IN THE SUPREME COURT OF PENNSYLVANIA

No. 63 MAP 2012 and 64 MAP 2012

Robinson Township, Washington County, Pennsylvania, Brian Coppola, Individually and in his Official Capacity As Supervisor Of Robinson Township, Township of Nockamixon, Bucks County, Pennsylvania, Township of South Fayette, Allegheny County, Pennsylvania, Peters Township, Washington County, Pennsylvania, David M. Ball, Individually and in his Official Capacity as Councilman of Peters Township, Township of Cecil, Washington County, Pennsylvania, Mount Pleasant Township, Washington County, Pennsylvania, Borough of Yardley, Bucks County, Pennsylvania, Delaware Riverkeeper Network, Maya Van Rossum, the Delaware Riverkeeper, Mehernosh Khan, M.D., *Appellees*

v.

Commonwealth of Pennsylvania, Pennsylvania Utility Commission, Robert F. Powelson, in his Official Capacity as Chairman of the Public Utility Commission, Office of the Attorney General of Pennsylvania, Linda L. Kelly, in her Official Capacity as Attorney General of the Commonwealth of Pennsylvania, Pennsylvania Department of Environmental Protection and Michael L. Krancer, in his Official Capacity as Secretary of the Department of Environmental Protection, *Appellants*

Appeal from the order of Commonwealth Court at No. 284 MD 2012 dated July 26, 2012.

Brief of Amicus Curiae, The Pennsylvania Coal Alliance

Kevin J. Garber, Esquire
Pa. ID No. 51189
Blaine A. Lucas, Esquire
Pa. ID No. 35344
Lawrence H. Baumiller, Esquire
Pa. ID No. 200387
Babst, Calland, Clements & Zomnir, P.C.
Two Gateway Center, 6th Floor
Pittsburgh, Pennsylvania 15222
(412) 394-5400

Counsel for Amicus Curiae,
The Pennsylvania Coal Alliance

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

The Pennsylvania Coal Alliance ("PCA") files this brief as *Amicus Curiae* pursuant to Pa. R.App.P. 531, in support of the appeals of the Commonwealth of Pennsylvania, the Pennsylvania Public Utility Commission, the Office of the Attorney General, the Pennsylvania Public Utility Commission, and various representatives of those entities in their official capacities (the "Commonwealth Parties"), from the Commonwealth Court's July 26, 2012 order declaring Section 3304 of Act 13 of 2012 ("Act 13") unconstitutional.

The municipalities which are parties to this action, South Fayette Township, Allegheny County, Nockamixon Township and Yardley Borough, Bucks County, and Cecil Township, Mt. Pleasant Township, Peters Township, and Robinson Township, Washington County (collectively the "Municipal Parties") are creatures of the state and can only exercise those powers conferred upon them by the General Assembly. The General Assembly has the power to create municipalities, terminate them, and, between these two extremes, define and limit their powers.

The General Assembly possesses the Constitutional prerogative to completely preempt any local government regulation of oil and gas resources. However, instead it chose through the enactment of Act 13 (and specifically Chapter 33 thereof) to limit only partially the jurisdiction of the Municipal Parties and other municipalities. The legislature took this action in order to bring sorely needed uniformity to local government regulation of these resources and to stem the tide of increasingly onerous and excessive ordinances. In doing so, however, the General Assembly did not create a regulatory vacuum. In addition to authorizing continued local government regulation within the parameters of Section 3304, Act 13 imposed a number of restrictions on oil and gas operations, including a variety of new or increased distance limitations aimed at balancing the legislature's goal of encouraging oil and gas resource development with the protection of the health, safety environment and property of Pennsylvania citizens.

In invalidating Section 3304 on the basis that it is allegedly inconsistent with municipal comprehensive plans, none of which were even entered into the record, the Commonwealth Court majority turns on its head the entire structure of Pennsylvania local government, land use and preemption law. Based on the Commonwealth Court's flawed logic, an advisory non-appealable municipal comprehensive plan now can be used as the basis to thwart the express unequivocal intention of the General Assembly, not only with regard to oil and gas development, but any other regulated activity or use. The irony here is that several of the Municipality Parties' own zoning ordinances fail to meet their newly created "comprehensive plan compatibility" test.

Faced with the General Assembly's clear Constitutional power to draw the state versus local "regulatory line", the Commonwealth Court majority instead ventures into the murky waters of substantive due process. In doing so, the Court improperly assumes the role of Commonwealth "super-planner", seizing from the General Assembly its police power to set public policy with regard to oil and gas resources. Tellingly, the Commonwealth Court decision fails to cite any case, from any jurisdiction, applying either Federal of state law, which directly supports its finding that Section 3304 violates substantive due process. Similarly, the majority stretches existing Pennsylvania case law dealing with "spot zoning" on a specific property to create a new "spot use" theory based on use classifications applicable to an entire zoning district or multiple districts. There is no such precedent under Pennsylvania law, and in fact a similar argument was rejected by the Commonwealth Court in *Plaxton v. Lycoming Co. Zoning Hearing Bd.*, 986 A.2d 199 (Pa. Commw. Ct. 2010).

