

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

Nos. 63 MAP 2012 and 64 MAP 2012

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

Appellees,

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,

Appellants.

**BRIEF OF AMICUS CURIAE PENNSYLVANIA STATE ASSOCIATION
OF BOROUGHES IN SUPPORT OF APPELLEE MUNICIPALITIES**

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

Date: September 18, 2012

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I. STATEMENT OF INTEREST

Chartered in 1911, the Pennsylvania State Association of Boroughs (“PSAB”) has a long history of representing the interests of boroughs throughout the Commonwealth and helping to shape the principles and laws at the very foundation of local municipal government. PSAB today serves more than 900 rural and urban boroughs, and nearly 16,000 borough officials, advocating their interests at state and federal levels and presenting a unified voice on matters of great public concern. As a nonprofit incorporated association committed to improving local governments, PSAB provides research, education, and programs to assist officials in fulfilling their elected duties with purpose and responsibility, as well as seeking to advance civil development and economic growth.

In Pennsylvania, drilling for natural gas has become essential to sustained economic development – this valued natural resource is now an integral part of our modern economy. It is estimated that at least seventy-five percent of all boroughs within the Commonwealth may be impacted by oil and gas operations as currently regulated. With the passage of Act 13, however, the Legislature sought to centralize such control in Commonwealth agencies – activities such as drilling, constructing access roads, and operating compressor stations and pipelines. For this initiative – consolidating the regulation of extraction, processing, and transportation of natural gas and providing for a local impact fee – PSAB consistently has offered the Legislature its full support for the process of revising Pennsylvania’s Oil and Gas Act.

As passed, however, Act 13 contains certain unconstitutional provisions that strip fundamental powers from borough government. Specifically, Section 3304 usurps municipal zoning authority by providing a statewide exemption for the drilling industry whereby oil and gas operations must be allowed in all zoning districts. PSAB recognizes the importance of

centralized control over *how* oil and gas operations are regulated, but it stands firm behind the proposition that local governments are in the best position to determine *where* such operations may be allowed. On this matter, it is of vital importance to boroughs and other municipalities to retain the ultimate ability and right of planning for effective land use so as to properly manage the growth, orderly development, and health, safety and welfare of local communities.

It is for these reasons, and because boroughs are and have been a viable and vibrant form of self-government woven deeply into the history of Pennsylvania, that PSAB has a significant interest in this matter. Its adjudication shall have a substantial and direct statewide impact upon the legislative functions, duties, and responsibilities of borough officials as to providing for the health, safety and welfare of millions of residents throughout the Commonwealth.

II. STATEMENT OF CONCURRENCE IN PRELIMINARY MATTERS

PSAB's participation in this matter as *amicus curiae* is presented in support of the position of Appellee Borough of Yardley, Bucks County, Pennsylvania, as well as the shared position of additional Appellees, 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, Delaware Riverkeeper Network, Maya Van Rossum, the Delaware Riverkeeper, and Mehernosh Khan, M.D. (hereinafter, the "Municipalities"), and *amicus* adopts by reference as if set forth herein the counter-statement of jurisdiction, orders in question, counter-statement of the scope and standard of review, counter-statement of the questions presented, counter-statement of the case, and the arguments and authorities cited as set forth in the Municipalities' Reply Brief.

III. COUNTER-STATEMENT OF QUESTION INVOLVED

Whether the Commonwealth Court erred in its decision overruling the Preliminary Objections of Appellants as to Counts I, II, and III of the Municipalities' Petition for Review, holding that Section 3304 of Act 13 constitutes an unconstitutional exercise of police power and a violation of substantive due process, because it usurps local municipal power of land use planning and requires local governments to violate statutory duties by enacting and amending local ordinances to favor private interests in oil and gas over the public interest of protecting the health, safety, morals and public welfare of the citizens of Pennsylvania.

Suggested Answer: In the negative.

IV. SUMMARY OF ARGUMENT

PSAB's participation in this matter as *amicus curiae* is offered in full support of the position of the Municipalities. It is the conviction of PSAB that the decision of the Commonwealth Court was correct in so far as the Court overruled the Preliminary Objections of the Commonwealth and Attorney General. A reversal of that decision – specifically, the ruling on Counts I, II and III that Section 3304 of Act 13 is unconstitutional – stands to harm a broad range of local communities and families across the Commonwealth who may have little or no financial interest in oil and gas development. PSAB, therefore, limits its argument to the constitutionality of the zoning restrictions as set forth in Section 3304 of Act 13.

