IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

DOCKET 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,

Appeal of: the Commonwealth of Pennsylvania; Office of the Attorney General of Pennsylvania; and Linda L. Kelly, in her Official Capacity as Attorney General of the Commonwealth of Pennsylvania

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BRIEF OF APPELLEES

APPEAL FROM THE ORDERS OF THE COMMONWEALTH COURT ENTERED JULY 26, 2012, AT NO. 284 M.D. 2012

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I. COUNTER-STATEMENT OF STANDARD AND SCOPE OF REVIEW

"Because the issues involve the proper interpretation of constitutional and statutory provisions, they pose questions of law. As such, this Court's scope of review is plenary and our standard of review is *de novo.*" *Alliance Home of Carlisle, PA v. Bd. of Assessment Appeals*, 591 Pa. 436, 449, 919 A.2d 206, 214 (2007).

II. COUNTER-STATEMENT OF THE QUESTIONS INVOLVED

1. Whether this Honorable Court should affirm the Commonwealth Court determination that Act 13 violates Article I, Section 1 of the Pennsylvania Constitution and Section 1 of the 14th Amendment to the United States Constitution because the zoning scheme provided for in Act 13 is an improper use of the Commonwealth's police power that is not designed to protect the health, safety, morals and public welfare of the citizens of Pennsylvania?

   Answered Below: Yes.
   Suggested Answer: Yes.

2. Whether this Honorable Court should affirm the Commonwealth Court determination that Act 13 violates Article I, Section 1 of the Pennsylvania Constitution because it allows for incompatible uses in like zoning districts and therefore constitutes an unconstitutional use of zoning districts?

   Answered Below: Yes.
   Suggested Answer: Yes.

3. Whether this Honorable Court should affirm the Commonwealth Court determination that Act 13 prevents local municipalities from meeting its Constitutional and statutory obligation to protect the health, safety, morals and public welfare of local communities through zoning regulations in violation of the Municipalities Planning Code and Article I, Section 1 of the Pennsylvania Constitution?

   Answered Below: Yes.
   Suggested Answer: Yes.

4. Whether this Honorable Court should affirm the Commonwealth Court determination that the delegation of powers to the Pennsylvania Department of Environmental Protection in Act 13, allowing the agency to grant waivers without defined standards, is an unconstitutional breach of the doctrine of the non-delegation doctrine and the separation of powers embodied in the Pennsylvania and United States Constitutions?

   Answered Below: Yes.
   Suggested Answer: Yes.

5. Whether this Honorable Court should affirm the Commonwealth Court determination that Petitioners present a sufficient direct, substantial and immediate interest in the outcome of the litigation to confer standing to challenge the constitutionality of Act 13?

Answered Below: Yes.
Suggested Answer: Yes.

6. Whether this Honorable Court should affirm the Commonwealth Court determination that Petitioners' challenge to the constitutionality of selected provisions of Act 13 represented a justiciable question appropriately within the province of the judiciary?
Answered Below: Yes.
Suggested Answer: Yes.

7. Whether this Honorable Court should affirm the Commonwealth Court determination that Petitioners' challenge to the constitutionality of Act 13 presents an imminent and ripe claim for judicial review?
Answered Below: Yes.
Suggested Answer: Yes.

III. COUNTER-STATEMENT OF THE CASE[1]

a. Statement of Facts

1. Act 13 of 2012 – Zoning Provisions

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. If the Pennsylvania General Assembly has attempted preemption through Act 13, it assumed the power to zone for oil and gas operations, which is manifested through the promulgation of a uniform set of zoning regulations governing oil and gas operations throughout the Commonwealth. Act 13 does not serve to preempt the constitutional rational for zoning districts and said zoning districts remain in place.

The Act's restrictions on local ordinances are threefold. First, section 3302 resembles the former preemption provision in the prior Oil and Gas Act and was "not intended to change or

[1] Petitioners respectfully incorporate the briefs they filed as Appellants in the above-referenced Cross-Appeals and respectfully submit that the arguments set forth there provide an alternative basis for upholding the judgment of the Commonwealth Court.

affect . . . section 602[2] of the Oil and Gas Act." 58 Pa. C.S. § 3302. Second, section 3303 expands the Act's scope to preclude local regulation of oil and gas operations where operations are covered by "environmental acts"[3] — state environmental laws, or federal laws dealing with oil and gas operations — including where local governments are given the authority to regulate under those laws. 58 Pa. C.S. § 3303.

Third, section 3304 creates a uniform zoning scheme for local ordinances dealing with "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."[4] 58 Pa. C.S. § 3304(a) & (b). Further, it 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.

Section 3304 restricts a municipality's ability to specify which types of oil and gas operations are permitted in which zoning districts, and how to classify those permitted uses. For example, 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). Municipalities must allow impoundment areas as uses permitted by-right in all zoning districts, including residential districts, so long as they are not closer than 300 feet from an existing

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[2] Section 602 of the Oil and Gas Act was the prior preemption provision that this Court interpreted in *Huntley & Huntley, Inc. v. Borough Council of the Borough of Oakmont*, 600 Pa. 207, 964 A.2d 855 (2009) and *Range Res. Appalachia, LLC v. Salem Twp.*, 600 Pa. 231, 964 A.2d 869 (2009).

[3] The Act defines 'Environmental acts' as "[a]ll statutes enacted by the Commonwealth relating to the protection of the environment or the protection of public health, safety and welfare, that are administered and enforced by the department or by another Commonwealth agency, including an independent agency, and all Federal statutes relating to the protection of the environment, to the extent those statutes regulate oil and gas operations." 58 Pa. C.S.. § 3301.

[4] The Municipalities Planning Code requires zoning ordinances to "provide for the reasonable development of *minerals* in each municipality." 53 P.S. § 10603(i) (emphasis added).

building. 58 Pa. C.S. § 3304(b)(6). Operators often use impoundment areas to store thousands to millions of gallons of hydraulic fracturing hazardous wastewater.[5] Under the Act, impoundment areas, because they are now uses permitted by-right in residential districts, receive similar treatment as residential uses such as single-family dwellings.

To illustrate, Petitioner Cecil Township's R-2 Medium Density Residential Zoning District allows as permitted uses by right farms, single-family dwellings, two-family dwellings, multi-family dwellings, planned residential developments, customary accessory uses such as satellite dishes and garages, home offices and essential services. Houses of worship and daycare centers are conditional uses, which mean that although the use may be authorized, the use may only be constructed upon demonstration to the Board of Supervisors that the development plans satisfy ordinance standards following a duly advertised public hearing allowing for participation by potentially affected landowners. Now under Act 13, Petitioner Cecil Township must allow impoundment areas of hydraulic fracturing wastewater ("frac-ponds") as permitted uses by right. The result is that the approval of construction of a church or daycare center in the R-2 Zoning District will require greater local scrutiny than the approval of wastewater impoundments because the latter will be not be subject to any local scrutiny at all.

In addition, 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

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[5] This hazardous wastewater, which is contains a variety of known human carcinogens, was exempted from the Safe Drinking Water Act by § 322 of the 2005 Energy Policy Act, commonly referred to as the "Halliburton Loophole." *See* Energy Policy Act of 2005, 119 Stat. 694 (2005).

applicable federal standard. 58 Pa. C.S. § 3304(b)(7). Natural gas processing plants must be a use permitted *by right* in all industrial zoning districts, regardless of the district's distinction between heavy and light industrial, and a conditional use in agricultural zoning districts so long as they also meet the limited conditions listed above.

Also, municipalities cannot impose 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.[6] 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. 58 Pa. C.S. § 3304(b)(10). Municipalities cannot increase setbacks identified in the Act. 58 Pa. C.S. § 3304(b)(11).

Lastly, contrary to all other uses under the Municipalities Planning Code ("MPC"), 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).

2. July 26, 2012, Commonwealth Court Final Opinion and Order

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[6] This is so even though all other industrial uses would be limited to industrial districts and would be prohibited in other districts, such as residential, agricultural, commercial, village, institutional and resource protection districts.

On July 26, 2012, the Commonwealth Court issued a final majority Opinion and Order on the merits of Petitioners' challenge to Act 13, in part, having the following effect: 1) granting Petitioners' Motion for Summary Relief as to Counts I, II and III thereby declaring § 3304 of Act 13 unconstitutional and permanently enjoining enforcement of § 3304 and the remaining provisions of Chapter 33 with the exception of §§ 3301-3303; 2) granting Petitioners' Motion for Summary Relief as to Count VIII and declaring § 3215(b)(4) unconstitutional and null and void; (collectively, the "July 26th Order"). *See*, July 26, 2012 Commonwealth Court Amended Opinion and Order, attached hereto as **Exhibit 1**.

In the July 26th Order and corresponding opinion, a majority of the Commonwealth Court *en banc* panel explicitly reasoned as follows:

> Because the changes required by 58 Pa. C.S. § 3304 do not serve the police power purpose of the local zoning ordinances, relating to consistent and compatible uses in enumerated districts of a comprehensive zoning plan, any action by the local municipality required by the provisions of Act 13 would violate substantive due process as not in furtherance of its zoning police power. (p. 35)
>
> ...
>
> If the Commonwealth-proffered reasons are sufficient, then the legislature could make similar findings requiring coal portals, tipples, washing plants, limestone and coal strip mines, steel mills, industrial chicken farms, rendering plants and firework plants in residential zones for a variety of police power reasons advancing those interests in their development. It would allow the proverbial 'pig in the parlor instead of the barnyard.' (p. 33)
>
> ...
>
> In this case, by requiring municipalities to violate their comprehensive plans for growth and development, 58 Pa. C.S. § 3304 violates substantive due process because it does not protect the interests of neighboring property owners from harm, alters the character of neighborhoods and makes irrational classifications – irrational because it requires municipalities to allow all zones, drilling operations and impoundments, gas compressor stations, storage and use of explosives in all zoning districts, and applies industrial criteria to restrictions on height of structures, screening and fencing, lighting and noise. (p. 33)

See, Exhibit 1.

Therefore, the Court held:

> Because 58 Pa. C.S. § 3304 requires all oil and gas operations in all zoning districts, including residential districts, as a matter of law, we hold that 58 Pa. C.S. § 3304 violates substantive due process because it allows incompatible uses in zoning districts and does not protect the interests of neighboring property owners from harm, alters the character of the neighborhood, and makes irrational classifications. Accordingly, we grant Petitioners' Motion for Summary Relief, declare 58 Pa. C.S. § 3304 unconstitutional and null and void, and permanently enjoin the Commonwealth from enforcing it. Other than 58 Pa. C.S. §§ 3301 through 3303, which remain in full force and effect, the remaining provisions of Chapter 33 that enforces § 58 Pa. C.S. § 3304 are similarly enjoined. (p. 35).

See, Exhibit 1, at p. 35.

In addition, by unanimous vote, the Court held:

> Given the lack of guiding principles as to how DEP is to judge operator submissions, Section 3125(b)(4) delegates the authority to DEP to disregard the other subsections and allow setbacks as close to the water source it deems feasible. Because the General Assembly gives no guidance when the other subsections may be waived, Section 3215(b)(4) is unconstitutional because it gives DEP the power to make legislative policy judgments otherwise reserved for the General Assembly. (p. 52).

See, Exhibit 1, at p. 52.

IV. SUMMARY OF ARGUMENT

This Honorable Court should affirm the Commonwealth Court July 26th Opinion and Order regarding Counts I-III and Count VIII of the Petition for Review. Act 13 violates the United States and Pennsylvania Constitutions. Act 13's promulgation of a uniform set of zoning regulations governing oil and gas operations throughout the Commonwealth constitutes a single set of statewide zoning rules which allow for incompatible uses in like zoning districts thereby eliminating the constitutional rationale for such districts. Act 13's broad brush approach and failure to account for the health, safety and welfare of citizens, and the preservation of the character of residential neighborhoods and beneficial and compatible land uses results in an improper use of the Commonwealth's police power and is therefore unconstitutional. Furthermore, Act 13 constitutes an unconstitutional delegation of power to the Pennsylvania

Department of Environmental Protection which allows the agency to grant waivers without any guiding standards to circumscribe the agency's policy-making discretion.

In addition, this Honorable Court should affirm the Commonwealth Court's unanimous decision regarding the justiciability of Petitioners' claims and the standing of Municipal Petitioners and Individual Petitioners, Brian Coppola and David M. Ball. Petitioners have properly raised purely constitutional questions for this Court's judicial review. Municipal Petitioners have a direct, substantial and immediate interest in the litigation as their local government functions have been placed at issued through Act 13's zoning provisions. Moreover, Individual Petitioners have a direct, substantial and immediate interest in the litigation as they face harm to their property and financial interests.

V. ARGUMENT

1. This Honorable Court should affirm the July 26th Order because the Commonwealth Court properly determined that Act 13 violates Article I, Section 1 of the Pennsylvania Constitution and Section 1 of the 14th Amendment to the United States Constitution because the zoning scheme provided for in Act 13 is an improper use of the Commonwealth's police power that is not designed to protect the health, safety, morals and public welfare of the citizens of Pennsylvania.

a. Constitutional Basis for Zoning Authority

Article I, Section 1 of the Pennsylvania Constitution guarantees individuals' ability to acquire, possess and protect property and to use that property as the individual sees fit. *See,* PA. CONST. Art. I, Sec 1; *see also, Appeal of Girsh,* 437 Pa. 237, 241, 263 A.2d 395, 397, n. 3 (1970). Individuals' constitutional rights to use their property in any manner have traditionally been limited by the police power of the state, which is the exercise of the sovereign's right to take actions to protect the lives, health, morals, comfort and general welfare of the populace. *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 241, (1978) (rehearing denied); *In re Appeal of Realen Valley Forge Greenes Associates*, 838 A.2d 718, 728 (Pa. 2003).

In its July 26th Order, the Commonwealth Court followed well established Pennsylvania law holding that the sovereign's exercise of the police power limiting the use of property is constitutional when it is designed to ***protect*** citizens by ensuring that an individual's use of his or her real property will not cause harm to neighbors or infringe upon the neighbors' property rights and interests. *Hopewell Township Board of Supervisors v. Golla*, 499 Pa. 246, 452 A.2d 1337, 1341-42 (1982). Furthermore, the exercise of the police power over individuals' rights to use their real property as they choose is manifested through a legislative body's power to establish zoning districts. *Best v. Zoning Board of Adjustment of the City of Pittsburgh*, 393 Pa. 106, 111, 141 A.2d 606, 610 (1958). This Honorable Court has expressly defined constitutionally based zoning as "the legislative division of a community into areas in each of which only certain designated uses of land are permitted so that the community may develop in an orderly manner in accordance with a comprehensive plan." *Id.* at 609. In proper recognition of these principles, the Commonwealth Court explained:

> Zoning ordinances segregate industrial districts from residential districts, and there is segregation of the noises and odors necessarily incident to the operation of industry from those sections in which the homes are located. Out of this process, a zoning ordinance implements a comprehensive zoning scheme; each pieces of property pays, in the form of reasonable regulation for its use, for the protection that the plan gives to all property lying within the boundaries of the plan.

See, Exhibit 1, at p. 29.

b. Proper Purposes of Zoning

As correctly acknowledged by the Commonwealth Court, implementation of constitutionally valid zoning restrictions is based upon the recognition that some uses of land are incompatible with other uses of land:

> 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.

See, Exhibit 1, at p. 29.

Zoning allows a sovereign to designate distinct areas of a community where only certain, compatible uses of land are allowed, thereby protecting landowners because all property in a particular district is subject to the same restrictions. *Village of Euclid, Ohio v. Ambler Realty, Co.* 272 U.S. 365, 388 (1926) ("A nuisance may be merely a right thing in the wrong place."); *United Artists Theater Circuit, Inc. v. City of Philadelphia*, 595 A.2d 6 (Pa. 1991) (reargument granted and reversed on other grounds 535 Pa. 370, 635 A.2d 612). As this Court has held: "A basic purpose of zoning is to ensure an orderly physical development of the city, borough, township or other community <u>by confining particular uses of property to certain defined areas</u>." *Hanna v. Bd. of Adjustment*, 183 A.2d 539, 543 (Pa. 1962). (emphasis added).

The police power to zone cannot be exercised in an unreasonable or arbitrary manner and must be based upon the unique facts and circumstances present in each community. In *Village of Euclid, Ohio v. Ambler Realty, Co.* 272 U.S. 365, 387 (1926), the United States Supreme Court recognized that: "[a] regulatory zoning ordinance, which would be clearly valid as applied to the great cities, might be clearly invalid as applied to rural communities." *See also, Eller v. Bd. of Adjustment*, 414 Pa. 1, 198 A.2d 863 (1964). Furthermore, the United States Supreme Court explained how zoning districts serve a legitimate police power to protect the health, safety and welfare of the community by excluding non-compatible uses:

> The establishment of such districts or zones may, among other things, prevent congestion of population, secure quiet residence districts, expedite local transportation and facilitate the suppression of disorder, the extinguishment of fires, and the enforcement of traffic and sanitary regulations. The danger of fire and of contagion are often lessened by the exclusion of [industrial activities] from areas devoted to residences, and, in consequence, the safety and health of the community may be promoted.

Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 392 (1926).

This Honorable Court has described "[t]he very essence of [z]oning" as "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). More recently, in *Huntley & Huntley v. Borough of Oakmont*, 964 A.2d 855 (Pa. 2009), this 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.

In *Huntley*, this Honorable Court drew a "where versus how" distinction between zoning and land use classifications that were enacted to preserve the character of neighborhoods and to plan for community development and the technical regulations governing the manner in which an industry operates. 964 A.2d at 865-66. The Court held that:

> While the governmental interest involved in oil and gas development and in land-use control at times may overlap, ***the core interests in these legitimate governmental functions are quite distinct***. The state's interest in oil and gas development is centered primarily on the efficient production and utilization of the natural resources of the state. A county's ***interest in land-use control***, in contrast, is one of more orderly development and ***use of land in a manner consistent with local demographic and environmental concerns***.

Id. at 865. (emphasis added).

Following the Court's decision in *Huntley*, the Pennsylvania Commonwealth Court in *Penneco Oil Company* followed the Pennsylvania Supreme Court's rationale by finding that local zoning regulations relative to oil and gas activities are a proper use of the sovereign's police power stating that, "... 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 regulating 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.*

The Dissent authored by Judge Brobson cites *Huntley* for the proposition that "a local ordinance may not stand as an obstacle to the execution of the full purposes of the objectives of the Legislature." *Huntley*, 964 A.2d at 863. However, the scope of *Huntley's* preemption did not extend to its definition of the proper purposes of zoning pursuant to use of the police power. Furthermore, the General Assembly is not being "held hostage" by a municipalities' comprehensive plan. *See*, Exhibit 1, at PKB-6. Rather, the General Assembly is "held hostage," or more pointedly held in check, by the Pennsylvania and United States Constitutions.

c. The Commonwealth's Police Power

The sovereign's power and authority to zone is not unlimited. Exercise of the police power to regulate the use of real property through the enactment of zoning ordinances **is only constitutional when it promotes the public health, safety, morality and general welfare interests of the community and the regulations are substantially related to the purpose the ordinance purports to serve**. *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*, 215 A.2d 597, 607 (Pa. 1966); *Boundary Drive Associates v. Shrewsbury Township Board of Supervisors*, 491 A.2d 86, 90 (Pa. 1985). When enacting zoning regulations, all public authorities, **including the Pennsylvania General Assembly**, must exercise this police power in furtherance of the public health, safety, morals and general welfare of the particular community. *See, Exton Quarries, Inc. v. Zoning*

Board of Adjustment of West Whiteland Township, 228 A.2d 169, 182 (Pa. 1967) (concurring opinion of Chief Justice Bell) (emphasis added).

The Commonwealth[7] continually maintains, and has argued repeatedly in its briefs, that it has the authority of the General Assembly to preempt local laws, amend existing statutes and take local zoning power away from municipalities.[8] *See*, Brief of Attorney General, at pp. 30-33; *see also*, Brief of Agency Appellants, at pp. 14-15, 19-20. To be sure, Petitioners do not dispute this point. However, the Commonwealth's argument essentially states that because the General Assembly maintains these certain heightened powers, its zoning acts are *per se* proper uses of the police power. *Id.* It is this unwarranted extension of the preemption principle that Petitioners dispute. Through its authority, the Commonwealth cannot preempt the Constitution and it cannot eliminate the directives which flow from it, including the creation of constitutional zoning districts providing for compatible uses in like spaces. *See*, *Euclid*, *supra*. As such, through Act 13, the General Assembly cannot eliminate the protections afforded to defined zoning districts, including residential districts, by Article I, Section 1 of the Pennsylvania Constitution. *See also*,

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[7] Commonwealth Appellants include the Commonwealth of Pennsylvania, the Office of the Attorney General and Linda L. Kelly, in her official capacity as Attorney General of the Commonwealth of Pennsylvania (hereinafter separately referred to as the "Attorney General"). Additionally, Commonwealth Appellants also include the Public Utility Commission, Robert F. Powelson, in his official capacity as Chairman of the Public Utility Commission, the Pennsylvania Department of Environmental Protection, and Michael L. Krancer, in his official capacity as Secretary of the Department of Environmental Protection (hereinafter separately referred to as "Agency Appellants"). Both groups of Appellants are represented by independent counsel and filed separate appeals to the Pennsylvania Supreme Court. The appeal of the Attorney General has been docketed at No. 64 MAP 2012. The appeal of Agency Appellants has been docketed at No. 63 MAP 2012. As the issues raised by the Attorney General and Agency Appellants are largely the same, Petitioners file this reply brief in response to both appeals.

[8] The Department of Environmental Protection ("DEP"), one of the Agency Appellants herein, was invited to file an amicus brief by this Honorable Court regarding the *Huntley* decision. 964 A.2d at 860. Contrary to its current position, the DEP acknowledged that a "core municipal function" included designating different areas of a municipality for different uses. *Id.* at 862.