Affirmation of the majority's substantive due process/spot use theory will open the proverbial floodgates to litigation of every zoning use classification based on alleged comprehensive plan inconsistency, and would upend over a century of Constitutional, statutory

and case law defining the relative powers of the General Assembly and the municipalities which it creates and controls.

II. INTEREST OF AMICUS CURIAE

The PCA is a non-profit trade association organized and existing under the laws of the Commonwealth of Pennsylvania and located at 212 North Third Street, Suite 102 Harrisburg, PA, 17101. PCA represents surface and underground coal operators that produce bituminous coal mined in the Commonwealth. PCA's mission is to advance the mining and use of the Commonwealth's most abundant and economical energy resource in an environmentally responsible manner through sound legislative and regulatory policies and judicial decisions. PCA represents both large and small companies, partnerships and individuals that produce nearly 80% of the approximately 60 million tons of bituminous coal mined last year in Pennsylvania. Members of the PCA mine coal within the statutory framework established by the Pennsylvania Surface Mining Conservation and Reclamation Act, 52 P.S. § 1396.1 (2012), *et seq.*, the Bituminous Mine Subsidence and Land Conservation Act, 52 P.S. § 1406.1 (2012), *et seq.*, and several other environmental statutes including the Coal Refuse Disposal Act, 52 P.S. § 30.51 (2012), *et seq.*, and the Clean Streams Law, 35 P.S. § 691.1 (2012), *et seq.* There are over 400 underground mines, surface mines, and reprocessing sites in Pennsylvania.

The issue before the Court is critical to PCA's members and vital to the economy of the Commonwealth. Coal mining is a key industry in Pennsylvania. Pennsylvania is the fourth largest coal producing state in the United States, behind only Wyoming, West Virginia and Kentucky. Seven percent of the country's total coal output is mined in Pennsylvania. Based on data from 2008, the latest industry data available, the value of coal mined in the Commonwealth alone was estimated at $7.4 billion. The Pennsylvania mining industry last year created 41,500 direct and indirect jobs in Pennsylvania with a total payroll in excess of $2.2 billion and paid

over $70 million in local, state and federal taxes. The Commonwealth Court's decision that the General Assembly cannot adopt legislation that preempts local land use controls threatens coal mining in the same manner as it does oil and gas drilling, leaving municipalities free to adopt land use controls that will disrupt coal production because operators will be subject to a patchwork of conflicting regulations that will be contingent upon arbitrary municipal boundaries rather than on the geology of coal deposits.

III. STATEMENT OF JURISDICTION

This Honorable Court has jurisdiction to review final orders of the Commonwealth Court of Pennsylvania pursuant to 42 P.S. § 723(a) (2012).

IV. ORDERS IN QUESTION, STATEMENT OF THE SCOPE OF REVIEW AND STANDARD OF REVIEW

PCA incorporates by reference the Orders in Question, the Statement of the Scope of Review, and the Standard of Review set forth in the Briefs of the Commonwealth Parties.

V. STATEMENT OF THE QUESTION PRESENTED

Did the Commonwealth Court of Pennsylvania commit an error of law by deciding that the adoption by municipalities of optional comprehensive plans under the Municipalities Planning Code, 53 P.S. § 10101 (2012), *et seq.*, could foreclose the General Assembly from adopting legislation that preempts local zoning regulations?

Suggested Answer: Yes.

VI. STATEMENT OF THE CASE

PCA incorporates by reference the Statement of the Case set forth in the Brief of the Commonwealth Parties.

VII. ARGUMENT

A. Municipalities Are Creatures of the State and Can Only Exercise Those Powers Conferred Upon Them by the General Assembly.

By holding that Act 13 violates the Municipal Parties' right to substantive due process because it requires municipalities to allow oil and gas operations in residential districts, which allegedly would "violate" their comprehensive plans, the Commonwealth Court turned on its head the long recognized legal precept that municipalities are creatures of the state and only possess those powers conferred upon them by the General Assembly. Essentially, the Commonwealth Court ruled that municipalities, through their comprehensive plans, can dictate to the Commonwealth what police powers the Commonwealth may exercise.

Municipalities only have those powers granted by the General Assembly: "The General Assembly shall provide by general law for local government within the Commonwealth." Pa. Const. Art. 9 § 1. Pursuant to this edict (and predecessor Constitutional provisions), the General Assembly created a variety of local government classifications, and in various codes created and set forth the structure and powers of, for example, First and Second Class Townships, Boroughs, First, Second, Second A and Third Class Cities, and Home Rule Communities. As recently stated by this Court:

> As creatures of the state, municipalities have no inherent powers, but rather possess only such powers of governments as are expressly granted to them and as are necessary to carry the same in to effect.

Huntley & Huntley, Inc. v. Borough Council of the Borough of Oakmont, 964 A.2d 855, 862 (Pa. 2009) (internal citations and quotations omitted).

