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OCT 12 2012

IN THE SUPREME COURT OF PENNSYLVANIA

Middle

Docket No. 63 MAP 2012

Robinson Township, *et al.*,
Appellees

v.

Commonwealth of Pennsylvania, *et al.*,
Appellants

BRIEF OF *AMICI CURIAE* SENATOR JOSEPH SCARNATI, III
AND REPRESENTATIVE SAMUEL H. SMITH IN SUPPORT OF APPELLANTS
COMMONWEALTH OF PENNSYLVANIA, *et al.*

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Date: October 11, 2012

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I. STATEMENT OF INTEREST OF AMICI CURIAE

Senator Joseph Scarnati, III, is a member of the Pennsylvania State Senate and is the President Pro Tempore of that body. Representative Samuel H. Smith is a member of the Pennsylvania House of Representatives and is the Speaker of that body. Senator Scarnati and Speaker Smith (together, "*Amici*") file this brief as *amici curiae* in support of Appellants Commonwealth of Pennsylvania, *et al.*

Appellees have challenged, and the Commonwealth Court has found unconstitutional, portions of Act 13 of 2012 ("Act 13"), codified at 58 P.S. §§ 2301-3504. Act 13 came into existence as House Bill 1950, introduced in the House on November 1, 2011. Act 13 was subsequently considered by the Senate, and received final passage from the Senate on December 14, 2011.

Both Senator Scarnati and Speaker Smith voted in favor of House Bill 1950 in their respective chambers. As the leaders of their respective chambers, *Amici* appointed the members of the conference committee that reconciled the House and Senate versions of the legislation. Senator Scarnati, himself, participated in that conference. After that conference, the final version of House Bill 1950 was adopted by the Senate on February 7, 2012 and by the House on February 8, 2012.

Appellees allege that the General Assembly's process for passage of Act 13 violated the Pennsylvania Constitution and that the General Assembly passed the law for an improper purpose. Appellees' constitutional challenges "implicat[e] the delicate relationship between the legislative and judicial branches." *DeWeese v. Weaver*, 824 A.2d 364, 369 (Pa. Commw. Ct. 2003).

As the highest ranking constitutional officers of the Pennsylvania General Assembly, *Amici* are sworn to defend the Pennsylvania Constitution. Having presided over passage of Act 13 in their respective chambers, *Amici* have considered the constitutionality of both the process by which Act 13 was passed through the General Assembly and the constitutionality of the tenets of that law.

Amici initially requested the Court's leave to intervene in this case to defend the constitutionality of Act 13, which request was denied by the Court's Order of September 24, 2012. By that Order, however, the Court noted that the denial was without prejudice to file an *amicus curiae* brief. Because the deadline for filing such briefs has passed, *Amici* have filed a motion for leave to file this brief *nunc pro tunc*.

Amici offer the Court the following analysis of the constitutionality of Act 13, and request the Court reverse the Commonwealth Court's ruling that portions of Act 13 are unconstitutional.

II. SUMMARY OF ARGUMENT

The Commonwealth Court, by its July 26th Order, found that found that section 3304 of Act 13 violated Article I, section 1 of the Pennsylvania Constitution as an impermissible exercise of the Commonwealth's police power and that section 3215 of the Act violated the constitutional non-delegation doctrine.

Contrary to the Commonwealth Court's holding, section 3304 of Act 13 is a constitutional exercise of the Commonwealth of Pennsylvania's authority over Pennsylvania municipalities. Section 3304 of Act 13, contrary to Appellees' contentions, is not a "zoning ordinance." Act 13 does not directly regulate private property or

individual rights. Act 13, instead, governs the conduct of municipalities by, e.g., restricting what local ordinances may be imposed on Pennsylvania's oil and gas industry. Those municipalities, as creatures of the state, are wholly subject to the authority of the Commonwealth, as sovereign. Act 13, therefore, is not subject to Appellees' challenge pursuant to Article I, section 1 of the Pennsylvania Constitution, and need not be an appropriate exercise of the Commonwealth's police powers to survive that challenge. Nonetheless, even if Act 13 were construed as directly burdening private property interests, the law is a valid exercise of the police power: a reasonable and necessary measure to serve the public's interest in environmental protection, property rights, and economic development.

Further, section 3215 of Act 13 does not violate the non-delegation doctrine of the Pennsylvania Constitution because the Act provides sufficient guidance to the Department of Environmental Protection to contain appropriately that Department's discretion in performance of the acts delegated to it by the General Assembly.