53 P.S. § 10605, (setting forth by Pennsylvania statute the constitutional directive to zone only compatible land uses is within constitutional constraints). Rather, by preempting the core function of local governments, the Commonwealth took on these constitutional mandates for itself requiring the General Assembly to "play by the same rules" undertaking and enacting zoning laws in accordance therewith. If the General Assembly desired to preempt the local governments' ability to protect the health, safety and welfare of its residents, the duty to protect local citizens and to preserve the residential character of neighborhoods would then fall squarely within the lap of the General Assembly. The Commonwealth Court expressly held that: "58 Pa. C.S. § 3304 requires local zoning ordinances be amended which, as *Huntley* states, involves a different police power. The public interest in zoning is in the development of use of land in a manner consistent with local demographic and environmental concerns." *See*, Exhibit 1, at p. 32.

Similarly, the July 26th Order did not suggest that municipalities have a zoning power that cannot be overridden. The Commonwealth Court correctly recognized that, "[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." *See*, Exhibit 1, at p. 34. Additionally, the Court added, "[w]hile there is no disagreement with the dissent's statement that a local ordinance may not frustrate the purposes and objectives of the legislature, the claim here is that the Pennsylvania Constitution stands in the way." *See*, Exhibit 1, at p. 34, fn. 23. (emphasis added). These statements stand in direct contrast to Agency Appellants' assertion that the Court below "[held] that the Act's zoning provisions are unconstitutional usurpations by the Commonwealth of the municipalities' zoning power." *See*, Brief of Agency Appellants, at pp. 15-16. In addition, nowhere did the Court find that "municipalities have a right to exercise zoning powers which cannot be overridden by the state." *See*, Brief of Attorney General, at p. 33. Rather, the decision reflects that the legislature's authority is subservient to the Constitution.

By designating certain zoning districts for certain land uses, the Commonwealth, through Act 13, engaged in zoning. As explained, when engaged in zoning, the Commonwealth must follow the same constitutional mandates that are imposed upon municipalities when enacting zoning ordinances, and that were used by this Honorable Court and the Pennsylvania Commonwealth Court to scrutinize the ordinances in *Huntley* and in *Penneco* as this Court has consistently held on numerous occasions. The Commonwealth must show that any 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); *National Land and Investment Co. v. Easttown Township Board of Adjustment*, 215 A.2d 597, 607 (Pa. 1966); *Boundary Drive Associates v. Shrewsbury Township Board of Supervisors*, 491 A.2d 86, 90 (Pa. 1985).

For zoning to be constitutional under Article I, Section 1, it "must be directed toward the community as a whole, concerned with the public interest generally, and justified by a *balancing* of community costs and benefits." *In re Realen Valley Forge Greenes Associates*, 838 A.2d 718, 729 (Pa. 2003). Zoning is not a mechanical exercise that can be accomplished without a diligent inquiry into the land and community to be zoned. Because the Constitution protects property rights, the Commonwealth is empowered to infringe upon those rights through zoning powers only when such zoning will benefit the individual community. *Id.*

As now asserted by Appellants, the Commonwealth cannot simply pass off Act 13 as exclusively a policy decision to promote oil and gas development in Pennsylvania falling within the General Assembly's police power. This Honorable Court has expressly maintained that, "[g]ood intentions do not excuse non-compliance with the Constitution." *Mesivtah Eitz Chaim of Bobov, Inc., v. Pike County Board of Assessment Appeals*, 44 A.3d 3, 8 (Pa. 2012). Similar to

the zoning provisions of Act 13, this Court stated, "[t]he legislature may certainly determine what exemptions it chooses to grant, but only within the boundaries of the Constitution." *Id.* The Commonwealth **must** undertake an analysis to determine how the zoning regulation will benefit the local community's health, safety, morals or general welfare before any zoning regulation may be constitutionally justified as an enactment pursuant to the Commonwealth's police power.[9] This constitutional "zoning standard" applies to all levels of government alike; the Commonwealth is likewise limited by constitutional restraints. *Exton Quarries, Inc. v. Zoning Bd. of Adjustment of West Whiteland Twp.*, 228 A.2d 169, 182 (Pa. 1967) (concurring opinion).

The Commonwealth Court appreciated that the general purposes set forth in Act 13 "...are sufficient to have the state exercise its police powers to promote the exploitation of oil and gas resources." *See*, Exhibit 1, at p. 32. However, by the same accord, the Commonwealth Court cited *Huntley* to support that, "the interests that justify the exercise of the police power in development of oil and gas operations and zoning are not the same." *See*, Exhibit 1, at p. 31. Contrary to the interests associated with the development of oil and gas, "[z]oning, on the other hand, is to foster the orderly development and use of land in a manner consistent with local demographic and environmental concerns." *See*, Exhibit 1, at p. 31. The Commonwealth Court created a clear distinction between the proper purposes of the Act, in general, and the improper purpose of the Act as it relates to zoning.

The Commonwealth now seems to suggest that because the Court below found the overall designated purposes of Act 13 to be acceptable, that the requirements established by Section 3304 likewise fall within constitutional purview. *See*, Brief of Agency Appellants, at pp 16-17, 20, 23. Regardless, section 3304 cannot independently pass constitutional scrutiny. The

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[9] As this Court held in *Huntley*, zoning controls "pertain only to the specific attributes and developmental objectives of the locality in question." 964 A.2d at 864.

General Assembly, through section 3304, has taken on zoning authority which requires a showing of a substantial relationship to the benefit of health, safety and welfare of Pennsylvania communities. This requires examination and protection of an entirely distinct set of interests. In order to pass constitutional muster, the Commonwealth failed to make this showing and instead blankly asserted that Act 13 has an appropriate purpose. No Pennsylvania court has ever found that such heavy industrial uses are compatible with the uses in residential districts, including schools and neighborhoods, and serve to benefit the health, safety and welfare of the community. To the contrary, the Commonwealth Court correctly found that the insertion of these incompatible activities is unconstitutional, and therefore its decision should be affirmed.

d. Substantive Due Process Inquiry

In order to show that the Commonwealth, through enactment of the zoning provisions within Act 13, has made proper use of its police powers, the Act must survive a substantive due process inquiry. Zoning ordinances are held to a higher Constitutional standard because they affect the exercise of property rights under the Pennsylvania and United States Constitutions. Zoning, while recognized as a restriction on constitutionally-protected property rights, is an exercise of particular type of police power that is valid *when* it is used to promote the public health, safety, and welfare interests of a local community, and when the means used substantially relate to those police power purposes. *Nat'l Land & Inv. Co. v. Kohn*, 419 Pa. 504, 522-23, 215 A.2d 597, 607 (1965); *Swade v. Zoning Board of Adjustment of Springfield Township*, 140 A.2d 597 (Pa. 1958)*; C & M Developers, Inc. v. Bedminster Township Zoning Hearing Board*, 573 Pa. 2, 820 A.2d 143, 150 (2002); *Boundary Drive Associates v. Shrewsbury Twp. Bd. of Sup'rs*, 507 Pa. 481, 489, 491 A.2d 86, 90 (1985).

Contrary to the Commonwealth's assertion that no more than a rational basis test should be employed during constitutional review of Act 13, this Honorable Court has made clear that

the substantive due process inquiry necessary when reviewing a zoning enactment employs a heightened standard of review. *See*, Brief of Attorney General, at p. 32; *see also*, Brief of Agency Appellants, at pp. 20-21. Zoning involves the exercise of a different type of police power and is subject to a higher Constitutional standard than a typical law because of the impact on property rights.

As this Court and the Commonwealth Court recognized, the police power exercised via a zoning ordinance has a different goal and purpose than the police power behind a state law that deals with environmental and economic regulation of oil and gas development. *See*, Exhibit 1, at p. 32; *see also*, *Swade v. Zoning Bd. of Adjustment of Springfield Township*, 392 Pa. 269, 271, 140 A.2d 597, 598 (1958). As such, while the Commonwealth may have thought that it enacted Act 13 pursuant to its police power of regulating and promoting oil and gas development statewide, it also crossed into the realm of the zoning police power, which is a different power subject to *different* Constitutional standards. *See*, Exhibit 1, at p. 32

Rational basis review, where *any* legitimate end justifies the means, is not even close to the same standard as the substantive due process inquiry applicable to zoning ordinances. If this were true, many cases decided by this Court and other courts in the Commonwealth would have incorrectly found zoning ordinances to be invalid. To illustrate, if rational basis review applied to zoning ordinances, municipalities and the Commonwealth could constitutionally enact zoning that is *not* designed to promote the continuity or preservation of agriculture, but rather is designed to limit the development of certain uses. This runs directly counter to cases decided by this Court, as well as the Commonwealth Court. *C & M Developers, Inc. v. Bedminster Twp. Zoning Hearing Bd.*, 573 Pa. 2, 26-27, 820 A.2d 143, 158-59 (2002); *see also*, *Main St. Dev. Group, Inc. v. Tinicum Twp. Bd. of Supervisors*, 19 A.3d 21, 27-29 (Pa. Commw. Ct. 2011),

reargument denied (May 12, 2011), *appeal denied,* 40 A.3d 123 (Pa. 2012) (discussing Supreme Court and Commonwealth Court decisions striking down zoning ordinances).

"While courts are bound to accept the judgment of the legislative body concerning the necessity of zoning classifications, they may, nevertheless, inquire as to whether or not a particular zoning classification bears **a substantial relationship** to the public health, safety, morals or general welfare." *Trumbaur v. Zoning Hearing Bd.*, 73 Pa. D. & C.2d 20 (Pa. Com. Pl. 1975) (*citing*, *Bilbar Construction Co. v. Easttown Township Bd. of Adjustment*, 141 A.2d 851 (Pa. 1958); *Best v. Zoning Bd. of Adjustment*, 141 A.2d 606 (Pa. 1958)). By requiring a "substantial relationship to the health, safety, morals or general welfare of the community," Pennsylvania courts engage in a "substantive due process" analysis in reviewing zoning ordinances. *Surrick v. Zoning Hearing Bd.*, 382 A.2d 105, 108 (Pa. 1977).

It is based upon these plainly articulated standards that the Commonwealth Court conducted its inquiry. The Court below clearly acknowledged its obligation to consider a community's health, safety and welfare in relation to a zoning enactment, and explained its duty as follows:

> To determine whether a zoning ordinance is unconstitutional under Article 1, Section 1 of the Pennsylvania Constitution and Fourteenth Amendment to the United States Constitution, a substantive due process inquiry must take place. When making that inquiry, we take into consideration the rights of all property owners subject to the zoning and the public interests sought to be protected

See, Exhibit 1, at p. 30.

A zoning ordinance must bear a "substantial relationship" to the public health, safety and welfare in order to be constitutional. Nevertheless, the Commonwealth seeks review based upon a faulty lower standard because there exists no plausible substantial relationship between the zoning enactments required by Act 13 and benefit to individual Pennsylvania communities. In contrast to the Courts' decisions in *Huntley* and *Penneco Oil Company* which define a proper use

of the sovereign's police power restricting drilling operations to certain defined zones, Act 13's broad brush approach and failure to account for the health, safety and welfare of citizens, the value of properties, adequate open spaces, traffic, congestion, the preservation of the character of residential neighborhoods and beneficial and compatible land uses, results in an improper use of the Commonwealth's police power and is therefore unconstitutional.

The Commonwealth's zoning regulations in Act 13 are unconstitutional under Article I, Section 1 of the Pennsylvania Constitution as the Commonwealth did not engage in any localized effort to balance between "community costs and benefits." *In re Realen Valley Forge Greenes Associates*, 838 A.2d at 729. The Commonwealth simply did not consider—at a community by community level—the impact on property rights that will result from placing industrial uses next door to the panoply of non-industrial land uses that exist throughout the state. Municipalities across Pennsylvania vary greatly in many respects, including topography, wind conditions, population density, and infrastructure. Yet, in enacting Act 13's zoning provisions, the Commonwealth failed to undertake *any* localized analysis of municipal comprehensive plans, zoning districts, or the public health, safety, and welfare needed to provide a constitutional basis for its zoning regulations.[10] Act 13 essentially zones each municipality in the Commonwealth in an identical manner allowing for industrial uses in non-industrial areas.

No substantial relationship exists between 1) the provisions of the Act that authorize industrial activity in residential and commercial zoning districts as permitted uses by right; and 2) each community's comprehensive plan for orderly development, which considers the health, safety, and public welfare needs of each respective municipality. To illustrate, every

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[10] Local municipal officials are in the best position to understand and zone based on the municipality's geography, topography, density and current residential and commercial development patterns. (R.R. at 957a-970a).

municipality must allow hazardous waste water impoundment areas as uses permitted by right in *every single zoning district*, including residential districts. The Act requires this regardless of whether the district is actually suitable for the use, and regardless of whether a three hundred foot setback is sufficient to protect the health, safety, and welfare of surrounding landowners, let alone property values and other uses in the vicinity. The Act requires this despite municipal comprehensive plans that have planned development in an orderly fashion to preserve the character of neighborhoods, allow for a variety of uses, and set expectations of surrounding property owners. 53 P.S. § 10301(a).

The Act demonstrates that the General Assembly sought merely to benefit the oil and gas industry and its operations, rather than to enact a zoning scheme that sought to, *on the balance*, benefit *all* property owners and citizens whose rights are constitutionally guaranteed and protected. Act 13 contains no such balance or consideration of other property owners. Rather, Act 13 allows an industrial use—oil and gas operations—in residential, agricultural, resource protection, and commercial districts.[11] Act 13's new statewide zoning scheme frustrates a basic rationale for zoning, namely, the inclusion of only compatible land uses and the separation of

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[11] Natural gas development and processing is an industrial use. Unconventional well sites are generally developed in different stages and are on average several acres in size. Initially, a road is constructed and a pad is cleared. The impact is typical of any a noisy, dusty construction site, and the process can take several months to complete. Upon completion of the pad, drilling generally entails twenty-four (24) hour operation of sizeable drilling rigs accompanied by numerous diesel engines to provide power to the site. There will also be a substantial amount of truck traffic to and from the drill site. Once completed, the well pads will include wellheads, condensate tanks, vapor destruction units with open flames, pipelines and metering stations. These are typically structures that vary tremendously in size, scale and appearance from dwellings or other buildings found in residential and commercial zoning districts. Compressor stations and processing plans are clearly industrial uses as they process raw materials into various products. Unlike well development, the intensity of activities remains constant. Prior to Act 13, these industrial uses were generally included in zoning definitions of heavy industry. Heavy industry is normally defined as the type of industrial activities that create more significant impacts to neighboring properties, are often more closely regulated to minimize or prevent such impacts. (R.R. at 957a-970a).

industrial uses from residential or other similar uses in to preserve the character of a residential area and to promote a healthy local environment for those residents.[12] The reason that residential districts are constitutional is that the district serves to protect landowners from non-compatible land uses and the harms associated therewith. Inclusion of industrial operations as a permitted use in all zoning districts frustrates the reason a district is constitutional as it no longer serves its legitimate function of protecting the health, safety and welfare of the community. *See*, *Euclid*, *supra*.

Furthermore, any attempt to enact zoning regulations that introduce industrial uses into varied residential, agricultural and commercial districts must accurately examine and account for the potential negative effects that will inevitably result. It is undisputed that communities have a reasonable concern that noise, odors, heavy truck traffic, open flames, workers living on-site, and potential harmful emissions may flow from those industrial sites into residential neighborhoods. Communities also have a reasonable concern over the impact on property values due to the perceived or real risk associated with living near industrial activity. The Commonwealth failed to

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[12] Under Act 13, industrial development in presently undeveloped residential areas will almost certainly make future residential use unlikely. Residential development is the most sensitive to land use conflict. For this reason, residential zoning standards frequently allow only housing at various densities, and a few compatible uses (Such as churches, home occupations, and schools). Under Act 13, an industrial development can now occur virtually anywhere. The industrialization of residential areas makes it practically impossible to make the careful growth calculations that lie at the heart of ensuring a municipality is accounting for its fair share of regional growth. Random industrialization by oil and gas development will affect many residential growth areas. Act 13's "broad brush" and "one-size-fits-all" approach to zoning fails to contemplate the uniqueness of each municipality throughout the state and ignores considerations such as open space; traffic, road access; congestion; topography; density of populations, compatibility of uses; existing development patterns. Once industrial development occurs, it forever alters the character of a residential area, and negates municipal efforts to accomplish the basic purposes of zoning. As municipalities with significant shale gas reserves can expect multiple wells, numerous impoundments, miles of pipeline, several compressor and processing plants, all within its borders, they will be left to plan **<u>around</u>** rather than plan **<u>for</u>** orderly growth. (R.R. at 957a-970a).

consider any of these localized concerns associated with oil and gas operations, concerns which were illustrated in part in the Petition for Review and the affidavits and reports submitted in conjunction with Petitioner's Brief in Support of Motion for Summary Relief. (R.R. at 089a-094a, 782a-970a).

As indicative of the harm of placing industrial activity in residential districts, Municipal Petitioner Mount Pleasant Township, which once allowed oil and gas drilling in all areas, has experienced the following:

> As a result of the oil and gas development within its borders, Mount Pleasant has experienced an overturned tanker truck, an explosion, a spill and seven (7) fires at well sites. Furthermore, the Township was forced to close one (1) road and threatened to close one (1) other road that became impassable in residential areas due to an onslaught of heavy truck traffic that they were not otherwise built for. Along the same lines, there were eleven (11) oil and gas related reportable accidents/incidents due to the increased volume of truck traffic for the period of 2010-2011.

(R.R. at 784a). *See also*, (R.R. at 783a-784a, ¶¶ 5-7).

As for property values, the harm to property ownership occurs at the moment the potential for industrial activity enters an area. Governor Corbett, when serving as the Attorney General, acknowledged this immediate harm in a 2008 Consumer Advisory in which he stated that, "[s]elling or leasing the rights to your land should never be taken lightly because it means giving up certain privileges and ownership rights for parts of your property ... These leases can affect the value of your property, your ability to sell your home or your land, and give others broad access to your property for an extended period of time."[13] (R.R. at 942a-944a).

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[13] This Consumer Advisory would not apply to a surface owner who does not own their gas. In many places within the Commonwealth oil and gas is owned by out-of-state individuals who have leased their oil and gas to out-of-state oil and gas companies. *Chartiers Block Coal Co. v. Mellon*, 25 A. 597, 599 (Pa. 1893). The person who owns the oil and gas rights underlying the property has the implied right to use the surface estate to access and extract these natural resources. *Consol Coal Co. v. White*, 875 A.2d 318, 326 (Pa. Super. 2005).

Brian E. Coppola, a Robinson Township resident and property owner, states as follows:

> Additionally, as an individual landowner and resident of Robinson Township I own property and live in a district that has been zoned by the Township as a residential area allowing for compatible residential uses. I purchased this property in reliance upon the Township's zoning scheme and the protection it afforded to my home and my family. I could be assured that a landfill, factory or the like would not end up next door. Importantly, I wanted to know from the Township that I was building in a district that provides protection. Under Act 13, that line of inquiry must be answered with an immediate 'no.' As a landowner, Act 13 will immediately and entirely deny me of the protections once relied upon and afforded as a result of the Township's zoning and cause irreparable harm. The value of my home immediately stands in jeopardy as I am unable to guarantee any prospective buyer that their future neighbor will not be an industrial application.

(R.R. at 814a, ¶ 22). For further evidence of this concern, *see also*, (R.R. at 822a, ¶ 22).

Individual Petitioners' will suffer a decrease in property values due to the prospect that a wastewater impoundment could be installed less than a football field's distance from their homes, or that drilling operations could occur in close proximity to their homes. (R.R. at 814a, ¶ 22; R.R. at 822a, ¶ 22). This is only exacerbated by the prospect of contamination to a property's water supply, as illustrated in the Affidavit of Stacey Haney, due to industrial activity next door. (R.R. at 831a, ¶ 13). Such a threat of contamination harms Individual Petitioners who not only have interests in the equity value of their home, but also those who have well water and agricultural operations on their land. (R.R. at 814a-815a, ¶¶ 22-23; R.R. at 822a-823a, ¶¶ 22-23; R.R. at 831a-832a, ¶¶ 12-15, 19 (indicating water and health issues); R.R. at 793a, ¶ 23 ("I have already been approached by residents and builders who have decided not to build in Cecil Township as residential zoning districts no longer serve to protect their home and biggest investment from industrial activity.")).

Individual Petitioners have relied on the zoning ordinances in their respective municipalities to protect their investments in their homes and businesses, and to provide safe, healthy, and desirable places in which to live, work, raise families, and engage in recreational

activities. (R.R. at 814a-815a, ¶¶ 22-23; R.R. at 822a-823a, ¶¶ 22-23). Act 13 sweeps all this aside in favor of one industry—the oil and gas industry—and its desire to place its operations wherever and whenever it wishes to do so with as little resistance as possible.

Lastly, a variety of emissions result from each stage of natural gas drilling operations that affect local areas in different ways depending on topography, weather patterns, population density, and nearby uses.[14] (R.R. at 089a-094a). Act 13's uniform zoning scheme shows no regard for such concerns, placing uniform setbacks for impoundments, compressor stations, and processing facilities, among other operations. *See*, 58 Pa. C.S. § 3304. As such, there was no analysis of how local wind and weather patterns, local topography, and similar characteristics would exacerbate emission issues.[15] Act 13 imposes a one-size-fits-all regulatory scheme which fails to address, let alone protect and advance, the health, safety and welfare of the public living around these sites as the exposures they encounter will differ from site to site. (R.R. at 089a-094a; R.R. at 834a-938a.) Just as the United States Supreme Court in *Euclid* explained *supra*, the

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[14] For example, a compressor station operator appearing before the Zoning Hearing Board for Petitioner, Cecil Township, testified as follows:

> Q: Are there VOCs [volatile organic compounds] at compressor sites?
> A: Yes, there is [sic].
> Q: And do you know how many tons per year are emitted from a compressor site?
> A: I can tell you what our final build out would be for this site with eight engines and a maximum load it would be 19-and-a-half tons of VOCs a year.
> . . . .
> Q: Do you know how far those emissions travel?
> A: It would depend on your topography and upon the meteorological conditions whether it's a windy day or not. And then you say how far they could travel, you know, you would be talking about a certain concentration that could be associated with that.

