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Planning, Zoning and Hazardous Liquids Pipelines

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Hazardous liquids pipelines² intended to transport natural gas liquids from the Marcellus and Utica shale formations have been proposed in several states. Local governments and communities have questioned the extent to which they may utilize planning and zoning powers to regulate the location and operation of hazardous liquid pipelines in order to assure compatibility of that land use with other uses of land.

This briefing paper presents some background concerning applicable state and federal law and hazardous liquids pipelines, in order to help inform the deliberations of local governments and planning and zoning agencies. It is not intended to provide legal advice, and planners and local government officials are encouraged to consult with legal counsel in developing or amending zoning ordinances and comprehensive land use plans to address new and existing hazardous liquids pipelines. It also does not address planning and zoning and natural gas pipelines, which are subject to the jurisdiction of the Federal Energy Regulatory Commission (FERC) under the Natural Gas Act.

In a 2010 report on pipeline risk and local development planning, the federal Office of Pipeline Safety noted that the risks associated with hazardous liquids pipelines are different than the risks of natural gas pipelines. While the report

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² “Hazardous liquids” are defined under the Hazardous Liquids Pipeline Safety Act of 1979 to include petroleum or a petroleum product; and any substance the Secretary of Transportation decides may pose an unreasonable risk to life or property when transported by a hazardous liquid pipeline facility in a liquid state (except for liquefied natural gas).

characterized the risk associated with natural gas pipelines as a “primarily acute hazard” that dissipates in the absence of an ignition source, the risk associated with hazardous liquids pipelines is more varied, depending on the composition of commodities being transported.

Hazardous liquid pipelines transport a greater variety of products (including petroleum, petroleum products, natural gas liquids, anhydrous ammonia, and carbon dioxide), so the risks of hazardous liquid pipeline releases vary according to the commodity involved. Releases of some commodities transported in hazardous liquid pipelines, such as propane, pose primarily an acute hazard of fire or explosion, similar to natural gas. These commodities have a high vapor pressure and are in liquid form while transported under pressure in a pipeline. However, if they are released from the pipeline, they will convert to gas as the pressure is reduced. Some of these commodities have densities greater than air, so they have a stronger propensity to remain near the ground than natural gas, which disperses more readily. The behavior of these commodities when released presents some different challenges for mitigation, compared to other hazardous liquids or natural gas.

Releases of other hazardous liquids, such as gasoline and crude oil, have both acute and more long-term potential consequences, as the released product can spread over land and water, flowing into valleys, ravines, and waterways. This can result in harmful consequences to people and to the environment, including human injuries or fatalities from fire or explosion, as well as potential ecological damage and contamination of drinking water supplies occurring some distance from the point of initial release.

U.S. Department of Transportation, Office of Pipeline Safety, *Building Safe Communities: Pipeline Risk and its Application to Local Development Decisions*, October 2010, p. 7. <https://primis.phmsa.dot.gov/comm/publications/PIPA/PIPA-PipelineRiskReport-Final-20101021.pdf>

Does federal law preempt local governments from applying zoning ordinances to interstate hazardous liquids pipelines?

The short answer is **no**, providing that the zoning ordinance is not attempting to regulate matters that are preempted by the Pipeline Safety Act or the safety

standards developed by the U.S. Department of Transportation’s Pipeline and Hazardous Materials Safety Administration.

Congress has expressly preempted state law with respect to pipeline **safety** in this manner:

A State authority that has submitted a current certification under section 60105(a) of this title may adopt additional or more stringent safety standards for intrastate pipeline transportation only if those standards are compatible with the minimum standards prescribed under this chapter. A State authority may not adopt or continue in force safety standards for interstate pipeline facilities or interstate pipeline transportation[.]

49 U.S.C. 60104(c).

Texas Midstream Gas Services LLC v. City of Grand Prairie, 608 F.3d 200 (5th Cir. 2010) addressed whether the Pipeline Safety Act preempted an amendment to a city development code adopted after Texas Midstream Gas Services (TMGS) announced plans to construct a natural gas pipeline and compressor station to clean and compress natural gas for interstate transport. The amended code required a setback from roads, a security fence, enclosed building for the compressor station, paved road, and noise controls.

The Fifth Circuit Court of Appeals reviewed the history of the Pipeline Safety Act of 1994 (PSA)³ and found its goal was to provide “adequate protection against risks to life and property posed by pipeline transportation and pipeline facilities.” Noting that the Act expressly preempts state “safety standards for interstate pipeline facilities or interstate pipeline transportation,” at 49 U.S.C. 60104(c), the Court turned to TMGS’s claim that federal regulation addressed the location of compressor stations and pipeline setbacks, thus preempting the City standards.

