

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

No. 63 MAP 2012

No. 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, 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

AMICUS CURIAE BRIEF OF COUNCIL OF THE CITY OF PITTSBURGH

Appeal from the Commonwealth Court order of July 26, 2012, in No. 284 M.D. 2012

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STATEMENT OF INTEREST OF AMICUS CURIAE

Amici, Council of the City of Pittsburgh (“City Council”), is Council for the City of Pittsburgh, a Second Class City, governed by its Home Rule Charter, that is provided by law with the fundamental right to adopt ordinances and make land use determinations in order to protect the health, safety and welfare of its residents. City Council asserts that the protection of residents, neighborhoods, and the city environment constitute the highest and best use of the police powers that a municipality possesses. Additionally, City Council is charged with the ability to regulate zoning so as to protect certain development initiatives and preserve community character. Without this ability, a community’s identity can change to become a depressed and undesirable place to live. Alteration of the characteristics of a community can have lasting negative economic impacts. In this regard, City Council has a substantial and compelling interest in preserving its right to zone.

Act 13 of 2012 P.L. 87 (Feb. 14, 2012)(“Act 13”), affects the interest of City Council by attempting to usurp local regulatory zoning powers relating to oil and gas operations. Specifically, Section 3304 replaces a municipality’s traditional zoning authority with a “general rule” 58 Pa. C.S. § 3304 which effectively eliminates the municipality’s right to determine an appropriate zoning plan that protects the safety and property rights of its residents, while allowing for the safe and orderly development of oil and gas operations. Because the provisions of Act 13 are an unlawful attempt to undermine City Council’s ability to protect residents and define the characteristics of its community, City Council implores this Honorable Court to affirm the Order of July 26, 2012 holding that Section 3304 of Act 13 is null and void.

STATEMENT OF FACTS

Council of the City of Pittsburgh adopts and incorporates by reference the Statement of Facts in the Brief of Appellees Nos. 63 & 64 MAP 2012 (filed September 18, 2012).

SUMMARY OF ARGUMENT

The City of Pittsburgh is a city organized and existing under the Second Class City Code, and governed by its Home Rule Charter. The City of Pittsburgh, through City Council, is granted the fundamental right to adopt ordinances which provide for zoning, subdivision, and land use strategies that protect the health, safety and welfare of its residents, while providing for the safe and orderly development of businesses of all types within the city boundaries. Section 3304 of Act 13 adopted by the legislature on February 14, 2012 effectively eliminates City Council's governance of issues relating to the development of oil and gas operations, with no recognition of City Council's need to insure public safety and preserve community character while encouraging the development of business within the City's boundaries.

The Commonwealth Court's Order of July 26, 2012 protects and upholds the rights of City Council to protect the health, safety, morals and public welfare through local zoning legislation. Its decision in this case is consistent with a long line of cases decided by both the Commonwealth Court of Pennsylvania and this Honorable Court which have recognized the importance of allowing a municipality to design ordinances in a manner that take into account the health and safety of its residents while encouraging development opportunities at the same time. The legislature, in enacting Section 3304 of Act 13 chose to ignore the potential needs of the communities and in fact, relegated those needs to a lower priority than the needs of the oil and gas industry.

Although the City of Pittsburgh is not governed by the Pennsylvania Municipalities Planning Code, 53 P.S. 410101-11202 et seq, it shares the concerns of those communities which are governed by this statute. Section 3304 of Act 13 conflicts with the provisions of the City's Home Rule Charter which provides City Council the right and obligation to adopt zoning and planning ordinances. In sum, Act 13 is an ill-disguised attempt to replace the ability of local municipalities to plan for safe and well-designed communities with the right of oil and gas interests to develop our communities in a manner in which is most beneficial to their business interests.

ARGUMENT

1. The Commonwealth Court of Pennsylvania Properly Determined that Section 3304 of Act 13 Prevents Local Municipalities from Meeting Their Obligation to Protect the Health, Safety, Morals and Public Welfare of Local Communities Through Zoning Regulations.

