

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

Nos. 64 MAP 2012

ROBINSON TOWNSHIP, Washington County, Pennsylvania; BRIAN COPPOLA, Individually and in his Official Capacity as Supervisor of Robinson Township; TOWNSHIP OF NOCKAMIXON, Bucks County, Pennsylvania; TOWNSHIP OF SOUTH FAYETTE, Allegheny County, Pennsylvania; PETERS TOWNSHIP, Washington County, Pennsylvania; DAVID M. BALL, Individually and in his Official Capacity as Councilman of Peters Township; TOWNSHIP OF CECIL, Washington County, Pennsylvania; MOUNT PLEASANT TOWNSHIP, Washington County, Pennsylvania; BOROUGH OF YARDLEY, Bucks County, Pennsylvania; DELAWARE RIVERKEEPER NETWORK; MAYA van ROSSUM, the Delaware Riverkeeper; and MEHERNOSH KHAN, M.D.

Appellees/Cross-Appellants

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

Appellants/Cross-Appellees

Commonwealth of Pennsylvania; Office of the Attorney General of Pennsylvania; and Linda L. Kelly, in her Official Capacity as Attorney General of the Commonwealth Of Pennsylvania: Appellants at Docket No. 64 MAP 2012.

BRIEF FOR APPELLANTS COMMONWEALTH OF PENNSYLVANIA; OFFICE OF THE ATTORNEY GENERAL OF PENNSYLVANIA; AND LINDA L. KELLY, IN HER OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA

**APPEAL FROM THE ORDER OF THE COMMONWEALTH COURT ENTERED
ON JUNE 26, 2012 AT NO. 284 M.D. 2012**

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STATEMENT OF JURISDICTION

This is an appeal from a final order of the Commonwealth Court in a matter which was originally commenced in that court. This Court has jurisdiction pursuant to 42 Pa.C.S. § 723(a).

STATEMENT OF STANDARD AND SCOPE OF REVIEW

Scope of review: This case involves an appeal from a determination (order granting summary relief) regarding the constitutionality of a statute. As such, it involves questions of law for which the scope of review is plenary. The Court may therefore examine the entire record. *Brittain v. Beard*, 601 Pa. 409, 417, 974 A.2d 479, 483-84 (2009); *Commonwealth v. Bullock*, 590 Pa. 480, 487, 913 A.2d 207, 212 (2006); *Pennsylvania Turnpike Commission v. Commonwealth*, 587 Pa. 347, 362, 899 A.2d 1085, 1094 (2006).

Standard of review: The standard of review is *de novo*. *Commonwealth v. Bullock*, 590 Pa. 480, 487, 913 A.2d 207, 212 (2006); *Pennsylvania Turnpike Commission v. Commonwealth*, 587 Pa. 347, 362, 899 A.2d 1085, 1094 (2006). An application for summary relief is governed by Pa.R.A.P. 1532(b). It is treated in the same manner as a motion for summary judgment under the Rules of Civil Procedure. Accordingly, the same standard of review applies to an application for summary relief as to a motion for summary judgment on appeal. *Brittain v. Beard*, 601 Pa. 409, 417, 974 A.2d 479, 483-84 (2009).

ORDER IN QUESTION

The text of the July 26, 2012 Order of Commonwealth Court, which is the basis of the present appeal, is set forth below as follows:

ORDER

AND NOW, this 26th day of July, 2012, the preliminary objections filed by the Commonwealth to Counts IV, V, VI, VII, IX, X, XI and XII are sustained and those Counts are dismissed. The preliminary objections to Counts I, II, III and VIII are overruled.

Petitioners' motion for summary relief as to Counts I, II, and III is granted. 58 P.S. §3304 is declared unconstitutional, null and void. The Commonwealth is permanently enjoined from enforcing its provisions. Other than 58 Pa. C.S. §3301 through §3303 which remain in full force and effect, the remaining provisions of Chapter 33 that enforce 58 Pa. C.S. §3304 are similarly enjoined.

Petitioners' motion for summary relief as to Count VIII is granted and Section 3215(b)(4) is declared null and void.

The cross-motions for summary relief filed by the Pennsylvania Public Utility Commission and Robert F. Powelson in his Official Capacity as Chairman of the Public Utility Commission and by the Department of Environmental Protection and Michael L. Krancer in his Official Capacity as Secretary of the Department of Environmental Protection are denied.

/s/
DAN PELLÉGRINI, President Judge

STATEMENT OF THE QUESTIONS INVOLVED

- I. WHETHER THE COMMONWEALTH COURT ERRED IN FINDING THAT THE MUNICIPALITIES AND THEIR OFFICIALS HAD STANDING TO BRING THE CLAIMS RAISED IN THE PETITION FOR REVIEW?**

Suggested Answer: Yes.

- II. WHETHER THE COMMONWEALTH COURT ERRED IN FINDING THAT THE CLAIMS BROUGHT BY THE MUNICIPALITIES AND THEIR OFFICIALS WERE JUSTICIABLE AND NOT BARRED BY THE POLITICAL QUESTION DOCTRINE?**

Suggested Answer: Yes.

- III. WHETHER THE COMMONWEALTH COURT ERRED IN OVERRULING THE COMMONWEALTH'S PRELIMINARY OBJECTIONS, AND GRANTING SUMMARY RELIEF IN FAVOR OF THE MUNICIPALITIES AND THEIR OFFICIALS ON COUNTS I-III OF THE PETITION FOR REVIEW?**

Suggested Answer: Yes.

- IV. WHETHER THE COMMONWEALTH COURT ERRED IN OVERRULING THE COMMONWEALTH'S PRELIMINARY OBJECTIONS, AND GRANTING SUMMARY RELIEF IN FAVOR OF THE MUNICIPALITIES AND THEIR OFFICIALS ON COUNT VIII OF THE PETITION FOR REVIEW?**

Suggested Answer: Yes.

STATEMENT OF THE CASE

This case raises significant constitutional questions regarding the power of the General Assembly to establish economic and environmental policies for the Commonwealth where they conflict with the land use decisions of local municipalities. It also raises important questions regarding the ability of the General Assembly to enact complex statutes which require the Department of Environmental Protection (DEP) and other state administrative agencies to implement highly-technical, but necessary, regulations to give those statutes effect without violating the non-delegation doctrine under Article II, Section 1 of the Pennsylvania Constitution.

Procedural History.

Act 13 of 2012 (Act 13), 58 Pa. C.S. §§ 2301-3504, was signed into law on February 14, 2012. Act 13 is a comprehensive and broad reform of the laws governing the development of oil and gas resources in Pennsylvania. Among other things, the General Assembly intended, through Act 13, to establish uniformity and promote growth in the industry by preempting local ordinances which impose conditions or limitations on oil and gas operations. Chapter 33 of Act 13, 58 Pa. C.S. §§ 3301-3304. The General Assembly further provided that oil and gas development be allowed as a permitted use in any zoning district, and restrictions placed on oil and gas development by municipalities be no greater than those placed on other industrial uses. 58 Pa. C.S. § 3304.

Robinson Township and the other petitioners¹ below filed a petition for review in the original jurisdiction of Commonwealth Court on March 29, 2012. (Petition for Review &

¹ In addition to Robinson Township, the petitioners included six other municipalities from Pennsylvania (Township of Nockamixon, Township of South Fayette, Peters Township, Township of Cecil, Mount Pleasant Township, and the Borough of Yardley); two officials from

Exhibits 1-47; R.R. 54a-604a) They seek a declaratory judgment that Act 13 of 2012, 58 Pa. C.S. §§ 2301-3504, is unconstitutional and request that Act 13 be permanently enjoined. The Municipalities raise twelve separate claims in which they assert that Act 13 violates the Pennsylvania Constitution. (Petition at ¶ 20; R.R. 61a-63a) They specifically allege that Act 13 violates the following provisions of the Pennsylvania Constitution: Article I, Section 1; Article I, Section 10; Article I, Section 27; Article II, Section 1; Article III, Section 3; and Article III, Section 32. They further allege that it authorizes the PUC to perform legislative and judicial functions in violation of the separation of powers doctrine and that some of its provisions are unconstitutionally vague in violation of the Due Process Clause of the Village of Amendment to the United States Constitution.² (Petition at ¶ 20; R.R. 61a-63a)

these municipalities (Brian Coppola, Supervisor of Robinson Township; and David M. Ball, Councilman of Peters Township); the Delaware Riverkeeper Network, a non-profit organization which has as its primary mission the maintenance and restoration of the Delaware River; Maya Van Rossum, a privately funded ombudsman who advocates for the protection and restoration of the Delaware River Basin; and Dr. Mehernosh Khan, M.D., a medical doctor practicing in Monroeville, Allegheny County. For the sake of simplicity, the petitioners in Commonwealth Court will collectively be referred to as the “Municipalities” unless greater specificity is required.

² The Municipalities also filed a separate motion requesting a preliminary injunction in which they asked the Court to preliminarily enjoin Act 13 from going into effect on April 14, 2012. (Motion for Preliminary Injunction, 4/3/2012) The Commonwealth respondents filed an answer in opposition to the motion for a preliminary injunction on April 10, 2012. (Commonwealth’s Answer to motion for preliminary injunction, 4/10/2012) A hearing was held before Senior Judge Keith B. Quigley on April 11, 2012. No evidence was presented to the Court, but the parties were able to present argument. (Transcript of Preliminary Injunction Hearing) Later that same day, Senior Judge Quigley issued an order granting, in part, a preliminary injunction. The Commonwealth Court’s order enjoined Section 3309 of Act 13 of 2012, 58 Pa. C.S. § 3309, from going into effect for 120 days. The Pennsylvania Public Utility Commission (PUC) filed an Expedited Application to Modify Order on April 25, 2012. (R.R. 605a-612a) Senior Judge Quigley denied the application to modify the April 11, 2012 preliminary injunction order by an order issued on April 27, 2012. (R.R. 629a-630a) The Commonwealth of Pennsylvania; Office of the Attorney General of Pennsylvania; and Linda L. Kelly, in her official capacity as Attorney General of Pennsylvania (Respondents below), filed a notice of appeal on May 3, 2012 from the Commonwealth Court’s April 11, 2012 order granting a preliminary injunction and its April 27, 2012 order denying the application to modify the

The Commonwealth, the Office of Attorney General, and Attorney General Linda L. Kelly³ filed preliminary objections in which they maintained that the Municipalities lack standing, the Municipalities' claims involve nonjusticiable political questions which are properly decided by the Legislature through the democratic process and not through the courts, and the Municipalities failed to state a claim for which relief may be granted. (Preliminary Objections of Respondents Commonwealth of Pennsylvania; Office of the Attorney General; and Linda L. Kelly, Attorney General of the Commonwealth Of Pennsylvania, filed 4/30/2012; R.R. 631a-637a)

On May 7, 2012, the Municipalities filed a motion for summary judgment which was subsequently converted to a motion for summary relief pursuant to Pa. R.A.P. 1532(b) by order of Commonwealth Court. (Order, 5/10/2012) In support of their motion, the Municipalities filed a supporting brief along with evidentiary materials.⁴ (R.R. 700a-984a)

preliminary injunction. (Commonwealth and Attorney General's Notice of Appeal, 5/3/2012) The Commonwealth and Attorney General's appeal was docketed at No. 37 MAP 2012. The DEP and PUC filed a separate appeal from the Commonwealth Court's April 11 and April 27, 2012 orders. (DEP and PUC's Notice of Appeal, 5/3/2012) The DEP and PUC's appeal was docketed at 40 MAP 2012. The Municipalities have filed a motion to dismiss these appeals as moot. This motion has not been ruled on by the Court as of this time and the appeals from the granting of the preliminary injunction are still pending.

³ The Commonwealth; the Office of Attorney General; and Linda L. Kelly, the Attorney General of the Commonwealth of Pennsylvania were respondents below and are Appellants in the case presently before the Court at No. 64 MAP 2012. The Public Utility Commission (PUC); Robert F. Powelson, Chairman of the PUC; Pennsylvania Department of Environmental Protection (DEP); and Michael L. Krancer, Secretary of the DEP were additional respondents in Commonwealth Court. They are Appellants at No. 63 MAP 2012. They have separate counsel and are not represented by the Office of Attorney General for purposes of this case.

⁴ Municipalities' motion for summary relief, brief and supporting evidentiary materials were filed pursuant to Commonwealth Court's expedited briefing schedule. (Order, 4/20/2012) The evidentiary materials filed by the Municipalities include affidavits from various municipal officials; Petitioner Maya Van Rossum, the Delaware Riverkeeper; and a registered nurse. The Municipalities also included expert reports from Stephen King, a toxicologist; Leslie Birnbaum, an Industrial Hygienist; and Richard Grossman, a Community Planning Consultant. The

After the parties filed briefs on the merits of both the preliminary objections of the Commonwealth parties and the Municipalities' motion for summary relief, the Commonwealth Court, sitting *en banc*, heard oral argument on June 6, 2012. On July 26, 2012, the Commonwealth Court issued a decision in which it granted in part (as to Counts IV, V, VI, VII, IX, X, XI and XII of the Complaint), and denied in part (as to Counts I, II, III, and VIII) the Commonwealth parties' preliminary objections. In addition, it granted the Municipalities' motion for summary relief as to Counts I, II, III and declared Section 3304 of Act 13 (providing for uniformity of local ordinances) to be unconstitutional. The Commonwealth Court also granted summary relief as to Count VIII and declared Section 3215(b)(4) of Act 13 (providing for DEP to grant waivers from the setback requirements for oil and gas wells from certain water sources) to be unconstitutional. (Opinion and Order, ___ A.3d at ___, 2012 WL 3030277 (Pa. Cmwlth., July 26, 2012); Com. Appellants' Brief, Attachment A)

The Commonwealth, the Office of Attorney General, and Attorney General Linda L. Kelly filed a notice of appeal from the Commonwealth Court's order on July 30, 2012. The appeal is docketed at No. 64 MAP 2012. The PUC, PUC Chairman Powelson, the DEP, and DEP Secretary Krancer have filed a separate notice of appeal at No. 63 MAP 2012. The Municipalities have filed cross-appeals from the same order at Nos. 72 and 73 MAP 2012.

Municipalities also incorporated the forty-seven exhibits attached to the Petition for Review into their motion for summary relief.

Names of Judges Whose Decision Is To Be Reviewed.

The Commonwealth Court, sitting *en banc*, issued a decision (4-3) in this case pursuant to Section 256(b) of its Internal Operating Procedures. The decision is reported at ___ A.3d ___, 2012 WL 3030277 (Pa. Cmwlth., July 26, 2012) A copy of the decision is attached as **APPENDIX A**. The opinion was authored by President Judge Dan Pellegrini, joined by Judge Bernard L. McGinley, Judge Bonnie Brigance Leadbetter, and Judge Patricia A. McCullough. Judge P. Kevin Brobson wrote a dissenting opinion, joined by Judge Robert Simpson and Judge Anne E. Covey. Judge M. Hannah Leavitt recused herself in this case and Judge Renee Cohn Jubelirer did not participate in the decision.

Statement of Facts

A. Overview of Act 13 of 2012

Act 13 of 2012 (Act 13), 58 Pa. C.S. §§ 2301-3504, was signed into law on February 14, 2012. It is a comprehensive revision of Pennsylvania's Oil and Gas Act, 58 P.S. §§ 601.101 – 601.605. The Oil and Gas Act was enacted in 1984 and has been in effect for almost 30 years without being substantially changed. Among other things, Act 13 revises and updates the Commonwealth's environmental regulation of the oil and natural gas industries, promotes economic development and energy self-sufficiency in Pennsylvania, provides for drilling impact fees which are targeted to benefit municipalities where oil and gas operations occur, and creates uniformity with respect to the development and operation of oil and gas operations in different municipalities throughout Pennsylvania while preventing individual municipalities from unreasonably excluding or hampering development of an important and growing industry.

Act 13 consists of the following six chapters:

- Chapter 23 (Unconventional Gas Well Fee) authorizes counties to impose an impact fee to benefit, in part, municipalities which are impacted by unconventional natural gas wells. The administration of the collection and distribution of the impact fee is performed by the PUC. 58 Pa. C.S. §§ 2301-2318.
- Chapter 25 (Oil and Gas Lease Fund) provides for the distribution of money from the Commonwealth's Oil and Gas Lease Fund to the Environmental Stewardship Fund and the Hazardous Sites cleanup Fund. In 2013, Act 13 requires the transfer of 20 Million Dollars. In 2014, Act 13 requires the transfer of 35 Million Dollars. In 2015, Act 13 requires the transfer of 40 Million Dollars. In 2016 and subsequent years, Act 13 requires the transfer of 50 Million Dollars. 58 Pa. C.S. §§ 2501-2505.
- Chapter 27 (Natural Gas Energy) provides funding to encourage the purchase of (or conversion to) fleet vehicles which use compressed or liquefied natural gas by a Commonwealth authority, a municipal authority, the Pennsylvania Turnpike, a local transportation organization, a nonprofit entity, a state-owned or state-related university, and qualifying companies doing business in Pennsylvania. 58 Pa. C.S. §§ 2701-2704.
- Chapter 32 (Development) provides for the "development of oil and gas resources of this Commonwealth consistent with protection of the health, safety, environment and property of Pennsylvania citizens." It further provides for the safety of personnel and facilities as well as the "safety and property rights of persons residing in areas where mining, exploration, development, storage, or production occurs." Finally, it is

intended to “protect the natural resources, environmental rights and values secured by the Constitution of Pennsylvania.” 58 Pa. C.C. §§ 3201-3274.

- Chapter 33 (Local Ordinances Relating to Oil and Gas Operation) provides for the express preemption of local ordinances which impose conditions or limitations on oil and gas operations which are regulated by Chapter 32 (Development). It further provides that state environmental laws, to the extent they regulate oil and gas operations, preempt any local environmental laws. 58 Pa. C.S. §§ 3301-3309.
- Chapter 35 (Responsibility for Fee) provides that any fee owed pursuant to Chapter 23 is the responsibility of producers and cannot be made an obligation of a landowner or leaseholder of real property regardless of any pre-existing or future contractual agreements. 58 Pa. C.S. §§ 3501-3504.

The requirements and provisions contained in Chapter 32 (Development) and Chapter 33 (Local Ordinances Relating to Oil and Gas Operation) of Act 13 are the focal point of the Municipalities’ claims in the present case. It is these two chapters which contain the statutory provisions which establish uniform standards governing the production of oil and gas in Pennsylvania and preempt local ordinances which attempt to limit or regulate oil and gas operations to the extent those features are regulated by Chapter 32.

B. Chapter 32 (Development)

Chapter 32 provides a detailed and extensive scheme for granting well permits and regulating oil and gas activities in Pennsylvania while insuring a uniform state-wide system for protecting the environment from the potential harms caused by oil and gas operations. It provides, *inter alia*, for the following:

- Well Permits approved by DEP. This includes provisions regarding the scope of such permits, notice requirements, the plugging of abandoned and orphan wells, permit fees, and water management. Section 3211 of Act 13, 58 Pa. C.S. § 3211.
- Objections to permit applications by interested landowners and leaseholders. Section 3212 of Act 13, 58 Pa. C.S. § 3212.
- Comments by municipalities which may be considered by DEP in issuing permits. Section 3212.1 of Act 13, 58 Pa. C.S. § 3212.1.
- Well location restrictions. Act 13 establishes minimum setback requirements for establishing new wells. For unconventional gas wells, the setback requirements normally require at least a minimum distance of 500 feet from any building. There is a 1,000 foot minimum distance for unconventional gas wells from water wells, reservoirs and other water supply extraction points without consent from the water purveyor. Section 3215 of Act 13, 58 Pa. C.S. § 3215.
- Impact on public resources shall be considered in granting permits. DEP shall consider the impact of proposed wells on (1) publicly owned parks, forests, game lands; (2) National or State scenic rivers; (3) National natural landmarks; (4) Habitats of rare and endangered flora and fauna; (5) Historical and archaeological sites listed on the Federal or State list of historic places; and (6) Sources used for public drinking supplies. Section 3215(c) of Act 13, 58 Pa.C.S. § 3215(c).
- Restrictions on the placement of wells in Floodplains. Section 3215(f) of Act 13, 58 Pa. C.S. § 3215(f).
- Requirements for the restoration of land area disturbed in siting, drilling, completing and producing a well. Section 3216 of Act 13, 58 Pa. C.S. § 3216.

