IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

No. 63 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, and MEHERNOSH KAHN, M.D.,

v.

COMMONWEALTH OF PENNSYLVANIA, PENNSYLVANIA PUBLIC UTILITY COMMISSION, ROBERT F. POWELSON, in his Official Capacity as Chairman of the Public Utility Commission, OFFICE OF THE ATTORNEY GENERAL, 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,

Appeal of: PENNSYLVANIA PUBLIC UTILITY COMMISSION, Robert F. Powelson, in his Official Capacity as Chairman of the Public Utility Commission and PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION and Michael L. Krancer, in his Official Capacity as Secretary of the Department of Environmental Protection

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

BRIEF OF *AMICI CURIAE* THE PENNSYLVANIA INDEPENDENT OIL AND GAS ASSOCIATION, THE MARCELLUS SHALE COALITION, MARKWEST LIBERTY MIDSTREAM & RESOURCES, LLC, PENNECO OIL COMPANY, INC., AND CHESAPEAKE APPALACHIA, LLC, IN SUPPORT OF APPELLANTS

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The Pennsylvania Independent Oil and Gas Association ("PIOGA"), the Marcellus Shale Coalition ("MSC"), MarkWest Liberty Midstream & Resources, LLC, Penneco Oil Company, Inc., and Chesapeake Appalachia, LLC (collectively "Industry Parties"), submit this brief as *Amici Curiae* and pursuant to Pa.R.A.P. 531(a), in support of the appeals of the Appellants ("Commonwealth Parties") from the Commonwealth Court's July 26, 2012 order declaring portions of Act 13 of 2012 ("Act 13") facially unconstitutional.

I. INTRODUCTION AND SUMMARY OF ARGUMENT

The Commonwealth Court, by the narrowest majority, invoked "substantive due process" as a justification for revisiting fundamental policy decisions made by the Legislature in response to this Court's decision in *Huntley & Huntley, Inc. v. Borough Council of Borough of Oakmont,* and for then substituting its judgment for that of the Legislature with respect to how *and where* the Commonwealth's oil and gas resources will be developed. *See Huntley*, 964 A.2d 855, 866 (Pa. 2009) ("*[A]bsent further legislative guidance*, we conclude that the [local 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.") (emphasis added).

The four-member majority, proceeding past dispositive issues of standing and justiciability, responded to complaints from less than 1% of the municipalities in our Commonwealth and decided that it was unreasonable for the Legislature to adopt, and for the Governor to endorse, rational and uniform development of oil and gas resources throughout our Commonwealth. The majority, expressing *its* preference for local control over statewide policies, cast aside legislative concerns over balkanization as municipalities erect barriers to oil and gas development, and supporting infrastructure, within their borders. The majority then

failed to appreciate that the "police power" is vested in the Legislature by the Pennsylvania Constitution and not in municipalities. It decided that municipalities, and not the Legislature, should decide *where* development of the Commonwealth's oil and gas resources should take place and also *where* the interconnected network of pipelines and related facilities that are essential and unique to the development of those resources will be located.[1]

In order to strike down the uniformity provision of Act 13, Section 3304, the majority was forced to create new law and discover new constitutional rights and entitlements. The "substantive due process" clause provided the means to revisit this purportedly "bad" law. The majority's analysis, however, ignored a basic principle of constitutional law, specifically, that there is no violation of the due process clause in the absence of a deprivation of a constitutionally protected interest. The threshold constitutional question left unanswered by the majority is - *what is the constitutionally protected interest that has been deprived by the uniformity provisions of Act 13?*

Rather than expressly answer that question, the majority relied on an unexpressed, and fundamentally flawed, premise. The silent premise upon which the majority built its analysis is that property owners have a constitutional right to be protected from neighboring, allegedly objectionable land uses. The problem with this unarticulated premise is that there is no such constitutional right.

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[1] The four-member majority consisted of President Judge Pellegrini, and Judges McGinley, Leadbetter and McCullough. Judges Brobson, Simpson and Covey dissented. Judge Cohn Jubelirer was not a member of the *en banc* panel that heard and decided the case. Judge Leavitt did not participate in the decision of the case. The Commonwealth Court's 4-3 split decision reflects that at least one other commissioned judge of the court, who was not a member of the *en banc* panel that heard the case, disagreed with the majority opinion. As explained by the majority opinion "[w]hile the majority of the en banc panel voted to grant Petitioners' Motion for Summary Relief regarding Counts I-III, because of a recusal, the vote of the remaining commissioned judges on those Counts resulted ***in a tie***, requiring that this opinion be filed pursuant to Section 256(b) of the Internal Operating Procedures of the Commonwealth Court." *See Robinson Township, et al. v. Commonwealth of Pennsylvania, et al.*, 2012 Pa. Commw. LEXIS 222, at *1-*2, n.1 (Pa. Cmwlth. July 26, 2012) (emphasis added).

The majority's solution converts Article I, Section I of the Pennsylvania Constitution from a bill of rights that protects citizens from an overreaching government into a source of rights that neighbors may now assert against each other. The majority, in other words, created a "substantive due process" right to complain about a neighbor's use of his or her property.

Article I of the Pennsylvania Constitution does not confer enforceable rights on municipalities. Municipalities, moreover, cannot "borrow" the personal rights of select groups of residents in order to advance claims in court. The majority created a dangerous, new form of representational standing not previously recognized in this Commonwealth, whereby municipalities have been empowered to advance the personal claims of select groups of residents against the Commonwealth and, presumably, private parties. It then compounded that error by concluding that the personal rights of residents that municipalities can now "borrow" includes a previously unrecognized *constitutional right* to be protected from neighboring, allegedly objectionable land uses. By allowing municipalities to borrow the personal rights of a select group of residents, the majority's decision allows those municipalities to trample on the rights of countless other residents in their communities – those that rely upon the oil and gas industry for their livelihoods, the industry itself, and the thousands of landowners throughout the Commonwealth who receive royalties from oil and gas drilling activities. Those other residents, who these municipalities apparently do not wish to represent, are equally entitled to have their interests considered and weighed, but will not under the majority's newly-created representational standing and constitutional right.

The Commonwealth Court also erred in declaring that Section 3215(b)(4) of Act 13 violates Article II, Section 1 of the Pennsylvania Constitution. The Legislature made the basic policy choices that underlie all of Chapter 32 of Act 13, including Section 3215(b)(4) challenged

by the Municipalities. Section 3215 is explicit with respect to where wells can, and cannot, be drilled and supplies PaDEP with the requisite guidance for rendering waiver determinations, which PaDEP has been doing effectively, under almost identical statutory language in the former Oil and Gas Act, for *over 27 years*.

II. NATURE OF THE APPEAL

On February 14, 2012, Pennsylvania Governor Tom Corbett signed into law Act 13 of 2012, a broad reform of the key environmental protection regime that governs the development of oil and gas resources in the Commonwealth. 58 Pa.C.S. §§ 2301-3504. Act 13, which is the product of years of debate and months of intense negotiation, provides a wide-ranging update to and re-codification of the Commonwealth's Oil and Gas Act. In addition to extensive revisions to the Oil and Gas Act's environmental regulatory provisions, Act 13 also addresses drilling fees and local regulation of the industry.

By its 4-3 decision, the Commonwealth Court, on July 26, 2012, declared portions of Act 13 facially unconstitutional. Specifically, the majority decision, issued after expedited briefing and argument by the parties, declared Sections 3215(b)(4) and 3304 of Act 13 facially unconstitutional.

Section 3215(b)(4) of Act 13, 58 Pa.C.S. § 3215(b)(4), is part of Chapter 32 of the Act, which sets the core environmental protection goals for the development of oil and gas resources within the Commonwealth. Section 3215 of Act 13 restricts the location of oil and gas wells through, among other things, the imposition of setbacks. Section 3215(b)(4) authorizes needed regulatory flexibility by providing the Pennsylvania Department of Environmental Protection ("PaDEP") with authority to waive certain of the location restrictions contained in Section 3215.

The Commonwealth Court concluded that Section 3215(b)(4) of Act 13 violates Article

II, Section 1 of the Pennsylvania Constitution because, according to the majority opinion, the Legislature failed to provide PaDEP with adequate statutory guidance for making waiver determinations.

Section 3304 of Act 13, 58 Pa.C.S. § 3304, is a key provision of Chapter 33 of Act 13. Chapter 33 of Act 13 provides long-term regulatory predictability for job-creators and capital investors, and helps businesses succeed by providing increased uniformity and fairness of local ordinances while preserving local government's traditional zoning authority. *See* 58 Pa.C.S. §§ 3301-3309. Chapter 33 governs the enactment by "local governments" – a county, city, borough, incorporated town or township of this Commonwealth – of "local ordinances" – an ordinance or other enactment, including a provision of a home rule charter, adopted by a local government that regulates oil and gas operations. 58 Pa.C.S. § 3301 (defining terms). Building upon, and consistent with, Section 603(i) of the Pennsylvania Municipalities Planning Code, 53 P.S. § 10603(i), Section 3304 of Act 13 requires that all local ordinances regulating oil and gas operations must allow for the "reasonable development" of oil and gas resources, based upon express standards set forth in Sections 3304(b)(1) through (b)(11). 58 Pa.C.S. § 3304.

Four members of the Commonwealth Court have concluded that Section 3304 of Act 13 is unconstitutionally irrational, in violation of Article I, Section 1 of the Pennsylvania Constitution and the Fourteenth Amendment to the United States Constitution, because oil and gas uses are, in their opinion, singled out for different treatment by the Legislature that is incompatible with existing municipal comprehensive plans and surrounding land uses. As such, the majority concluded that Section 3304 is bad for the Commonwealth and, in their view, an invalid exercise of the police power by the Legislature.

