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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 Pennsylvania 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

BRIEF OF *AMICUS CURIAE* PENNSYLVANIA STATE ASSOCIATION OF TOWNSHIP SUPERVISORS IN SUPPORT OF APPELLEES

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Received in Supreme Court

SEP 18 2012

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Dated: September 18, 2012

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I. STATEMENT OF INTEREST

The Pennsylvania State Association of Township Supervisors ("PSATS") respectfully submits this brief pursuant to Pennsylvania Rule of Appellate Procedure 531. PSATS is a statutorily authorized unincorporated association headquartered in Cumberland County, Pennsylvania. PSATS provides member services to and represents the interests of officials from over 1,400 townships of the second class in the Commonwealth of Pennsylvania.

Hundreds of those townships, including several parties to this action, are located within the Marcellus Shale region and, taken together, host thousands of unconventional natural gas wells within their borders. Those townships, as well as other municipalities, are also home to a wide variety of other natural gas operations, including pipelines and compressor stations, all of which are necessary to ensure the reasonable development of the Commonwealth's natural gas resources.

In no small part because of the willingness of the vast majority of the Commonwealth's municipal governments to work together with the natural gas industry, development of the Marcellus Shale has proceeded at such a rapid pace that it was recently identified as the most productive natural gas deposit in North America. According to reports recently issued by the Department of Environmental Protection ("DEP"), during the first half of 2012 natural gas production in the Commonwealth increased by a staggering 82% when compared to production in the first half of 2011. In addition, in the past 18 months, DEP issued over 5,000 permits for new unconventional natural gas wells and already this year producers have drilled nearly 1,000 new wells.

There is no question that the dramatic growth of the natural gas industry has been an economic boon to the Commonwealth and the residents of PSATS's members, as evidenced by

Governor Corbett's recent statement that approximately 240,000 Pennsylvanians are employed in the oil and natural gas industry. Yet while these facts, as well as many others, evidence the economic growth associated with the development of the Marcellus Shale, they also necessarily and directly contradict the misconception that a statewide "patchwork" of hostile municipal ordinances has somehow impeded the development of this important and valuable natural resource. Instead, these municipal ordinances have allowed for the proper balance of growth in an industry and quality of life in the community.

Against the backdrop of such robust development, the General Assembly enacted Act 13 of 2012, P.L. 87, 58 Pa.C.S. § 2301 *et seq.* ("Act 13") in February 2012. Act 13 addressed a comprehensive list of issues associated with unconventional natural gas development. For example, in recognition of the significant short and long-term local impacts that such development has had and will continue to have throughout the Commonwealth, Act 13 requires that natural gas producers pay an impact fee that will be distributed to counties and municipalities in the Marcellus Shale region or otherwise used by the Commonwealth for Marcellus Shale-related purposes. Act 13 also expanded environmental protections in the former Oil and Gas Act by, among other things, requiring that unconventional natural gas wells comply with increased setbacks from streams and other water bodies.

However, Act 13 also mandated an unprecedented amount of land use restriction and zoning uniformity on a statewide level. It requires that municipalities permit most natural gas operations, including unconventional natural gas wells, in all zoning districts, thus mandating incompatible uses within those districts. It also restricts municipalities' abilities to impose conditions on natural gas operations to those that are no more stringent than those imposed on other industrial uses, <u>even when there are no other similar uses within the zoning district</u>.

The central issue in this action is the validity of those zoning requirements. As such, PSATS and its members have a direct and substantial interest in its outcome. This Court's resolution will bear directly upon the rights and obligations of PSATS's members and will resolve the extent to which municipalities will continue to determine, if at all, the long-term character of their local communities and play a supporting role in the development of the Commonwealth's natural gas resources.

II. <u>ARGUMENT</u>

A. The Municipalities Have Standing to Challenge the Constitutionality of Act 13.

The Commonwealth Court correctly held that the municipal petitioners, including PSATS members Robinson Township, Peters Township, Cecil Township, Mt. Pleasant Township and Nockamixon Township (collectively, "Municipalities"), have standing to challenge the constitutionality of Act 13.