III. ARGUMENT

A. **The Court Should Reverse The Commonwealth Court's Order Because Section 3302 Of Act 13 Conforms With Article I, Section 1 of the Pennsylvania Constitution.**

1. **Act 13 is a regulation of the Pennsylvania municipalities, not of private interests, and therefore is not subject to Appellees' challenge under Article I, section 1 of the Pennsylvania Constitution.**

The Commonwealth Court found that Act 13 violated Article I, section 1 of the Pennsylvania Constitution, which provides that "*individuals* have the right to enjoy private property." *BAC, Inc. v. Bd. of Sup'rs of Millcreek Twp.*, 534 Pa. 381, 384, 633

A.2d 144, 146 (1993) (emphasis added). Pursuant to that section, government interference with private property rights may be justified only by an exercise of police power substantially related to the protection of public welfare. *Id.*

A proper constitutional review of Act 13, however, does not present any issue of interference with private property rights that would be limited as an exercise of the Commonwealth's police power. Instead, this case involves the authority of the Commonwealth to regulate the activities of its political subdivisions. Appellees concede that Act 13's purported "zoning provisions" are, in fact, regulations of the conduct of Pennsylvania municipalities. See Appellees' Brief at p. 3 ("Section 3304 creates a uniform zoning scheme *for local ordinances* dealing with oil and gas operations;" "Section 3304 *restricts a municipality's ability* to specify which types of oil and gas operations are permitted ... and how to classify permitted uses."); *id.* at p. 5 ("Municipalities also cannot impose limits or conditions ..."). Appellees do not contend that the alleged "zoning requirements" of Act 13 directly regulate private property or private interests, as would a governmental taking or a zoning requirement.

The Commonwealth Court's decision held improperly that the Commonwealth's authority to regulate its municipalities should be subject to the same level of constitutional scrutiny as those municipalities' zoning regulation of private property interests. Although it is true that municipal zoning regulations are constitutional only when they serve a "legitimate public purpose" such as "preserving or promoting the public health, safety, morals or general welfare," see e.g., *Best v. Zoning Bd. of Adjustment of City of Pittsburgh*, 393 Pa. 106, 141 A.2d 606, 610 (1958), there is no

basis for Appellees' assertion that "the Commonwealth, through Act 13, engaged in zoning" or that "[w]hen engaged in zoning, the Commonwealth must follow the same Constitutional mandates that are imposed upon municipalities when enacting zoning ordinances." Appellees' Brief at p. 15.

Contrary to Appellees' suggestion, Act 13 is not a zoning ordinance and is not an exercise of the Commonwealth's police power, or otherwise constrained by Article I, section 1 of the Pennsylvania Constitution. Initially, an act of the General Assembly is, by definition, no ordinance at all. See *Buckwalter v. Borough of Phoenixville*, 603 Pa. 534, 543 n. 1, 985 A.2d 728, 734 (2009) ("An ordinance is defined to be 'a rule or regulation adopted by a municipal corporation.'") (quoting *Meredith v. Whillock*, 173 Mo. App. 542, 158 S.W. 1061 (1913)). More critically, the "police power" test that Appellees contend should be applied to Act 13 is rooted in "the time-tested conceptional limit of public encroachment upon *private interests*." *Goldblatt v. Town of Hempstead, N. Y.*, 369 U.S. 590, 594 82 S. Ct. 987, 990 (1962) (emphasis added). Accordingly, the "police power" test ensures that the Commonwealth and its subdivisions "regulate private property's use in the public interest." *Western Pennsylvania Socialist Workers 1982 Campaign v. Connecticut*, 512 Pa. 23, 39, 515 A.2d 1331, 1339 (1986).

Act 13, a regulation of Pennsylvania municipalities and their conduct, does not bear directly on private interests, and therefore is not limited by Article I, section 1 of the Pennsylvania Constitution. The municipal Appellees are not afforded the same protections from state action as private Pennsylvania citizens. Rather, a municipality is a mere creature of the state, and has no sovereignty to protect it from state legislative

action. "[I]t is fundamental that municipalities are creatures of the state and that the authority of the Legislature over their powers is supreme." *Naylor v. Twp. of Hellam*, 565 Pa. 397, 403, 773 A.2d 770, 773 (2001); *see also Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. 518, 660-61 (1819); *Warner Cable Commc'ns Inc. v. Borough of Schuylkill Haven*, 784 F. Supp. 203, 211 (E.D. Pa. 1992) ("[A] borough or other municipal corporation is not a sovereign with inherent powers, but rather a creature of the state. As such, it is completely subject to the state legislature's authority and may do only those things which the legislature has placed in its power." (citing *In re Borough of Ambridge*, 53 Pa. Cmwlth. 251, 417 A.2d 291, 292 (1980))). As to municipalities, the Commonwealth "has authority to . . . enlarge or diminish their powers . . . and overrule their legislative action whenever it is deemed unwise, impolitic or unjust, and even abolish them altogether." *In re City of Pittsburg*, 217 Pa. 227, 237, 66 A. 348, 351 (1907), *aff'd sub nom. Hunter v. City of Pittsburgh*, 207 U.S. 161, 28 S. Ct. 40, 52 L. Ed. 151 (1907).