- Requirements placed on well operators for the protection of fresh groundwater and water supplies. Sections 3217 and 3218 of Act 13, 58 Pa. C.S. §§ 3217-3218.
- Corrosion control requirements for pipelines, storage tanks, well casings and other structures used by oil and gas producers. Section 3218.4 of Act 13, 58 Pa. C.S. § 3218.4.
- Plugging requirements for abandoned wells. Section 3220 of Act 13, 58 Pa. C.S. § 3220.
- Well reporting requirements. Well operators are required to collect and report specified data to DEP. Section 3222 of Act 13, 58 Pa. C.S. § 3222.
- Reporting of information which is claimed to be a trade secret or confidential proprietary information to health care professionals. Vendors, service companies and operators are required to identify the amount of any chemicals claimed to be a trade secret or confidential proprietary information to any health professional who requests it provided the health professional executes a confidentiality agreement. Under ordinary circumstances, the request must be made in writing and the confidentiality agreement signed prior to providing the information. However, in an emergency, the information must be provided immediately upon the verbal acknowledgement that it may not be used for purposes other than for the medical purposes asserted subject to the subsequent execution of a written statement of need and a confidentiality agreement. Sections 3222.1(10) - (11) of Act 13, 58 Pa. C.S. §§ 3222.1(10) – (11).
- Requirements for coal operators engaged in operations in the vicinity of oil or gas wells. Section 3224 of Act 13, 58 Pa. C.S. § 3224.

- Requirements for the posting of a bond by the owner or operator of an oil or gas well with DEP. Section 3225 of Act 13, 58 Pa. C.S. § 3225.
- Creation of Oil and Gas Technical Advisory Board to provide technical advice to DEP in promulgating appropriate regulations under the Act. Section 3226 of Act 13, 58 Pa. C.S. § 3226.
- Requirements for underground gas storage. Sections 3231-3237 of Act 13, 58 Pa. C.S. §§ 3231-3237.
- Authorization of limited use of eminent domain powers by public utilities to acquire real property which is presently, or previously has been used, for the commercial production of natural gas. Section 3241 of Act 13, 58 Pa. C.S. § 3241.
- Enforcement by DEP of the requirements under Act 13, including the revocation of permits, the assessment of civil fines and penalties, and obtaining an injunction in state court. Sections 3251-3262 of Act 13, 58 Pa. C.S. §§ 3251-3262.
- Preserving existing rights and remedies of the Commonwealth and District Attorneys. Act 13 expressly preserves any existing rights and remedies of the Commonwealth under the common law and other statutes relating to the drilling for and production of oil and gas. The right to seek judicial relief, including the right to suppress a nuisance, abate pollution and enforce rights under the common law or statute are retained. Section 3257 of Act 13, 58 Pa. C.S. § 3257.
- Preserving existing requirements under the Solid Waste Management Act, Clean Streams Law, Dam Safety Encroachments Act, and Air Pollution Control Act. Section 3273 of Act 13, 58 Pa. C.S. § 3273.

C. Chapter 33 (Local Ordinances Relating to Oil and Gas Operations)

Chapter 33 provides for the express preemption of local ordinances which impose conditions or limitations on oil and gas operations which are regulated by Chapter 32 (Development). It further provides that state environmental laws, to the extent they regulate oil and gas operations, preempt any local environmental laws. It provides, *inter alia*, for the following:

- Preemption of local ordinances regulating oil and gas operations governed by Chapter 32 of Act 13. Section 3302 of Act 13, 58 Pa. C.S. § 3302.
- Preemption by state environmental laws of local ordinances to the extent they regulate oil and gas operations. Section 3303 of Act 13, 58 Pa. C.S. § 3303.
- Uniformity of local ordinances. Local ordinances shall allow for reasonable development of oil and gas resources and cannot impose conditions, requirements or limitations on oil and gas operations which are more stringent than those imposed on other industrial uses. Section 3304 of Act 13, 58 Pa. C.S. § 3304.
- Allowing for oil and gas operations, other than activities at impoundment areas, compressor stations and processing plants, as a permitted use in all local zoning districts (provided necessary setback provisions and other requirements under the Act are satisfied). Section 3304(b)(5) of Act 13, 58 Pa. C.S. § 3304(b)(5).
- Special requirements and restrictions for locating impoundment areas, compressor stations, and natural gas processing plants. Sections 3304(b)(6)-(8) of Act 13, 58 Pa. C.S. §§ 3304(b)(6)-(8).

- Authorizing the PUC to provide advisory opinions to municipalities regarding whether a proposed local ordinance complies with the MPC or Act 13. Section 3305(a) of Act 13, 58 Pa. C.S. § 3305.
- Authorizing the PUC to review requests by oil or gas operators and individuals within a municipality who are aggrieved by the enactment or enforcement of a local ordinance to determine whether it violates the Municipalities Planning Code (MPC), 53 P.S. §§10101 – 11107, or Act 13. An order issued by the PUC is subject to a de novo appeal to Commonwealth Court. Aggrieved parties are not required to obtain review from the PUC and have the right to seek immediate redress through a civil action brought in Commonwealth Court. Sections 3305(b) and 3306 of Act 13, 58 Pa. C.S. §§ 3305(b) and 3306.
- Providing for payment of reasonable attorney fees and costs to a plaintiff by a municipality where a court finds that the enforcement or enactment of a local zoning ordinance was done with willful or reckless disregard of the requirements of the MPC, or Act 13. Section 3307(1) of Act 13, 58 Pa. C.S. § 3307(1).
- Providing for payment of reasonable attorney fees and costs to a municipality by a plaintiff where a court finds that an action was frivolous or brought without substantial justification. Section 3307(2) of Act 13, 58 Pa. C.S. § 3307(2).
- Making a municipality ineligible to receive funds collected under Chapter 23 (relating to unconventional gas well fee) of the Act where the Commonwealth Court or Supreme Court have declared that the municipality has enacted or enforced a local ordinance which violates the Act. The municipality remains ineligible to receive

funds under Chapter 23 until it amends or repeals the invalid ordinance. Section 3308 of Act 13, 58 Pa. C.S. § 3308.

- Providing a safe harbor provision for municipalities in which they have 120 days from the effective date of Chapter 33 in which to amend a pre-existing local ordinance in order to come into compliance with the requirements of Act 13.

Municipalities would not be subject to the imposition of attorney fees and would not be rendered ineligible to receive their share of impact fees under Chapter 23 even if they had not yet amended their local ordinance before the end of the grace period.

Section 3309 of Act 13, 58 Pa. C.S. § 3309.

Statement of the Determinations Under Review.

The Commonwealth Court (*en banc*), in a 4-3 decision, held, *inter alia*, that the General Assembly lacks the authority under its police powers to require municipalities to permit oil and gas development in zoning districts where such activity would be inconsistent with their comprehensive plans.⁵ It determined that Section 3304 of Act 13, 58 Pa. C.S. § 3304, which provides for uniformity of local ordinances and prohibits municipalities from establishing certain restrictions on the location of oil and gas facilities is unconstitutional under Article I, Section 1 of the Pennsylvania Constitution and should be permanently enjoined.⁶ (Opinion at *11-*15, ___ A.3d ___; Com. Appellants' Brief, Attachment A at 12-15) The Commonwealth Court further held that Act 13's provisions which allow DEP to grant waivers from the setback requirements

⁵ The Commonwealth Court initially determined that the Municipalities have standing and that their claims are not barred by the political question doctrine. (Opinion at *3-*10, ___ A.3d ___; Com. Appellants' Brief, Attachment A at 6-12) Although the majority of the *en banc* panel ruled in favor of the Municipalities on Counts I-III of the Complaint, the entire court was actually deadlocked 4-4, with one judge recusing herself, on the constitutionality of Section 3304 of the Act. (See Opinion at *1 n.1., ___ A.3d ___; Com. Appellant's Brief, Attachment A at 1).

⁶ The Commonwealth Court also enjoined those provisions of Chapter 33 of Act 13 (58 Pa. C.S. §§ 3305-3309) which implemented Section 3304.

from certain water sources for oil and gas wells (58 Pa. C.S. § 3215(b)(4)) violate the non-delegation doctrine under Article II, Section 1 of the Pennsylvania Constitution.⁷ It concluded that DEP was not given sufficient guidance in determining whether to grant a waiver under Section 3215(b)(4) of Act 13. (Opinion at *20-*22, ___ A.3d ___; Com. Appellants' Brief, Attachment A at 18-20)

The dissent would have found the General Assembly's actions in allowing oil and gas drilling, subject to other limitations and permitting requirements under Act 13, to be a legitimate exercise of the Commonwealth's police powers. It recognized that oil and gas development is dependent on the location of these precious natural resources and that a municipality's comprehensive plan does not create a constitutional impediment to the General Assembly's goal of optimizing the development of oil and natural gas. (Opinion at *23-*26, ___ A.3d ___; Com. Appellants' Brief, Attachment A at 20-23)

Statement of Place of Raising or Preservation of Issues.

The Municipalities raised the question of the constitutionality of Act 13 of 2012 in their petition for review and their motion for summary relief. The Commonwealth and Attorney General Kelly filed preliminary objections in which they maintained that the Municipalities lack standing, the Municipalities' claims involve nonjusticiable political questions which are properly decided by the Legislature through the democratic process and not through the courts, and the Municipalities failed to state a claim for which relief may be granted. (Preliminary Objections of Respondents Commonwealth of Pennsylvania; Office of the Attorney General; and Linda L. Kelly, Attorney General of the Commonwealth Of Pennsylvania, filed 4/30/2012; R.R. 631a-

⁷ This part of the decision was decided by a 7-0 vote.

637a). The Commonwealth and Attorney General Kelly filed a brief in support of their preliminary objections and a brief in opposition to the Municipalities' motion for summary relief.

SUMMARY OF ARGUMENT

The Municipalities in this case seek to prohibit and exclude oil and gas development within their borders. In adopting this “Not-In-My-Backyard” philosophy, they seek to have their interests elevated above those of all the citizens of this Commonwealth as expressed by their elected representatives in the General Assembly through the passage of Act 13 of 2012. While local municipalities certainly play an important role in Pennsylvania government, the Commonwealth Court’s unyielding adherence to an idyllic Jeffersonian model of small town life improperly shifts the ultimate authority to establish economic and environmental policy from the General Assembly to the local borough and township hall. In striking down Section 3304 of Act 13 as unconstitutional under vague principles of substantive due process, Commonwealth Court mistakenly concludes that the General Assembly lacks the authority to preempt the land use plans established by local officials under the Municipalities Planning Code and require municipalities to allow the development of oil and natural gas in all zoning districts.

Commonwealth Court further errs by improperly limiting the ability of the General Assembly to carry out its policies by delegating to administrative agencies the task of implementing legislation through appropriate regulations. This Court has clearly established that the non-delegation doctrine under Article I, Section 1 of the Constitution requires that basic policy choices be made by the General Assembly. Furthermore, it may delegate policy-making authority to the executive branch only if it makes the basic policy choices and enacts sufficient standards to restrain the discretion of the delegated administrative functions. However, Section 3215(b)(4) of Act 13, in providing DEP with the authority to grant a waiver from the setback requirements from certain sources of water for well permits, clearly meets the standards for proper delegation established by this Court. Section 3215(b)(4) provides that waivers may be granted only where it is shown that additional measures will be taken which are necessary to

protect the waters of the Commonwealth. Further guidance is given by Act 13 which provides that the Legislature intended to “permit optimal development of oil and gas resources of this Commonwealth consistent with protection of the health safety, environment and property of Pennsylvania citizens.” 58 Pa. C.S. § 3202. Act 13 also provides that it is intended to act concurrently with the Clean Water Act and other environmental statutes. Viewed in its entirety, Act 13 provides sufficient standards for DEP to implement appropriate regulations under Section 3215(b)(4).

The order of the Commonwealth Court granting summary relief in favor of the Municipalities on Counts I, II, III, and VIII of the Petition for Review should be reversed, and judgment entered in favor of the Commonwealth and Attorney General Linda L. Kelly.

ARGUMENT

The Commonwealth Court committed four errors of law in this case. First, it found that the Municipalities had standing. Second, it found that the Municipalities' claims were not barred by the political question doctrine. Third, it found that the Municipalities had a substantive due process right under Article I, Section 1 of the Pennsylvania Constitution to preserve prior land use planning determinations made pursuant to the Municipalities Planning Code where they conflict with the Commonwealth's policies relating to oil and natural gas development as established by Act 13 of 2012. Fourth, it found that Section 3215(b)(4) of the Act (which allows DEP to grant waivers from the setback requirements from certain water sources for oil and gas wells) violates the non-delegation doctrine of Article I, Section 1 of the Pennsylvania Constitution - despite numerous provisions in the Act which give guidance to DEP as to the purpose of Act 13 and provide standards for DEP in implementing this provision.

We explain in turn below why the Municipalities lack standing and why their claims are non-justiciable under the political question doctrine. In the event that the Court were to reach the merits, we then explain why the Municipalities fail to state a claim on Counts I-III (Article I, Section 1 of the Pennsylvania Constitution) and Count VIII (Article II, Section 1 of the Pennsylvania Constitution).

I. THE MUNICIPALITIES AND THEIR OFFICIALS LACK STANDING TO RAISE A CHALLENGE TO THE PASSAGE OF ACT 13 OF 2012 ON THE GROUNDS THAT IT VIOLATES THE PENNSYLVANIA CONSTITUTION.

As a pre-requisite to obtaining judicial relief in this case, the Municipalities and their officials must first satisfy the requirement of standing. *Sierra Club v. Hartman*, 529 Pa. 454, 605 A.2d 309 (1992). In discussing principles of standing, it is necessary to consider both the nature of the particular claims raised, and the alleged injury or impact on a particular individual,

business or organization. For a party to be aggrieved, it must have a substantial, direct, immediate and not remote, interest in the subject-matter of the litigation. *Philadelphia Palisades Park, LLC v. Commonwealth*, 585 Pa. 196, 203-04, 888 A.2d 655, 659-60 (2005). A substantial interest is an interest which surpasses the common interest of all citizens in seeking obedience to the law. *Id.* See also *Sierra Club*, 529 Pa. at 456, 605 A.2d at 310; *Consumer Party of Pennsylvania v. Commonwealth*, 510 Pa. 158, 168, 507 A.2d 323, 328 (1986) (petitioner's interest must be greater than, and distinguishable from, the common interest shared by all taxpayers). Likewise, an interest is sufficiently "direct" only when the aggrieved person can show a causal connection between the alleged harm to his or her interest and the matter complained of. *City of Philadelphia v. Commonwealth*, 575 Pa. 542, 559-60, 838 A.2d 566, 577 (2003).

The Municipalities raise a number of constitutional challenges to Act 13 in the petition for review.⁸ Underlying all of their claims is the supposition that Act 13 adversely affects the ability of municipalities to regulate oil and gas operations within their jurisdiction and to exercise their zoning powers under the Municipalities Planning Code (MPC), 53 P.S. §§ 10101-11107. However, the Legislature has established municipalities and their power is ultimately derived from it. Conversely, the Legislature reserves the power to modify or rescind these powers as it sees fit. While the MPC and other legislation may give certain powers to municipalities, the Legislature may repeal, limit, or preempt such provisions so long as it does not violate the

⁸ In addition to Robinson Township and the other municipalities named as petitioners, Brian Coppola (Supervisor of Robinson Township) and David M. Ball (Councilman of Peters Township) are also named. The Municipalities themselves group these two individuals as being included among the Municipal Petitioners. Moreover, they do not allege any facts which would provide an independent basis for standing or demonstrate that they were harmed as individuals apart from them being officials of their respective municipal governments. Accordingly, we believe it is proper to address the standing of both the municipalities and their officials together.

Federal or Commonwealth Constitutions in the process. *See Olon v. Commonwealth, Dept. of Corrections*, 534 Pa. 90, 94, 626 A.2d 533, 535 (1993).

The harm alleged by the Municipalities is illusory and non-existent. While the Municipalities and their officials may prefer to retain the power to make all land use determinations relating to oil and gas production within their borders, they do not have a legal right to do so where the Legislature has decided otherwise. It is a long held principle that “a court [will not] listen to an objection made to the constitutionality of an act by a party whose rights it does not affect.” *In re Knowles’ Estate*, 295 Pa. 571, 580-82, 145 A. 797, 800 (1929). *See also Dwyer v. Dilworth*, 392 Pa. 123, 139 A.2d 653 (1958); *City of Philadelphia*, 575 Pa. at 559-60, 838 A.2d at 577. Where the Legislature has enacted a uniform law relating to environmental protection and the development of oil and gas for the entire Commonwealth, the Municipalities lack a legal right to complain that the sovereign has changed or even eliminated some of its powers under a prior statute. *See Philadelphia Facilities Management Corp. v. Biester*, 431 A.2d 1123, 1133 (Pa. Cmwlth. 1981) (“Such powers or functions as a municipality had were derived from and deemed dependent upon the will of the state legislature” and municipal corporation lacked standing even under Home Rule Charter since Legislature retained power to impose restrictions on Philadelphia City government.).

While it is apparent from the legal standards set forth above that the Municipalities lack standing because they have not suffered a cognizable legal injury given the nature of the alleged harm, the relief they seek, and their legal status as a subordinate government unit to the Commonwealth, we would further note that the Municipalities do not enjoy the same constitutional protections as citizens of this Commonwealth. In Counts I, II and III of the Petition for Review, the Municipalities raise claims based on Article I, Section 1 of the

Pennsylvania Constitution. This provision provides protection for the liberty and property interests of individuals. It does not guarantee the “rights” of municipalities or other government bodies. Any interest which the Municipalities may have in making local zoning decisions regarding the development of oil and gas is clearly not encompassed by Article I, Section I of the Constitution.⁹ Accordingly, the Municipalities lack standing to raise Counts, I, II and III in the petition for review. *See William Penn Parking Garage v. City of Pittsburgh*, 464 Pa. 168, 346 A.2d 269 (1975) (party seeking to establish standing must show that alleged interest is within the zone of interests which are protected by the particular constitutional guarantee).

For the reasons explained above, the Municipalities do not have a direct legal interest in the Legislature’s decision to change their basic structure or the scope of their powers as they are in fact created by, exist for, and derive their powers from the Commonwealth government itself. The Municipalities also cannot bring this case as surrogates of their own citizens or other third parties. As a general matter, a party does not have standing to raise claims regarding the constitutional rights of third parties. *See Biester*, 431 A.2d at 1131 (“a party may not contest the constitutionality of a statute because of its effect on the putative rights of other person or entities”). There is an exception to this rule where “(1) the relationship of the litigant to the third party is such that enjoyment of the right by the third party is inextricably bound up with the

⁹ In *Huntley & Huntley v. Borough Council of the Borough of Oakmont*, 600 Pa. 207, 964 A.2d 855 (2009), this Court held that the Legislature in enacting the Oil and Gas Act, Act 13’s predecessor, did not intend to negate the power of municipalities to use their zoning powers to regulate oil and gas development within their territory. However, this Court did not hold that the Legislature lacked the authority to preempt local zoning laws and in fact recognized the Legislature’s right to do so. In passing Act 13, the Legislature made clear its intent to preempt local zoning powers. Furthermore, the Municipalities simply do not have any basis to argue that Act 13 is invalid because it conflicts with or preempts the MPC or any other statute. Likewise, municipalities cannot claim that they are harmed because the Legislature chooses to use its powers to preempt local ordinances with statewide standards and regulations for the oil and gas industry.

activity the litigant seeks to pursue; and (2) there is some obstacle to the third party's assertion of his own right." *Id.* at 1131-1132 (citing *Harrisburg School District v. Harrisburg Education Assoc.*, 379 A.2d 893 (Pa. Cmwlth. 1977)). However this exception does not apply here.