It is well established that in order for a party to have standing, it must have a substantial, direct and immediate interest in the subject matter of the litigation. *Wm. Penn Parking Garage, Inc. v. City of Pittsburgh*, 464 Pa. 168, 195, 346 A.2d 269, 282 (1975). A party's interest is substantial if there is a discernible adverse effect to some interest other than the abstract interest of all citizens in having others comply with the law. *Id.* An interest is direct if there is a causal connection between the asserted violation and the harm complained of and is immediate if that connection is not remote or speculative. *City of Philadelphia v. Commonwealth*, 575 Pa. 542, 560, 838 A.2d 566, 577 (2003) (internal citations omitted). Importantly, a party's interest need not give rise to a "legal right" in order for it to have standing. *Wm. Penn Parking Garage, Inc.*, 464 Pa. 168, 199-201, 346 A.2d 269, 285.

In *City of Philadelphia*, which the Commonwealth Court relied on below, this Court reviewed the City of Philadelphia's challenge that a state statute violated the Pennsylvania Constitution's single-subject requirement. The Commonwealth respondents asserted numerous arguments as to why the City of Philadelphia purportedly lacked standing. They argued that the City of Philadelphia's injuries were speculative and remote, that it could not be aggrieved because it was "merely a creature of the sovereign created for the purpose of carrying out local government functions," and that it had no enforceable rights. 575 Pa. 542, 559, 838 A.2d 566,

576. It is noteworthy that those arguments are substantially identical to those raised by the Commonwealth of Pennsylvania, Office of the Attorney General and Attorney General Linda L. Kelly (collectively, "Commonwealth Parties") in the court below and in this appeal. *See* Brief of Commonwealth Parties at p. 24 (alleging that the "harm alleged by the Municipalities is illusory and non-existent," the Municipalities have suffered no harm given "their status as a subordinate government unit to the Commonwealth," and the "Municipalities lack a legal right to complain").[1]

This Court rejected those arguments. It noted that the City of Philadelphia contended that the statute in question would affect numerous governmental functions. Therefore, this Court held that the City of Philadelphia had standing because its constitutional challenge was premised on the fact that the challenged law would have an effect on "its interests and functions as a governing entity, and not merely upon harm to its citizens individually." 575 Pa. at 563, 838 A.2d at 579; *see also Franklin Tp. v. Commonwealth, Dep't of Envtl. Res.*, 500 Pa. 1, 452 A.2d 718 (1982) (township had standing because the possible location of a toxic waste landfill through a permitting process implicated the township's responsibility to protect the quality of life of its citizens); *Harrisburg Sch. Dist. v. Hickok*, 762 A.2d 398, 404 (Pa.Cmwlth. 2000) (school district had standing to challenge constitutionality of statute that restricted its ability to manage its own affairs, despite Commonwealth's argument that school districts have no power to challenge the constitutionality of the General Assembly's actions).

[1] Although the Commonwealth Parties argue that the Municipalities lack a "legal right" to assert their claims, as noted above, in *Wm. Penn Parking Garage, Inc.*, this Court confirmed that parties do not need exercise a "legal right" to have standing. 464 Pa. 168 at 199-201, 346 A.2d at 285 (holding that use of "legal right" standard was "outmoded").

Here, too, this Court should reject the Commonwealth Parties' argument that the Municipalities lack standing. The Municipalities premised their constitutional challenge to Act 13 on the fact that compliance with it would negatively affect their ability to perform their constitutionally and statutorily mandated governmental functions. Thus, they are not attempting to simply stand in the shoes of their residents by asserting claims more appropriately brought by those residents.

The Commonwealth Court recognized the effects that Act 13 would have on the Municipalities' governmental functions:

> [Section 3304] 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 and 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.

Robinson Tp., et al. v. Commonwealth, ___ A.3d ____, No. 284 M.D. 2012, 2012 WL 3030277, at *7 (Pa.Cmwlth. July 26, 2012) ("*Robinson*"). As the Municipalities also noted, Act 13's requirements affect their existing obligations and functions under the Municipalities Planning Code ("MPC"). For example, they contend that complying with Act 13's requirements will necessarily force them to violate comprehensive plans that they established pursuant to the MPC and conduct hearings in a manner inconsistent with the MPC. *See Robinson*, 2012 WL 3030277, at *6 (listing other governmental functions affected by Act 13).

Thus, the claims asserted here are unlike those asserted in *City of Pittsburgh v. Commonwealth*, 535 A.2d 680 (Pa.Cmwlth. 1987), where the Commonwealth Court held that the City of Pittsburgh had no standing. In that case, the city made no allegation that its governmental functions would be adversely affected by the challenged statutes' tax structure.

