

**IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT**

No. 63 MAP 2012

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

v.

COMMONWEALTH of Pennsylvania, Pennsylvania Public Utility Commission, Robert F. Powelson, in his Official Capacity as Chairman of the Public Utility Commission, Office of the Attorney General 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.

**BRIEF OF *AMICUS CURIAE* THE PENNSYLVANIA CHAPTER
OF THE AMERICAN PLANNING ASSOCIATION, IN SUPPORT
OF APPELLEES**

**Appeal from the July 26, 2012 Order of Court entered by the Commonwealth
Court of Pennsylvania, No. 284 M.D. 2012**

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I. Statement of Interest

The Pennsylvania Chapter of the American Planning Association (the “PA APA”) is a nonprofit, non-partisan organization for the promotion of land-use planning, and for professional planners and planning officials in the Commonwealth. To fulfill its mission of providing leadership in the development of vital communities, the PA APA advocates that planning is an essential function in creating successful communities throughout the Commonwealth. Approximately 3,000 members strong, the PA APA works to promote planning at all levels of the Commonwealth.

The PA APA has an interest in this case because Act 13 of 2012, P.L. 87, February 14, 2012, directly restricts the ability of local authorities, whom its members assist on a daily basis, to provide coherent comprehensive plans for their communities. Accordingly, the PA APA files this *amicus curiae* in the instant case under Pa.R.A.P. 531(a). While recognizing that the instant case involves several issues of great importance, the PA APA limits this brief to addressing the issue it finds to be of most importance to the continuation of good zoning in Pennsylvania – the issue of the constitutionality *vel non* of 58 Pa.C.S. § 3304.

II. Summary of Argument

It is incontestable that property rights are protected by the constitutions of Pennsylvania and the United States. It is also incontestable, at this point in time, that such property rights are subject to regulation by a state, and derivatively therethrough by its local authorities, only as a valid exercise of the state’s police power. To be valid, any exercise of the state’s police power in this regard must be non-arbitrary in its effects. Thus, one of the fundamental constraints on any land use regulation is that the regulation must result in the orderly distribution of all legal uses

across a geographic region in a manner that is calculated to minimize the detrimental impact of the use of any given land parcel on its neighbors.

Section 3304 withdraws a particular set of land uses from the otherwise comprehensive array of all legal uses that local authorities must take into consideration when formulating their comprehensive plans. It then reserves to the Commonwealth the right to arbitrarily superimpose individual elements of that set of land uses at any random location it selects and to do so without any regard to the uses the parcel at that location or any of its neighboring parcels is permitted under the otherwise governing local comprehensive plan. This arbitrariness is the antithesis of the constitutional requirement of orderly distribution of uses in a manner that is calculated to minimize the detrimental impact of the use of one parcel upon its neighboring parcels. Accordingly, as the Commonwealth Court correctly held, § 3304 is unconstitutional.

III. Argument

The PA APA submits that the Commonwealth Court correctly held that 58 Pa.C.S. § 3304¹ is unconstitutional, null, and void, because the statute violates substantive due process by allowing 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. *Robinson Twp. v. Commonwealth*, 2012 WL 3030277, P. 56 (Pa.Cmwlt. July 26, 2012). The Court reasoned that the changes required by 58 Pa.C.S. § 3304 do not serve the police power purpose of the local zoning ordinances, which relate to consistent and compatible uses in the enumerated districts of a comprehensive zoning plan, and therefore, any action by the local municipality required by the provisions of Act 13 would violate substantive due process as

¹ See *Appendix A* for text of 58 Pa. Cons. Stat. § 3304.

not in furtherance of its zoning police power. *Id.* 58 Pa.C.S. § 3304 mandates that all municipalities must enact zoning ordinances in accordance with its provisions. However, requiring a municipality to amend its zoning ordinances to allow for the “reasonable development of oil and gas resources” in any of its zoning districts eviscerates a municipality’s comprehensive plan and promote uses that are incompatible with the public’s interest in the orderly development and use of land in a manner that is compatible with the local demographic and environment. *Id.*