The principle that the Commonwealth has the ultimate authority over municipalities, including their creation *and* termination, is well settled:

> Municipal corporations are agents of the state, invested with certain subordinate governmental functions for reasons of

> convenience and public policy. **They are created, governed, and the extent of their powers determined by the legislature, and subject to change, repeal, or total abolition at its will.** They have no vested rights in their offices, their charters, their corporate powers, or even their corporate existence. This is the universal rule of constitutional law, and in no state has it been more clearly expressed and more uniformly applied than in Pennsylvania. In *Philadelphia v. Fox*, 64 Pa. 169, 180-81, this court, speaking through SHARWSOOD, J., said: "The city of Philadelphia is a municipal corporation, that is a public corporation created by the government for political purposes, and having subordinate and local powers of legislation. . . . It is merely an agency instituted by the sovereign for the purpose of carrying out in detail the objects of government, essentially a revocable agency, having no vested right to any of its powers or franchises, the charter or act of erection (creation?) being in no sense a contract with the state, and, therefore, fully subject to the control of the legislature who may enlarge or diminish its territorial extent or its functions, may change or modify its internal arrangements or destroy its very existence with the mere breath of arbitrary discretion. . . . **The sovereign may continue its corporate existence and yet assume or resume the appointments of all its officers and agents into its own hands; for the power which can create and destroy can modify and change.**"
>
> **The fact that the action of the state towards its municipal agents may be unwise, unjust, oppressive, or violative of the natural or political rights of their citizens is not one which can be made the basis of action by the judiciary.**

Commonwealth v. Moir, 49 A. 351, 352 (Pa. 1901) (quoting *Phila. v. Fox*, 64 Pa. 169, 180-81 (1870)) (emphasis added).

Simply put, the General Assembly has the power to create municipalities, to terminate all or a certain class of municipalities, and, in between those two extremes, to define the powers of those municipalities.

B. The General Assembly Has the Power to Totally or Partially Preempt Local Government Regulation of Any Activity.

"The matter of preemption is a judicially created principle, based on the proposition that a municipality, as an agent of the state, cannot act contrary to the state." *Duff v. Twp. of Northampton*, 532 A.2d 500, 503 (Pa. Commw. Ct. 1987). In determining whether a state statute

preempts a local ordinance, there are three types of preemption: express, implied or field, and conflict. *See Huntley & Huntley,* 964 A.2d at 863-864. Section 603(b) of the Pennsylvania Municipalities Planning Code (the "MPC") expressly recognizes that statewide statutes addressing mineral extraction and a variety of other activities preempt local zoning ordinances in accordance with their terms. 53 P.S. §10603(b) (2012). These statutes include the Oil and Gas Act, Surface Mining Conservation and Reclamation Act, Noncoal Surface Mining Conservation and Reclamation Act, Bituminous Mine Subsidence and Land Conservation Act, Nutrient Management Act, Agriculture Area Security Law, and An Act Protecting Agricultural Operations from Nuisance Suits and Ordinances under Certain Circumstances. *Id.*

C. The General Assembly Has Exercised Its Constitutional Prerogative to Partially Preempt Local Government Regulation of Oil and Gas Operations.

On two occasions, this Court has had the opportunity to address the question of where the General Assembly, through the former Oil and Gas Act, intended to draw the line with regard to the limits of local authority over the oil and gas industry. In *Range Resources—Appalachia, LLC v. Salem Township*, 964 A.2d 869 (Pa. 2009), the Court invalidated a local ordinance that (a) singled out the oil and gas industry for disparate treatment and (b) attempted to impose its own comprehensive regulatory scheme relative to oil and gas development. This Court stated that:

> [N]ot only does the Ordinance purport to police many of the same aspects of oil and gas extraction activities that are addressed by the [Oil and Gas Act], but the comprehensive and restrictive nature of its regulatory scheme represents an obstacle to the legislative purposes underlying the [Oil and Gas Act], thus implicating the principles of conflict preemption.

Id. at 877.

In the companion case, *Huntley & Huntley*, this Court drew a distinction of "where versus how," holding that a local ordinance that established districts in which gas wells were permitted

by conditional use was valid. *Huntley & Huntley*, 964 A.2d at 865-866. The Court found that the ordinance was not preempted because it served a different purpose than the Oil and Gas Act:

> This limitation on preemption regarding MPC-enabled legislation **appears to reflect the General Assembly's recognition**, as Appellants contend, that, while effective oil and gas regulation in service of the [Oil and Gas Act's] goals may require the knowledge and expertise of the appropriate state agency, the MPC's authorization of local zoning laws is provided in recognition of the unique expertise of municipal governing bodies to designate where different uses should be permitted in a manner that accounts for the community's development objectives, its character, and the "suitabilities and special nature of particular parts of the community." 53 P.S. § 10603(a), quoted in Brief for Appellants at 22. **Accordingly, and again, absent further legislative guidance, we conclude that the Ordinance serves different purposes from those enumerated in the Oil and Gas Act, and hence, that its overall restriction on oil and gas wells in R–1 districts is not preempted by that enactment.**

Id. (emphasis added). Thus, although this Court concluded that the then existing language of the Oil and Gas Act did not preempt the zoning ordinance there, it also clearly recognized that the General Assembly could enact legislation that further preempts a municipality's ability to zone oil and gas operations. *Huntley & Huntley* did not circumscribe the General Assembly's ultimate preemptive authority; rather, it merely attempted to ascertain the legislature's intent as to where the line was being drawn between municipal and Commonwealth regulatory jurisdiction.

