

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

Nos. 64, MAP 2012

ROBINSON TOWNSHIP, Washington County, Pennsylvania; BRIAN COPPOLA, Individually and in his Official Capacity as Supervisor of Robinson Township; TOWNSHIP OF NOCKAMIXON, Bucks County, Pennsylvania; TOWNSHIP OF SOUTH FAYETTE, Allegheny County, Pennsylvania; PETERS TOWNSHIP, Washington County, Pennsylvania; DAVID M. BALL, Individually and in his Official Capacity as Councilman of Peters Township; TOWNSHIP OF CECIL, Washington County, Pennsylvania; MOUNT PLEASANT TOWNSHIP, Washington County, Pennsylvania; BOROUGH OF YARDLEY, Bucks County, Pennsylvania; DELAWARE RIVERKEEPER NETWORK; MAYA van ROSSUM, the Delaware Riverkeeper; and MEHERNOSH KHAN, M.D.

Appellees/Cross-Appellants

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; LINDA L. KELLY, in her Official Capacity as Attorney General of the Commonwealth of Pennsylvania; PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION; and MICHAEL L. KRANCER, in his Official Capacity as Secretary of the Department of Environmental Protection

Appellants/Cross-Appellees

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: Appellants at Docket No. 64 MAP 2012.

**REPLY BRIEF FOR APPELLANTS 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**

**APPEAL FROM THE ORDER OF THE COMMONWEALTH COURT ENTERED
ON JUNE 26, 2012 AT NO. 284 M.D. 2012**

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STATEMENT OF THE CASE

The Commonwealth and Attorney General Linda L. Kelly appeal the July 26, 2012 decision of Commonwealth Court to the extent that it declared that Section 3304 of Act 13 of 2012, and other related provisions providing for the uniformity of local ordinances, violates Article I, Section 1 of the Pennsylvania Constitution. They also appeal the Commonwealth Court's determination that Section 3215(b)(4) (providing for DEP to grant waivers from setback requirements for oil and gas wells from certain water sources) violates the non-delegation doctrine under Article II, Section 1 of the Pennsylvania Constitution. (Appeal at No. 64 MAP 2012).

In their initial brief, the Commonwealth and Attorney General Kelly argue that the Commonwealth Court erred in reaching its decision because (1) the Municipalities lack standing to raise a challenge to the passage of Act 13; (2) the Municipalities' claims are non-justiciable because they ultimately involve policy decisions delegated to the General Assembly and are therefore barred under the separation of powers doctrine and the political question doctrine; (3) Act 13 does not violate principles of due process under Article I, Section 1 of the Pennsylvania Constitution because it has a rational basis and constitutes a proper exercise of the Commonwealth's police powers; and (4) Act 13 establishes sufficient standards for the DEP to promulgate regulations and grant waivers pursuant to Section 3215(b)(4) so as to not violate the non-delegation doctrine of Article II, Section 1 of the Pennsylvania Constitution.

The Municipalities have filed a seventy page brief in opposition to these arguments. While there is a temptation to address at length each and every point made by the Municipalities in their brief, the Commonwealth and Attorney General have already set forth their position in some detail in their initial brief and will refrain from simply reiterating what has been previously

argued. *See* Pa.R.A.P. 2113 (Reply Brief); Pa.R.A.P. 2140(d) (Page Limits for Reply Briefs). Instead, this reply brief will focus on what is a fundamental disagreement between the parties regarding the authority of the General Assembly to determine economic and environmental policy for the entire Commonwealth, and the limitations which are placed on municipal governments in pursuing their own agendas – even where their policies would otherwise meet constitutional muster if not for the preemptive effect of a statewide legislative mandate.