Act 13 amends the Pennsylvania Oil and Gas Act to establish, in part, a uniform zoning scheme for oil and gas development that applies to every zoning district in every political subdivision in Pennsylvania. Pursuant to Section 3304 of the Act, each municipality must allow “oil and gas operations,” except for natural gas processing plants, in all zoning districts. *See* 58 Pa. C.S. § 3304(b)(1) & (b)(5)-(b)(8). By superseding existing or future local regulations, Act 13 presents an improper restriction on the ability of a municipality to zone a particular industrial use, i.e. oil and gas operations, within its own borders. For this reason, the provisions of Act 13 illegally preclude the City of Pittsburgh and other municipalities from creating rules that protect the health, safety and welfare of their citizens. As such, Section 3304 of Act 13 must be declared null and void.

As stated, Section 3304 of Act 13 creates a uniform zoning plan for local ordinances relating to “oil and gas operations.” Specifically, it sets forth a list of requirements that a local ordinance must follow in order to provide for the required “reasonable development of oil and gas resources.” 58 Pa. C.S. § 3304(a) & (b). It further defines “oil and gas operations” broadly to include, among other activities, well location assessment, drilling, hydraulic fracturing, pipeline operations, processing plants, compressor stations, and ancillary equipment. 58 Pa. C.S. § 3301.

Act 13 also provides that natural gas compressor stations must be a use permitted by right in agricultural and industrial zoning districts and a conditional use in all other districts, so long as the following limited conditions are met: 1) the compressor station is not closer than seven-hundred fifty (750) feet from an existing building and two-hundred (200) feet from any property line; and 2) the noise level does not exceed either 60dBa at the nearest property line or an applicable federal standard. 58 Pa. C.S. § 3304(b)(7). In addition, natural gas processing plants must be a use permitted by right in all industrial zoning districts and a conditional use in agricultural zoning districts so long as they also meet the limited conditions listed above.

Under the Act, municipalities are prohibited from imposing more stringent conditions, requirements, or limitations on the construction of oil and gas operations than those placed on construction activities for other industrial uses within the municipality's boundaries. Similarly, municipalities cannot impose more stringent conditions or limitations on structure height, screening, fencing, lighting, or noise for permanent oil and gas operations than those imposed on other industrial uses or land development in the particular zoning district where the oil and gas operations are situated. *See*, 58 Pa. C.S. § 3304(b)(7)(ii) & (b)(8)(ii). Municipalities also cannot impose limits or conditions on subterranean operations, hours of operations of compressor stations and processing plants, or hours of operation for oil or gas well drilling, or for drilling rig assembly and disassembly, nor can they increase setbacks identified in the Act. 58 Pa. C.S. § 3304(b)(10); 58 Pa. Cons. § 3304(b)(11). Finally, Act 13 mandates no more than a 30-day review period for uses permitted by-right where a complete application is submitted, and no more than a 120-day review period for conditional uses. 58 Pa. C.S. § 3304(b)(4).

As provided above, Act 13 authorizes oil and gas development activities as a use permitted in every zoning district without regard to compatibility with other uses permitted within that zoning district. By doing so, Act 13 directly interferes with a municipality's ability to create new or follow existing zoning ordinances or zoning districts that would protect the health, safety, morals and welfare of citizens and provide for orderly development of the community. Protecting residents by regulating land use development is an objective that is traditionally accomplished through local municipal zoning.

Zoning has always been an essential way for a municipal body to achieve the broad goal of improving and preserving the quality of life for its citizens. Moreover, zoning is the primary method used by City Council, as well as all other municipalities, to maintain a community's character and guard against the infiltration of incompatible uses in a given district. In contrast to these goals, the provisions of Act 13 directly and impermissibly attack the municipal right of self regulation accomplished through zoning.

2. The Legislature Has Historically Recognized the Unique Needs of the City of Pittsburgh with Regard to Zoning by Carving Out the City of Pittsburgh from the Requirements of the Pennsylvania Municipalities Planning Code.

It is well established that statutory and charter authority for zoning ordinances and zoning administration of the City of Pittsburgh is not governed by the Pennsylvania Municipalities Planning Code (MPC), Act of July 31, 1968, P.L. 805, *as amended*, 53 P.S. §§ 10101-11201, and that the MPC has no application to the City.