The provisions in Section 3304 of Act 13, requiring local ordinances to allow for oil and gas operations in all zoning districts, constitute an unconstitutional exercise of police power, because the Municipalities would be required to enact and amend their local ordinances overwhelmingly to benefit private interests over those of the general public, in violation of the duty to protect the health, safety, morals and public welfare of the citizens of Pennsylvania. Under Section 3304, local ordinances would be only reactive to oil and gas operations and local land use planning would be, first and foremost, an accommodation to private interests.

Section 3304 of Act 13 furthermore violates the principles of substantive due process by unconstitutionally requiring the Municipalities to enact and amend their local zoning ordinances in contradiction to their concurrent, but incompatible, statutory duties under the Pennsylvania Municipalities Planning Code. By usurping the power of local government to regulate local land use, the Legislature has so subverted the zoning authority of the Municipalities that they are precluded from considering any meaningful balance between public and private interests, making any subsequent or amended land use ordinance irrational and, therefore, unconstitutional.

V. ARGUMENT

SECTION 3304 OF ACT 13 VIOLATES ARTICLE I, SECTION I OF THE PENNSYLVANIA CONSTITUTION AND THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

- A. Section 3304 of Act 13 constitutes an unconstitutional exercise of police power, because the Municipalities would be required to enact and amend their local ordinances overwhelmingly to benefit private interests over those of the general public, in violation of the duty to protect the health, safety, morals and public welfare of the citizens of Pennsylvania.**

Fundamental to the principle of municipal zoning is the division of a jurisdiction into districts, promoting efficient land uses according to natural features and local needs. Land use planning seeks to promote the orderly development of a community and protect public health, safety and general welfare. At its core, the philosophy of zoning involves *planning*. Zoning is forward-looking and used by local governments to designate permitted uses of land based on mapped zones that separate one land use from another. While such planning segregates land uses considered incompatible, the primary purpose of zoning is to set aside areas so that private interests may flourish at the least expense to others. Industry is permitted and promoted in a zone appropriate for its needs, while individuals and families are protected for their safe enjoyment of residential life.

The importance of local governments may be seen in their positive effect on our daily lives and those of fellow Pennsylvanians. They are responsible for schools, police protection, fire protection, streets, water, garbage disposal, and parks. Local governments maintain properties and property values, provide community services, and serve as a crucial first line of defense in meeting homeland security challenges. Local officials are intimately familiar with communities and the needs of their residents. This contrasts with state and federal officials, who may be constrained by physical distance or bureaucratic remove. Essential to local governments

is the proposition that each community may meet its needs in its own way. A strength to Commonwealth resourcefulness, local governments develop meaningful and varied solutions to common problems; they do not require standard answers. While there are numerous state, federal, and constitutional limits on the authority of governments, there should always be room for local responses to local problems.

Local governments derive their regulatory authority as granted by the Legislature, but they are provided broad authority under the police power to adopt measures designed to promote the public interest. Municipal power, although being granted by the Legislature, includes such powers necessarily inferred therefrom. *See Com. v. Creighton*, 639 A.2d 1296 (Pa. Commw. 1994); *Clearview Bowling Center, Inc. v. Borough of Hanover*, 244 A.2d 20 (Pa. 1968). Moreover, local governments are permitted to rely on their inherent authority to regulate private parties within their jurisdiction and enact regulations and ordinances which are designed to promote health safety and welfare of all citizens. *Citizens for Personal Water Rights v. Borough of Hughesville*, 815A.2d 15 (Pa. Commw. 2002). Local governments cannot be eliminated constitutionally, nor can the Legislature require them to violate our state or federal Constitutions, which would be required by Section 3304 of Act 13.

Under the Pennsylvania Municipalities Planning Code (“MPC”) a municipality is required to enact zoning ordinances reflecting the policy goals and objectives as stated in its Statement of Community Development, in consideration of its character, the needs of its citizens, and “suitabilities and special nature of particular parts of the municipality.” 53 P.S. § 10603(a). As zoning ordinances are a derogation of individual property rights and construed strictly, the comprehensive framework of the MPC provides the mechanisms for special exceptions and

variances, as well as conditional uses, to be considered, allowed, or denied by a zoning board or governing body in order to obtain relief from zoning requirements. 53 P.S. § 10603(c).