(R.R. at 090a-091a).

[15] In fact, sulfur dioxide, a neurotoxin, is so pervasive in drilling activities, a study in Texas demonstrated exposure to it could cause such severe health effects, based upon air disbursement mobility, that setbacks are recommended at least one (1) mile from all schools. (R.R. at 428a-438a).

Commonwealth Court below acknowledged the importance of zoning as tool for keeping these issues away from residential zones: "Zoning is an extension of the concept of a public nuisance which protects property owners from activities that interfere with the use and enjoyment of their property." *See*, Exhibit 1, at p. 27.

Other than the minimum setbacks written into the Act, the Commonwealth imposes no density limitations as to the number of impoundments, well sites or compressor stations that may be placed in any particular district; there are no limitations on the hours of operations, lighting or emissions; there are no requirements for soundwalls, vapor recovery units, or fencing; and there are no limitations or setbacks on the around-the-clock heavy truck traffic to and from these sites. Additionally, these minimum setbacks exist only from existing structures; there are no setbacks for roads or from property lines. This provides little protection to those properties which either do not have an existing structure on it or larger properties where a building sits farther from the property boundary. As a permitted use by right, there is no forum or means for a municipality to minimize any negative consequences from surrounding uses, affording no way to protect the health, safety and welfare of its residents.

Notwithstanding the foregoing, the Commonwealth and the Dissent suggest that the General Assembly struck an appropriate balance because adequate protections have been written into Act 13, including through the use of setbacks and the permitting process. *See*, Brief of Attorney General, at p. 34; Exhibit 1, at PKB-4. In response to these assertions, the Majority Opinion correctly points out that:

> [T]hose additional setbacks are based upon industry standards regarding industrial operations, and that the added 'consideration' that the operations, the resultant light, noise and traffic, has to be permitted 24 hours a day. None of these 'considerations' would be necessary if the industrial uses included in the definition of oil and gas operations were not allowed because they are incompatible with the other uses in that district."

See, Exhibit 1, at p. 34, fn. 22.

Nevertheless, these "protections" provided for by Act 13 fail to account for a number of the above-explained concerns that are inherently tied to the introduction of industrial operations into residential and other non-industrial zones. Also, roads, lights, emissions, truck traffic and noise know no setbacks or limitations, and children playing or utilizing yards or playgrounds within the three-hundred (300) foot setback lack similar protection. *See*, *Euclid*, 272 U.S. at 391. Moreover, no Pennsylvania court has condoned the utilization of setbacks as a tool to comply with the constitutional basis for a zoning district. *See*, *Best*, 141 A.2d 606.

The Commonwealth was constitutionally required to consider such local variables and issues prior to enacting any zoning regulation, including recognition of community comprehensive plans, local community development objectives, varied zoning districts and consideration of the health, safety, welfare and morals of local communities. *See*, 53 P.S. § 10603(a), 10604(1) & (5), 10605. Rather, by enacting Act 13, the Commonwealth not only failed to comply with constitutional limitations on zoning power, but also it failed to apply any standard whatsoever. Despite engaging in zoning, the Commonwealth ignored the obligations and limitations in the Pennsylvania and United States Constitution. As a result, Act 13's uniform zoning scheme is not "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). Based upon the foregoing, the Commonwealth Court correctly held that Act 13 is an improper use of the Commonwealth's police power and violates Article I, Section 1 of Pennsylvania Constitution and the 14th Amendment of the U.S. Constitution. Accordingly, the Commonwealth Court's decision as to Count I of the Petition for Review must be affirmed.

2. This Honorable Court should affirm the July 26th Order because the Commonwealth Court properly determined that Act 13 violates Article I, Section 1 of the

Pennsylvania Constitution because it allows for incompatible uses in like zoning districts and therefore constitutes an unconstitutional use of zoning districts.

a. Zoning Districts & Compatibility of Uses

The Commonwealth Court aptly held that, "58 Pa. C.S. § 3304 is a requirement that zoning ordinances be amended in violation of the basic precept that 'land-use restrictions designate districts in which only compatible uses are allowed and incompatible uses are excluded.'" *See*, Exhibit 1, at p. 34. (*citing*, *City of Edmonds*, 514 U.S. at 732.). Agency Appellants attempt to assert that this "basic precept" of zoning is "unfounded and inconsistent" with Pennsylvania law. *See*, Brief of Agency Appellants, at p. 21. Notwithstanding the Commonwealth's arguments otherwise, it is clear that *City of Edmonds* supports this 'basic precept' of zoning:

> Land use restrictions aim to prevent problems caused by the 'pig in the parlor instead of the barnyard.' In particular, reserving land for single-family residences preserves the character of neighborhoods, securing 'zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.'

City of Edmonds v. Oxford House, Inc., 514 U.S. 725, 732-733 (1995). (citations omitted).

That this Honorable Court has never cited to the *City of Edmonds* case is irrelevant as its precedential value as U.S. Supreme Court case is clear. *See*, Brief of Agency Appellants, at pp. 17, 21-22. Furthermore, Agency Appellants' statement that "no decision of [the Pennsylvania Supreme] Court (or of the Commonwealth Court, aside from the present case) has defined the outer parameters of lawful zoning according to the so-called 'basic precept' on which the lower court's ruling rests," is patently untrue. *Id.* at 21. Agency Appellants make this statement unsupported by contrary case law and fail to explain its basis in light of the plethora of case law supporting this position that has been cited by the Petitioners. Most notably, the U.S. Supreme Court has similarly held that when zoning is constitutionally performed with the aim of

benefitting the health, safety, morals or general welfare of a community, such a goal is routinely accomplished by placing compatible uses in like districts. *See*, *Euclid*, 272 U.S. 365.

Proper zoning, therefore, is accomplished through the use of districts rather than by independent parcels. An example of this can be seen through any traditional residential district which allow for only traditionally residential activities as uses permitted by right within the district. Local ordinances which grouped together residential uses and disallowed industrial uses as a permitted use by right, including oil and gas drilling, withstand constitutional scrutiny and were previously designated as a valid use of the police power prior to the enactment of Act 13. *See*, *Huntley & Huntley v. Borough of Oakmont*, 964 A.2d 855 (Pa. 2009).

Lawful zoning "necessarily requires that the picture of the whole community be kept in mind while dividing it into *compatibly related zones* by ordinance enactments." *Atherton Development Company v. Township of Ferguson*, 29 A.3d 1197, 1204 (Pa. Commw. Ct. 2011). (emphasis added). Establishment of zoning districts, and the associated restriction of certain uses in particular zones, must be done in conformance with a comprehensive plan for community growth and development so that the classifications will allow the community to develop in an orderly manner while observing the public interest of the community as a whole. *Swade v. Zoning Board of Adjustment of Springfield Twp.*, 140 A.2d 597, 598, (Pa. 1958); *Best v. Zoning Board of Adjustment of the City of Pittsburgh*, 141 A.2d 606, 610 (Pa. 1958); *In re Appeal of Realen Valley Forge Greenes Associates*, 838 A.2d 718, 729 (Pa. 2003).

Municipal Petitioners have established multiple zoning districts within their boundaries—such as residential, commercial and industrial districts—based on a review of numerous factors, including population density, compatibility of uses, topography, road access, and existing development patterns. Within each zoning district, Municipal Petitioners have provided for certain, limited types of uses to ensure that development of land within each district is of the

same general character, in order to protect the health, safety morals and welfare of the community and to provide for orderly growth and development. *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365 (1926). As a necessary component to establishing zoning districts, Municipal Petitioners have also classified land uses in each particular district according to the intensity of the use. Through use of these districts, Municipal Petitioners have zoning ordinances in place that allow for oil and gas activities in their municipalities, and that provide for a balance between the safety of citizens, orderly development of the community, and the development of oil and gas operations. Jointly, Municipal Petitioners have close to 150 unconventional wells drilled within their borders. (R.R. at 064a, ¶ 31).

b. Spot Zoning

This Honorable Court has unequivocally held that differential zoning of particular parcels or uses, without a reasonable basis for the differentiation in a zoning district that is not compatible with that use, commonly known as "spot zoning," is an unconstitutional abuse of the police powers entrusted in the sovereign. *In re Appeal of Realen Valley Forge Greenes Associates,* 576 Pa. 115, 133, 838 A.2d 718, 729 (2003). This Court has deemed spot zoning to be "an arbitrary exercise of police powers that is prohibited by our Constitution. . . . [T]he most important factor in an analysis of a spot zoning question is whether the rezoned land is being treated unjustifiably different from similar surrounding land." *Id.* at 729 (Pa. 2003) (internal citations and quotations omitted). A municipality cannot simply "put[] on blinders and confine[] its vision to just one isolated place or problem within the community, disregarding a community-wide perspective..." *Atherton Development Company*, 29 A.3d at 1204 (*citing*, *Twp. of Plymouth v. Cnty. of Montgomery*, 109 Pa. Commw. Ct. 200, 531 A.2d 49, 57 (1987)).

Based upon these principles, the Commonwealth Court noted that:

> While in spot zoning the land is classified in a way that is incompatible with the classification of the surrounding land, the same unconstitutional infirmity exists here. What we have under Act 13 is a 'spot use' where oil and gas uses are singled out for different treatment that is incompatible with other surrounding permitted uses.

See, Exhibit 1, at pp. 34-35, fn. 23.

As recognized by the Court below, the logical and practical extent of Act 13 will have the same effect as "spot zoning" in that it inevitably allows uses entirely incompatible with existing uses that are similar and compatible throughout varied zoning districts in the Commonwealth. The reason individuals or corporations seek the relief of re-zoning of selected parcels, which ultimately culminates in a spot zoning case, is the recognition that incompatible uses within an otherwise homogeneous zoning district would be unquestionably unconstitutional. Without the occurrence of rezoning a selected area of land, the requested use would not be permitted in light of the state and federal constitutional directives imposed upon a municipality by Section 605 of the MPC. *See*, 53 P.S. § 10605. ("Where zoning districts are created, all provisions shall be uniform for each class of uses or structures, within each district…"). Spot zoning or re-zoning of certain parcels results in the disintegration of protections afforded to landowners who purchase residential property in reliance upon the zoning district. If any non-compatible use can be inserted into any district, zoning districts would become irrelevant.

Oil and gas operations are inherently industrial. (R.R. at 828a-833a; R.R. at 089a-094a, 123a-136a). Nonetheless, under Act 13, drilling, hydraulic fracturing, compressor stations, and other operations must be allowed in every zoning district in a municipality, including residential, open space and resource protection districts. Act 13's injection of oil and gas operations—an otherwise industrial use—into residential, agricultural, commercial, conservation, and other districts is analogous to unconstitutional "spot zoning" and therefore subject to the same analysis. Allowing drilling operations as a permitted use in residential zones is a "differing

zoning treatment . . . which cannot be justified with reference to any of the community-wide concerns that serve as the legitimate basis for zoning in conformance with a comprehensive plan." *In re Realen Valley Forge Greenes Associates*, 838 A.2d 718, 731n.7 (Pa. 2003).

Agency Appellants contend that Act 13 is the antithesis of unconstitutional "spot zoning" because it creates a uniform zoning scheme which applies universally across the entire Commonwealth. *See*, Brief of Agency Appellants, at pp. 22-23. In other words, no municipality has been selected for individualized treatment. However, this analysis dodges the real issue. Spot zoning considerations are based upon a parcel-by-parcel analysis of uses occurring within a specific zoning district. The problem that Act 13 presents is that it allows for uses which are incompatible, and hence non-uniform, from all the other designations permitted within a certain district. It is irrelevant that the law is uniform in the sense that a neighboring municipality also may be forced to permit an industrial application in an area where a house sits next door.

Further, when Act 13's provisions authorizing oil and gas development in every district are inserted into existing zoning ordinances, they *do* result in parcels of lands "being singled out for treatment unjustifiably differing from that of similar surrounding land." *Appeal of Mulac*, 418 Pa. 207, 210, 210 A.2d 275, 277 (1965). This is because oil and gas property owners are allowed to place an industrial use in the form of a wellpad, a compressor station, a gas processing facility, or a frack water impoundment on their property, whereas all the other parcels in the district cannot put an industrial use such as a factory, a quarry, or an asphalt plant on their own property, and yet all the properties are in the same district with no distinguishing features.

Act 13 creates what can be classified as a "reverse spot zone." This Honorable Court has confirmed the invalidity of reverse spot zoning or leaving a plot of land as one type of zone as the surrounding land is re-zoned into an incompatible type. *See e.g., In re Realen Valley Forge Greenes Associates*, 576 Pa. 115, 133, 838 A.2d 718, 729 (2003). In articulating the argument

against reverse spot zoning, this Honorable Court has recently explained the grounds to find this kind of zoning act invalid and unconstitutional: "the rezoning and development of surrounding lands narrows the legislative focus to a single property or small area the differing zoning treatment of which can not be justified with reference to any of the community-wide concerns that serve as the legitimate basis for zoning in conformance with a comprehensive plan." *In re Realen Valley Forge Greenes Associates*, 576 Pa. 115, 136 n.7 (2003); *see also, Main Street Development Group, Inc. v. Tinicum Tp. Bd. of Supervisors*, 19 A.3d 21, 27-28, 29-30 (Pa. Commw. 2011) (declaring that the purposes of zoning districts must be respected). Act 13 is effectively a "reverse spot zone" that is invalid because it unduly disturbs the expectations of the districts by allowing oil and gas development to occur where all other industrial uses are prohibited or limited.

Act 13 aims to allow as much oil and gas activity as possible throughout every municipality. It contains no justification showing that the allowance of one type of industrial use next to incompatible residential, commercial, and agricultural uses is grounded in "the characteristics of the tract and its environs." *In re Realen Valley Forge Greenes Associates*, 838 A.2d at 730. There is no basis to conclude that each particular locality within the Commonwealth is well suited to handle the introduction of industrial oil and gas operations into each and every one of its already-classified zones.

To illustrate, Petitioner Mount Pleasant Township once lived under what would be the result of Act 13 and the zoning scheme that the General Assembly has purported to create. *See*, Ex. 1, at ¶ 5. Mount Pleasant allowed drilling operations as a permitted use in all zoning districts with no site-by-site determinations or municipal oversight. (R.R. at 783a). As a Mount Pleasant has explained:

> As a result of such lack of local controls, the industry unrelentingly moved forward and developed its operations with full force in all areas and zoning districts in the Township without any consultation with the Township or consideration of local characteristics, orderly development or comprehensive plans. This disorderly style of development that has been notorious for acting first then determining the consequences of those actions later, has rendered useless and eliminated areas of the Township which would have been otherwise reserved for differing aspects of community growth including, for example, residential or other developments.

(R.R. at 783a-784a; ¶¶ 5-6).

After over one hundred Marcellus (100) wells were drilled, four (4) hazardous wastewater impoundments were constructed and miles of pipeline laid, the Township recognized the need to consider the unique characteristics of each locale and subsequently revised its oil and gas ordinance to allow for oil and gas operations as conditional uses. (R.R. at 784a-786a, ¶¶ 7, 10-13).

Despite the well-settled rule of law, Act 13 has unlawfully created a non-uniform class by mandating industrial activities in residential and other non-industrial areas.[16] The U.S. Supreme Court has stated that:

> "...the exclusion of buildings devoted to business, trade, etc., from residential districts bears a rational relation to the health and safety of the community. Some grounds for this conclusion are promotion of the health and security from injury of children and others by separating dwelling houses from territory devoted to trade and industry ... aiding the health and safety of the community, by excluding from residential areas the confusion and danger of fire, contagion, and disorder, which in greater or less degree attach to the location of stores, shops and factories."

Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 391 (1926).

Act 13 has effectively placed drilling operations on par with other uses that are permitted within any zoning district. For instance, because the density of oil and gas activities is not restricted, a

[16] By contrast, the state of Texas also has been successfully experiencing shale drilling for years, yet local zoning remains in place demonstrating the lack of necessity for Act 13.

single family home in a district zoned as residential may no longer expect solely residential neighbors but could potentially end up surrounded by impoundments holding hydraulic fracturing wastewater and dangerous chemicals only three-hundred (300) feet away on all sides. As horizontal drilling allows for operations to take place over a distance of one (1) mile[17], and as impoundments are not necessary or even used by many drilling companies, there is no need to place such uses in non-compatible districts.[18] In any other instance, allowing and storing hazardous waste in an otherwise residential area would amount to unconstitutional "spot zoning."

Contrary to the Dissent's suggestion that "Section 3304 does not require a municipality to covert a residential district into an industrial district," because of its lack of density restrictions, Act 13 does in fact allow a residential district to be entirely overtaken by industrial activity. *See*, Exhibit 1, at PKB-3. Act 13, however, allows for such a scenario which is clearly unconstitutional and violates Article I, Section 1 of the Pennsylvania Constitution and the 14th Amendment of the United States Constitution. The rationale for restricting uses to protect the health, safety and welfare by grouping compatible uses in defined districts ceases to function.

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[17] The Dissent argues that "[t]he natural resources of this Commonwealth exist where they are, without regard to any municipality's comprehensive plan." *See*, Exhibit 2, at PKB-3. However, Act 13 encompasses far more than simply the natural resources available in the Commonwealth. As explained *supra*, "oil and gas operations" are defined by Act 13 to include impoundments, compressor stations and processing plants. The Dissent functionally ignores that horizontal drilling operations can occur up to one (1) mile away from surface operations. Lastly, like all other uses in Pennsylvania, if a hardship is alleged the drilling industry would be able to seek relief by way of a variance. *See*, *Wilson v. Plumstead Twp. Zoning Hearing Bd.*, 936 A.2d 1061 (Pa. 2007); *see also*, 53 P.S. §10910.2.

[18] Likewise, as determined by the Pennsylvania Commonwealth Court, impoundments are "accessory uses" which are in need of a principle use. *Warner Jenkinson Company, Inc. v. Zoning Hearing Bd. of the Twp. of Robeson*, 863 A.2d 139, 143 (Pa. Commw. Ct. 2004). As such, Act 13 has created a special classification for frac-water impoundments associated with drilling activities by allowing an accessory use to be placed in any area regardless of whether a corresponding principal use is similarly located.

Rather than creating uniform classes within each zoning district as required by the constitutional directives of Article I, Section 1 of the Pennsylvania Constitution, Act 13 singles out the oil and gas industry for special treatment without any basis grounded in the health, safety, welfare, and orderly development of local communities.[19] Act 13 contains no "community-wide perspective" of where oil and gas operations may be most appropriate, given all other uses in the community. *See*, *Atherton Development Company*, 29 A.3d at 1204 (*quoting*, *Twp. of Plymouth*, 531 A.2d at 57). Consequently, Act 13 leads to the anomaly of oil and gas operations as permitted in every zoning district, regardless of whether such operations are compatible with other uses in the zoning districts. Whereas other industrial uses are confined to industrial districts with like uses, according to the terms of Act 13, drilling and related land uses activities which are inherently industrial in nature will now transcend all zoning boundaries.

Act 13 causes zoning districts to contain entirely incompatible uses and it does so, consistent with unconstitutional "spot zoning," without any substantial relationship to the health, safety and welfare of local communities. As a result, the Act is an unconstitutional legislative act in violation of Article I, Section 1 of the Pennsylvania Constitution and is an arbitrary exercise of the Commonwealth's police power. Otherwise, the rationale for the constitutionality of a

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[19] Assuming that a zoning ordinance does not directly speak to a specific use, applicants will look to a zoning ordinance for a use in a zoning district most analogous to their proposed activity. Now, because Act 13 allows hazardous wastewater impoundments, or frac-ponds, associated with oil and gas operations as a permitted use in residential districts, other industries will likewise seek to place impoundments "used to store toxic and/or hazardous waste byproducts from manufacturing activities" within residential districts by asserting that their use is comparable to frac-ponds, as was the proposed used in *Warner Jenkinson Company, Inc. v. Zoning Hearing Bd. of the Twp. of Robeson*, 863 A.2d 139, 140 (Pa. Commw. Ct. 2004) (emphasis added) (finding impoundments an accessory use in need of a principal use). Such a scenario could either open the door to all impoundments used for any purpose being permitted in residential areas. Or, conversely, if a municipality objected, it could result in an equal protection claim against a municipality which denies the applicant's request to insert an additional incompatible use within a zoning district although it may serve similar functions to those uses otherwise permitted by the local zoning ordinance as directed by the General Assembly.

residential district that serves to protect the health, safety and welfare ceases to exist and zoning districts as a whole become unconstitutional. The Commonwealth Court's decision as to Count II of the Petitioner fore Review must be affirmed.

3. This Honorable Court should affirm the July 26th Order because the Commonwealth Court properly determined that Act 13 prevents local municipalities from meeting its Constitutional and statutory obligation to protect the health, safety, morals and public welfare of local communities through zoning regulations in violation of the Municipalities Planning Code and Article I, Section 1 of the Pennsylvania Constitution.

a. The Role of the Municipalities Planning Code

The Commonwealth of Pennsylvania, through enactment of the Municipalities Planning Code ("MPC"), vested local government with the police power to establish zoning districts, and did so in recognition of the fact that to be constitutional, zoning must reflect the uniqueness of each community. *See,* 53 P.S. 10101 *et seq.* The MPC is the Legislature's directive for the unified regulation of land use and development. *Gary D. Reihart, Inc. v. Carroll Township,* 487 Pa. 461, 466, 409 A.2d 1167, 1170 (1979). In recognition of the constitutional limits of the sovereign's authority to exercise the police power, the MPC prescribes a detailed framework related to the enactment of zoning regulations, including, *inter alia*:

a. Zoning ordinances should reflect the policy goals of the statement of community development objectives . . . and **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) (emphasis added);

b. The provisions of zoning ordinances shall be designed to **promote, protect and facilitate** any or all of the following: the **public health, safety**, morals, and the **general welfare**; **coordinated and practical community development**... 53 P.S. § 10604(1) (emphasis added);

c. The provisions of zoning ordinances shall be **designed to accommodate reasonable overall community growth**, including population and employment growth, and opportunities for development of a variety of residential dwelling types and nonresidential uses. 53 P.S. § 10604(5) (emphasis added); and

d. In any municipality . . . which enacts a zoning ordinance, no part of such municipality shall be left unzoned. The provisions of all zoning ordinances may be classified so that **different provisions may be applied to different classes of situations, uses and structures** and to such various districts of the municipality as shall be described by a map made part of the zoning ordinance. **Where zoning districts are created, all provisions shall be uniform for each class of uses or structures, within each district**. . . 53 P.S. § 10605 (emphasis added).

