonetheless pertaining to technical features of either drilling or matters ancillary to drilling, also will likely face preemption. These provisions include those specific to gas drilling, including those concerning access roads, transmission lines, and water treatment facilities. These latter regulations, however, may have a slight chance of surviving a preemption challenge if couched in a provision that applies to all industries.

Additionally, courts also will likely hold a provision preempted if it imposes excessive costs on oil and gas drilling, regardless of whether it is specifically regulated in the OGA. For example, in Salem, the court found that the “requirement of restoring nearby streets to their pre-drilling conditions regardless of whether the wear and tear on such roadways was caused by vehicles associated with drilling activities” imposed “excess costs.”\textsuperscript{91} As such, any road-bonding requirement for township or access roads is particularly likely to be preempted, even if it applies generally to all industries. As before, general applicability of a road-bonding requirement would increase its chances of not being preempted.

\textsuperscript{90}See, supra note 27 for the discussion of meaning of ordinance.

B. Dark Gray Area – Probable Preemption

The dark gray area includes zoning provisions that one would expect to be preempted after review of the Huntley and Salem decisions, but that nonetheless may avoid preemption given a sympathetic court. As mentioned above, the Fayette County ordinance contains a setback condition for well sites that a court could have read to be preempted by the OGA after the Huntley decision, yet it was upheld by the court in Penneco. This demonstrates that a zoning provision whose possible preemption is explicitly mentioned or strongly hinted at in Huntley may escape preemption based on some combination of (1) de minimus effect; (2) its relationship to traditional zoning purposes; (3) narrow interpretation of the holding in Huntley; or (4) court mistake or oversight.

Using setbacks as an example, the court in Huntley noted that “an ordinance would [not] be enforceable to the extent it sought to increase specific setback requirements contained in the Act.”92 Although a narrow interpretation of this language would leave space for other types of setbacks, provided that the specific types of setbacks mentioned in the OGA are not increased,93 this reading would adhere to the letter, but not the spirit, of the court’s reasoning. It is therefore unclear why the Penneco court upheld the Fayette County ordinance that included a fifty-foot property line setback not mentioned in the OGA. The ordinance’s success could be due to the Penneco court’s narrow reading of Huntley’s footnote ten, but it is equally possible that the court simply ignored the provision because of its de minimus nature, or inadvertently overlooked it altogether.

Another area of regulation that would seem to face probable preemption is environmental regulation beyond mere minimization of common nuisances or amelioration of aesthetic impacts. First, it would be hard to imagine effective environmental regulation that

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93 The OGA provides two specific setback requirements for wells: (a) 200 ft. from any existing building or water well without consent of the owner; and (b) 100 ft. from any stream, spring, body of water, or wetlands larger than one acre in size. Pa. Oil and Gas Act, 58 PA. CONS. STAT. § 601.205 (2011).
did not target a feature of gas drilling. However even to the extent that environmental regulation could be phrased generally – for example, a general requirement that all industry in the town refrain from polluting the air or prohibitions on waste dumping – purpose and comprehensive scheme issues would arise. On the other hand, Article X of the BOZO, which was tacitly approved of in the Huntley decision, did contain environmentally based conditions outside of the scope of traditional nuisance regulation. Furthermore, the court never mentioned that the permissible purposes of protecting the character of residential neighborhoods and encouraging the beneficial and compatible land uses it cited in both the Huntley and Salem cases were meant to be exclusive. As discussed above, there is some support that environmental purposes would be permissible. Indeed, the court in Penneco interpreted permissible purposes as broadly as possible when it approved of the FCZO’s ability to impose additional conditions on gas drilling based on the “health, safety, and welfare” of township residents. A similarly sympathetic court might also approve of a generally applicable environmental regulation.

C. Light Gray Area – Possible Preemption

Conditional use restrictions whose apparent purpose is consistent with traditional zoning purposes, and which only incidentally affect oil and gas activities, bear some risk of preemption, but are equally likely to be found permissible by a court. This excludes, however, any conditions related to traditional zoning purposes that the Huntley court specifically suggested might be preempted (i.e., setbacks).