III. THE INTERESTS OF *AMICI CURIAE*[2]

This appeal is of great importance to Industry Parties who, after being denied intervention by the Commonwealth Court in this matter, have participated as *Amici Curiae* throughout the proceedings.[3] Act 13 represents a carefully crafted legislative solution to the challenges and opportunities presented by the tremendous growth in Pennsylvania's unconventional natural gas (Marcellus shale) production. The Commonwealth Court, by its 4-3 decision, has prevented the Commonwealth from acting in the best interests of all of its citizens by promoting the safe and reasonable development of natural resources while generating billions of dollars of revenue for, and creating tens of thousands of jobs in, the Commonwealth.

The majority eviscerated the needed reforms that Act 13 provides and interfered with Industry Parties' legally enforceable property interests. Property interests have been acquired, hundreds of millions of dollars have been expended, thousands of employees have been hired, and materials, equipment and other resources have been deployed across the Commonwealth, as part of the historic development of the Marcellus shale.[4]

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[2] Support for the assertions herein, unless otherwise noted, can be found in the Industry Parties' August 1, 2012 application to this Court for leave to file an *Amici Curiae* statement in support of the Commonwealth Parties' application for expedited consideration of the appeal, which included declarations from the Industry Parties and other exhibits in support. That application was granted by the Court on August 21, 2012. *See* April 21, 2012 Order, *Robinson Township, et al. v. Commonwealth of Pennsylvania, et al.*, No. 63 MAP 2012.

[3] On April 20, 2012, the Commonwealth Court entered an order denying Industry Parties' petition for leave to intervene. The Commonwealth Court concluded that Industry Parties fell within the class of persons permitted to intervene under Pa.R.C.P. 2327(4), specifically finding that Industry Parties held legally enforceable property interests that will be affected by Act 13. The Commonwealth Court concluded, nonetheless, that Industry Parties' interests were adequately represented by the Commonwealth Parties. *See* April 20, 2012 Order, *Robinson Township, et al. v. Commonwealth of Pennsylvania, et al.*, No. 284 MD 2012. This Court subsequently denied intervention to the Industry Parties on the same grounds. *See* June 21, 2012 Order, *Robinson Township, et al. v. Commonwealth of Pennsylvania, et al.*, No. 37 MAP 2012, 40 MAP 2012.

[4] Industry Parties have significant leasehold and other property interests related to oil and gas well development and associated activities both within, and outside of, the Municipalities' borders. Leasehold interests, such as those held by certain of the Industry Parties, and members of PIOGA and the MSC, are

Some municipalities, having decided that oil and gas resources should be developed elsewhere in the Commonwealth, have tried to seal their borders. They do not want oil and gas wells in their towns and they do not want the pipelines and related infrastructure within their communities. To achieve their goals, these municipalities have enacted ordinances that effectively preclude the reasonable development of oil and gas resources under both the Oil and Gas Act (repealed and recodified in Act 13) and Chapters 32 and 33 of Act 13. For example:

- Appellee South Fayette Township adopted Ordinance No. 5-2010, which specifically targets the development of oil and natural gas within the Township. This ordinance, which was adopted on November 4, 2010, *after* this Court's decision in *Huntley*, contains extensive setbacks, regulations on the features of wells, and environmental requirements and restrictions that, when combined, all but exclude oil and gas operations from the Township. The ordinance also imposes an extortionary application fee of $5,000.00 and requires that the applicant put an additional $25,000.00 in escrow for the Township to draw upon, at its discretion, for administrative and engineering expenses during the application process. None of these requirements are imposed on other industrial and commercial land uses in the Township.[5]

- Appellee Peters Township adopted Ordinance No. 737 on August 8, 2011. Like the ordinance in South Fayette Township, the exclusionary Peters Township ordinance specifically targets oil and natural gas development and contains extensive requirements for oil and gas operations that are not imposed on other industrial or commercial land uses within the Township. Those requirements include a 40-acre site minimum, pre-drilling, extensive post-hydraulic fracturing and baseline water and soil studies, and a host of other provisions regarding the construction, operation and functioning of oil and gas operations. The ordinance, moreover, purports to provide the Township with unbridled discretion "to impose any other additional conditions" on oil and gas operations that the Township deems necessary.[6]

These are just two examples of many local ordinance provisions hostile to oil and gas

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protectable "property interests." *See, e.g., Graham Realty Co. v. Dep't of Transportation*, 447 A.2d 342, 344 (Pa. Cmwlth. 1982) (a leasehold interest is a property interest that may not be condemned without just compensation). In addition, under Pennsylvania law, an oil-and-gas lease is a transfer of real property. *See Lesnick v. Chartiers Natural Gas Co.*, 889 A.2d 1282, 1284 (Pa. Super. 2005). Both the Commonwealth Court and this Court, in denying the Industry Parties intervention in this litigation, confirmed that Industry Parties hold these protectable property interests.

5 The ordinance is available at http://www.south-fayette.pa.us/.

6 The ordinance is available at http://www.peterstownship.com.

development that have been developed by municipalities across the Commonwealth. Such ordinances have, in turn, spawned additional litigation over the scope and effect of the preemption provisions of the former Oil and Gas Act and have impeded the development of oil and gas resources in certain municipalities in the Commonwealth. *See, e.g.*, *Huntley*, 964 A.2d at 856; *Range Resources-Appalachia v. Salem Township*, 964 A.2d 869 (Pa. 2009); *Penneco Oil Co. v. County of Fayette*, 4 A.3d 722 (Pa. Cmwlth. 2010); *In Re: Appeal of Range Resources Appalachia, LLC From The Decision Of The South Fayette Township Zoning Hearing Board*, SA No. 11-1278, Allegheny County Court of Common Pleas (pending).

Certain of the local ordinances go so far as to legislate private property and contract rights by purporting to prohibit well operators from obtaining any zoning approval unless they first receive the consent of any surface owner of property to drill a well. The ordinances specifically targeting oil and gas operations adopted by Appellees South Fayette Township and Peters Township both contain such a requirement.[7] Not only do such provisions infringe upon a developer's contractual rights, but they also create in surface owners a full veto power over development that they otherwise lack pursuant to Pennsylvania law established over a century ago in *Chartiers Block Coal Company v. Mellon*, 25 A. 597 (Pa. 1893), as recently reaffirmed by *Belden & Blake v. DCNR*, 969 A.2d 528 (Pa. 2009).

The decision at issue, by four members of the Commonwealth Court, allows these hostile local ordinances to stand, thus allowing continued, unwarranted and unlawful municipal interference with the responsible development of the substantial investments made in the

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[7] Appellee South Fayette Township's oil and gas ordinance requires an applicant to provide "[w]ritten authorization from the property owner(s) who has legal or equitable title in and to the surface of the proposed Development or Facility." Appellee Peters Township's oil and gas ordinance similarly provides that an application "shall be accompanied with written permission from the property owner(s) who has legal or equitable title in and to the surface of the drill site or demonstrable documentation of the applicant's authority to occupy the surface for the purpose of mineral extraction."

Commonwealth by Industry Parties in oil and gas resources and operations. Although these hostile local ordinances purport to have been adopted to protect the health, safety, morals and general welfare of the municipalities' citizens, those purposes had already been addressed by the former Oil and Gas Act and PaDEP's extensive regulatory regime governing oil and gas operations. Those purposes have been further addressed by the Legislature, as a matter of State policy, through its passage of Act 13.

Additionally, as a result of the decision, Industry Parties will be unable to obtain waivers from PaDEP with respect to certain oil and gas well location restrictions. The Legislature expressly recognized, by Section 3215(b)(4) of Act 13, that flexibility was needed with respect to the efficient development, production and utilization of the Commonwealth's oil and gas resources, in accordance with plans, terms and conditions identifying additional measures, facilities or practices to be employed during well site construction, drilling and operations necessary to protect the waters of this Commonwealth. Without the flexibility of Section 3215(b)(4), which has been part of oil and gas regulation in this Commonwealth *for over 27 years*, Industry Parties will be unable to locate oil and gas wells in areas of the Commonwealth that the Legislature expressly recognized are, with oversight and regulation by PaDEP, appropriate for oil and gas well operations.

As a result of the Commonwealth Court's declaration that Section 3215(b)(4) of Act 13 is unconstitutional, the feasibility of Industry Parties drilling sites on their respective, current schedules is in question, as is their ability to drill certain wells before the underlying leases expire. This means that Industry Parties will need to re-evaluate well sites at a cost of tens of thousands of dollars and may result in reduced operations.

The Commonwealth Court's split decision, moreover, directly affects royalty and other

payments to landowners who have oil and gas leases with Industry Parties. The decision draws into question whether Industry Parties will be able to proceed under certain leases or whether such operations have been, or will be, zoned out by municipalities. The decision also draws into question whether Industry Parties will have to abandon certain leases because waivers from the PaDEP under Section 3215(b)(4) of Act 13 cannot be obtained.

The uncertainty and disruption to Industry Parties' operations created by the litigation surrounding Act 13 is rampant. Industry Parties have been denied zoning and other municipal approvals and have been forced into collateral litigation with municipalities over such approvals. By way of example, Industry Party MarkWest has been engaged in litigation with Appellee Cecil Township with respect to a proposed natural gas compressor station to be located in an *industrial* district of the Township. MarkWest was recently forced to file an action in the Commonwealth Court seeking declaratory and injunctive relief against Appellee Cecil Township stemming from the Township's June 15, 2012, denial, in violation of Section 3304(b)(7) of Act 13, 58 Pa.C.S. § 3304(b)(7), of MarkWest's zoning application for the proposed compressor station. *See, e.g.*, *MarkWest v. Cecil Township*, Commonwealth Court of Pennsylvania, 430 MD 2012 (stayed pending the outcome of these appeals). MarkWest, moreover, was forced to file a protective appeal with the Township's zoning hearing board stemming from the same denial (also stayed).

Additionally, in light of the pending litigation against Act 13, the Pennsylvania Public Utility Commission did not address Chapter 33 of Act 13 in its May 10, 2012 implementing order and, moreover, has postponed disposition of requests for advisory opinions and orders with respect to compliance with Section 3304 under Sections 3305(a) and (b) of Act 13, 58 Pa.C.S. §§ 3305(a) & (b).