The Court noted that Congress may preempt state or local law expressly, or by conflict preemption (directly conflicting with it) or field preemption (occupying a field so pervasively as to exclude state regulation). In the case of the PSA, because Congress had expressly preempted state safety standards, the Court would not

³ The Pipeline Safety Act of 1994 combined and recodified without change the 1968 Natural Gas Pipeline Safety Act and the 1979 Hazardous Liquids Pipeline Safety Act

imply any further preemption. Since the setback requirement was motivated not out of safety concerns but to preserve neighborhood cohesion, avoid eyesores and diminished property values, the Court would not void the city ordinance *even though* there was a federal regulation addressing setbacks for compressor stations with respect to fire risk, since “a local rule may incidentally affect safety, so long as the effect is not ‘direct and substantial.’ Although the local setback might require a greater distance to adjacent buildings than would the federal regulation at 49 C.F.R. 192.163, “this incidental salutary effect on fire safety does not undermine Congress’ intent in promulgating the PSA as it is neither direct nor substantial.” *Id.* at 211.

The District Court had apparently decided that the security fence requirement was a safety requirement preempted by the PSA, and TMGS argued that all the remaining portions of the amended ordinance, addressing building materials, roofing, noise levels, and landscaping, were connected and should also be struck. The Court of Appeals rejected this, noting that the remaining portions were capable of being separately applied and were severable.

Other federal cases that help to illuminate the boundary between permissive local regulation and preempted activity include *United Gas Pipeline Co. v. Terrebone Parish Police Jury*, 319 F. Supp. 1138 (E.D. La 1970). In this case, the ordinance at issue sought to regulate the construction, installation, and operation of gas or liquid petroleum pipelines or canals in the parish, and provided for specifications, reports, permits, insurance, fees, and setting penalties for violation thereof. The Court of Appeals for the Fifth Circuit, in a *per curiam*⁴ decision, affirmed the District Court decision and found the ordinance to be preempted, noting that “we do not hold that the Parish Police Jury cannot enact a valid ordinance requiring permits with reasonable conditions.” *United Gas Pipeline Co. v. Terrebone Parish Police Jury*, 445 F.2d 301, 302 (5th Cir. 1971).

In the case of *Washington Gas Light Co. v Prince George's County Council*, 711 F3d 412 (4th Cir. 2013), the Court of Appeals for the Fourth Circuit rejected the argument that county zoning plans came within the express preemption provision of 49 USC 60104(c). Washington Gas Light Company ("Washington Gas")

⁴ “Per curiam” decisions are typically short decisions issued in the name of the entire Court rather than specific judges.

operated a natural gas substation in Prince George's County, Maryland ("Chillum Site"), and sought to expand that substation with the addition of a liquefied natural gas ("LNG") storage tank. When Prince George's County denied the request based on recently enacted county zoning plans, the company appealed, claiming that the ordinance was preempted by the PSA.

The county zoning plans to which the company objected were an overlay zone and transit development plan aimed at maximizing "transit-oriented development" in the area around the West Hyattsville Metro Center and prohibiting all industrial usage in the area that included the substation.

Noting that the county zoning plans were designed to foster transit-oriented development, to assure that all new development was pedestrian-oriented, and to enhance and protect the environment by protecting environmentally sensitive areas and minimizing the impacts of development, the Court concluded that "in light of these goals, it is clear that the County Zoning Plans are primarily local land use regulations as opposed to safety regulations."

Rejecting a claim that the PSA had preemptive effect beyond the express preemption provision, the Court noted that even *if* it agreed with the argument, it would still not conclude that Congress intended the PSA to occupy the field of natural gas facility siting, because:

Specifically, the PSA expressly circumscribes the Secretary of Transportation's role in this area, indicating, "[t]his chapter does not authorize the Secretary of Transportation to prescribe the location or routing of a pipeline facility." 49 U.S.C. 60104(e) (2006).

Id. at 422.

These decisions are consistent with the jurisprudence in other federal District and Circuit Courts with respect to state and local enactments. Safety ordinances and state laws attempting to govern construction, installation, inspection, and depth of interstate natural gas pipelines have been held to be preempted by the PSA's predecessor statutes, but no court has held that the PSA has preempted local zoning ordinances with respect to hazardous liquids pipelines.

Does state law preempt local government planning and zoning with respect to pipeline and related facility location?

Each state's laws will differ regarding the authority that local governments have with respect to the routing and location of hazardous liquids pipelines and related facilities.

In Kentucky, for example, the General Assembly has authorized local governments pursuant to Kentucky Revised Statutes (KRS) Chapter 100 to adopt comprehensive land use plans and zoning ordinances regulating land use.

Before addressing specific approaches that have been or could be used to assure compatibility of the routing and siting of pipelines and related facilities to current land uses and future planned development, it is instructive to determine whether pipelines transporting hazardous liquids are subject to the state planning and zoning statutes, or whether local government regulation has been preempted.