A primary function of zoning ordinances, historically, has been to regulate land uses, the physical structures that house them, access ways, landscape buffers and other land development tools, which may be needed to reduce adverse impacts of a use. It is well-recognized that uses requiring stricter regulations over specific operations, such as landfills, power plants, and industrial uses, whether as a potential to pollute or have a destructive environmental impact, may be regulated more directly and specifically by state and federal governments. See Robert S. Ryan, *Pennsylvania Zoning Law and Practice*, § 3.3.4.

In a substantive due process inquiry where the rights of landowners are balanced against public interests sought to be protected through an exercise of police power, a court must accord substantial deference to the preservation of rights of property owners, within constraints of the common law maxim: *sic utere tuo ut alienum non laeda* – use your own property as not to injure your neighbors. *Hopewell Tp. Bd. Of Sup'rs v. Golla*, 452 A.2d 1337, 1341 (Pa. 1982). As regulations grounded in the police power, zoning must accomplish an average reciprocity of advantage, 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. *In re Realen Valley Forge Greenes Associates*, 838 A.2d 718, 729 (Pa. 2003). Under Section 3304, however, protection of the public interest is subverted, because local governments must first advance the private interests benefiting from oil and gas development. Local governments no longer would be able to consider how a zoning ordinance may protect the health, safety, morals, or general welfare of their communities, since the decision has been made that oil and gas operations would be allowed in all zoning districts.

When notified of the Commonwealth's appeal of this decision, PSAB immediately recognized the potential to cause ambiguity and chaos in the efforts of local governments to preserve the integrity of their communities, as well as the potential to effect a radical depression on property values and change the nature of residential life in Pennsylvania. The apparent consequences of a reversal of the Commonwealth Court's decision likely will impact every borough official and municipal officer in the Commonwealth. Specifically, PSAB is concerned that if this Honorable Court reverses the Commonwealth Court's decision, the precedential effect will have a significant disruptive power on community life in the area of natural gas drilling, which will impact many innocent families by casting a pall of doubt over the continued availability of adequate community services and the future ability simply to enjoy their family homes and preserve values for eventual sale.

If the Commonwealth Court's decision is not affirmed, there is an imminent danger that the nature of residential and agricultural communities will be forever lost. We have a tremendous natural resource in Pennsylvania – one that is tied intimately to our economic future – but that opportunity brings with it great responsibility. The play for shale gas is in its infancy in Pennsylvania; however, once the genie is out of the bottle, it cannot be put back in. Unlike other oil and gas producing states, where wells are drilled in wide vistas of open land far removed from residential communities, Pennsylvania's shale formations exist in the backyards of thousands of local communities – or, perhaps, in the front yards, too. If Section 3304 were reactivated in its original form, local governments would be prevented from ensuring the safety of local residents and prevented from planning for the future of those communities. Ordinances instead would become reactive – reactive to new and unexpected oil and gas operations and reactive to the private interests they serve. Local planning for the public interest would become,

first and foremost, an accommodation to private interests. All that once seemed certain in communities would yield to uncertainty.

If the decision of the Commonwealth Court is reversed, Section 3304 of Act 13 would have a profound disruptive effect on local communities and Pennsylvania residents by mandating incompatible uses in zoning districts in derogation of comprehensive municipal zoning plans. It would impair the legal authority of municipalities to regulate local land use and make it impossible for municipalities to create new, or follow existing, comprehensive plans, zoning ordinances, and zoned districts. For these reasons, PSAB stands firmly behind the Municipalities and endorses their position that the decision of the Commonwealth Court was fundamentally correct, as to overruling the Preliminary Objection of the Commonwealth and Attorney General, and that its reversal would have the capacity to effect grave consequences throughout the Commonwealth. *Amicus* respectfully requests this Honorable Court to affirm the Commonwealth Court's published opinion, thus, reiterating the long-standing authority of local governments to plan their own destinies. Doing so immediately is critical to PSAB, its members, and local communities throughout this Commonwealth.