Article I Section 1 of the Pennsylvania Constitution protects the citizen's right to the enjoyment of private property, and governmental interference with this right is circumscribed by the due process provisions of the Fifth and Fourteenth Amendments to the United States Constitution. U.S. Const. amends. V, XIV; Pa. Const. art. 1, § 1; *Surrick v. Zoning Hearing Bd. of Upper Providence Twp.*, 476 Pa. 182, 188, 382 A.2d 105, 107-108 (1977). Zoning is, in general, a proper exercise of police power which can permissibly limit an individual's property rights. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 47 S.Ct. 114 (1926). The Pennsylvania judiciary has long-recognized the right of landowners in the Commonwealth to use their property as they wish, subject to valid zoning requirements that protect the interests of the public and of neighboring property owners. *In re Realen Valley Forge Greenes Associates*, 576 Pa. 115, 131, 838 A.2d 718, 728 (2003). Specifically, this Court has acknowledged that “[i]t is well settled that [the] Constitutionally ordained right of property is and must be subject and subordinated to the Supreme Power of Government-- generally known as the Police Power-- to regulate or prohibit an owner's use of his property.” *Cleaver v. Bd. of Adjustment of Tredyffrin Twp.*, 414 Pa. 367, 369, 200 A.2d 408, 410 (1964). Where there is a particular public health, safety, morality, or welfare interest in a community, the municipality may utilize zoning

measures that are substantially related to the protection and preservation of such an interest. *C & M Developers, Inc. v. Bedminster Twp. Zoning Hearing Bd.*, 573 Pa. 2, 15, 820 A.2d 143, 150 (2002) (citing *National Land and Investment Co. v. Easttown Twp. Bd. of Adjustment*, 419 Pa. 504, 522, 215 A.2d 597, 607 (1966)).

Municipalities of the Commonwealth derive their zoning power from the Pennsylvania Municipalities Planning Code (“the MPC”), Act of July 31, 1968 P.L. 805, No. 247, 53 P.S. § 10101 et seq. In exercising this zoning power, the municipalities have formed a state-wide tapestry of individualized comprehensive plans that accommodate reasonable overall community growth and opportunities for community development. *See* 53 P.S. § 10603(a) (zoning ordinance should reflect the needs of the citizens and the suitability and specific nature of particular parts of the municipality). Pursuant to the MPC, the governing body of a municipality “may enact, amend and repeal zoning ordinances to implement comprehensive plans and to accomplish any of the purposes of [the MPC].” 53 P.S. § 10601. Purposes of the MPC include the following:

“to protect and promote safety, health and morals; to accomplish coordinated development; to provide for the general welfare by guiding and protecting amenity, convenience, future governmental, economic, practical, and social and cultural facilities, development and growth . . . to guide uses of land and structures, type and location of streets, public ground and other facilities . . . **and to permit municipalities to minimize such problems as may presently exist or which may be foreseen.**”

53 P.S. § 10105 (emphasis added); *Hoffman Min. Co., Inc. v. Zoning Hearing Bd. of Adams Twp., Cambria County*, 32 A.3d 587, 593 (Pa. 2011).

A zoning ordinance will be presumed constitutionally valid unless a challenging party shows that it is unreasonable, arbitrary, or not substantially related to the police power interest that the ordinance purports to serve. *C & M Developers*, 820 A.2d at 150-51. Thus, regardless

of whether a zoning ordinance is enacted at the local level or at the state level, it is limited by constitutional constraints.

One of the fundamental constitutional constraints on zoning is that a zoning law must provide for an orderly distribution of uses so as to minimize the detrimental impact of the use of any particular parcel upon the property rights of its neighbors. Importantly, as regulations grounded in the delegated police power, zoning must accomplish “an average reciprocity of advantage,” so-termed by Mr. Justice Holmes in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415, 43 S.Ct. 158 (1922), by which “all property owners in a designated area are placed under the same restrictions, not only for the benefit of the municipality as a whole but also for the common benefit of one another.” *United Artists Theater Circuit, Inc. v. City of Philadelphia, Philadelphia Historical Commission*, 528 Pa. 12, 25-26, 595 A.2d 6, 13 (1991). Furthermore, 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. *Hopewell Twp. Bd. of Supervisors v. Golla*, 499 Pa. 246, 254-55, 452 A.2d 1337, 1341-42 (1982).

This Court has noted the distinction between the tailored purposes behind land-use planning in local zoning and the general purposes of state enactments. In *Huntley & Huntley, Inc. v. Borough Council of Borough of Oakmont*, 600 Pa. 207, 964 A.2d 855 (Pa. 2009), Mr. Justice Saylor, writing for the majority, explained:

By way of comparison, the 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.

Huntley, 600 Pa. at 224, 964 A.2d at 865; *See* 53 P.S. § 10606. The Court further noted that the “most salient objectives underlying the [Borough’s zoning] restrictions on oil and gas drilling in residential districts appear to be those pertaining to preserving the character of residential neighborhoods.” *Id.*

For decades, PA APA members have worked with local municipal authorities to achieve the constitutionally mandated orderly distribution of uses in developing their comprehensive plans. Now, the Commonwealth has imposed § 3304 upon the local authorities. In effect, § 3304 withdraws a particular set of uses from the otherwise comprehensive array of all permissible uses that local authorities take into consideration when constructing their comprehensive plans and reserves to the Commonwealth the right to superimpose that set of uses arbitrarily at any location within the comprehensive plan without any regard for the uses to which that property or any adjacent property are permitted to be used. This arbitrariness is the antithesis of the constitutional requirement of orderly distributing uses to minimize the detrimental impact of adjacent uses. The Commonwealth has unjustifiably covered the state-wide tapestry of municipal comprehensive plans with its own veneer, in total disregard of the considerable time, money, and skills that local governments expended in creating their comprehensive plans. Because of the arbitrary effect on permitted land uses, § 3304 is constitutionally deficient.