Subsequent to the rulings in *Range Resources* and *Huntley & Huntley*, scores of municipalities, using the perceived opening created by the *Huntley & Huntley* decision, adopted a wide array of restrictive and often inconsistent ordinances that either facially or *de facto* excluded the industry altogether, imposed multiple and onerous setbacks, ranging anywhere from several hundred feet to a mile, imposed onerous and often unattainable noise limits singling out the industry, attempted to regulate well features and imposed a variety of environmental restrictions, imposed excessive fees, imposed both locational and operational restrictions on mid-stream facilities, prohibited or limited seismic testing, and imposed road restrictions that singled

out the industry or were otherwise inconsistent with the requirements of the Pennsylvania Vehicle Code. *See* Blaine A. Lucas, *Survey of Recent Pennsylvania Municipal Ordinance Activity Impacting the Development of the Marcellus Shale Play*, THE PIOGA PRESS, 22-25 (Oct. 2011), http://content.yudu.com/Library/A1ue7e/PIOGAPressOctober201 /resources/22.htm.

The General Assembly enacted Chapter 33 of Act 13 in order to curb the excesses in many of these municipal ordinances and to bring at least some degree of local ordinance uniformity to oil and gas development in the Commonwealth. It did so by reenacting with some modification the preemption provision of the former Oil and Gas Act (Act 13 § 3302), adding a preemption provision based on state and federal "environmental acts" (Act 13 § 3303), and adding requirements regarding the "reasonable development" of oil and gas resources[1] (Act 13 § 3304). These three sections, especially Section 3304, provided the "further legislative guidance" referenced in *Huntley & Huntley*, moving and clarifying the legislature's desired line between municipal and Commonwealth regulation of oil and gas resources. Indeed, although it did not do so, the legislature would have been within its Constitutional prerogative to completely preempt any local regulation of the oil and gas industry, an approach taken by the legislatures in Ohio and West Virginia.[2] In fact, one of the original legislative drafts of what eventually became Act 13 would have done precisely this, providing that:

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[1] Section 603(i) of the MPC requires that "[z]oning ordinances shall provide for the reasonable development of minerals in each municipality." 53 P.S. § 10603(i) (2012). With the passage of Act 13, the General Assembly merely defined what constitutes "reasonable development."

[2] The Ohio Oil and Gas Law preempts all local government regulation of not only oil and gas wells, but also upstream and midstream activities. ORC Section 1509.02 (2012) creates the Division of Oil and Gas resources within the Ohio Department of Natural Resources, which has the exclusive authority to regulate all aspects of the industry in the state:

> The division has sole and exclusive authority to regulate the permitting, location, and spacing of oil and gas wells and production operations within the state, excepting only those activities regulated under federal laws for which oversight has

§ 3272. Local ordinances.

(a) General rule.--Except as provided under subsection (b), this chapter and any other environmental law are [sic] of Statewide concern and [sic] occupy the entire field of regulation regarding oil and gas operations, to the exclusion of all local rules, regulations, codes, agreements, resolutions, ordinances and other local enactments. No local rule, regulation, code, agreement, resolution, ordinance or other local enactment of any municipality may regulate oil and gas operations. All local rules, regulations, codes, agreements, resolutions, ordinances and other local enactments that regulate oil and gas operations are hereby superseded and preempted.

(b) Exception.--Subsection (a) shall not apply to ordinances adopted under the act of October 4, 1978 (P.L.851, No.166), known as the Flood Plain Management Act.

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been delegated to the environmental protection agency and activities regulated under sections 6111.02 to 6111.029 of the Revised Code. The regulation of oil and gas activities is a matter of general statewide interest that requires uniform statewide regulation, and this chapter and rules adopted under it constitute a comprehensive plan with respect to all aspects of the locating, drilling, well stimulation, completing, and operating of oil and gas wells within this state, including site construction and restoration, permitting related to those activities, and the disposal of wastes from those wells.

(emphasis added).

The Horizontal Well Act, which the West Virginia legislature passed in December 2011, similarly preempts local regulation of the unconventional oil and gas industry. W. Va. Code § 22-6A-6(b) (2012) provides:

> Except for the duties and obligations conferred by statute upon the shallow gas well review board pursuant to article eight, chapter twenty-two-c of this code, the coalbed methane review board pursuant to article twenty-one of this chapter, and the oil and gas conservation commission pursuant to article nine, chapter twenty-two-c of this code, the secretary [of the Department of Environmental Protection] has sole and exclusive jurisdiction to regulate the permitting, location, spacing, drilling, fracturing, stimulation, well completion activities, operation, and all other drilling and production processes, plugging and reclamation of oil and gas wells and production operations within the state.

(emphasis added).

H.B. 1950, Printer No. 2689, 2011 Leg. (Pa. 2011) (emphasis added), *available at* http://www.legis.state.pa.us/CFDOCS/Legis/PN/Public/btCheck.cfm?txtType=PDF&sessYr=2011&sessInd=0&billBody=H&billTyp=B&billNbr=1950&pn=2689.

