No. 30670 - *State of West Virginia ex rel. James E. Lovejoy, Kevin G. Lovejoy, John D. Lovejoy, Ronald D. Lovejoy, Denese E. Lovejoy, Barbara Myers, Carolyn Brewster, Ronald Lovejoy, II, and Ronald G. Lovejoy v. Michael O. Callaghan, Secretary, West Virginia Department of Environmental Protection; the Oil and Gas Conservation Commission, and James Martin, Chief, Office of Oil & Gas, West Virginia Department of Environmental Protection*

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

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RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
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Albright, Justice, concurring:

While I concur in the decision of the majority, I wish to write separately to express certain observations concerning the classification of the administrative rule that was challenged by the Petitioners as invalid (39 W.Va.C.S.R. § 1-4.4(a)), and the various considerations underlying the legislative enactments, which address the issue of oil and gas conservation, that are set forth in article 9, chapter 22C of our state code. *See* W.Va. Code §§ 22C-9-1 to -16 (1994) (Repl. Vol. 2002).

Although the majority found it unnecessary to characterize the administrative rule applied by the Oil and Gas Commission in its decision to issue the working well permit, I wish to briefly address the nature of the rule.[1] Despite the efforts of the various Respondents and the amicus curiae to describe the rule as procedural, it is clear that the rule qualifies as a legislative rule under both statutory definitions and case law applying those definitions.

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[1]According to the parties, the rule at issue has been submitted to the Legislature for consideration during the 2003 legislative session.

Administrative Rule Characterization

The Legislature has defined a "legislative rule" as follows:

> "Legislative rule" means every rule, as defined in subsection (i) of this section, proposed or promulgated by an agency pursuant to this chapter. Legislative rule includes every rule which, when promulgated after or pursuant to authorization of the legislature, has (1) the force of law, or (2) supplies a basis for the imposition of civil or criminal liability, or (3) grants or denies a specific benefit. Every rule which, when effective, is determinative on any issue affecting private rights, privileges or interests is a legislative rule. Unless lawfully promulgated as an emergency rule, a legislative rule is only a proposal by the agency and has no legal force or effect until promulgated by specific authorization of the legislature. Except where otherwise specifically provided in this code, legislative rule does not include (A) findings or determinations of fact made or reported by an agency, including any such findings and determinations as are required to be made by any agency as a condition precedent to proposal of a rule to the legislature; (B) declaratory rulings issued by an agency pursuant to the provisions of section one [§ 29A-4-1], article four of this chapter; (C) orders, as defined in subdivision (e) of this section; or (D) executive orders or proclamations by the governor issued solely in the exercise of executive power, including executive orders issued in the event of a public disaster or emergency;

W.Va. Code § 29A-1-2(d) (1982) (Repl. Vol. 1998).

In contrast, a "procedural rule" is defined as a rule "which fixes rules of procedure, practice or evidence for dealings with or proceedings before an agency, including forms prescribed by the agency." W.Va. Code § 29A-1-2(g). While I can appreciate the efforts of counsel to find a way to keep the rule from being declared invalid for lack of legislative approval, the rule at issue is clearly beyond the definitional parameters of a

"procedural rule." Rather than being a rule limited in effect to addressing procedural niceties, the rule at issue clearly rises to the level of a "legislative rule," which must proceed through the legislative rule making process prior to promulgation. *See* W.Va. Code § 29A-3-12 (1996) (Repl. Vol. 1998).

By definition, "legislative rules" are those rules which, "when effective, . . . [are] determinative on any issue affecting private rights, privileges or interests." W.Va. Code § 29A-1-2(d). It is simply beyond dispute that the rule at issue, which arguably involves circumvention of the "consent and easement" provision found in West Virginia Code § 22C-9-7(b)(4), affects the private rights of those people whose consent is not required under the rule when a discovery well is drilled. *See also Chico Dairy Co. v. Human Rights Comm'n*, 181 W.Va. 238, 244, 382 S.E.2d 75, 81 (1989) (finding that administrative rule defining handicapped person for purposes of the W.Va. Human Rights Act was "legislative" in nature as "the rule confers a right not provided by law; and the rule affects private rights and purports to regulate private conduct"). Moreover, the Legislature specifically anticipated and provided for the proposal of rules in accordance with the Administrative Procedures Act "to implement and make effective the provisions of this article [W.Va. Code § 22C-9-1 *et seq.*]." W.Va. Code § 22C-9-5. The rule at issue was clearly formulated for the purpose of implementing the "consent and easement" provision of West Virginia Code § 22C-9-7, and consequently it necessarily qualifies as a "legislative rule"-- a rule which requires legislative approval before the rule can have the force and effect of law. *See State ex rel. Kincaid v. Parsons*, 191 W.Va.

608, 610, 447 S.E.2d 543, 545 (1994) (viewing express legislative authorization of rule promulgating authority as indicative of legislative characterization of regional jail's rule banning tobacco use).

Tradeoffs Underlying Act

In trying to convince this Court to declare the administrative rule invalid, the *amicus curiae* suggested that the "consent and easement" provision is itself unconstitutional.[2] This issue was not fully briefed; I reference this contention only as a vehicle for discussion of the panoply of considerations underlying and inherent to the enactment of the Oil and Gas Conservation statutes. *See* W.Va. Code § 22C-9-1 to -16 (1994) (Repl. Vol. 2002).

