IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

Docket No. 63 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: Pennsylvania Public Utility Commission, Robert F. Powelson, in his Official Capacity as Chairman of the Public Utility Commission & Pennsylvania Department of Environmental Protection and Michael L. Krancer, in his Official Capacity as Secretary of the Department of Environmental Protection

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BRIEF OF APPELLANTS

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

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I. STATEMENT OF JURISDICTION

As set forth in Appellants' Jurisdictional Statement, this Court has subject matter jurisdiction under 42 Pa. C.S. § 723(a) and Pa.R.A.P. 1101 over the appeal of the Pennsylvania Public Utility Commission and Chairman Robert F. Powelson (collectively, "the Commission"), as well as the Pennsylvania Department of Environmental Protection and Secretary Michael L. Krancer (collectively, "the Department").

II. ORDERS OR OTHER DETERMINATIONS IN QUESTION

The text of the order from which the Commission and the Department seek review is as follows:

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 [sic] 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.
>
> /s/
> DAN PELLEGRINI, President Judge

A copy of the July 26, 2012 *en banc* order and supporting/dissenting opinions, as amended by order of July 31, are attached hereto as Exhibit A.[1] The slip opinions are presently reported as: Robinson Township v. Commonwealth, ___ A.3d ____ , 2012 WL 3030277 (Pa. Cmwlth. 2012). Sections 3304 and 3215, 58 Pa. C.S. §§ 3304, 3215, are attached as Exhibits B and C.

III. STATEMENT OF THE SCOPE OF REVIEW AND STANDARD OF REVIEW

This appeal concerns the constitutionality of portions of Act 13 of 2012. As such, the scope of review is plenary and the standard of review is *de novo*. Konidaris v. Portnoff Law Assocs., Ltd., 598 Pa. 55, 69, 953 A.2d 1231, 1239 (2008). Or, as this Court has otherwise observed in this context, the standard of review is "exacting":

> A statute will be found unconstitutional only if it "clearly, palpably and plainly" violates constitutional rights. Under well-settled principles of law, there is a strong presumption that legislative enactments do not violate the constitution. Further, there is a heavy burden of persuasion upon one who questions the constitutionality of an Act.

Com. v. MacPherson, 561 Pa. 571, 580, 752 A.2d 384, 388 (2000) (internal citations omitted). Because the presumption of constitutionality must be given real effect, a lower court's mere citation to it is not enough. See Reichley by Wall v. N. Penn Sch. Dist., 533 Pa. 519, 528, 626 A.2d 123, 128 (1993) (reversing lower court ruling that statute was unconstitutional even though lower court "duly recited" review standards and "purported to apply them"; finding challengers did not meet "heavy burden" to show enactment was unconstitutional).

[1] The original opinion was amended to correct the text of a footnote in the dissenting opinion.

IV. STATEMENT OF THE QUESTIONS INVOLVED

1. Did the Commonwealth Court err in overruling Appellants' preliminary objections and granting Appellees' motion for summary relief as to Counts I, II and III of Appellees' Petition for Review, where Act 13 does not violate principles of substantive due process under Art. I, § 1 of the Pennsylvania Constitution or the Fourteenth Amendment to the United States Constitution because it has a rational basis, constitutes a proper exercise of the police powers, and does not unconstitutionally impact local land use planning?

Commonwealth Court answer: no.

2. Did the Commonwealth Court err in overruling Appellants' preliminary objections and granting Appellees' motion for summary relief as to Count VIII of Appellees' Petition for Review, where Act 13 does not violate Art. II, § 1 of the Pennsylvania Constitution because it provides sufficient guidance to the Department of Environmental Protection as to when to grant a waiver from the setback requirements established by the General Assembly for oil and gas wells from the waters of the Commonwealth?

Commonwealth Court answer: no.

3. Did the Commonwealth Court err in concluding that the claims raised in Appellees' Petition for Review are justiciable?

