

# PITTSBURGH BUSINESS TIMES

## COMMENTARY - ACT 13

# Lessons Pennsylvania can learn from Colorado

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“Been there, done that” might be the response of a Colorado resident to the landmark Robinson Township decision on local drilling regulation. Critics complain the decision issued by Pennsylvania’s highest court will increase uncertainty and costs for drillers. Yet Colorado has for decades



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implemented the regulatory approach foreshadowed by the Robinson Township decision.

The state Supreme Court’s decision struck down portions of the newly enacted Act 13, which had handed state officials greater control over the natural gas drilling process. It returned the law to where it was before the passage of Act 13, where the rule was that municipalities could determine where they allowed natural gas drilling but could not tell drillers how to drill. Additionally, those who challenge municipal regulations must proceed through

a time consuming and expensive process.

In the past two decades, Colorado experienced surging demand for its natural gas reserves. There, courts rendered total drilling bans unlawful but permitted regulations that did not “frustrate” statewide goals. Commentators criticized this approach because it created great regulatory uncertainty.

Local governments in Colorado engaged in regulatory excess because they knew drillers would have to litigate each disputed local regulation. Municipalities characterized their rules as land-use actions rather than prohibited regulations on technical drilling operations. Typically, operational regulations were linked to a particular land-use regulation power. Then they used broad discretionary language – such as avoiding harm to public health, safety and welfare – in denying drilling. Finally, they recognized delays in permitting could have the same effect as denials because in rapidly growing areas, minimum setback distances often made gas extraction impossible once other construction was completed. When faced with economic uncertainties, like expiring leases, drillers often looked elsewhere rather than expose their bottom line to the undue risk created by the unpredictable local regulatory climate.

The uncertainty in Colorado caused a flood of never-ending land-use litigation. Each periodic small change

made to the law increased the costs of small oil and gas operators by about 10 percent. Costs also increased to local governments and the citizens of Colorado.

Uncertainty often produces unintended consequences. Local opposition to drilling incentivizes drilling not in the areas best suited for it, but rather in the least politically mobilized and hostile communities. Lower income and minority areas often bear the burden of the “negative externalities” that result from drilling.

In the current political landscape – where the Pennsylvania Supreme Court may strike down statewide laws that restrict the ability of local governments to regulate drilling – Pennsylvania can enhance local governance and cut expense by creating a statutory appeals process for drilling disputes. Once a year, the court would sit in a one-week session to hear these appeals. The discovery rules could be tailored to prevent the appeal from becoming a counterproductive litigation tactic.

When the dust settles from the Robinson Township decision, a directive by the Supreme Court to the Appellate Court Procedural Rules Committee can launch this important initiative. Because without further action, Pennsylvania risks learning Colorado’s history lesson the hard way.

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