As noted above, the fact that the Huntley court upheld Oakmont’s ordinance, which it found to allow oil and gas drilling as a conditional use, bolsters the notion that a municipality would be able to impose at least some conditions on gas drilling. It otherwise would make little sense to allow codification of gas drilling as a conditional use. While the Pennsylvania Supreme Court has not provided any concrete guidance on the subject, the safest conditions would presumably be those that relate to traditional zoning motives
identified by the court — i.e., “preserving the character of residential neighborhoods” and “encouraging ‘beneficial and compatible land uses.’” Provisions also will bear less likelihood of being preempted to the extent that they do not impose large compliance costs.

Provisions commonly found in most township zoning ordinances would face the least chance of preemption. These include provisions directed at controlling odor, noise, dust on public roads, fencing around hazards, lighting requirements, and aesthetic regulation. Most of these sorts of traditional zoning regulations are (most saliently) geared toward the permissible purposes mentioned in Huntley, particularly the maintenance of the character of residential neighborhoods. It is important to note, however, that even though an ordinance provision may be related to a permissible purpose, it still must not regulate a feature of oil and gas drilling operations. As the court stated in Huntley:

[O]ur holding . . . should not be understood to imply that any and all regulation of oil and gas development under the Ordinance would be permissible simply because it is zoning legislation enacted pursuant to the MPC. We do not, for instance, suggest that the municipality could permit drilling in a particular district but then make that permission subject to conditions addressed to features of well operations regulated by the Act.  

As such, even a provision with a strong traditional zoning purpose must still avoid targeting technical aspects of oil and gas development or it will face preemption. One way an ordinance provision can avoid preemption is by targeting general standards, as opposed to the gas industry in particular. For example, a noise provision may be written so that it mandates specific noise muffling equipment be used during drilling or require a particular procedure for drilling that creates less noise. Such ordinances would probably be considered to be regulating a feature of oil and gas drilling operations.

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94 Huntley, 964 A.2d at 865; Range Rs., 964 A.2d at 876 n.8.
95 Huntley, 962 A.2d at 866 n.11.
operations. On the other hand, an ordinance may be written to simply impose a decibel ceiling on all industrial activities in the township. This sort of regulation is not directed at any technical component of well operations, and therefore bears less likelihood of preemption.

As the *Blaine* case reminds us, however, even a facially gas-drilling-neutral ordinance may face preemption if it is actually directed at gas drilling as applied. A noise ordinance directed at “all extractive activities” or “all industry” in a township may be found to be a back door regulation of gas drilling if gas drilling is the only extractive or industrial activity within the township borders. General provisions likewise may face preemption if they necessarily entail imposing excess costs on the gas drilling industry. A general decibel level provision that sets a maximum level so low that it mandates use of a particular sort of muffler or an operational technique that makes gas drilling cost prohibitive also may be found to be preempted. In a situation such as this, it is possible that a court may decide to strike down either the entire ordinance or merely its application to gas drilling activities.

The gray area, however, also includes some provisions related to traditional zoning purposes that may unavoidably target oil and gas drilling. In *Penneco*, for example, a requirement that a fence or shrubbery wall be placed around an active wellhead was upheld. Well sites may present unique dangers and aesthetic concerns that other industries within a municipality do not, and the OGA arguably does not address these sorts of issues. At minimum, the *Penneco* case stands for the proposition that courts are willing to tolerate these types of regulations provided they do not place onerous restrictions on the gas drilling industry.

**D. No Preemption**

A municipality’s ability to determine the location of oil and gas development within its borders through the inclusion or exclusion of oil and gas activities from particular zones was expressly validated in *Huntley*. Barring a reversal of Pennsylvania Supreme Court precedent, zoning provisions allowing or disallowing oil and gas development within a zone do not face preemption. This
immunity from preemption also extends to oil and gas drilling as a conditional use within a zone; the ordinances at issue in both Huntley and Penneco included such conditional uses.