For example, in Kentucky, KRS 353.500(2) expresses a legislative intent that "governmental responsibility for regulating all aspects of oil and gas exploration, production, development, gathering, and transmission rests with state government" and preempts all other non-state entities from doing so "except as provided in KRS Chapter 100." The General Assembly adopted this statute in response to an effort by a County Fiscal Court to regulate "gathering lines," (which are lines running from wellhead to transmission lines) but expressly protected the ability of local governments to act under KRS Chapter 100. The power of local communities to plan for land use and to regulate land use through KRS Chapter 100, including use of land to support transmission lines, is thus *expressly* preserved in Kentucky in KRS 353.500(2).

Does state law exempt natural gas liquids pipelines and other hazardous liquids pipelines from the jurisdiction of planning commissions and boards of adjustment?

The next inquiry is whether state planning and zoning statutes allow for local regulation of pipelines. Often, zoning laws will provide a limited exemption from planning and zoning for governmental facilities, including public utilities.

In Kentucky, for example, local regulation of **some** transmission pipelines (i.e. those owned by regulated utilities) is addressed under KRS 100.324, which provides that:

100.324 Public utility facilities excepted -- Review of proposed acquisition, disposition, or change by commission.

(1) All other provisions of this chapter to the contrary notwithstanding, public utilities operating **under the jurisdiction of** the Public Service Commission, except as specified in KRS 100.987, or **the** Department of Vehicle Regulation or **Federal Energy Regulatory Commission**, any municipally owned electric system, and common carriers by rail shall not be required to receive the approval of the planning unit for the location or relocation of any of their service facilities. Service facilities include all facilities of such utilities and common carriers by rail other than office space, garage space, and warehouse space and include office space, garage space, and warehouse space when such space is incidental to a service facility. The Public Service Commission and the Department of Vehicle Regulation shall give notice to the planning commission of any planning unit of any hearing which affects locations or relocations of service facilities within that planning unit's jurisdiction.

(2) The nonservice facilities excluded in subsection (1) of this section must be in accordance with the zoning regulations.

(3) Upon the request of the planning commission, the public utilities referred to in this section shall provide the planning commission of the planning unit affected with information concerning service facilities which have been located on and relocated on private property.

(4) Any proposal for acquisition or disposition of land for public facilities, or changes in the character, location, or extent of structures or land for public facilities, excluding state and federal highways and public utilities and common carriers by rail mentioned in this section, shall be referred to the commission to be reviewed in light of its agreement with the comprehensive

plan, and the commission shall, within sixty (60) days from the date of its receipt, review the project and advise the referring body whether the project is in accordance with the comprehensive plan. If it disapproves of the project, it shall state the reasons for disapproval in writing and make suggestions for changes which will, in its opinion, better accomplish the objectives of the comprehensive plan.

No permit required for construction or occupancy of such public facilities shall be issued until the expiration of the sixty (60) day period or until the planning commission issues its report, whichever occurs first.

KRS 100.324(1) (Emphasis added).

By its plain terms, KRS 100.324(1) is limited in scope to “public utilities” operating under state or federal jurisdiction. For example, the now-defunct proposed Utica Marcellus Texas Pipeline, LLC (UMTP), which proposed to “repurpose” a natural gas pipeline for natural gas liquids transportation after the pipeline was “abandoned in place” by FERC, was **not** a project proposed by a public utility regulated by the state Public Service Commission (PSC) or the Federal Energy Regulatory Commission (FERC), nor is the routing of any proposed natural gas liquids pipeline under the PSC’s or the FERC’s jurisdiction.

In many cases, existing natural gas transmission pipelines are being proposed to be “abandoned in place,” requiring that the pipeline company secure approval for “abandonment” of the pipeline as a natural gas pipeline from the Federal Energy Regulatory Commission, which had at one time issued a “Certificate of Public Convenience And Necessity.” Since FERC’s jurisdiction under the Natural Gas Act does not extend beyond natural gas pipelines, FERC would lose jurisdiction after approval of “abandonment in place.” FERC acknowledged as much in the case of the Tennessee Gas pipeline that was once proposed to be abandoned in place and converted to transmission of natural gas liquids. In the *Notice of Intent to Prepare An Environmental Assessment for the Proposed Abandonment and Capacity Restoration Project*, published at 80 FR 23530 (April 28, 2015), FERC noted:

Following the abandonment of Tennessee pipeline facilities, if the Commission approves the Project, Tennessee indicates that it would complete necessary work to disconnect and transfer the Abandoned Line and associated facilities to Utica Marcellus Texas Pipeline, LLC (UMTP) who would convert the Abandoned Line to natural gas liquids (NGL) products transportation service (UMTP Project). **These activities involving future use of the Abandoned Line are not under the FERC’s jurisdiction**, and therefore are not subject to the FERC’s review procedures.

