[J-23-2010]
IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

HOFFMAN MINING COMPANY, INC.,	:	No. 23 WAP 2009
Appellant	:	Appeal from the Commonwealth Court Opinion and Order entered October 15, 2008, at No. 2122 CD 2007, affirming the Order of the Cambria County Court of Common Pleas entered October 29, 2007, at No. 2007-0890.
v.	:	
ZONING HEARING BOARD OF ADAMS TOWNSHIP, CAMBRIA COUNTY, AND TOWNSHIP OF ADAMS,	:	958 A.2d 602 (Pa. Cmwlth. 2008)
Appellees	:	ARGUED: April 13, 2010

CONCURRING OPINION

MR. CHIEF JUSTICE CASTILLE **DECIDED: NOVEMBER 23, 2011**

I concur in the result reached by the Majority and join its analysis, insofar as that analysis goes; I also join Mr. Justice Saylor's Concurring Opinion, as I will explain below. The Majority appears to review all of appellant's claims through the prism of the express preemption clause of the Surface Mining Conservation and Reclamation Act (the "Surface Mining Act"), 52 P.S. § 1396.17a. While such an analysis accounts for some of appellant's arguments, the bulk of appellant's field and conflict preemption points are not directly addressed. The oversight may be a consequence of imprecise briefing by appellant, which conflates distinct legal theories concerning preemption. Nevertheless, the blended arguments implicate separate theories easily discernible in

terms of existing preemption paradigms, and I believe it is prudent to acknowledge and address the points.

As the Majority observes, appellant poses its claims in terms of a five-factor test formulated by the Commonwealth Court in Duff v. Township of Northampton, 532 A.2d 500 (Pa. Cmwlth. 1987), without acknowledging subsequent binding precedent from this Court that refined the Duff articulation of the law of preemption in Pennsylvania. See Majority Slip Op. at 22 n.18. As a direct result, appellant both comingles its arguments regarding the distinct types of preemption recognized by this Court and fails to address relevant factors in a cogent and persuasive manner. Nonetheless, to the extent that its arguments implicate current preemption paradigms, it is clear that appellant posits, in addition to the argument addressed by the Majority: (1) that the field of surface mining, and consequently the Adams Township Ordinance (the "Ordinance") and its setback requirement provision, are preempted expressly by Section 17.1 of the Surface Mining Act, 52 P.S. § 1396.17a; (2) that the field of surface mining and the Ordinance are preempted expressly by Section 4.2(a) of the Surface Mining Act, 52 P.S. § 1396.4b; and (3) that Section 1413.5(a) of the Ordinance is in conflict with Section 4.2(c) of the Surface Mining Act, and is thusly preempted under conflict theory.[1] Appellees take the

[1] The Majority's narrow reading of appellant's first two arguments, *i.e.*, that the Surface Mining Act preempts Section 1413.5(a) of the Ordinance rather than the entire Ordinance, is to a degree understandable, as appellant argues field and conflict preemption concurrently in trying to meet the Duff test. Notably, however, appellant did not restrict its prayer for relief to the striking of Section 1413.5(a) of the Ordinance as invalid. See Appellant's Brief at 19 ("Section 17.1 preempts all regulation of surface mining."); id. at 23 ("Section 4.2(a) is likewise an expression of legislative intent to preempt the field of regulation of coal surface mining."). I believe that appellant's field preemption arguments should be addressed as formulated, and rejected on the merits, as I explain infra, in addition to any conflict preemption arguments.

A potential threshold question is whether appellant preserved its field preemption arguments regarding Sections 17.1 and 4.2(a) of the Surface Mining Act. The record (…continued)

same narrow view of appellant's arguments as the Majority, and they do not respond to most of appellant's identifiable claims. I briefly address each of these additional theories raised by appellant, in order to explain the reasons why I believe that the Commonwealth Court decision should be affirmed.

I. Field Preemption

A. Section 17.1

Section 17.1 states:

> Except with respect to ordinances adopted pursuant to . . . the "Pennsylvania Municipalities Planning Code" [the "MPC"], all local ordinances and enactments purporting to regulate surface mining are hereby superseded. **The Commonwealth by this enactment hereby preempts the regulation of surface mining as herein defined.**

52 P.S. § 1396.17a (citation and footnote omitted) (emphasis added). Appellant argues that, in Miller & Son Paving, Inc. v. Wrightstown Township, 451 A.2d 1002 (Pa. 1982) ("Miller"), this Court held that the second clause of Section 17.1 preempts the field of surface mining regulation, rendering invalid any local ordinances, including those adopted pursuant to the MPC after the effective date of the Surface Mining Act. See Appellant's Brief at 14 (Miller "Court held that . . . all ordinances, **including** zoning ordinances enacted after January 1, 1972, that regulate surface mining operations would be preempted by the [Surface Mining Act]") (emphasis in original).