Commonwealth Court answer: no.

4. Did the Commonwealth Court err in concluding that the claims raised in Appellees' Petition for Review are ripe?

Commonwealth Court answer: no.

V. STATEMENT OF THE CASE

A. Form of Action and Procedural History

This is a civil action in which the Appellees (hereafter, "the Municipalities")[2] seek to enjoin and declare unconstitutional parts of Act 13 of 2012, 58 Pa. C.S. §§ 2301-3504, which amends the Oil and Gas Act (Title 58). On February 14, 2012, the Governor signed Act 13 into law. On March 29, 2012, the Municipalities filed a fourteen count petition for review in the Commonwealth Court's original jurisdiction, challenging the constitutionality of Act 13 and seeking injunctive relief to restrain its enforcement. On April 3, 2012, the Municipalities filed a motion requesting that the court enter a preliminary injunction enjoining certain portions of Act 13 from becoming effective. A single judge of the Commonwealth Court, by order dated April 11, 2012, granted limited injunctive relief. The Commission and the Department appealed that decision to this Court, which is docketed at 40 MAP 2012. The Commonwealth and the Attorney General also appealed. See 37 MAP 2012.

Subsequent to the preliminary injunction proceedings, the Commonwealth Court ordered expedited briefing on the petition for review. In response, the Commission and the Department, joined by the Commonwealth of Pennsylvania, the Office of Attorney General, and Attorney General Linda L. Kelly, filed preliminary objections to each count of the petition.[3] The

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[2] Appellees are Robinson Township; Brian Coppola, individually and in his official capacity as Supervisor of Robinson Township; Township of Nockamixon, Township of South Fayette, Peters Township; David M. Ball, individually and in his official capacity as Councilman of Peters Township; Township of Cecil, Mount Pleasant Township, Borough of Yardley, Delaware Riverkeeper Network; Maya Van Rossum; and Mehernosh Khan, M.D.

[3] The Commonwealth of Pennsylvania and the Attorney General acted in concert with the Commission and the Department throughout the Commonwealth Court proceedings, and the Commonwealth and the Attorney General have filed an appeal with this Court substantially similar to the appeal of the Commission and the Department. See No. 64 MAP 2012. Thus, unless indicated otherwise, references in this brief to actions of the Commission and the

Municipalities then filed a "motion for summary judgment," which the Commonwealth Court later deemed an application for summary relief per Pa.R.A.P. 1532(b). The Commission and the Department cross-filed for summary relief.

On June 6, 2012, an *en banc* panel of the Commonwealth Court heard oral argument on the preliminary objections, the application for summary relief, and the cross-application for summary relief. A divided Commonwealth Court entered an opinion and order on July 26, 2012, as follows: (1) by a unanimous vote, sustaining the Commission's and the Department's preliminary objections as to Counts IV, V, VI, VII, IX, X, XI and XII of the petition for review; (2) by a 4-3 vote, granting the Municipalities' motion for summary relief as to Counts I, II and III, and overruling the Preliminary Objections to the same Counts; (3) by a unanimous vote, granting the Municipalities' motion for summary relief as to Count VIII of the petition; and (4) by a unanimous vote, denying the Commission's and the Department's cross-application for summary relief in its entirety. The majority opinion notes that the Hon. Mary Hannah Leavitt (one of the nine commissioned judges of Commonwealth Court) did not participate in the decision. The first footnote to the opinion notes that the case was decided under Commonwealth Court Internal Operating Procedure § 256(b).[4] As such, it appears the Hon. Renee Cohn Jubelirer—the sole participating commissioned Commonwealth Court judge detached from the

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Department are intended implicitly to note similar action by the Commonwealth and the Attorney General.