B. Section 3304 of Act 13 violates the principles of substantive due process by unconstitutionally restricting the power of the Municipalities to regulate local land use and precluding consideration of the balance between public and private interests, making any subsequent local regulation irrational.

To determine whether a zoning ordinance is unconstitutional under Article 1, § 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, courts must consider the rights of all property owners subject to the zoning and the public interests sought to

be protected. This Honorable Court has established criteria to determine whether zoning is constitutional:

lawful zoning 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.

In re Realen Valley Forge Greenes Associates, 838 A.2d 718, 729 (Pa. 2003). In the present matter, the issue is broader – an *a priori* inquiry – and concerns the possibility of whether any municipal zoning legislation may be constitutionally sound under Section 3304. Put another way, the Legislature has so restricted the authority of the Municipalities that they are precluded from considering any meaningful balance between public and private interests, making any subsequent or amended land use ordinance irrational and, necessarily, unconstitutional as a matter of law. Section 3304 of Act 13 neither preempts the authority of the Municipalities to regulate land use, thereby replacing it with an alternative comprehensive regulatory scheme, nor provides the Municipalities with a means of enacting meaningful – and constitutional – ordinances to satisfy the provisions of the Oil and Gas Act and statutory duties under the MPC.

Section 3304 requires municipalities to enact and amend ordinances allowing for a *new* incompatible land use, without also giving municipalities the power to mitigate conflicts with current compatible and incompatible land uses within a single zone. An effect of Section 3304 is to subvert the authority of local government and transform local land use ordinances into discriminatory regulations burdening those without a beneficial interest in oil and gas operations. Pennsylvania has a long history of centralizing regulation over oil and gas operations through amendments to the Oil and Gas Act, but an exception to this rule has traditionally been carved out for local municipal control of land use planning. In 1984, such preemptive intent was

expressed by the statement that, “all local ordinances and enactments purporting to regulate oil and gas well operations regulated by this Act are hereby superseded.” 58 P.S. § 601.602 (repealed). However, an exception to this preemption was also unequivocally noted for ordinances which were adopted pursuant to the 1968 Pennsylvania Municipalities Planning Code. Therefore, as of 1984 local municipal authority to regulate both land uses through zoning and oil and gas well operations which were enacted under the MPC were expressly preserved – both the *how* and the *where*.

In 1992, the legislative intent of Section 602 was clarified with the addition of the second sentence and the phrase “and supersedes” in the third sentence. Local land use regulations enacted pursuant to the MPC now could not therefore “impose conditions, requirements or limitations on the same” features of the oil and gas well operations regulated by this Act or accomplish the same purpose of the Oil and Gas Act. The legislature recognized therefore that the MPC and the Oil & Gas Act both must work in tandem and traditional land use planning authority by local municipalities was still preserved. The plain language of Section 602, both before and after its amendment, demonstrates that it is only the legislative actions which regulate oil and gas “operations” which are preempted and superseded. Were this not the intent of the legislature, the references to “operations” and the exception for ordinances enacted pursuant to the MPC readily could have been omitted.

A presumption of preemption, however, does not occur merely because the Commonwealth has legislated in a particular area. An intent to preempt must be stated on the face of such legislation that local enactments are precluded or otherwise an intent is expressed that local governing bodies may not supplement the state legislation. *See Hydropress Env'tl.*

Services, Inc. v. Twp. of Upper Mount Bethel, County of Northampton, 836 A.2d 912 (Pa. 2003);
Western Pennsylvania Restaurant Ass'n. v. City of Pittsburgh, 77 A.2d 616 (Pa. 1951).

With Section 3304 of Act 13, however, it appeared that the Legislature also sought to gain control of *where* oil and gas operations may be conducted. However, unlike Chapter 32 of Act 13, relating to development, which expressly preempts and supersedes all local ordinances adopted pursuant to the MPC relating to development of oil and gas operations, Section 3304 contains no such definitive language. Likewise, in regard to environmental regulation, Section 3303 states that,

environmental acts are of Statewide concern and, to the extent that 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.