It is undeniable that § 3304 undermines the “reciprocity of advantage” that forms the basis of zoning. Each zoned community in the Commonwealth possesses a unique geographical character and is precisely configured to support the economic development, environmental attributes and quality of life its inhabitant’s value; it is a fine balance unique to that community. Municipal zoning is best suited to dictate the “where” aspects of unconventional shale gas

extraction and to un-preemptively control such things as the zoning districts in which it is permitted or is not permitted. Local and county government should also be allowed to retain the jurisdictional authority to decide zoning districts in which natural gas development is appropriate, or districts, such as residential areas, where it is not appropriate. Removing local zoning control of any particular set of uses is a direct attack on the foundation of a thriving community.

Additionally, allowing unconventional shale gas extraction in a residentially zoned neighborhood would be a particularly egregious usurpation of the zoning power of the local authority. Zoning is premised on stability and predictability; it aims to prevent anyone from interrupting the zoning framework. As evidenced in the numerous opinions of this Court, rational land use regulation is a comprehensive process that begins with the municipal expression of policy in its comprehensive plan implemented on the ground through zoning and other regulatory tools and programs, all of which are vetted by the public before adoption. *However, § 3304 allows anyone and everyone to disrupt the fabric of the local zoning tapestry.* In following the requirements set out in the subsections of § 3304, there is great potential for incompatible uses. Such incompatibly paired uses will result in safety problems, permanent landscape alteration, and random real estate depreciation.

The practical effect of § 3304 is to undermine one of zoning's greatest compensatory benefits that local owners receive in return for their restrictions imposed upon their property rights, i.e. predictability of investment. For instance, the law completely eliminates the ability of any investor to forecast the value of his investment, given the fact that at any time the Commonwealth may designate an adjacent property for a use that is otherwise not provided for under the otherwise applicable comprehensive plan. Likewise, a single family homeowner can

no longer expect that his surrounding community will be composed of similar land uses. While the industrial use owner often grates under the burden of regulatory requirements that another, less impacting use owner is free of, he/she is often dependent on the infrastructure that is available at the location of his parcel. However, the element of arbitrariness imposed by § 3304 makes it difficult for the infrastructure planner focusing on a planned development to anticipate from where and how deep the demands will be for funded-out infrastructure development.

In addition to the lack of predictability, it is our professional opinions that the setback requirements in § 3304 are inadequate for existing buildings. We also point out that these setback requirements improperly encroach on neighboring parcels with regard to the construction of future buildings, as there is nothing to stop the operation from drilling right up to the property line of an adjacent parcel where there is currently no existing building.

Furthermore, it is our professional opinions that § 3304 does not take into consideration the fact that topographical conditions make it necessary for municipalities to have different needs in regards to oil and gas drilling. We have found that to be effective, such regulations must be based on qualifications and characteristics like unique topography, elevation of the drilling site, surrounding foliage, and location of residences and businesses, among other considerations. Consequently, in our professional opinions, the neighboring residential and commercial owners will be detrimentally affected by § 3304's inadequate one-size-fits-all setbacks and that those setbacks will disrupt predictable property quality and conditions otherwise provided for by compatible zoning districts.

The Commonwealth and the oil and gas industry may argue that without a law like § 3304 valuable natural resources would go untapped or be underutilized. But, there is nothing special about the gas and oil resources in this regard, as the same can be said for almost any

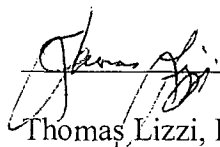
natural resource. It was settled long ago that the benefits of orderly community development come at the cost of the occasional loss of the best economic use of a particular land parcel. *See, Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 125 (1978) and cases cited therein (noting that zoning laws have been viewed as permissible governmental actions “even when prohibiting the most beneficial use of the property.”).

IV. Conclusion

The PA APA recognizes the economic benefits inherent in unconventional shale gas extraction, but is deeply concerned about the future of zoning if the power of local authorities to comprehensively plan for *all* legal uses is allowed to be preempted under Act 13. The Commonwealth is not adequately utilizing the precious resource it has in its regional, county and local planners. The expertise of the PA APA would be of great benefit to the Commonwealth. Thus, the purposes of local zoning codes benefit the entire community in the orderly and rational development and use of land.

