

ZONING FOR OIL & GAS ACTIVITIES

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Federal, state, and local governments share regulatory authority over oil and gas activities. Many communities in West Virginia want to regulate oil and gas to protect against local impacts caused by drilling and associated byproducts. However, local government regulation must be enabled by the West Virginia Legislature and must not be preempted. *Preemption* means an issue is already regulated by state or federal law and, thus, local governments are precluded from also regulating the issue. In general, state and federal governments preempt local governments by regulating "how" oil and gas activities take place, while local governments retain the ability to regulate "where" the activities take place.

Explicit and De Facto Bans

Although local governments have some control over the location of oil and gas activities, municipalities and counties in West Virginia may not explicitly ban oil and gas activities.¹ Additionally, local governments in West Virginia may not issue a de facto ban, where an ordinance theoretically allows oil and gas activity, but practically creates so many barriers that it is banned.

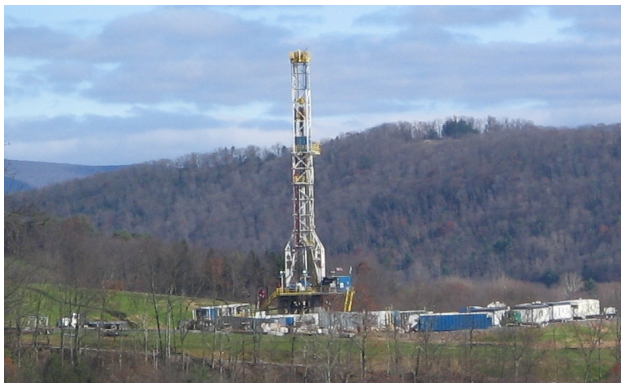
Permitting Requirements

Local governments in West Virginia likely may not issue permits for oil and gas extraction activity because that authority has not been expressly granted by the state. Instead, Chapter 22 of the West Virginia Code sets forth a comprehensive framework for oil and gas well permits,² which includes disclosing the type of well, location, depth, purpose of the well, fees associated with the well, and similar issues.³ The Secretary of the West Virginia Department of Environmental Protection is given sole discretion to authorize or deny the permit.⁴ However, local governments may be able to issue zoning permits for oil and gas activities for the purpose of confirming whether the location of the activity conforms with the zoning ordinance. Permits may also be issued under a local floodplain ordinance to regulate development in the floodplain.

Uses Associated with Oil & Gas: Regulating the Disposal or Storage of Fracking Byproducts

Extractive industry involves a wide array of "uses." One use related to oil and gas is the "disposal or storage of fracking byproducts." Presumably, where oil and gas uses may be regulated by zoning, so may uses associated with oil and gas.

In West Virginia, case law indicates that local governments may not ban this particular associated use, a point of law that quite possibly applies to other uses associated with oil and gas.⁵



Zoning

Local government regulation of oil and gas activities typically involves zoning. A zoning ordinance usually divides a municipality or county into districts that specify permitted uses and development standard for property within each district.⁶ Zoning may address height, area, bulk, and use of land and buildings.⁷ In West Virginia, zoning may additionally involve establishment of performance standards for various land uses.⁸ Instead of focusing on the use of the land, performance standards address the adverse impacts of land use on nearby owners, including noise, dust, and light.

Districts

Local governments have the power to restrict certain uses to specific districts in certain parts of the jurisdiction while prohibiting the activity in other areas. The key is whether the regulation is reasonable and whether the regulation allows the activity in at least some portion of the jurisdiction. Although the zoning power is broad—to promote the health, safety, and welfare of residents—the scope of this authority as applied to oil and gas remains uncertain.⁹ However, local governments in West Virginia are likely able to establish some parts of the community where oil and gas activities may not occur, so long as the activities are allowed in other areas.

Setbacks

Another traditional zoning tool to address concerns related to extractive industry is a setback. A setback is a specified distance that a use or structure must be away from other uses or structures. For instance, a local government could require all natural gas wells be at least 500 feet away from residential uses. State law in West Virginia regulates some setbacks for horizontally-drilled natural gas wells. Zoning setbacks must not be inconsistent with state setbacks but could regulate setbacks from different features and potentially impose greater setbacks. Any time an aspect of oil and gas, such as setback requirements, is regulated by the state, local governments must be cautious of preemption.

Performance Standards

Performance standards regulate impacts—such as noise, dust, light, and vibration—that a use will have on a community. For example, a community may limit the decibel levels of extractive industry during or outside of certain hours. Although West Virginia state law refers to the effects of noise, dust, and light on dwellings caused by horizontal drilling, no state regulations exist to limit such effects. Therefore, local governments may be able to set performance standards for oil and gas activities.

Conclusions

Local governments in West Virginia may not ban oil and gas activities. However, carefully crafted zoning provisions may address the location and local impacts of those activities. Any local regulation should consider existing state regulations and should only be undertaken after consultation with legal counsel.

Footnotes

¹ The City of Morgantown banned fracking within one mile of city limits, but the Circuit Court struck down the ban because state law comprehensively occupied the field of fracking regulations. *Northeast Natural Energy, L.L.C. v. City of Morgantown*, No. 11-C-411, 2011 WL 3584376 (W. Va. Cir. Ct. Aug. 12, 2011). The City of Morgantown did not appeal.

² W. Va. Code § 22-6-1, *et seq.*

³ W. Va. Code § 22-6-6(c).

⁴ *Id.* §§ 22-6-6(h), 22-6-11.

⁵ In 2017, the Fourth Circuit Court of Appeals struck down a Fayette County, West Virginia zoning ordinance that banned the storage of fracking wastewater within the county. *EQT Production Co. v. Wender*, 870 F.3d 322, 325 (4th Cir. 2017).

⁶ W. Va. Code § 8A-1-2(gg).

⁷ W. Va. Code § 8A-7-2(b)(8).

⁸ W. Va. Code § 8A-7-2(b)(6).

⁹ After its fracking ban was struck down, the City of Morgantown used its zoning ordinance to restrict oil and gas extraction to very limited areas near the airport. However, until this or another zoning ordinance is challenged, the state of West Virginia law on this issue is unknown.