Landowners in areas where there is proposed drilling, members of the oil and gas industry, and other interested parties may raise challenges to Act 13 in the context of specific controversies which occur once the law is implemented.¹⁰ There is no reason to believe that these third parties are incapable of raising and litigating these issues in the same manner that other land use and environmental disputes are routinely litigated across the Commonwealth. Moreover, landowners and other aggrieved third parties would appear to have a greater interest in raising a challenge to the constitutionality of Act 13 than the Municipalities in this case.

The Municipalities do not have a cognizable legal interest under the Constitution which would give them standing in their own right. The fact that the democratically elected representatives of the General Assembly have enacted a new law which changes some of the duties and responsibilities of Municipalities and their officials does not create legal harm as to them. Conversely, there is no reason to allow the Municipalities to bring claims on behalf of others where there are numerous individuals and businesses across the Commonwealth who are capable of doing so in the proper forum and at the proper time. Therefore, the Court should find that the Municipalities lack standing and their claims should be dismissed.

¹⁰ The Municipal parties in this case apparently believe that they would be better positioned to restrict natural gas development and production under their pre-existing zoning ordinances rather than under Act 13. However, they represent only a small fraction of municipalities in Pennsylvania. There is good reason to believe that the existing zoning ordinances in other municipalities are less restrictive than what is provided for under Act 13. Accordingly, it is certainly possible that entities in the oil and gas industry may in particular cases challenge some aspects of the permitting requirements under Act 13.

II. THE MUNICIPALITIES' CLAIMS ARE NON-JUSTICIABLE BECAUSE THEY SEEK TO HAVE THE COURT INTRUDE UPON MATTERS DELEGATED TO THE LEGISLATIVE BRANCH AND ARE THEREFORE BARRED UNDER THE SEPARATION OF POWERS DOCTRINE AND THE POLITICAL QUESTION DOCTRINE.

The Legislature, in enacting Act 13 of 2012, has exercised its fundamental and constitutionally prescribed authority to make laws to further the public health, safety and welfare of the citizens of Pennsylvania. Although there were undoubtedly few, if any, lawmakers who were completely satisfied with all the provisions contained in Act 13, it represents the end result of our democratic system of government. As such, there is a strong presumption of its constitutionality. A statute “will not be invalidated unless it clearly, palpably and plainly violated the Constitution.” *Consumer Party*, 510 Pa. at 175, 507 A.2d at 331-32. Moreover, “[a]ll doubt is to be resolved in favor of sustaining the legislation.” *Philadelphia v. Depuy*, 431 Pa. 276, 279, 244 A.2d 741, 743 (1968).

At the heart of this litigation is the Municipalities’ contention that the General Assembly has improperly determined what is the best way to exercise the Commonwealth’s police powers, protect and develop the Commonwealth’s natural resources, and balance the delegation of authority over land use decisions between the Commonwealth government and local municipalities. Article I, Section 27 of the Pennsylvania Constitution provides that the Commonwealth is the “trustee” of Pennsylvania’s natural resources and that “the Commonwealth shall conserve and maintain them for the benefit of all the people.” This constitutional provision provides the Legislature with the authority to determine the best way to manage the development of Pennsylvania’s oil and gas resources while protecting the environment. While the Municipalities maintain that Act 13 is completely arbitrary and without any rational basis, this claim is patently untrue. The Municipalities are unhappy with the policy

decisions which the Legislature has made in enacting Act 13. Rather than attempting to obtain changes to Act 13 through the political process, though, they ask the Court to nullify policy determinations which were made pursuant to powers committed to the Legislature under the Constitution. The Court should reject the Municipalities' attempt to veil their claims as something more than an attempt to overturn the result of a political battle which they lost in the Legislature. After even a cursory review of their claims, it is apparent that the Municipalities raise nonjusticiable political issues which are barred by underlying principles of the separation of powers and the political question doctrine.

In *Baker v. Carr*, 369 U.S. 186 (1962), the United States Supreme Court explained the rationale underlying the refusal of the judiciary to interfere with the integral operations of the legislature as follows:

Prominent on the surface of any case held to involve a political question is found a texturally demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id. at 217. This Court has adopted and applied the standard set forth in *Baker v. Carr*. See *Sweeney v. Tucker*, 473 Pa. 493, 508, 375 A.2d 698, 705 (1977) (adopting standards articulated in *Baker v. Carr*) (“Under the principle of the separation of the powers of government, however, no branch should exercise the functions exclusively committed to another branch”); *Lawless v. Jubelirer*, 789 A.2d 820, 828 (Pa. Cmwlth. 2002).

In *Marrero v. Commonwealth*, 559 Pa. 14, 739 A.2d 110 (1999), this Court affirmed the Commonwealth Court's decision dismissing a challenge by the School District of Philadelphia to

the amount of funding provided by the Legislature as barred by the political question doctrine. In that case, although Article III, Section 14 of the Constitution requires the Legislature to “provide for the maintenance and support of a thorough and efficient system of public education,” this Court agreed with the Commonwealth Court that the claims were nonjusticiable:

Thus, this court will not inquire into the reason, wisdom, or expediency of the legislative policy with regard to education, nor any matters relating to legislative determinations of school policy or the scope of educational activity. . . . this court is . . . unable to judicially define what constitutes an “adequate” education or what funds are “adequate” to support such a program. These are matters which are exclusively within the purview of the General Assembly’s powers, and they are not subject to intervention by the judicial branch of our government.

Marrero, 559 Pa. at 20, 739 A.2d at 113-14 (quoting 709 A.2d 956, 965 (Pa. Cmwlth. 1999)).

This Court further agreed that there was “a lack of judicially manageable standards for resolving” these types of claims under Article III, Section 14 “and it would be impossible to resolve the claims without making an initial policy determination of a kind which is clearly of legislative, and not judicial, discretion.” *Id.*, 559 Pa. at 19, 739 A.2d at 113 (quoting Commonwealth Court decision, 709 A.2d at 966).

Although Article III, Section 14 governs education and Article I, Section 27 governs the management of Pennsylvania’s natural resources, the two provisions are similar in that they both commit discretionary authority to the Legislature. It is also true as to both provisions that there are no “manageable standards” for the judiciary to assess the merit of the determinations made by the Legislature. The Legislature in enacting Act 13 has created a statutory scheme which has a reasonable relation to protecting the environment while at the same time promoting the development of the oil and gas industry in Pennsylvania. Although the Legislature’s authority is derived from Article I, Section 27 in the present case, the Municipalities’ claims are barred by

the political question doctrine for the same reasons the claims relating to Article III, Section 14 were barred in *Marrero*.

III. ACT 13 DOES NOT VIOLATE PRINCIPLES OF DUE PROCESS UNDER ARTICLE I, SECTION 1 OF THE PENNSYLVANIA CONSTITUTION AND THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION AS IT HAS A RATIONAL BASIS AND CONSTITUTES A PROPER EXERCISE OF THE COMMONWEALTH'S POLICE POWERS.

This is a case of the tail wagging the dog. For more than three hundred years, Pennsylvania's General Assembly has been the primary political body vested with the authority to establish policy for the Commonwealth and its citizens. However, the Commonwealth Court's decision turns the established framework for our republican system of government – as established by our Constitution - on its head by making the rationally based determinations of the democratically elected Legislature subservient to the zoning decisions and zoning plans of local governments.

The Commonwealth Court held that Section 3304 and related provisions of Act 13 were unconstitutional and that the Municipalities were therefore entitled to summary relief on Counts I, II and III of the Petition for Review.¹¹ Its decision, based on vague principles of substantive due process under Article I, Section 1 of the Constitution, elevates a municipality's comprehensive plan for zoning as established under the MPC to a sacrosanct position which is

¹¹ In Count I of the Petition for Review, the Municipalities allege that the Legislature in enacting Act 13 has engaged in unconstitutional statewide zoning in violation of Article I, Section 1 of the Pennsylvania Constitution and the Fourteenth Amendment to the United States Constitution. (Petition at ¶¶ 77-107; R.R. 81a-95a) In Count II of the Petition for Review, the Municipalities allege that Act 13 conflicts with the requirements for zoning created by the Legislature under the MPC in violation of Article I, Section 1 of the Pennsylvania Constitution. (Petition at ¶¶ 108-117; R.R. 95a-99a) In Count III of the Petition for Review, the Municipalities allege that Act 13 prevents municipalities from protecting the health, safety and welfare of their citizens in violation of Article I, Section 1 of the Pennsylvania Constitution. (Petition at ¶¶ 118-125; R.R. 100a-102a)

protected by the Constitution against change by the Legislature.¹² The Commonwealth Court's decision is ultimately based on the false premise that any type of land use planning which allows for incompatible uses in the same zoning district must be inherently irrational and therefore unconstitutional. However, as explained by Judge Brobson in his Dissent in Commonwealth Court, the majority's reasoning is fundamentally flawed:

[T]he majority . . . reaches a legal conclusion that any zoning ordinance that allows a particular use in a district that is incompatible with the other uses in that same district is unconstitutional. I find no support for this broad legal proposition 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 and authority of municipalities to grant a use variance.

(Dissenting Opinion at *25, ___ A.3d at ___; Com. Appellants' Brief, Attachment A at 21-22).

Municipalities simply do not have an inherent right to the powers conferred upon them by the state. Municipalities are creatures of the state and their powers are ultimately derived through the grace of the Legislature. *Pennsylvania Gaming Control Bd. v. City Council of Phila.*, 593 Pa. 241, 266, 928 A.2d 1255, 1270 (2007). While the MPC places limits on the power of municipalities in enacting zoning laws, the Legislature may repeal, limit, or preempt such provisions so long as it does not violate the Federal or Commonwealth Constitutions in the process. *See Olon*, 534 Pa. at 94, 626 A.2d at 535; *Appeal of Gagliardi*, 401 Pa. 141, 143, 163 A.2d 418, 419 (1960) (A municipality “possesses only such powers of government as are expressly granted to it and as are necessary to carry the same into effect.”). The fact that Act 13

¹² Presumably, Commonwealth Court would agree that the result intended by Section 3304 of Act 13 could be accomplished through a constitutional amendment. However, one might ask why Article I, Section 27 of the Constitution doesn't already confer the necessary authority on the Legislature? If Article I, Section 27 is insufficient, one must further ask what language would be necessary in a constitutional amendment to confer the General Assembly with the authority to enact Section 3304 or similar provisions governing the production of natural resources?

may conflict with the MPC does not render Act 13 unconstitutional. While in local communities the MPC may at times seem to have “constitutional” dimensions, it is not a part of the Constitution and the Legislature is not bound to follow it in enacting legislation.

As discussed, *supra*, municipalities are not persons or citizens and it therefore seems doubtful that the Municipalities are proper parties to assert claims under Article I, Section 1 of the Pennsylvania Constitution. However, even if the Municipalities have standing to bring these claims, they cannot establish that Act 13 violates due process. There is a strong presumption that acts of the General Assembly are constitutional. Accordingly, Municipalities have a heavy burden in attempting to have Act 13 declared unconstitutional. *Pennsylvania Against Gambling Expansion Fund, Inc. v. Commonwealth* [PAGE], 583 Pa. 275, 292, 877 A.2d 383, 393 (2005).

Furthermore, to withstand a due process challenge, a law which does not implicate any fundamental rights (such as Act 13) must only be rationally related to a valid state objective. See *Parker v. Commonwealth, Dept. of Labor and Industry*, 540 A.2d 313 (Pa. Cmwlth.), *aff'd*, 521 Pa. 531, 557 A.2d 1061 (1988). In the present case, the provisions contained in Act 13 are rationally related to the Commonwealth’s objectives of protecting the environment, protecting the rights of landowners, and encouraging the economic development of the oil and gas industry. As such, Act 13 is a proper exercise of the Commonwealth’s police powers and does in fact further the health, safety and welfare of Pennsylvania’s citizens. *Huntley*, 600 Pa. at 220, 694 A.2d at 863 (“a local ordinance may not stand as an obstacle to the execution of the full purposes and objectives of the Legislature.”). While the Municipalities may question the wisdom of the Legislature’s choices, Act 13 meets the minimum requirements of due process.

The Commonwealth Court, relying on *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) and *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725 (1995),¹³ concludes that Section 3304 of act 13 “violates substantive due process because it allows incompatible uses in zoning districts and does not protect the interests of neighboring property owners from harm, alters the character of the neighborhood, and makes irrational classifications.” (Opinion at *15, ___ A.3d at ___; Com. Appellants’ Brief, Attachment A at 15) However, the Commonwealth Court turns *Village of Euclid* and its progeny on their head when it suggests that municipalities have a right to exercise zoning powers which cannot be overridden by the state. *Village of Euclid* and later United States Supreme Court cases helped guarantee that the government could use zoning to regulate land use without violating the substantive due process rights of individual property owners. While the necessity of having some type of zoning is now widely accepted and no longer controversial, neither the United States Supreme Court nor the Pennsylvania Supreme Court have ever held that zoning is a birthright of municipalities or that the state government cannot limit the scope and authority of zoning by them. Neither the Pennsylvania Constitution nor the MPC establishes vested rights which prevent the Legislature from limiting the power of municipalities to regulate the oil and gas industry.

The jurisprudence of substantive due process in the context of local zoning has traditionally focused on how zoning restricts or limits landowners in fully exercising their property rights. However, in this case, Commonwealth Court found that by allowing certain

¹³ It is worth noting that the holding of the Supreme Court in *City of Edmonds* is that the Fair Housing Act preempted a local zoning ordinance to the extent it created a zoning district which limited non-family residential properties, and precluded group homes and other uses covered by the Act. Although *City of Edmonds* involved a statute passed by Congress and the present case involves a statute passed by the General Assembly, the same principles of preemption and due process would seem to apply. Commonwealth Court’s conclusion that due process is violated by requiring local zoning ordinances to allow for incompatible uses within zoning districts is inconsistent with the Supreme Court’s decision in *City of Edmonds*.

landowners to develop their property, the substantive due process rights of their neighbors (i.e. adjoining landowners) would be violated. In other words, it found that the rights of those who neighbor land which might be developed for its oil and gas reserves would have their due process rights violated if certain zoning provisions were allowed to be preempted by Act 13.

The Commonwealth Court's decision leaves the impression that Act 13 would leave a vacuum in which oil and gas interests would be free to expand development without any restrictions or government oversight. If the General Assembly had completely eviscerated local zoning ordinances without creating **any** requirements for obtaining permits for oil and gas development, the Commonwealth Court's decision might have some validity. However, the fact remains that Act 13 established an extensive permitting process administered by DEP. Even though oil and gas development must be allowed in districts zoned for residential use, an actual permit is far from automatic as the permit applicant must still meet the rigorous setback and environmental standards under Act 13 before being granted a permit. Adjoining landowners retain significant rights, including the right to object to the granting of a permit by DEP and the right to participate in the process – including the right to appeal. 58 Pa. C.S. § 3212. Furthermore, the Commonwealth, District Attorneys, and interested landowners retain their rights under the common law to suppress a nuisance and abate pollution. 58 Pa. C.S. § 3257. Given these protections, as well as the protections provided under existing environmental laws such as the Clean Streams Law and Solid Waste Management Act, it is difficult to understand how the due process rights of the Municipalities or their citizens are not appropriately, or adequately, protected.¹⁴

¹⁴ The General Assembly had a rational basis in enacting Section 3304 of Act 13 since oil and gas resources can only be developed where they are found. It would limit the potential production of these precious natural resources if local municipalities could permanently exclude

IV. ACT 13 ESTABLISHES BASIC POLICY CHOICES AND ENACTS SUFFICIENT STANDARDS FOR THE DEP TO PROMULGATE REGULATIONS AND GRANT WAIVERS WITHOUT VIOLATING THE NON-DELEGATION DOCTRINE OF ARTICLE II, SECTION 1 OF THE PENNSYLVANIA CONSTITUTION.

Section 3215(b)(4) of Act 13, 58 Pa. C.S. § 3215(b)(4), provides DEP with the authority to grant a waiver from the setback requirements from certain sources of water in obtaining well permits. It provides, in relevant part, “The department shall waive the distance restrictions upon submission of a plan identifying additional measures, facilities or practices to be employed during well site construction, drilling and operations necessary to protect the waters of this Commonwealth.” 58 Pa. C.S. § 3215(b)(4). The Commonwealth Court concluded that this provision violates the non-delegation doctrine of Article I, Section 1 of the Constitution because it gives DEP insufficient guidance as to when to grant a waiver from the setback requirements established by the Legislature. The Commonwealth and the Attorney General respectfully disagree.

Initially, the Municipalities’ claim that Act 13 unconstitutionally delegates legislative authority to DEP appears premature and speculative as they do not point to any specific waivers which have been granted or any regulations which have been enacted which would violate the requirements of Article II, Section 1 of the Pennsylvania Constitution. Nonetheless, their challenge under Article II, Section 1 cannot be maintained in any case as Act 13 provides

development based on largely artificial distinctions created by zoning districts. In a very real sense, oil and gas production is different from the production of steel or the manufacture of automobiles. If a landowner or other individual affected by the granting of a permit under Act 13 believes his constitutional rights are not adequately protected in a particular case, he can make an as applied challenge to the constitutionality of the permit which adversely affects him. However, while the Municipalities may have a fundamental disagreement with the underlying purpose of Section 3304 and the expansion of oil and gas production in Pennsylvania, the Commonwealth Court erred in finding that Section 3304 – on its face - violates substantive due process.

sufficient guidance to DEP to allow them to implement necessary regulations and otherwise follow the Act's requirements as established by the Legislature.

The non-delegation doctrine is a natural corollary of Article II, Section 1. “[I]t requires that the basic policy choices involved in ‘legislative power’ actually be made by the Legislature as constitutionally mandated.” *Chartiers Valley Joint Schools v. County Bd. of Sch. Dirs.*, 418 Pa. 520, 529, 211 A.2d 487, 492 (1965). Nonetheless, while prohibited from delegating the power to make laws, the Legislature can delegate policy-making authority to the executive branch so long as it makes the basic policy choices and enacts adequate standards to guide and restrain the exercise of the delegated administrative functions. *Id.*, 418 Pa. at 529, 211 A.2d at 492. Furthermore, as this Court recently recognized in *Casino Free Philadelphia v. Pennsylvania Gaming Control Board*, 594 Pa. 202, 207, 934 A.2d 1249, 1253 (2007), “there is nothing in the [non-delegation doctrine] that would require an exhaustive definition of [each purpose and objective of a law]. The Legislature is not constitutionally required to micromanage the administrative agencies it creates.”

We look to Section 3215(b)(4) itself in the first instance in ascertaining the intent of the Legislature. It provides, in relevant part, that waivers are to be granted where “additional measures, facilities or practices” are to be used “necessary to protect the waters of this Commonwealth.” The standard for granting waivers is clear: have **necessary** steps been taken to protect the waters of this Commonwealth. While answering this question fully may depend on scientific and technical experts, the Legislature regularly requires administrative agencies to fulfill its intent by promulgating regulations to spell out the precise requirements which must be met under a statute based on an agency's expertise in a specific field.

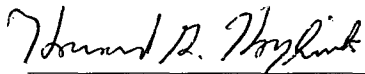
While it may be argued that the language of Section 3215(b)(4) is insufficient by itself to give DEP the necessary guidance to fulfill the Legislature's intent, the full statute certainly does so. Act 13 includes specific guidance as to the purpose of its provisions. In Section 3202 it states that the Legislature intended, *inter alia*, to "permit optimal development of oil and gas resources of this Commonwealth consistent with protection of the health safety, environment and property of Pennsylvania citizens." 58 Pa. C.S. § 3202. These and other clearly stated objectives provide the necessary signposts for DEP to make appropriate regulations without usurping the Legislature's function. Act 13 also provides a substantial amount of guidance through its lengthy and rather detailed provisions governing the operations of the oil and gas industry in Chapter 32 of the Act. Further guidance can be found through the Clean Water Act and other existing environmental laws which the Legislature made clear are to work concurrently with Act 13 so as to further the environmental goals of the Commonwealth. *See* Section 3257 of Act 13. Given the ample guidance provided to DEP, it is in the position to promulgate appropriate regulations to allow it to determine whether a permit applicant has demonstrated that it will take the steps necessary for protecting the Commonwealth's waters as required by the Legislature. Accordingly, Act 13 does not violate the non-delegation doctrine of Article II, Section 1 of the Constitution and the waiver provision of Section 3215(b)(4) should be found to be valid.