Municipalities, in turn, have halted their efforts to comply with Section 3304 of Act 13,

or have completely reversed course. On the same day the Commonwealth Court issued its Act 13 decision, for example, Cranberry Township, Butler County, announced that it would not proceed with adopting an ordinance that places the municipality in compliance with Act 13.[8]

At the same time, the Industry Parties, *beginning September 1, 2012*, remain obligated to pay *millions* of dollars in impact fees imposed by Act 13, which redistributes industry revenue to communities affected by Marcellus shale gas development. *See* 58 Pa.C.S. § 2303(a)(2). Act 13's impact fee provisions *expressly* go hand-in-hand with the Act's reforms regarding local regulation of oil and gas operations. *See* 58 Pa.C.S. § 3308. As a result of the Court's split decision, however, Industry Parties receive all of the burdens, but none of the corresponding benefits, of Act 13. Municipalities, on the other hand, including those challenging Act 13 in this case, with ordinances that fail to allow for the reasonable development of oil and gas resources under prior law as well as Act 13, are nonetheless scheduled to receive disbursements of these fees, contrary to the comprehensive, statewide update to the statutory regime governing oil and natural gas operations in the Commonwealth. *See* 58 Pa.C.S. § 2314(d).

Further postponement of Act 13 could also have dramatic impacts on the job market and the State's economic recovery. By creating jobs, spurring local spending and generating millions of dollars in tax revenue, gas extraction from conventional (sandstone, limestone) formations and newly defined unconventional (shale) formations, has been playing a key role in Pennsylvania's recovery from the economic downturn throughout the extraction "supply chain." Last year, the Governor's Marcellus Shale Advisory Commission Report confirmed the significant role of the extraction of shale gas in Pennsylvania's economy:

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[8] *See* http://www.post-gazette.com/stories/local/marcellusshale/pa-court-upsets-marcellus-shale-zoning-law-646394/.

> The development of vast natural gas resources trapped beneath more than half of Pennsylvania has created tens of thousands of new jobs, generated billions of dollars in tax and lease revenues for the Commonwealth and its citizens, infused billions of additional dollars in bonus lease and royalty payments to landowners, and significantly expanded access to clean, affordable energy sources for residential, commercial and industrial customers.
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> Generally, when the public thinks of jobs that are associated with the Marcellus Shale natural gas play, the perception is drilling work. However, the natural gas industry employs individuals from many other trades and sectors. From site selection and preparation to pre-drilling work, to production stages and finally, delivery of the natural gas, each stage engages many other industries. A study published by Penn State provides the following example: *"Exploration crews purchase supplies, stay at hotels, and dine at local restaurants. Site preparation requires engineering studies, heavy equipment and aggregates. Drilling activity generates considerable business for trucking firms and well-support companies now based in Pennsylvania that, in turn, buy supplies, such as fuel, pipe drilling materials and other goods and services. Likewise, construction of pipelines requires steel, aggregates, and the services of engineering construction firms."* The Penn State study goes on to state that for every $1.00 that Marcellus producers spend in the state, $1.90 of total economic output is generated. The ripple effect that the natural gas industry causes enables businesses to hire additional workers, which ultimately leads to higher income taxes. This business-to-business activity has already generated increased sales and sales tax revenues and has the potential to produce even greater returns in the future . . . .

Governor's Marcellus Shale Advisory Commission Report, pp. 7, 83 (July 22, 2011) (emphasis original).[9] Further postponement of the certainty provided by Act 13's uniformity of regulation of oil and natural gas development threatens Pennsylvania's recovery from the economic downturn.

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[9] Available at: http://www.portal.state.pa.us/portal/server.pt/community/marcellus_shale_advisory_commission/20074.

IV. ARGUMENT

A. The Commonwealth Court Erred In Allowing The Municipalities To Proceed With Their Claims.

The court below concluded that the Municipalities have standing to bring this action because Act 13 requires that they take action to bring their local ordinances into compliance with Act 13. *See Robinson Twp.*, 2012 Pa. Commw. LEXIS 222, at *23. The court further concluded that, even if such an interest was not direct or immediate so as to confer standing, the Municipalities' claims that they are required to pass unconstitutional zoning amendments "are inextricably bound" with the rights of unnamed property owners who are purportedly adversely affected by Chapter Act 13, thus conferring standing the Municipalities. *Id.* at *24.

The court below erred in concluding that the Municipalities have standing.[10] The court's conclusion *presupposes* that Act 13 is unconstitutional in some way, that Act 13 irreconcilably conflicts with the Pennsylvania Municipalities Planning Code ("MPC"), 53 P.S. §§ 10101 *et seq.*, and that the Legislature does not have the ability to direct how the police power, *which is constitutionally vested in the Legislature*, is wielded by municipalities pursuant to delegations of that authority by statute.

This Court's well-established precedent holds that a municipality, as a creature of the State, has no vested right in its corporate powers, or even in its very existence, and that the authority of the Legislature over their powers is supreme:

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[10] "The purpose of the requirement of standing is to *protect against improper plaintiffs*." *Application of Biester v. Thornburgh*, 409 A.2d 848, 851 (Pa. 1979) (citing *Wm. Penn Parking Garage, Inc. v. City of Pittsburgh*, 346 A.2d 269, 280-81 (Pa. 1975)) (emphasis added). "Rooted in this precept is the notion that for a party to maintain a challenge to an official order or action his rights must have been invaded or infringed." *Sierra Club v. Hartman*, 605 A.2d 309, 310 (Pa. 1992). "Where a plaintiff fails to allege an injury [to a legally protected right] which he has suffered as a result of the defendant's conduct, the plaintiff lacks standing to maintain the suit." *Pennsylvania State Lodge v. Commonwealth*, 571 A.2d 531, 532 (Pa. Cmwlth. 1990), *aff'd*, 591 A.2d 1054 (Pa. 1991).

> 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 SHARSWOOD, 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.***"
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> ***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 *Philadelphia v. Fox*, 64 Pa. 169, 180-81 (1870)) (emphasis added). *See also Pittsburgh's Petition*, 66 A. 348, 352 (Pa. 1907), *aff'd sub nom.*, *Hunter v. Pittsburgh*, 207 U.S. 161 (1907).

Municipal corporations are not sovereigns; they have no inherent powers and may do only those things which the Legislature has expressly or by necessary implication placed within their power to do. *See Kline v. City of Harrisburg*, 68 A.2d 182, 185 (Pa. 1949); *see also Huntley*, 964 A.2d at 862; *Devlin v. City of Philadelphia*, 862 A.2d 1234, 1242 (Pa. 2004); *Denbow v. Borough of Leetsdale*, 729 A.2d 1113, 1118 (Pa. 1999).

It follows from these foundational principals of state-municipal legal relations that municipalities, as creatures of the State, "[do not] have authority to question the constitutionality

of [] legislative enactments of [their] creator" that circumscribe, modify or otherwise impact their power or authority to act. *Board of Supervisors of East Norriton Township v. Gill Quarries, Inc.*, 417 A.2d 277, 278 (Pa. Cmwlth. 1980) (*en banc*); *Marriott Corporation v. Board of Assessment Appeals of Montgomery County*, 438 A.2d 1032, 1035 (Pa. Cmwlth. 1982).

The Municipalities' standing undisputedly rests upon their assertion that Act 13 circumscribes, modifies or otherwise limits their ability, under the MPC or otherwise, to regulate oil and gas operations within their borders to protect the health, safety and welfare of their citizenry. (R. 64a, 66a-71a) [Petition for Review, ¶¶ 31, 44-51]. The Municipalities, however, as creatures of the State, have no authority to challenge the constitutionality of a legislative enactment on the basis that it circumscribes, modifies or otherwise limits their power or authority to act, such as their authority to zone. Although the Legislature gave municipalities the power to sue and be sued in their corporate names, *see, e.g.*, 53 P.S. § 66501 (Second Class Township Code), it did not give them power to challenge the Legislature's directives, such as the extent to which certain activities are subject to local zoning legislation. The Municipalities lack standing to ask the courts to change a part of the statutory framework within which the Legislature, as sovereign, has determined they shall operate.[11]

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[11] The result is no different for a home rule municipality, such as Petitioner Peters Township. It was in the context of the foregoing traditional conception of state-municipal legal relations that the Home Rule Amendment to the Pennsylvania Constitution was adopted and subsequently implemented by the Home Rule Charter and Optional Plans Law, 53 Pa.C.S. §§ 2901 *et seq.*, and predecessor statutory provisions. The Home Rule Amendment of the Pennsylvania Constitution, PA. CONST. art IX, § 2, provides in part that: "Municipalities shall have the right and power to frame and adopt home rule charters . . . A municipality which has a home rule charter may exercise any power or perform any function *not denied* by this Constitution, by its home rule charter *or by the General Assembly at any time*." (Emphasis added.). It is thus clear that the Constitution reserved to the state legislature the power to impose restrictions, limitations and regulations on the grant of home rule to municipalities. *See Fross v. County of Allegheny*, 20 A.3d 1193, 1202-1203 (Pa. 2011) (". . . grant of power to a home rule county is not absolute. Acts of the Legislature may circumscribe, either expressly or impliedly, the power of a home rule county to legislate in a particular arena, which may give rise to conflicts between local and statewide legislation.") (citations omitted); *Spahn v. Zoning Bd. of Adjustment*, 977 A.2d 1132, 1143-44 (Pa. 2009) (holding that, by constitutional mandate, the Legislature may limit the functions to be

For these reasons, the Commonwealth Court's reliance upon this Court's decision in *City of Philadelphia v. Commonwealth*, 838 A.2d 566 (Pa. 2003), as supporting the Municipalities' standing to challenge Act 13 is misplaced. *See Robinson Twp.*, 2012 Pa. Commw. LEXIS 222, at *22 (citing *City of Philadelphia*). In that case, the City of Philadelphia, and others, filed a petition challenging the constitutionality of Act 230 of 2002, which, *inter alia*, reorganized the governance of the Pennsylvania Convention Center. *See* 838 A.2d at 573. On appeal, this Court determined that the City had standing to participate in the challenge because Act 230 of 2002 "affect[ed] city governmental functions relative to collective bargaining, budget management, and urban renewal." *Id.* at 579. The basis of the City's standing was, therefore, that Act 230 adversely and directly affected the City's "government functions relative to collective bargaining, budget management, and urban renewal," not that it altered the City's powers as a local government. *Id.*; *see also Id.* at 559, n.6 (summarizing the City's brief regarding standing allegations).