In adopting Section 3304, the General Assembly chose to assert for itself partial jurisdiction over the "where" part of the regulatory equation. However, in doing so it did not abandon locational regulation of oil and gas operations. Section 3304 permits local governments to continue to regulate the location of oil and gas wells with 500 feet of existing buildings in residential zoning districts, as well as the location of compressor stations and processing plants within certain distances of existing buildings and property lines. Act 13 §§ 3304(b)(5.1), (7) & (8). More critically, in Chapter 32 the General Assembly imposed a variety of new or increased distance limitations on oil and gas operations, including:

- Wells may not be drilled within 200 feet, or, in the case of an unconventional well, 500 feet measured horizontally from the vertical well bore to an existing building or water well;

- Unconventional gas wells may not be drilled within 1,000 feet measured horizontally from the vertical well bore to any existing water well, surface water intake, reservoir or other water supply extraction point used by a water purveyor without the written consent of the water purveyor;

- No well site may be prepared or well drilled within 100 feet or, in the case of an unconventional well, 300 feet from the vertical well bore or 100 feet from the edge of the well site, whichever is greater, measured horizontally from any solid blue lined stream, spring or body of water as identified on the most current 7 ½ minute topographic quadrangle map of the United States Geological Survey;

- The edge of the disturbed area associated with any unconventional well site must maintain a 100-foot setback from the edge of any solid blue lined stream, spring or body of water as identified on the most current 7 ½ minute topographic quadrangle map of the United States Geological Survey; and

- No unconventional well may be drilled within 300 feet of any wetlands greater than one acre in size, and the edge of the disturbed area of any well site must maintain a 100-foot setback from the boundary of the wetlands.

Act 13 §§ 3215(a) & (b).

The multitude of dimensional restrictions contained in Section 3304 and Chapter 32 reflect a legislative intent to encourage oil and gas resource development, while at the same time protecting "the health, safety, environment and property of Pennsylvania citizens." Act 13 § 3202(1). To the extent "use compatibility" is ever an appropriate subject for judicial Constitutional scrutiny, Section 3304 and the balance of Act 13 certainly pass the rational basis test. *See* discussion at pages 16-18, *infra.*

D. Alleged Inconsistency With an Advisory, Non-Appealable Municipal Comprehensive Plan Is Not a Basis For Invalidating a Statewide Statute Comprehensively Regulating an Activity.

1. Comprehensive Plans Are Merely a Guideline and Do Not Have the Force of Law.

The Commonwealth Court opinion below elevates a municipal comprehensive plan to a status and legal authority well beyond that conferred upon it under Pennsylvania law. The majority starts by incorrectly stating that "the MPC requires that every municipality adopt a comprehensive plan," citing to Section 301 of the MPC (53 P.S. § 10301). *See Robinson Twp. v. Commonwealth*, No. 284 M.D. 2012, 2012 WL 3030277, at *12 (Pa. Commw. Ct. Jul. 26, 2012). Although Section 301 of the MPC sets forth the mandatory and optional elements for a comprehensive plan, it does not require that a municipality adopt one. "While [MPC] Section 601 . . . could be read as requiring a preexisting comprehensive plan, a number of other sections of the [MPC] clearly assume that a zoning ordinance may be in existence although the community has adopted only a part—or none—of its comprehensive plan." Robert S. Ryan, *Pennsylvania Zoning Law and Practice* § 3.2.14 (George T. Bisel Co., Inc. 1992). According to

statistics tracked by the Pennsylvania Department of Community and Economic Development, there are 193 municipalities in Pennsylvania that have a zoning ordinance but do not have a comprehensive plan. *County/Municipal Planning, Zoning and Building Report*, PA. DEP'T OF CMTY. AND ECON. DEV., http://munstatspa.dced.state.pa.us/ReportViewer.aspx?R=CountyMuniBuilding&rendering=H (last visited Aug. 31. 2012). Conversely, there are 338 municipalities with a comprehensive plan but no zoning ordinance. *Id.*

Because a comprehensive plan is advisory, it is not appealable. *Penny v. Warrington Twp. Bd. of Supervisors*, 21 Bucks Co. L. Rep. 322, 326 (Ct. Com. Pl. 1971), *cited with approval in Saenger v. Planning Comm'n of Berks Co.*, 308 A.2d 175 (Pa. Commw. Ct. 1973). Moreover, although a zoning ordinance is to be "generally consistent" with the municipal comprehensive plan (*see* MPC § 603(j) (53 P.S. § 10603(j) (2012)), "no action by the governing body of a municipality shall be invalid nor shall the same be subject to challenge or appeal on the basis that such action is inconsistent with, or fails to comply with, the provision of a comprehensive plan." MPC § 303(c), 53 P.S. § 10303(c) (2012).

2. The Commonwealth Court Rendered Its Decision on Comprehensive Plan Compatibility Without Admitting Into the Record Any Such Plan or Any Other Evidence.

Perhaps the most striking thing about the Commonwealth Court's decision is that it reached its finding regarding Section 3304's lack of alleged comprehensive plan compatibility without apparently admitting into the record or otherwise discussing or analyzing the comprehensive plan of any of the Municipal Parties or any other municipality. Nor was there any expert planner testimony on compatibility of uses. Indeed, there was no evidence of record that supported the conclusion that natural gas exploration and production is inconsistent with uses in a residential district, either as identified in a comprehensive plan or in a zoning ordinance. In many municipalities, oil and gas related operations, as well as other extractive

industries, are authorized in residential districts as either permitted uses, conditional uses or special exceptions.