CONCLUSION

For the reasons set forth above, the order of the Commonwealth Court granting summary relief in favor of the Municipalities on Counts I, II, III, and VIII of the Petition for Review should be reversed, and judgment entered in favor of the Commonwealth and Attorney General Linda L. Kelly.

Respectfully submitted,

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Date: September 4, 2012

Robinson Twp., et al. v. COP, et al.

Nos. 63, 64, 72 & 63 MAP 2012

APPENDIX A

2012 WL 3030277

Only the Westlaw citation is currently available.
Commonwealth Court of Pennsylvania.

ROBINSON TOWNSHIP, Washington County, Pennsylvania, Brian Coppola, Individually and in his Official Capacity as Supervisor of Robinson Township, Township of Nockamixon, Bucks County, Pennsylvania, Township of South Fayette, Allegheny County, Pennsylvania, Peters Township, Washington County, Pennsylvania, David M. Ball, Individually and in his Official Capacity as Councilman of Peters Township, Township of Cecil, Washington County, Pennsylvania, Mount Pleasant Township, Washington County, Pennsylvania, Borough of Yardley, Bucks County, Pennsylvania, Delaware Riverkeeper Network, Maya Van Rossum, the Delaware Riverkeeper, Mehernosh Khan, M.D., Petitioners
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 of Pennsylvania, Linda L. Kelly, in her Official Capacity as Attorney General of the Commonwealth of Pennsylvania, Pennsylvania Department of Environmental Protection and Michael L. Krancer, in his Official Capacity as Secretary of the Department of Environmental Protection, Respondents.

No. 284 M.D.2012. | Argued June 6, 2012. | Decided July 26, 2012.

Synopsis

Background: Municipalities and individuals brought petition for review challenging constitutionality of act which set out statutory framework for regulation of oil and gas operations, preempted local regulation of such operations, and gave power of eminent domain to natural gas corporations.

Holdings: The Commonwealth Court, en banc, Dan Pellegrini, P.J., held that:

- [1] act imposed direct, immediate, and substantial obligations on municipalities, and therefore municipalities had standing to challenge act's constitutionality;
- [2] issue of whether act was unconstitutional was not a nonjusticiable political question;
- [3] statutory requirement that municipal zoning ordinances be amended to include oil and gas operations in all zoning districts was in violation of substantive due process (Per Pellegrini, P.J., for an equally divided court);
- [4] statute allowing inclusion of oil and gas operations in all zoning districts was not an unconstitutional special law;
- [5] statute permitting public utilities commission to issue advisory opinions on proposed local ordinances did not violate separation of powers doctrine; and
- [6] statutory well location restrictions failed to provide sufficient guidance to Department of Environmental Protection (DEP) as to when to grant a waiver from setback requirements and thus were unconstitutional violation of non-delegation doctrine.

Ordered accordingly.

P. Kevin Brobson, J., dissented in part and filed opinion in which Robert Simpson and Anne E. Covey, JJ., joined.

West Headnotes (23)

[1] **Action**



In simple terms, “standing to sue” is a legal concept assuring that the interest of the party who is suing is really and concretely at stake to a degree where he or she can properly bring an action before the court.

[2] **Action**



Unlike the federal courts, where a lack of standing is directly correlated to the ability of the court to maintain jurisdiction over the action, the test for standing in the state is a flexible rule of law.

[3] **Action**



Certain public officials have standing to represent the interest of the public both under their authority

as representatives of the public interest and under the doctrine of “parens patriae”; this doctrine refers to the ancient powers of guardianship over persons under disability and of protectorship of the public interest which were originally held by the crown of England as father of the country, and which as part of the common law devolved upon the states and federal government.

[4] **Action**

Statutory act creating framework for regulation of oil and gas operations imposed direct, immediate, and substantial obligations on municipalities, and therefore municipalities had standing to challenge act's constitutionality; act required uniformity of local ordinances to allow for reasonable development of oil and gas resources and thus required each municipality to take specific compliance action, act required municipalities to enact certain zoning ordinances, and municipalities argued that such zoning ordinances would be unconstitutional. 58 Pa.C.S. §§ 2301 et seq.

[5] **Action**

Local councilmembers had suffered injury, as would support standing to challenge statutory framework for regulation of oil and gas operations, where challenged statutes would have required councilmembers to vote for zoning amendments which councilmembers believed were unconstitutional. 58 Pa.C.S. §§ 2301 et seq.

[6] **Action**

Landowners had suffered injury, as would support standing to challenge statutory framework for regulation of oil and gas operations; landowners resided in a district that had previously been zoned residential but in which oil and gas operations were now permitted pursuant to regulatory framework. 58 Pa.C.S. §§ 2301 et seq.

[7] **Action**

Environmental association lacked standing to bring action challenging constitutionality of statutory framework for regulation of oil and gas operations, where association did not show that any one member had suffered or was threatened with suffering direct, immediate, and substantial injury. 58 Pa.C.S. §§ 2301 et seq.

[8] **Action**

Interest of privately-funded environmental ombudsman in challenging statutory framework for regulation of oil and gas operations did not rise to level of substantial, immediate and direct interest as required for standing, where ombudsman alleged that truck traffic and air pollution resulting from regulatory scheme would interfere with her personal enjoyment of river as well as work as ombudsman. 58 Pa.C.S. §§ 2301 et seq.

[9] **Action**

Interest of physician in constitutional challenge to statutory framework for regulation of oil and gas operations, which exempted oil and gas industry from certain chemical disclosure requirements, was speculative and thus insufficient to confer standing, despite argument that confidentiality restrictions could affect physician's ability to provide medical care to patients; mere possibility that physician might not have the information needed to provide care was not sufficient. Const. Art. 3, §§ 3, 32; 58 Pa.C.S. § 3222.1(b)(10) and (b)(11).

[10] **Courts**

Issue of whether statutory act setting out framework for regulation of oil and gas operations was unconstitutional was not a

nonjusticiable political question; court was not required to make any specific legislative policy determinations in order to come to resolution of matters presented. Const. Art. 1 § 27; 58 Pa.C.S. §§ 2301 et seq.

[11] **Courts**



A challenge to the legislature's exercise of a power that the constitution commits exclusively to the legislature presents a non-justiciable political question.

[12] **Zoning and Planning**



Statutory requirement that municipal zoning ordinances be amended to include oil and gas operations in all zoning districts was in violation of substantive due process guarantees of both state and federal constitutions; statute did not protect the interests of neighboring property owners from harm, altered the character of neighborhoods, and made irrational classifications. (Per Pellegrini, P.J., for an equally divided court.) U.S.C.A. Const.Amend. 14; Const. Art. 1, § 1; 58 Pa.C.S. § 3304.

[13] **Municipal Corporations**



Municipalities are creatures of the state and have no inherent powers of their own; rather, they possess only such powers of government as are expressly granted to them and as are necessary to carry the same into effect. (Per Pellegrini, P.J., for an equally divided court.)

[14] **Zoning and Planning**



Zoning is an extension of the concept of a public nuisance which protects property owners from activities that interfere with the use and enjoyment of their property. (Per Pellegrini, P.J., for an equally divided court.)

[15] **Zoning and Planning**



To determine whether a zoning ordinance is unconstitutional under state constitution and Fourteenth Amendment, a substantive due process inquiry must take place; when making that inquiry, court takes into consideration the rights of all property owners subject to the zoning and the public interests sought to be protected. (Per Pellegrini, P.J., for an equally divided court.) U.S.C.A. Const.Amend. 14; Const. Art. 1, § 1.

[16] **Zoning and Planning**



Statute allowing inclusion of oil and gas operations in all zoning districts was not an unconstitutional special law, even though framework treated oil and gas industry differently from other extraction industries; distinction was based on real differences that justified varied classification for zoning purposes. Const. Art. 3, § 32; 58 Pa.C.S. § 3304.

[17] **Constitutional Law**



Under state constitution's prohibition of special laws, any statutory distinction between groups must seek to promote a legitimate state interest or public value and bear a reasonable relationship to the object of the classification. Const. Art. 3, § 32.

[18] **Eminent Domain**



The exclusive method to challenge the condemnor power to take property is the filing of preliminary objections to a declaration of taking. 26 Pa.C.S.A. § 306.

[19] **Constitutional Law**



Statutory act for regulation of oil and gas operations preempted municipalities' obligation to plan for environmental concerns for oil and gas operations, and thus act did not unconstitutionally prevent municipalities from fulfilling such obligation; act specifically stated that all local obligation or power to deal with the environment was preempted, and thus municipalities could no longer take into consideration environmental concerns in administration of zoning ordinances. Const. Art. I, § 27; 58 Pa.C.S. § 3303.

[20] **Constitutional Law**

Under the separation of powers doctrine, neither the legislative branch nor the executive branch of government acting through an administrative agency may constitutionally infringe on the judicial prerogative.

[21] **Constitutional Law**

Statute permitting public utilities commission to issue advisory opinions on proposed local ordinances, under statutory framework for regulation of oil and gas operations, did not violate separation of powers doctrine, despite argument that statute permitted commission, an executive agency, to perform both legislative and judicial function; advisory opinions were to be non-binding, and statute specifically gave Commonwealth Court de novo review of a commission final order. 58 Pa.C.S. § 3305(a).

[22] **Constitutional Law**

Statutory well location restrictions, forming part of statutory framework for regulation of oil and gas operations, failed to provide sufficient guidance to Department of Environmental Protection (DEP) as to when to grant a waiver from setback requirements and thus were unconstitutional violation of non-delegation doctrine; statute gave no guidance to DEP to guide and constrain its decision to waive distance

requirements from water body and wetland setbacks, and statute did not provide how DEP was to evaluate an operator's plan for additional measures for water protection. Const. Art. 2, § 1; 58 Pa. C. S. § 3215(b)(4).

[23] **Constitutional Law**

Statutory setback, timing and permitting provisions, forming part of statutory framework for regulation of oil and gas operations, were not unconstitutionally vague; statute provided specific information regarding local ordinance requirements in addition to well location restrictions and distance within which well could be drilled from existing water wells, surface water intakes, reservoirs, or other water supply extraction points. 58 Pa.C.S. §§ 3304, 3215.

West Codenotes

Held Unconstitutional

58 Pa. C .S. § 3215(b)(4)

Validity Called into Doubt

58 Pa.C.S. § 3304

Attorneys and Law Firms

Susan J. Kraham, New York, NY, John M. Smith, Canonsburg, and Jordan B. Yeager, Doylestown, for petitioners.

Howard G. Hopkirk, Senior Deputy Attorney General, Harrisburg, and Matthew H. Haverstick, Philadelphia, for respondents.

Walter A. Bunt, Jr., Pittsburgh, for amici curiae Penneco Oil Company, Inc., Chesapeake Appalachia, LLC, MarkWest Liberty Midstream & Resources, LLC, The Pennsylvania Independent Oil and Gas Association and The Marcellus Shale Coalition.

BEFORE: PELLEGRINI, President Judge and MCGINLEY, Judge and LEADBETTER, Judge and SIMPSON, Judge and BROBSON, Judge and McCULLOUGH, Judge and COVEY, Judge.

Opinion

OPINION BY PRESIDENT Judge PELLEGRINI.¹

*1 Before this Court are preliminary objections filed by the Commonwealth of Pennsylvania, Pennsylvania Public Utility Commission (Commission), *et al.*,² (collectively, the Commonwealth) in response to a petition for review filed by Robinson Township, *et al.*,³ (collectively, Petitioners) challenging the constitutionality of Act 13.⁴ Also before the Court is Petitioner's motion for summary relief seeking judgment in their favor.⁵ The Commission and the DEP have filed a cross-motion for summary relief.

On March 29, 2012, Petitioners filed a petition for review in the nature of a complaint for declaratory judgment and injunctive relief in this Court's original jurisdiction challenging the constitutionality of Act 13 pertaining to Oil and Gas—Marcellus Shale.⁶ Act 13 repealed Pennsylvania's Oil and Gas Act⁷ and replaced it with a codified statutory framework regulating oil and gas operations in the Commonwealth. Among other provisions involving the levying and distribution of impact fees and the regulation of the operation of gas wells, Act 13 preempts local regulation,⁸ including environmental laws and zoning code provisions except in limited instances regarding setbacks in certain areas involving oil and gas operations. "Oil and gas operations" are defined as:

- (1) well location assessment, including seismic operations, well site preparation, construction, drilling, hydraulic fracturing and site restoration associated with an oil or gas well of any depth;
- (2) water and other fluid storage or impoundment areas used exclusively for oil and gas operations;
- (3) construction, installation, use, maintenance and repair of:
 - (i) oil and gas pipelines;
 - (ii) natural gas compressor stations; and
 - (iii) natural gas processing plants or facilities performing equivalent functions; and

(4) construction, installation, use, maintenance and repair of all equipment directly associated with activities specified in paragraphs (1), (2) and (3), to the extent that:

- (i) the equipment is necessarily located at or immediately adjacent to a well site, impoundment area, oil and gas pipeline, natural gas compressor station or natural gas processing plant; and
- (ii) the activities are authorized and permitted under the authority of a Federal or Commonwealth agency.

58 Pa.C.S. § 3301. Act 13 also gives the power of eminent domain to a corporation that is empowered to transport, sell or store natural gas, *see* 58 Pa.C.S. § 3241, and requires uniformity of local ordinances, 58 Pa.C.S. § 3304.

Petitioners allege that they have close to 150 unconventional⁹ Marcellus Shale wells drilled within their borders, and Act 13 prevents them from fulfilling their constitutional and statutory obligations to protect the health, safety and welfare of their citizens, as well as public natural resources from the industrial activity of oil and gas drilling. Petitioners allege that Act 13 requires them to modify many of their zoning laws.¹⁰

*2 In response to the passage of the Act, Petitioners filed a 12-count petition for review alleging that Act 13 violates:

- Article 1 § 1 of the Pennsylvania Constitution and § 1 of the 14th Amendment to the U.S. Constitution as an improper exercise of the Commonwealth's police power that is not designed to protect the health, safety, morals and public welfare of the citizens of Pennsylvania; **(Count I)**
- Article 1 § 1 of the Pennsylvania Constitution because it allows for incompatible uses in like zoning districts in derogation of municipalities' comprehensive zoning plans and constitutes an unconstitutional use of zoning districts; **(Count II)**
- Article 1 § 1 of the Pennsylvania Constitution because it is impossible for municipalities to create new or to follow existing comprehensive plans, zoning ordinances or zoning districts that protect the health, safety, morals and welfare of citizens and to provide for orderly development of the community in violation of the MPC¹¹ resulting in an improper use of its police power; **(Count III)**

- Article 3 § 32 of the Pennsylvania Constitution because Act 13 is a “special law” that treats local governments differently and was enacted for the sole and unique benefit of the oil and gas industry; **(Count IV)**
 - Article I §§ 1 and 10 of the Pennsylvania Constitution because it is an unconstitutional taking for private purposes and an improper exercise of the Commonwealth's eminent domain power; **(Count V)**
 - Article I § 27 of the Pennsylvania Constitution because it denies municipalities the ability to carry out their constitutional obligation to protect public natural resources; **(Count VI)**
 - the doctrine of Separation of Powers because it entrusts an Executive agency, the Commission, with the power to render opinions regarding the constitutionality of Legislative enactments, infringing on a judicial function; **(Count VII)**
 - Act 13 unconstitutionally delegates power to the Pennsylvania Department of Environmental Protection (DEP) without any definitive standards or authorizing language; **(Count VIII)**
 - Act 13 is unconstitutionally vague because its setback provisions and requirements for municipalities fail to provide the necessary information regarding what actions of a municipality are prohibited; **(Count IX)**
 - Act 13 is unconstitutionally vague because its timing and permitting requirements for municipalities fail to provide the necessary information regarding what actions of a municipality are prohibited; **(Count X)**
 - Act 13 is an unconstitutional “special law” in violation of Article 3, § 32 of the Pennsylvania Constitution because it restricts health professionals' ability to disclose critical diagnostic information when dealing solely with information deemed proprietary by the natural gas industry while other industries under the federal Occupational and Safety Act have to list the toxicity of each chemical constituent that makes up the product and their adverse health effects; **(Count XI)** (Dr. Khan is the only petitioner bringing this claim.)
- *3 • Article 3, § 3 of the Pennsylvania Constitution prohibition against a “bill” having more than a single subject because restricting health professionals' ability to disclose critical diagnostic information is a different

subject than the regulation of oil and gas operations; **(Count XII)** (Dr. Khan is the only petitioner bringing this claim)¹²

Petitioners' motion for summary relief echoes the allegations in the petition for review.¹³

In response to the petition for review, the Commonwealth has filed preliminary objections alleging that: (1) Petitioners lack standing to file their action; (2) Petitioners' claims are barred because they involve non-justiciable political questions; and (3) Counts I through XII fail to state claims upon which relief may be granted. Regarding Counts XIII and XIV, the Commonwealth alleges that Petitioners have not set forth a separate cause of action for granting relief and also fail to state claims upon which summary relief may be granted. It requests that we dismiss the petition for review and, necessarily, its motion for summary relief as well. The Commonwealth has also filed a cross-application for summary relief.

I.

STANDING

The Commonwealth contends that the seven municipalities (municipalities), the two councilmembers, the physician and the environmental association do not have standing to challenge the constitutionality of Act 13.

[1] In simple terms, “standing to sue” is a legal concept assuring that the interest of the party who is suing is really and concretely at stake to a degree where he or she can properly bring an action before the court. *Baker v. Carr*, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962) (stating that the “gist” of standing is whether the party suing alleged such a personal stake in the outcome of the controversy); 3 CHARLES H. KOCH, JR., *ADMINISTRATIVE LAW AND PRACTICE*, § 14.10, at 387 (2d ed.1997). Pennsylvania has its own standing jurisprudence, although the doctrine of standing in this Commonwealth is recognized primarily as a doctrine of judicial restraint and not one having any basis in the Pennsylvania Constitution. *Housing Auth. of the City of Chester v. Pa. State Civil Serv. Comm'n*, 556 Pa. 621, 730 A.2d 935 (1999).

[2] Fundamentally, the standing requirement in Pennsylvania “is to protect against improper plaintiffs.” *Application of Biester*, 487 Pa. 438, 442, 409 A.2d 848, 851 (1979). Unlike the federal courts, where a lack of

standing is directly correlated to the ability of the court to maintain jurisdiction over the action, the test for standing in Pennsylvania is a flexible rule of law, perhaps because the lack of standing in Pennsylvania does not necessarily deprive the court of jurisdiction. Compare *Jones Mem'l Baptist Church v. Brackeen*, 416 Pa. 599, 207 A.2d 861 (1965), with *Raines v. Byrd*, 521 U.S. 811, 117 S.Ct. 2312, 138 L.Ed.2d 849 (1997). As a result, Pennsylvania courts are much more expansive in finding standing than their federal counterparts.

*4 In *William Penn Parking Garage, Inc. v. City of Pittsburgh*, 464 Pa. 168, 192, 346 A.2d 269, 281 (1975), where there was a challenge to the legality and the constitutionality of a parking tax, our Supreme Court extensively reviewed the law of standing and stated the general rule: A party has standing to sue if he or she has a "substantial, direct, and immediate interest" in the subject matter of the litigation. The elements of the substantial-direct-immediate test have been defined as follows:

A "substantial" interest is an interest in the outcome of the litigation which surpasses the common interest of all citizens in procuring obedience to the law. A "direct" interest requires a showing that the matter complained of caused harm to the party's interest. An "immediate" interest involves the nature of the causal connection between the action complained of and the injury to the party challenging it, and is shown where the interest the party seeks to protect is within the zone of interests sought to be protected by the statute or constitutional guarantee in question.