Here, by contrast, the Municipalities attack Act 13 on the basis that it circumscribes, modifies or otherwise limits their very *ability*, under the MPC or other statutory grant of authority, to regulate oil and gas operations within their borders to protect the health, safety and welfare of their citizenry. (R. 64a, 66a-71a) [Petition for Review, ¶¶ 31, 44-51].

While the distinction may be a fine one, it is, based on *Moir, et al., supra*, a real one.

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performed by home rule municipalities and can effectively abrogate local ordinances by enacting a conflicting statute concerning substantive matters of statewide concern). When the Amendment was implemented by the Home Rule Charter and Optional Plans Law, as well as by predecessor statutory provisions, the legislature did not give municipalities *carte blanche* powers of home rule but instead imposed restrictions and limitations. Those legislative limitations are cataloged in the implementing statutes; and included is the following: "A municipality which has adopted a home rule charter may exercise any powers and perform any function *not denied* by the Constitution of Pennsylvania, *by statute* or by its home rule charter." 53 Pa.C.S. § 2961 (emphasis added). *See also* 53 Pa.C.S. § 2962(c)(2) ("A municipality shall not: . . . (2) Exercise powers contrary to or in limitation or enlargement of powers granted by statutes which are applicable in every part of this Commonwealth").

There is a difference between a municipality's contention, as in *City of Philadelphia*, that a legislative enactment adversely and directly affects "government functions relative to collective bargaining, budget management, and urban renewal" *within* a structure created for it by the Legislature and one, like Municipalities assert here, that *questions the wisdom of the very structure itself.* With respect to the latter, a municipality cannot be heard to complain. Municipalities have no inherent powers and may do only those things which the Legislature has expressly or by necessary implication placed within their power to do.

1. Municipalities cannot "borrow" the standing of property owners.

The Commonwealth Court erred in concluding that the Municipalities' also have standing because their claims that they are required to pass unconstitutional zoning amendments "are inextricably bound" with the rights of unnamed property owners who are purportedly adversely affected by Chapter Act 13. *See Robinson Twp.*, 2012 Pa. Commw. LEXIS 222, at *24.

The Municipalities cannot "borrow" the standing of their residents, or assert their residents' respective individual rights against the Commonwealth. *See City of Pittsburgh v. Commonwealth of Pennsylvania,* 535 A.2d 680 (Pa. Cmwlth. 1987), *aff'd,* 559 A.2d 513 (Pa. 1989). In *City of Pittsburgh*, the city and Richard S. Caliguiri, individually and as mayor of the city, requested the court to declare unconstitutional a section of the Local Tax Enabling Act that prevented the city from collecting a wage tax from nonresidents working within the city who have paid a similar tax to the political subdivisions where they reside. The city contended that its residents bore an unconstitutionally unfair tax burden by reason of these statutory provisions and, thus, the state legislation violated the uniformity clause of the Pennsylvania Constitution, the equal protection clause of the United States Constitution, and Sections 1 and 2 of Article IX of the Pennsylvania Constitution. The Commonwealth Court upheld the state's preliminary

objection raising the city's lack of standing to assert federal or state constitutional protections against the Commonwealth:

> ***This court has held that inasmuch as a municipality is merely a creature of the sovereign created for the purpose of carrying out local government functions, the municipality has no standing to assert the claims of its citizens against the Commonwealth.*** ... Here, the thrust of the petition for review is that the citizens of Pittsburgh are being disadvantaged by the allegedly unfair and discriminatory provisions of the challenged statutes. ***There is no allegation that the city's local government functions have been adversely affected by the allegedly unequal tax structure.*** ... We conclude that the city's cause of action against the Commonwealth is barred and the respondents' demurrer in that regard must be sustained.

535 A.2d at 682 (citations omitted, emphasis added). *See also City of Phila. v. Schweiker*, 817 A.2d 1217, 1222-23 (Pa. Cmwlth. 2003), *aff'd*, 858 A.2d 75 (Pa. 2004) (City, as a creature of the sovereign had no standing to assert the claims of its citizens against the Commonwealth, citing *City of Pittsburgh*).

Here, the Municipalities do not suffer any harm to their "local government function" as a result of Act 13. Indeed, the Municipalities do not have a constitutionally protected right to zone, or an obligation to zone in a certain way to protect "borrowed" rights of select property owners within their respective borders. *See* Argument, Section C, *infra*. Alleged harms to the personal rights of the Municipalities' residents flowing from Act 13 are not harms suffered by the Municipalities themselves. If such harms even exist, which is disputed, then the affected residents can raise and litigate these personal claims in a proper forum and at the proper time. There is no claim that these purportedly affected residents are unable or incapable of raising and litigating these issues and no reason to allow the Municipalities to assert such claims on their behalf.

The Commonwealth Court's decision takes the law in a troubling direction. It allows municipalities to derive standing to sue by "borrowing" personal rights of, or injuries allegedly

suffered by, a select group of residents – those opposed to oil and gas development. The Commonwealth Court's decision then compounds this error by concluding the personal rights of these select residents, which can now be "borrowed" by municipalities, includes a previously unrecognized, but now *constitutionally protected*, life, liberty or property right in preventing neighbors from making annoying, unpleasant or simply unpopular use of their land.

The decision below must be reversed. Municipalities cannot "borrow" the personal rights of select groups of their residents and it is not their responsibility, as creatures and arms of the Legislature, to advocate for select groups of residents' *cause of the day*. Allowing municipalities to "borrow" the personal rights of their residents would aggrandize the rights and powers of political subdivisions *beyond* what the United States Constitution, the Pennsylvania Constitution, and the Commonwealth, as sovereign, have given to them. *See Commonwealth v. East Brunswick Township*, 956 A.2d 1100, 1108 (Pa. Cmwlth. 2008) ("Article 1 of the Pennsylvania Constitution sets forth a Declaration of the Rights of individual citizens, not the rights of municipal corporations. It protects individuals 'against infringement by government.'").

These select groups of residents, moreover, whose personal rights are being "borrowed" by the Municipalities, do not have the newly found constitutional right bestowed on them by the Commonwealth Court's decision. The due process clauses of the United States and Pennsylvania Constitutions forbid *the government* from depriving individuals of life, liberty, or property without due process of law. They do not give rise to an affirmative duty on the part of a state, or political subdivision thereof, to protect its citizens, nor do they protect private parties from the acts of other private parties. *See DeShaney v. Winnebago County Soc. Servs. Dep't*, 489 U.S. 189, 195 (1989).[12]

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[12] This Court has held that "the requirements of Article I, Section 1 of the Pennsylvania Constitution are not distinguishable from those of the [Due Process Clause of the 14th Amendment] . . . [thus] we may

The mischief that can be made as a result of this newly-found ability of municipalities to bring suits on behalf of a select group of residents that they currently are catering to, created by the decision below, is impossible to miss in this case. The very exclusionary and hostile local ordinances that the Municipalities are championing, by this litigation, on behalf of one select group of residents opposed to oil and gas development directly impede the interests of other groups of residents - members of their communities that rely upon the oil and gas industry for their livelihoods, the industry itself, and the thousands of landowners throughout the Commonwealth who receive royalties from oil and gas drilling activities. The Municipalities, in short, by being permitted to "borrow" the personal rights of a select group of residents, in turn, trample on the rights of countless others in their communities who they do not represent and who are equally entitled to have their interests considered and weighed.

2. Municipalities cannot assert claims based upon Article I, Section 1 of the Pennsylvania Constitution or Section 1 of the 14th Amendment to the United States Constitution.

The Municipalities cannot, *as a matter of law*, assert claims pursuant to Article I, Section 1 of the Pennsylvania Constitution or Section 1 of the 14th Amendment to the United States Constitution. As such, and notwithstanding the foregoing arguments concerning the Municipalities complete lack of standing here, the Commonwealth Court erred when it concluded that the Municipalities can assert claims that Chapter 33 of Act 13 represents an improper and arbitrary exercise of the Legislature's police power in violation of Article I, Section 1 of the Pennsylvania Constitution or the 14th amendment to the United States Constitution (Counts I, II, III of the Municipalities' petition for review).

In *East Brunswick Township*, the Commonwealth Court addressed a township's

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apply the same analysis to both claims." *Pennsylvania Game Comm'n v. Marich*, 666 A.2d 253, 255 n.6 (Pa. 1995).

constitutional challenge to Act 38 of 2005 - the Agriculture, Communities and Rural Environment (ACRE) statute, 3 Pa.C.S. §§ 311 *et seq.* *See* 956 A.2d at 1102. The central purpose of Act 38 is to protect normal agricultural operations from unauthorized local regulation. *See* 3 Pa.C.S. § 313. The township had argued that Act 38 violates both the United States and Pennsylvania Constitutions by infringing on the township's right to protect the health, welfare and safety of its citizens against the alleged hazards presented by land application of sewage sludge. *Id.* at 1106. In support, the township directed the Commonwealth Court to such varied sources as the Declaration of Independence, the first Pennsylvania Constitution of 1776 and sections 2 and 25 of the Pennsylvania Constitution's Declaration of Rights. *Id.* at 1106-1107.