MPC § 107, 53 P.S. § 10107. *Klein v. Council of the City of Pittsburgh*, 1643 A.2d 1107 (Pa. Commw. Ct. 1994). It is clear that when the Cities of Pittsburgh and Philadelphia were exempted from the MPC, that the legislature recognized that the unique characteristics of these Cities necessitated local control over zoning subdivisions and land use development. The Cities must have complete power over zoning and land development approvals granted by the City since its size and scope of development create its own set of unique problems. City Zoning is governed by provisions of the Second Class City Code, the Act of March 31, 1927, P.L. 98, §§ 1-8, 53 P.S. §§ 25051-25058, and by the general home rule powers implemented in the Pittsburgh Home Rule Charter, § 101, subject to the Home Rule Charter Act of April 13, 1972, P.L. 184, § 302, 53 P.S. § 1-302. *Id.* The provisions of the Second Class City Code further provide City Council with the power to make regulations to secure the general health of its inhabitants. The Code specifically states as follows:

“For the purpose of promoting the health, safety, morals or the general welfare of the community, cities of the second class are hereby empowered to regulate, restrict, or determine, the height, number of stories and size of buildings and other structures, the percentage of lot that may be built upon, the size of yards, courts and other open spaces, the density of population, and the location, use and occupancy of buildings, structures and land for trade, industry, residence or other purposes.”

53 P.S. § 25051 (emphasis added).

In furtherance of that goal, the City's Zoning Ordinance was developed. The Ordinance was created to encourage and protect the most appropriate use of land throughout the city and to stabilize and conserve the value of land and buildings. *Pittsburgh Zoning Ordinance*, Title 9 of the Pittsburgh Code Enacted August 26, 1998, effective February 26, 1999 as amended.

The Pennsylvania Supreme Court has acknowledged that municipalities play a vital role with regard to land use regulation. *Huntley & Huntley, Inc. v. Borough Council of Borough of Oakmont*, 964 A.2d 855, 866 (Pa. 2009) (“the MPC's authorization of local zoning laws is provided in recognition of the unique expertise of municipal governing bodies to designate where different uses should be permitted in a manner that accounts for the community's development objectives, its character, and the ‘suitabilities and special nature of particular parts of the community.’” (quoting 53 P.S. 10603(a)). In *Huntley & Huntley v. Borough of Oakmont*, 964 A.2d 855 (Pa. 2009), the Supreme Court held that limiting oil and gas operations to certain zoning districts in order to protect the residential character of neighborhoods was a valid use of the sovereign’s police power.

Following the Court’s decision in *Huntley*, the Pennsylvania Commonwealth Court in *Penneco Oil Company* followed the Pennsylvania Supreme Court’s rationale in holding that local zoning regulations relating to oil and gas activities are a proper use of the sovereign’s police power. The Court held, “... the most salient objectives underlying restrictions on oil and gas drilling in residential districts appeared to be those pertaining to preserving the character of residential neighborhoods and encouraging beneficial and compatible land uses.” *Penneco Oil Company, Inc. v. County of Fayette*, 4 A.3d 722, 726 (Pa. Commw. Ct. 2010) (*cert. denied*, Pa. Jan. 6, 2012). The Pennsylvania Commonwealth Court in *Penneco Oil Company* also found that the police powers’ objectives are served by proper local regulations regarding drilling in residential areas that are enacted to serve the safety and welfare of its citizens, “encouraging

the most appropriate use of the land throughout the borough, conserving the value of property, minimizing overcrowding, traffic, congestion and providing adequate open spaces.” *Id.*

“[T]he very essence of [z]oning” is “the designation of certain areas for different use purposes.” *Swade v. Zoning Board of Adj. of Springfield Twp.*, 140 A.2d 597, 598 (Pa. 1958).