S. Whitehall Twp. Police Serv. v. S. Whitehall Twp., 521 Pa. 82, 86-87, 555 A.2d 793, 795 (1989) (internal citations omitted).

Although the substantial-direct-immediate test is the general rule for determining the standing of a party before the court, there have been a number of cases that have granted standing to parties who otherwise failed to meet this test, including *William Penn*. In *William Penn*, our Supreme Court addressed, among other issues, the standing of parking lot owners to challenge a parking tax imposed on patrons of their garages and lots. Even though the parking lot owners were not

required to pay the challenged tax, our Supreme Court held that:

[T]he causal connection between the tax and the injury to the parking operators is sufficiently close to afford them standing under a statute, such as section 6, which is essentially neutral on the question. While the tax falls initially upon the patrons of the parking operators, it is levied upon the very transaction between them. Thus the effect of the tax upon their business is removed from the cause by only a single short step.

We find very persuasive authority for this conclusion in *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S.Ct. 271, 69 L.Ed. 1070 (1925), and *Truax v. Raich*, 239 U.S. 33, 36 S.Ct. 7, 60 L.Ed. 131 (1915). In *Pierce*, the operators of private schools were held to have standing to challenge a law which required parents to send their children to public schools. In *Truax*, an alien was held to have standing to challenge a law which forbade certain employers to employ aliens as more than 20% of their work force. In each case the regulation was directed to the conduct of persons other than the plaintiff. However, the fact that the regulation tended to prohibit or burden transactions between the plaintiff and those subject to the regulation sufficed to afford the plaintiff standing. While the burdens imposed in those cases may have been more onerous than that involved in this case (amounting to a total prohibition is *Pierce*), that does not render the causal connection any less immediate.

*5 *William Penn*, 464 Pa. at 208-09, 346 A.2d at 289. In *Philadelphia Facilities Management Corporation v. Biester*, 60 Pa.Cmwlth. 366, 431 A.2d 1123, 1131-1132 (Pa.Cmwlth.1981), we explained that the United States Supreme Court set the criteria by which a party can challenge the legality and constitutionality of a statute on the putative rights of other persons or entities when "(1) the relationship of the litigant to the third party is such that the enjoyment of the right by the third party is inextricably bound with the activity the litigant seeks to pursue; and (2) there is some obstacle to the third party's assertion of his own right." See also *Consumer Party of Pa. v. Commonwealth*, 510 Pa. 158, 507 A.2d 323 (1986) (citing *Application of Biester*) (granting standing to a taxpayer challenging the constitutionality of a legislative pay raise).

This exception has been utilized by our courts to grant standing to taxpayers challenging a variety of governmental actions. For example, the courts have granted standing to

taxpayers challenging judicial elections on the grounds that those elections were scheduled in a year contrary to that prescribed by the Pennsylvania Constitution, *Sprague v. Casey*, 520 Pa. 38, 550 A.2d 184 (1988); to the state bar association, Pennsylvania attorneys, taxpayers and electors challenging the placement of a proposed state constitutional amendment on the ballot, *Bergdoll v. Kane*, 557 Pa. 72, 731 A.2d 1261 (1999); and to a state senator challenging the governor's failure to submit nominations to the state senate within the constitutional period, *Zemprelli v. Thornburg*, 47 Pa.Cmwlth. 43, 407 A.2d 102 (Pa.Cmwlth.1979). The theory underlying these cases is that public policy considerations favor a relaxed application of the substantial-direct-immediate test, particularly the "direct" element that requires the party bringing the action to have an interest that surpasses that of the common people. *Consumer Party*.

[3] Finally, certain public officials have standing to represent the interest of the public both under their authority as representatives of the public interest and under the doctrine of *parens patriae*. The doctrine of "*parens patriae*" refers to the "ancient powers of guardianship over persons under disability and of protectorship of the public interest which were originally held by the Crown of England as 'father of the country,' and which as part of the common law devolved upon the states and federal government." *In re Milton Hershey School Trust*, 807 A.2d 324, 326 n. 1 (Pa.Cmwlth.2002) (quoting *In re Pruner's Estate*, 390 Pa. 529, 532, 136 A.2d 107, 109 (1957)) (citations omitted). Under *parens patriae* standing, the attorney general is asserting and protecting the interest of another, not that of the Commonwealth. For example, public officials have an interest as *parens patriae* in the life of an unemancipated minor. *Commonwealth v. Nixon*, 563 Pa. 425, 761 A.2d 1151 (2000). See also *DeFazio v. Civil Service Commission of Allegheny County*, 562 Pa. 431, 756 A.2d 1103 (2000) (the sheriff of a second-class county was found to have standing to enjoin the enforcement of legislation that regulated activities both in and out of the workplace because the sheriff had to terminate employees who violated the legislation unless the civil service commission agreed to a suspension of the employees).

A.

Standing of Municipalities

*6 [4] Regarding the seven municipalities who have brought this action, the Commonwealth argues that the petition for review is premised on the notion that Act 13

is unconstitutional because it impacts the rights of citizens; however, the municipalities have no standing to assert the claims of their citizens against the Commonwealth because Act 13 does not harm the municipalities themselves and the petition for review only addresses speculative harms that may occur to the citizens. "The various Municipal Petitioners simply do not suffer any harm to their 'local government functions' if zoning is required and development allowed that allegedly harms the property and environmental rights of citizens of this Commonwealth. To the extent that such harms are 'permitted' by Act 13, which they are not, the appropriate citizens may have standing to bring such claims.... However, the Municipal Petitioners simply have no basis—no *standing*—to act as proxy parties for the appropriate litigants." (Commonwealth's Memorandum of Law in Support of Preliminary Objections at 9.) (Emphasis in original.)

The Petitioners, however, respond that Act 13 imposes substantial, direct and immediate obligations on them that will result in specific harms to their interests as governing entities, including adverse impacts that serve to affect their abilities to carry out their governmental functions, duties and responsibilities under Pennsylvania law. They explain that Act 13 imposes substantial, direct, immediate and affirmative obligations on them that affect their local government functions, including the requirement of modifying their zoning laws in ways that will make the ordinances unconstitutional.¹⁴ Specifically, to implement the mandates of Act 13, the municipalities would be required to completely rewrite their zoning codes and pass new land-use ordinances that create special carve-outs for the oil and gas industry that are inconsistent with long-established municipal comprehensive plans. Noteworthy, Act 13 provides Petitioners with 120 days to expend significant time, monies and resources to develop entirely new comprehensive plans and ordinances; consult with respective planning commissions and county planning commissions; submit formal copies of proposed ordinances to municipal and county planning commissions; submit the proposed ordinance to the Public Utility Commission for review; advertise public notice of public hearings; conduct public hearings; submit revised formal copies of proposed ordinances and publicly advertise for the passage and approve final ordinances and comprehensive plans.

To maintain standing to a constitutional challenge, the municipality must establish that its interest in the outcome of the challenge to a state law is: (1) substantial when aspects of the state law have particular application to local

government functions (as opposed to general application to all citizens); (2) direct when the state law causes the alleged constitutional harm; and (3) sufficiently immediate when the municipality asserts factually supported interests that are not speculative or remote. *City of Philadelphia v. Commonwealth of Pennsylvania*, 575 Pa. 542, 561–63, 838 A.2d 566, 578–79 (2003) (holding that the City of Philadelphia had standing to challenge the constitutionality of a state law because “the City’s present assertion that it is an aggrieved party is premised upon the effects of [the Act] upon its interests and functions as a governing entity, and not merely upon harm to its citizens.”) See also *Franklin Twp. v. Dep’t of Envtl. Res.*, 500 Pa. 1, 452 A.2d 718 (1982) (township had standing because of its direct and substantial interest where the possibility of harm was immediate to the quality of life of its citizens); *William Penn*, 464 Pa. at 280, 346 A.2d at 280 (quoting *Man O’War Racing Ass’n, Inc. v. State Horse Racing Comm’n*, 433 Pa. 432, 441, 250 A.2d 172, 176–77 (1968)) (“The party must have a direct interest in the subject-matter of the particular litigation, otherwise he can have no standing to appeal. And not only must the party desiring to appeal have a direct interest in the particular question litigated, but his interest must be immediate and pecuniary, and not a remote consequence of the judgment. The interest must also be substantial.”) A substantial interest is one in which there is some discernible adverse effect to some interest other than the abstract interest of all citizens in having others comply with the law.

*7 In this case, the municipalities have standing to bring this action because Act 13 imposes substantial, direct and immediate obligations on them that affect their government functions. Specifically, 58 Pa.C.S. § 3304 requires *uniformity of local ordinances* to allow for the reasonable development of oil and gas resources. That will require each municipality to take specific action and ensure its ordinance complies with Act 13 so that an owner or operator of an oil or gas operation can utilize the area permitted in the zoning district. If the municipalities do not take action to enact what they contend are unconstitutional amendments to their zoning ordinances, they will not be entitled to any impact fees to which they may otherwise be entitled and could be subject to actions brought by the gas operators. Because Act 13 requires that the municipalities enact zoning ordinances to comply with the provisions of Act 13, the municipalities have standing because Act 13 has a substantial, direct and immediate impact on the municipalities’ obligations. Moreover, even if the interest of the litigant was not direct or immediate, the municipalities’ claims that they are required to pass unconstitutional zoning amendments are inextricably

bound with those of the property owners’ rights whose property would be adversely affected by allowing oil and gas operations in all zoning districts as a permitted use when even the Commonwealth admits that property owners affected by such a permitted use would have standing to bring a challenge to the constitutionality of the Act 13.

B.

Standing of Council Members and Landowners

[5] [6] The Commonwealth also contends that Coppola and Ball, who have sued as councilmembers of their respective municipalities and as a “citizen of the Commonwealth,” have failed to allege any kind of significant interest and have not pled any interest, claim or harm of any kind in their individual capacities. Coppola and Ball allege that they are local elected officials acting in their official capacities representing their respective municipalities who could be subject to personal liability and who would be required to vote on the passage of zoning amendments to comply with Act 13. They are also residents of the townships in which they serve as local elected officials. As individual landowners and residents, they live in a district that has been zoned residential in which oil and gas operations are now permitted under Act 13. They will not be able to rely on the fact that their next-door neighbor will not use his or her property for an industrial activity that will serve to immediately devalue their properties. Coppola has provided an affidavit stating the same and that his respective township has lost areas for future development by way of drilling in residential areas. Ball has provided an affidavit stating that Act 13 entirely denies him of the protections he relied upon regarding the value of his home and he is unable to guarantee to any prospective buyer that industrial applications will not exist in the residential area in the future. As local elected officials acting in their official capacities for their individual municipalities and being required to vote for zoning amendments they believe are unconstitutional, Coppola and Ball have standing to bring this action.

C.

Standing of Associations

*8 [7] As to the Delaware Riverkeeper Network, even in the absence of injury to itself, an association may have standing solely as the representative of its members and

may initiate a cause of action if its members are suffering immediate or threatened injury as a result of the contested action. *Mech. Contractors Ass'n of E. Pa., Inc. v. Dep't of Educ.*, 860 A.2d 1145 (Pa.Cmwlth.2004); *Nat'l Solid Wastes Mgmt. Ass'n v. Casey*, 135 Pa.Cmwlth. 134, 580 A.2d 893 (Pa.Cmwlth.1990). However, having not shown that at least one member has suffered or is threatened with suffering a "direct, immediate, and substantial" injury to an interest as a result of the challenged action," which is necessary for an association to have standing, *Energy Conservation Council of Pa. v. Public Util. Comm'n*, 995 A.2d 465, 476 (Pa.Cmwlth.2010), the Delaware Riverkeeper Network lacks standing. See also *Sierra Club v. Hartman*, 529 Pa. 454, 605 A.2d 309 (1992) (holding that Sierra Club and various other environmental organizations that brought suit challenging the failure by the Legislature to adopt a proposed air pollution regulation lacked standing because their interest in upholding a constitutional right to clean air were no greater than the common interest of all citizens).

D.

Standing of Riverkeeper

[8] This failure extends to Van Rossum, the Delaware Riverkeeper¹⁵ who similarly fails to plead any direct and immediate interest, claim or harm. While she contends that she has performed numerous activities in relation to gas drilling issues in the Delaware River Basin, including data gathering, she also contends that her personal use and enjoyment of the Delaware River Basin will be negatively affected if gas drilling is authorized to proceed in these areas without the protections afforded by locally-enacted zoning ordinances. Her concern that truck traffic and air pollution will interfere with her enjoyment of the river or her work as ombudsman, however, does not rise to the level of a substantial, immediate and direct interest sufficient to confer standing.

E.

Standing of Medical Doctor

[9] Finally, we turn to whether Dr. Khan has standing to challenge the constitutionality of Act 13 as being a "special law" in violation of Article 3, § 32 of the Pennsylvania Constitution because it treats the oil and gas industry differently than other industries regarding the disclosure of

critical diagnostic information and as having more than a single subject in violation Article 3, § 3 of the Pennsylvania Constitution because it deals with both the health care of patients and a different subject, the regulation of oil and gas operations.

58 Pa.C.S. § 3222.1(b)(10) and (b)(11), titled "Hydraulic fracturing chemical disclosure requirements," regarding hydraulic fracturing of unconventional wells performed on or after the date of the Act, provides that the following are required disclosures:

(10) A vendor, service company or operator shall identify the specific identity and amount of any chemicals claimed to be a trade secret or confidential proprietary information to any health professional who requests the information in writing if the health professional executes a confidentiality agreement and provides a written statement of need for the information indicating all of the following:

*9 (i) The information is needed for the purpose of diagnosis or treatment of an individual.

(ii) The individual being diagnosed or treated may have been exposed to a hazardous chemical.

(iii) Knowledge of information will assist in the diagnosis or treatment of an individual.

(11) If a health professional determines that a medical emergency exists and the specific identity and amount of any chemicals claimed to be a trade secret or confidential proprietary information are necessary for emergency treatment, the vendor, service provider or operator shall immediately disclose the information to the health professional upon a verbal acknowledgment by the health professional that the information may not be used for purposes other than the health needs asserted and that the health professional shall maintain the information as confidential. The vendor, service provider or operator may request, and the health professional shall provide upon request, a written statement of need and a confidentiality agreement from the health professional as soon as circumstances permit, in conformance with regulations promulgated under this chapter.

Under these two sections of Act 13, upon request from a health professional, information regarding any chemicals related to hydraulic fracturing of unconventional wells shall be provided by the vendor.

Dr. Kahn's only predicate for his interest in Act 13 is that "he treats patients in an area that *may likely* come into contact with oil and gas operations." (See PFR at ¶ 35.) Petitioners contend that this gives him a direct, substantial and immediate interest in this controversy because it affects his ability to effectively treat his patients. They explain that Dr. Khan is a medical doctor and resident of the Commonwealth and operates a family practice in Monroeville, Allegheny County, where he treats patients in an area that may likely come into contact with oil and gas operations. Because the claim that 58 Pa.C.S. § 3222.1(b)(10) and (b)(11) restricts health professionals' ability to disclose critical diagnostic information when dealing with information deemed proprietary by the natural gas industry, it requires him to disregard general ethical duties and affirmative regulatory and statutory obligations and to hide information they have gained solely because it was produced by an industry favored by the General Assembly. (Petitioner's brief in opposition to Commonwealth's preliminary objections at 57.)

While keeping confidential what chemicals are being placed in the waters of the Commonwealth may have an effect, both psychologically and physically, on persons who live near or adjacent to oil and gas operations to where these chemicals may migrate both psychologically and physically, his standing to maintain the constitutional claims is based on his claim that the confidentiality restrictions may well affect his ability to practice medicine and to diagnose patients. However, until he has requested the information which he believes is needed to provide medical care to his patients and that information is not supplied or supplied with such restrictions that he is unable to provide proper medical care, the possibility that he may not have the information needed to provide care is not sufficient to give him standing. See *National Rifle Association v. City of Philadelphia*, 977 A.2d 78 (Pa.Cmwth.2009) (plaintiffs did not have standing to bring a claim that their rights under Article I, § 21 of the Pennsylvania Constitution that the "right of the citizens to bear arms in defence of themselves and the State shall not be questioned" were infringed by an ordinance requiring that stolen guns had to be reported to the police until the plaintiffs' guns were stolen or lost). See also *National Rifle Association v. City of Pittsburgh*, 999 A.2d 1256, (Pa.Cmwth.2010); *Commonwealth v. Ciccola*, 894 A.2d 744 (Pa.Super.2006), *appeal denied*, 591 Pa. 660, 916 A.2d 630 (2007); and *Commonwealth v. Semuta*, 902 A.2d 1254 (Pa.Super.2006), *appeal denied*, 594 Pa. 679, 932 A.2d 1288 (2007). (no standing to object to the constitutionality of a statute unless the party is affected by the particular

feature alleged to be in conflict with the constitution). Of course, once the composition of the chemicals placed in the Commonwealth's water is disclosed to him, if Dr. Kahn believes that the chemicals in the water cause a generalized health hazard that would affect the health, safety and welfare of the community, he would have standing to challenge the confidentiality provisions, even if he has signed the confidentiality agreement.

*10 Accordingly, because he does not have standing, Counts XI and XII of the Petition for Review are dismissed.

II.

JUSTICIABILITY

[10] The Commonwealth also preliminarily objects to the petition for review on the basis that Petitioners' claims are barred because they involve non-justiciable political questions. "The power to determine how to exercise the Commonwealth's police powers, including how to best manage Pennsylvania's natural resources and how to best protect its citizens, is vested in the Legislature." (Commonwealth's preliminary objections at 3.) It argues that Art. 1, § 27 of the Pennsylvania Constitution¹⁶ provides that the Commonwealth is the trustee of Pennsylvania's natural resources and it shall conserve and maintain them for the benefit of all the people. That provision provides the Legislature with the authority to determine the best way to manage the development of Pennsylvania's oil and gas resources while protecting the environment. If Petitioners are unhappy with the changes the Legislature has made in enacting Act 13, they should proceed through the political process and not ask this Court to nullify policy determinations that were made pursuant to the Constitution and for which there are no manageable standards for the judiciary to assess the merit of the determinations made by the Legislature.

[11] The political question doctrine is derived from the separation of powers principle. *Pa. Sch. Bds. Ass'n, Inc. v. Commonwealth Ass'n of Sch. Adm'rs*, 569 Pa. 436, 451, 805 A.2d 476, 484–485 (2002). A basic precept of our form of government is that the Executive, the Legislature and the Judiciary are independent, co-equal branches of government. *Id.* at 451, 805 A.2d at 485. Although the ordinary exercise of the judiciary's power to review the constitutionality of legislative action does not offend the principle of separation of powers, there are certain powers constitutionally conferred

upon the legislative branch that are not subject to judicial review. *Id.* A challenge to the Legislature's exercise of a power that the Constitution commits exclusively to the Legislature presents a non-justiciable political question. *Id.*

Under the Commonwealth's reasoning, any action that the General Assembly would take under the police power would not be subject to a constitutional challenge. For example, if the General Assembly decided under the police power that to prevent crime, no one was allowed to own any kind of gun, the courts would be precluded to hear a challenge that the Act is unconstitutional under Art. 1, § 21 of the Pennsylvania Constitution, which provides, "The right of the citizens to bear arms in defence of themselves and the State shall not be questioned." Nothing in this case involves making a determination that would intrude upon a legislative determination or, for that matter, require the General Assembly to enact any legislation to implement any potential adverse order; what we are asked to do is to determine whether a portion of Act 13 is constitutional or not, a judicial function. Because we are not required to make any specific legislative policy determinations in order to come to a resolution of the matters before us, the issue of whether Act 13 violates the Pennsylvania Constitution is a justiciable question for this Court to resolve.¹⁷

III.

FAILURE TO STATE A CLAIM

Counts I-III

Art. 1, § 1 of the Pennsylvania Constitution and violation of the Equal Protection Clause of the United States Constitution

*11 [12] The Commonwealth contends that Act 13's requirement that municipal zoning ordinances be amended to include oil and gas operations in all zoning districts does not violate the principles of due process under Art. 1, § 1 of the Pennsylvania Constitution¹⁸ and the Fourteenth Amendment of the United States Constitution¹⁹ because they have a rational basis and constitute a proper exercise of the Commonwealth's police powers.