In rejecting the township's arguments, the Commonwealth Court explained:

> There are several reasons why the Township's argument must be rejected. First and foremost, we are not prepared to reject one of the most basic precepts of governmental structure in this Commonwealth, *i.e.*, that "local governments are creatures of the legislature from which they get their existence." ROBERT E. WOODSIDE, PENNSYLVANIA CONSTITUTIONAL LAW 507 (1985). The subordinate role of municipalities within Pennsylvania's system of governance has been explained by the Pennsylvania Supreme Court as follows:
>
> > [I]t is fundamental that municipal corporations are creatures of the State and that the authority of the Legislature over their powers is supreme. Municipal corporations have no inherent powers and may do only those things which the Legislature has expressly or by necessary implication placed within their power to do.
>
> *Denbow v. Borough of Leetsdale,* 556 Pa. 567, 576, 729 A.2d 1113, 1118 (1999) (citations and quotation omitted). Indeed, under our constitution, local government begins with enabling legislation enacted by the General Assembly. Article IX, Section 1 states:
>
> > The General Assembly shall provide by general law for local government within the Commonwealth. Such general law shall be uniform as to all classes of local government regarding procedural matters.
>
> PA. CONST. art. IX, §1.
>
> Notwithstanding this well-settled authority, the Township invokes the

> Declaration of Rights found in Article 1 of the Pennsylvania Constitution to support its claim that Act 38 unconstitutionally intrudes upon a township's ability to legislate.
>
> . . .
>
> ***The Township's argument stems from a flawed premise. Article 1 of the Pennsylvania Constitution sets forth a Declaration of the Rights of individual citizens, not the rights of municipal corporations. It protects individuals "against infringement by government." WOODSIDE, PENNSYLVANIA CONSTITUTIONAL LAW 113. . . . A township is not a citizen.***
>
> . . .
>
> Act 38 is presumed to be constitutional and will not be set aside unless it "clearly, palpably and plainly violates the Constitution." *Commonwealth v. Means,* 565 Pa. 309, 315, 773 A.2d 143, 147 (2001). The Township has failed to overcome that presumption. ***Its reliance upon the Declaration of Rights in the Pennsylvania Constitution is misplaced.*** Ironically, Article 1 could be more properly invoked by Jeff Hill, whose right to operate his farm in the corporate form has been encroached upon by the Township. In short, the General Assembly acted constitutionally when it restricted municipalities from adopting "unauthorized local ordinances" that interfere with normal agricultural operations.

East Brunswick, 956 A.2d at 1107-1109 (emphasis added). *See also Commonwealth v. Packer Township*, 2012 Pa. Commw. LEXIS 198, at *9-*10 (Pa. Cmwlth. July 12, 2012) (rejecting township's constitutional challenges to ACRE statute under Article I of the Pennsylvania Constitution, citing *East Brunswick*).[13]

The Municipalities' arguments with respect to Act 13 in Counts I, II, and III of the petition fare no better than those raised by the township in *East Brunswick* and *Packer Township* with respect to Act 38. The Municipalities are not "citizens" and, as such, their reliance on any provision of the Declaration of Rights in the Pennsylvania Constitution as a basis for their claims is, as the Commonwealth Court previously concluded, "misplaced."

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[13] As noted by the Commonwealth Court, the Legislature has, in accordance with Article IX, Section 1 of the Pennsylvania Constitution, provided for local government. *Id.* at 1107, n.19 (citing, *inter alia*, The Second Class Township Code, 53 P.S. §§ 65101-68701). "These schemes create different types of municipal corporations; establish their form of government; and grant them powers necessary to carry out their statutory responsibilities." *Id.*

The Municipalities' invocation of Section 1 of the 14th Amendment to the United States Constitution as the basis for their claims should, likewise, be rejected. A municipality may not bring a constitutional challenge against its creating state when the constitutional provision that supplies the basis for the complaint was, as the provision invoked by the Municipalities here, written to protect *individual* rights, as opposed to collective or structural rights. *See Williams v. Mayor & City Council of Baltimore*, 289 U.S. 36, 40 (1933) ("a municipal corporation, created by a state for the better ordering of government, has no privileges or immunities under the federal constitution which it may invoke in opposition to the will of its creator."); *Trenton v. New Jersey*, 262 U.S. 182, 187-188 (1923) (city has no Fourteenth Amendment rights vis-à-vis the state that created it because the city is merely a component of the state, rather than an individual state citizen); *Newark v. New Jersey*, 262 U.S. 192, 196 (1923) ("The city cannot invoke the protection of the Fourteenth Amendment against the state."); *see also Branson Sch. Dist. RE-82 v. Romer*, 161 F.3d 619, 628 (10th Cir. 1998) ("It is well-settled that a political subdivision may not bring a federal suit against its parent state based on rights secured through the Fourteenth Amendment ... *Williams* and *Trenton* [teach that] a municipality may not bring a constitutional challenge against its creating state when the constitutional provision that supplies the basis for the complaint was written to protect individual rights, as opposed to collective or structural rights.").

Inasmuch as the Municipalities cannot assert Article I, Section 1 or Fourteenth Amendment claims against the state that created them, the Commonwealth Court erred in concluding that they have standing with respect to Counts I, II and III of the petition.[14]

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[14] For these same reasons, the Commonwealth Court erred in concluding that two individual municipal officials had standing, not as individual residents whose property interests may be affected by Act 13, but "[a]s local elected officials acting in ***their official capacities*** for their individual municipalities and being required to vote for zoning amendments they believe are unconstitutional . . . ."

B. The Municipalities Raised, And The Commonwealth Court Decided, Non-Justiciable Political Questions.

The Commonwealth Court rejected arguments by the Commonwealth Parties, and *Amici*, that the Municipalities' claims raise non-justiciable political questions because the Legislature has complete discretion under the United States and Pennsylvania Constitutions to decide whether to enact any zoning and land use legislation.

The Commonwealth Court concluded that, under such reasoning, *any* action that the Legislature would take under the police power would not be subject to a constitutional challenge. The court argued, by example, that under the Commonwealth Parties' reasoning, if the Legislature decided to prevent crime under its police power by passing legislation prohibiting gun ownership, then the court would be precluded from hearing a challenge that the legislation was unconstitutional under Article I, Section 21 of the Pennsylvania Constitution. *See Robinson Twp.*, 2012 Pa. Commw. LEXIS 222, at *36.

The problem with the Commonwealth Court's example, however, and thus its underlying reasoning, is apparent – in its example, the Legislature is attempting to do that which it is expressly *forbidden* to do by the Pennsylvania Constitution. Thus, a challenge to the court's hypothetical gun ownership legislation by a *proper petitioner*, on the basis that it violates Article I, Section 21 of the Pennsylvania Constitution, would not raise a non-justiciable political question. Under the court's example, moreover, a municipality would have no right to bring

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See Robinson Township, 2012 Pa. Commw. LEXIS 222, at *26 (emphasis added). Because a municipality can operate only through its officials, Petitioners Coppola and Ball are the equivalent of the Municipalities for purposes of the standing analysis. *See, e.g.*, 53 P.S. § 65601 (second class township acts through its board of supervisors); *Miller v. Bd. of Prop. Assessment, Appeals & Review of Allegheny County*, 703 A.2d 733, 735 (Pa. Cmwlth. 1997) (official capacity suits generally represent only another way of pleading an action against an entity of which an officer is an agent); *Bagley v. Philadelphia*, 25 A.2d 579, 581 (Pa. Super. 1942) ("Municipalities must necessarily act through their officials, departments and agencies."). Thus, for the same reasons that the Municipalities lack standing, *see supra*, Petitioners Coppola and Ball also lack standing.

such a challenge. *See East Brunswick*, 956 A.2d at 1108 ("Article 1 of the Pennsylvania Constitution sets forth a Declaration of the Rights of individual citizens, not the rights of municipal corporations").

Here, by contrast, the Municipalities, which have no rights at all under Article I of the Pennsylvania Constitution, seek relief on the sole basis that the Legislature has, in the exercise of its discretion, chosen to enact legislation Municipalities do not like because it circumscribes, modifies or otherwise impacts their authority to zone under the MPC. The Legislature was, however, well within its constitutionally-granted powers to limit, through Act 13, the Municipalities' authority to zone under the MPC – authority that can be abolished at any time at the will or whim of the Legislature who gave the Municipalities the authority to zone.[15]

Ordinarily, the exercise of the judiciary's power to review the constitutionality of legislative action does not offend the principle of separation of powers. *See, e.g., Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). A challenge to the Legislature's exercise of a power which the Constitution commits exclusively to the Legislature, however, presents a non-justiciable "political question." *Sweeney v. Tucker*, 375 A.2d 698, 705-706 (Pa. 1977).

In this regard, this Court cautions: "The Constitution has given us a list of the things which the Legislature may not do. If we extend that list, we alter the instrument; we become ourselves the aggressors, and violate both the letter and spirit of the organic law as grossly as the Legislature possibly could. If we can add to the reserved rights of the people, we can take them

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[15] As explained below, for substantive due process rights to attach there must first be the deprivation of a property right or other interest that is *constitutionally* protected. *See* Argument, Section C, *infra*. The Municipalities, however, do not specify which property right or other protected interest *of theirs* is deprived by Act 13 (because none has, in fact, been deprived). The Commonwealth Court's majority leapt over this prong of the due process analysis as well. Because the prerequisite property interest for substantive due process review is lacking, and no other constitutional right is present, Counts I-III of petition are, as asserted by the Municipalities, necessarily challenging *solely* the wisdom of enactment, rendering their claims non-justiciable.

away; if we can mend, we can mar." *Russ v. Commonwealth*, 60 A. 169, 172 (Pa. 1905). In short, "[t]he legislature may do whatever it is not forbidden to do by the federal or state Constitutions." *Luzerne County v. Morgan*, 107 A. 17 (Pa. 1919).

When the Legislature has the discretion under the U.S. and Pennsylvania Constitutions to decide whether to enact a particular piece of legislation, a court has no authority to interfere with the Legislature's exercise of that discretion. For a court to do so is for it to violate separation-of-powers principles. *See Glenn Johnston, Inc. v. Commonwealth*, 726 A.2d 384, 388 (Pa. 1999).