[4] Pa. Cmwlth. I.O.P. § 256(b):

> When there exists a vacancy or a recusal among the commissioned judges that results in an even number of commissioned judges voting on a circulating panel opinion or en banc opinion, and when the vote of all participating commissioned judges results in a tie, the opinion shall be filed as circulated. The opinion shall contain a footnote on the first page indicating that the opinion is filed pursuant to this paragraph. Unless there is a majority vote of the participating commissioned judges to publish, the opinion shall not be published.

en banc panel—agreed at least with the result advocated by the dissenting judges regarding Counts I, II and III, yielding in effect a 4-4 vote of the court's participating active judges as to those Counts.

On July 27, the Commission and the Department initiated this appeal. The Commonwealth and the Attorney General also appealed to this Court. See No. 64 MAP 2012. By order dated July 31, the Commonwealth Court issued an amended opinion, which corrected a footnote in the dissenting opinion.

On August 2, 2012, the Municipalities filed an application to lift the automatic supersedeas entered as a result of the appeals of the Commission, the Department, the Commonwealth and the Attorney General. After oral argument on the application, by order dated August 15, 2012, the Commonwealth Court granted the application in part, by lifting the stay of the July 26 order as to Counts I-III, and denying the application in part, by leaving in place the stay of the July 26 order as to Count VIII.

On August 24, 2012, the Municipalities filed Notices of Appeal, thereby cross-appealing the Commonwealth Court's final order dismissing Counts IV, V, VI, VII, IX, X, XI and XII of the petition for review. See 72 MAP 2012 & 73 MAP 2012.

B. Statement of Prior Determinations

On April 11, 2012, a single judge of the Commonwealth Court (Quigley, S.J.) entered a preliminary injunction and, on April 27, denied the Commission's application for reconsideration. On April 20, 2012, Commonwealth Court (also per Quigley, S.J.,) denied all applications to intervene.

On July 26, 2012, the Commonwealth Court *en banc* entered an order (1) granting in part and denying in part the preliminary objections of the Commission and the Department, (2) granting in part and denying in part the application for summary relief of the Municipalities,

and (3) denying the application for summary relief of the Commission and the Department. On August 15, 2012, the Commonwealth Court (per Pellegrini, P.J.) vacated the automatic supersedeas in part.

C. Names of Judges Whose Determinations are to be Reviewed

This is an appeal from the July 26, 2012, final order entered by an *en banc* panel of the Commonwealth Court in 284 M.D. 2012. The majority opinion was authored by the Hon. Dan Pellegrini, who was joined by the Hon. Bernard L. McGinley, the Hon. Bonnie Brigance Leadbetter and the Hon. Patricia A. McCullough. The dissenting opinion was authored by the Hon. Kevin Brobson, who was joined by the Hon. Robert Simpson and the Hon. Anne E. Covey.

D. Chronological Statement of the Facts

On February 14, 2012, Act 13 of 2012 was signed into law, amending Title 58 relating to Oil and Gas. P.L. 87, No. 13 (Feb. 14, 2012), codified at 58 Pa. C.S. §§ 2301-3504. Reproduced Record ("R.R.") at 640a. Certain parts of the law took effect immediately, while others took effect in 60 days (i.e., April 16, 2012). P.L. 87, No. 13, § 9.

Act 13 is the General Assembly's response to the challenges of environmental protection and economic growth that come with the commercial development of unconventional geological formations such as the Marcellus Shale. R.R. at 638a. The express, declared purposes of Act 13 are fourfold:

> (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.

Among Act 13's features are requirements for statewide uniformity with respect to local zoning ordinances related to "oil and gas operations." 58 Pa. C.S. § 3304.[5] The zoning requirements of Act 13 establish, among other things, permitted and conditional uses in districts created by local authorities and establish required setbacks and noise limits for oil and gas operations. For example, the Act provides that compressor stations and processing plants are not permitted uses in residential districts, and limits their placements elsewhere to specific distances from existing buildings and lot lines. 58 Pa. C.S. § 3304(b)(5), (7), (8).