Id. at 23531 (Emphasis added).

Thus, absent exclusion from planning and zoning statutes, approval of the planning unit for the location or relocation for all service facilities would be required if the pipeline falls within the ambit of those structures and land uses regulated by the zoning statutes and ordinance. If a zoning ordinance required a new or converted NGL pipeline to apply for a conditional use permit, or to be located in a particular zoning classification (thus making any pipeline converted after enactment of the zoning ordinance “nonconforming,”) that action would in no fashion be preempted under KRS 100.324(1).

State zoning law may exempt certain types of facilities from zoning restrictions. In Kentucky, as noted above, KRS 100.324(4) provides for local planning unit review of land acquisition for public facilities other than those of “public utilities and common carriers by rail.” This is referred to as the “community facilities review,” and results in a nonbinding determination of compatibility of the proposed facility with the comprehensive land use plan.

Interstate gas transmission pipelines, while typically a “common carrier” under federal law, are not necessarily a “public facility” be exempted from zoning approval. Such is the case in Kentucky under KRS 100.324(4)⁵, and such pipelines

⁵ (19) "Public facility" is defined in KRS 100.111(19) to mean “any use of land whether publicly or privately owned for transportation, utilities, or communications, or for the benefit of the general public, including but not limited to libraries, streets, schools, fire or police stations, county buildings, municipal buildings, recreational centers including parks, and cemeteries[.]”

are subject to regulation pursuant to comprehensive plans and zoning regulations adopted pursuant to KRS Chapter 100.

What approaches are available under state zoning laws for assuring that pipeline routing is consistent with locally adopted plans and codes?

Typical planning and zoning laws empower local communities to regulate land use, through the adoption of a “comprehensive plan.” Comprehensive plans “serve as a guide for public and private actions and decisions *to assure the development of public and private property in the most appropriate relationship.*” KRS 100.183 (Italics added).

Comprehensive plans usually include, as they do under Kentucky law, a statement of goals and objectives “which shall serve as a guide for the physical development *and economic and social well-being of the planning unit,*” a land use plan element “which shall show proposals for the most appropriate, desirable, and feasible patterns for the general location, character, extent, and interrelationship of the manner in which the community should use its public and private land...,” a community facilities plan element, a “transportation plan element,” and other elements which in the judgment of the planning commission will further serve the purposes of the comprehensive plan.

The transportation plan element shall:

show proposals for the most desirable, appropriate, economic, and feasible pattern for the general location, character, and extent of the channels, routes, and terminals for transportation facilities for the circulation of persons and goods for specified times as far into the future as is reasonable to foresee. The channels, routes, and terminals may include, without being limited to, all classes of highways or streets, railways, airways, waterways; routings for mass transit trucks, etc.; and terminals for people, goods, or vehicles related to highways, airways, waterways, and railways.

KRS 100.187(3).

Once a comprehensive plan is adopted, the planning unit may adopt zoning regulations that list the types of zones that may be used.

State laws, such as Kentucky's KRS 100.202, allow planning units some alternatives to classic zoning, such as allowing the unit to place all property in one zone, or to address all land use proposals as conditional uses. This allows the planning commission to adopt the role of a board of zoning adjustment with respect to conditional use requests.

Unless a planning unit has taken one of these different approaches, the zoning regulations will define various land use zones and uses, which must be uniform throughout the zone. The text of the zoning regulations shall also make provision for granting variances, for what uses require a conditional use permit, for the status and rights of nonconforming uses of land and structures, and other provisions deemed necessary.

What may a city or county regulate through zoning regulations?

KRS 100.203 is typical of what may be found in other states and allows for the regulation of:

- The activity on the land, including filling or excavation of land, removal of natural resources, and use of waterways and flood prone land;
- The size, width, height, bulk, location of structures, buildings, and signs
- Minimum or maximum areas, yards, and other open spaces which are to be left unoccupied, and minimum distance requirements between buildings and other structures;
- Intensity of use;
- Districts of special interest to the proper development of the community (including historical districts, planned business districts, planned industrial districts, conservation districts and others);
- Fringe areas for each district with requirements to make it compatible with neighboring districts;

- The activities and structures on the land at or near major thoroughfares, their intersections, and interchanges, and transportation arteries, bodies of water, [and] places having unique interest or value, flood plain areas, and other places having a special character or use affecting or affected by their surroundings.

KRS 100.203.

For land “which is used for agricultural purposes,” zoning regulations are often limited to setbacks from roads, buildings in flood plains and flood ways, and mobile homes and other dwellings.

Is a natural gas liquids or other hazardous liquids pipeline a “structure” that can be regulated by planning and zoning?