Despite the General Assembly's efforts, Act 13 cannot override Petitioners' mandate of how zoning is implemented and approved at the local level, as defined in the MPC. Rather than being a merely policy choice, the MPC is the tool by which the constitutional directives of the U.S. Supreme Court and Pennsylvania Supreme Court regarding zoning are accomplished.

b. Municipalities' Comprehensive Plans

The Commonwealth Court correctly reasoned that:

> 58 Pa. C.S. § 3304 requires zoning amendments that must be normally justified on the basis that they are in accord with the comprehensive plan, not to promote oil and gas operations that are incompatible with the uses by people who have made investment decisions regarding businesses and homes on the assurance that the zoning district would be developed in accordance with comprehensive plan and would only allow compatible uses.

See, Exhibit 1, at pp. 32-33.

As such, Act 13 violates Article I, Section 1 of the Pennsylvania Constitution because Act 13 authorizes oil and gas development activities as a permitted use in every zoning district irrespective of compatibility. This renders it impossible for municipalities to comply with the MPC because Act 13 interferes with a municipality's ability to create new or to follow existing comprehensive plans, zoning ordinances or zoning districts that serve to protect the health, safety, morals and welfare of citizens and to provide for orderly development of the community.

Act 13 requires that Municipal Petitioners conform their zoning ordinances to the specific framework in the Act or face a validity challenge by oil and gas operators and others "aggrieved by" zoning affecting oil and gas operations. 58 Pa. C.S. § 3305(b). Municipal Petitioners must

implement this scheme, or face the immediate threat of litigation, fees and loss of impact fee revenue *regardless* of Municipal Petitioners' other obligations under the MPC and Article I, Section 1 of the Pennsylvania Constitution. Act 13 requires Municipal Petitioners to provide for "reasonable development" of oil and gas resources in a vacuum, regardless of the balancing that the MPC and Pennsylvania Constitution require given local resources and property uses.

In enacting zoning ordinances, Municipal Petitioners must comply with a number of duties under the MPC and the Pennsylvania Constitution. The MPC and the Constitution place strict limitations on municipal officials, requiring that zoning ordinances be enacted for only specific purposes, in recognition of the property rights guaranteed by Article I, Section 1 of the Pennsylvania Constitution. *See*, 53 P.S. § 10604. To illustrate, Municipal Petitioners must design these ordinances "[t]o accommodate reasonable *overall community growth*, including population and employment growth and opportunities for development of a variety of residential dwelling types and non-residential uses." *In re Realen Valley Forge Greenes Associates*, 838 A.2d 718, 729 (Pa. 2003) (*citing*, 53 P.S. § 10604(5)) (emphasis added).

> As regulations grounded in the delegated police power, zoning must accomplish "an average reciprocity of advantage" so-termed by Mr. Justice Holmes in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415, 43 S.Ct. 158, 67 L.Ed. 322 (1922), by which "[a]ll property owners in a designated area are placed under the same restrictions, not only for the benefit of the municipality as a whole **but also for the common benefit of one another.**" *United Artists Theater Circuit, Inc. v. City of Philadelphia, Philadelphia Historical Commission*, 528 Pa. 12, 595 A.2d 6, 13 (1991).

Id. (emphasis added).

In order to comply with this constitutional directive, zoning ordinances "shall generally implement the municipal and multi-municipal comprehensive plan or, where none exists, the municipal statement of community development objectives." 53 P.S. 10303(d). Comprehensive plans must include a number of components, such as a statement of future development

objectives, a land use plan, plan for meeting housing needs of residents, "statement of the interrelationships among the various plan components, which may include an estimate of the environmental, energy conservation, fiscal, economic development and social consequences on the municipality." 53 P.S. 10301(a).

Municipal Petitioners have sought to comply with these various duties through their respective zoning ordinances, which consider the unique nature of each municipality and its planning objectives, orderly development, the health, safety, and welfare, of its citizens, and the reasonable development of minerals. Municipal Petitioners have worked to strike the balance required by the MPC and the Pennsylvania Constitution. As such, Municipal Petitioners' comprehensive plans do not authorize or anticipate industrial activities in their residential zones. Despite this long-standing framework, Act 13 forces Municipal Petitioners to violate *all other* duties required by the MPC and the Constitution, except for providing for the "reasonable development" of oil and gas resources. Municipal Petitioners must now enact "one-size-fits-all" 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).

The Act's zoning scheme does not account for the unique nature and resources of each municipality, the uses already in place, or the future growth plans of the municipality, as is required. Act 13 likewise does not account for Municipal Petitioners' various comprehensive plans, which embody the general development objectives, and present and future needs of the municipality for *all* uses and *all* resources, not simply the development of oil and gas resources. Municipal Petitioners must now enact Act 13's oil and gas zoning scheme despite what their comprehensive plans dictate for orderly development in the municipality.

Act 13's oil and gas zoning scheme places Municipal Petitioners in a position where they must *comply with the Act and violate the MPC*, including its provisions designed to protect private property rights under Article I, Section 1 of the Pennsylvania Constitution. In order to comply with Act 13's zoning scheme, Municipal Petitioners must essentially upset the expectations and rights of all other property owners, including Individual Petitioners, *except for oil and gas owners*. Petitioners have invested time and resources into their properties based on existing zoning ordinances and comprehensive plans. (R.R. at 814a-815a, ¶¶ 22-23; R.R. at 822a-823a, ¶¶ 22-23). As Act 13 violates the constitutional basis for zoning, Municipal Petitioners cannot abide by Act 13 without, in turn, violating the Pennsylvania and United States Constitutions. Therefore, the Commonwealth Court decision as to Count III of the Petition for Review must be affirmed.

4. This Honorable Court should affirm the July 26th Order because the Commonwealth Court properly determined that the delegation of powers to the Pennsylvania Department of Environmental Protection in Act 13, allowing the agency to grant waivers without defined standards, is an unconstitutional breach of the doctrine of the non-delegation doctrine and the separation of powers embodied in the Pennsylvania and United States Constitutions.

Section 3215(b)(4) of the Act is an unconstitutional delegation of legislative powers from the General Assembly to the Department of Environmental Protection ("Department") and the Commonwealth Court's unanimous entry of Summary Relief in favor of the Petitioners and the accompanying declaration that Section 3215(b)(4) of the Act is null and void must be affirmed by this Court. [20] Section 3215 regulates the location of oil and gas wells and provides for mandatory setback distance requirements from, *inter alia,* bodies of water, wetlands and water sources. 58 Pa. C.S. § 3215. These setback distances are indicative of the General Assembly's

[20] The section of the Commonwealth Court's Order granting Summary Relief as to Count VIII of the Petition for Review and declaring Section 3215(b)(4) to be unconstitutional was joined by all of the judges.

policy determination that these features must be protected from encroachment by oil and gas wells. *Id.* Nonetheless, through Section 3215(b)(4) of Act 13, the General Assembly has ***mandated*** that the Department issue waivers to these setback distances, without including any substantive guidance to the Department to assist it in issuing the waivers from setback distances that it is compelled to approve. Thus, by requiring the Department to grant waivers of setback distances without any substantive guidance, the General Assembly has unconstitutionally delegated basic, lawmaking tasks to an administrative agency.

Section 3215 of Act 13 contains numerous provisions that regulate where oil and gas wells may be located, to protect buildings, drinking water wells, bodies of water, reservoirs and wetlands. *Id.* However, Section 3215 also allows parties to obtain waivers from these protective setback requirements. In relevant part, section 3215(b)(4) provides that, "[t]he department *shall waive* the distance restrictions upon submission of *a plan* identifying additional measures, facilities or practices to be employed during well site construction, drilling and operations necessary to protect the waters of this Commonwealth. The waiver, *if granted*, shall include additional terms and conditions required by the department necessary to protect the waters of this Commonwealth." *Id.* at § 3215(b)(4) (emphasis added). This open-ended, unrestricted grant of authority from the General Assembly to the Department to make fundamental policy choices concerning the setback distance from oil and gas wells to sensitive features, including drinking water sources, contravenes well-settled law that prohibits the General Assembly from delegating basic policy-making determinations to administrative agencies such as the Department.

The non-delegation doctrine is rooted in Article II, Section 1 of the Pennsylvania Constitution, which provides that "[t]he legislative power of this Commonwealth shall be vested in a General Assembly, which shall consist of a Senate and a House of Representatives." PA.CONST. ART. II § 1. This Court has held that "[a] fundamental principle of our constitutional

law is that the power conferred upon a legislature to make laws cannot be delegated by that branch of government to any other body or authority." *Archbishop O'Hara's Appeal*, 131 A.2d 587, 593 (Pa. 1957). Although the General Assembly is prohibited from delegating the power to make a law, it may vest an administrative agency with the authority and discretion to execute the law. *Belovsky v. Redevelopment Authority,* 54 A. 277, 283-84 (Pa. 1947). However, while the General Assembly is free to confer such authority on an administrative agency, this Court has found that it must be limited to "a prescribed standard or standards under which the authority and discretion are to be exercised." *Id.*

The delegation language of Section 3215(b)(4) is constitutionally deficient because it does not contain any actual standards to guide or constrain the Department's exercise of discretion in its evaluation of requests for waivers from water body and wetland setbacks, 58 Pa. C.S. § 3215(b)(4). Section 3215(b)(4), *requires* the Department to grant waivers of setback distance restrictions as long as an oil and gas operator submits a plan "identifying additional measures, facilities or practices to be employed during well site construction, drilling and operations necessary to protect the waters of this Commonwealth." 58 Pa. C.S. § 3215(b)(4). The General Assembly has provided the Department with no guidance as to how it must consider and weight these "additional measures, facilities or practices to be employed during well site construction, drilling" and what constitutes the "operations necessary to protect the waters of this Commonwealth" in order to determine the extent of the waiver setback that is applicable, yet compels the Department to waive the setbacks. *Id.*

In practice, the General Assembly requires the Department to ignore the oil and gas well location setback restrictions contained elsewhere in Section 3215 and to create and apply totally new setbacks in the absence of any substantive standards, guidelines or benchmarks from the General Assembly. This places the Department in the position of the General Assembly, making

policy choices based upon little more than broad-based considerations of protecting the waters of the Commonwealth. Contrary to the Commonwealth's contentions, it is the General Assembly's mandate that the Department must issue waivers that makes Section 3215(b)(4) particularly egregious. As referenced by Agency Appellants, the previous iteration of the Oil and Gas Act allowed the Department to exercise its discretion concerning whether or not to grant a waiver. *See,* 58 P.S. § 601.25 (". . . The department may waive such distance restrictions. . .") (emphasis added). Thus, the Department had the ability to refuse to issue waivers. By requiring the Department to issue waivers, the General Assembly has eliminated the Department's ability to refuse to grant waivers and therefore has obligated the Department to make policy choices that are solely for the General Assembly to decide. 58 Pa. C.S.§ 3215(b)(4).

This unfettered discretion to make basic policy choices regarding the location of wells is not limited to the Department's analysis of an application. Rather, Section 3215(b)(4) also allows the Department to determine and impose "additional terms and conditions" on waivers to protect Commonwealth waters. Again, despite entrusting the Department with the power to impose conditions on the location of oil and gas wells, the Act is devoid of any criteria that the Department must consider when imposing such conditions, including whether there is any minimum setback that cannot be waive regardless of the operator's request.

In its unanimous Opinion as to Count VIII of the Petition for Review, the Commonwealth Court recognized that "[i]n authorizing a waiver, Section 3215(b)(4) gives no guidance to DEP that guide and constrain its discretion to waive the distance requirements from water body and wetland setbacks. Moreover, it does not provide how DEP is to evaluate an operator's 'plan identifying additional measures, facilities or practices to be employed . . . necessary to protect the waters of this Commonwealth.' 58 Pa. C.S. § 3215(b)(4)." *See*, Exhibit 1, at pp. 51-52. The Commonwealth Court concluded that its "lack of guiding principles as to how DEP is to judge

operator submissions" rendered it an unconstitutional delegation of power because it "provides insufficient guidance to DEP as to when to grant a waiver from the setback requirements established by the Legislature." *See*, Exhibit 1, at p. 52. To reach the conclusion that Section 3215(b)(4) was an unconstitutional delegation of lawmaking powers from the General Assembly to an administrative agency, the Commonwealth Court properly relied on and applied this Court's approach to the non-delegation issue in *Pennsylvanians Against Gambling Expansion Fund, Inc. v. Commonwealth,* 877 A.2d 383 (Pa. 2005) ("*PAGE*").

In *PAGE,* this Court evaluated, *inter alia,* whether Section 1506 of the Pennsylvania Race Horse Development and Gaming Act ("Gaming Act") was an "impermissible grant of legislative authority to the Gaming Control Board because the General Assembly has unconstitutionally empowered the Board to act like a super-zoning board or authority with limited and unfettered description." *Id.* at 415. After evaluating the terminology of the Gaming Act, this Court stated that "[w]hile *Section* 1506 allows the [Gaming Control] Board in its discretion to consider local zoning ordinances when reviewing an application for a slot machine license and to provide a 60-day comment period prior to final approval, the [Gaming Control] Board is not given any guidance as to the import of the same." *PAGE* at 418-19. Reacting to the unlimited discretion vested in the Gaming Control Board via Section 1506, this Court concluded that "as a matter of law, *Section 1506* does not comply with the dictates of *Article II, Section 1* insofar as the General Assembly has failed to provide adequate standards and guidelines required to delegate, constitutionally, the power and authority to execute or administer that provision of the [Gaming] Act to the [Gaming Control] Board." *Id.* at 419.

In light of the extensive similarities between Section 3215(b)(4) of Act 13 and Section 1506 of the Gaming Act, the Commonwealth Court's application of *PAGE* was appropriate. Like Section 1506 of the Gaming Act, Section 3215(b)(4) sets forth general considerations for an

administrative agency to consider but provides no guidance as to the weight or import of those factors in the agency's deliberation. *Compare,* 4 Pa. C.S. § 1506; 58 Pa. C.S. § 3215(b)(4). Both this Court in *PAGE* and the Commonwealth Court in its Opinion recognized that the almost limitless discretion of administrative agencies to consider and render determinations, without any meaningful standards and guidelines, constituted a violation of Article II, Section 1 of the Pennsylvania Constitution. Despite the readily apparent applicability of *PAGE* to the instant proceeding, the Agency Appellants instead contend that this Court's decision in *Eagle Environmental II, LP v. Commonwealth, Department of Environmental Protection,* 884 A.2d 867 (Pa. 2005) is more analogous to Section 3215(b)(4) and should have been applied by the Commonwealth Court. However, *Eagle Environmental II* is wholly dissimilar to this case.

In *Eagle Environmental II,* this Court considered, *inter alia*, whether a "Harms/Benefits Test" included as part of the review process for permit applications under the Solid Waste Management Act ("SWMA") and the Municipal Waste Management Planning, Recycling and Waste Reduction Act ("Act 101") was an unconstitutional delegation of legislative power. *Id.* The primary and crucial difference between the "Harms/Benefit Test" under examination in *Eagle Environmental* II and the waiver provision in Section 3215(b)(4) of Act 13 is that the "Harms/Benefit Test" is part of a more comprehensive regulatory scheme and does not stand alone as the sole basis for approval or denial of an application, as Section 3215(b)(4) does. This critical difference makes application of the *Eagle Environmental II* holding to the case *sub judice* inappropriate.

Very clearly, the approval process for applications submitted under the SWMA and Act 101 is far more detailed and structured than the procedure for review of applications for waivers of setback requirements under Section 3215(b)(4) of Act 13. *Compare,* 25 Pa. Code §§ 271.127(a); 287.127(a); 25 Pa. Code §§ 271.127(b); 287.127(b); 25 Pa. Code §§ 271.127(c);

287.127(c); and 58 Pa. C.S. § 3215(b)(4). The substantial factual differences between the level of the Department's discretion in the SWMA and Act 101 considered in *Eagle Environmental II* and the Department's vast discretion pursuant to Section 3215(b)(4) prohibits the application of *Eagle Environmental II* as the Commonwealth has suggested, and instead demonstrates the appropriateness of the Commonwealth Court's reliance on *PAGE.* Just as *Eagle Environmental II* has no practical connection to the statutory scheme at issue in the case *sub judice,* the Appellants' alternative arguments in favor of overturning the Commonwealth Court's Order are similarly without merit.

Agency Appellants assert that Section 3215(b)(4) prevents the Department from 'arbitrarily granting distance setbacks to whomever, wherever, and however it wants; instead, it must receive and review a meaningful plan." *See*, Brief of Agency Appellants, at p. 28. This assertion is belied by the actual text of Section 3215(b)(4) which makes no mention of the word "meaningful," and does not describe what a "meaningful plan" would consist of. *See,* 58 Pa. C.S. § 3215(b)(4). Rather, Section 3215(b)(4) provides that, so long as a plan contain certain generic features, the Department *must* issue a waiver. *Id.* This interjection of what the PUC and the Department *believe* that the General Assembly *meant* is demonstrative of the fundamental problem with Section 3215(b)(4) as recognized by Commonwealth Court: the actual statutory provisions do not establish any restriction or control on the Department, which allows it limitless discretion to act as it chooses.

The Agency Appellants similarly err by arguing that "Section 3215 sets both a floor and a ceiling for the Department's discretion: it must at least see and require measures "necessary" to protect Commonwealth waters, but it cannot require more than what is necessary before issuing a permit." *See*, Brief of Agency Appellants, at pp 28-29. This "floor and ceiling" scheme offered by Agency Appellants in their Brief is irrelevant because Section 3215(b)(4) does not define

what "necessary" means in the context of the grant of waivers to setback requirements, 58 Pa. C.S. § 3215(b)(4). Although, as Agency Appellants suggest, the General Assembly *should* have established clear guidelines for the Department's exercise of its discretion, the General Assembly failed to do so, which, as the Commonwealth Court found, renders this section unconstitutional.

In light of the lack of specific language in Section 3215(b)(4) to constrain the Department's discretion, the Commonwealth contends that this Court must also examine other sections of Act 13, namely, Section 3202, for the restrictions upon the Department's exercise of discretion. However, Section 3202 of Act 13 is nothing more than a recitation of general, inoffensive considerations underlying the enactment of Act 13 as a whole. *See,* 58 Pa. C.S. § 3202; *see also*, Brief of Agency Appellants, at p. 29; Brief of Attorney General, at p. 37. By suggesting that Section 3202 represents the standard for the Department's exercise of its discretion in approving waivers, the Commonwealth has conceded that Section 3215(b)(4) vests the Department with powers on par with those possessed by the General Assembly, which is unconstitutional and underscores precisely why the Commonwealth Court's decision must be affirmed. Given the lack of any guiding principles as to how the Department is to judge operator submissions and develop proper protective conditions, the Department has been permitted to make legislative policy judgments otherwise reserved for the General Assembly. As recognized by the Commonwealth Court, through its application of this Court's jurisprudence, this framework is unconstitutional and, as a result, the Commonwealth Court's determination as to Count VIII of the Petition for Review must be affirmed.

5. This Honorable Court should affirm the July 26th Order because Petitioners each have legal standing to challenge the constitutionality of Act 13 and assert the claims stated in the Petition.

In order to maintain standing to challenge a governmental action, the aggrieved party must show a substantial, direct and immediate interest in the controversy. *See, e.g.*, *William*

Penn Parking Garage, Inc. v. City of Pittsburgh, 464 Pa. 168, 202 (1975); *Harrisburg School District v. Hickok*, 762 A.2d 398, 404 (Pa. Commw. Ct. 2000). A *substantial* interest requires that the aggrieved party have an interest in the case's outcome beyond that of the general public. *See*, *Harrisburg*, 762 A.2d at 404. A *direct* interest requires that the harm suffered by the aggrieved party be caused by the challenged governmental action. *Id.* An *immediate* interest requires a sufficiently close, non-remote causal connection between the challenged governmental action and the harm suffered by the aggrieved party. *Id.* There is no requirement that an aggrieved party's interest be a "legal right" in order for that party to have standing to challenge a governmental action. *William Penn*, 464 Pa. at 199-202 ("The requirement of a 'legal interest' tends to conceal the necessary construction of the legal rules relied upon by the challenger and therefore is not a useful guide to the determination of standing questions"). All groups of Petitioners have a substantial, direct and immediate interest in the resolution of this litigation.

a. Municipal Petitioners have standing because they have a direct, substantial and immediate interest in local government functions and their ability to pass effective legislation.

The Petitioners include seven (7) Pennsylvania municipalities,[21] (Robinson Township, Peters Township, South Fayette Township, Cecil Township, Mount Pleasant Township, Nockamixon Township and Yardley Borough). Additionally, Brian Coppola, Chairman of the Board of Supervisors of Robinson Township, and David M. Ball, Councilman for Peters Township, have joined in their official and individual capacities (all aforementioned Petitioners,

[21] Petitioners have received letters/resolutions of support from a number of municipalities including, but not limited to, Pittsburgh, Allegheny County; Dallas Township, Luzerne County; South Strabane Township, Washington County; Buffalo Township, Butler County; and Tinicum Township, Bucks County. (*See*, R.R. at 914a-982a).

collectively "Municipal Petitioners").[22] Act 13 imposes substantial, direct, and immediate obligations on Municipal Petitioners that will result in specific harms to their interests as governing entities distinct from the claims of their citizens, including adverse impacts that serve to affect their abilities to carry out their governmental functions, duties, and responsibilities under Pennsylvania law including their oaths to uphold the Pennsylvania Constitution (53 P.S. § 65501). (R.R. at 782a-827a, 945a-948a).