Instead, the court found that the city was merely acting as a surrogate for its residents, who were the parties actually subject to the tax in question. 535 A.2d 680, 683. It is also dissimilar to *North Fayette Tp. v. Commonwealth*, 436 A.2d 243 (Pa.Cmwlth. 1981), where the Commonwealth Court held that a township lacked standing because it made no showing that there was an adverse effect on its responsibility to carry out local government functions.

In addition, this Court must reject the Commonwealth Parties' suggestion that any harm to the Municipalities as a result of the enactment and future enforcement of Act 13 is "illusory" and "non-existent." *See* Brief of Commonwealth Parties at p. 24. As the Commonwealth Court correctly found, if municipalities do not take action to enact what that court considered to be unconstitutional amendments to their zoning ordinances, they will be prohibited from collecting impact fees and could be subject to further legal actions. 2012 WL 3030277, at *7. Indeed, three of the municipalities that are parties to this action – Robinson, Cecil and South Fayette Townships – have ordinances that are already the subject of formal review by the Public Utility Commission ("Commission") as a result of challenges brought pursuant to Section 3305(b) of Act 13. If the Commission rejects the ordinances as non-compliant, those municipalities will lose their share of impact fee funds, *see* 58 Pa.C.S. § 3308, and the harm to each township will be much more than "illusory" and "non-existent." *See Franklin Tp.*, 500 Pa. 1, 10, 452 A.2d 718, 722 (recognizing that possibility of harm was immediate and that "direct and substantial interest of local government . . . cannot be characterized as remote.").[2]

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[2] This Court should also affirm the Commonwealth Court's conclusion that the Municipalities' claims are ripe for review. The Pennsylvania courts have exercised equitable jurisdiction to permit parties to raise pre-enforcement challenges. For example, in *Arsenal Coal Co. v. Commonwealth, Dep't of Envtl. Res.*, 505 Pa. 198, 210-211, 477 A.2d 1333, 1340 (1984), this Court found that the parties attempting to invoke the court's equitable jurisdiction were faced with two choices in the absence of pre-enforcement judicial review. On one hand, the parties could refuse to comply with the regulations at issue, a strategy this Court found "beset with

Moreover, certain of the *amici* supporting the Commonwealth Parties contend that municipalities have standing to raise constitutional challenges to statutes that indirectly affect their governmental functions, but not to statutes that directly do so. *See* Brief of *Amicus Curiae* American Petroleum Institute at p. 9. But it would make little sense to permit municipalities to exercise standing to challenge the constitutionality of statutes that have an indirect effect on their governmental functions, but not to challenge those that have a more direct effect on those functions. *See Harrisburg Sch. Dist.*, 762 A.2d at 404 (school district had standing because "the affairs of operating the school district have been taken away from it."). In any event, as shown above and more comprehensively by the Municipalities in their brief, they have alleged that Act 13 will have both direct and indirect effects on their governmental functions.

Put simply, the Commonwealth Court correctly held that Act 13 "imposes substantial, direct and immediate obligations on [the Municipalities] that affect their government functions." 2012 WL 3030277, at *7. Accordingly, this Court should affirm the Commonwealth Court's holding that the Municipalities have standing to challenge the constitutionality of Act 13.

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penalties and impediments . . . rendering it inadequate." 505 Pa. 198, 210-211, 477 A.2d 1333, 1340. On the other hand, the parties could submit to and comply with the regulations and later challenge them through piecemeal litigation, which this Court acknowledged as an obviously expensive and inefficient endeavor. *Id.* As a result, this Court held that the Commonwealth Court should have exercised its equitable jurisdiction to hear the pre-enforcement challenge. *Id.* at 211, 477 A.2d at 1340. Given that the Commonwealth Court recognized that the Municipalities would face a similarly undesirable choice, it appropriately exercised its equitable jurisdiction.

B. The Commonwealth Court Properly Found that the Municipalities' Constitutional Challenge Does Not Violate the Political Question Doctrine and is a Justiciable Dispute.

The Commonwealth Court appropriately and unanimously rejected the Commonwealth Parties' argument that the Municipalities' claims are barred because they involve non-justiciable political questions.

The political question doctrine derives from the well-established principle that the executive, legislature and judiciary branches are independent, but co-equal branches of government. *Pennsylvania Sch. Bds. Ass'n, Inc. v. Commonwealth Ass'n of Sch. Adm'rs*, 569 Pa. 436, 451, 805 A.2d 476, 484-485 (2002) (citing *Sweeny v. Tucker*, 473 Pa. 493, 375 A.2d 698 (1977)).