Moreover, oil and gas operations are not an "industrial" use. While there are short term impacts during well site development, the long range impacts, compared with manufacturing uses, commercial uses, or even many residential uses, are minimal. Under the North American Industry Classification System, "Mining, Quarrying and Oil and Gas Extraction" is a separate classification from "Manufacturing." *See* UNITED STATES CENSUS BUREAU, http://www.census.gov/econ/census07/ (last visited Aug. 31, 2012). Many comprehensive plans simply do not mention oil and gas operations or other extractive industries at all. If such a use is not even mentioned in a comprehensive plan, how is there even a basis to conclude that oil and gas operations are incompatible with uses within a particular zoning district?

3. Several of the Municipal Parties' Zoning Ordinances Fail Their Own "Comprehensive Plan Compatibility" Test.

In invalidating Section 3304 based on alleged incompatibility with comprehensive plans, none of which was even of record before it, the Commonwealth Court imposed on the General Assembly a standard that is not even applied to the municipalities which it created. *See* MPC § 603(c), 53 P.S. §10603(c) (2012). Ironically, if such a standard was applied, many of the Municipal Parties' own zoning ordinances would be invalid.

For example, Cecil Township authorizes oil and gas development, including wells, as a conditional use[3] in all zoning districts, including residential ones, subject to an overlay district defined by distance from buildings. CECIL, PA., ORDINANCE 2-2011 (Sept. 6, 2011) *available at*

[3] A conditional use is a permitted use, so long as the proposed use satisfies the standards for such a use set forth in the zoning ordinance. *Ligo v. Slippery Rock Twp.*, 936 A.2d 1236, 1242 (Pa. Commw. Ct. 2007). Designation as a conditional use evidences a legislative decision that the particular use is appropriate for the zoning district. *Bailey v. Upper Southampton Twp.*, 690 A.2d 1324, 1326 (Pa. Commw. Ct. 1997).

http://www.ceciltownship-pa.gov/documents/ord201102.pdf.[4] If the concept of "compatibility" with residential uses is properly a matter of judicial scrutiny, Act 13 does far more than Cecil's ordinance to promote it. Cecil's overlay district is based on a distance of 500 feet from a building and 2,000 feet from a school. One of the very provisions of Act 13 invalidated by the Commonwealth Court, Section 3304(b)(5.1), largely mirrors the same 500 foot building distance requirement contained in the Cecil overlay.[5] In addition, Chapter 32 of Act 13 provides for a variety of additional distance limitations from water wells, water purveyor facilities, streams, springs, bodies of water and wetlands, none of which are addressed in the Cecil Township zoning ordinance. *See* discussion at pages 11-12, *supra*.

Similarly, Robinson Township authorizes oil and gas wells as a conditional use in all zoning districts, including the R-A Residential/Agricultural and R Residential Districts, subject to setback requirements of 50 feet from the property line and 300 feet from an adjoining residence. ROBINSON, PA. ZONING ORDINANCE, § 27-1811 (Nov. 7, 1983, as amended) (on file with author). Mt. Pleasant Township is even less restrictive. Its zoning ordinance authorizes oil and gas wells as a conditional use in every zoning district, including the R-1 Rural Residential, R-2 Suburban Residential, R-3 Neighborhood Residential, and R-4 Neighborhood Core Districts, with no specific distance limitations. MT. PLEASANT, PA. ZONING ORDINANCE, §§ 200-15, 200-22, 200-29, 200-36, 200-43, 200-51, 200-59 (Jan. 24, 2007, as amended) *available at* http://www.ecode360.com/MO2183.

Thus, it should be abundantly clear that the Municipal Parties' objections to Section 3304 have little to do with "comprehensive plan compatibility." Although they will not admit it, their

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[4] "The ordinances of municipal corporations of the Commonwealth shall be judicially noticed." 42 Pa. C.S. § 6107(a) (2012).

[5] CECIL, PA., ORDINANCE 2-2011 (Sept. 6, 2011) *available at* http://www.ceciltownship-pa.gov/documents/ord201102.pdf.

true objection is with General Assembly's assertion of its Constitutionally unassailable authority to preempt (albeit partially) local government regulation of oil and gas resources.

E. The "Reasonable Development of Oil And Gas Resources" Provisions of Section 3304 of Act 13 Do Not Violate Substantive Due Process.

As discussed above, municipalities are creatures of the state and have only those powers granted by the General Assembly. *Huntley & Huntley*, 964 A.2d at 862. As such, there is no property interest in any such power granted by the state. *See Moir*, 49 A. at 352 (Pa. 1901). If there is no deprivation of a constitutionally protected property interest, there can be no violation of the right to substantive due process. *See Kahn v. State Bd. of Auctioneer Examiners*, 842 A.2d 936, 946 (Pa. 2004).