In light of the following considerations, the Commonwealth Court correctly determined that:

> In this case, the municipalities have standing to bring this action because Act 13 imposes substantial, direct and immediate obligations on them that affect their government functions. Specifically, 58 Pa. C.S. § 3304 requires uniformity of local ordinances to allow for the reasonable development of oil and gas resources. That will require each municipality to take specific action to ensure its ordinance complies with Act 13 so that an owner or operator of an oil or gas operations 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.

See, Exhibit 1, at p. 15.[23]

This Honorable Court has held that standing inquiries in Pennsylvania courts, unlike in federal courts, are prudential in nature:

> Our Commonwealth's standing doctrine is not a senseless restriction on the utilization of judicial resources; rather, it is a prudential, judicially-created tool meant to winnow out those matters in which the litigants have no direct interest in pursuing the matter. Such a requirement is critical because only when "parties have sufficient interest in a matter [is it] ensure[d] that there is a legitimate controversy before the court."

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[22] See Petitioners brief in support of their Cross-Appeal for discussion of the standing of the remaining Petitioners.
[23] This portion of the decision represented the view of the unanimous Court below.

In re Hickson, 573 Pa. 127, 135-36 (2003).

For purposes of standing, this Honorable Court has established that a municipality's interest in the outcome of a constitutional challenge to a state law is: (1) *substantial* when aspects of the state law have particular application to local governing functions (as opposed to general application to all citizens); (2) *direct* when the state law causes the alleged constitutional harm; and (3) sufficiently *immediate* when the municipality asserts factually-supported interests that are not speculative or remote. *City of Philadelphia v. Commonwealth of Pennsylvania*, 575 Pa. 542, 561-63 (2003) (holding that the City of Philadelphia had standing to challenge the constitutionality of a state law because "the City's present assertion that it is an aggrieved party is premised upon the effects of [the Act] upon its interests and functions as a governing entity, and not merely upon harm to its citizens[.]")

The Commonwealth Court has similarly held that subordinate government entities have standing to challenge state governmental actions and contest laws that directly impact local government functions, powers and obligations. *See, e.g., City of Philadelphia v. Commonwealth of Pennsylvania*, 575 Pa. at 561-62, 838 A.2d at 578; *City of Philadelphia v. Commonwealth of Pennsylvania*, 922 A.2d 1, 9-10 (Pa. Commw. Ct. 2003); *Harrisburg School District v. Hickok*, 762 A.2d 398, 404 (Pa. Commw. Ct. 2000) (later distinguished on separate ground); *Township of South Fayette v. Commonwealth of Pennsylvania*, 459 A.2d 41, 43-45 (Pa. Commw. Ct. 1983). For example, in *Harrisburg School District*, the Court held that a school district had standing to challenge the constitutionality of the Education Empowerment Act. 762 A.2d at 404. An important factor weighing in favor of standing was that the Commonwealth had removed the ability of the school district to manage its own affairs. *Id.* The Court rejected the Commonwealth's argument that "school districts have only those powers that the legislature has granted them, and creations of the state, such as school districts, do not have the power to

challenge the constitutionality of their creator's actions." *Id.*

Accordingly, a Pennsylvania municipality has standing to challenge a state governmental action when the alleged constitutional harm affects specific local governing functions and the municipality does not merely assert, in isolation, general constitutional claims on behalf of its citizens. *City of Philadelphia, et al v. Schweiker, et al*, 817 A.2d 1217, 1222-23 (Pa. Commw. 2003). This Honorable Court emphasized this distinction in *City of Philadelphia v. Commonwealth of Pennsylvania* when it rejected the Commonwealth's argument that Philadelphia lacked standing to bring a constitutional challenge against a state law because local government functions had been affected. 838 A.2d at 579.

Municipal Petitioners have zoning ordinances in place that allow for oil and gas activities within their municipalities, and that provide for a balance between the safety of citizens, orderly development of the community, and the development of oil and gas operations. As such, Municipal Petitioners have established multiple zoning districts within their boundaries—such as residential, commercial and industrial districts—based on a review of numerous factors, including population density, compatibility of uses, topography, road access, and existing development patterns. Within each zoning district, Municipal Petitioners have provided for certain, limited types of uses to ensure that development of land within each district is of the same general character, in order to protect the health, safety morals and welfare of the community. *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365 (1926). As a necessary component to establishing zoning districts, Municipal Petitioners have also classified land uses in each particular district according to the intensity of the use.

Act 13 imposes substantial, direct, immediate, and affirmative obligations on Municipal Petitioners that affect their local government functions. Under the Municipalities Planning Code ("MPC") and the Constitution, Municipal Petitioners are charged with specific obligations when

enacting zoning legislation. Act 13 imposes new, mandatory duties upon Municipal Petitioners that conflict with existing legal obligations imposed on them by the Municipalities Planning Code. Through Act 13, the Pennsylvania General Assembly has required Municipal Petitioners to immediately violate their duty to protect the health, safety and welfare of its citizens which conflicts with their elected officials' oath to uphold the U.S. and Pennsylvania Constitutions by mandating that Municipal Petitioners must:

a. modify their zoning laws in a manner that fail to give consideration to the character of the municipality, the needs of its citizens and the suitabilities and special nature of particular parts of the municipality; 53 P.S. § 10603(a).

b. modify their zoning laws in a manner that would violate and contradict the goals and objectives of Petitioners' comprehensive plans; 53 P.S. § 10605.

c. modify zoning laws and create zoning districts that violate Petitioners' constitutional duties to only enact zoning ordinances that protect the health, safety, morals and welfare of the community; *See*, 53 P.S. § 10604.

d. conduct Public Hearings to gather citizen comments regarding authorized oil and gas development in residential and commercial districts as a permitted use by right even though such comments and evidence cannot be considered by Petitioners who, by state law, must approve the state's zoning scheme regardless of the findings of the elected officials in violation of 53 P.S. § 10908.

e. conduct Public Hearings negating citizens' due process rights to meaningful participation in proceedings involving the adoption of a zoning ordinance; *Messina v. East Penn Twp.*, 995 A.2d 517 (Pa. Commw. Ct. 2010).

f. pass zoning laws without affording its citizens due process that will result in the zoning laws being *void ab initio*; *Luke v. Cataldi*, 932 A.2d 45 (Pa. 2007).

g. allow heavy industrial uses in all zoning districts, including residential areas, near homes, schools, churches and nursing homes in violation of 53 P.S. § 10605.

h. must enact zoning laws that do not allow for the orderly development of their respective communities; and, *See*, 53 P.S. § 10605.

i. adopt zoning laws that are an improper use of the sovereign's police powers in violation of the U.S. Constitution and Pennsylvania Constitution.

In order to implement the mandates of Act 13, Municipal Petitioners must completely re-

write their zoning codes and pass new land use ordinances that create special carve-outs for the oil and gas industry that are inconsistent with long-established municipal comprehensive plans. In many cases, Act 13's affirmative mandates conflict with Municipal Petitioners' duty under the Municipalities Planning Code to ensure that local zoning laws are based on the protection of the health, safety, morals, general welfare and orderly development of the community. 53 P.S. §§ 10603(j), 10605. Additionally, Act 13 imposes an affirmative obligation on municipalities to repeal, modify and amend existing ordinances that directly, *or even indirectly*, regulate oil and gas development. *See*, 58 Pa. C.S. §§ 3302-04. If Municipal Petitioners are found to be in noncompliance—including unintended noncompliance—with either the provisions of Act 13 or the MPC, they are subject to sanction. Yet, as demonstrated, it would be impossible to comply with both.

As stated in the Affidavit of a Cecil Township Supervisor:

> The Township and I, as a Supervisor, have to make a choice to either violate Act 13 and comply with the Pennsylvania Constitution and the Municipalities Planning Code and attempt to defend the Township in actions imposing sanctions for non-compliance with Act 13 including the denial of impact fee monies or immediately comply with Act 13 and violate the Pennsylvania Constitution, the Municipalities Planning Code and my oath of office. As a Supervisor, should I choose to protect the health, safety and welfare of our citizens and follow the Pennsylvania Constitution and the Municipalities Planning Code, I run the risk of violating Act 13 and having sanctions in the form of attorneys fees and costs being levied against the Township as called for in Act 13.

(R.R. at 791a, ¶¶ 15-16).

Further, as stated by the Chairman of the Nockamixon Township Board of Supervisors:

> As a Township Supervisor, I am obligated to carry out my authority in a way that ensures "sound fiscal management" and secures "the health, safety and welfare" of Township citizens. 53 P.S. § 65607(1).
>
> I must also carry out obligations imposed by other Commonwealth laws, including agency regulations. 53 P.S. § 65607(7).
>
> ***

As a supervisor, there is a risk that if I am found to have acted or failed to act in violation of the law I could be charged with a summary offense. 53 P.S. § 68501.

> If there is a finding that the Township violated the law, and the Township is subject to monetary sanctions, the Township Auditor may also attempt to subject me to a surcharge assessment, regardless of whether there has been any intent to violate the law. 53 P.S. § 65907.
>
> ***
>
> [T]there are conflicts between the dictates of Act 13 and the dictates of the Pennsylvania Constitution, the Municipalities Planning Code, and other state laws.
>
> If, in an attempt to honor my obligations under the Pennsylvania Constitution, there is a determination that the Township has violated Act 13, the Township may have to pay attorneys' fees and costs. If that happens, as a Supervisor I face the risk that I could be charged with a summary offense and assessed a surcharge. I face similar risks if, in an attempt to honor Act 13, there is a determination that the Township has violated the MPC or Pennsylvania Constitution.

(R.R. at 945a-946a, ¶¶ 2-10).

In conjunction with the mandates explained above, Act 13 requires Municipal Petitioners to bring all local zoning ordinances into conformity with the new law within 120-days[24] or face penalties. *See*, 58 Pa. C.S. § 3309(b). Specifically, if Municipal Petitioners are unable to comply within the 120-day deadline prescribed in Act 13, they are subject to challenge by a private party in front of the PUC or the Commonwealth Court, which could result in Municipal Petitioners losing access to any funds collected under Act 13's impact fee until they are able to revise their ordinances. 58 Pa. C.S. § 3308. Additionally, Municipal Petitioners face the real threat of paying attorney fees and costs in a court challenge, which poses a significant hindrance to municipalities already facing severe revenue difficulties. 58 Pa. C.S. § 3307. Contrary to the Commonwealth's assertions, because ordinances of Municipal Petitioners do not currently comply with the terms

[24] Act 13's original 120-day deadline for the modification of local zoning ordinances was extended by an additional 120-days as a result of the preliminary injunction the Commonwealth Court issued on April 11, 2012.

of Act 13, modification <u>will</u> be required or the various penalties granted under Chapter 33 of the Act, including sanctions or the loss of impact fee monies, will follow. *See*, Brief of Agency Appellants, at p. 41.

As recognized by *City of Philadelphia v. Commonwealth of Pennsylvania*, 575 Pa. at 561-62, 838 A.2d at 578, these are a cognizable harms where the General Assembly has "significantly interfere[d] with" Municipal Petitioners' ability to carry out its obligations, and removed rights such as judicial review that "are valuable in themselves" as a means of carrying out Municipal Petitioners' obligations. In *City of Philadelphia*, the Court observed that the challenged legislation repealed, for instance, provisions allowing for judicial review "were of substantial benefit to the City in its efforts to develop an approved financial plan, maintain its fiscal stability, and receive assistance from PICA." *Id.*

Act 13 provides Municipal Petitioners ***120 days*** to expend significant time, monies and resources to: 1) develop entirely new comprehensive plans and ordinances; 2) consult with their respective planning commissions and county planning commissions; 3) submit formal copies of proposed ordinances to municipal and county planning commissions; 4) submit the proposed ordinance to the Public Utility Commission for its review and direction; 5) advertise public notice of public hearings; 6) conduct public hearings; 7) submit revised formal copies of proposed ordinances to the appropriate planning commissions if public hearings resulted in any substantial changes to the proposal; and 8) publicly advertise for passage of the instruments and approve final ordinances and comprehensive plans. All of these activities results in the immediate expenditure of time and money that may be rendered unnecessary should the Court find Act 13 unconstitutional.

Petitioners have legal standing to prosecute this action because Act 13 imposes a radically new set of unconstitutional mandates on Municipal Petitioners that must be

accomplished in a very limited period of time, and Municipal Petitioners' failure to comply subjects them to sanctions.[25] *Zemprelli v. Daniels,* 496 Pa. 247, 252 436 A.2d 1165, 1167-68 (1981); *Arsenal Coal Co. v. Dept. of Environmental Resources,* 505 Pa. 198, 477 A.2d 1333, 1338 (1984); *City of Philadelphia v. Commonwealth of Pennsylvania,* 575 Pa. 542, 564, 838 A.2d 566, 580 (2003); and *Commonwealth of Pennsylvania v. Locust Township,* 600 Pa. 533, 548, 968 A.2d 1263, 1272 (2009). Act 13 places an unconstitutional mandate upon Municipal Petitioners which prevents Municipal Petitioners from fulfilling their constitutional and statutory obligations to protect the health, safety and welfare of their citizens from the industrial activity of oil and gas drilling. (R.R. at 828a-833a). Act 13 likewise prevents Municipal Petitioners from carrying out their constitutional obligation to protect public natural resources, by removing from Municipal Petitioners all meaningful authority over where oil and gas development will proceed in their respective municipalities. (R.R. at 945a-948a; R.R. at 946a-948a, ¶¶ 8, 11-24).

Municipal Petitioners are municipalities with yearly operating budgets ranging from several hundred thousand dollars to an excess of ten (10) million dollars. Municipalities that cannot afford to absorb the prospective of paying excessive attorney's fees and costs, as is now possible under Act 13, a figure that may bankrupt a smaller municipality, will take fewer chances and may be forced to be more lenient in its laws. By contrast, a more affluent municipality may be more aggressive and protective with its regulations as it can better absorb a potential award of attorney's fees and costs. Therefore, at issue is not only the prospect for sanctions, but, in some

[25] The Commonwealth has admitted that "[i]f a statute is declared unconstitutional, state and local officials are not required to follow the statute (and are in fact obligated not to) even though it still appears on the books." *See*, Commonwealth Respondents' Answer to Petitioners' Motion for a Preliminary Injunction, at p. 12. Such an admission further demonstrates the immediacy and substantiality of Petitioners' interest as their obligation not to follow an unconstitutional mandate will subject them to sanctions, including monetary penalties.

cases, the viability of the entire Township may be at stake. A supervisor of Municipal Petitioner Robinson Township states:

> As a Supervisor, should I choose to protect the health, safety, and welfare of our citizens and follow the Pennsylvania Constitution and the Municipalities Planning Code, I run the risk of violating Act 13 and having sanctions in the form of attorney fees and costs being levied against the Township as called for in Act 13. As the industry typically utilizes major law firms, attorney fees and costs could exceed $100,000. As the Township's yearly budget is typically $500,000 or less, the imposition of sanctions could serve to bankrupt Robinson Township.

(R.R. at 813a, ¶¶ 16-17).

Individuals vested with legislative powers have legal standing to contest procedural infringements upon their legislative duties and functions. *Zemprelli v. Daniels,* 496 Pa. 247, 252 436 A.2d 1165, 1167-68 (1981); *Ritter v. Commonwealth*, 120 Pa. Commw. Ct. 374, 548 A.2d 1317 (1988), aff'd *Ritter v. Commonwealth*, 521 Pa. 536, 557 A.2d 1064 (1989) (per curiam). This Honorable Court has acknowledged that, "[t]he existing case law addressing legislative standing reflects a sensible approach. Legislators and council members have been permitted to bring actions based upon their special status where there was a discernible and palpable infringement on their authority as legislators." *Fumo v. City of Philadelphia*, 972 A.2d 487, 501 (Pa. 2009) (emphasis added).

Act 13 prevents Municipal Petitioners from passing effective and constitutional legislation in order to protect the health, safety and welfare of its citizens from the industrial activity of oil and gas drilling. As a result of Act 13's obligations and restrictions, Municipal Petitioners, including Brian Coppola and David Ball in their official capacities, face a substantial and imminent risk of violating their oaths of office as local elected officials, whereby they swore to uphold the U.S. and Pennsylvania Constitutions as required by Pennsylvania law (53 P.S. § 65501). (R.R. at 810a-827a, 945a-948a). Municipal Petitioners also face the risk of committing a summary offense if they violate the Second Class Township Code. (R.R. at 946a, ¶ 9).

Furthermore, a surcharge could be levied where Municipal Petitioners' actions cause a financial loss to their respective municipalities, *even where no intent to violate the law is present.* (R.R. at 810a-827a, 945a-948a).

These harms alleged are quite clearly not illusory but force Municipal Petitioners to make real choices regarding the governance of their locales. While the Commonwealth alleges that the Petition is merely "dressed up" with "speculative" harms to Municipal Petitioners, the Commonwealth Court has reviewed direct evidence of the harms Municipal Petitioners face as a result of Act 13—*even in the face of the Commonwealth Court's preliminary and permanent injunctions.* As demonstrated in the Petition for Review, compressor station midstream operator MarkWest used the enactment of Act 13 to write a letter to Municipal Petitioner Cecil Township demanding a permit to construct a compressor station in an area in which the Zoning Hearing Board had previously determined it was incompatible. (R.R. at 794a, ¶¶ 30-32). MarkWest threatened that sanctions were imminent for non-compliance. On April 11, 2012, this Court preliminarily enjoined the effective date of Act 13 recognizing the immediate, real and irreparable harm Municipal Petitioners faced associated with such demands made upon their law. Disregarding this Court Order, MarkWest again twice contacted Cecil Township requesting, "a zoning certificate that indicates that a compressor station is a permitted use in the industrial zoning district" and subsequently requested review by the Commonwealth Court. (R.R. at 794a, ¶ 33). In addition, ordinances of Petitioners Robinson Township, Cecil Township and South Fayette Township have been challenged and are currently being reviewed by the PUC. Again, Municipal Petitioners must decide how to proceed with the threat of sanctions still looming. *See*, *Arsenal Coal*, 77 A.2d at 1338.

The immediacy of Municipal Petitioners' harm is further demonstrated by this Honorable Court's holding in *Franklin Twp., v. Commonwealth DER*, 452 A.2d 718 (Pa. 1982). In that case,

the Township appealed the issuance of a permit for a toxic waste disposal site and raised a number of environmental risks posed by the proposed disposal, similar to the hazardous waste impoundment activities permitted in all zoning districts by Act 13. *Id.* This Honorable Court determined the Township had standing because even the possibility of harm was immediate:

> **The direct and substantial interest of local government in the environment and in the quality of life of its citizenry cannot be characterized as remote.** We need not wait until an ecological emergency arises in order to find that the interest of the municipality and county faced with such a disaster is immediate. When a toxic waste disposal site is established, **undoubtedly there is an instantaneous change in the land on which it is located, and an immediate risk to the surrounding environment and quality of life. These critical matters must be addressed by local government without delay.** The environment which forms a part of the physical existence of the municipality or county has been altered and immediate attention must be given to the changed character if the local government is to properly discharge its duties and responsibilities. Furthermore, in the event of an environmental emergency, the local municipality and county would be the first line of containment and defense.

Id. at 722. (emphasis added).

Lastly, the Commonwealth's assertion that Municipal Petitioners lack standing because they failed to articulate a legally protected right is ungrounded. *See*, Brief of Attorney General, at p. 24. To establish standing, Municipal Petitioners need not articulate a legally protected right, but rather only a substantial, direct, and immediate interest. The long line of precedent flowing from the Pennsylvania Supreme Court's decision in *William Penn* firmly establishes that inquiries into whether a party has a "legal right" are irrelevant to standing in Pennsylvania. 464 Pa. at 199-202. For these reasons, Municipal Petitioners have a direct, substantial and immediate local government interest in the outcome of this case. As a result, the Commonwealth Court's decision regarding Petitioners' standing must be affirmed.

b. Individual Petitioners have standing to challenge the constitutionality of Act 13 because they face direct, substantial and immediate harm to their individual property and financial interests.

Petitioners also include Brian Coppola and David Ball (collectively, the "Individual

Petitioners") who have challenged Act 13 based upon the deprivation of their constitutional rights. The Commonwealth is misguided to the extent it argues that Individual Petitioners lack standing due to the fact that some of their alleged injuries may also occur to other members of the general public. It is irrelevant to a standing inquiry whether the substantial, direct and immediate harm asserted by the Petitioners is shared by other members of the public. "To deny standing to persons who are in fact injured simply because many others are also injured, would mean that the most injurious and widespread government actions could be questioned by nobody." *Parents United For Better Schools, Inc. v. School District of Philadelphia Bd. of Education*, 646 A.2d 689, 692 (Pa. Commw. Ct. 1994) (*quoting*, *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 688 (1973)).

Individual Petitioners have relied on the zoning ordinances in their respective municipalities to protect their investments in their homes and businesses, and to provide safe, healthy, and desirable places in which to live, work, raise families, and engage in recreational activities. In order to comply with Act 13's zoning scheme, Municipal Petitioners must essentially upset the expectations and rights of all other property owners, including Individual Petitioners, *except for oil and gas owners*.

Both Brian Coppola and David Ball are also residents of the Townships in which they serve as local elected officials. As individual landowners and residents of their respective Townships, they each own property and live in a district that has been zoned as a residential area allowing for compatible residential uses. They purchased their property and own their homes in residential zoning districts and did so in reliance on the protection afforded by their respective Townships' zoning schemes. (R.R. at 810a-827a). Each will suffer immediate and irreparable harm upon the implementation of Act 13 as they will no longer be able to rely on the fact that their next door neighbor will not be an industrial activity, which will serve to immediately

devalue their properties. As landowners, Act 13 will immediately and entirely deny these Petitioners of the protections once relied upon and afforded as a result of the Township's zoning.[26] The value of their homes immediately stands in jeopardy as they will be unable to make any guarantees to any prospective buyers.