The courts of this Commonwealth have consistently held that the political question doctrine precludes them from ruling on those cases where the General Assembly has been vested exclusive power by the Pennsylvania Constitution. *Marrero v. Commonwealth*, 559 Pa. 14, 739 A.2d 110 (1999) (internal citations omitted). "Courts will not review the actions of another branch of government where political questions are involved because the determination of whether the action taken is within the power granted by the Constitution has been entrusted exclusively and finally to political branches of government for self-monitoring." *Blackwell v. City of Philadelphia*, 546 Pa. 358, 364, 684 A.2d 1068, 1071 (1996) (internal citations omitted).

But, it is equally clear that where a constitutional violation has been alleged, "a court may not abdicate its responsibility to uphold the Constitution by using the Separation of Powers Doctrine or the nonjusticiable political-question doctrine" as a basis for abstaining from a decision. *Millcreek Tp. Sch. Dist. v. County of Erie*, 714 A.2d 1095, 1104 (Pa.Cmwlth. 1998). As this Court recently confirmed in *Mesivtah Eitz Chaim of Bobov, Inc. v. Pike County Bd. of*

Assessment Appeals, 44 A.3d 3 (Pa. 2012), where it rejected an argument that a statutorily created standard for obtaining property tax exemptions trumped the constitutional standard established by this Court, "the ultimate power and authority to interpret the Pennsylvania Constitution rests with the Judiciary and in particular with this Court." 44 A.3d 3, 7 (quoting *Stilp v. Commonwealth*, 588 Pa. 539, 905 A.2d 918, 948 (2006)).

The Commonwealth Parties argue that Article I, Section 27 of the Pennsylvania Constitution vests the General Assembly with the discretion to determine the best way to manage the development of the Commonwealth's oil and gas resources and, as a result, the courts cannot question the constitutionality of those efforts. Brief of Commonwealth Parties at pp. 27-28. That argument glosses over the fact that while the General Assembly may have discretion to enact legislation establishing the Commonwealth's policy relating to the development of oil and gas resources, it still must do so in a manner that satisfies constitutional standards.

The Commonwealth Parties also analogize to this Court's decision in *Marrero* for the proposition that this Court should not render a decision on the constitutionality of Act 13. In *Marrero*, the School District of Philadelphia raised a constitutional challenge regarding the amount of funding provided to it by the General Assembly. In response, the Commonwealth argued that the political question doctrine barred the school district's claims because Article III, Section 14 expressly delegates authority to the Legislature to "provide for the maintenance and support of a thorough and efficient system of public education. . . ."[3]

[3] The Commonwealth Parties contend that Article III, Section 14 and Article I, Section 27 are similar in that they both commit discretionary authority to the General Assembly. Brief of Commonwealth Parties at p. 29. However, there is at least one material difference. In contrast to Article III, Section 14, which expressly delegates exclusive authority to the General Assembly, Article I, Section 27 identifies the Commonwealth as the trustee of natural resources and establishes a "public trust" by stating that the Commonwealth "shall conserve and maintain them for the benefit of all the people." *Payne v. Kassab*, 312 A.2d 86, 94 (Pa.Cmwlth. 1973)

This Court affirmed the Commonwealth Court's decision to apply the political question doctrine because there was a "lack of judicially manageable standards" for resolving claims under Article III, Section 14 of the Pennsylvania Constitution. 559 Pa. 14, 19, 739 A.2d 110, 113. As a result, this Court found that it would be impossible for it to resolve the school district's claims without making a policy determination and that such policy questions are exclusively within the purview of the General Assembly. *Id.* at 19, 739 A.2d at 113-114.

Here, the Municipalities have raised a justiciable challenge not by arguing that Act 13 does not reflect the best or their preferred policies, but that by enacting it the General Assembly failed to satisfy well-established standards necessary to justify the exercise of its police power. Specifically, the Municipalities contend that the General Assembly adopted a comprehensive set of zoning regulations in Chapter 33 of Act 13 and that the Pennsylvania courts have made clear that legislative bodies, when enacting zoning regulations, must exercise their police power in a constitutional manner.