Similarly, we will address the Municipalities’ position that the General Assembly is limited in its ability to delegate to DEP, or other administrative agencies, the responsibility to promulgate regulations, grant waivers, or take other action based on the stated purpose and general objectives of a statute without further fact-finding or establishment of highly-defined criteria by the Legislature. For the reasons explained in the argument section of this brief, the Municipalities’ position, if adopted by this Court, will diminish the ability of the General Assembly to establish uniform statewide policies for the benefit of all citizens of the Commonwealth and unduly burden the General Assembly in implementing its policies through administrative agencies which have the scientific and technological expertise necessary to execute the General Assembly’s intent in a highly specialized and complex modern World.¹

¹ The Commonwealth and Attorney General’s position regarding standing and non-justiciability of the Municipalities’ claims (i.e. political question doctrine) is fully presented in our initial brief and does not require fuller elaboration here. While we remain adamant in our position that judgment should have been granted in favor of the Commonwealth on those claims, we limit this brief to a further explanation of our argument on the merits as those issues appear to be more complex and susceptible to confusion.

ARGUMENT

I. THE LIMITATIONS ON ZONING PLACED ON MUNICIPALITIES BY ACT 13 ARE A PROPER EXERCISE OF THE COMMONWEALTH'S POLICE POWERS BECAUSE THEY FURTHER THE COMMONWEALTH'S INTERESTS IN THE DEVELOPMENT OF A RARE NATURAL RESOURCE WHILE ESTABLISHING SUFFICIENT PROCEDURAL SAFEGUARDS TO PROTECT THE INTERESTS OF PROPERTY OWNERS.

The Municipalities' argument and the Commonwealth Court's majority opinion in this case are centered on the false premise that Act 13 is inherently incompatible with basic principles of land use planning. They paint a picture of residential neighborhoods torn apart by the indiscriminate placement of gas wells by an industry permitted to operate wherever it pleases. In the wake of these operations, neighboring landowners are victims who have no rights and no recourse. If this picture were correct, there would be good reason to conclude that Act 13 violates the substantive due process rights of Pennsylvania's citizens. However, this picture is a distortion of how Act 13 actually impacts zoning, and fails to take into account the protections which Act 13 provides to neighboring landowners and the population as a whole. While Act 13 does restrict the ability of Municipalities to exclude oil and gas development from specified zoning districts as a matter of course, it does not leave a vacuum. Rather, it establishes minimum setback requirements, strict environmental standards, and other criteria which must be met before property may be used for oil and gas related activities. Act 13, therefore, does not eviscerate the protections provided by local zoning ordinances; it simply substitutes the regulations and standards established by local government officials as they relate to the location of oil and gas development with those of the General Assembly.

Act 13 provides a minimum setback requirement of 500 feet from any building for an unconventional gas well. 58 Pa. C.S. § 3215. To put this in perspective, an acre of land (of equal dimensions) would be approximately 208 feet by 208 feet. The typical residential

neighborhood in Pennsylvania – complete with sidewalks, manicured lawns, and white picket fences - would simply not be impacted by Section 3304.² Upon closer examination, it is only residential zoning districts which are vastly undeveloped or which have houses on tracts of land which are more than two acres in area which could be affected by Section 3304.³ The General Assembly could have reasonably concluded that the benefits of increasing the potential supply of natural gas by allowing limited development in relatively undeveloped and non-densely populated areas of the Commonwealth outweighs the harm in requiring municipalities to deviate from their comprehensive plans under the MPC.

The Commonwealth is not suggesting that local zoning ordinances do not serve a legitimate purpose or that they lack a rational basis under the Constitution. In fact, we recognize that municipal ordinances enjoy the same presumption of constitutionality as laws enacted by the General Assembly. *Bilbar Construction Co. v. Board of Adjustment of Easttown Township*, 393 Pa. 62, 71, 141 A2d 851, 856 (1958). The Municipalities, however, seem to believe that because

² Ozzie and Harriet can sleep at night without worrying that they will wake up to find the proverbial “pig” in their “parlor.” The “pig” will undoubtedly be unable to meet the minimum setback requirements in their typical suburban neighborhood. If Ozzie and Harriet move to a less developed location where oil and gas wells might be allowed under Act 13, the “pig” would still be at a minimum almost two football fields away from their front porch. If the placement of an unconventional gas well still posed problems (e.g. contamination of well water), Ozzie and Harriet could object to the granting of a permit by DEP or exercise their pre-existing rights as landowners to suppress a nuisance as provided for under the common law.