Accordingly, Appellees cannot challenge Act 13, a regulation of municipal conduct, under Article I, section 1 of the Pennsylvania Constitution. Appellees' challenge does not present a proper constitutional claim, but instead merely amounts to second-guessing of state policy judgments regarding the regulation of Pennsylvania municipalities. The Commonwealth Court's ruling in favor of this challenge therefore should be reversed.

2. Even If Act 13 Were Considered A Zoning Regulation, It Is A Valid Exercise Of The Commonwealth's Police Powers.

Even if Act 13 could be said to regulate private property interests, it nonetheless is a proper exercise of the Commonwealth's police power and therefore survives Appellees' Article I challenge.

"A state's police power is one of the most essential powers of government which allows it to promote the public health, morals or safety and the general well-being of the community." *Adams Sanitation Co., Inc. v. Com., Dep't of Env'tl. Prot.*, 552 Pa. 304, 313, 715 A.2d 390, 395 (1998). As such, "the police power is one of the most essential and least limitable powers of the Commonwealth." *Eagle Env'tl. II, L.P. v. Commonwealth, Dep't of Env'tl. Prot.*, 584 Pa. 494, 519, 884 A.2d 867, 882 (2005); see also *Hadacheck v. Sebastian*, 239 U.S. 394, 410, 36 S. Ct. 143, 145, 60 L. Ed. 348 (1915). "While the state's exercise of its police power often causes tension between the Commonwealth and property owners, the courts will not invalidate the Commonwealth's exercise of its police powers unless it is performed in an unreasonable and arbitrary manner." *Adams Sanitation Co.*, 715 A.2d at 395.

Accordingly, "one who challenges the constitutionality of the exercise of the state's police power, affecting a property interest, must overcome a heavy burden of proof to sustain that challenge." *Commonwealth v. Barnes & Tucker Co.*, 472 Pa. 115, 123, 371 A.2d 461, 465 (1977). With this burden in mind, the standard used by courts when considering whether there has been an unconstitutional exercise of the state's police power is as follows:

To justify the State in . . . interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals.

Adams Sanitation Co., 715 A.2d at 395 (alteration in original) (quoting *Lawton v. Steele*, 152 U.S. 133, 137, 14 S. Ct. 499, 38 L. Ed. 385 (1894)) (internal quotation marks omitted).

Here, the Commonwealth's asserted purposes underlying Act 13 include protecting the environment, protecting the rights of landowners, and encouraging the economic development of Pennsylvania's oil and gas industry. It is beyond dispute that these objectives favor public interests. Finally, Act 13 represents the sole reasonably necessary means to ensure uniformity in regulation of the oil and gas industry by Pennsylvania's municipalities; without its uniformity requirements, divergent policies in local municipalities would thwart the Commonwealth's aims. As established above, Act 13 regulates the conduct of municipal governments, and therefore is not overly oppressive upon individual Pennsylvania citizens. Therefore, even if credence is given to Appellees' contention that the Commonwealth's regulation of municipalities through Act 13 is subject to the same "police power" limitation as municipal regulation of private property, Act 13 is a valid exercise of the police power.

B. The Court Should Reverse The Commonwealth Court's Order Because Section 3215 Of Act 13 Does Not Violate The Non-Delegation Doctrine.

The Commonwealth Court incorrectly found that Act 13 violated Article 2, section 1 of the Pennsylvania Constitution because the law provides insufficient guidance to the

Department of Environmental Protection regarding the Department's discretion to grant waivers of setback requirements for oil and gas wells from the waters of the Commonwealth.

Article 2, section 1 provides, "[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." Pursuant to the non-delegation doctrine as reflected in Article II, Section 1 and Article III, Section 1 (no law shall be passed except by bill), the Legislature may not delegate its lawmaking power to any other branch of government, body or authority. *Ins. Fed. of Pa., Inc. v. Dep't of Ins.*, 585 Pa. 630, 889 A.2d 550 (2005).

The Legislature, however, may delegate policy making authority to an administrative agency as long as the Legislature makes the basic policy choices and enacts adequate standards guiding and restraining the exercise of the delegated administrative functions. *Id.*; see also *Eagle Envtl. II*, 884 A.2d at 880).

[T]o do so, [the General Assembly] must establish primary standards and impose upon others the duty to carry out the declared legislative policy in accordance with the general provisions of the enabling legislation [T]he principal limitations on the General Assembly's power to delegate such authority are twofold: (1) the basic policy choices must be made by the Legislature; and (2) the legislation must contain adequate standards which will guide and restrain the exercise of the delegated administrative functions.