Without any precedent remotely on point, the Commonwealth Court held that the General Assembly's legislating of the outer bounds of municipal power is a violation of the Substantive Due Process Clause of the Pennsylvania Constitution. That clause provides that, "[a]ll men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness." Pa. Const. Art. 1 § 1. There is no reported Pennsylvania case where this Constitutional provision was used to invalidate any statewide environmental statute regulating any industry, or limiting in any fashion the power of the Commonwealth over municipalities.

Nor do any of the other cases cited by the majority support its conclusion that Section 3304 violates substantive due process. Although the United States Supreme Court's seminal decision in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), is referenced by the majority, that case did not involve any form of due process claim. Instead, the Court there upheld the facial validity of a zoning ordinance which divided the village into a number of zoning districts and limited the permissible uses within each. In so finding, the *Euclid* Court

merely ruled that this one particular type of zoning control constituted a valid exercise of the police power. However, the Commonwealth Court majority morphs this relatively well-settled point of law into the opposite proposition—that land use controls must be structured in this fashion. The type of land use ordinance utilized in *Euclid* is, not surprisingly, commonly referred to in planning parlance as Euclidean zoning. It is not without its detractors, however, and is often criticized as contributing to suburban sprawl. As a result, in recent years a number of other forms of land use controls have gained favor, including performance zoning and traditional neighborhood mixed use concepts. Section 3304's and Chapter 32's implementation of a regulatory regime based in large part on distance limitations combined with some zoning district restrictions is no less as a rational way to prevent the "pig in the parlor" than a rigid application of Euclidean zoning concepts.

The other cases cited by the majority similarly had nothing to do with substantive due process. *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725 (1995) was a case brought under the Federal Fair Housing Act and did not involve substantive due process claims. *In re Realen Valley Forge Greenes Associates*, 838 A.2d 718 (Pa. 2003) was a spot zoning case.

In stark contrast to the Commonwealth Court's finding of a state law due process violation, a legislative act will withstand a Federal substantive due process challenge "if the government identifies the legitimate state interest that the legislature could rationally conclude was served by the statute." *County Concrete Corp. v. Twp. of Roxbury*, 442 F.3d 159, 169 (3d Cir. 2006). Here, Section 3304 is a clearly rational mechanism whereby the General Assembly is implementing its goal of optimal development of oil and gas resources consistent with the protection of citizen safety and property rights and the environment. Although they might

disagree with the specific manner in which these goals are implemented, it is not within the purview of the courts to second guess that legislative determination.[6]

F. Spot Zoning is Not Present Here Because Act 13 Did Not Require That Two Similar Tracts of Land Be Treated Differently.

The Commonwealth Court relies upon *In re Realen Valley Forge Greenes Associates* for the proposition that Section 3304 creates an illegal "spot use." *See Robinson Twp.*, at *14, footnote 21. Pennsylvania courts have never recognized such a concept. In *In re Realen Valley Forge Greenes Associates*, this Court observed that, "[i]n spot zoning, the legislative focus narrows to a single property and the costs and benefits to be balanced are those of particular property owners." *Id.* at 728 (emphasis added). Spot zoning involves the "singling out of one lot or a small area for different treatment from that accorded to similar surrounding land indistinguishable from it in character, for the economic benefit of the owner of that lot or to his economic detriment," and "the most important factor in an analysis of a spot zoning question is whether the rezoned land is being treated unjustifiably different from similar surrounding land." *Id.* Section 3304 merely requires that municipalities authorize oil and gas operations in certain zoning districts either as a permitted use or as a conditional use, subject to a number of distance limitations, which is not the same thing as treating similar parcels differently for no justifiable reason.

The only reported Pennsylvania appellate Court case where a party argued that an ordinance amendment was invalid spot zoning because it authorized a use in certain zoning districts was *Plaxton v. Lycoming Co. Zoning Hearing Bd.*, 986 A.2d 199 (Pa. Commw. Ct. 2010). In *Plaxton*, the Commonwealth Court rejected the claim that a county zoning ordinance that authorized wind energy facilities as a permitted use in certain residential and agricultural

[6] Similarly, an executive action will withstand a Federal substantive due process challenge unless the action "shocks the conscience". *United Artists Theatre Circuit, Inc. v. Twp. of Warrington*, 316 F.3d 392, 399-400 (3d Cir. 2003).

districts constituted spot zoning. The Court distinguished this situation from a spot zoning case because it did not deal with a particular piece of property, stating that "the ordinance amendments did not rezone the property at issue at all," and that, "[t]o the contrary, the ordinance amendments permit a use by right in several zoning districts where that use was not specifically allowed under the prior ordinance." *Id.* at 210-211. The Court also rejected a claim that the ordinance amendment was invalid because it was inconsistent with the county comprehensive plan, citing to Section 303(c) of the MPC (53 P.S. § 10303(c)) (2012). *Id.* at 211-212. *See* discuss at page 13, *supra.*

G. If Upheld, the Commonwealth Court's "Comprehensive Plan Compatibility" Test Will Open Up the Floodgates to Litigation of Every Zoning Ordinance Use Classification and Every Statewide Environmental Statute.

