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

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

CONCURRING OPINION

MR. JUSTICE SAYLOR **DECIDED: NOVEMBER 23, 2011**

I join the majority's well-reasoned opinion.

I write only to observe that much of the difficulty in this area of the law stems from the decision in Miller & Son Paving, Inc. v. Wrightstown Township, 499 Pa. 80, 451 A.2d 1002 (1982). Specifically, the Miller Court discerned a difference between the concepts of supersedure and preemption in construing the section of the Surface Mining Act addressing the statute's effect on local ordinances, reasoning that that the statutory reference to the former term suggested a temporal overlay. See id. at 86-87, 451 A.2d at 1005. In the preemption context, however, these terms are commonly employed as synonyms. For example, the pervasively applicable federal conflict preemption provision under Section 514(a) of the Employee Retirement Income Security Act is phrased in terms of supersedure, although it is widely understood to embody preemption. See 29 U.S.C. §1144(a).

Absent Miller, I would read Section 17.1, in accordance with its rather natural and straightforward purport, to except ordinances adopted pursuant to the Municipalities Planning Code from the scope of the intended preemption.[1] While I realize that the social landscape has changed significantly since Miller, particularly in terms of the Commonwealth's and the Nation's energy needs and the increasing desire for domestic energy production, I would leave it to the Legislature – in its role as the policy-making branch – to modify the choice it made in Section 17.1 to preserve a substantial degree of local control over land use planning, even in the surface mining arena, via the lawmaking procedures authorized in the Municipalities Planning Code. Notably, the Legislature has made such an adjustment in connection with the Oil and Gas Act, see 58 P.S. §601.602,[2] but, to date, has not done so for the Surface Mining Act.

Mr. Chief Justice Castille and Madame Justice Orie Melvin join this concurring opinion.

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[1] As the majority explains, Section 17.1, entitled "Local ordinances," prescribes as follows:

> Except with respect to ordinances adopted pursuant to the act of July 31, 1968 (P.L. 805, No. 247), known as the "Pennsylvania Municipalities Planning Code," 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 (emphasis added; footnote omitted).

[2] As the majority observes, in 1992, the Legislature added the following language to the otherwise very similar preemption language of the Oil and Gas Act: "No ordinances or enactments adopted pursuant to the aforementioned acts [including the Municipalities Planning Code] 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." 58 P.S. §601.602.