58 Pa.C.S.A. § 3303 (relating to environmental acts). If the Legislature can clearly express its intent to preempt other areas of regulation in the Oil and Gas Act – such as the section above, which is immediately prior to Section 3304 – then why is such language missing from the zoning restrictions of Section 3304? Moreover, where the Legislature has sought to preempt local regulation of oil and gas regulations in Act 13, it has included a regulatory scheme – it has attempted to occupy the field. This is not the case with zoning. Rather, it is the *lack* of regulation that characterizes this provision – the opposite of what is required for preemption.

In his dissent to the *Robinson Twp.* majority opinion, Judge Brobson recognizes that Section 3304 sought to de-regulate land use concerning oil and gas operations. He states that such de-regulation is necessary, because the development of natural resources is different than typical industrial development, and natural resources must be developed where they are found.

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.

Robinson Twp. v. Com., 284 M.D. 2012, 2012 WL 3030277 (Pa. Commw. Ct. 2012). Assuming that extraction is viable, it may be correct that oil and gas deposits generally can be extracted only from where they exist, but Judge Brobson's argument also implies that deposits are scattered, and that if the Commonwealth does not allow for their development *wherever* they are found, public interest is not served.

The image of isolated pockets of oil and gas is outdated when considering the techniques of modern hydrofracturing and the geology of Pennsylvania shale formations such as the Marcellus. While conventional drilling sought to extract natural gas from relatively shallow and random pools, the Marcellus formation has been described as a blanket of shale, about 100 feet thick and a mile deep, lying beneath a vast portion of the Commonwealth, which includes over half its counties. Neither the Commonwealth, nor the best interests of its residents, would suffer from local communities setting aside those areas where neighborhoods have formed and people have chosen to enjoy peaceful residential life. There is plenty of oil and gas to be found outside the walls of the parlor. Whether a local government should allow unfettered access to this natural resource, however, is the just determination of *that* community and not of a Legislature unconstitutionally seeking to usurp its zoning authority. A decision of this consequence must consider the unique economic, commercial, and geographic diversity of the locale and the social fabric of the community.

What is also plain from the text of Act 13, however, is that the Legislature intended its regulation of *operations* to be different from its restrictions on local zoning power, as evidenced

by the language used to preempt regulation of operational activities compared to the language used in Section 3304 to restrict local zoning. There is a recognition of the need for land use planning to continue by local municipalities, but the Legislature limits municipal power to outlaw oil and gas operations from any zoning districts. The inclusion of such limitations, however, does not rise to the level of the preemptory language addressed in *Hydropress* so as to be considered an area to preempt all local regulation. Even where it is determined that the Legislature has totally preempted regulation by local municipalities, local governments have nevertheless retained the right to designate appropriate zoning districts for those regulated uses. *See e.g., Appeal of Sawdey*, 85 A.2d 28 (Pa. 1951).

Comparable preemptive language is found in other related environmental statutes such as the Surface Mining Act, 52 P.S. § 1396.17(a), the Non-Coal Act 52 P.S. § 1316 and the Solid Waste Act, 35 P.S. § 6018.105(h). Consistently, such statutes have preserved the rights of municipalities to regulate basic land uses through the adoption of appropriate ordinances pursuant to the MPC. It has been determined under the Surface Mining Act, for example, that the legislature did not intend to “displace all existing and future local regulation of surface mining.” *Miller & Son Paving, Inc. v. Wrightstown Twp.*, 451 A.2d 1002, 1004 (Pa. 1982). In *Miller & Son Paving, Inc.*, the Court affirmed the authority of a municipality to designate certain zoning districts where specific land uses are excluded altogether. And in *Mahony v. Twp. of Hampton*, 651 A.2d 525 (Pa. 1994), the Court affirmed the right of a municipality to disallow gas production in every zoning district.