[13] The Commonwealth states that Act 13 does not preempt local municipalities' powers to enact zoning ordinances if they are in accord with 58 Pa.C.S. §§ 3302 and 3304. Unlike

58 Pa.C.S. § 3303, which preempts all municipalities from enacting environmental laws, 58 Pa.C.S. § 3302 does keep the local municipalities' power of local zoning but only if provisions do not conflict with Chapter 32 of Act 13, which relates to oil and gas well operations and environmental concerns. 58 Pa.C.S. § 3304. 58 Pa.C.S. § 3304 mandates that all municipalities must enact zoning ordinances in accordance with its provisions. This mandate, it argues "must be evaluated in light of the fundamental structural principles establishing the relationship between the Commonwealth and its municipalities. It cannot be disputed ... that the Commonwealth has established municipalities and that their power derives solely from its creator-state. 'Municipalities are creatures of the state and have no inherent powers of their own. Rather, they "possess only such powers of government as are expressly granted to them and as are necessary to carry the same into effect." ' " *Huntley & Huntley, Inc. v. Borough Council of Oakmont*, 600 Pa. 207, 220, 964 A.2d 855, 862 (2009).... To state the obvious, the MPC is a statute just like any other and as such, its zoning provisions are subject to amendment, alteration, or repeal by subsequent statutory enactment, unless such legislative act violates the Commonwealth or United States Constitutions." (Commonwealth's memorandum of law in support of preliminary objections at 24.)

While recognizing that their power to regulate zoning is only by delegation of the General Assembly, the municipalities contend that Act 13 is unconstitutional because it forces municipalities to enact zoning ordinances in conformance with 58 Pa.C.S. § 3304 allowing, among other things, mining and gas operations in all zoning districts which are incompatible with the municipalities' comprehensive plans that denominates different zoning districts, making zoning irrational. Simply put, they contend that they could not constitutionally enact a zoning ordinance if they wanted to, and it does not make an ordinance any less infirm because the General Assembly required it to be passed.

A.

[14] Zoning is an extension of the concept of a public nuisance which protects property owners from activities that interfere with the use and enjoyment of their property. In *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 732-33, 115 S.Ct. 1776, 131 L.Ed.2d 801 (1995), the United States Supreme Court described the purpose of zoning as follows:

*12 Land-use restrictions designate "districts in which only compatible uses are allowed and incompatible uses

are excluded.” D. Mandelker, *Land Use Law* § 4.16, pp. 113–114 (3d ed.1993) (hereinafter Mandelker). These restrictions typically categorize uses as single-family residential, multiple-family residential, commercial, or industrial. *See, e.g.*, 1 E. Ziegler, Jr., *Rathkopf’s The Law of Zoning and Planning* § 8.01, pp. 8–2 to 8–3 (4th ed.1995); Mandelker § 1.03, p. 4; 1 E. Yokley, *Zoning Law and Practice* § 7–2, p. 252 (4th ed.1978).

Land use restrictions aim to prevent problems caused by the “pig in the parlor instead of the barnyard.” *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388, 47 S.Ct. 114, 118, 71 L.Ed. 303 (1926). In particular, reserving land for single-family residences preserves the character of neighborhoods, securing “zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.” *Village of Belle Terre v. Boraas*, 416 U.S. 1, 9, 94 S.Ct. 1536, 1541, 39 L.Ed.2d 797 (1974); *see also Moore v. East Cleveland*, 431 U.S. 494, 521, 97 S.Ct. 1932, 1947, 52 L.Ed.2d 531 (1977) (Burger, C.J., dissenting) (purpose of East Cleveland’s single-family zoning ordinance “is the traditional one of preserving certain areas as family residential communities”).²⁰ *See also Cleaver v. Bd. of Adjustment*, 414 Pa. 367, 378, 200 A.2d 408, 415 (1964).

So there is not a “pig in the parlor instead of the barnyard,” zoning classifications contained in the zoning ordinance are based on a process of planning with public input and hearings that implement a rational plan of development. The MPC requires that every municipality adopt a comprehensive plan which, among other things, includes a land use plan on how various areas of the community are to be used. Section 301 of the MPC, 53 P.S. § 10301. The municipality’s zoning ordinance implements the comprehensive plan. Section 303 of the MPC, 53 P.S. § 10303.

A typical zoning ordinance divides the municipality into districts in each of which uniform regulations are provided for the uses of buildings and land, the height of buildings, and the area or bulk of buildings and open spaces. *See* Section 605 of the MPC, 53 P.S. § 10605. Permitted or prohibited uses of property and buildings are set forth for each zoning district, e.g., residential, commercial, and industrial. Use districts are often further sub-classified, for instance, into residential districts and then restricted to single-family houses and those in which multifamily or apartment structures are permitted; commercial districts into central and local, or those in which light manufacturing is permitted or excluded; for heavy but non-nuisance types of industry; and nuisance

or unrestricted districts. Height regulations fix the height to which buildings or portions thereof may be carried. Bulk regulations fix the amount or percentage of the lot which may be occupied by a building or its various parts, and the extent and location of open spaces, such as building setbacks, side yards and rear yards. Zoning ordinances segregate industrial districts from residential districts, and there is segregation of the noises and odors necessarily incident to the operation of industry from those sections in which the homes are located. Out of this process, a zoning ordinance implements a comprehensive zoning scheme; each piece of property pays, in the form of reasonable regulation of its use, for the protection that the plan gives to all property lying within the boundaries of the plan.

B.

*13 [15] To determine whether a zoning ordinance is unconstitutional under Article I, § 1 of the Pennsylvania Constitution and Fourteenth Amendment to the United States Constitution, a substantive due process inquiry must take place. When making that inquiry, we take into consideration the rights of all property owners subject to the zoning and the public interests sought to be protected. Quoting from *Hopewell Township Board of Supervisors v. Golla*, 499 Pa. 246, 255, 452 A.2d 1337, 1341–42 (1982), our Supreme Court in *In re Realen Valley Forge Greenes Assocs.*, 576 Pa. 718, 729, 838 A.2d 718, 728 (2003), stated that:

[t]he substantive due process inquiry, involving a balancing of landowners’ rights against the public interest sought to be protected by an exercise of the police power, must accord substantial deference to the preservation of rights of property owners, within constraints of the ancient maxim of our common law, *sic utere tuo ut alienum non laedas*. 9 Coke 59—So use your own property as not to injure your neighbors. A property owner is obliged to utilize his property in a manner that will not harm others in the use of their property, and zoning ordinances may validly protect the interests of neighboring property owners from harm.

The Court went on to state that under that standard for zoning to be constitutional, it “must be directed

toward the community as a whole, concerned with the public interest generally, and justified by a *balancing* of community costs and benefits. These considerations have been summarized as requiring that *zoning be in conformance with a comprehensive plan* for growth and development of the community.” *Id.* (Emphasis added).

The Commonwealth argues that Act 13 mandates that zoning regulations be rationally related to its objective: (1) optimal development of oil and gas resources in the Commonwealth consistent with the protection of the health, safety, environment and property of Pennsylvania citizens; (2) protecting the safety of personnel and facilities employed in coal mining or exploration, development, storage and production of natural gas or oil; (3) protecting the safety and property rights of persons residing in areas where mining, exploration, development, storage or production occurs; and (4) protecting the natural resources, environmental rights and values secured by the Constitution of Pennsylvania. 58 Pa.C.S. § 3202.

However, the interests that justify the exercise the police power in the development of oil and gas operations and zoning are not the same. In *Huntley & Huntley, Inc.*, 600 Pa. at 222–24, 964 A.2d at 864–66, our Supreme Court explained that while governmental interests involved in oil and gas development and in land-use control at times may overlap, the core interests in these legitimate governmental functions are quite distinct. The state's interest in oil and gas development is centered primarily on the efficient production and utilization of the natural resources in the state. Zoning, on the other hand, is to foster the orderly development and use of land in a manner consistent with local demographic and environmental concerns. It then stated, as compared to the state interest in oil and gas exploration:

*14 [T]he purposes of zoning controls are both broader and narrower in scope. They are narrower because they ordinarily do not relate to matters of statewide concern, but pertain only to the specific attributes and developmental objectives of the locality in question. However, they are broader in terms of subject matter, as they deal with all potential land uses and generally incorporate an overall statement of community development objectives that is not limited solely to energy development. *See* 53 P.S. § 10606; *see also id.*, § 10603(b) (reflecting that, under the MPC, zoning ordinances are permitted to restrict or regulate such things as the structures built upon land and watercourses and the density of the population in different areas). *See generally* Tammy Hinshaw & Jaqualin

Peterson, 7 Summ. Pa. Jur.2d Property § 24:12 (“A zoning ordinance reflects a legislative judgment as to how land within a municipality should be utilized and where the lines of demarcation between the several use zones should be drawn.”). More to the point, the intent underlying the Borough's ordinance in the present case includes serving police power objectives relating to the safety and welfare of its citizens, encouraging the most appropriate use of land throughout the borough, conserving the value of property, minimizing overcrowding and traffic congestion, and providing adequate open spaces. *See* Ordinance § 205–2(A).

Id. at 224, 964 A.2d at 865.

In this case the reasons set forth in 58 Pa.C.S. § 3202 are sufficient to have the state exercise its police powers to promote the exploitation of oil and gas resources. This is the overarching purpose of Act 13 which becomes even more evident by 58 Pa.C.S. § 3231 which authorizes the taking of property for oil and gas operations.

58 Pa.C.S. § 3304 requires that local zoning ordinance be amended which, as *Huntley & Huntley, Inc.* states, involves a different exercise of police power. The public interest in zoning is in the development and use of land in a manner consistent with local demographic and environmental concerns. 58 Pa.C.S. § 3304 requires zoning amendments that must be normally justified on the basis that they are in accord with the comprehensive plan, not to promote oil and gas operations that are incompatible with the uses by people who have made investment decisions regarding businesses and homes on the assurance that the zoning district would be developed in accordance with comprehensive plan and would only allow compatible uses. If the Commonwealth-proffered reasons are sufficient, then the Legislature could make similar findings requiring coal portals, tipples, washing plants, limestone and coal strip mines, steel mills, industrial chicken farms, rendering plants and fireworks plants in residential zones for a variety of police power reasons advancing those interests in their development. It would allow the proverbial “pig in the parlor instead of the barnyard.”²¹

*15 In this case, by requiring municipalities to violate their comprehensive plans for growth and development, 58 Pa. C.S § 3304 violates substantive due process because it does not protect the interests of neighboring property owners from harm, alters the character of neighborhoods and makes irrational classifications—irrational because it requires municipalities to allow all zones, drilling operations

and impoundments, gas compressor stations, storage and use of explosives in all zoning districts, and applies industrial criteria to restrictions on height of structures, screening and fencing, lighting and noise.²² Succinctly, 58 Pa.C.S. § 3304 is a requirement that zoning ordinances be amended in violation of the basic precept that “Land-use restrictions designate districts in which only compatible uses are allowed and incompatible uses are excluded.” *City of Edmonds*, 514 U.S. at 732 (internal quotation omitted). If a municipality cannot constitutionally include allowing oil and gas operations, it is no more constitutional just because the Commonwealth requires that it be done.²³

Because the changes required by 58 Pa.C.S. § 3304 do not serve the police power purpose of the local zoning ordinances, relating to consistent and compatible uses in the enumerated districts of a comprehensive zoning plan, any action by the local municipality required by the provisions of Act 13 would violate substantive due process as not in furtherance of its zoning police power. Consequently, the Commonwealth’s preliminary objections to Counts I, II and III are overruled.

C.

Because 58 Pa.C.S. § 3304 requires all oil and gas operations in all zoning districts, including residential districts, as a matter of law, we hold that 58 Pa.C.S. § 3304 violates substantive due process because it allows incompatible uses in zoning districts and does not protect the interests of neighboring property owners from harm, alters the character of the neighborhood, and makes irrational classifications. Accordingly we grant Petitioners’ Motion for Summary Relief, declare 58 Pa.C.S. § 3304 unconstitutional and null and void, and permanently enjoin the Commonwealth from enforcing it. Other than 58 Pa.C.S. §§ 3301 through 3303, which remain in full force and effect, the remaining provisions of Chapter 33 that enforce 58 Pa.C.S. § 3304 are similarly enjoined.

Count IV—Art. IV, § 32 of the Pennsylvania Constitution “Special Law”

[16] Petitioners argue that Article 3, § 32²⁴ has been violated because Act 13 treats the oil and gas industry differently from other energy extraction and production industries by allowing the oil and gas industry to be the only industry permitted to entirely bypass the statutory baselines underlying the constitutionality of zoning and by

giving them special treatment in the way they are included in all zones. To support their argument, Petitioners point to 58 Pa.C.S. § 3304 for example, which provides a time limitation on local municipalities when reviewing zoning applications. They contend, however, that all others who want to develop land in a district are required to follow the time constraints set forth in the MPC. They further argue that Act 13 creates an unconstitutional distinction between densely and sparsely populated communities because densely populated communities and their residents are afforded greater protection under Act 13 due to setback requirements.²⁵

*16 In its preliminary objections, the Commonwealth contends that Act 13 is not a “special law” in violation of Article 3, § 32 of the Pennsylvania Constitution because it is uniform in its regulation of the oil and gas industry and does not benefit or apply solely to a single group or entity or municipality. It alleges that Act 13 has not singled out one particular member of the oil and gas industry for special treatment, and Petitioners cannot show that Act 13 selects one municipality among similarly-situated political units for special treatment. The Commonwealth points out that “special laws” are only those laws which grant special privileges to an individual person, company or municipality, *see Wings Field Preserv. Assocs. v. Dep’t of Transp.*, 776 A.2d 311 (Pa.Cmwlt.2001), and the Legislature has made a valid classification in providing for the regulation of the oil and gas industry.

[17] Any distinction between groups must seek to promote a legitimate state interest or public value and bear a reasonable relationship to the object of the classification. *Pa. Tpk. Comm’n v. Commonwealth*, 587 Pa. 437, 363–365, 899 A.2d 1085, 1094–1095 (2004). Regarding the mineral extraction industry, Pennsylvania courts have legitimate classifications that include classification of coal mines according to the nature of the different kinds of coal, and legislate for each class separately. *Durkin v. Kingston Coal Co.*, 171 Pa. 193, 33 A. 237 (1895); *Read v. Clearfield Co.*, 12 Pa.Super. 419 (1900); classification of open pit mining as distinguished from other mining, *Dufour v. Maize*, 358 Pa. 309, 56 A.2d 675 (1948).

In this case, while Act 13 does treat the oil and gas industry differently from other extraction industries, it is constitutional because the distinction is based on real differences that justify varied classifications for zoning purposes. While Section 3304 does violate Article 1, § 1, it does not violate Article 3, §

32. Accordingly, the Commonwealth's preliminary objection to Count IV is sustained.

Count V—Article 1, §§ 1 and 10 of the Pennsylvania Constitution and the Fifth Amendment to the United States Constitution Eminent Domain

[18] In this Count, Petitioners argue that Section 3241(a) of Act 13 is unconstitutional under the United States and Pennsylvania Constitutions because it allows on behalf of a private person the taking of property for storage reservoirs and protective areas around those reservoirs.²⁶ 58 Pa.C.S. § 3241(a) provides, in relevant part:

(a) General rule. Except as provided in this subsection, *a corporation* empowered to transport, sell or store natural gas or manufactured gas in this Commonwealth *may appropriate an interest in real property* located in a storage reservoir or reservoir protective area for injection, storage and removal from storage of natural gas or manufactured gas in a stratum which is or previously has been commercially productive of natural gas.

*17 58 Pa.C.S. § 3241(a) (emphasis added).

“Constitutions of the United States and Pennsylvania mandate that private property can only be taken to serve a public purpose. [Our Supreme Court] has maintained that, to satisfy this obligation, the public must be the primary and paramount beneficiary of the taking.” *Opening Private Road for Benefit of O'Reilly*, 607 Pa. 280, 299, 5 A.3d 246, 258 (2010). Petitioners contend that no public purpose, only private gain, is served by allowing oil and gas operators to take private property for the oil and gas industry.

In its preliminary objections, among other things, the Commonwealth contends that Petitioners fail to state a claim upon which relief may be granted under Count V because they have failed to allege and there are no facts offered to demonstrate that any of their property has been or is in imminent danger of being taken, with or without just compensation. Even if they had an interest that was going to be taken, we could not hear this challenge in our original jurisdiction because the exclusive method to challenge the condemnor power to take property is the filing of preliminary objections to a declaration of taking. *See* 26 Pa.C.S. § 306. Accordingly, the Commonwealth's preliminary objection to Count V is sustained and Count V is dismissed.

Count VI—Art. 1, § 27 of The Pennsylvania Constitution Public Natural Resources

[19] Article 1, § 27 of the Pennsylvania Constitution provides:

Natural resources and the public estate

The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. *As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.* (Emphasis added.)

Petitioners contend that Chapter 33 of Act 13 violates Article 1, § 27 of the Pennsylvania Constitution because it takes away their ability to strike a balance between oil and gas development and “the preservation of natural, scenic, historic and esthetic values of the environment by requiring a municipality to allow industrial uses in non industrial areas with little ability to protect surrounding resources and community.” In its preliminary objections, the Commonwealth argues that Count VI should be dismissed as well because Article 1, § 27 explicitly imposes a duty on the Commonwealth, not on municipalities, to act as “trustee” to conserve and maintain the Commonwealth's natural resources, and, therefore, Petitioners fail to state a claim upon which relief may be granted. Even if they have an obligation, the Commonwealth contends that they do not have the power to take into consideration environmental concerns in making zoning determinations because the Commonwealth preempts the local regulation of oil and gas operations regulated by the environmental acts pursuant to 58 Pa.C.S. § 3303.

*18 In *Community College of Delaware County v. Fox*, 20 Pa.Cmwlth. 335, 342 A.2d 468 (Pa.Cmwlth.1975), the sewage permit issued by the Department of Environmental Resources, predecessor of DEP, allowed a sewer authority to run a 24-inch diameter sewer along a stream. Suit was brought against the sewer authority claiming a violation of Article 1, § 27 because the issuance of the sewer permit harmed the natural resources of the Commonwealth. The sewer authority argued that the action was not maintainable because only the Commonwealth was named as a trustee of the Commonwealth natural resources in that provision. In rejecting that argument, we stated:

The language of Section 27, of course, does not specify what governmental agency or agencies may be responsible for the preservation of the natural scenic, historic and esthetic values enumerated therein, but it seems clear that many state and local governmental agencies doubtless share this responsibility. The legitimate public interest in keeping certain lands as open space obviously requires that a proper determination of the use to which land shall be adapted must be made, but again this is clearly not a statutory function of the DER. On the contrary, we believe that such a determination clearly is within the **statutory authority** not of the DER but of the various boroughs, townships, counties, and cities of the Commonwealth pursuant to a long series of legislative enactments. **Among these enactments is the Municipalities Planning Code which specifically empowers the governing bodies of these governmental subdivisions to develop plans for land use and to zone or to regulate such uses.** Another such enactment is the Eminent Domain Code under which property may be taken and its owners may be compensated when it is condemned for a proper public purpose. These municipal agencies have the responsibility to apply the Section 27 mandate as they fulfill their respective roles in the planning and regulation of land use, and they, of course, are not only agents of the Commonwealth, too, but trustees of the public natural resources as well, just as certainly as is the DER.

342 A.2d at 481–82 (emphasis added).

College of Delaware held that *local* agencies were subject to suit under Article 1, § 27 because of statutory obligations that they were required to consider or enforce. With regard to Petitioners' claim that Act 13 violates Article 1, § 27 because

they cannot strike a balance between environmental concerns and the effects of oil and gas operations in developing their zoning ordinances, an obligation is placed on them by the MPC. It requires that all municipalities, when developing the comprehensive plan upon which all zoning ordinances are based, must “plan for the protection of natural and historic resources” but that obligation is limited “to the extent not preempted by Federal or State law.” Section 301(a)(6) of the MPC, 53 P.S. § 10301(a)(6).