³ While there are legitimate reasons for a municipality to plan for future growth by reserving certain areas for residential use, they do not supersede all other legitimate government objectives. Moreover, any alleged harm to current residents is significantly diminished where there is limited development, the land which is actually being used for residential purposes is underutilized, and the distance between residences or other buildings is substantial. There is also the distinct possibility in these types of situations that the designation of undeveloped land as “residential” has not been made for proper land use purposes but is a pre-text for the exclusion of industrial, mining, and other business activities which the residents would like to keep out of their community. The General Assembly has both the authority and the responsibility to place the health, safety and welfare of the citizens of the entire state over the parochial interests of individual municipalities.

their zoning plans have a rational basis and would meet constitutional muster, Act 13's adjustment of the zoning scheme to allow greater development of oil and gas resources must be improper. Their analysis is wrong because they do not recognize that the Constitution does not dictate the policy choices of the Legislature so long as they are constitutional. There is more than one constitutionally permissible way for the government to make land use planning decisions. In other words, there is more than one way to skin a cat.

There is really no doubt that the General Assembly may regulate the development of the oil and gas industry under its police powers. In fact, the Municipalities concede as much in their brief. *See* Municipalities' Brief (64 MAP 2012, filed 9/18/12, at 13). This case is really less about whether Act 13 has a rational basis for purposes of Article I, Section 1 of the Constitution and more about whether the General Assembly may preempt the requirements of local zoning ordinances to permit a particular use of property which is inconsistent with the land use planning of a municipality. However, this latter question is one which has previously been decided by this Court.

In *Olon v. Commonwealth, Department of Corrections*, 534 Pa. 90, 94, 626 A.2d 533, 535 (1993), this Court held that the Commonwealth could convert property for use as a state prison which was located in an area designated for residential use only under local zoning ordinances. In reaching its decision, the Court stated:

The Commonwealth Court thus correctly understood *Orgontz*^{4]} to require specific legislative intent to override municipal zoning powers before a Commonwealth agency will be deemed to possess preemptive land use powers; nevertheless such an intent is evident in the legislation underlying this case.

More recently, regarding legislation concerning the same subject matter as is involved in the present lawsuit, this Court in *Huntley & Huntley v. Borough Council of the Borough of Oakmont*,

⁴ *Dep't of General Services v. Ogontz Area Neighbors Ass'n*, 505 Pa. 614, 483 A.2d 448 (1984).

600 Pa. 207, 964 A.2d 855 (2009), held that the Legislature in enacting the Oil and Gas Act⁵ (Act 13's predecessor) did not intend to preempt the power of municipalities to use their zoning powers to regulate the location of oil and gas development. However, in reaching this result, this Court acknowledged the ultimate authority of the General Assembly to preempt local zoning. In enacting Act 13, the General Assembly has done nothing more than exercise the authority recognized by this Court in *Huntley*.

Zoning is a tool which allows local governments to place restrictions on the use of land by property owners within the parameters allowed under the United States and Pennsylvania Constitutions. Zoning districts are a means to achieve rational and comprehensive land use planning, but zoning is never an end in itself. While zoning districts may seek uniformity, the law recognizes that this is not always possible. Exceptions for non-conforming pre-existing uses and properties whose unique character require the granting of a variance are required not only under the MPC, but as a matter of constitutional necessity to protect the rights of property owners. Although these exceptions run counter to the uniformity zoning districts are intended to preserve, they do not prevent municipalities from achieving the goals of local land use planning. Contrary to the underlying theory of the Municipalities in this case, these types of exceptions for "incompatible uses" are not unconstitutional and do not render a municipality's comprehensive plan irrational.

While Act 13 theoretically opens up a large number of properties for development which would otherwise be barred under local zoning ordinances, its setback requirements, strict environmental standards, and other substantive and procedural requirements limit the amount of actual development and provide neighboring landowners with significant protections to

⁵ 58 P.S. §§ 601.101 – 601.606.

guarantee their rights under Article I, Section 1 of the Pennsylvania Constitution. *See, e.g.*, Section 3211 (well permits); Section 3212 (Permit Objections); Section 3215 (Well location restrictions); Section 3217 (Protection of fresh groundwater and casing requirements); Section 3218 (Protection of water supplies); Section 3254 (Restraining violations); and Section 3257 (Existing rights and remedies preserved and cumulative remedies authorized). Act 13 also takes into account the impact which the oil and gas industry may have on municipalities themselves by establishing impact fees paid by industry to offset the various costs incurred as a result of increased development and production. Section 2302 (unconventional gas well fee).