Ass'n of Settlement Cos. v. Dep't of Banking, 977 A.2d 1257, 1265 (Pa. Commw. Ct. 2009) (quoting *Blackwell v. Com.*, *State Ethics Com'n.*, 523 Pa. 347, 358, 567 A.2d 630, 636 (1989); *Gilligan v. Pa. Horse Racing Comm'n.*, 422 A.2d 487, 489 (Pa. 1980)) (internal quotation marks omitted); see also *Pa. Builders Ass'n v. Dep't of Labor and*

Indus., 4 A.3d 215, 224 (Pa. Commw. Ct. 2010). "In determining whether an act expresses basic policy choices, a reviewing court should look to the act's 'purpose, its nature and its reasonable effect; [courts] are not limited to the mere letter of the law but must look beyond the letter to determine its true purpose and effect.'" *Ass'n of Settlement Cos.*, 977 A.2d at 1265 (alteration in original) (quoting *Water & Power Res. Bd. v. Green Springs Co.*, 145 A.2d 178, 181 (Pa. 1958)).

Here, Act 13 clearly sets forth the General Assembly's purposes for the Act: protecting the environment; protecting the rights of landowners; and, encouraging the economic development of Pennsylvania's oil and gas industry. Because it is clear that Act 13 sets forth the General Assembly's basic policy, "the first requirement for lawful delegation of administrative duties by the General Assembly has clearly been met." See *Pa. Builders Ass'n*, 4 A.3d at 224.

Within section 3215, the General Assembly further sets forth the primary standards for the carrying out of these legislative policies: "wells may not be drilled ..." within certain distances from wells, reservoirs, or other water supply extraction points, 58 Pa.C.S. § 3215(a), unless DEP shall waive such requirements. 58 Pa.C.S. § 3215(b). This delegation to grant waivers is not unfettered; to the contrary, DEP may not waive such restrictions until the party seeking waiver submits a "plan identifying additional measures, facilities, or practices to be employed . . . to protect the waters of this Commonwealth," *id.*, and any waiver granted shall include these additional terms. *Id.* These standards provide sufficient guidance to DEP to restrain the administration of Act 13. See *Harman v. Commonwealth, Hous. Fin. Agency, Homeowners' Emergency*

Mortgage Assistance Program, 108 Pa. Cmwlth. 285, 288, 529 A.2d 1153, 1154 (Pa. Commw. Ct. 1987) ("not all of the administrative details must be specifically enumerated in the statute." (citing *Gilligan*, 422 A.2d at 487)). DEP, the agency vested with responsibility to protect Pennsylvania's watersheds and conserve the waters and streams of the Commonwealth, see *Texas Keystone Inc. v. Pennsylvania Dept. of Conservation and Natural Resources*, 851 A.2d 228, 231 n. 1 (Pa. Cmwlth. Ct. 2004), commonly and appropriately exercises its discretion to determine whether certain acts or omissions are necessary to assure that those waters sufficiently are protected. See, e.g., *Sentinel Ridge Development, LLC v. Department of Environmental Protection*, 2 A.3d 1263, 1265 (Pa. Cmwlth. Ct. 2010); *Potratz v. Com., Dept. of Environmental Protection*, 897 A.2d 16, 20-22 (Pa. Cmwlth. Ct. 2006)

Act 13 contains standards sufficient to adequately guide and restrain DEP in carrying out the law. Because § 3215 "has enumerated and detailed eligibility requirements . . . and thereby conferred upon the Agency the authority and discretion necessary for the execution of the law," there is "no unconstitutional delegation of legislative authority." *Id.* at 1155.

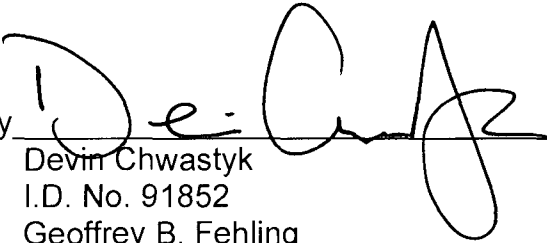
IV. CONCLUSION

For the foregoing reasons, *Amici Curiae*, Senator Joseph Scarnati, III and Representative Samuel H. Smith, request that the Court reverse the Commonwealth Court's holding that section 3304 of Act 13 violated Article I, section 1 of the

Pennsylvania Constitution and that section 3215 of Act 13 violated Article 2, section 1 of the Constitution.

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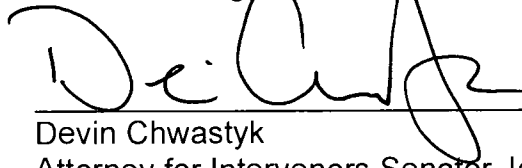
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