In determining whether state planning and zoning laws can regulate construction or conversion of hazardous liquids pipelines, attention must be paid to the definitions. Kentucky’s law, for example, regulate “structures” and, according to KRS 100.111(21), a structure is defined as “**anything** constructed or made, the use of which required **permanent location *in or on*** the ground or attachment to something having a permanent location in or on the ground, including buildings and signs [.]” (Emphasis added).

A buried pipeline, being “constructed or made” and having a permanent location in the ground, would fall within the definition of “structure” under Kentucky law.

What types of zoning processes have been adopted in other jurisdictions?

A 2004 Special Report published by the Transportation Research Board of the National Academies, titled *Transmission Pipelines and Land Use: A Risk-Informed Approach*, Special Report 281, noted that

Most local governments do not address pipeline issues. For those that do, there are few or no standards on which to base zoning ordinances

and other development regulations. Some communities that have experienced pipeline incidents are implementing ordinances and other policies to reduce the perceived risks attributable to transmission pipelines, but these proposed ordinances do not appear to be based on a systematic assessment of risks and costs.

Id. at p. 4. <https://www.nap.edu/read/11046/chapter/1>

The Special Report noted that:

Rational land use decisions that provide appropriate physical separation between people and pipelines could reduce the risk associated with the increasing numbers of people in proximity to transmission pipelines. Possible land use techniques include, for example, establishing setbacks; regulating or prohibiting certain types of structures (such as schools, hospitals, and apartment buildings) and uses near transmission pipelines; and encouraging, through site and community planning, other types of activities and facilities (e.g., linear parks, recreational paths) within or in the vicinity of pipeline rights-of-way.

The Special Report recommended that the Office of Pipeline Safety “develop risk-informed land use guidance for application by stakeholders. The guidance should address:

- Land use policies affecting the siting, width, and other characteristics of new pipeline corridors;
- The range of appropriate land uses, structures, and human activities compatible with pipeline rights-of-way;
- Setbacks and other measures that could be adopted to protect structures that are built and maintained near pipelines; and
- Model local zoning ordinances, subdivision regulations, and planning policies and model state legislation that could be adopted for land uses near pipelines.

Id. pp. 9-10.

In response to the report, the PHMSA in 2007 helped initiate a multi-stakeholder initiative, the Pipelines and Informed Planning Alliance (PIPA), www.pipa-info.com, which produced a guidance document, titled *Partnering to Further Enhance Pipeline Safety In Communities Through Risk-Informed Land Use Planning: Final Report of Recommended Practices* (November 2010). <https://primis.phmsa.dot.gov/comm/publications/PIPA/PIPA-Report-Final-20101117.pdf>.

PIPA's recommended practices are focused on how to manage new development near existing pipelines rather than on routing of new pipelines so as to minimize adverse impacts on other development, other existing and projected land uses, and natural resources. Similarly, communities such as Austin, Texas have adopted zoning setbacks for new development near hazardous liquids pipelines, but do not have comparable setbacks or standards for routing of new pipelines.

Additionally, the Office of Pipeline Safety has published *Building Safe Communities: Pipeline Risk and its Application To Local Development Decisions* (October 2010). <https://primis.phmsa.dot.gov/comm/publications/PIPA/PIPA-PipelineRiskReport-Final-20101021.pdf>. The report notes that:

As additional homes, businesses, and schools are constructed and other development occurs, more people will be living, working, and shopping in the vicinity of transmission pipelines. Similarly, with increasing demand for energy, it is likely that new transmission pipelines will be constructed in areas of existing development. Because of these expected trends, local governments are increasingly required to make decisions concerning land use planning and development in the vicinity of transmission pipelines. The federal government, along with its state partner agencies, regulates the safe construction, testing, operation, and maintenance of the nation's transmission pipelines. In addition, federal pipeline safety regulations include targeted regulations for inspecting and managing the integrity of pipeline segments that have the potential to impact populated and developed areas.

Permitting and routing of interstate natural gas pipelines are approved by the Federal Energy Regulatory Commission (FERC). State agencies (e.g. Public Utility Commissions) approve the permitting and routing of intrastate natural gas pipelines and hazardous liquid transmission pipelines.

Unfortunately, the assumption that a state agency, such a Public Service or Utility Commission, approves in advance the routing of hazardous liquids transmission pipelines is often mistaken. While some other states, such as Minnesota, have siting requirements for such pipelines, others like Kentucky do not. Thus, in the case of Kentucky, any routing regulation must come from the local government through Chapter 100.

Regulating Hazardous Liquids Pipelines Through Conditional Use Permits

One approach to routing regulation, which has been adopted and applied in Adams County, Colorado, is to require that pipelines obtain a conditional use permit (CUP).

What is a conditional use permit?