Based upon these considerations, the Commonwealth Court correctly explained:

> Coppola and Ball allege that they are local elected officials acting in their official capacities representing their respective municipalities who could be subject to personal liability and who would be required to vote on the passage of zoning amendments to comply with Act 13.
>
> . . .
>
> They are also residents of the townships in which they serve as local elected officials. As individual landowners and residents, they live in a district that has been zone residential in which oil and gas operations are now permitted under Act 13. They will not be able to rely on the fact that their next-door neighbor will not use his or her property for an industrial activity that will serve to immediately devalue their properties.

See, Exhibit 1, at p. 16.

While Individual Petitioners satisfy the substantial-direct-immediate test for the reasons set forth in this filing, they alternatively have standing to bring this action under the *Biester* standard because "(1) the governmental action would otherwise go unchallenged; (2) those directly and immediately affected by the complained-of matter [--the oil and gas industry--] are beneficially affected and not inclined to challenge the action; (3) judicial relief is appropriate; (4) redress through other channels is unavailable; and (5) no other persons are better situated to assert the claim." *Stilp v. Commonwealth of Pennsylvania*, 596 Pa. 62, 72 (2007). For these reasons, Individual Petitioners have a direct, substantial and immediate interests in the outcome of this case. As a result, the Commonwealth Court's July 26th Order must be affirmed.

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[26] This constitutes a denial of due process rights as there will be no meaningful opportunity to be heard; municipalities under Act 13 have no discretion in whether to enact the mandated zoning changes.

6. This Honorable Court should affirm the July 26th Order because Petitioners' claims raise questions solely regarding the constitutionality of Act 13 which are properly addressed by the judicial branch through judicial review.

a. Act 13 is subject to judicial review because of Petitioners' constitutional challenge.

It is well-established in our tripartite system of government that the judicial branch was established to review the constitutionality of acts laid down by the legislative branch. In the seminal case of *Marbury v. Madison*, the United States Supreme Court explained the role of judicial review:

> It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. .... This is of the very essence of judicial duty. If the courts are to regard the constitution; and the constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case to which they both apply.

Marbury v. Madison, 5 U.S. 137, 177-178 (1803).

If the legislature policed its own constitutionality as the Commonwealth now seeks to do regarding Petitioners' challenge to Act 13:

> It would be giving to the legislature a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure.

Id. at 178.

The Commonwealth Court recognized this concern stating, "[u]nder the Commonwealth's reasoning, any action that the General Assembly would take under the police power would not be subject to a constitutional challenge." *See*, Exhibit 1, at p. 23.

The political question doctrine bars courts from hearing a very limited subset of cases where the Constitution commits a power exclusively to the Legislature. *Marrero v. Commonwealth*, 739 A.2d 110, 112 (Pa. 1999) (*quoting*, *Sweeney v. Tucker*, 375 A.2d 698 (Pa. 1977)). The political question doctrine "should only be invoked by a court when considering

matters that are textually committed to a co-equal branch of government and which do not involve another branch of government acting outside its scope of constitutional authority." *Lawless v. Jubelirer*, 789 A.2d 820, 827 (Pa. Commw. Ct. 2002) (emphasis in original); *Millcreek Twp. Sch. Dist. v. County of Erie*, 714 A.2d 1095, 1104 (Pa. Commw. Ct. 1998) ("it is 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 such an abstention.").

This principle—that the court will review constitutional violations—carries over into municipal law as well, where cases such as *Com. ex rel. Woods v. Walker* have held that "[t]he county as an agent or a subdivision of government directed by the state to perform an act in relation thereto cannot question the state's power unless the constitution is impugned..." 305 Pa. 31, 35, 156 A. 340, 341 (1931) (emphasis added)).

In the Petition for Review, Petitioners do not challenge whether the General Assembly has enacted sound legislative policy. Rather, Petitioners' challenge to the Act, and their allegations supporting such a challenge, are purely and soundly based upon the question of whether the General Assembly has enacted legislation which is properly constitutional and follows the non-discretionary constitutional mandates imposed upon it. This is plainly a question for the Court. The Commonwealth's approach to Petitioners' claims is to simply and baldly label the matter as a "political question"; and thereby attempt to end any analysis or inquiry by the Court. To accept this position would have the effect of eliminating the Court's ability to review any legislative act for constitutionality. This is obviously an absurd and unsupported position as the courts clearly have the ability to review the constitutionality of any legislative act, as the General Assembly may only do what it is not forbidden to by the federal and state Constitutions. *Luzerne County v. Morgan*, 107 A. 17 (Pa.1919).

The Court below accepted its proper role as a judicial body to review the constitutionality of Act 13:

> Nothing in this case involves making a determination that would intrude upon a legislative determination ... what we are asked to do is to determine whether a portion of Act 13 is constitutional or not, a judicial function.
>
> ...
>
> Because we are not required to make any specific legislative policy determinations in order to come to a resolution of the matters before us, the issue of whether Act 13 violates the Pennsylvania Constitution is a justiciable question for this Court to resolve.

See, Exhibit 1, at p. 24.

The limitations on the powers of the legislature are not to be determined from the general body of law, but from the constitution itself. *Erie & N.E.R. Co. v. Casey*, 26 Pa. 287 (1856). A state constitution is a limitation on legislative power not a grant, so that the Legislature may not enact any law expressly or inferentially prohibited by the Constitution of the state or nation. *See*, *Collins v. Commonwealth*, 106 A. 229 (Pa. 1919). The General Assembly cannot displace the Courts' interpretation of the Constitution because "the ultimate power and authority to interpret the Pennsylvania Constitution rests with the Judiciary and in particular the [Pennsylvania Supreme Court]." *Mesivtah Eitz Chaim of Bobov, Inc., v. Pike County Board of Assessment Appeals*, 44 A.3d 3, 7 (Pa. 2012). Any alleged good intentions of the General Assembly do not excuse non-compliance with the Constitution. *Id.* at 8. A legislative enactment will be deemed unconstitutional if it clearly, palpably, and plainly violates the Constitution. *Stilp v. Com.*, 905 A.2d 918, 939 (Pa.2006)

Petitioners have alleged constitutional questions which properly fall within the province of the judiciary for review. These are constitutional questions for the court to address, not for the legislature to simply ignore by exercising their "policy judgment." The Commonwealth Court correctly determined Petitioners' claims are justiciable and its decision must be affirmed.

b. The Commonwealth's exercise of its police power is limited by non-discretionary constitutional restraints and therefore may be reviewed for its constitutionality.

The General Assembly has adopted a comprehensive set of zoning regulations via Section 3301, *et. al.*, of Act 13. The standards by which Pennsylvania courts judge the constitutionality of zoning ordinances under Article I, Section 1 of the Constitution of Pennsylvania, and the 14th Amendment to the Constitution of the United States have been stated and restated in a long line of decisions by this Court. *Exton Quarries, Inc. v. Zoning Bd. of Adjustment of West Whiteland Tp.*, 228 A.2d 169, 178-179 (Pa. 1967). The Commonwealth however attempts to "side step" the constitutional standard for a valid zoning provision by simply arguing that Act 13 and its zoning provisions are a "political question." This thinly veiled attempt by the General Assembly cannot escape the constitutional scrutiny mandated by this Honorable Court. The General Assembly cannot instruct the Courts as to what is constitutional. Only the judicial branch of government has the power to make determinations regarding the constitutionality of legislative enactments. *In re Investigation by Dauphin County Grand Jury, September 1938*, 332 Pa. 342, 352-53, 2 A.2d 804, 807 (1938).

The instant matter is not simply a policy decision as the Commonwealth attempts to lead the Court to believe. Rather, this matter involves the constitutionality of a legislative act of the General Assembly that clearly, palpably, and plainly violates the Constitution. Article I, Section 1 of the Pennsylvania Constitution guarantees individuals the ability to acquire, possess and protect property and to use that property as the individual sees fit without interference from the government. *See,* PA. CONST. Art. I, Sec 1. In certain limited circumstances, the Commonwealth may constitutionally employ its police powers in a manner that may infringe upon citizens' property rights. However, the powers of the Commonwealth are not unlimited and will be deemed an arbitrary exercise of the Commonwealth's police powers prohibited by Article I,

Section 1 of the Pennsylvania Constitution if the enactment is not designed to protect the health, safety and welfare of the community. Act 13 cannot escape the Constitutional scrutiny that accompanies all zoning enactments. Petitioners' claims are justiciable, and therefore the Commonwealth Court's July 26th Order must be affirmed.

7. This Honorable Court should affirm the July 26th Order because Petitioners' pre-enforcement challenge to the constitutionality of Act 13 presents a ripe claim for judicial review because of the imminent hardship imposed on Petitioners by enforcement of Act 13.

"Ripeness arises out of a judicial concern not to become involved in abstract disagreements of administrative policies." *Texas Keystone, Inc. v. Pa. Dep't of Conservation & Natural Res.*, 851 A.2d 228, 239 (Pa. Commw. Ct. 2004). This Honorable Court detailed ripeness considerations in *Twp. of Derry v. Pa. Dep't of Labor & Industry,* 932 A.2d 56, 57-58 (Pa. 2007):

> In deciding whether the doctrine of ripeness bars our consideration of a declaratory judgment action, we consider "whether the issues are adequately developed for judicial review and what hardships the parties will suffer if review is delayed." *Alaica v. Ridge,* 784 A.2d 837, 842 (Pa.Cmwlth.2001) (quoting *Treski v. Kemper Nat'l Ins. Co.,* [449 Pa.Super. 620, 674 A.2d 1106, 1113 (1996)]). . . . Under the "hardship" analysis, we may address the merits even if the case is not as fully developed as we would like, if refusal to do so would place a demonstrable hardship on the party. *Id.*

As this Honorable Court has held, the equitable jurisdiction of the Commonwealth Court allows parties to raise pre-enforcement challenges to the substantive validity of laws when the parties would otherwise be forced to either submit to the regulations and incur the cost and burden that the regulations would inevitably impose or simply defend themselves against sanctions for non-compliance with the law. *Commonwealth of Pennsylvania v. Locust Township,* 968 A.2d 1263, 1272 (Pa. 2009) (*citing*, *Arsenal Coal Co. v. Dept. of Environmental Resources,* 477 A.2d 1333, 1338 (1984)). Considering a pre-enforcement challenge to newly adopted regulations, the Supreme Court in *Arsenal Coal* determined that "[w]here the effect of the

challenged regulations . . . is direct and immediate, the hardship thus presented suffices to establish the justiciability of the challenge in advance of enforcement." 477 A.2d 1333, 1339 (1984). In the event jurisdiction was denied, plaintiffs would otherwise be forced to choose between two hardships – an outcome which this Court has deemed unsatisfactory. *Id.*

Furthermore, Petitioners claims have raised important constitutional questions that are appropriate for resolution at the pre-enforcement stage. "Declaratory judgment is the proper procedure to determine whether a statute violates the constitutional rights of those it affects." *Allegheny Ludlum Steel Corp. v. Pennsylvania Public Utility Commission,* 447 A.2d 675, 679 (Pa. Commw. Ct. 1982) (aff'd 459 A.2d 1218 (Pa. 1983)); *see also*, *Nat'l Solid Wastes Mgmt. Ass'n v. Casey*, 143, 580 A.2d 893, 898 (Pa. Commw. Ct. 1990).

This case fits clearly in the *Arsenal Coal* and *Allegheny Ludlum* paradigms. Petitioners in the instant matter would either be forced to submit to Act 13's unlawful requirements and incur the cost and burden of such submission or defend themselves against sanctions for non-compliance with the law. *See*, *Commonwealth of Pennsylvania v. Locust Township,* 968 A.2d 1263, 1272 (Pa. 2009) (*citing*, *Arsenal Coal* at 207-208, 477 A.2d at 1338). As demonstrated *supra* regarding Petitioners' standing, the various harms alleged by Petitioners imposed by the enforcement of Act 13 are real, imminent and are neither speculative nor hypothetical. (R.R. at 066a-071a; R.R. at 079a, ¶ 72; R.R. at 782a-833a, 945a-948a). As noted earlier, Act 13 imposes substantial, direct, and immediate obligations on Municipal and Individual Petitioners. If Petitioners decline to implement the obligations imposed by Act 13, they are subject to significant hardship including potential financial penalties. As illustrated by Municipal Petitioner Mount Pleasant Township:

> [U]nder Act 13, Mount Pleasant must pick its poison – it may either continue to zone in a constitutional manner and face sanctions and liability under Act 13, or it may zone in the manner provided for by Act 13 and act in violation of the

> Pennsylvania Constitution and the rights of its citizens. This is seemingly a choice that Mount Pleasant does not with to be forced to make. Moreover, in light of the Township's limited budgetary resources, it may in reality have no choice other than to comply with Act 13 and act in violation of the Pennsylvania Constitution and the rights of its citizens. The alternative, which presents the specter of sanctions including monetary penalties, may present more than the Township could practically and logistically sustain.

(R.R. at 786a-787a, ¶¶ 15-16).

This is precisely the dilemma the *Arsenal Coal* Court sought to eliminate in recognizing the Court's jurisdiction over pre-enforcement review. This Court clearly has subject matter jurisdiction over Petitioners' claims.

The Commonwealth misrepresents the Commonwealth Court's decision concerning ripeness. Agency Appellants assert, "Despite acknowledging that the Municipalities' constitutional claims are based on 'speculative, hypothetical events that may or may not occur in the future,' the Commonwealth Court proceeded to evaluate and assess those unripe claims. Opinion at 24 n.17." *See*, Brief of Agency Appellants, at p. 40. Agency Appellants against state that the Court "acknowledged that the Municipalities' claims were unripe." *See*, Brief of Agency Appellants, at p. 41.

Yet, the Commonwealth Court never "acknowledge" that Petitioners' claims were unripe. The part of the Court's opinion cited out of context by the Commonwealth reads as follows:

> The ***Commonwealth also raises the issue of ripeness arguing*** that this Court should refrain from making a determination because the answer would be based on Petitioners' assertions of ***speculative, hypothetical events that may or may not occur in the future***. *See Pa. Power & Light Co v. Pa. Pub. Util. Comm'n,* 401 A.2d 1255, 1257 (Pa. Cmwlth. 1979). However, our Supreme Court has held that "the equitable jurisdiction of this Court allows parties to raise pre-enforcement challenges to the substantive validity of laws when they would otherwise be forced to submit to the regulations and incur cost and burden that the regulations would impose or be forced to defend themselves against sanctions for non-compliance with the law. In this case, the municipalities have alleged that they will be required to modify their zoning codes, and if they fail to do so, they will be subject to penalties and/or prosecution under 58 Pa. C.S. §3255. ***Therefore, the constitutionality issue is ripe for review, and*** declaratory judgment is the proper

procedure to determine whether a statute violates the constitutional rights of those it affects." *Allegheny Ludlum Steel Corp. v. Pa. Pub. Util. Comm'n,* 447 A.2d 675, 679 (Pa. Cmwlth. 1982).

See, Exhibit 1, at p. 24, fn. 17. (emphasis added) (underlining indicating quoted language in Agency Appellants' Brief).

The Commonwealth has cited its own argument as set forth by the Court, and presented it as something that it is not. As can be seen from the entirety of the footnote, the Court never acknowledged that Petitioners' claims were unripe—in fact, it found that the claims *were* ripe for review. The Commonwealth's gross misrepresentation of the lower Court's opinion has no place before this Honorable Court.

VI. CONCLUSION

For the reasons expressed above, it is respectfully requested that this Honorable Court affirm the Commonwealth Court's July 26th Opinion and Order regarding Counts I-III and Count VIII of the Petition for Review. In addition, this Honorable Court should affirm the Commonwealth Court's decision regarding the justiciability of Petitioners' claims and the standing of Municipal Petitioners and Individual Petitioners, Brian Coppola and David M. Ball.

Respectfully Submitted:

BY:____________________

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EXHIBIT 1

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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

Petitioners,

v.

Commonwealth of Pennsylvania, Pennsylvania Public Utility Commission, Robert F. Powelson, in His Official Capacity as Chairman of the Public Utility Commission, Office of the Attorney General of Pennsylvania, Linda L. Kelly, in Her Official Capacity as Attorney General of the Commonwealth of Pennsylvania, Pennsylvania Department of Environmental Protection and Michael L. Krancer, in His Official Capacity as Secretary of the Department of Environmental Protection,

Respondents

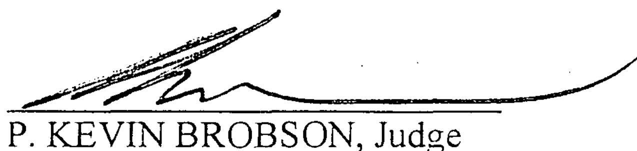
No. 284 M.D. 2012
Argued: June 6, 2012

AMENDING ORDER

AND NOW, this 31st day of July, 2012, the dissenting opinion filed with this Court dated July 26, 2012, is amended to reflect the following changes to footnote 1 as follows:

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

A corrected copy of the opinion and order is attached.



P. KEVIN BROBSON, Judge

Certified from the Record

JUL 31 2012

and Order Exit

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Robinson Township, Washington :
County, Pennsylvania, Brian Coppola, :
Individually and in his Official :
Capacity as Supervisor of Robinson :
Township, Township of Nockamixon, :
Bucks County, Pennsylvania, :
Township of South Fayette, :
Allegheny County, Pennsylvania, :
Peters Township, Washington :
County, Pennsylvania, David M. Ball, :
Individually and in his Official :
Capacity as Councilman of Peters :
Township, Township of Cecil, :
Washington County, Pennsylvania, :
Mount Pleasant Township, :
Washington County, Pennsylvania, :
Borough of Yardley, Bucks County, :
Pennsylvania, Delaware Riverkeeper :
Network, Maya Van Rossum, :
the Delaware Riverkeeper, :
Mehernosh Khan, M.D., :
Petitioners :
:
v. : No. 284 M.D. 2012
Commonwealth of Pennsylvania, : Argued: June 6, 2012
Pennsylvania Public Utility :
Commission, Robert F. Powelson, :
in his Official Capacity as Chairman :
of the Public Utility Commission, :
Office of the Attorney General of :
Pennsylvania, Linda L. Kelly, in :
her Official Capacity as Attorney :
General of the Commonwealth of :
Pennsylvania, Pennsylvania :
Department of Environmental :
Protection and Michael L. Krancer, :
in his Official Capacity as Secretary :
of the Department of Environmental :
Protection, :
Respondents :

BEFORE: HONORABLE DAN PELLEGRINI, President Judge
HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE BONNIE BRIGANCE LEADBETTER, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE ANNE E. COVEY, Judge

OPINION BY
PRESIDENT JUDGE PELLEGRINI[1] FILED: July 26, 2012

Before this Court are preliminary objections filed by the Commonwealth of Pennsylvania, Pennsylvania Public Utility Commission (Commission), *et al.*,[2] (collectively, the Commonwealth) in response to a petition for review filed by Robinson Township, *et al.*,[3] (collectively, Petitioners)

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[1] While the majority of the *en banc* panel voted to grant Petitioners' Motion for Summary Relief regarding Counts I-III, because of a recusal, the vote of the remaining commissioned judges on those Counts resulted in a tie, requiring that this opinion be filed pursuant to Section 256(b) of the Internal Operating Procedures of the Commonwealth Court. 210Pa. Code §67.29(b).

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

[3] The other Petitioners are: Washington County, Pennsylvania; Brian Coppola (Coppola), individually and in his Official Capacity as Supervisor of Robinson Township; Township of Nockamixon, Bucks County, Pennsylvania; Township of South Fayette, Allegheny County, Pennsylvania; Peters Township, Washington County, Pennsylvania; David M. Ball (Ball), individually and in his Official Capacity as Councilman of Peters Township; Township of Cecil, Washington County, Pennsylvania; Mount Pleasant Township, Washington County, Pennsylvania; Borough of Yardley, Bucks County, Pennsylvania; Delaware Riverkeeper Network; Maya Van Rossum (Van Rossum), the Delaware Riverkeeper; and Mehernosh Khan, M.D. (Dr. Khan).

challenging the constitutionality of Act 13.[4] Also before the Court is Petitioner's motion for summary relief seeking judgment in their favor.[5] The Commission and the DEP have filed a cross-motion for summary relief.

On March 29, 2012, Petitioners filed a petition for review in the nature of a complaint for declaratory judgment and injunctive relief in this Court's original jurisdiction challenging the constitutionality of Act 13 pertaining to Oil and Gas – Marcellus Shale.[6] Act 13 repealed Pennsylvania's Oil and Gas Act[7] and replaced it with a codified statutory framework regulating oil and gas operations in the Commonwealth. Among other provisions involving the levying and distribution of impact fees and the regulation of the operation of gas wells, Act 13 preempts local regulation,[8] including environmental laws and zoning code provisions except in

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[4] 58 Pa. C.S. §§2301-3504.

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

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

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

[8] 58 Pa. C.S. §3303 provides:

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

limited instances regarding setbacks in certain areas involving oil and gas operations. "Oil and gas operations" are defined as:

> (1) well location assessment, including seismic operations, well site preparation, construction, drilling, hydraulic fracturing and site restoration associated with an oil or gas well of any depth;
>
> (2) water and other fluid storage or impoundment areas used exclusively for oil and gas operations;
>
> (3) construction, installation, use, maintenance and repair of:
>
> (i) oil and gas pipelines;
>
> (ii) natural gas compressor stations; and
>
> (iii) natural gas processing plants or facilities performing equivalent functions; and
>
> (4) construction, installation, use, maintenance and repair of all equipment directly associated with activities specified in paragraphs (1), (2) and (3), to the extent that:
>
> (i) the equipment is necessarily located at or immediately adjacent to a well site, impoundment area, oil and gas pipeline, natural gas compressor station or natural gas processing plant; and
>
> (ii) the activities are authorized and permitted under the authority of a Federal or Commonwealth agency.