This disjunction is articulated further in *Plymouth Twp. v. Montgomery County*, 531 A.2d 49 (Pa. Commw. Ct. 1987), whereby the Commonwealth Court specifically acknowledged that: “We must recognize statutory and judicial distinctions between ordinance provisions governing

where the location of a facility may be (zoning provisions) and, on the other hand, how it may be technically designed and operated (operational regulations).” *Id.* at 50 (emphasis in original). Upon this premise, Courts have consistently rejected municipal regulations pertaining to operational or functional aspects of landfills, surface mines, quarries and sewage facilities, yet preserving the underlying authority of municipalities to identify and designate zoning districts within the scheme of its land use planning where geographically such operations can be conducted. *See, e.g., Tinicum Twp. v. Delaware Valley Concrete, Inc.*, 812 A.2d 758 (Pa. Commw. Ct. 2002) (blasting under the Non-Coal Act); *Plymouth Twp. v. Montgomery County*, 531 A.2d 49 (Pa. Commw. Ct. 1987) (capacity, design and size of landfills); *Warner Company v. Zoning Hearing Board of Tredyffrin Twp.*, 612 A.2d 578 (Pa. Commw. Ct. 1992) (surface activities under Non-Coal Act); *Hill v. Zoning Hearing Board of Maxatowny*, 597 A.2d 1245 (Pa. Commw. Ct. 1991) (waste processing); *Green Twp. v. Kuhl*, 379 A.2d 1383 (Pa. Comm. Ct. 1977) (landfill geological and engineering standards); *Township of Ross v. Crown Wrecking Co., Inc.*, 500 A.2d 1293 (Pa. Commw. Ct. 1985) (landfill hours of operation, fencing, air and noise pollution); and *Municipality of Monroville v. Chambers Development Corporation*, 491 A.2d 307 (Pa. Commw. Ct. 1985) (landfill hours of operation).

Traditional authority of local zoning was again affirmed in *Mahony v. Township of Hampton*. This Court considered and reviewed a zoning ordinance which prohibited the private enterprise operation of gas wells in residential districts as defined by the municipality but where the ordinance otherwise permitted the public operation of such wells. Safety hazards associated with oil and gas well in extracting, containing and in utilizing such resources were not lost on this Court as an example of a possible justification for entirely prohibiting gas production in residential districts. *Id.* at 527. Such concern is justifiably consistent with preserving the

authority of local governing bodies over the determination and designation of appropriate zoning districts, pursuant to the procedures and purposes of the MPC, and the exercise of its police powers to protect and promote overall public health, safety and general welfare of the community.

A review of Act 13 demonstrates that, while the Legislature included the mandate in Section 3304 to allow oil and gas operations in all zoning districts, its overall purpose was to provide the Commonwealth with regulatory oversight as to the *activities* of oil and gas operations – to wit, *how* operations are run. In spite of nominal setback requirements for the placement of wellheads and well pads, the Legislature offered no evidence of any intent to occupy the field of land use planning for oil and gas development. And, apart from its blanket clause providing an *exemption* from zoning regulations, there is nothing to support the conclusion that all land use ordinances, current and future, are void with respect to oil and gas operations and, thus, preclude local zoning authority beyond the nominal setbacks. Accordingly, the authority of a municipality to identify and designate potential industry hazards, and to regulate the location of such activities within designated zones, would be usurped.

With the mere possibility of oil and gas well production in a community, the validity of any current zoning ordinance is called into question where it attempts to reasonably regulate land uses, designate locations for land uses, and put into place reasonable limits in order to protect the health safety and public welfare or otherwise prescribes appropriate means of due process for municipal review. However, it is well-settled that municipalities have the authority to enact and interpret their own zoning ordinances as such regulation is reflective of a community's development objectives and should "give consideration to the character of the municipality, the needs of the citizens and the suitabilities and special nature of particular parts of the

municipality.” 53 P.S. § 10603(a). Although the MPC sets forth a framework for the municipalities to follow in regulating land use and development, the individual municipalities retain the right to regulate, since it is the municipality and its elected officials as stewards of the public trust that have the greater understanding of the geographical and topographical features, resources, needs and character of their community. In *Western Pennsylvania Restaurant Ass’n. vs. City of Pittsburgh*, 77 A.2d 616 (Pa. 1951), this Court opined,

[w]here the legislature has assumed to regulate a given course of conduct by prohibitory enactments, a municipal corporation with subordinate power to act in the matter may make such additional regulations in aid and furtherance of the purpose of the general law as may seem appropriate to the necessities of the particular locality and which are not in themselves unreasonable.

Id. at 620. Therefore, municipalities have retained the fundamental ability to create reasonable regulations related to land use and development, even where the legislature is regulating such similar acts.