Moreover, adopting the Commonwealth Parties' argument that the Pennsylvania courts cannot hear a constitutional challenge to Act 13 would effectively mean that the General Assembly would have carte blanche to enact other legislation pursuant to its police power authority, regardless of the constitutional ramifications. The Commonwealth Court already rejected that argument, finding that "[u]nder the Commonwealth's reasoning, ***any action*** that the

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(citing *Commonwealth v. National Gettysburg Battlefield Tower, Inc.*, 302 A.2d 886 (1973), aff'd, 311 A.2d 588 (Pa. 1973)). Therefore, there is no express delegation exclusively to the General Assembly. In addition, whereas this Court held in *Marrero* that Article III, Section 14 provides no "judicially manageable standards" whereby it could determine compliance with Article III, Section 14, the Pennsylvania courts have applied standards to determine the Commonwealth's compliance with Article I, Section 27. *See Payne*, 312 A.2d at 94 (establishing a threefold standard for testing compliance with Article I, Section 27).

General Assembly would take under the police power would not be subject to a constitutional challenge." 2012 WL 3030277 at *10 (emphasis added).

More importantly, the Commonwealth Court confirmed that it did not need to make policy determinations in rendering its unanimous decision:

> 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 determine whether a portion of Act 13 is unconstitutional 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.

Id. The Commonwealth Court did not weigh in on matters such as whether the setbacks provided for in Chapter 33 of Act 13 should be increased or decreased, certain natural gas operations should more appropriately be identified as conditional or permitted uses in this zoning district or that zoning district, or prerequisite noise requirements for compressor stations and processing plants should be more or less restrictive. Those decisions are appropriately left to the General Assembly, provided that the legislation it adopts complies with constitutional standards. It is that question – whether the portions of Act 13 that are at issue are constitutional because they are not an appropriate exercise of the police power – that makes this dispute a justiciable one. Accordingly, this Court should affirm that the political question doctrine has no application to this action.

C. The Zoning Provisions in Act 13 were an Improper Use of the Police Power and Violate Substantive Due Process.

As a threshold matter, PSATS does not dispute that municipalities are creatures of the state and their powers are ultimately derived from the General Assembly. *See Huntley & Huntley, Inc. v. Borough of Oakmont*, 600 Pa. 207, 220, 964 A.2d 855, 862 (2009). PSATS also does not dispute that the General Assembly may repeal, limit or preempt municipalities' authority, including that provided for in the MPC, so long as it does not violate the Federal or Pennsylvania Constitutions in the process. *Robinson*, 2012 WL 3030277, at *11.

What PSATS does dispute, however, is the implication raised by that because the General Assembly can take authority away from municipalities, the manner in which it does so is automatically a constitutional use of the police power. On that point, the Commonwealth Court rightly stated, "[i]f a municipality cannot constitutionally include allowing oil and gas operations, it is no more constitutional just because the Commonwealth requires that it be done." 2012 WL 3030277, at *15. In other words, legislative action, whether at the statewide or local level, must still comply with constitutional standards. *Id.* at n.23 (recognizing the dissent's argument that a local ordinance may not frustrate the General Assembly's purposes and objectives, but finding that the "claim here is that the Pennsylvania Constitution stands in the way.").

This Court's recent decision in *Mesivtah Eitz Chaim of Bobov, Inc.* is instructive on that point. There, this Court examined whether an entity seeking a property tax exemption as an "institution of purely public charity" must first satisfy the applicable constitutional standard before meeting the more lenient statutory standard. This Court held that the General Assembly "may certainly determine what exemptions it chooses to grant, but only within the boundaries of the Constitution." 44 A.3d 3, 8. Therefore, if a party cannot satisfy the constitutional standard,

the fact that it might satisfy the statutory test is irrelevant. Here, too, the General Assembly may certainly determine the manner in which oil and natural gas development takes place, but the manner in which it does so must first satisfy constitutional standards.

The provisions being challenged by the Municipalities amount to a statewide zoning ordinance, given that Chapter 33 dictates the zoning districts in which oil and gas operations may or may not take place. 58 Pa.C.S. § 3304. Because Chapter 33 includes zoning provisions, the Commonwealth Court held that a substantive due process inquiry must take place that "takes into consideration the rights of all property owners subject to the zoning and the public interests sought to be protected." 2012 WL 3030277, at *13. In order for legislative enactments addressing zoning to be constitutional they 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." *In re Realen Valley Forge Greenes Assocs.*, 576 Pa. 118, 133, 838 A.2d 718, 728 (2003).