As this Court has emphasized: "We are not a Supreme, or even a Superior Legislature, and we have no power to redraw the Constitution or to rewrite Legislative Acts or Charters, desirable as that sometimes would be." *Mt. Lebanon v. County Bd. of Elections of the County of Allegheny*, 368 A.2d 648, 649-50 (Pa. 1977) (internal quotation omitted). Thus, where the Legislature has the discretion to decide whether to enact a particular piece of legislation, "[t]here is no appeal to the courts from the judgment of the legislature as to the wisdom or policy which the Commonwealth shall adopt." *Maurer v. Boardman*, 7 A.2d 466, 472-73 (Pa. 1939); *Mercurio v. Allegheny County Redevelopment Auth.*, 839 A.2d 1196, 1203 (Pa. Cmwlth. 2003).

No provision of the Pennsylvania Constitution imposes upon the Legislature a duty to pass legislation addressing zoning or land use regulation. Moreover, even on a subject, such as public education, where the Pennsylvania Constitution *requires* the Legislature to act, the Legislature retains *unfettered discretion* to decide what legislation to enact, and challenges to its discretion are non-justiciable.[16] *See Marrero v. Commonwealth ("Marrero II")*, 739 A.2d 110, 113-14 (Pa. 1999).

Accordingly, even if the Legislature had a constitutional duty to enact zoning and land

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[16] The Legislature must "provide for the maintenance and support of a thorough and efficient system of public education to serve the needs of the Commonwealth." PA. CONST. art. III, § 14.

use legislation to fulfill some purpose (which it does not), it would have complete discretion over *what* zoning legislation was necessary.

And, as with the Pennsylvania Constitution, no provision of the United States Constitution imposes a duty on the Legislature to enact legislation concerning zoning and land use, including the legislation the Municipalities would like.

Accordingly, the Legislature has complete discretion under the United States and Pennsylvania Constitutions to decide whether to enact *any* zoning and land use legislation. *See Morgan*, 107 A. at 17. Given that this is so, the Municipalities' state no claim upon which relief may be granted.

The Municipalities ask the courts to find the Legislature at fault for exercising its legislative discretion (as opposed to refusing to perform a *mandatory* constitutional duty) in a manner Municipalities do not like. For the courts to do so would be for it to improperly substitute its judgment, on a policy matter, for that of the Legislature and to violate separation-of-powers principles. The claims made by the Municipalities in the petition are non-justiciable, and the courts should not entertain them.

C. Act 13 Does Not Deprive Municipalities Of A Property Right That Is Constitutionally Protected.

As explained by this Court, "[s]ubstantive due process is the 'esoteric concept interwoven within our judicial framework to guarantee fundamental fairness and substantial justice,' and its precepts protect fundamental liberty interests against infringement by the government." *Kahn v. State Board of Auctioneer Examiners*, 842 A.2d 936, 946 (Pa. 2004). Preliminarily, for substantive due process rights to attach, there must first be the *deprivation* of a property right or other interest that is constitutionally protected. *Id.*

Article I, Section 1 of the Pennsylvania Constitution, and Section 1 of the 14th

Amendment to the United States Constitution, upon which the Municipalities rely, set forth the rights of *individual* citizens, not the rights of municipal corporations. For this reason alone, Counts I - III necessarily fail as asserted by the Municipalities. *See East Brunswick*, 956 A.2d at 1107-1109; *Williams*, 289 U.S. at 40; *Trenton*, 262 U.S. at 187-188.

Municipalities, moreover, do not have a constitutionally protected right, or even an obligation, to zone. *See Hoffman Mining Co. v. Zoning Hearing Bd.*, 32 A.3d 587, 593 (Pa. 2011) ("We begin by reiterating the statutory basis for a municipality's exercise of zoning power. As creatures of the state, municipalities have no inherent powers, but rather 'possess only such powers of government as are expressly granted to them and as are necessary to carry the same into effect.'") (quoting *Huntley*, 964 A.2d at 862). The MPC could be amended or repealed in its entirety by the Legislature tomorrow if it so desired. To the extent Act 13 circumscribes, modifies or otherwise limits municipalities' ability under the MPC or other statutory grant of authority, to regulate oil and gas operations within their borders to protect the health, safety and welfare of their citizenry, as Counts I – III assert, the Municipalities simply have no claim. *Id.* at 593-594.

Furthermore, Act 13's provisions mandating uniformity among local ordinances regulating oil and gas operations cannot, as the Municipalities assert, be construed as unnecessarily and unreasonably interfering with property rights in violation of Article I, Section 1 of the Pennsylvania Constitution or Section 1 of the 14th Amendment to the United States Constitution. It is a fundamental principle of law that zoning is a restriction on, and a deprivation of, a property owner's constitutionally ordained rights of property under common law. As explained by this Court in *Hopewell Township*, Article I, Section 1 of the Pennsylvania Constitution circumscribes the government's ability to interfere with a citizen's right to the

enjoyment of private property. *See Hopewell Township Board of Supervisors v. Golla*, 452 A.2d 1337, 1342 (Pa. 1982). "We must *start with the basic proposition that absent more, an individual should be able to utilize his own land as he sees fit.*" *Id.* at 1342 (quoting *Appeal of Girsh*, 263 A.2d 395, 397 n.3 (Pa. 1970)) (emphasis original). Thus:

> the function of judicial review, when the validity of a zoning ordinance is challenged, is to engage in a meaningful inquiry into the reasonableness of the *restriction* on land use in light of the *deprivation* of landowner's freedom thereby incurred. A conclusion that an ordinance is valid necessitates a determination that the public purpose served thereby adequately outweighs the landowner's *right to do as he sees fit with his property*, so as to satisfy the requirements of due process.

Id. at 1342 (emphasis added). This Court further explained that, while zoning may have a worthwhile objective, "since it is a *restriction on* and a *deprivation of* a property owner's Constitutionally ordained rights of property, it can be sustained only if it is *clearly necessary* to protect the health or safety or morals or general welfare of the people." *Id.* (emphasis added in part, original in part).

Far from restricting or depriving a property owner's constitutionally ordained right to do as he sees fit with his property, Act 13's local ordinance provisions necessarily *restore and expand* such rights. Section 3302 of Act 13 preempts local ordinances adopted pursuant to the MPC (or Flood Plain Management Act) if: (1) the ordinance "contain[s] provisions ... that accomplish the same purposes as set forth in" the Act; or (2) the ordinance "contain[s] provisions which impose conditions, requirements or limitations on the same features of oil and gas well operations regulated by" the Act. 58 Pa.C.S. § 3302. Section 3303 of Act 13 adds an additional, and broad, preemption provision to the Oil and Gas Act with respect to oil and gas operations regulated by environmental acts. *Id.* at § 3303. Section 3304 of the Act mandates uniformity among local ordinances regulating oil and gas operations. *Id.* at § 3304. Thus, under Act 13, each and every property owner in the Commonwealth, including the Municipalities, is permitted

to do more with his or her property, not less. There is, in short, no deprivation.

The fact that Act 13 does not restrict or deprive property rights is best illustrated by its operation in those municipalities with no local ordinances regulating oil and gas operations at all. The MPC, for example, does not mandate that municipalities zone; instead, it simply permits zoning in accordance with the statute. *See* 53 P.S. § 10601 ("the governing body of each municipality, in accordance with the conditions and procedures set forth in this act, *may* enact ... zoning ordinances ....") (emphasis added). Thus, there are many municipalities across this Commonwealth that have no zoning at all. In such municipalities, Section 3304 of the Act, which mandates uniformity among local ordinances regulating oil and gas operations – *i.e.*, those local ordinances that *already exist* or that are *subsequently* enacted – has *no* impact on property owners. Section 3304 does not become a *de facto* zoning ordinance in those municipalities because there is no local zoning in those municipalities to begin with. In those municipalities *with* zoning, the impact is solely in one direction – a landowner is permitted to do more with his or her property, not less.

The majority's "pig in the parlor instead of the barnyard" analogy has it wrong. *Robinson Twp.*, 2012 Pa. Commw. LEXIS 222, at *44, *50. Zoning ordinances restrict and, *absent zoning*, landowners are permitted to have "pigs," or any other "animal" in their parlors, barnyards or anywhere else on their property, subject to other applicable, and constitutional, statutory or regulatory restrictions and common law doctrines of nuisance. The majority opinion fails to identify *any* property right or other interest protected by due process of law of which the Municipalities, or property owners, have been deprived of as a result of the operation of Section 3304.

D. Act 13 Has A Real And Substantial Relationship To A Legitimate State Interest.

Because Act 13 does not deprive the Municipalities (or property owners) of a property right or other interest that is constitutionally protected, they have no substantive due process claim. Even assuming a deprivation, however, the Municipalities' claims still fail. To succeed, the Municipalities must establish that Act 13 lacks a real and substantial relationship to a legitimate legislative purpose. *See Kahn*, 842 A.2d at 946-47. As explained by this Court in *Kahn*:

> Whether a statute is wise or whether it is the best means to achieve the desired result are matters left to the legislature and not the courts. Moreover, the General Assembly is presumed to have investigated the question and ascertained what is best for the good of the profession and the good of the people. *As long as there a basis for finding that the statute is rationally related to a legitimate state interest, the statute must be upheld.*

Kahn, 842 A.2d 947 (emphasis added).

The Municipalities cannot meet their burden. As recognized by this Court in *Huntley*, the efficient production and utilization of the State's natural resources is a legitimate governmental purpose for legislation. *See* 964 A.2d at 865-66; *see also Range*, 964 A.2d at 874 (noting the Commonwealth's agreement with appellee's position regarding the need for *statewide uniformity* in the regulation of the oil and gas industry). Act 13 is clearly intended to promote that purpose. *See* 58 Pa.C.S. § 3202. It does so by imposing uniform standards and limitations on the development of oil and gas resources throughout the Commonwealth. *See* 58 Pa.C.S. §§ 3201-3309. Judge Brobson's dissent in this case echoes that indisputable conclusion:

> . . . Section 3304 of Act 13 is a valid exercise of the police power. The law promotes the health, safety, and welfare of all Pennsylvanians by establishing zoning guidance to local municipalities that ensures ***the uniform and optimal development of oil and gas resources in this Commonwealth***. Its provisions ***strike a balance*** both by providing for the harvesting of those natural resources, wherever they are found, and by restricting oil and gas operations based on (a) type, (b) location, and (c) noise level. The General Assembly's decision, as

> reflected in this provision, does not appear arbitrary, unreasonable, or wholly unrelated to the stated purpose of the law.