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

Petitioners allege that they have close to 150 unconventional[9] Marcellus Shale wells drilled within their borders, and Act 13 prevents them from fulfilling their constitutional and statutory obligations to protect the health, safety and welfare of their citizens, as well as public natural resources from the industrial activity of oil and gas drilling. Petitioners allege that Act 13 requires them to modify many of their zoning laws.[10]

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

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

> [I]s the General Assembly's considered response to the challenges of environmental protection and economic development that come with the commercial development of unconventional formations, geological formations that cannot be produced at economic flow rates or in economic volumes except by enhanced drilling and completion technologies. One of the most commonly known unconventional formations is the Marcellus Shale, a hydrocarbon-rich black shale formation that underlies approximately two-thirds of Pennsylvania and is believed to hold trillions of cubic feet of natural gas and is typically encountered at depths of 5,000 to 9,000 feet.
>
> Act 13 broadly rewrote Pennsylvania's Oil and Gas Act in an effort to, *inter alia,* modernize and bolster environmental protections in light of the increased drilling likely to occur throughout the Commonwealth as Marcellus Shale natural gas resources are tapped.... Act 13 also institutes an impact fee, which redistributes industry revenue to communities directly affected by Marcellus Shale operations (as well as to other Commonwealth entities involved in shale development). Finally, and perhaps most relevant to these Preliminary Objections, Act 13 fosters both environmental predictability and investment in the nascent shale industry by

(Footnote continued on next page...)

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

> - Article 1 §1 of the Pennsylvania Constitution and §1 of the 14th Amendment to the U.S. Constitution as an improper exercise of the Commonwealth's police power that is not designed to protect the health, safety, morals and public welfare of the citizens of Pennsylvania; **(Count I)**
>
> - Article 1 §1 of the Pennsylvania Constitution because it allows for incompatible uses in like zoning districts in derogation of municipalities' comprehensive zoning plans and constitutes an unconstitutional use of zoning districts; **(Count II)**
>
> - Article 1 §1 of the Pennsylvania Constitution because it is impossible for municipalities to create new or to follow existing comprehensive plans, zoning ordinances or zoning districts that protect the health, safety, morals and welfare of citizens and to provide for orderly development of the community in violation of the MPC[[11]] resulting in an improper use of its police power; **(Count III)**
>
> - Article 3 §32 of the Pennsylvania Constitution because Act 13 is a "special law" that treats local

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(continued...)

> increasing statewide uniformity in local municipal ordinances that impact oil and natural gas operations.

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

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

governments differently and was enacted for the sole and unique benefit of the oil and gas industry; **(Count IV)**

- Article 1 §§1 and 10 of the Pennsylvania Constitution because it is an unconstitutional taking for private purposes and an improper exercise of the Commonwealth's eminent domain power; **(Count V)**

- Article 1 §27 of the Pennsylvania Constitution because it denies municipalities the ability to carry out their constitutional obligation to protect public natural resources; **(Count VI)**

- the doctrine of Separation of Powers because it entrusts an Executive agency, the Commission, with the power to render opinions regarding the constitutionality of Legislative enactments, infringing on a judicial function; **(Count VII)**

- Act 13 unconstitutionally delegates power to the Pennsylvania Department of Environmental Protection (DEP) without any definitive standards or authorizing language; **(Count VIII)**

- Act 13 is unconstitutionally vague because its setback provisions and requirements for municipalities fail to provide the necessary information regarding what actions of a municipality are prohibited; **(Count IX)**

- Act 13 is unconstitutionally vague because its timing and permitting requirements for municipalities fail to provide the necessary information regarding what actions of a municipality are prohibited; **(Count X)**

- Act 13 is an unconstitutional "special law" in violation of Article 3, §32 of the Pennsylvania Constitution because it restricts health professionals' ability to disclose critical diagnostic information when dealing solely with information deemed proprietary by the natural gas industry while other industries under the federal Occupational and Safety Act have to list the toxicity of each chemical constituent that makes up the

product and their adverse health effects; **(Count XI)** (Dr. Khan is the only petitioner bringing this claim.)

- Article 3, §3 of the Pennsylvania Constitution prohibition against a "bill" having more than a single subject because restricting health professionals' ability to disclose critical diagnostic information is a different subject than the regulation of oil and gas operations; **(Count XII)** (Dr. Khan is the only petitioner bringing this claim.)[12]

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

In response to the petition for review, the Commonwealth has filed preliminary objections alleging that: (1) Petitioners lack standing to file their action;

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

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

> (1) whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense which could be established by additional discovery or expert report, or
>
> (2) if, after the completion of discovery relevant to the motion, including the production of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury."

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

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

I.

STANDING

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

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

Fundamentally, the standing requirement in Pennsylvania "is to protect against improper plaintiffs." *Application of Biester*, 487 Pa. 438, 442, 409 A.2d 848, 851 (1979). Unlike the federal courts, where a lack of standing is directly correlated to the ability of the court to maintain jurisdiction over the action, the test for standing in Pennsylvania is a flexible rule of law, perhaps because the lack of standing in Pennsylvania does not necessarily deprive the court of jurisdiction. *Compare Jones Mem'l Baptist Church v. Brackeen*, 416 Pa. 599, 207 A.2d 861 (1965), *with Raines v. Byrd*, 521 U.S. 811 (1997). As a result, Pennsylvania courts are much more expansive in finding standing than their federal counterparts.

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

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

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

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

> [T]he causal connection between the tax and the injury to the parking operators is sufficiently close to afford them standing under a statute, such as section 6, which is essentially neutral on the question. While the tax falls initially upon the patrons of the parking operators, it is levied upon the very transaction between them. Thus the effect of the tax upon their business is removed from the cause by only a single short step.
>
> We find very persuasive authority for this conclusion in *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S.Ct. 271, 69 L.Ed. 1070 (1925), and *Truax v. Raich*, 239 U.S. 33, 36 S.Ct. 7, 60 L.Ed. 131 (1915). In *Pierce*, the operators of private schools were held to have standing to challenge a law which required parents to send their children to public schools. In *Truax*, an alien was held to have standing to challenge a law which forbade certain employers to employ aliens as more than 20% of their work force. In each case the regulation was directed to the conduct of persons other than the plaintiff. However, the fact that the regulation tended to prohibit or burden transactions between the plaintiff and those subject to the regulation sufficed to afford the plaintiff standing. While the burdens imposed in those cases may have been more onerous than

> that involved in this case (amounting to a total prohibition is *Pierce*), that does not render the causal connection any less immediate.

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

This exception has been utilized by our courts to grant standing to taxpayers challenging a variety of governmental actions. For example, the courts have granted standing to taxpayers challenging judicial elections on the grounds that those elections were scheduled in a year contrary to that prescribed by the Pennsylvania Constitution, *Sprague v. Casey*, 520 Pa. 38, 550 A.2d 184 (1988); to the state bar association, Pennsylvania attorneys, taxpayers and electors challenging the placement of a proposed state constitutional amendment on the ballot, *Bergdoll v. Kane*, 557 Pa. 72, 731 A.2d 1261 (1999); and to a state senator challenging the governor's failure to submit nominations to the state senate within the constitutional period, *Zemprelli v. Thornburg*, 407 A.2d 102 (Pa. Cmwlth. 1979). The theory underlying these cases is that public policy considerations favor a relaxed

application of the substantial-direct-immediate test, particularly the "direct" element that requires the party bringing the action to have an interest that surpasses that of the common people. *Consumer Party.*

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

A.

Standing of Municipalities

Regarding the seven municipalities who have brought this action, the Commonwealth argues that the petition for review is premised on the notion that

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

The Petitioners, however, respond that Act 13 imposes substantial, direct and immediate obligations on them that will result in specific harms to their interests as governing entities, including adverse impacts that serve to affect their abilities to carry out their governmental functions, duties and responsibilities under Pennsylvania law. They explain that Act 13 imposes substantial, direct, immediate and affirmative obligations on them that affect their local government functions, including the requirement of modifying their zoning laws in ways that will make the ordinances unconstitutional.[14] Specifically, to implement the mandates of Act 13,

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

the municipalities would be required to completely rewrite their zoning codes and pass new land-use ordinances that create special carve-outs for the oil and gas industry that are inconsistent with long-established municipal comprehensive plans. Noteworthy, Act 13 provides Petitioners with 120 days to expend significant time, monies and resources to develop entirely new comprehensive plans and ordinances; consult with respective planning commissions and county planning commissions; submit formal copies of proposed ordinances to municipal and county planning commissions; submit the proposed ordinance to the Public Utility Commission for review; advertise public notice of public hearings; conduct public hearings; submit revised formal copies of proposed ordinances and publicly advertise for the passage and approve final ordinances and comprehensive plans.

To maintain standing to a constitutional challenge, the municipality must establish that its interest in the outcome of the challenge to a state law is: (1) substantial when aspects of the state law have particular application to local government functions (as opposed to general application to all citizens); (2) direct when the state law causes the alleged constitutional harm; and (3) sufficiently immediate when the municipality asserts factually supported interests that are not speculative or remote. *City of Philadelphia v. Commonwealth of Pennsylvania,* 575 Pa. 542, 561-63, 838 A.2d 566, 578-79 (2003) (holding that the City of Philadelphia had standing to challenge the constitutionality of a state law because "the City's present assertion that it is an aggrieved party is premised upon the effects of [the

(continued...)

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

Act] upon its interests and functions as a governing entity, and not merely upon harm to its citizens.") *See also Franklin Twp. v. Dep't of Envlt. Res.*, 500 Pa. 1, 452 A.2d 718 (1982) (township had standing because of its direct and substantial interest where the possibility of harm was immediate to the quality of life of its citizens); *William Penn,* 464 Pa. at 280, 346 A.2d at 280 (quoting *Man O'War Racing Ass'n, Inc. v. State Horse Racing Comm'n*, 433 Pa. 432, 441, 250 A.2d 172, 176-77 (1968)) ("'The party must have a direct interest in the subject-matter of the particular litigation, otherwise he can have no standing to appeal. And not only must the party desiring to appeal have a direct interest in the particular question litigated, but his interest must be immediate and pecuniary, and not a remote consequence of the judgment. The interest must also be substantial.'") A substantial interest is one in which there is some discernible adverse effect to some interest other than the abstract interest of all citizens in having others comply with the law.

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

to comply with the provisions of Act 13, the municipalities have standing because Act 13 has a substantial, direct and immediate impact on the municipalities' obligations. Moreover, even if the interest of the litigant was not direct or immediate, the municipalities' claims that they are required to pass unconstitutional zoning amendments are inextricably bound with those of the property owners' rights whose property would be adversely affected by allowing oil and gas operations in all zoning districts as a permitted use when even the Commonwealth admits that property owners affected by such a permitted use would have standing to bring a challenge to the constitutionality of the Act 13.

B.

Standing of Council Members and Landowners

The Commonwealth also contends that Coppola and Ball, who have sued as councilmembers of their respective municipalities and as a "citizen of the Commonwealth," have failed to allege any kind of significant interest and have not pled any interest, claim or harm of any kind in their individual capacities. Coppola and Ball allege that they are local elected officials acting in their official capacities representing their respective municipalities who could be subject to personal liability and who would be required to vote on the passage of zoning amendments to comply with Act 13. They are also residents of the townships in which they serve as local elected officials. As individual landowners and residents, they live in a district that has been zoned residential in which oil and gas operations are now permitted under Act 13. They will not be able to rely on the fact that their next-door neighbor will not use his or her property for an industrial activity that will serve to immediately devalue their properties. Coppola has provided an affidavit stating the same and that his respective township has lost areas for future development by way

of drilling in residential areas. Ball has provided an affidavit stating that Act 13 entirely denies him of the protections he relied upon regarding the value of his home and he is unable to guarantee to any prospective buyer that industrial applications will not exist in the residential area in the future. As local elected officials acting in their official capacities for their individual municipalities and being required to vote for zoning amendments they believe are unconstitutional, Coppola and Ball have standing to bring this action.

C.

Standing of Associations

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

D.

Standing of Riverkeeper

This failure extends to Van Rossum, the Delaware Riverkeeper[15] who similarly fails to plead any direct and immediate interest, claim or harm. While she contends that she has performed numerous activities in relation to gas drilling issues in the Delaware River Basin, including data gathering, she also contends that her personal use and enjoyment of the Delaware River Basin will be negatively affected if gas drilling is authorized to proceed in these areas without the protections afforded by locally-enacted zoning ordinances. Her concern that truck traffic and air pollution will interfere with her enjoyment of the river or her work as ombudsman, however, does not rise to the level of a substantial, immediate and direct interest sufficient to confer standing.

E.

Standing of Medical Doctor

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

Finally, we turn to whether Dr. Khan has standing to challenge the constitutionality of Act 13 as being a "special law" in violation of Article 3, §32 of the Pennsylvania Constitution because it treats the oil and gas industry differently than other industries regarding the disclosure of critical diagnostic information and as having more than a single subject in violation Article 3, §3 of the Pennsylvania Constitution because it deals with both the health care of patients and a different subject, the regulation of oil and gas operations.

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

> (10) A vendor, service company or operator shall identify the specific identity and amount of any chemicals claimed to be a trade secret or confidential proprietary information to any health professional who requests the information in writing if the health professional executes a confidentiality agreement and provides a written statement of need for the information indicating all of the following:
>
> (i) The information is needed for the purpose of diagnosis or treatment of an individual.
>
> (ii) The individual being diagnosed or treated may have been exposed to a hazardous chemical.
>
> (iii) Knowledge of information will assist in the diagnosis or treatment of an individual.
>
> (11) If a health professional determines that a medical emergency exists and the specific identity and amount of any chemicals claimed to be a trade secret or confidential proprietary information are necessary for emergency treatment, the vendor, service provider or operator shall

> immediately disclose the information to the health professional upon a verbal acknowledgment by the health professional that the information may not be used for purposes other than the health needs asserted and that the health professional shall maintain the information as confidential. The vendor, service provider or operator may request, and the health professional shall provide upon request, a written statement of need and a confidentiality agreement from the health professional as soon as circumstances permit, in conformance with regulations promulgated under this chapter.

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

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

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

have standing to challenge the confidentiality provisions, even if he has signed the confidentiality agreement.

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

II.

JUSTICIABILITY

The Commonwealth also preliminarily objects to the petition for review on the basis that Petitioners' claims are barred because they involve non-justiciable political questions. "The power to determine how to exercise the Commonwealth's police powers, including how to best manage Pennsylvania's natural resources and how to best protect its citizens, is vested in the Legislature." (Commonwealth's preliminary objections at 3.) It argues that Art. 1, §27 of the Pennsylvania Constitution[16] provides that the Commonwealth is the trustee of Pennsylvania's natural resources and it shall conserve and maintain them for the benefit of all the people. That provision provides the Legislature with the authority to determine the best way to manage the development of Pennsylvania's oil and gas resources while

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

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

protecting the environment. If Petitioners are unhappy with the changes the Legislature has made in enacting Act 13, they should proceed through the political process and not ask this Court to nullify policy determinations that were made pursuant to the Constitution and for which there are no manageable standards for the judiciary to assess the merit of the determinations made by the Legislature.

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

Under the Commonwealth's reasoning, any action that the General Assembly would take under the police power would not be subject to a constitutional challenge. For example, if the General Assembly decided under the police power that to prevent crime, no one was allowed to own any kind of gun, the courts would be precluded to hear a challenge that the Act is unconstitutional under Art. 1, §21 of the Pennsylvania Constitution, which provides, "The right of the citizens to bear arms in defence of themselves and the State shall not be questioned." Nothing in this case involves making a determination that would

intrude upon a legislative determination or, for that matter, require the General Assembly to enact any legislation to implement any potential adverse order; what we are asked to do is to determine whether a portion of Act 13 is constitutional or not, a judicial function. Because we are not required to make any specific legislative policy determinations in order to come to a resolution of the matters before us, the issue of whether Act 13 violates the Pennsylvania Constitution is a justiciable question for this Court to resolve.[17]

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[17] The Commonwealth also raises the issue of ripeness arguing that this Court should refrain from making a determination because the answer would be based on Petitioners' assertions of speculative, hypothetical events that may or may not occur in the future. *See Pa. Power & Light Co v. Pa. Pub. Util. Comm'n,* 401 A.2d 1255, 1257 (Pa. Cmwlth. 1979). However, our Supreme Court has held that "the equitable jurisdiction of this Court allows parties to raise pre-enforcement challenges to the substantive validity of laws when they would otherwise be forced to submit to the regulations and incur cost and burden that the regulations would impose or be forced to defend themselves against sanctions for non-compliance with the law. In this case, the municipalities have alleged that they will be required to modify their zoning codes, and if they fail to do so, they will be subject to penalties and/or prosecution under 58 Pa. C.S. §3255. Therefore, the constitutionality issue is ripe for review, and declaratory judgment is the proper procedure to determine whether a statute violates the constitutional rights of those it affects." *Allegheny Ludlum Steel Corp. v. Pa. Pub. Util. Comm'n,* 447 A.2d 675, 679 (Pa. Cmwlth. 1982).

III.

FAILURE TO STATE A CLAIM

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

The Commonwealth contends that Act 13's requirement that municipal zoning ordinances be amended to include oil and gas operations in all zoning districts does not violate the principles of due process under Art. 1, §1 of the Pennsylvania Constitution[18] and the Fourteenth Amendment of the United States Constitution[19] because they have a rational basis and constitute a proper exercise of the Commonwealth's police powers.

The Commonwealth states that Act 13 does not preempt local municipalities' powers to enact zoning ordinances if they are in accord with 58 Pa. C.S. §§3302 and 3304. Unlike 58 Pa. C.S. §3303, which preempts all municipalities from enacting environmental laws, 58 Pa. C.S. §3302 does keep the local municipalities' power of local zoning but only if provisions do not conflict with

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

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

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

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

A.

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

> Land-use restrictions designate "districts in which only compatible uses are allowed and incompatible uses are excluded." D. Mandelker, Land Use Law § 4.16, pp. 113–114 (3d ed.1993) (hereinafter Mandelker). These restrictions typically categorize uses as single-family residential, multiple-family residential, commercial, or industrial. *See, e.g.,* 1 E. Ziegler, Jr., Rathkopf's The Law of Zoning and Planning § 8.01, pp. 8–2 to 8–3 (4th ed. 1995); Mandelker § 1.03, p. 4; 1 E. Yokley, Zoning Law and Practice § 7–2, p. 252 (4th ed. 1978).
>
> Land use restrictions aim to prevent problems caused by the "pig in the parlor instead of the barnyard." *Village of Euclid v. Ambler Realty Co.,* 272 U.S. 365, 388, 47 S.Ct. 114, 118, 71 L.Ed. 303 (1926). In particular, reserving land for single-family residences preserves the character of neighborhoods, securing "zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people." *Village of Belle Terre v. Boraas,* 416 U.S. 1, 9, 94 S.Ct. 1536, 1541, 39 L.Ed.2d 797 (1974); *see also Moore v. East Cleveland,* 431 U.S. 494, 521, 97 S.Ct. 1932, 1947, 52 L.Ed.2d 531 (1977) (Burger, C.J., dissenting) (purpose of East Cleveland's single-family zoning ordinance "is the traditional one of preserving certain areas as family residential communities").[20]

[20] Ignoring that *Edmonds* was cited to explain the purpose of zoning and not the constitutional standard under the Pennsylvania Constitution, the dissent dramatically states that if

(Footnote continued on next page...)

See also Cleaver v. Bd. of Adjustment, 414 Pa. 367, 378, 200 A.2d 408, 415 (1964).

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

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no incompatible uses were permitted as part of the comprehensive plan, based on the above discussion, that would mean the end of variances and the grant of non-conforming uses. What that position ignores is that non-conforming uses were in existence before zoning and that variances are designed to ameliorate the application of the zoning ordinance to a particular parcel of property. Neither destroys the comprehensive scheme of zoning. *In Appeal of Michener*, 382 Pa. 401, 407, 115 A.2d 367, 371 (1955), our Supreme Court, quoting *Clark v. Board of Zoning Appeals*, 301 N.Y. 86, 90, 91, 92 N.E.2d 903, 904, 905 (1950), explained that in the context of why and when a variance should be granted and the importance of maintaining the general scheme of zoning stating:

> '[B]efore the board may vote a variance, there must be shown, among other things, 'that the plight of the owner is due to unique circumstances and not to the general conditions in the neighborhood which may reflect the unreasonableness of the zoning ordinance itself'. The board, being an administrative and not a legislative body, may not review or amend the legislatively enacted rules as to uses, or amend the ordinance under the guise of a variance, * * * or determine that the ordinance itself is arbitrary or unreasonable * * *. If there be a hardship, which * * * is common to the whole neighborhood, the remedy is to seek a change in the zoning ordinance itself. * * * Nothing less than a showing or hardship special and peculiar to the applicant's property will empower the board to allow a variance. * * * The substance of all these holdings is that no administrative body may destroy the general scheme of a zoning law by granting special exemption from hardships common to all.

ordinance implements the comprehensive plan. Section 303 of the MPC, 53 P.S. §10303.

A typical zoning ordinance divides the municipality into districts in each of which uniform regulations are provided for the uses of buildings and land, the height of buildings, and the area or bulk of buildings and open spaces. *See* Section 605 of the MPC, 53 P.S. §10605. Permitted or prohibited uses of property and buildings are set forth for each zoning district, e.g., residential, commercial, and industrial. Use districts are often further sub-classified, for instance, into residential districts and then restricted to single-family houses and those in which multiple-family or apartment structures are permitted; commercial districts into central and local, or those in which light manufacturing is permitted or excluded; for heavy but non-nuisance types of industry; and nuisance or unrestricted districts. Height regulations fix the height to which buildings or portions thereof may be carried. Bulk regulations fix the amount or percentage of the lot which may be occupied by a building or its various parts, and the extent and location of open spaces, such as building set-backs, side yards and rear yards. Zoning ordinances segregate industrial districts from residential districts, and there is segregation of the noises and odors necessarily incident to the operation of industry from those sections in which the homes are located. Out of this process, a zoning ordinance implements a comprehensive zoning scheme; each piece of property pays, in the form of reasonable regulation of its use, for the protection that the plan gives to all property lying within the boundaries of the plan.