In view of the foregoing, the PA APA respectfully requests this Court to affirm the Commonwealth Court’s holding that 58 Pa.C.S. § 3304 is unconstitutional.

Respectfully submitted,



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APPENDIX A

58 Pa. Cons. Stat. § 3304: Uniformity of local ordinances recites:

- (a) General rule.--In addition to the restrictions contained in sections 3302 (relating to oil and gas operations regulated pursuant to Chapter 32) and 3303 (relating to oil and gas operations regulated by environmental acts), all local ordinances regulating oil and gas operations shall allow for the reasonable development of oil and gas resources.
- (b) Reasonable development of oil and gas resources.--In order to allow for the reasonable development of oil and gas resources, a local ordinance:
 - (1) Shall allow well and pipeline location assessment operations, including seismic operations and related activities conducted in accordance with all applicable Federal and State laws and regulations relating to the storage and use of explosives throughout every local government.
 - (2) May not impose conditions, requirements or limitations on the construction of oil and gas operations that are more stringent than conditions, requirements or limitations imposed on construction activities for other industrial uses within the geographic boundaries of the local government.
 - (3) May not impose conditions, requirements or limitations on the heights of structures, screening and fencing, lighting or noise relating to permanent oil and gas operations that are more stringent than the conditions, requirements or limitations imposed on other industrial uses or other land development within the particular zoning district where the oil and gas operations are situated within the local government.
 - (4) Shall have a review period for permitted uses that does not exceed 30 days for complete submissions or that does not exceed 120 days for conditional uses.
 - (5) Shall authorize oil and gas operations, other than activities at impoundment areas, compressor stations and processing plants, as a permitted use in all zoning districts.
 - (5.1) Notwithstanding section 3215 (relating to well location restrictions), may prohibit, or permit only as a conditional use, wells or well sites otherwise permitted under paragraph (5) within a residential district if the well site cannot be placed so that the wellhead is at least 500 feet from any existing building. In a residential district, all of the following apply:
 - (i) A well site may not be located so that the outer edge of the well pad is closer than 300 feet from an existing building.
 - (ii) Except as set forth in paragraph (5) and this paragraph, oil and gas operations, other than the placement, use and repair of oil and gas pipelines, water pipelines, access roads or security facilities, may not take place within 300 feet of an existing building.
 - (6) Shall authorize impoundment areas used for oil and gas operations as a permitted use in all zoning districts, provided that the edge of any impoundment area shall not be located closer than 300 feet from an existing building.
 - (7) Shall authorize natural gas compressor stations as a permitted use in agricultural and industrial zoning districts and as a conditional use in all other zoning districts, if the natural gas compressor building meets the following standards:

- (i) is located 750 feet or more from the nearest existing building or 200 feet from the nearest lot line, whichever is greater, unless waived by the owner of the building or adjoining lot; and
 - (ii) the noise level does not exceed a noise standard of 60dbA at the nearest property line or the applicable standard imposed by Federal law, whichever is less.
- (8) Shall authorize a natural gas processing plant as a permitted use in an industrial zoning district and as conditional uses in agricultural zoning districts if all of the following apply:
 - (i) The natural gas processing plant building is located at the greater of at least 750 feet from the nearest existing building or at least 200 feet from the nearest lot line unless waived by the owner of the building or adjoining lot.
 - (ii) The noise level of the natural gas processing plant building does not exceed a noise standard of 60dbA at the nearest property line or the applicable standard imposed by Federal law, whichever is less.
- (9) Shall impose restrictions on vehicular access routes for overweight vehicles only as authorized under 75 Pa.C.S. (relating to vehicles) or the MPC.
- (10) May not impose limits or conditions on subterranean operations or hours of operation of compressor stations and processing plants or hours of operation for the drilling of oil and gas wells or the assembly and disassembly of drilling rigs.
- (11) May not increase setback distances set forth in Chapter 32 (relating to development) or this chapter. A local ordinance may impose setback distances that are not regulated by or set forth in Chapter 32 or this chapter if the setbacks are no more stringent than those for other industrial uses within the geographic boundaries of the local government.

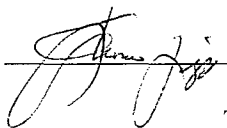
PROOF OF SERVICE

I do hereby certify that I am on this day serving two (2) copies of the foregoing Brief Of Amicus Curiae The Pennsylvania Chapter Of The American Planning Association, In Support Of Appellees in the manner indicated below, which is in accordance with the requirements of Pa. R.A.P. 121:

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