Act 13 is such a state law. It preempts a municipalities' obligation to plan for environmental concerns for oil and gas operations. One of the purposes given by the General Assembly in enacting Chapter 32 of Act 13, dealing with oil and gas operations, was to “[p]rotect the natural resources, environmental rights and values secured by the Constitution of Pennsylvania. 58 Pa.C.S. § 3202. In Section 3303, the General Assembly specifically stated that all local obligation or power to deal with the environment was preempted because Chapter 32 occupied “the entire field to the exclusion of all local ordinances.” 58 Pa.C.S. § 3303. By doing so, municipalities were no longer obligated, indeed were precluded, from taking into consideration environmental concerns in the administration of their zoning ordinances. Because they were relieved of their responsibilities to strike a balance between oil and gas development and environmental concerns under the MPC, Petitioners have not made out a cause of action under Article 1, § 27. Accordingly, the Commonwealth's preliminary objection to Count VI is sustained and that count is dismissed.

Counts VII—Violation of Separation of Powers—Commission

*19 [20] [21] Under the Separation of Powers doctrine, “Neither the legislative branch nor the executive branch of government acting through an administrative agency may constitutionally infringe on this judicial prerogative.” *Pennsylvania Human Relations Comm'n v. First Judicial Dist. of Pa.*, 556 Pa. 258, 262, 727 A.2d 1110, 1112 (1999). In its preliminary objections, the Commonwealth denies that 58 Pa.C.S. § 3305(a) violates the doctrine of Separation of Powers because it only confers authority on the Public Utility Commission to issue non-binding advisory opinions regarding the compliance of a local zoning ordinances with the requirements of Act 13. The Commonwealth also denies that Section 3305(b) violates the doctrine of Separation of Powers by allowing the Commission to make a determination regarding the constitutionality of a local zoning ordinance.

Petitioners disagree, arguing that 58 Pa.C.S. § 3305(a) violates the doctrine because it permits an executive agency, i.e., the Commission, to perform both legislative and judicial function. The Commission is to play an integral role in the exclusively legislative function of drafting legislation. The Commission is also to render unappealable, advisory opinions. Petitioners argue that Section 3305(b) violates the doctrine because the constitutionality of a municipal zoning ordinance as related only to oil and gas development is no longer determined in accordance with a local municipality's zoning ordinance but is determined solely by the Commission.

58 Pa.C.S. § 3305(a) provides:

(a) Advisory opinions to municipalities.—

(1) A municipality may, prior to the enactment of a local ordinance, in writing, request the commission to review a proposed local ordinance to issue an opinion on whether it violates the MPC, this chapter or Chapter 32 (relating to development).

(2) Within 120 days of receiving a request under paragraph (1), the commission shall, in writing, advise the municipality whether or not the local ordinance violates the MPC, this chapter or Chapter 32.

(3) An opinion under this subsection shall be advisory in nature and not subject to appeal.

58 Pa.C.S. § 3305(b) provides the following regarding “Orders”:

(1) An owner or operator of an oil or gas operation, or a person residing within the geographic boundaries of a local government, who is aggrieved by the enactment or enforcement of a local ordinance may request the commission to review the local ordinance of that local government to determine whether it violates the MPC, this chapter or Chapter 32.

(2) Participation in the review by the commission shall be limited to parties specified in paragraph (1) and the municipality which enacted the local ordinance.

(3) Within 120 days of receiving a request under this subsection, the commission shall issue an order to determine whether the local ordinance violates the MPC, this chapter or Chapter 32.

(4) An order under this subsection shall be subject to de novo review by Commonwealth Court. A petition for review must be filed within 30 days of the date of service of the commission's order. The order of the commission shall be made part of the record before the court.

*20 58 Pa.C.S. § 3305(a) does not give the Commission any authority over this Court to render opinions regarding the constitutionality of legislative enactments. 58 Pa.C.S. § 3305(a) merely allows the Commission to give a non binding advisory opinion, and although that opinion is not appealable by the municipality, no advisory opinion is. Moreover, 58 Pa.C.S. § 3305(b) specifically gives this Court *de novo* review of a Commission final *order* so there is no violation of the Separation of Power doctrine. Accordingly, the Commonwealth's preliminary objection is sustained as to Count VII.

Count VIII—Violation of Non-Delegation Doctrine—DEP

[22] Petitioners contend Act 13 violates Article 2, § 1 because it provides insufficient guidance to waive setback requirements established by the General Assembly for oil and gas wells from the waters of the Commonwealth. Specifically, they contend that 58 Pa. C.S. § 3215(b)(4) violates the basic principles that the legislation must contain adequate standards that will guide and restrain the exercise of the delegated administrative functions because the statutory language fails to contain adequate standards or constrains DEP's discretion when it administers mandatory waivers from water body and wetland setbacks. Section 3215(b), regarding “Well location restrictions,” provides:

(b) Limitation.—

(1) No well site may be prepared or well drilled within 100 feet or, in the case of an unconventional well, 300 feet from the vertical well bore or 100 feet from the edge of the well site, whichever is greater, measured horizontally from any solid blue lined stream, spring or body of water as identified on the most current 7½ minute topographic quadrangle map of the United States Geological Survey.

(2) The edge of the disturbed area associated with any unconventional well site must maintain a 100-foot setback from the edge of any solid blue lined stream, spring or body of water as identified on the most current 7½

minute topographic quadrangle map of the United States Geological Survey.

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

(4) *The department shall waive the distance restrictions upon submission of a plan identifying additional measures, facilities or practices to be employed during well site construction, drilling and operations necessary to protect the waters of this Commonwealth.* The waiver, if granted, shall include additional terms and conditions required by the department necessary to protect the waters of this Commonwealth. Notwithstanding section 3211(e), if a waiver request has been submitted, the department may extend its permit review period for up to 15 days upon notification to the applicant of the reasons for the extension.

58 Pa.C.S. § 3215(b) (emphasis added).

*21 Article 2, § 1 of the Pennsylvania Constitution provides that the legislative power of the Commonwealth is vested in a General Assembly consisting of a Senate and a House of Representatives. Although this article prohibits delegation of the legislative function, the Legislature may confer authority and discretion upon another body in connection with the execution of a law but that “legislation *must contain adequate standards which will guide and restrain* the exercise of the delegated administrative functions.” *Eagle Envt. II, L.P. v. Commonwealth*, 584 Pa. 494, 515, 884 A.2d 867, 880 (2005) (emphasis added) quoting *Gilligan v. Pa. Horse Racing Comm’n*, 492 Pa. 92, 94, 422 A.2d 487, 489 (1980). See also *Commonwealth of Pa. v. Parker White Metal Co.*, 512 Pa. 74, 515 A.2d 1358 (1986). Further, although the Legislature may delegate the power to determine some fact or state of things upon that the law makes or intends to make its own action depend, it cannot empower an administrative agency to create the conditions which constitute the fact. *In Re Marshall*, 363 Pa. 326, 69 A.2d 619 (1949); *Reeves v. Pa. Game Comm’n*, 136 Pa.Cmwth. 667, 584 A.2d 1062 (Pa.Cmwth.1990). Basic policy choices must be made by the General Assembly. *Blackwell v. State Ethics Comm’n*, 523 Pa. 347, 567 A.2d 630 (1989).

In its preliminary objections, the Commonwealth denies that 58 Pa.C.S. § 3215(b)(4) grants DEP the power to grant waivers without establishing standards for making determinations in violation of the non-delegation doctrine

under Article 2, § 1.²⁷ Those standards, it contends, are contained in 58 Pa.C.S. § 3202, which provides that the General Assembly intended to “Permit optimal development of oil and gas resources of this Commonwealth consistent with protection of health, safety, environment and property of Pennsylvania citizens.” 58 Pa.C.S. § 3202.

In *Pennsylvanians Against Gambling Expansion Fund v. Commonwealth*, 583 Pa. 275, 877 A.2d 383 (2005) (PAGE), our Supreme Court considered a similar defense to a constitutional challenge under Article 2, § 1 to 4 Pa.C.S. § 1506. At the time PAGE was decided, Section 1506 provided that the siting of a gaming facility:

shall not be prohibited or otherwise regulated by any ordinance, home rule charter provision, resolution, rule or regulation of any political subdivision or any local or State instrumentality or authority that relates to zoning or land use to the extent that the licensed facility has been approved by the board.

The Gaming Board stated that the policies and objectives listed by the Legislature in 4 Pa.C.S. § 1102²⁸ as well as standards provided in other sections in the Pennsylvania Race Horse Development and Gaming Act, 4 Pa.C.S. §§ 1101–1904, were sufficient standards for the Board to exercise its discretion with regard to zoning. Our Supreme Court rejected the Board’s argument while acknowledging the “eligibility requirements and additional criteria guide the Board’s discretion in determining whether to approve a licensee, we find that they do not provide adequate standards upon which the Board may rely in considering the local zoning and land use provisions for the site of the facility itself.” 583 Pa. at 335, 877 A.2d at 419. It then declared 4 Pa.C.S. § 1506 to be unconstitutional and severed it from the Gaming Act.

*22 The subsections of Section 3215(b) provide specific setbacks between the wellbore or the disturbed area of a well site and the water source. In authorizing a waiver, Section 3215(b)(4) gives no guidance to DEP that guide and constrain its discretion to decide to waive the distance requirements from water body and wetland setbacks. Moreover, it does not provide how DEP is to evaluate an operator’s “plan identifying additional measures, facilities or practices to be employed ... necessary to protect the waters of this Commonwealth.” 58 Pa.C.S. § 3215(b)(4).

Just as in *PAGE*, some general goals contained in other provisions are insufficient to give guidance to permit DEP to waive specific setbacks. Given the lack of guiding principles as to how DEP is to judge operator submissions, Section 3215(b)(4) delegates the authority to DEP to disregard the other subsections and allow setbacks as close to the water source it deems feasible. Because the General Assembly gives no guidance when the other subsections may be waived, Section 3215(b)(4) is unconstitutional because it gives DEP the power to make legislative policy judgments otherwise reserved for the General Assembly. Of course, our holding does not preclude the General Assembly's ability to cure the defects by subsequent amendment that provides sufficient standards. Accordingly, because Act 13 provides insufficient guidance to DEP as to when to grant a waiver from the setback requirements established by the Legislature, Section 3215(b)(4) is unconstitutional under Article 2, § 1. The Commonwealth's preliminary objection is overruled and summary relief is entered in favor of the Petitioners on this count.

Counts IX & X—Unconstitutionally Vague

[23] The Commonwealth denies that the setback, timing and permitting provisions and requirements for municipalities under Act 13 are unconstitutionally vague because they fail to provide sufficient information to inform Petitioners as to what is permitted or prohibited under the Act. Petitioners allege that the Act is vague relying on Section 3304, "Uniformity of local ordinances." They argue, for example, that under Section 3304(b), the Act mandates distance requirements for municipalities requiring that any local zoning ordinance governing oil and gas operations strictly comply with the same, but fails to provide any meaningful information or guidance with regard to when to grant a waiver or variance of the distance requirements pursuant to Sections 3215(a) and (b).

Both Sections 3304 and 3215 provide specific information regarding the local ordinance requirements. Section 3215 specifically provides well location restrictions and the distance within which they may be drilled from existing water wells, surface water intakes, reservoirs or other water supply extraction points. While Section 3304(b)(4) does not provide for adequate standards, Section 3304 is not unconstitutionally vague, and the Commonwealth's preliminary objections to Counts IX and X are sustained.

*23 Accordingly, the Commonwealth's preliminary objections to Counts IV, V, VI, VII, IX, X, XI and XII are sustained. The preliminary objections to Counts I, II, III and VIII are overruled. Petitioners' request for summary relief as to Counts I, II, III and VIII is granted and these provisions are declared null and void.

The Commonwealth's cross-motion for summary relief is denied.

Judge LEAVITT did not participate in the decision in this case.

ORDER

AND NOW, this 26th day of July, 2012, the preliminary objections filed by the Commonwealth to Counts IV, V, VI, VII, IX, X, XI and XII are sustained and those Counts are dismissed. The preliminary objections to Counts I, II, III and VIII are overruled.

Petitioners' motion for summary relief as to Counts I, II, and III is granted. 58 P.S. § 3304 is declared unconstitutional, null and void. The Commonwealth is permanently enjoined from enforcing its provisions. Other than 58 Pa.C.S. § 3301 through § 3303 which remain in full force and effect, the remaining provisions of Chapter 33 that enforce 58 Pa.C.S. § 3304 are similarly enjoined.

Petitioners' motion for summary relief as to Count VIII is granted and Section 3215(b)(4) is declared null and void.

The cross-motions for summary relief filed by the Pennsylvania Public Utility Commission and Robert F. Powelson in his Official Capacity as Chairman of the Public Utility Commission and by the Department of Environmental Protection and Michael L. Krancer in his Official Capacity as Secretary of the Department of Environmental Protection are denied.

DISSENTING OPINION BY Judge BROBSON.

*23 I agree with the majority's analysis of the standing and justiciability questions. I also agree with the majority's decision to sustain the Preliminary Objections of the Commonwealth Respondents directed to Counts IV–VII and IX–XII and dismiss those Counts of the Petition for Review. I further agree with the majority's decision to grant Petitioners' Motion for Summary Relief directed to Count VIII. I thus join in those portions of the majority opinion. I write separately,

however, because I disagree with the majority's analysis and disposition of Counts I–III of the Petition for Review. I thus respectfully dissent.

The majority holds that Section 3304 of Act 13, 58 Pa.C.S. § 3304, is an affront to substantive due process because it would allow “oil and gas operations,” what the majority refers to as the “pig,” in zoning districts that, based on a local municipality's comprehensive plan, allow for incompatible uses—*i.e.*, residential and agricultural, to name a few. The majority refers to these incompatible zoning districts as “the parlor.” Instead, the majority appears to argue that this particular pig belongs in an unidentified but different zoning district, which the majority identifies only as “the barnyard.” The majority reasons that if the General Assembly can require that municipalities allow this particular pig to be in every zoning district, it could also “require steel mills, industrial chicken farms, rendering plants and fireworks plants in residential zones.” (Maj. slip op. at 29–30.)

*24 The problem with the majority's analysis is that this particular pig (unlike steel mills, chicken farms, rendering plants, and fireworks plants) can only operate in the parts of this Commonwealth where its slop can be found. The natural resources of this Commonwealth exist where they are, without regard to any municipality's comprehensive plan. Oil and gas deposits can exist in a residential district just as easily as they might exist in an industrial district. What a local municipality allows, through its comprehensive plan, to be built above ground does not negate the existence and value of what lies beneath.

The General Assembly recognized this when it crafted Act 13 and, in particular, Section 3304. It decided that it was in the best interest of all Pennsylvanians to ensure the optimal and uniform development of oil and gas resources in the Commonwealth, *wherever those resources are found*. To that end, Act 13 allows for that development under certain conditions, recognizing the need to balance that development with the health, safety, environment, and property of the citizens who would be affected by the development.

Section 3304, however, does not, as the majority suggests, eviscerate local land use planning. 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. Section 3304 does not require a municipality to convert a residential district into an industrial district. Indeed, in crafting Section 3304 of Act 13, the General Assembly allowed, but restricted, oil and gas operations

based on, and not in lieu of, each local municipality's existing comprehensive plan.

“Oil and gas operations” is broadly defined to include different classes of activities, or “uses”, related to oil and gas operations—*e.g.*, assessment/extraction, fluid impoundment, compressor stations, and processing plants. Section 3301 of Act 13, 58 Pa.C.S. § 3301. The definition reflects multiple different “uses” related to the oil and gas industry. Recognizing that some of these uses would be more intrusive than others, if not downright unsuitable for certain zoning districts, Section 3304(b) *limits* where and under what circumstance certain oil and gas operations may be allowed within a particular zoning district of a municipality.

Section 3304(b)(5), for example, provides that a local zoning ordinance must allow oil and gas operations as permitted uses in all zoning districts, but excludes from this command activities at impoundment areas, compressor stations, and processing plants. In terms of wells, Section 3304(b)(5.1) empowers local municipalities to prohibit wells within a residential district if the well cannot be located in such a way as to comply with a 500 foot setback. With respect to compressor stations, Section 3304(b)(7) provides that a municipality must allow them as a permitted use in agricultural and industrial zoning districts only. In all other zoning districts, however, they would be allowed only as conditional uses, so long as certain setback and noise level requirements can be satisfied. Act 13 does not require a municipality to allow a processing plant in a residential district. To the contrary, Section 3304(b)(8) would restrict processing plants to industrial zoning districts as a permitted use and agricultural districts as a conditional use, subject to setback and noise level requirements.

*25 The majority cites *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 115 S.Ct. 1776, 131 L.Ed.2d 801 (1995). In *City of Edmonds*, a city filed a declaratory judgment action, seeking a ruling that its single-family zoning provision did not violate the Fair Housing Act. From *City of Edmonds*, the majority excises the following sentence: “Land-use restrictions designate ‘districts in which only compatible uses are allowed and incompatible uses are excluded.’” *City of Edmonds*, 514 U.S. at 732 (quoting D. Mandelker, Land Use Law § 4.16, at 113–14 (3d ed.1993)). The words “due process” appear nowhere in the Supreme Court's opinion in *City of Edmonds*. Yet, the majority, based on this quote, reaches a legal conclusion that any zoning ordinance that allows a particular use in a district that is incompatible with the other uses in that same district is unconstitutional. I

find no support for this broad legal proposition in *City of Edmonds*. 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 and authority of municipalities to grant a use variance.

The desire to organize a municipality into zones made up of compatible uses is a goal, or objective, of comprehensive planning. See *Huntley & Huntley, Inc. v. Borough Council of Borough of Oakmont*, 600 Pa. 207, 224, 964 A.2d 855, 865 (2009).¹ But it is not an inflexible constitutional edict. Although the inclusion of one incompatible use within a zoning district of otherwise compatible uses might be bad planning, it does not itself render the ordinance, or law, constitutionally infirm. “[A] local ordinance may not stand as an obstacle to the execution of the full purposes and objectives of the Legislature.” *Id.* at 220, 964 A.2d at 863. This is exactly what the majority has done in this case by deferring to the locally-enacted comprehensive plans and zoning ordinances over the will of the General Assembly as expressed in Section 3304 of Act 13.²

Section 3304 of Act 13 is, in essence, a zoning ordinance. Substantive due process cases addressed to local zoning ordinances tend to involve challenges to ordinances as *too* restrictive of the citizenry's right to use their property. Here, the challenge is that the law is too lax, in that it allows a use that Petitioners claim is appropriately restricted, if not prohibited, by local zoning ordinances. The inquiry, however, is the same, that being whether the challenged law reflects the proper exercise of the police power. If so, we must uphold it. Our Supreme Court has summarized the appropriate standard for evaluating such challenges as follows:

When presented with a challenge to a zoning ordinance, the reviewing court presumes the ordinance is valid. The burden of proving otherwise is on the challenging party.

A zoning ordinance is a valid exercise of the police power when it promotes public health, safety or welfare and its regulations are substantially related to the purpose the ordinance purports to serve. In applying that formulation, Pennsylvania courts use a substantive due process analysis which requires a reviewing court to balance the public interest served by the zoning ordinance against the confiscatory or exclusionary impact of regulation on individual rights. The party challenging the constitutionality of certain zoning provisions must establish that they are arbitrary, unreasonable and unrelated

to the public health, safety, morals and general welfare. Where their validity is debatable, the legislature's judgment must control.

*26 *Boundary Drive Assocs. v. Shrewsbury Twp. Bd. of Supervisors*, 507 Pa. 481, 489–90, 491 A.2d 86, 90 (1985) (citations omitted). In addition, “[t]he party challenging a legislative enactment bears a heavy burden to prove that it is unconstitutional. A statute will only be declared unconstitutional if it clearly, palpably and plainly violates the constitution. Any doubts are to be resolved in favor of a finding of constitutionality.” *Payne v. Commonwealth, Dep't of Corr.*, 582 Pa. 375, 383, 871 A.2d 795, 800 (2005) (citations omitted).