The Municipalities have strong objections to the expansion of the oil and gas industry in Pennsylvania. However, their disagreement with the General Assembly is ultimately a disagreement over policy choices which raise questions which are political rather than constitutional in nature. Act 13 clearly furthers the health, safety, and welfare of the citizens of Pennsylvania. As such, it represents a rational choice which is well within the powers of the General Assembly. It is also uniform and statewide in application. Therefore, it does not constitute “special legislation” or “spot zoning” as argued by the Municipalities. Section 3304 of Act 13 is a proper exercise of the powers expressly granted the General Assembly under Article I, Section 27 of the Pennsylvania Constitution. *See Com. v. Parker White Metal Co.*, 512 Pa. 74, 515 A.2d 1358 (1986) (in upholding the constitutionality of the Solid Waste Management Act, “we must also bear in mind that it was enacted to implement the will of the people as expressed in Article I, Section 27 of the Pennsylvania Constitution.”). If the Municipalities wish to change Act 13, they should seek to amend or repeal the law through the political process and not by petitioning the courts.

II. ACT 13 ESTABLISHES BASIC POLICY CHOICES AND ENACTS SUFFICIENT STANDARDS FOR THE DEP TO PROMULGATE REGULATIONS AND GRANT WAIVERS WITHOUT VIOLATING THE NON-DELEGATION DOCTRINE OF ARTICLE II, SECTION 1 OF THE PENNSYLVANIA CONSTITUTION.

Section 3215(b)(4) of Act 13, 58 Pa. C.S. § 3215(b)(4), provides DEP with the authority to grant a waiver from the setback requirements from certain sources of water when issuing well permits. It provides, in relevant part, “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.**” 58 Pa. C.S. § 3215(b)(4) (emphasis added).

The Municipalities maintain that the Commonwealth Court’s determination that the waiver provisions under Section 3215(b)(4) of Act 13, 58 Pa. C.S. § 3215(b)(4), violate the non-delegation doctrine under Article II, Section 1 is correct. In their argument, they rely on the standard set forth in this Court’s decision in *Pennsylvanians Against Gambling Expansion Fund v. Commonwealth*, 583 Pa. 275, 877 A.2d 383 (2005) (*PAGE*). In *PAGE*, this Court reiterated the basic standard for making a determination regarding the constitutionality of the General Assembly’s delegation of authority under Article II, Section 1 as follows:

While the General Assembly may, with adequate standards and guidelines, constitutionally delegate the power and authority to execute or administer a law, the prohibition against delegation of “legislative power requires that the *basic policy choices* be made by the General Assembly.

Id. 583 Pa. at 331-32, 877 A.2d at 417. While the Attorney General agrees with the Municipalities as to the standard to be applied, she disagrees with the Commonwealth Court’s application of that standard to the particular facts of this case.

Section 3202 sets forth the purpose of Chapter 32 of Act 13 as follows:

(1) Permit optimal development of oil and gas resources of this Commonwealth consistent with protection of the health, safety, environment and property of Pennsylvania citizens.

(2) Protect the safety of personnel and facilities employed in coal mining or exploration, development, storage and production of natural gas or oil.

(3) Protect the safety and property rights of persons residing in areas where mining, exploration, development, storage or production occurs.

(4) Protect the natural resources, environmental rights and values secured by the Constitution of Pennsylvania.

58 Pa. C.S. § 3202. The General Assembly has further indicated that Chapter 32 does not affect or limit any rights or responsibilities of DEP under the Clean Streams Law, the Air Pollution Control Act, the Dam Safety Encroachments Act or the Solid Waste Management Act. 58 Pa. C.S. § 3273. Likewise, the General Assembly has expressly provided that it is “the purpose of [Chapter 32] to provide additional and cumulative remedies to control activities related to drilling for, or production of, oil and gas in this Commonwealth, and nothing contained in this chapter abridges or alters rights of action or remedies existing, or which existed previously, in equity or under common or statutory law, criminal or civil.” 58 Pa. C.S. § 3257.