Appellant's interpretation of Miller is unpersuasive. At issue in Miller was a local zoning ordinance pre-dating the Surface Mining Act, which the Court held was "neither

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(continued…)

suggests that appellant may not have preserved the Section 4.2(a) issue, but appellees do not argue waiver, and the Majority does not find waiver. In any event, the issue is one of law easily resolved on the existing record, as I will explain.

superseded nor preempted" and was valid. The Court did not decide the validity of any local ordinances promulgated after the effective date of the Surface Mining Act, and indicated only, contrary to appellant's argument, that "the Legislature could not have intended in 1971 to displace all existing and future local regulation of surface mining." 451 A.2d at 1005. I would reject appellant's Miller-based **field preemption** argument on this ground.[2]

Notably, appellant does not offer a well-developed field preemption argument premised on the plain language of Section 17.1. To the extent any such argument is intended, appellant seems to claim that the second clause of Section 17.1 should be read independently of the first clause, as an absolute bar to all local regulation of surface mining enacted after 1972. See Appellant's Brief at 17-20 (comparing Section 17.1 of the Surface Mining Act with Section 602 of the Oil and Gas Act). I incline toward Justice Saylor's view that, in Section 17.1 of the Surface Mining Act, the General Assembly intended the terms "supersede" and "preempt" as synonyms, and thereby meant "to except ordinances adopted pursuant to the [MPC] from the scope of the intended preemption," regardless of whether the ordinances were adopted before or after the effective date of the Surface Mining Act. See Concurring Slip Op. at 2. Absent the Miller decision, I would be inclined to interpret both clauses of Section 17.1 coextensively, to save from preemption all MPC-enabled local ordinances. Even

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[2] Appellant also relies on Pennsylvania Coal Co. v. Township of Conemaugh, 612 A.2d 1090 (Pa. Cmwlth. 1992) ("Conemaugh") and Huntley & Huntley, Inc. v. Borough Council of Borough of Oakmont, 964 A.2d 855 (Pa. 2009) ("Huntley") to support its interpretation of Miller and its field preemption claim. Both Conemaugh and Huntley, however, addressed not field preemption (*i.e.*, validity of local regulation *in toto*), but the validity of specific ordinances under a theory of conflict preemption. In both cases, the issue was whether distinct provisions of local ordinances regulated zoning rather than mining/drilling operations; to the extent the provisions addressed zoning aspects, they were valid. Conemaugh and Huntley are inapposite as to the issue of field preemption.

interpreted independently, however, the second clause of Section 17.1 reflects the General Assembly's intent to permit local regulation as described in the Majority's analysis, and thereby forecloses appellant's field preemption claim.[3, 4]

B. Section 4.2(a)

Similarly, I would reject appellant's alternate claim, which is that Section 4.2(a) reveals the General Assembly's intent to preempt all local ordinances in the field of surface mining. In relevant part, Section 4.2(a) provides:

> [A]ll surface mining operations coming within the provisions of this act shall be under the **exclusive jurisdiction** of the [Department of Environmental Resources ("DER")] and shall be conducted in compliance with such reasonable rules and regulations as may be deemed necessary by the [DER] for the fulfillment of the purposes, and provisions of this act, and other acts where applicable . . . for the health and safety of those persons engaged in the work and for the protection of the general public.

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[3] Moreover, in light of the plain language of Section 17.1, which contemplates at least some local regulation of surface mining (specifically MPC-promulgated ordinances), I would reject appellant's argument that the General Assembly's legislative scheme is so pervasive and comprehensive as to implicitly preclude all local regulation of surface mining. See Appellant's Brief at 24-25. Accord Holt's Cigar Co. v. City of Philadelphia, 10 A.3d 902, 921 n.6 (Pa. 2011) (Castille, C.J., dissenting, joined by Todd and Orie Melvin, JJ.) (citing Mars Emergency Med. Serv., Inc. v. Township of Adams, 740 A.2d 193, 195 (Pa. 1999)).