The stated legislative purposes of Act 13 include:

- (1) [permitting] optimal development of oil and gas resources of this Commonwealth consistent with the health, safety, environment and property of Pennsylvania citizens[;]
- (2) [protecting] the safety of personnel and facilities employed in coal mining or exploration, development, storage and production of natural gas or oil[;]
- (3) [protecting] the safety and property rights of persons residing in areas where mining, exploration, development, storage or production occurs[;] and
- (4) [protecting] the natural resources, environmental rights and values secured by the Constitution of Pennsylvania.

58 Pa.C.S. § 3202. The stated purpose of Section 3304 of Act 13 is to “allow for the *reasonable* development of oil and gas resources” in the Commonwealth, consistent with the purposes of Chapter 32 of Act 13. *Id.* § 3304(a) (emphasis added).

In light of the standards set forth above, which must guide our review, 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.

“The line which in this field separates the legitimate from the illegitimate assumption of [police] power is not capable of precise delineation. It varies with circumstances and conditions.” *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387, 47 S.Ct. 114, 71 L.Ed. 303 (1926). There is no doubt that Petitioners have legitimate concerns and questions about the wisdom of Act 13. But it is not our role to pass upon the wisdom of a particular legislative enactment. Under these circumstances and conditions, Petitioners have failed to make out a constitutional challenge to Section 3304 of Act 13. For that reason, I would sustain the Commonwealth Respondents' preliminary objections directed to Counts I through III of the Petition for Review and deny Petitioners' Motion for Summary Relief directed to those Counts.

Judges SIMPSON and COVEY join in this dissenting opinion.

1 While 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. 210Pa. Code § 67.29(b).

2 The other Respondents are: Robert F. Powelson, in his official capacity as Chairman of the Public Utility Commission; Office of the Attorney General of the Commonwealth of Pennsylvania; Linda L. Kelly, in her official capacity as Attorney General of the Commonwealth of Pennsylvania; Pennsylvania Department of Environmental Protection (DEP); and Michael L. Krancer, in his official capacity as Secretary of the Department of Environmental Protection.

3 The other Petitioners are: Washington County, Pennsylvania; Brian Coppola (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 (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 (Van

Rossum), the Delaware Riverkeeper; and Mehernosh Khan, M.D. (Dr. Khan).

4 58 Pa.C.S. §§ 2301–3504.

5 Petitioners originally filed a motion for summary judgment, which this Court by order dated May 10, 2012, deemed a motion for summary relief pursuant to Pa. R.A.P. 1532(b).

6 The petition is lengthy consisting of 108 pages and 14 counts: 12 counts requesting declaratory relief, one count requesting a preliminary injunction and another requesting a permanent injunction.

7 Act of December 19, 1984, P.L. 1140, *as amended*, formerly 58 P.S. §§ 601.101–601.605.

8 58 Pa.C.S. § 3303 provides:

Notwithstanding any other law to the contrary, environmental acts are of Statewide concern and, to the extent they regulate oil and gas operations, occupy the entire field of regulation, to the exclusion of all local ordinances. The Commonwealth by this section, preempts and supersedes the local regulation of oil and gas operations regulated by the environmental acts, as provided in this chapter.

9 An “unconventional well” is defined as “A bore hole drilled or being drilled for the purpose of or to be used for the production of natural gas from an unconventional formation.” 58 Pa.C.S. § 3203.

10 The Commonwealth agrees that such modification will be necessary in order to promote statewide uniformity of ordinances. Its brief in support of the preliminary objections states that Act 13:

[I]s the General Assembly's considered response to the challenges of environmental protection and economic development that come with the commercial development of unconventional formations, geological formations that cannot be produced at economic flow rates or in economic volumes except by enhanced drilling and completion technologies. One of the most commonly known unconventional formations is the Marcellus Shale, a hydrocarbon-rich black shale formation that underlies approximately two-thirds of Pennsylvania and is believed to hold trillions of cubic feet of natural gas and is typically encountered at depths of 5,000 to 9,000 feet.

Act 13 broadly rewrote Pennsylvania's Oil and Gas Act in an effort to, *inter alia*, modernize and bolster environmental protections in light of

the increased drilling likely to occur throughout the Commonwealth as Marcellus Shale natural gas resources are tapped.... Act 13 also institutes an impact fee, which redistributes industry revenue to communities directly affected by Marcellus Shale operations (as well as to other Commonwealth entities involved in shale development). Finally, and perhaps most relevant to these Preliminary Objections, Act 13 fosters both environmental predictability and investment in the nascent shale industry by increasing statewide uniformity in local municipal ordinances that impact oil and natural gas operations.

(Commonwealth's memorandum of law in support of preliminary objections at 3-4) (footnotes omitted).

11 The MPC refers to the Pennsylvania Municipalities Planning Code, Act of July 31, 1968, P.L. 805, *as amended*, 53 P.S. §§ 10101-11202.

12 Petitioners seek preliminary and permanent injunctive relief in **Counts XIII and XIV** respectively.

13 "The standard for summary relief is found at Pa. R.A.P. 1532(b) which is similar to the relief envisioned by the rules of civil procedure governing summary judgment. "After the relevant pleadings are closed, but within such time as not to unreasonably delay trial, any party may move for summary judgment in whole or in part as a matter of law:

(1) whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense which could be established by additional discovery or expert report, or

(2) if, after the completion of discovery relevant to the motion, including the production of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury."

Brittan v. Beard, 601 Pa. 405, 417 n. 7, 974 A.2d 479, 484 n. 7 (2009).

14 For example, Petitioners allege that they would have to: (a) modify their zoning laws in a manner that fails to give consideration to the character of the municipality, the needs of its citizens and the suitabilities and special nature of particular parts of the municipality, Section 603 of the MPC, 53 P.S. § 10603(a); (b) modify their zoning laws in a manner that would violate and contradict the goals and objectives of Petitioners' comprehensive plans, Section 605 of the MPC, 53 P.S. § 10605; and (c) modify zoning laws and create zoning districts that

violate Petitioners' constitutional duties to only enact zoning ordinances that protect the health, safety, morals and welfare of the community, Section 604 of the MPC, 53 P.S. § 10604.

15 The petition for review states that Van Rossum is a full-time, privately funded ombudsman responsible for the protection of the waterways in the Delaware River Watershed. She advocates for the protection and restoration of the ecological, recreational, commercial and aesthetic qualities of the Delaware River, its tributaries and habitats. (Petition for Review (PFR) at ¶ 33.) Petitioners further explain that Delaware Riverkeeper Network (DRN) is "a non-profit organization established in 1988 to protect and restore the Delaware River, its associated watershed, tributaries and habitats." (PFR at ¶ 32.) "To achieve these goals, DRN organizes and implements streambank restorations, a volunteer monitoring program, educational programs, environmental advocacy initiatives, recreational activities, and environmental law enforcement efforts throughout the entire Delaware River Basin watershed. DRN is a membership organization headquartered in Bristol, Pennsylvania, with more than 8,000 members with interests in the health and welfare of the Delaware River and its watershed. DRN brings this action on its own behalf and on behalf of its members, board and staff." (PFR at ¶ 32.)

16 Art. 1, § 27 of the Pennsylvania Constitution provides:

Natural resources and the public estate.

The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.

17 The Commonwealth also raises the issue of ripeness arguing that this Court should refrain from making a determination because the answer would be based on Petitioners' assertions of speculative, hypothetical events that may or may not occur in the future. *See Pa. Power & Light Co. v. Pa. Pub. Util. Comm'n*, 43 Pa.Cmwlth. 252, 401 A.2d 1255, 1257 (Pa.Cmwlth.1979). However, our Supreme Court has held that "the equitable jurisdiction of this Court allows parties to raise pre-enforcement challenges to the substantive validity of laws when they would otherwise be forced to submit to the regulations and incur cost and burden that the regulations would impose or be forced to defend themselves against sanctions for non-compliance with the law. In this case,

the municipalities have alleged that they will be required to modify their zoning codes, and if they fail to do so, they will be subject to penalties and/or prosecution under 58 Pa.C.S. § 3255. Therefore, the constitutionality issue is ripe for review, and declaratory judgment is the proper procedure to determine whether a statute violates the constitutional rights of those it affects.” *Allegheny Ludlum Steel Corp. v. Pa. Pub. Util. Comm’n*, 67 Pa.Cmwlth. 400, 447 A.2d 675, 679 (Pa.Cmwlth.1982).

18 Article 1, § 1 of the Pennsylvania Constitution provides: “All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness.”

19 Section 1 of the 14th Amendment to the United States Constitution provides: “All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

20 Ignoring that *Edmonds* was cited to explain the purpose of zoning and not the constitutional standard under the Pennsylvania Constitution, the dissent dramatically states that if no incompatible uses were permitted as part of the comprehensive plan, based on the above discussion, that would mean the end of variances and the grant of non-conforming uses. What that position ignores is that non-conforming uses were in existence before zoning and that variances are designed to ameliorate the application of the zoning ordinance to a particular parcel of property. Neither destroys the comprehensive scheme of zoning. In *Appeal of Michener*, 382 Pa. 401, 407, 115 A.2d 367, 371 (1955), our Supreme Court, quoting *Clark v. Board of Zoning Appeals*, 301 N.Y. 86, 90, 91, 92 N.E.2d 903, 904, 905 (1950), explained that in the context of why and when a variance should be granted and the importance of maintaining the general scheme of zoning stating:

‘[B]efore the board may vote a variance, there must be shown, among other things, ‘that the plight of the owner is due to unique circumstances and not to the general conditions in the neighborhood which may reflect the unreasonableness of the zoning ordinance itself’. The board, being an administrative and not a legislative body, may not review or amend the legislatively enacted rules as

to uses, or amend the ordinance under the guise of a variance, * * * or determine that the ordinance itself is arbitrary or unreasonable * * *. If there be a hardship, which * * * is common to the whole neighborhood, the remedy is to seek a change in the zoning ordinance itself. * * * Nothing less than a showing of hardship special and peculiar to the applicant’s property will empower the board to allow a variance. * * * The substance of all these holdings is that no administrative body may destroy the general scheme of a zoning law by granting special exemption from hardships common to all.

21 While I would not call oil or gas “slop,” the dissent posits that this particular pig—oil and gas operations—can only operate where the “slop” is found, inferring that that allows compressor stations, impoundment dams and blasting and the storage of explosives be exempt from normal planning. However, the “slop” here is not the oil and gas but the effects of oil and gas operations on other landowners’ quiet use and enjoyment of their property. The slop here—noise, light, trucks, traffic—literally affects the use of the landowner’s parlor. The dissent also seems to limit the Legislature’s police power to “break” local zoning to extraction industries. There may be other reasons—such as economic development that the General Assembly may want to break local zoning, such as the building of the gas extraction plant that could be used to justify almost any use in any zone under the exercise of police power. Whether you classify oil and gas operations as a “pig in the parlor” or a “rose bush in a wheat field,” it nonetheless constitutes an unconstitutional “spot use.”

22 The dissent states that the Section 3304 does not eviscerate local zoning because it does not give *carte blanche* to the oil and gas industry and does not require a municipality to convert a residential district into an industrial district. The dissent then goes on to state that “in crafting Section 3304 of Act 13, the General Assembly allowed, but restricted, oil and gas operations based on, and not in lieu of each local municipality existing comprehensive plan.” 58 Pa.C.S. § 3304, it posits, shows consideration by requiring additional setbacks for the more intensive of its uses.

It is true that 58 Pa.C.S. § 3304 does not convert residential districts into industrial zones; it just requires that industrial uses be permitted in residential districts and that the zoning restrictions applicable to industrial uses be applied. It is also true that 58 Pa.C.S. § 3304 does not replace the comprehensive plan; it just supplants the comprehensive plan by allowing oil and gas operations in districts under the comprehensive plan where such a use is not allowed.

Again, it is true that Act 13 does provide additional consideration by requiring additional setbacks to lessen the negative effects of oil and gas operations, such as machinery noise and flood lights, on adjoining homeowners. However, the dissent fails to mention that those additional setbacks are based on industry standards regarding industrial operations, and that the added "consideration" that the operations, and the resultant light, noise, and traffic, has to be permitted 24 hours a day. None of these "considerations" would be necessary if the industrial uses included in the definition of oil and gas operations were not allowed because they are incompatible with the other uses in that district.

23 While there is no disagreement with the dissent's statement that a local ordinance may not frustrate the purposes and objectives of the legislature, the claim here is that the Pennsylvania Constitution stands in the way. While recognizing that "the desire to organize a municipality into zones made of compatible uses is a goal, or objective, of comprehensive planning," and that the inclusion of incompatible uses might be bad planning, the dissent concludes that it does not render the ordinance unconstitutionally infirm. If that were true, then the creation of a spot zone would similarly not be unconstitutional under Article I, § 1 of the Pennsylvania Constitution and the Fourteenth Amendment to the United States Constitution. Spot zoning is "[a] singling out of one lot or a small area for different treatment from that accorded to similar surrounding land indistinguishable from it in character, for the economic benefit of the owner of that lot or to his economic detriment." *Appeal of Mulac*, 418 Pa. 207, 210, 210 A.2d 275, 277 (1965). While in spot zoning the land is classified in a way that is incompatible with the classification of the surrounding land, the same unconstitutional infirmity exists here. What we have under Act 13 is a "spot use" where oil and gas uses are singled out for different treatment that is incompatible with other surrounding permitted uses. What the dissent ignores is that the sanctioning of "bad planning" renders the affected local zoning ordinances unconstitutionally irrational.

24 Article 3, § 32 of the Pennsylvania Constitution provides:

Certain local and special laws.

The General Assembly shall pass no local or special law in any case which has been or can be provided for by general law and specifically the General Assembly shall not pass any local or special law:

1. Regulating the affairs of counties, cities, townships, wards, boroughs or school districts;
2. Vacating roads, town plats, streets or alleys;

3. Locating or changing county seats, erecting new counties or changing county lines;
4. Erecting new townships or boroughs, changing township lines, borough limits or school districts;
5. Remitting fines, penalties and forfeitures, or refunding moneys legally paid into the treasury;
6. Exempting property from taxation;
7. Regulating labor, trade, mining or manufacturing;
8. Creating corporations, or amending, renewing or extending the charters thereof.

Nor shall the General Assembly indirectly enact any special or local law by the partial repeal of a general law; but laws repealing local or special acts may be passed.

25 Petitioners also argue that there is disparity because under 58 Pa.C.S. § 3218.1, public drinking water facilities are treated differently than private water wells or other drinking sources. That section provides that "[a]fter receiving notification of a spill, the department shall, after investigating the incident, notify any public drinking water facility that could be affected by the event that the event occurred." Under this section, Petitioners allege that there is an unconstitutional distinction between public drinking water supplies and private wells in violation of equal protection principles.

26 The Fifth Amendment to the Constitution of the United States provides, in relevant part, "[N]or shall private property be taken for public use, without just compensation." U.S. Const. amend. V.

Article I, § 1 of the Pennsylvania Constitution reads, "All men ... have certain inherent and indefeasible rights, among which are those ... of acquiring, possessing and protecting property...."

Article I, § 10 of the Pennsylvania Constitution provides, in relevant part, "[N]or shall private property be taken or applied to public use, without authority of law and without just compensation being first made or secured."

27 Article 2, § 1 of the Pennsylvania Constitution provides that "The legislative power of this Commonwealth shall be vested in a General Assembly, which shall consist of a Senate and a House of Representatives."

28 4 Pa.C.S. § 1102 provides that:

The General Assembly recognizes the following public policy purposes and declares that the following objectives of the Commonwealth are to be served by this part:

- (1) The primary objective of this part to which all other objectives and purposes are secondary is

to protect the public through the regulation and policing of all activities involving gaming and practices that continue to be unlawful.

(2) The authorization of limited gaming by the installation and operation of slot machines as authorized in this part is intended to enhance live horse racing, breeding programs, entertainment and employment in this Commonwealth.

(3) The authorization of limited gaming is intended to provide a significant source of new revenue to the Commonwealth to support property tax relief, wage tax reduction, economic development opportunities and other similar initiatives.

(4) The authorization of limited gaming is intended to positively assist the Commonwealth's horse racing industry, support programs intended to foster and promote horse breeding and improve the living and working conditions of personnel who work and reside in and around the stable and backside areas of racetracks.

(5) The authorization of limited gaming is intended to provide broad economic opportunities to the citizens of this Commonwealth and shall be implemented in such a manner as to prevent possible monopolization by establishing reasonable restrictions on the control of multiple licensed gaming facilities in this Commonwealth.

(6) The authorization of limited gaming is intended to enhance the further development of the tourism market throughout this Commonwealth, including, but not limited to, year-round recreational and tourism locations in this Commonwealth.

(7) Participation in limited gaming authorized under this part by any licensee or permittee shall be deemed a privilege, conditioned upon the proper and continued qualification of the licensee or permittee and upon the discharge of the affirmative responsibility of each licensee to provide the regulatory and investigatory authorities of the Commonwealth with assistance and information necessary to assure that the policies declared by this part are achieved.

(8) Strictly monitored and enforced control over all limited gaming authorized by this part shall be provided through regulation, licensing and appropriate enforcement actions of specified locations, persons, associations, practices, activities, licensees and permittees.

(9) Strict financial monitoring and controls shall be established and enforced by all licensees or permittees.

(10) The public interest of the citizens of this Commonwealth and the social effect of gaming

shall be taken into consideration in any decision or order made pursuant to this part.

(11) It is necessary to maintain the integrity of the regulatory control and legislative oversight over the operation of slot machines in this Commonwealth; to prevent the actual or appearance of corruption that may result from large campaign contributions; ensure the bipartisan administration of this part; and avoid actions that may erode public confidence in the system of representative government.

1 In *Huntley*, the Supreme Court addressed a challenge to a local zoning ordinance that restricted oil and gas extraction in a residential zoning district. The issue before the Court was whether the Oil and Gas Act, Act of December 19, 1984, P.L. 1140, *as amended*, 58 P.S. §§ 601.101–605 (repealed 2012) (Former Act), preempted the local ordinance. The Supreme Court held that although the Former Act preempted the field of local regulation in terms of how oil and gas resources are developed in the Commonwealth, it left room for local municipalities, through the MPC, to regulate where those resources are developed: “[A]bsent further legislative guidance, we conclude that the [local] ordinance serves different purposes from those enumerated in the [Former] Act, and, hence, that its overall restriction on oil and gas wells in R–1 districts is not preempted by that enactment.” *Huntley*, 600 Pa. at 225–26, 964 A.2d at 866 (emphasis added). With Act 13, which repealed the Former Act, the General Assembly has provided the courts with clear legislative guidance on the question of whether Act 13 is intended to preempt the field of how *and where* oil and gas natural resources are developed in the Commonwealth.

2 The majority cites to our Supreme Court's decision in *In re Realen Valley Forge Greener Associates*, 576 Pa. 718, 838 A.2d 718 (2003), in support of its claim that zoning must be in conformity with a local municipalities' comprehensive plan. A closer reading of the Supreme Court's decision in *In re Realen*, however, shows that the Court in that case was dealing with a “spot zoning” challenge, where the municipality attempted to act in contravention of its own comprehensive plan. As stated above, however, the General Assembly cannot be held hostage by each local municipality's comprehensive plan when exercising its police power. Accordingly, the restriction imposed on municipalities in *In re Realen* to comply with their comprehensive plans does not extend to the General Assembly when exercising its police power.

End of Document

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CERTIFICATE OF SERVICE

I, **Howard G. Hopkirk**, Senior Deputy Attorney General, hereby certify that on September 4, 2012, I caused to be served the foregoing **BRIEF FOR APPELLANTS COMMONWEALTH OF PENNSYLVANIA; OFFICE OF THE ATTORNEY GENERAL OF PENNSYLVANIA; AND LINDA L. KELLY, IN HER OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA** by depositing two copies of same in the United States Mail, first class, postage prepaid, in Harrisburg, Pennsylvania upon the following:

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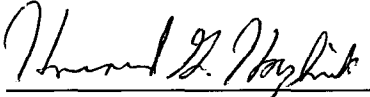
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