VII. A QUICK NOTE ON COMPLETE EXCLUSION OF GAS DRILLING

One issue not addressed by the two-step test or the preemption risk spectrum is what would happen if a municipality decided to completely exclude gas drilling from a township. As the court held in Huntley, the determination of whether gas drilling may or may not be included in a particular zone does not constitute regulation of a feature of gas drilling. Neither does it evince a preempted purpose, at least with respect to residential zones. Conceivably then, a municipality could completely exclude gas drilling without facing the explicit purpose or feature preemptions of Section 602.\(^6\)

However, there are two problems with a municipality’s ability to completely exclude gas drilling. The first problem pertains to comprehensive scheme preemption. Although the location-based restrictions discussed in Huntley did not trigger the purpose or feature preemptions of Section 602, the court had no occasion to discuss what would happen if the municipality used those restrictions to completely exclude gas drilling. It is at least possible that, in aggregate, location-based restrictions may present a comprehensive scheme to regulate gas drilling that impermissibly conflicts with the legislative scheme of the OGA. At issue again is what triggers comprehensive scheme preemption, and whether it is possible to trigger that type of preemption without any infringement on the explicit preemptions found in Section 602.

The second problem is the added burden that any municipality faces when it attempts to completely exclude a particular use. In Beaver Gasoline v. Zoning Hearing Board of the Borough of Osborn, the Pennsylvania Supreme Court held that “a zoning ordinance which totally excludes a particular business from an entire municipality must bear a more substantial relationship

\(^6\) Or, if a municipality really wanted to play it safe, it could rezone the entire city residential, and then exclude gas drilling.
to public, health, safety, morals and general welfare than an ordinance which merely confined that business to a certain area of the municipality.” Although a substantial relationship may exist when the use is one that is “generally known to give off noxious odors, disturb the tranquility of a large area by making loud noises, [or has] the obvious potential of poisoning the air or water,” the municipality may have the burden of showing this relationship. In the *General Battery v. Zoning Hearing Board of Alsace Township* case, for example, the Pennsylvania Commonwealth Court held that a municipality did not meet its burden for completely excluding industrial waste disposal facilities from the town, especially given that the industry was regulated by the Commonwealth. The oil and gas industry is similarly regulated at the state level and, while a municipality may still be able to meet its burden of showing a “substantial relationship,” this poses an additional challenge.

**Conclusion**

It is important to recognize that while the *Huntley* and *Salem* decisions are the most powerful precedent on municipal zoning authority to affect gas drilling activities, they are not the final word. The two ordinances addressed in those cases, the BOZO and the SALDO Appendix, respectively, represent two extremes on a regulatory continuum: at one end, merely determining the permissible locations for gas drilling within the township and, at the other, a comprehensive and purposeful scheme to regulate all gas drilling related activity. While a municipality’s ability to regulate gas drilling is clearly limited, there are still a number of traditional types of zoning regulations that remain in the gray area between these two extremes. The only case to directly address a zoning ordinance falling within this gray area, thus far, is the *Penneco* case, which upheld the validity of the ordinance in its entirety and its application.

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98 *Id.* at 504.
to gas drilling, even with respect to provisions that arguably could have been held preempted after Huntley. The Penneco case demonstrates the discretion that a court may exercise in determining the fate of municipal ordinances.

In the end, given this broad discretion, intangible factors may weigh more heavily than the nuances of statutory language in the preemption analysis for a challenged ordinance. Although understanding the contours of a “feature” of gas drilling and the permissible overlap between traditional zoning purposes and the enumerated purposes of the OGA are important, the “feel” of an ordinance may be more determinative. The explicit preemption carve-out for zoning laws in Section 602 demonstrates a legislative desire to balance the interests of energy exploration and production with the fundamental authority of a local government to control the living space of its residents. The more gas drilling threatens reasonable regulations designed to protect the serenity of living spaces, the more likely it will be found to have no preemptive effect. Likewise, where an ordinance appears to be primarily concerned with the process of drilling or environmental regulation beyond the ambit of traditional zoning regulation, it probably will be struck down as preempted. In a preemption analysis, the sympathies and biases of a particular justice will also undoubtedly play a role.

The question of the extent of municipal authority to regulate gas drilling under the OGA does not operate within a vacuum. With recent calls from the Pennsylvania Department of Environmental Protection to overhaul the OGA, and with national press attention focused on the environmental and health concerns surrounding gas drilling, a court might favor municipal arguments, at least until a legislative change to the OGA materializes. In the meantime, we should expect to see more challenges to ordinances, more ordinances that push the envelope, and clarification by courts of the ability of municipalities to affect gas drilling through zoning regulation.