The General Assembly has provided ample guidance as to its policy choices in enacting Act 13 of 2012. In determining what is “necessary to protect the waters of this Commonwealth,” DEP is to be guided, *inter alia*, by protecting the safety and property rights of persons in areas affected by mining, exploration, and development; protecting the safety of individuals and facilities employed in mining and other activities covered by Act 13; and permitting development of oil and gas resources but only where it is consistent with protecting the health, safety, environment and property of Pennsylvania citizens. *See* 58 Pa. C.S. § 3202. The Commonwealth Court’s determination that Act 13 somehow lacks sufficient standards and

guidelines is simply wrong, and unnecessarily fetters the ability of the General Assembly to implement important programs and policies through administrative agencies. As this Court recognized in *Casino Free Philadelphia v. Pennsylvania Gaming Control Board*, 594 Pa. 202, 207, 934 A.2d 1249, 1253 (2007), “there is nothing in the [non-delegation doctrine] that would require an exhaustive definition of [each purpose and objective of a law]. The Legislature is not constitutionally required to micromanage the administrative agencies it creates.”

In *Eagle Environmental II v. Commonwealth, Department of Environmental Protection*, 584 Pa. 494 884 A.2d 867 (2005), this Court upheld regulations promulgated under the Solid Waste Management Act (SWMA), 35 P.S. §§ 6018.101-6018.1003, as not violating the non-delegation doctrine under Article II, Section 1 of the Pennsylvania Constitution. The Court found that “[t]he legislature has signaled to the [Environmental Quality Board] the necessary considerations for such a balancing of duties, including the need to protect the health, safety, welfare and property of the people from the dangers of waste disposal and the desire to encourage private enterprise.” *Eagle Environmental II*, 584 Pa. 514, 884 A.2d at 879. The policy directives found to be constitutional under the SWMA are strikingly similar to the policy directives under Act 13. Despite the Municipalities’ protestations to the contrary, this Court’s decision in *Eagle Environmental II* not only supports, but requires, reversal of the Commonwealth Court’s determination that the waiver provision of Section 3215(B)(4) is

unconstitutional under the non-delegation doctrine of Article II, Section 1.⁶

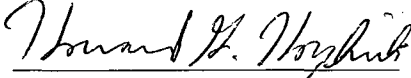
⁶ It is worth noting that the challenge in *Eagle Environmental II* was primarily concerned with the appropriateness of a specific regulation, the “Harms/Benefits Test” under 25 Pa. Code § 271.127(c). The Municipalities in this case have an even greater burden because they are claiming that Section 3215(b)(4) is facially unconstitutional and that it is impossible for DEP to grant waivers under any circumstances. If Section 3215(b)(4) were upheld and DEP implemented regulations and/or granted waivers pursuant to this section, the Municipalities or other interested parties could then raise objections based on the particular facts in those cases. However, as explained above and in our initial brief, there is more than sufficient guidance regarding the underlying policy choices of the General Assembly to allow DEP to determine what is “necessary” to protect the waters of the Commonwealth for purposes of Section 3215(b)(4).

CONCLUSION

For the reasons set forth above, and in the Commonwealth and Attorney General Linda L. Kelly's initial brief, the order of the Commonwealth Court granting summary relief in favor of the Municipalities on Counts I, II, III, and VIII of the Petition for Review should be reversed, and judgment entered in favor of the Commonwealth and Attorney General Linda L. Kelly.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, **Howard G. Hopkirk**, Senior Deputy Attorney General, hereby certify that on September 25, 2012, I caused to be served the foregoing **REPLY BRIEF FOR APPELLANTS 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** by depositing two copies of same in the United States Mail, first class, postage prepaid, in Harrisburg, Pennsylvania upon the following:

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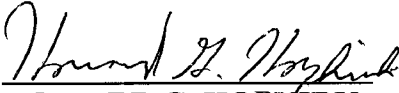
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