“Conditional uses” are those uses which **may** be allowed within designated zones under certain conditions. A conditional use “is essential to or would promote the public health, safety, or welfare in one (1) or more zones, but which would impair the integrity and character of the zone in which it is located, unless restrictions on location, size, extent, and character of performance are imposed in addition to those imposed in the zoning regulation[.]” Jurisdiction for hearing applications for a conditional use permit often rests with a Board of Zoning Adjustments. Approval may be conditioned on such things such as time limitations, requirements that one or more things be done before the request can be initiated, and conditions of a continuing nature.

On the plus side, the conditional use process is well-understood by communities and developers alike and allows the planning unit to identify in advance which zones may be suitable for the conditional use, and which are not. Conditions may be tailored to address and mitigate the impacts of a particular project in order to

make the use compatible with the zone(s) in which it is proposed to be located, addressing concerns including:

- Noise and odor from aboveground pipeline operation and maintenance activities such as pump station machinery, start-up and shut-down activities, heat exchangers or other equipment emissions, relief valves, backup power generators, and other sources of noise or odor;
- Impacts on existing and proposed roads and other infrastructure, including water and wastewater infrastructure;
- Proximity to industrial areas where manufacturing processes involve storage of flammable liquids or gases, toxic chemicals, explosives, or other hazardous substances that could be compromised as a result of an accident;
- Proximity to institutional facilities such as schools, daycare facilities, hospitals, nursing homes, jails and prisons, and other potentially difficult to evacuate facilities. The location of the proposed pipeline should also be routed to reduce the potential of interference of the transmission pipeline operations and maintenance with these facilities, since institutional facilities may be difficult to evacuate;
- Proximity to public safety and emergency response facilities;
- Proximity to current or planned places of mass public assembly;
- Proximity to cultural, historic, and natural resources of significance; and
- Proximity to and impacts on prime or significant farmland.

It also has the advantage of allowing the activity to be brought under regulation more quickly by amending the zoning regulations to include “hazardous liquids transportation by pipeline” among the conditional uses for which a permit is required.

The only drawback is that a community may prefer matters be decided at the planning commission and legislative body level, as would be the case with a rezoning.

Consultation Zones And Pre-Application Consultation

Another approach to local planning and zoning regulation is that of the “consultation zone,” which can be used alone or in conjunction with other zoning provisions. A model ordinance that was developed by PIPA and has been adopted in several communities, creates a “consultation zone” within which, for proposed new land uses and developments, the property developer/owner is required to initiate consultation with the transmission pipeline operator. The purpose of the consultation is to protect the transmission pipeline by promoting adequate consideration of the potential safety impacts of the proposed land use or property development on the pipeline and to raise awareness of the potential safety impacts of the transmission pipeline on the proposed land use or development so they can be taken into account during planning and design. *Partnering to Further Enhance Pipeline Safety In Communities Through Risk-Informed Land Use Planning: Final Report of Recommended Practices* (November 2010), pp. 25=26.

<https://primis.phmsa.dot.gov/comm/publications/PIPA/PIPA-Report-Final-20101117.pdf>. Absent site-specific information, a standard consultation zone distance, on either side of the pipeline centerline, of 660 to 1,000 feet is suggested for hazardous liquids transmission pipelines. However, it is recommended that communities develop and utilize site-specific distances for consultation zones, based on the unique characteristics for the pipeline and the area surrounding the pipeline, such as operating pressure, pipe diameter, type of product carried, and local topography. The American Petroleum Institute Recommended Practice (API RP) 1162, Public Awareness Programs for Pipeline Operators, First Edition, December 2003, includes recommendations for collaboration among pipeline operators, property owners/developers and emergency response officials that may be helpful in developing criteria for a planning area. API RP 1162 applies within 660’ of a hazardous liquid pipeline.

<https://mycommittees.api.org/standards/pipeline/1162%20Links/1162nonprintable.pdf>.

While the consultation zone model ordinance was crafted to apply to new development near existing pipelines, **a consultation requirement for new hazardous liquids pipelines** could be adopted as part of a county’s zoning regulations, requiring that prior to filing an application for a conditional use permit or a rezoning, the applicant provide notice to all property owners within a set distance (for example, 660 feet from proposed pipe centerline) and conduct at least one pre-application meeting with those stakeholders. The goal of the consultation is to promote adequate consideration of the potential safety impacts of the proposed land use or property development from the proposed pipeline and raise awareness of the potential safety impacts of the transmission pipeline on the proposed land use or development so they can be taken into account during the pipeline planning and design.

Regulating New Pipeline Routing And Controlling Use Of Existing And Converted Pipelines Through Adoption of Zoning Standards

As an alternative to or in coordination with the use of conditional use permits, a community could amend the zoning code to identify in which zoning classifications a hazardous liquids pipeline is a permitted use and could adopt special conditions. This approach would provide less individualized scrutiny than the conditional use process, since permitted uses with special standards typically require, at most, staff level review and allow staff-level approval.