The Legislature was clear in its enactment of article nine, chapter 22C regarding its mutual concerns of economic development and conservation of resources:

> (a) It is hereby declared to be the public policy of this state and in the public interest to:
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> (1) Foster, encourage and promote exploration for and development, production, utilization and conservation of oil and gas resources;
>
> (2) Prohibit waste of oil and gas resources and unnecessary surface loss of oil and gas and their constituents;

[2]The Independent Oil and Gas Association of West Virginia suggests that the "consent and easement" provision found in West Virginia Code § 22C-9-7(b)(4) is constitutionally infirm on two grounds: (1) impairment of contract; and (2) deprivation of property without due process of law.

> (3) Encourage the maximum recovery of oil and gas; and
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> (4) Safeguard, protect and enforce the correlative rights of operators and royalty owners in a pool of oil or gas to the end that each such operator and royalty owner may obtain his just and equitable share of production from such pool of oil or gas.

W.Va. Code § 22C-9-1(a).

As might be expected, the provisions of the Oil and Gas Conservation Act reveal a clear balancing of interests among the various entities affected by the enactment. Whereas the Act seeks to prohibit a surface owner from preventing operation of a mineral owner's right to search for oil and gas via a discovery or test well,[3] the Legislature has, at the same time, devised a method of assuring that people who previously went unpaid for mineral extraction under the law of capture now will receive payment pursuant to a formula that contemplates pooling of the rights of those holding mineral rights to contiguous properties and a sharing of the costs of extraction and the royalties resulting from the production of oil and gas from deep wells.

While either the surface owner or the mineral rights owner might make an argument that the Act seeks to impair their individual rights, the Legislature had before it the difficult task of achieving a balance of both sets of rights. In clear recognition of the public

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[3]While the Act speaks in terms of a "discovery" well, the regulations also refer to a "test well." *See* W.Va. Code § 22C-9-7(a)(1); 39 W.Va.C.S.R. § 1-3.21. A "test well" is defined as "a well intended to discover a 'new' pool." *Id.*

interest to be advanced by developing a system that would seek to "encourage the maximum recovery of oil and gas from all productive formations in this state," the Legislature appears to have located a middle ground which serves to both benefit production interests and the interests of those people who might otherwise not have been justly compensated for such mineral extraction. W.Va. Code § 22C-9-1(b).

The enactment of the Oil and Gas Damage Compensation Act in 1983[4] further evidences the various considerations and tradeoffs that were made in conjunction with these statutes. In full recognition of the fact that "the public interest requires that the surface owner be entitled to fair compensation for the loss of the use of surface area during the rotary drilling operation," the Legislature established a statutory cause of action for surface owners to recover for loss of use[5] resulting from drilling operations while expressly preserving certain

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[4]1983 W.Va. Acts, ch. 69.

[5]The statutory cause of action sets forth a host of factors that are to be considered in calculating the compensation owed to the surface owner:

> (1) Lost income or expenses incurred as a result of being unable to dedicate land actually occupied by the driller's operation or to which access is prevented by such drilling operation to the uses to which it was dedicated prior to commencement of the activity for which a permit was obtained measured from the date the operator enters upon the land until the date reclamation is completed, (2) the market value of crops destroyed, damaged or prevented from reaching market, (3) any damage to a water supply in use prior to the commencement of the permitted activity, (4) the cost of repair of personal property up to the value of replacement by personal property of like age,

(continued...)

common law rights of action. W.Va. Code §§ 22-7-1(a)(2); 22-7-3; 22-7-4 (1994) (Repl. Vol. 2002). The creation of this statutory cause of action evidences a specific legislative awareness of the burdens imposed on the surface owner and provides an express remedy to address those unique burdens.

As with all legislation that involves advancing the economic interests of the state, burdens are borne by numerous entities. Thus, to look at just one particular entity's interest, without considering the broad panoply of affected interests, is to deny recognition of the vast considerations and tradeoffs underlying these legislative enactments. When viewed with a perspective that takes into account the combined interests of all the entities involved -- the interests of both surface owners and mineral rights owners, as well as the public interest that is necessarily served through such economic endeavors -- the interests of all the affected entities, on balance, appear to be properly accounted for and addressed.

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[5](...continued)

> wear and quality, and (5) the diminution in value, if any, of the surface lands and other property after completion of the surface disturbance done pursuant to the activity for which the permit was issued determined according to the actual use made thereof by the surface owner immediately prior to the commencement of the permitted activity.

W.Va. Code § 22-7-3(a)(1).

In light of these considerations, I submit respectfully that a convincing case can be made for holding the "consent and easement" provision applicable only to wells drilled within a pool after a test or discovery well has been drilled and thereby exempting the drilling of a test or discovery deep well from the "consent and easement" provision. *See* W.Va. Code § 22C-9-7(b)(4). Moreover, I further submit that the overall legislative scheme concerning oil and gas conservation may be seen as constitutional notwithstanding the apparently dichotomous treatment of initial discovery or test wells and subsequent wells within an established pool.