Robinson Twp., 2012 Pa. Commw. LEXIS 222, at *92 (Brobson, J., dissenting) (emphasis added).

The majority, however, argues that the uniform and optimal development of the State's oil and gas resources cannot justify the exercise of the Legislature's police power embodied in Section 3304 of Act 13. It suggests, relying on this Court's *Huntley* decision, that Section 3304 constitutes zoning and, as such, it must have a *different* police power justification to survive due process review, namely the orderly development and use of land in a manner consistent with local demographic and environmental concerns. *See Robinson Twp.*, 2012 Pa. Commw. LEXIS 222, at *50.

Section 3304 of Act 13 is not, for the reasons above, a zoning ordinance – it does not restrict or deprive any property owner of his constitutionally ordained right to do as he sees fit with his property, nor does it impose *de facto* zoning in municipalities without any zoning. Even if Section 3304 were considered as such, however, the State's interest in the uniform and optimal development of its oil and gas resources would justify its exercise of the police power. This conclusion is driven by the MPC itself, which expressly mandates that zoning ordinances provide for "reasonable development of minerals." 53 P.S. § 10603(i). For purposes of the MPC, "minerals" include "crude oil and natural gas." *Id.* at § 10107.[17] Further, the MPC, with respect

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[17] Through Section 3304 of Act 13, which requires that all local ordinances regulating oil and gas operations must allow for the "reasonable development" of oil and gas resources based upon express standards set forth in Section 3304(b)(1) through (b)(11), the Legislature has effectively provided express *instruction* to municipalities on how they must weigh the numerous competing interests in Section 10603 and 10604 of the MPC, 53 P.S. §§ 10603, 10604, with respect to promulgation of zoning ordinances. *See* 1 Pa.C.S. § 1932; *see also State Ethics Comm'n v. Cresson*, 597 A.2d 1146 (Pa. 1991) (aspects of the Election Code and the Ethics Act related to the same subject matter, *i.e.*, requirements for filing a nomination petition, are in *pari materia* and must be construed together); *Port Auth. of Allegheny County v. Div. 85, Amalgamated Transit Union*, 383 A.2d 954 (Pa. Cmwlth. 1978) (provisions of the Port

to both municipal comprehensive plans and ordinance provisions, expressly recognizes that local zoning ***must*** be consistent with State law with respect to mineral extraction, including the Oil and Gas Act. *See* 53 P.S. §§ 10301(6), 10603(b).

As reflected in the MPC, fostering the uniform and optimal development of the State's oil and gas and other mineral resources is clearly a legitimate basis for "zoning," or other exercise of the police power by the Legislature. Thus, to the extent Section 3304 of Act 13 is a "zoning" ordinance, as the majority contends, then it represents a legitimate exercise of the police power – otherwise, the Court must likewise be prepared to hold that the MPC itself, which *mandates* that zoning ordinances provide for "reasonable development of minerals," also represents an unconstitutional exercise of the police power by the Legislature.

Indeed, given the mandate in the MPC that zoning ordinances provide for "reasonable development of minerals," each and every municipality in this Commonwealth could, if it so desired, exercise its authority under the MPC to adopt a zoning ordinance that is *identical* to Section 3304 of Act 13. That is because, as recognized by Judge Brobson's dissent below, Section 3304 strikes a careful *balance*, fully consistent with the MPC, by allowing for the harvesting of natural resources where they are found, while at the same time restricting oil and gas operations based on type, location and noise. *See Robinson Twp.*, 2012 Pa. Commw. LEXIS 222, at *92 (Brobson, J., dissenting).[18] Through Section 3304, the Legislature recognized the

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Authority Act are in *pari materia* with provisions of the Public Employee Relations Act insofar as they relate to the same class of persons or things and must be construed together as one enactment).

[18] As noted in Judge Brobson's dissent, there is no requirement under Pennsylvania law that zoning districts must *only* include uses that are compatible, and cannot include any uses that might be considered incompatible. *See Robinson Twp.*, 2012 Pa. Commw. LEXIS 222, at *86-*87 (Brobson, J., dissenting) (rejecting the majority's flawed legal conclusion, based on *City of Edmunds v. Oxford House*, 514 U.S. 725 (1995), that it is a "basic precept" that any zoning ordinance that allows a particular use in a district that is incompatible with other uses in that same district is unconstitutional). "Indeed, if accepted, such a rule of law would call into question, if not sound the death knell for, zoning practices that heretofore have recognized the validity of incompatible uses -- e.g., the allowance of a pre-existing nonconforming use

need to balance development of oil and gas resources in the Commonwealth with the health, safety, environment and property interests of the citizen affected by such development. *Id.* "It does not give carte blanche to the oil and gas industry to ignore local zoning ordinances and engage in oil and gas operations anywhere it wishes." *Id.* at *84. Rather, Section 3304 recognizes the various uses related to the oil and gas industry and limits where, and under what circumstances, those uses may be allowed within particular zoning districts in a municipality. *Id.* at *85; *see* 58 Pa.C.S. §§ 3304(b)(1)-(11).

1. The Commonwealth Court's majority misconstrues *Huntley*.

This Court's *Huntley* decision does not hold, as the Commonwealth Court's majority contends, that the State's interest in uniform and optimal development of oil and gas resources in this Commonwealth *cannot* justify the exercise of its police powers to adopt Section 3304 – or, according to the majority, to "zone." *See Robinson Twp.*, 2012 Pa. Commw. LEXIS 222, at *48-*50.

In *Huntley*, this Court held that the challenged zoning ordinance was not preempted by Section 602 of former Oil and Gas Act, 58 P.S. § 601.602, because the preemptive language of that section pertained specifically to features of well operations and the Act's stated purpose, neither of which the challenged ordinance addressed. *See Huntley*, 964 A.2d at 863-66.

This Court, in reaching its holding that the challenged ordinance and the Act served different purposes, recognized that *Commonwealth's interests* in oil and gas development and *a municipality's interests* in local land-use control at times may overlap, but often do not. *Id.* at 865-66. Given these often differing interests, the stated intent underlying the challenged ordinance, and the lack of "further legislative guidance" on the issue of whether the Act was

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and authority of municipalities to grant a use variance." *Id.* at *87.

intended to preempt municipal restrictions on the location of oil and gas wells, the Court concluded that challenged ordinance served different purposes from those enumerated in the former Oil and Gas Act and, consequently, that the ordinance's overall restriction on oil and gas wells in R-1 districts was not preempted by the Act. *Id.*

Huntley, in short, does not hold as the Commonwealth Court's majority contends. The efficient production and utilization of the State's natural resources is a legitimate governmental purpose for Section 3304, whether characterized as a "zoning" provision or something else.

Section 3304, more importantly, provides the "further legislative guidance" sought by *Huntley* on the "question of whether Act 13 is intended to preempt the field of how *and where* oil and natural gas resources are developed in the Commonwealth." *See Robinson Twp.*, 2012 Pa. Commw. LEXIS 222, at *87, n.1 (Brobson, J., dissenting) (emphasis original). The "further legislative guidance" supplied by Section 3304, moreover, recognizes that some uses related to the oil and gas industry can be more intrusive than others and unsuitable for certain zoning districts. *Id.* at *85-*86. Accordingly, "Section 3304(b) limits where and under what circumstances certain oil and gas operations may be allowed within a particular zoning district of a municipality." *Id.* at *85.[19]

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[19] This Court, in *Chanceford Aviation Properties v. Chanceford Township Board of Supervisors*, 923 A.2d 1099 (Pa. 2007), decided a case in which the Legislature mandated municipal zoning compliance with state-imposed rules regarding public airports. In *Chanceford*, the township argued that it is "outside the province of the judicial and executive branches to compel local legislative bodies to amend, repeal, and reenact their zoning ordinances since these legislative bodies may act, or not act, as they wish." 923 A.2d at 1108. This Court summarily rejected that argument, stating "Here, [the statute] commands that municipalities with airport hazard areas enact and carry out airport zoning regulations. Since the Township has a public airport, and thus airport hazard areas, it must comply with the legislature's mandate." *Id.* at 1108. *Chanceford Aviation*, along with *East Brunswick* and *Packer Township*, demonstrate that it is not unusual for the Legislature to direct how delegated zoning authority is to be exercised, that the Commonwealth's exercise of the police power is supreme and, further, why the Municipalities' constitutional challenges to Act 13 must be rejected.

2. Section 3304 does not require municipalities to "violate" their comprehensive plans.

The Commonwealth Court majority contends that Section 3304 requires municipalities to "violate" their comprehensive plans by requiring municipalities to allow oil and gas operations in districts under their comprehensive plans where such uses are not allowed. *See Robinson Twp.*, 2012 Pa. Commw. LEXIS 222, at *51 and *52, n.22.