Another alternative, which has been adopted in Boyle County, Kentucky, is a hybrid of the zoning district and conditional use permitting process. New or converted hazardous liquids pipelines are not allowed in certain zones and are allowed in others provided that a conditional use permit is approved.

A third alternative would be to create a new “hazardous liquids pipeline corridor” zoning classification as a “floating zone,” meaning that it is not attached to a particular property but is a proposed zone that would be overlaid through existing zones and would requiring planning commission and legislative body approval for rezoning in order to allow the proposed pipeline project. The corridor width could either be fixed by regulation or variable. The zoning classification could be limited to “hazardous liquids” or could include “intrastate natural gas pipelines” as

well, since neither is subject to FERC jurisdiction with respect to the routing of a pipeline. The classification can be limited to hazardous liquids pipelines, since there is a rational basis for distinguishing the two in terms of the risks posed to land and water resources from the latter as compared to the former.

Setbacks could be required in order to assure compatibility of the proposed pipeline corridor with nearby land uses in such matters as noise, impact on water resources, and impact on nearby land use and development.

While some communities have established firm setbacks of X feet, the better approach would be to establish setbacks on a project-specific basis, using accepted hazard analysis software to identify the area of potential impact in the event of a pipeline spill. The applicant would be required to submit a hazard analysis considering the volume of liquid that might be released (based on flow rates, spill detection time, pipeline shutdown time, and drain down volume), and where the spilled liquid would go (considering overland flow based on flow resistance, seepage and retention in soil, direction and speed of flow, existing drainage systems, flow barriers and fluid properties).

The zoning regulations could identify those resources that could not be within the area of potential impact, such as private, semi-public or public surface or groundwater withdrawals, wellhead protection areas, wetlands, parks, wildlife management areas, cultural or historic resources, areas of unstable geology or geography, and other areas deemed to be incompatible based on the potential for a release of hazardous liquids from a pipeline.

The standards for the new zoning classification could also address many of the issues that are mentioned above in the context of the conditional use process.

Would The Acquisition of Easements For A Contemplated Pipeline Project Qualify As A Nonconforming Use?

In many instances, local governments find out about a proposed pipeline construction or conversion proposal only after the company has begun to acquire easements needed for the project. Absent provisions in zoning laws addressing the

construction and conversion of hazardous liquids pipelines, the community may feel constrained to adopt such provisions quickly. The acquisition of easements, by itself, does not give the proposed pipeline “non-conforming” status protection against new restrictions on land use. Kentucky’s law is typical in this regard: a “nonconforming use or structure” is defined in KRS 100.111 to mean an activity or a building, sign, structure, or a portion thereof which lawfully existed before the adoption or amendment of the zoning regulation, but which does not conform to all of the regulations contained in the zoning regulation which pertain to the zone in which it is located.

KRS 100.253 is typical of state statutes concerning zoning and pre-existing land uses, and exempts as nonconforming uses only “[t]he lawful use of a building or premises, existing at the time of adoption of any zoning regulations affecting it[.]” The acquisition of an easement in anticipation of potentially constructing a pipeline would not make the use “existing” under Kentucky law, nor under most state laws. As the Court noted in *Perkins v. Joint City-Council Planning Commission*, 480 S.W.2d 166 (Ky. 1970):

The general rule is that for property to qualify as nonconforming use the use must have been actually demonstrated prior to the zoning ordinance. Mere contemplation of use of the property for a specific purpose is not sufficient to place it in a nonconforming-use status. *Smith v. Juillerat*, 161 Ohio St. 424, 119 N.E.2d 611 (1954). Nor is the purchase of the property accompanied by an intent to use it for a specific purpose sufficient. *Edelstein v. Dade County, Fla. App.*, 171 So.2d 611 (1965). An exception to the rule recognized by many jurisdictions is where substantial construction has been made on the property or substantial expenses incurred relating directly to the construction prior to the ordinance.

Id. at 168.

Would a pipeline converted from natural gas transmission to natural gas liquids transmission use after the effective date of a county or city zoning ordinance be “grandfathered” as a “nonconforming use?”

One question that arises is whether an existing gas pipeline proposed for conversion to hazardous liquids would be protected from subsequently adopted zoning regulation as a “nonconforming use.” To the extent that a pipeline was in existence and being utilized for natural gas (methane) transmission at the time that a zoning ordinance were adopted, the conversion of that gas transmission line to a different and more “intense” use would likely void any nonconforming status.

As noted above, the federal Office of Pipeline Safety 2010 Report on pipeline risk and local development planning noted that the potential consequences to host communities of transportation of hazardous liquids in pipelines are different than those associated with natural gas pipelines.