The Commonwealth Court in this case recognized this issue by stating the following:

“A typical zoning ordinance divides the municipality into districts in each of which uniform regulations are provided for the uses of buildings and land, the height of buildings, and the area or bulk of buildings and open spaces... Zoning ordinances segregate industrial districts from residential districts, and there is segregation of the noises and odors necessarily incident to the operation of industry from those sections in which the homes are located.” *Robinson Township, Washington County, Pennsylvania, et al v. Commonwealth of Pennsylvania, et al, No 284 M.D. 2012 Opinion By President Judge Pellegrini Filed July 26, 2012 at p. 29.*

In order to be valid, a zoning ordinance must bear a substantial relationship to legitimate community health, safety, and welfare purposes, and may not be unreasonably arbitrary, irrational, unjustifiably discriminatory or confiscatory. *Klein v. Council of the City of Pittsburgh*, 1643 A.2d 1107 (Pa. Commw. Ct. 1994). Moreover, limitations on a landowner’s right to enjoy or use his property must be “substantially related to preserving or promoting the public health, safety, morals or general welfare.” *Best v. Zoning Bd. of Adjustment of City of Pittsburgh*, 141 A.2d 606, 610 (Pa. 1958); *see also, Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365 (1926); *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 68 (1981); *National Land and Investment Co. v. Easttown Township Board of Adjustment*, 419 Pa. 504, 215 A.2d 597, 607 (1966); *Boundary Drive Associates v. Shrewsbury Township Board of Supervisors*, 507

Pa. 481, 489, 491 A.2d 86, 90 (1985). In other words, a municipality must design ordinances in a way that balance the needs of its people with the promotion of future growth and development opportunities within the community.

City Council has always sought to comply with these various duties when it crafted the City's Zoning Ordinance. The drafters of the Ordinance, and subsequent amendments, were careful to consider the unique nature of the City and its planning objectives, development goals, as well as the health, safety, and welfare, of its citizens. The Ordinance attempts to promote economic development while at the same time offering certain protections to its residents. Despite vigilance and careful design with regard to regulating activities within its borders as to other industrial activities, Act 13 would prohibit City Council from enacting regulations that would interfere with oil and gas operations. More specifically, Act 13 would require City Council to enact zoning over oil and gas operations *regardless* of "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). This generic-style zoning directly conflicts with a municipality's fundamental ability to construct zoning regulations that protect its unique community character and regulate development. Zoning cannot be implemented without a clear understanding of the location and future development plans of the area being zoned. Rather, zoning must foster the orderly development and use of land in a manner consistent with local demographics and area-specific concerns.

Act 13's oil and gas zoning regulations place municipalities in a position where they must comply with the Act and remove the cloak of protection (by way of zoning) that the municipality provides to its citizens. When dealing with oil and gas operations, City Council would be required to turn its back on the rights of all property owners, except for those in the business of oil and gas production. In sum, City Council would be forced to relinquish control over oil and gas operations to the provisions of Act 13, regardless of its impact on the health and safety of its residents and others with business interests in the community.

As stated above, Act 13's zoning provisions do not account for the unique nature and composition of a given municipality. It does not differentiate a busy city from a rural township. It also fails to comprehend many of the uses already in place, or the future development plans of a municipality. In essence City Council, and other municipalities, would be required to enact Act 13's oil and gas zoning scheme despite their current planning strategy or future plans for development. To permit such broad and generalized zoning not only removes the fundamental right of zoning regulation from City Council, but it also ignores City Council's ability to prevent the infiltration of dangerous and incompatible uses that local zoning provides. For these reasons, this Honorable Court must affirm the Commonwealth Court's Order of July 26, 2012.

CONCLUSION

In light of the foregoing, the Council of the City of Pittsburgh, respectfully requests that this Honorable Court affirm the July 26, 2012 Order of the Commonwealth Court holding that Section 3304 of Act 13 is null and void.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that two (2) true and correct copies of the foregoing **Amicus Curiae Brief of Council of the City of Pittsburgh** have been served upon the following by mailing the same first class mail, postage prepaid, this **18th** day of **September, 2012** to the following addresses:

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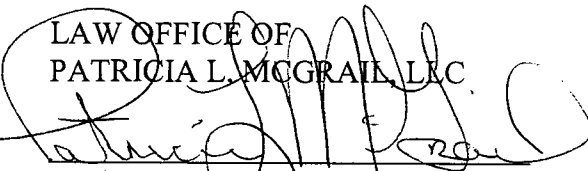
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