B.

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, we take into consideration the rights of all property owners subject to the zoning and the public interests sought to be protected. Quoting from *Hopewell Township Board of Supervisors v. Golla*, 499 Pa. 246, 255, 452 A.2d 1337, 1341-42 (1982), our Supreme Court in *In re Realen Valley Forge Greenes Assocs.*, 576 Pa. 718, 729, 838 A.2d 718, 728 (2003), stated that:

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

The Court went on to state that under that standard for zoning to be constitutional, it "must be directed toward the community as a whole, concerned with the public interest generally, and justified by a *balancing* of community costs and benefits. These considerations have been summarized as requiring that *zoning be in conformance with a comprehensive plan* for growth and development of the community." *Id.* (Emphasis added).

The Commonwealth argues that Act 13 mandates that zoning regulations be rationally related to its objective: (1) optimal development of oil and

gas resources in the Commonwealth consistent with the protection of the health, safety, environment and property of Pennsylvania citizens; (2) protecting the safety of personnel and facilities employed in coal mining or exploration, development, storage and production of natural gas or oil; (3) protecting the safety and property rights of persons residing in areas where mining, exploration, development, storage or production occurs; and (4) protecting the natural resources, environmental rights and values secured by the Constitution of Pennsylvania. 58 Pa. C.S. §3202.

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

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

> as the structures built upon land and watercourses and the density of the population in different areas). *See generally* Tammy Hinshaw & Jaqualin Peterson, 7 SUMM. PA. JUR.2D PROPERTY § 24:12 ("A zoning ordinance reflects a legislative judgment as to how land within a municipality should be utilized and where the lines of demarcation between the several use zones should be drawn."). More to the point, the intent underlying the Borough's ordinance in the present case includes serving police power objectives relating to the safety and welfare of its citizens, encouraging the most appropriate use of land throughout the borough, conserving the value of property, minimizing overcrowding and traffic congestion, and providing adequate open spaces. *See* Ordinance § 205-2(A).

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

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

58 Pa. C.S. §3304 requires that local zoning ordinance be amended which, as *Huntley & Huntley, Inc.* states, involves a different exercise of police power. The public interest in zoning is in the development and use of land in a manner consistent with local demographic and environmental concerns. 58 Pa. C.S.§3304 requires zoning amendments that must be normally justified on the basis that they are in accord with the comprehensive plan, not to promote oil and gas operations that are incompatible with the uses by people who have made investment decisions regarding businesses and homes on the assurance that the zoning district

would be developed in accordance with comprehensive plan and would only allow compatible uses. If the Commonwealth-proffered reasons are sufficient, then the Legislature could make similar findings requiring coal portals, tipples, washing plants, limestone and coal strip mines, steel mills, industrial chicken farms, rendering plants and fireworks plants in residential zones for a variety of police power reasons advancing those interests in their development. It would allow the proverbial "pig in the parlor instead of the barnyard."[21]

In this case, by requiring municipalities to violate their comprehensive plans for growth and development, 58 Pa. C.S §3304 violates substantive due process because it does not protect the interests of neighboring property owners from harm, alters the character of neighborhoods and makes irrational classifications – irrational because it requires municipalities to allow all zones, drilling operations and impoundments, gas compressor stations, storage and use of explosives in all zoning districts, and applies industrial criteria to restrictions on height of structures, screening and fencing, lighting and noise.[22] Succinctly, 58 Pa. C.S. §3304 is a

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

[22] The dissent states that the Section 3304 does not eviscerate local zoning because it does not give *carte blanche* to the oil and gas industry and does not require a municipality to convert a
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requirement that zoning ordinances be amended in violation of the basic precept that "Land-use restrictions designate districts in which only compatible uses are allowed and incompatible uses are excluded." *City of Edmonds*, 514 U.S. at 732 (internal quotation omitted). If a municipality cannot constitutionally include allowing oil and gas operations, it is no more constitutional just because the Commonwealth requires that it be done.[23]

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residential district into an industrial district. The dissent then goes on to state that "in crafting Section 3304 of Act 13, the General Assembly allowed, but restricted, oil and gas operations based on, and not in lieu of each local municipality existing comprehensive plan." 58 Pa. C.S. §3304, it posits, shows consideration by requiring additional setbacks for the more intensive of its uses.

It is true that 58 Pa. C.S. §3304 does not convert residential districts into industrial zones; it just requires that industrial uses be permitted in residential districts and that the zoning restrictions applicable to industrial uses be applied. It is also true that 58 Pa. C.S. §3304 does not replace the comprehensive plan; it just supplants the comprehensive plan by allowing oil and gas operations in districts under the comprehensive plan where such a use is not allowed. Again, it is true that Act 13 does provide additional consideration by requiring additional setbacks to lessen the negative effects of oil and gas operations, such as machinery noise and flood lights, on adjoining homeowners. However, the dissent fails to mention that those additional setbacks are based on industry standards regarding industrial operations, and that the added "consideration" that the operations, and the resultant light, noise, and traffic, has to be permitted 24 hours a day. None of these "considerations" would be necessary if the industrial uses included in the definition of oil and gas operations were not allowed because they are incompatible with the other uses in that district.

[23] While there is no disagreement with the dissent's statement that a local ordinance may not frustrate the purposes and objectives of the legislature, the claim here is that the Pennsylvania Constitution stands in the way. While recognizing that "the desire to organize a municipality into zones made of compatible uses is a goal, or objective, of comprehensive planning," and that the inclusion of incompatible uses might be bad planning, the dissent concludes that it does not render the ordinance unconstitutionally infirm. If that were true, then the creation of a spot zone would similarly not be unconstitutional under Article 1, §I of the Pennsylvania Constitution and the Fourteenth Amendment to the United States Constitution. Spot zoning is "[a] singling out of one lot or a small area for different treatment from that accorded to similar surrounding land

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

C.

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

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indistinguishable from it in character, for the economic benefit of the owner of that lot or to his economic detriment." *Appeal of Mulac*, 418 Pa. 207, 210, 210 A.2d 275, 277 (1965). While in spot zoning the land is classified in a way that is incompatible with the classification of the surrounding land, the same unconstitutional infirmity exists here. What we have under Act 13 is a "spot use" where oil and gas uses are singled out for different treatment that is incompatible with other surrounding permitted uses. What the dissent ignores is that the sanctioning of "bad planning" renders the affected local zoning ordinances unconstitutionally irrational.

through 3303, which remain in full force and effect, the remaining provisions of Chapter 33 that enforce 58 Pa. C.S. §3304 are similarly enjoined.

Count IV - Art. IV, §32 of the Pennsylvania Constitution "Special Law"

Petitioners argue that Article 3, §32[24] has been violated because Act 13 treats the oil and gas industry differently from other energy extraction and

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

Certain local and special laws.

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

1. Regulating the affairs of counties, cities, townships, wards, boroughs or school districts:

2. Vacating roads, town plats, streets or alleys:

3. Locating or changing county seats, erecting new counties or changing county lines:

4. Erecting new townships or boroughs, changing township lines, borough limits or school districts:

5. Remitting fines, penalties and forfeitures, or refunding moneys legally paid into the treasury:

6. Exempting property from taxation:

7. Regulating labor, trade, mining or manufacturing:

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

In its preliminary objections, the Commonwealth contends that Act 13 is not a "special law" in violation of Article 3, §32 of the Pennsylvania Constitution

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> 8. Creating corporations, or amending, renewing or extending the charters thereof.
>
> Nor shall the General Assembly indirectly enact any special or local law by the partial repeal of a general law; but laws repealing local or special acts may be passed.

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

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

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

In this case, while Act 13 does treat the oil and gas industry differently from other extraction industries, it is constitutional because the distinction is based on real differences that justify varied classifications for zoning purposes. While Section 3304 does violate Article 1, §1, it does not violate Article 3, §32. Accordingly, the Commonwealth's preliminary objection to Count IV is sustained.

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

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

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

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

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

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

Article 1, §10 of the Pennsylvania Constitution provides, in relevant part, "[N]or shall private property be taken or applied to public use, without authority of law and without just compensation being first made or secured."

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

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

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

Article 1, §27 of the Pennsylvania Constitution provides:

Natural resources and the public estate

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

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

In *Community College of Delaware County v. Fox,* 342 A.2d 468 (Pa. Cmwlth. 1975), the sewage permit issued by the Department of Environmental Resources, predecessor of DEP, allowed a sewer authority to run a 24-inch diameter sewer along a stream. Suit was brought against the sewer authority claiming a violation of Article 1, §27 because the issuance of the sewer permit harmed the

natural resources of the Commonwealth. The sewer authority argued that the action was not maintainable because only the Commonwealth was named as a trustee of the Commonwealth natural resources in that provision. In rejecting that argument, we stated:

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

342 A.2d at 481-82 (emphasis added).

College of Delaware held that *local* agencies were subject to suit under

Article 1, §27 because of statutory obligations that they were required to consider or enforce. With regard to Petitioners' claim that Act 13 violates Article 1, §27 because they cannot strike a balance between environmental concerns and the effects of oil and gas operations in developing their zoning ordinances, an obligation is placed on them by the MPC. It requires that all municipalities, when developing the comprehensive plan upon which all zoning ordinances are based, must "plan for the protection of natural and historic resources" but that obligation is limited "to the extent not preempted by Federal or State law." Section 301(a)(6) of the MPC, 53 P.S. §10301(a)(6).

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

Counts VII - Violation of Separation of Powers - Commission

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

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

58 Pa. C.S. §3305(a) provides:

(a) **Advisory opinions to municipalities.—**

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

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

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

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

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

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

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

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

commission shall be made part of the record before the court.

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

Count VIII - Violation of Non-Delegation Doctrine – DEP

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

(b) **Limitation.**—

> (1) No well site may be prepared or well drilled within 100 feet or, in the case of an unconventional well, 300 feet from the vertical well bore or 100 feet from the edge of the well site, whichever is greater, measured horizontally from any solid blue lined stream, spring or body of water as identified on the most current 7 ½ minute topographic quadrangle map of the United States Geological Survey.
>
> (2) The edge of the disturbed area associated with any unconventional well site must maintain a 100-foot setback from the edge of any solid blue lined stream, spring or body of water as identified on the most current 7 ½ minute topographic quadrangle map of the United States Geological Survey.
>
> (3) No unconventional well may be drilled within 300 feet of any wetlands greater than one acre in size, and the edge of the disturbed area of any well site must maintain a 100-foot setback from the boundary of the wetlands.
>
> (4) *The department shall waive the distance restrictions upon submission of a plan identifying additional measures, facilities or practices to be employed during well site construction, drilling and operations necessary to protect the waters of this Commonwealth.* The waiver, if granted, shall include additional terms and conditions required by the department necessary to protect the waters of this Commonwealth. Notwithstanding section 3211(e), if a waiver request has been submitted, the department may extend its permit review period for up to 15 days upon notification to the applicant of the reasons for the extension.

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

Article 2, §1 of the Pennsylvania Constitution provides that the legislative power of the Commonwealth is vested in a General Assembly consisting

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

In its preliminary objections, the Commonwealth denies that 58 Pa. C.S. §3215(b)(4) grants DEP the power to grant waivers without establishing standards for making determinations in violation of the non-delegation doctrine under Article 2, §1.[27] Those standards, it contends, are contained in 58 Pa. C.S. §3202, which provides that the General Assembly intended to "Permit optimal development of oil and gas resources of this Commonwealth consistent with

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

protection of health, safety, environment and property of Pennsylvania citizens." 58 Pa. C.S. §3202.

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

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

The Gaming Board stated that the policies and objectives listed by the Legislature in 4 Pa. C.S. §1102[28] as well as standards provided in other sections in

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[28] 4 Pa. C.S. §1102 provides that:

> The General Assembly recognizes the following public policy purposes and declares that the following objectives of the Commonwealth are to be served by this part:
>
> (1) The primary objective of this part to which all other objectives and purposes are secondary is to protect the public through the regulation and policing of all activities involving gaming and practices that continue to be unlawful.
>
> (2) The authorization of limited gaming by the installation and operation of slot machines as authorized in this part is intended to enhance live horse racing, breeding programs, entertainment and employment in this Commonwealth.

(Footnote continued on next page...)

(continued...)

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

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

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

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

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

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

(Footnote continued on next page...)

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

The subsections of Section 3215(b) provide specific setbacks between the wellbore or the disturbed area of a well site and the water source. In authorizing a waiver, Section 3215(b)(4) gives no guidance to DEP that guide and constrain its discretion to decide to waive the distance requirements from water body and wetland setbacks. Moreover, it does not provide how DEP is to evaluate an

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(continued...)

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

(10) The public interest of the citizens of this Commonwealth and the social effect of gaming shall be taken into consideration in any decision or order made pursuant to this part.

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

operator's "plan identifying additional measures, facilities or practices to be employed...necessary to protect the waters of this Commonwealth." 58 Pa. C.S. §3215(b)(4).

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

Counts IX & X -
Unconstitutionally Vague

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

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

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

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

DAN PELLEGRINI, President Judge

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

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Robinson Township, Washington County, Pennsylvania, Brian Coppola, Individually and in his Official Capacity as Supervisor of Robinson Township, Township of Nockamixon, Bucks County, Pennsylvania, Township of South Fayette, Allegheny County, Pennsylvania, Peters Township, Washington County, Pennsylvania, David M. Ball, Individually and in his Official Capacity as Councilman of Peters Township, Township of Cecil, Washington County, Pennsylvania, Mount Pleasant Township, Washington County, Pennsylvania, Borough of Yardley, Bucks County, Pennsylvania, Delaware Riverkeeper Network, Maya Van Rossum, the Delaware Riverkeeper, Mehernosh Khan, M.D., Petitioners	:	
v.	:	No. 284 M.D. 2012
Commonwealth of Pennsylvania, Pennsylvania Public Utility Commission, Robert F. Powelson, in his Official Capacity as Chairman of the Public Utility Commission, Office of the Attorney General of Pennsylvania, Linda L. Kelly, in her Official Capacity as Attorney General of the Commonwealth of Pennsylvania, Pennsylvania Department of Environmental Protection and Michael L. Krancer, in his Official Capacity as Secretary of the Department of Environmental Protection, Respondents	:	

ORDER

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

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

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

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

DAN PELLEGRINI, President Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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

Petitioners,

v.

Commonwealth of Pennsylvania, Pennsylvania Public Utility Commission, Robert F. Powelson, in His Official Capacity as Chairman of the Public Utility Commission, Office of the Attorney General of Pennsylvania, Linda L. Kelly, in Her Official Capacity as Attorney General of the Commonwealth of Pennsylvania, Pennsylvania Department of Environmental Protection and Michael L. Krancer, in His Official Capacity as Secretary of the Department of Environmental Protection,

Respondents

No. 284 M.D. 2012
Argued: June 6, 2012

BEFORE: HONORABLE DAN PELLEGRINI, President Judge
HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE BONNIE BRIGANCE LEADBETTER, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE ANNE E. COVEY, Judge

DISSENTING OPINION BY
JUDGE BROBSON FILED: July 26, 2012

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

The majority holds that Section 3304 of Act 13, 58 Pa. C.S. § 3304, is an affront to substantive due process because it would allow "oil and gas operations," what the majority refers to as the "pig," in zoning districts that, based on a local municipality's comprehensive plan, allow for incompatible uses—*i.e.*, residential and agricultural, to name a few. The majority refers to these incompatible zoning districts as "the parlor." Instead, the majority appears to argue that this particular pig belongs in an unidentified but different zoning district, which the majority identifies only as "the barnyard." The majority reasons that if the General Assembly can require that municipalities allow this particular pig to be in every zoning

district, it could also "require steel mills, industrial chicken farms, rendering plants and fireworks plants in residential zones." (Maj. slip op. at 29-30.)

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

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

Section 3304, however, does not, as the majority suggests, eviscerate local land use planning. It does not give carte blanche to the oil and gas industry to ignore local zoning ordinances and engage in oil and gas operations anywhere it wishes. Section 3304 does not require a municipality to convert a residential district into an industrial district. Indeed, in crafting Section 3304 of Act 13, the General Assembly allowed, but restricted, oil

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

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

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

industrial zoning districts as a permitted use and agricultural districts as a conditional use, subject to setback and noise level requirements.

The majority cites *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725 (1995). In *City of Edmunds*, a city filed a declaratory judgment action, seeking a ruling that its single-family zoning provision did not violate the Fair Housing Act. From *City of Edmonds*, the majority excises the following sentence: "Land-use restrictions designate 'districts in which only compatible uses are allowed and incompatible uses are excluded." *City of Edmunds*, 514 U.S. at 732 (quoting D. Mandelker, Land Use Law § 4.16, at 113-14 (3d ed. 1993)). The words "due process" appear nowhere in the Supreme Court's opinion in *City of Edmunds*. Yet, the majority, based on this quote, reaches a legal conclusion that any zoning ordinance that allows a particular use in a district that is incompatible with the other uses in that same district is unconstitutional. I find no support for this broad legal proposition in *City of Edmonds*. Indeed, if accepted, such a rule of law would call into question, if not sound the death knell for, zoning practices that heretofore have recognized the validity of incompatible uses—*e.g.*, the allowance of a pre-existing nonconforming use and authority of municipalities to grant a use variance.

The desire to organize a municipality into zones made up of compatible uses is a goal, or objective, of comprehensive planning. *See Huntley & Huntley, Inc. v. Borough Council of Borough of Oakmont*, 600 Pa. 207, 224, 964 A.2d 855, 865 (2009).[1] But it is not an inflexible

[1] In *Huntley*, the Supreme Court addressed a challenge to a local zoning ordinance that restricted oil and gas extraction in a residential zoning district. The issue before the Court was whether the Oil and Gas Act, Act of December 19, 1984, P.L. 1140, *as*
(Footnote continued on next page...)

constitutional edict. Although the inclusion of one incompatible use within a zoning district of otherwise compatible uses might be bad planning, it does not itself render the ordinance, or law, constitutionally infirm. "[A] local ordinance may not stand as an obstacle to the execution of the full purposes and objectives of the Legislature." *Id.* at 220, 964 A.2d at 863. This is exactly what the majority has done in this case by deferring to the locally-enacted comprehensive plans and zoning ordinances over the will of the General Assembly as expressed in Section 3304 of Act 13.[2]

Section 3304 of Act 13 is, in essence, a zoning ordinance. Substantive due process cases addressed to local zoning ordinances tend to

(continued...)

amended, 58 P.S. §§ 601.101-.605 (repealed 2012) (Former Act), preempted the local ordinance. The Supreme Court held that although the Former Act clearly preempted the field of local regulation in terms of how oil and gas resources are developed in the Commonwealth, it left room for local municipalities, through the MPC, to regulate where those resources are developed: "*[A]bsent further legislative guidance*, we conclude that the [local o]rdinance serves different purposes from those enumerated in the [Former] Act, and, hence, that its overall restriction on oil and gas wells in R-1 districts is not preempted by that enactment." *Huntley*, 600 Pa. at 225-26, 964 A.2d at 866 (emphasis added). With Act 13, which repealed the Former Act, the General Assembly has provided the courts with clear legislative guidance on the question of whether Act 13 is intended to preempt the field of how *and where* oil and gas natural resources are developed in the Commonwealth.

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

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

> When presented with a challenge to a zoning ordinance, the reviewing court presumes the ordinance is valid. The burden of proving otherwise is on the challenging party.
>
> A zoning ordinance is a valid exercise of the police power when it promotes public health, safety or welfare and its regulations are substantially related to the purpose the ordinance purports to serve. In applying that formulation, Pennsylvania courts use a substantive due process analysis which requires a reviewing court to balance the public interest served by the zoning ordinance against the confiscatory or exclusionary impact of regulation on individual rights. The party challenging the constitutionality of certain zoning provisions must establish that they are arbitrary, unreasonable and unrelated to the public health, safety, morals and general welfare. Where their validity is debatable, the legislature's judgment must control.

Boundary Drive Assocs. v. Shrewsberry Twp. Bd. of Supervisors, 507 Pa. 481, 489-90, 491 A.2d 86, 90 (1985) (citations omitted). In addition, "[t]he party challenging a legislative enactment bears a heavy burden to prove that it is unconstitutional. A statute will only be declared unconstitutional if it clearly, palpably and plainly violates the constitution. Any doubts are to be resolved in favor of a finding of constitutionality." *Payne v.*

Commonwealth, Dep't of Corr., 582 Pa. 375, 383, 871 A.2d 795, 800 (2005) (citations omitted).

The stated legislative purposes of Act 13 include:

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

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

In light of the standards set forth above, which must guide our review, Section 3304 of Act 13 is a valid exercise of the police power. The law promotes the health, safety, and welfare of all Pennsylvanians by establishing zoning guidance to local municipalities that ensures the uniform and optimal development of oil and gas resources in this Commonwealth. Its provisions strike a balance both by providing for the harvesting of those natural resources, wherever they are found, and by restricting oil and gas operations based on (a) type, (b) location, and (c) noise level. The General

Assembly's decision, as reflected in this provision, does not appear arbitrary, unreasonable, or wholly unrelated to the stated purpose of the law.

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

P. KEVIN BROBSON, Judge

Judges Simpson and Covey join in this dissenting opinion.

CERTIFICATE OF SERVICE

I, John M. Smith, do hereby certify that a true and correct copy of the foregoing Brief of Appellees was served via United States First-Class Mail on this 17th day of September 2012, to the following:

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