

PLANNING NEAR PIPELINES

Model Ordinances and Recommendations for Chester County, Pennsylvania

In recent years, a number of local governments around the country have used their land use planning, zoning and permitting authority in a proactive effort to increase the safety of people living near pipelines. During this time, the Pipeline and Hazardous Materials Safety Administration (PHMSA) also formed the Pipelines and Informed Planning Alliance (PIPA). A committee of 150 people from a wide array of stakeholder groups crafted recommended “Best Practices” that could be used as a starting point for local discussions on improved safety near pipelines. The PIPA report containing those recommendations was released in December 2010. The report provides local governments, developers, and pipeline companies with recommended practices to consider when considering land use in proximity to pipelines (and vice versa) and provides a framework for how to consider the risk when new homes, schools, and businesses are proposed to be constructed near high-pressure transmission pipelines.

The four prong strategy discussed below was first developed as part of a U.S. DOT Technical Assistance Grant in 2010. The goal under the grant was to review existing ordinances and compare them to the “Best Practices” standards prepared by PHMSA. Municipal laws and ordinances vary widely and from state to state. Mr. John Gaadt, AICP of Gaadt Perspectives, LLC, adapted and built upon PIPA’s recommendations to create a regulatory approach tailored for this region of Pennsylvania. Further technical assistance was provided by Vincent M. Pompo, Esq., Chairman of the Municipal Law Department and the Environmental Law Practice Group of Lamb McErlane, who provided legal review of the model ordinance framework.

The four prong municipal regulatory approach addresses the following:

- 1) Surface land uses affiliated with pipelines (providing for uses not otherwise permitted in most ordinances),
- 2) Street opening standards (providing for the regulation of street openings, installations and driveways),
- 3) Standards for new development in proximity to pipelines, and
- 4) Revisions to municipal comprehensive plans (providing the rational nexus between the comprehensive plan and code of ordinances).

Surface land uses affiliated with pipelines include, but are not limited to compressor stations, pumping stations, regulator stations, launcher/receiver stations, and other surface pipeline appurtenances. The purpose of such standards is to accommodate these uses consistent with the desire to protect the citizens of the municipality; minimize aesthetic, nuisance and visual impacts

through proper design, siting and screening; ensure the location of such uses complies with industry standards; and preserve community character adjacent to such uses.

Street opening standards are intended to provide for the opening, cutting, excavating, grading, boring, crossing, installation or disturbance upon, in, under, or across a Township road or road right of way. Such standards are intended for any street openings on Township roads (not necessarily pipeline projects) and provide municipalities with appropriate tools to regulate and manage such occurrences.

Standards for new development in proximity to pipelines address the need for development proposals to incorporate existing or proposed pipelines into their site planning activities. The purpose of such standards is to help prevent or minimize unnecessary risk to the public health, safety and welfare due to transmission pipelines; minimize the likelihood of accidental damage to transmission pipelines due to external forces, such as construction activity and equipment; avoid exposing land uses with high on-site populations that are difficult to evacuate; and help reduce adverse impacts in the event of a pipeline failure. Standards include additional requirements for plan submission, buffers, setbacks, signage and landscaping provisions.

Suggested municipal comprehensive plan language, as stated above, is intended to provide a rational nexus between the comprehensive plan and municipal ordinances (pursuant to Section 105 of the Pennsylvania Municipalities Planning Code, Act 247 of 1968, as amended). The purpose of such language is to acknowledge existing and proposed pipelines, recognize the benefits and risks of pipelines, acknowledge the need to monitor existing and proposed activity, enact regulations complimentary to state and federal law, encourage increased communication with pipeline operators, reference related county and statewide planning goals, and coordinate with county and state agencies on new pipeline projects.

Although minor revisions to the approaches developed as part of the strategy were made since 2010, the adoption of Act 13 in 2012 (a statute amending the PA Oil and Gas Act) put into question whether some or all of the approaches were pre-empted by the Act. A subsequent lawsuit challenging certain portions of Act 13 (specifically relevant here Section 3303 which excluded municipal regulation of oil and gas operations and Section 3304 which required uniformity of local ordinances including use and setback requirements for siting oil and gas operations in zoning districts, including the “reasonable development” clause which permitted oil & gas operations in all zoning districts within the guidelines set forth by the provisions) resulted in the PA Commonwealth Court finding portions of the Act to be unconstitutional. The state’s public utility commission, attorney general and other officials appealed the Commonwealth Court’s decision to the PA Supreme Court, and oral arguments began in October of 2012. In December of 2013, a plurality of three Supreme Court Justices decreed that the state does not have absolute power over municipalities in terms of environmental protection and Act 13 puts

municipalities in direct conflict with their constitutional authority to protect the environment under the “Environmental Rights Amendment”, Section 27 of the Pennsylvania Constitution. And, a majority of three Supreme Court Justices agreed that Sections 3303 and 3304 of the Act were unconstitutional. The Supreme Court recently denied a request to reconsider its opinion, and the decision on these grounds is now final. While the Supreme Court remanded certain arguments back to the Commonwealth Court for further consideration, in particular the role of the Pennsylvania Public Utility Commission (PUC) in reviewing local zoning ordinances, the Commonwealth Court in July of 2014 ruled that challenges to local ordinances must come before municipal zoning boards per the requirements of the Municipalities Planning Code, not the PUC.

Under Act 13 (and prior to the findings of PA’s Commonwealth Court and Supreme Court), it was concluded that three of the four approaches were consistent with and were on solid ground from a planning and legal perspective. These were the ordinance standards for new development in proximity to pipelines, ordinance standards for street openings, and revisions to municipal comprehensive plans to recognize existing and proposed transmission pipeline issues. The fourth item, “Surface land uses affiliated with pipelines” (providing for uses not otherwise permitted in most ordinances), was not consistent with the zoning provisions of Act 13. Subsequent to the findings of both the Commonwealth Court and the PA Supreme Court, all four strategies are now viewed to be consistent with PA law.

It is our opinion that these four items combine to provide an effective approach towards proactively addressing pipelines within the legislative and regulatory climate currently in existence. While we understand that each municipality will want to exercise its own discretion with regards to exact standards (for example, width of setbacks or landscaping provisions), as well as the placement of the ordinances within their codes, we are confident that the overall approach provides a legally sound land use planning role for municipalities and is appropriate for the protection of the health and welfare of the citizens of Chester County.

In all cases, municipalities should exercise due caution in adopting the model ordinances contained herein. As with any ordinance, each municipality is different and the approach taken to regulating transmission pipelines and their appurtenances should be tailored to the unique circumstances of the community.