To the extent the majority opinion is suggesting that municipalities have a *constitutional* obligation to zone in accordance with their "comprehensive plans," as adopted pursuant to the MPC, such suggestion has no merit. A municipality can never "violate" its comprehensive plan. While a comprehensive plan is a useful tool for properly guiding growth and development of the community, it is only an intermediate and inconclusive step in the land use planning. *See CACO Three, Inc. v. Board of Supervisors of Huntingdon Township*, 845 A.2d 991, 995 (Pa. Cmwlth.), *petition for allowance of appeal denied*, 860 A.2d 491 (Pa. 2004). Unlike a specific and regulatory zoning ordinance, a comprehensive plan is, by its nature, an abstract recommendation as to desirable approaches to land utilization and development of the community. *Id.* Consequently, a zoning ordinance cannot be substantively challenged on the basis that it is inconsistent with and fails to comply with a comprehensive plan, which is "by its nature, an abstract recommendation as to land utilization." *Briar Meadows Dev., Inc.*, 2 A.3d at 1307 (Pa. Cmwlth. 2010). *See also* 53 P.S. § 10303(c) ("Notwithstanding any other provision of this act, 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."); *Plaxton v. Lycoming County Zoning Hearing Bd.*, 986 A.2d 199, 211 (Pa. Cmwlth. 2009), *petition for allowance of appeal denied, Plaxton v. Lycoming County Zoning Hearing Bd.*, 2010 Pa. LEXIS 2340 (Pa. Oct. 14, 2010) (rejecting substantive

validity challenge to amendment to county zoning ordinance permitting, by right, wind energy facilities in certain zoning districts on the basis, *inter alia*, that the ordinance amendment failed to comply with county comprehensive plan); *CACO*, 845 A.2d at 995 (inconsistency with a comprehensive plan is not a proper basis for denying a land development plan).

Moreover, as recognized by Judge Brobson's dissenting opinion, "the General Assembly cannot be held hostage by each local municipality's comprehensive plan when exercising its police power." *See Robinson Twp.*, 2012 Pa. Commw. LEXIS 222, *89, n.2 (Brobson, J., dissenting). That is because, under the preemption doctrine, a local ordinance, and for even stronger reason a comprehensive *plan*, "may not stand as an obstacle to the execution of the full purposes and objectives of the Legislature." *Huntley*, 964 A.2d at 863. Conflict preemption "applies with equal force to municipal laws whose operation might otherwise conflict with the objectives of the state legislature." *Id.* at 863, n.6.

In sum, while the Municipalities may not agree with the wisdom of Act 13, they cannot establish that the Act lacks a real and substantial relationship to a legitimate State interest. Consequently, the Municipalities' substantive due process challenges to Act 13, Counts I – III, fail as a matter of law and the Commonwealth Court erred in overruling the Commonwealth's preliminary objections and granting summary relief to the Municipalities on those counts.

E. The Commonwealth Court Erred In Declaring Section 3215(b)(4) Of Act 13 Unconstitutional.

Section 3215(b)(4) of Act 13, 58 Pa.C.S. § 3215(b)(4), is part of Chapter 32 of the Act, which sets the core environmental protection goals for the development of oil and gas resources within the Commonwealth. Section 3215 of Act 13 restricts the location of oil and gas wells through, among other things, the imposition of setbacks. Section 3215(b)(4) authorizes needed regulatory flexibility by providing PaDEP with authority to waive certain of the location

restrictions contained in Section 3215.

The statute does not permit PaDEP to hand out waivers like business cards at a cocktail party. Rather, to obtain a waiver, the applicant must submit a plan to PaDEP identifying additional measures, facilities, or practices to be employed during well site construction, drilling, and operation that are "necessary to protect waters of this Commonwealth." 58 Pa.C.S. § 3215(b)(4). The waiver, if granted, must include additional terms and conditions required by PaDEP "necessary to protect the waters of this Commonwealth." *Id.*

This waiver authority provided to PaDEP in Section 3215(b)(4) has been part of oil and gas regulation in this Commonwealth for over 27 years – it is *not* a new creation of Act 13. The waiver authority formerly resided, in nearly identical form, in Section 205(b) of the former Oil and Gas Act, 58 P.S. § 601.205(b) (repealed by Act 13). The waiver provision has been effectively used and administered by PaDEP and industry for over 27 years.

The Commonwealth Court, relying upon this Court's decision in *Pennsylvanians Against Gambling Expansion Fund v. Commonwealth ("PAGE")*, 877 A.2d 383 (Pa. 2005), concluded that Section 3215(b)(4) of Act 13 violates Article II, Section 1 of the Pennsylvania Constitution because, according to the majority opinion, the Legislature failed to provide PaDEP with adequate statutory guidance for making waiver determinations. Specifically, the Commonwealth Court concluded that "general goals" contained in other provisions of Act 13, including Section 3202, 58 Pa.C.S. § 3202, are insufficient to give guidance to permit PaDEP to waive specific setbacks.

Article II, Section 1 of the Pennsylvania Constitution provides: "The Legislative power of this Commonwealth shall be vested in a General Assembly, which shall consist of a Senate and a House of Representatives." PA. CONST. art. II, § 1. Under this provision, "[w]hile the

legislature cannot delegate power to make a law, it may, where necessary, confer authority and discretion in connection with the execution of the law; it may establish primary standards and impose upon others the duty to carry out the declared legislative policy in accordance with the general provisions of the act." *Chartiers Valley Joint Schools v. Allegheny Co. Bd. of School Directors*, 211 A.2d 487, 492 (Pa. 1965). This "nondelegation principle" does not require that all details of enforcement be precisely or separately enumerated in the statute; its function is to ensure that the legislature makes the basic policy choices. *Id.* at 492. *See also Wm. Penn Parking Garage, Inc.*, 346 A.2d at 291.

To determine if a statute properly delegates authority, a court must look to the statute's purpose, its nature and its reasonable effect. *See Chartiers Valley*, 211 A.2d at 493. In doing so, the court "look[s] beyond the letter [of the law] to determine its true purpose and effect." *Id. See also Gilligan v. Pennsylvania Horse Racing Commission*, 422 A.2d 487, 490 (Pa. 1980); *Pa. Builders Ass'n v. Dep't of Labor & Indus.*, 4 A.3d 215, 224 (Pa. Cmwlth. 2010).

Chapter 32 of Act 13 has an explicit statement of purpose:

§ 3202. Declaration of purpose. [Effective April 14, 2012]

The purposes of this chapter are to:

(1) Permit optimal development of oil and gas resources of this Commonwealth consistent with protection of the health, safety, environment and property of Pennsylvania citizens.

(2) Protect the safety of personnel and facilities employed in coal mining or exploration, development, storage and production of natural gas or oil.

(3) Protect the safety and property rights of persons residing in areas where mining, exploration, development, storage or production occurs.

(4) Protect the natural resources, environmental rights and values secured by the Constitution of Pennsylvania.

58 Pa.C.S. § 3202. The Legislature, by Section 3202, has made the basic policy choices that

underlie all of Chapter 32 of Act 13, including Section 3215(b)(4) challenged by the Municipalities. Additionally, the remainder of Section 3215 itself, regarding well location restrictions, supplies additional basic policy choices made by the Legislature. Those provisions, Sections 3215(a), (b)(1)-(3), are explicit with respect to where wells can, and cannot, be drilled and supply PaDEP with further guidance when rendering waiver determinations pursuant to Section 3215(b)(4). The Legislature, moreover, through the Pennsylvania Clean Streams law has provided PaDEP with extensive, additional guidance on what is deemed "necessary to protect the waters of this Commonwealth." *See* 35 P.S. §§ 691.1 *et seq.*[20]

Section 3215(b)(4) of Act 13 is not at all analogous to the provision found unconstitutional by this Court in *PAGE*, but is instead guided by language more specific than other statutory language found constitutionally sufficient by this Court. The statutory provision challenged in *PAGE*, afforded the Gaming Control Board unlimited and unfettered "discretion [to] consider [] local zoning ordinances when considering an application for a slot machine license." 877 A.2d at 415 (quoting Section 1506 of Act 2004-71). This Court held that this provision was unconstitutional because, notwithstanding general goals contained in other provisions, it did not provide adequate standards upon which the Board could rely in considering the local zoning and land use provisions for the site of the facility itself. *Id.* at 418-419.

Here, by contrast, the basic policy choice has been made and PaDEP is given clear

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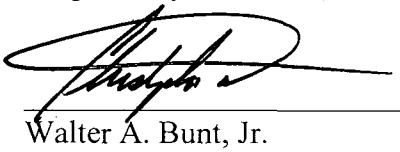
[20] Indeed it is neither new or unique for the Legislature to grant PaDEP the discretion to make decisions based upon its informed judgment as to what additional steps will protect the environment. *See, e.g.,* 58 Pa.C.S. § 3211(e) (Act 13) (Department may impose permit terms and conditions necessary to assure compliance with this Chapter and other laws administered by PaDEP); 35 P.S.§ 4006.1(b.1) (Air Pollution Control Act) (permit may contain terms and conditions "such terms and conditions as the department deems necessary to assure the proper operation of the source"); 35 P.S. § 691.316 (Clean Streams Law) (PaDEP may order correction of a polluting condition in a manner "satisfactory to the department"); 35 P.S. § 6020.501 (Hazardous Sites Cleanup Act) (PaDEP may undertake response actions relating to release of hazardous substance that "the department deems necessary or appropriate to protect the public health, safety or welfare or the environment.").

guidance on making waiver determinations, not only in the Act's explicit statement of purpose, but in Section 3215(b)(4) itself. PaDEP, who has been empowered by the Legislature to administer the Clean Streams Law, can certainly determine what is "necessary to protect the waters of this Commonwealth" based upon the requirements and obligations of that extensive statutory regime. The statutory directive to PaDEP to do what is "necessary to protect the waters of this Commonwealth," when coupled with explicit language in Section 3215 with respect to where wells can, and cannot, be drilled, and the Act's explicit statement of purpose, supply PaDEP with sufficient guidance for rendering waiver determinations pursuant to Section 3215(b)(4). There is, unlike the statutory provision at issue in *PAGE*, no unlimited and unfettered discretion provided to PaDEP under Section 3215(b)(4).

V. CONCLUSION

This Court should reverse the order of the Commonwealth Court granting the Municipalities summary relief on Counts I-III and VIII and instruct the Commonwealth Court to enter summary relief for the Commonwealth Parties on those counts.

Respectfully submitted,



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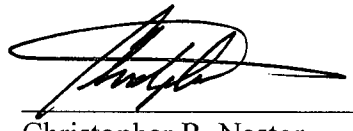

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