While the uniformity provisions in Chapter 33 of Act 13 unquestionably ensure the continued development of the natural gas industry, the interests that justify the exercise of the police power in the development of oil and gas operations and zoning are not the same. *Huntley*, 600 Pa. 207, 223-24, 964 A.2d 855, 864-65. In *Huntley*, this Court found that the Commonwealth's interest in oil and gas development is based on the efficient production and utilization of natural resources. One of the stated purposes of Chapter 32 is consistent with that interest. Chapter 32's purpose is, in part, to permit the "optimal development of oil and gas resources of this Commonwealth consistent with protection of the health, safety, environment

and property of Pennsylvania's citizens." 58 Pa.C.S. § 3202(1).[4] The Commonwealth Court found that purpose to be sufficient for the Commonwealth to exercise its police powers to promote the exploitation of oil and gas resources. 2012 WL 3030277, at *14.

However, the interests met by zoning are different, as the *Huntley* Court pointed out. Those interests are the use of land in a manner consistent with local concerns and, therefore, the quality of life in a community. 600 Pa. 207, 223-24, 964 A.2d 855, 864-65. Chapter 33's requirements that unconventional natural gas wells and other oil and gas operations be located in all zoning districts throughout the Commonwealth indicate that those provisions were aimed more at ensuring continued natural gas development than ensuring, as stated in Chapter 32, the health, safety, morals or general welfare or taking into account the local concerns referenced in *Huntley*.

As the Municipalities further note, the mandated introduction of industrial uses into otherwise compatible zoning districts will necessarily lead to negative effects that zoning that properly takes into account health, safety, morals or general welfare is intended to prevent. The provisions also conflict with the efforts of municipalities that have developed comprehensive plans with the intent to group compatible uses for the benefit of all residents, yet at the same time leave flexibility for the development of future residential, commercial, industrial and other interests. Further, the provisions necessarily cannot take into account the characteristics that may be unique to specific regions or localities and that justify more localized decisions as to placement of particular types of oil and gas operations. Thus, the Municipalities have shown that the statewide zoning provisions do not justify the exercise of the police power.

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[4] Chapter 33 contains no language similar to that in Section 3201(1). Unlike Chapter 32, which strives for "optimal development," Chapter 33's zoning restrictions are intended to require only the "reasonable development of oil and gas resources." 58 Pa.C.S. § 3304(b). The purposes of Chapter 32 should not be imputed to Chapter 33.

Act 13's requirement that municipalities must allow incompatible uses in zoning districts also presents additional constitutional issues. As previously stated by the Commonwealth Court, zoning necessarily requires that the legislative body divide the municipalities at issue into "compatibly related zones." *Atherton Development Co. v. Township of Ferguson*, 29 A.3d 1197, 1204 (Pa.Cmwlth. 2011). The limitation of uses within a particular zoning district ensures that each district will be developed in the same general manner. *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365 (1926).

The requirement of incompatible uses in otherwise compatible districts creates a form of unconstitutional "spot zoning." *Robinson*, 2012 WL 3030277, at n.23 (citing *Appeal of Mulac*, 418 Pa. 207, 210, 210 A.2d 275, 277 (1965) (spot zoning is the "singling out of one lot or a small area for different treatment from that accorded to similar surrounding land indistinguishable from it in character, for the economic benefit of the owner of that lot or to his economic detriment.")).

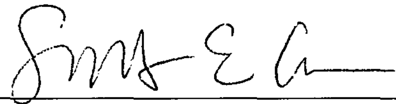
Although the "spot zones" created through Chapter 33 do not square up exactly with spot zoning in the traditional sense, they permit a similar situation to take place on a much broader scale. Whereas traditional "spot zoning" takes place on a property by property basis, Chapter 33 requires it on a zoning district by zoning district or municipality by municipality basis. 2012 WL 3030277, at n.23 ("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."). Requiring incompatible uses would make it extremely difficult, if not impossible, for municipalities to comply with previously adopted comprehensive plans, ensure their residents' investments are protected, and plan for orderly future development.

As such, as the Commonwealth Court correctly held that "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." *Robinson*, 2012 WL 3030277, at *15. This Court should affirm that decision.

III. CONCLUSION

For the reasons set forth above, this Court should affirm the Commonwealth Court's July 26, 2012 opinion and order.

Respectfully submitted,



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Dated: September 18, 2012

CERTIFICATE OF SERVICE

I, Scott E. Coburn, certify that on this 18th day of September, 2012, I caused a true and correct copy of the foregoing document to be sent via U.S. first-class mail to the following counsel of record:

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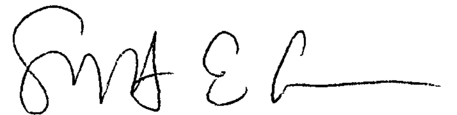

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