[4] I also note that appellant does not develop an argument challenging the Commonwealth Court's conclusion that the setback provision of the Ordinance is "quintessential land use control logically connected to land use planning" and, as a result, is a zoning regulation expressly saved from preemption by Section 17.1. Hoffman Mining Co. v. Zoning Hearing Bd. of Adams Township, 958 A.2d 602, 611 (Pa. Cmwlth. 2008); but see Huntley, 964 A.2d at 864 & nn. 10, 11 (regulation of non-zoning aspects of oil and gas drilling through MPC-enabled local legislation not permitted; question whether localities can increase state-prescribed setbacks through zoning legislation).

52 P.S. § 1396.4b(a) (emphasis added). Appellant claims that this Court has interpreted a similar provision of the Anthracite Strip Mining and Conservation Act (the "Strip Mining Act") as preempting the field of anthracite strip mining regulation. See Harris-Walsh, Inc. v. Borough of Dickson City, 216 A.2d 329 (Pa. 1966) ("Harris"). In Harris, the Court held that the Strip Mining Act provision granting "exclusive jurisdiction" to the Department of Mines and Mineral Industries over "all coal stripping operations coming within the provisions of th[e Strip Mining Act]" indicated the General Assembly's intention that "the Commonwealth, and only the Commonwealth, shall regulate the anthracite strip mining industry [and] preclude legislative action in the same field by any political subdivision." Id. at 336; accord Council of Middletown Township v. Benham, 523 A.2d 311, 314-15 (Pa. 1987) ("[t]otal preemption is the exception and not the rule" and has been recognized only in three areas: alcoholic beverages, banking, and anthracite strip mining).

The Majority does not address appellant's argument, and fails to address the Harris decision. In my view, the case plainly is distinguishable.

Notably, the Strip Mining Act at issue in Harris did not contain a counterpart to Section 17.1 of the Surface Mining Act and did not otherwise expressly address the preemptive effect of the state law on local legislation. The Harris Court considered the plain language, and the textual and historical contexts in which the phrase "exclusive jurisdiction" of Section 10 of the Strip Mining Act operated, and interpreted it as an expression of legislative intent to preempt that field. With respect to the Surface Mining Act, however, Section 4.2 has to be read *in pari materia* with Section 17.1, which protects local zoning ordinances adopted pursuant to the MPC. For the entire Surface Mining Act to be effective and for its interpretation to avoid absurd results, the phrase "exclusive jurisdiction" within Section 4.2 of the Surface Mining Act cannot be held to

mean what appellant advocates, *i.e.*, that the General Assembly sought to occupy the field of surface mining regulation so that all local ordinances, including those adopted pursuant to the MPC, are invalid. See 1 Pa.C.S. § 1922(1), (2). On these grounds, I would reject appellant's suggestion that we apply Harris to Section 4.2 of the Surface Mining Act and accept its derivative field preemption argument.

II. Conflict Preemption

Finally, I note that I agree with the Majority's conflict preemption analysis, because it squares with my dissenting expression in Holt's Cigar Co. v. City of Philadelphia, 10 A.3d 902 (Pa. 2011) ("Holt's"). In a conflict preemption analysis, the Court examines whether the state statute and the local enactment are irreconcilable, and whether the local enactment stands as an obstacle to the execution of the full purposes and objectives of the General Assembly. Fross v. County of Allegheny, 20 A.3d 1193, 1203 (Pa. 2011). Appellant argues that the Ordinance stands as an obstacle to the execution of the General Assembly's policies, as expressed in the Surface Mining Act, which "by implication" prohibits setbacks in excess of 300 feet. Appellant claims that, because the Surface Mining Act addresses and sets a 300-foot setback, the state statute is irreconcilable with the Ordinance's 1,000-foot setback provision, which is thereby preempted. Furthermore, appellant claims that the Ordinance's 1,000-foot setback denies appellant access to 88 percent of the coal on its parcel, contrary to the Surface Mining Act's purpose to balance environmental and agricultural interests with energy production goals. Appellant's Brief at 12-13, 19, 23, 26.