Additionally, the Pipeline and Hazardous Materials Safety Administration with the U.S. Department of Transportation has issued specific guidance on flow reversals, product changes, and conversion to service of natural gas pipelines to natural gas liquids transmission, noting the potential “significant impact these changes may have on the integrity of a pipeline.” That guidance can be found here at <http://www.oceweb.com/PLS/2014Gas/Guide-Flo%20Rev-Prod%20Ch-Conver.pdf>

Kentucky law is typical of how state zoning statutes treat existing uses that become “nonconforming” by virtue of subsequently adopted zoning regulation. KRS 100.253 governs the legal status of “existing nonconforming use,” providing in relevant part that

(1) The lawful use of a building or premises, existing at the time of the adoption of any zoning regulations affecting it, may be continued, although such use does not conform to the provisions of such regulations, except as otherwise provided herein.” With one exception not applicable here, the Board of Zoning Adjustment is prohibited from allowing “the enlargement or extension of a nonconforming use beyond the scope and area of its operation at the time the regulation which makes its use nonconforming was adopted[.]”

As noted in *Attorney General v. Johnson*, 255 S.W.2d 305 (Ky. 1962), the policy and spirit of zoning law is that nonconforming uses be eliminated over time, and

that they not be expanded or enlarged. The conversion of a natural gas pipeline to carry natural gas liquids is a more intense land use than the transmission of natural gas. Where natural gas leakage poses an explosion or fire hazard, the heavier and more volatile nature of natural gas liquids presents an asphyxiation, fire, explosion, and surface and groundwater contamination potential that differs from, and is greater than that of, methane.

As noted in *Am Jur 2d Zoning and Planning*,

the right to continue a nonconforming use of property does not authorize a different use inconsistent with zoning regulations, and there is no constitutionally protected right to change one nonconforming use to another use not allowed by the zoning ordinance. An existing nonconforming use therefore cannot be changed to another use that does not conform to the zoning law in existence at the time of the proposed change in use.

Am Jur. 2d Zoning and Planning Sec. 522.

The discussion in *Am.Jur.2d* concerning changes in existing nonconforming uses provides useful criteria by which to judge whether a proposed change in use is material. It supports the conclusion that the conversion, product change, and flow reversal proposed in converting a natural gas pipeline to a natural gas liquids pipeline represents a change in use that eliminates the legal nonconforming status of the property use and requires adherence to an ordinance requiring a conditional use permit for new or converted hazardous liquids pipelines:

§ 553 Change in form or kind of use; insubstantial change

A change of use of property eliminates the exemption of a legal nonconforming use from recently enacted zoning ordinances. As a matter of law, when an owner of a nonconforming use modifies that use, the municipality is entitled to terminate the entire nonconforming use. Thus, in order for a nonconforming use of property to retain its lawful character once applicable zoning law changes, it must continue in essentially the same form

as when it began.

A proposed change of use, to qualify as a continuation of an existing nonconforming use, must be sufficiently similar to the nonconforming use as not to constitute a new or different use. Although a substantially different use is not permitted, the proposed use need not be identical to the existing use. Slight changes of use are permitted, and a change in use is permissible when it involves nothing more than a conversion from one nonconforming use to a use that is substantially the same as the prior use. For example, a facility providing care for elderly persons with age-related mental illness does not lose its status as a nonconforming use when it changes its function to provide care and treatment for younger residents with mental illnesses.

In deciding whether a change of use is within the scope of the established nonconforming use, consideration may be given to such factors as: (1) the extent to which the use in question reflects the nature and purpose of the preexisting nonconforming use; (2) whether the use at issue is merely a different manner of using the original nonconforming use or whether it constitutes a use that is different in character, nature, and kind; and (3) whether the use will have a substantially different effect on the neighborhood. The degree to which the original nature and purpose of an undertaking remains unchanged largely determines whether there has been a change in the preexisting nonconforming use.

Id.

Utilizing these criteria, conversion of a natural gas transmission pipeline to a hazardous liquids pipeline would appear to void the legal nonconforming status of the land use and would require compliance with any ordinance regulating the location or use of land for hazardous liquids transmission by pipeline.

In conclusion, the use of planning and zoning powers to regulate the siting of new hazardous liquids pipelines and the conversion of existing gas pipelines to hazardous liquids service, is an important tool that is often overlooked by communities.

Below is a link to the Boyle County, Kentucky zoning ordinance regarding hazardous liquids pipelines that can provide some guidance to local officials in seeking to plan for and regulate such hazardous liquids pipelines. Boyle County uses a combination of limiting new or repurposed hazardous liquids pipelines to certain zones and requiring a conditional use permit within those zones. The applicable provisions are at pp. 5-45 through 5-47. https://7c9ca385-272b-46b8-b170-b15704dfecbb.filesusr.com/ugd/c16085_2d83294409f94cb3a0e8ad2aac79ab4e.pdf