Local legislation cannot permit what state statute or regulation forbids, or prohibits what state enactments allow. The fact that the Legislature has enacted a statewide regulatory scheme relating to a certain use does not, in itself, preclude a local municipality from also regulating in that area with a subordinate power to make additional regulations in furtherance of the purpose of the general law, and as may be appropriate to the necessities of a particular locality, and which are not in themselves unreasonable. *Liverpool Twp. v. Stephens*, 900 A.2d 1030, 1035 (Pa. Commw. 2006). As written, however, Section 3304 attempts to have a specific preemptive effect, restricting the authority of local governments, while “allowing” those same local governments to retain the regulatory burden of balancing public and private interests so severely at odds with the design of their comprehensive plans as to render the purposes and effect of all local ordinances irrational. The majority opinion recognized that Section 3304 would force

municipalities to enact irrational ordinances, in violation of the very principles of their communities:

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[.]

Robinson Twp. v. Com., 284 M.D. 2012, 2012 WL 3030277 (Pa. Commw. Ct. 2012). Every comprehensive plan of every community throughout the Commonwealth would be compromised by Section 3304 – and the Legislature’s attempt to de-regulate the “where” of oil and gas operations, under a guise of preemption, remains constitutionally infirm, even if preemption were to apply.

A municipality may not exercise power or authority in violation of the preemption doctrine, which provides that when the Legislature has preempted a field, the state has retained all regulatory and legislative power for itself and therefore prohibits local legislation in that area. However, in order for the municipal regulation to be totally preempted there must be either express language of preemption in the Commonwealth’s statute, as in various sections of Act 13, or the statutes must indicate a legislative intent that it should not be supplemented by municipalities. *Council of Middletown Tp., Delaware County v. Benham*, 523 A.2d 311, 314 (Pa. 1987). The Legislature is not presumed to have preempted a field merely by legislating in it; the state must clearly show its intent to preempt a field in which it has legislated. Section 3304 is not an example of Legislative intent to preempt and control regulation concerning zoning and land use planning for oil and gas operations; it is merely a blanket exemption for a single industry, and vested private interests, which will radically interfere with and frustrate the attempts of local governments to plan for the future of their communities and fulfill their statutory duties to protect the health, safety, morals, or general welfare of the community.

Given the geographical and topographical diversity of Commonwealth municipalities, a blanket exemption to allow oil and gas operations in *all* zoning districts is not rationally related to the public interest of each community, since local governments are precluded because of Section 3304 from balancing the costs and benefits of both public and private interests. Because the rights of *all* property owners in communities affected by oil and gas drilling could not be taken into consideration, Section 3304 of Act 13 is constitutionally infirm.

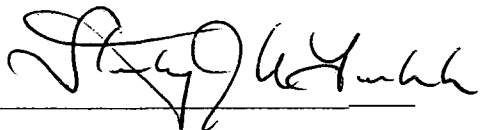
Section 3304 not only forces municipalities to enact irrational ordinances, it turns land use jurisprudence on its head. Courts would have to ask whether the benefits arising from the *lack* of land use regulation, principally benefitting the private interests of relatively few, justify the ongoing burdens borne by neighbors and the community. This Honorable Court has held that, “the function of judicial review, when the validity of a zoning ordinance is challenged, is to engage in a meaningful inquiry into the reasonableness of the restriction on land use in light of the deprivation of landowner’s freedom thereby incurred.” *In re Realen Valley Forge Greenes Associates*, 838 A.2d 718, 729 (Pa. 2003). Under Section 3304, however, the scales of justice have been tipped before we can even inquire into the reasonableness of any subsequent land use ordinance. The question before us, then, is not whether a landowner is unjustly deprived of freedom, but whether that landowner’s newfound license to pursue oil and gas in any community across this Commonwealth precludes local governments from enacting ordinances that are rational and just.

VI. CONCLUSION

It is for these reasons, as stated above, that the Pennsylvania State Association of Boroughs respectfully requests this Honorable Court to enter judgment in favor of the Municipalities and affirm the order of the Commonwealth Court in so far as that Court overruled the Preliminary Objections of the Commonwealth and Attorney General.

Dated: September 18, 2012

Respectfully submitted,

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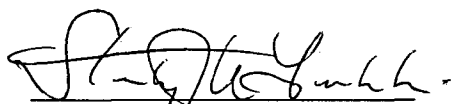
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