The state and local enactments are not irreconcilable. Appellant can comply with both the statewide (300 feet) and the local (1,000 feet) setbacks, at the same time, by

mining outside a 1,000-foot perimeter around any occupied dwellings. See, e.g., Mazzo v. Bd. of Pensions & Retirement, 611 A.2d 193 (Pa. 1992) (irreconcilable conflict where local ordinance prohibited reinstatement of city employee on terms mandated by controlling state enactment). Appellant does not disagree, but claims instead that the irreconcilable conflict is between the Ordinance and what it says is the silent protection the Surface Mining Act setback provision affords drilling outside the 300-foot perimeter around occupied dwellings. This sort of extrapolation from silence theory found some currency with the majority opinion in Holt's, but I am no more convinced by the theory here than I was in Holt's. Consistently with my position in Holt's, the Court cannot imply, solely from the Surface Mining Act's setback provision, a tacit legislative imperative that surface mining outside a 300-foot perimeter is affirmatively protected by the state statute against locally-tailored regulation. See Majority Slip Op. at 24; accord Holt's, 10 A.3d at 925-26 (Castille, C.J., dissenting, joined by Todd and Orie Melvin, JJ.) (local ordinance curtailing sales of dual use items used as drug paraphernalia is not preempted because protection of such sales could not be implied from silence of state statute criminalizing use of drug paraphernalia; local and state enactments were complementary). But, the inquiry does not end here.

Rather, the controlling inquiry is whether the Adams Township Ordinance's 1,000-foot setback is an obstacle to accomplishing the full purposes and objectives of the Surface Mining Act. The General Assembly stated the purposes of the Surface Mining Act as follows:

> [The Surface Mining Act] shall be deemed to be an exercise of the police powers of the Commonwealth for the general welfare of the people of the Commonwealth, by providing for the conservation and improvement of areas of land affected in the surface mining of bituminous and anthracite coal and metallic and nonmetallic minerals, to aid thereby in the protection of birds and wild life, to enhance the value of such

> land for taxation, to decrease soil erosion, to aid in the prevention of the pollution of rivers and streams, to protect and maintain water supply, to protect land and to enhance land use management and planning, to prevent and eliminate hazards to health and safety, to promote and provide incentives for the remining of previously affected areas, to allow for government-financed reclamation contracts authorizing incidental and necessary coal extraction, to authorize a remining and reclamation incentive program, to prevent combustion of unmined coal, and generally to improve the use and enjoyment of said lands, to designate lands unsuitable for mining and to maintain primary jurisdiction over surface coal mining in Pennsylvania. It is also the policy of this act to assure that the coal supply essential to the Nation's and the Commonwealth's energy requirements, and to their economic and social well-being, is provided and to strike a balance between protection of the environment and agricultural productivity and the Nation's and the Commonwealth's need for coal as an essential source of energy.

52 P.S. § 1396.1 (Purpose of Act).

In its brief, appellant notably quotes a severely truncated version of Section 1 and then emphasizes only the energy goals of the Surface Mining Act. Appellant forwards a claim that the Ordinance upsets the balance sought by the Surface Mining Act between protection of the environment and agricultural productivity and the need for coal as an essential source of energy. In support of this claim, however, appellant offers evidence only of the Ordinance's impact on its own use of land, an alleged loss of production of 88 percent, while offering as self-evident a claim of harmful effect deriving from lack of uniformity in setback provisions.

I would reject this conflict preemption theory for two reasons. First, on balance, the Ordinance's setback provision plainly appears to forward the General Assembly's purposes: to aid in the conservation and improvement of land affected by surface mining, to enhance the value of land for taxation, to protect land and to enhance land

use management and planning, to prevent and eliminate hazards to health and safety, generally to improve the use and enjoyment of said lands, and to designate lands unsuitable for mining. Tailoring setback provisions to local conditions and departing from uniformity in this respect is not, on its face, fatal to the Surface Mining Act. Second, appellant offers no analysis of the Ordinance's overall impact in light of the multiple factors actually outlined by the Surface Mining Act, *i.e.*, the environmental and agricultural benefits to be derived from the Ordinance as compared to the burden on the overall production of coal in Adams Township or the Commonwealth. In theory, I suppose, such evidence could show that, indeed, the Adams Township Ordinance setback requirements are overly restrictive. But, that is by no means self-evident. Because appellant did not adduce sufficient proof addressing the relevant Surface Mining Act factors, it did not carry its burden of proving that the Ordinance interferes with the purposes and objectives of the General Assembly.

For these reasons, in addition to the reason identified by the Majority and Justice Saylor, I concur in the mandate to affirm.

Mesdames Justice Todd and Orie Melvin join this concurring opinion.