If the Commonwealth Court's ruling is taken to its logical extreme, any existing zoning ordinance that authorizes oil and gas operations in what it labeled a residential district would be invalid as being inconsistent with its comprehensive plan.[7] Conversely, if a municipality has adopted a comprehensive plan, but not a zoning ordinance, is any oil and gas operation in an area delineated as residential in the plan a violation of substantive due process? However, the inevitable precedential impact will not stop with the oil and gas industry. The majority's decision opens the floodgates for lawsuits challenging municipal ordinances and land use decisions based on alleged inconsistency with comprehensive plans for <u>any</u> use. This is of grave

[7] There are many such ordinances in the Commonwealth. For example, in Lycoming County, a focal point for unconventional gas well drilling, the County Zoning Ordinance authorizes oil and gas development in almost all of its zoning districts, including residential ones, as either a permitted use by right or by special exception. Lycoming Co. Zoning Ordinance, § 3120, *available at* http://www.lyco.org/Portals/1/PlanningCommunityDevelopment/Documents/zoning/lycoming_co_zoning_ord_feb2011_an.pdf.

concern to the PCA and its members, as coal mining and other extractive industries probably would be next in line for challenge by those opposed to their operations.[8]

The impact of an affirmation of the Commonwealth Court majority's decision will not stop with one or two industries. Zoning ordinances often list literally dozens of uses as permitted in a specific zoning district by right, conditional use, or special exception. They can include various forms of residential, commercial, institutional, manufacturing and extractive uses, with some mix of these uses being authorized in various districts. For example, some ordinances, such as Mt. Pleasant's, authorize single family residences as a permitted use in a commercial zoning district.[9] Others may permit a variety of non-residential uses in residential districts. Based on the Commonwealth Court's logic, any use classification in a zoning ordinance can be attacked on compatibility grounds. If the Commonwealth Court's decision is affirmed, it also means that the comprehensive plan can be used to challenge and trump virtually every statewide environmental statute, notwithstanding the fact that in those statutes, and in Section 603(b) of the MPC, the General Assembly indicates a clear intention to the contrary.

In summary, the majority decision turns the entire structure of local government, land use and preemption law upside down, and allows a municipal advisory (and typically very general) document, which is not appealable, and which is of no legal effect vis-à-vis a municipal ordinance, to trump the actions of the legislative body that created the municipal entity in the first instance. Affirmation of that decision quite literally will turn the judiciary into the Commonwealth's super-planners, rendering decisions on the validity of legislative enactments and local zoning ordinances based on vague notions of "compatibility". In keeping with the

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[8] For example, the South Fayette Zoning Ordinance presently authorizes "mineral removal", defined to include virtually any extractive industry other than oil and gas, as a special exception in the Township's R-1 Rural Residential District.

[9] Mt. Pleasant Zoning Ordinance, § 200-51A.

Commonwealth Court's animal husbandry theme, this is the ultimate case of the "tail wagging the dog."

VIII. CONCLUSION

For the foregoing reasons, the Court should reverse the order of the Commonwealth Court granting summary relief to the Municipal Parties on Counts I-III of the Petition for Review, and enter summary relief for the Commonwealth Parties.

Respectfully Submitted,

Kevin J. Garber, Esquire
Pa. ID No. 51189
Blaine A. Lucas, Esquire
Pa. ID No. 35344
Lawrence H. Baumiller, Esquire
Pa. ID No. 200387
Babst, Calland, Clements & Zomnir, P.C.
Two Gateway Center, 6th Floor
Pittsburgh, Pennsylvania 15222
(412) 394-5400

Counsel for Amicus Curiae,
The Pennsylvania Coal Alliance

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 4th day of September, 2012, true and correct copies of the foregoing document were served by first class mail, postage pre-paid upon the following:

John M. Smith, Esquire
Jennifer Lynn Fahnestock, Esquire
Smith Butz, LLC
125 Technology Drive, Suite 202
Bailey Center I, Southpointe
Canonsburg, PA 15317

Jonathan M. Kamin, Esquire
Goldberg, Kamin & Garvin LLP
1806 Frick Building
Pittsburgh, PA 15219

Jordan B. Yeager, Esquire
Lauren M. Williams, Esquire
Curtin & Heefner LLP
Heritage Gateway Center
1980 South Eaton Road, Suite 220
Doylestown, PA 18901

William A. Johnson, Esquire
23 East Beau Street
Washington, PA 15301

Susan J. Kraham, Esquire
Columbia University School of Law
435 West 116th Street
New York, NY 10027

Howard G. Hopkirk
Senior Deputy Attorney General
Pennsylvania Office of Attorney General
Litigation Section
15th Floor, Strawberry Square
Harrisburg, PA 17120

James J. Rohn, Esquire
Mathew H. Haverstick, Esquire
Conrad O'Brien PC
1500 Market Street
Centre Square, West Tower, Suite 3900
Philadelphia, PA 19102-1021

Devin J. Chwastyk, Esquire
McNees, Wallace & Nurick, LLC
100 Pine Street
P.O. Box 1166
Harrisburg, PA 17108-1166

Robert A. Jackel
3614 Baring Street, Apartment 4
Philadelphia, PA 19104

Kevin J. Garber, Esquire
Blaine A. Lucas, Esquire
Lawrence H. Baumiller, Esquire