Act 13 also expressly preserves areas of local control. For example, Section 3304(b)(9) preserves a municipality's right to regulate overweight vehicles, and Section 3304(b)(2), (3) and

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[5]"Oil and gas operations" is defined to include:

(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.

(11) allow local regulation of construction operations, the heights of structures, screening and fencing, lighting and noise, and certain setbacks provided that restrictions are no more stringent than those imposed on other industrial uses. 58 Pa. C.S. § 3304(b)(2), (3), (11). In addition, Section 3257 expressly preserves existing rights and remedies with respect to abatement of nuisances, pollution and the like. 58 Pa. C.S. § 3257. Act 13 further specifically allows for municipal comment into the unconventional well permitting process, which allows the Department to hear "local conditions or circumstances which the municipality has determined should be considered by the department in rendering its determination on the unconventional well permit." 58 Pa. C.S. § 3212.1(a).

On March 29, 2012, the Municipalities filed a fourteen count petition for review in the Commonwealth Court's original jurisdiction, challenging the constitutionality of parts of Act 13 and seeking injunctive relief to restrain its enforcement. R.R. at 54a-170a. In the Municipalities' own words, the fourteen counts for relief were premised on the following alleged grounds:

> a. Act 13 violates Article I, Section 1 of the Pennsylvania Constitution and Section 1 of the 14th Amendment to the United States Constitution as Act 13's zoning scheme is 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**]
>
> b. Act 13 violates Article I, Section 1 of the Pennsylvania Constitution because it allows for incompatible uses in like zoning districts in derogation of municipalities' comprehensive zoning plans and therefore constitutes an unconstitutional use of zoning districts. [**Count II**]
>
> c. Act 13 violates Article I, Section 1 of the Pennsylvania Constitution as Act 13's allowance of oil and gas development activities as a permitted use by right in every zoning district renders it 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 resulting in an improper use of its police power. [**Count III**]

d. Act 13 violates Article III, Section 32 of the Pennsylvania Constitution because Act 13 is a "special law" that treats local governments differently and was enacted for the sole and unique benefit of the oil and gas industry. [**Count IV**]

e. Act 13 is an unconstitutional taking for a private purpose and an improper exercise of the Commonwealth's eminent domain power in violation of Article I, Sections 1 and 10 of the Pennsylvania Constitution. [**Count V**]

f. Act 13 violates Article I, Section 27 of the Pennsylvania Constitution by denying municipalities the ability to carry out their constitutional obligation to protect public natural resources. [**Count VI**]

g. Act 13 violates the doctrine of Separation of Powers because, through its provision that allows for advisory opinions, Act 13 permits an Executive agency, the Pennsylvania Public Utility Commission, to play an integral role in the exclusively Legislative function of drafting legislation. [**Count VII**]

h. Act 13 violates the doctrine of Separation of Powers because it entrusts an Executive agency, the Pennsylvania Public Utility Commission with the power to render opinions regarding the constitutionality of Legislative enactments, infringing on a judicial function. [**Count VII**]

i. Act 13 unconstitutionally delegates power to the Pennsylvania Department of Environmental Protection without any definitive standards or authorizing language. [**Count VIII**]

j. 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**]

k. 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**]

l. Act 13 is an unconstitutional "special law" in violation of Article III, Section 32 of the Pennsylvania Constitution which restricts health professionals' ability to disclose critical diagnostic information when dealing solely with information deemed proprietary by the natural gas industry. [**Count XI**]

m. Act 13's restriction on health professionals' ability to disclose critical diagnostic information is an unconstitutional violation of the single subject rule enunciated in Article III, Section 3 of the Pennsylvania Constitution. [**Count XII**]

R.R. at 60a-61a (citations omitted & count references added). The Municipalities sought preliminary and permanent injunctive relief. R.R. at 160a-162a. A single judge of the Commonwealth Court later granted preliminary injunctive relief, which had the effect of

extending the effective date of portions of Act 13.

After the preliminary injunction proceedings, the Commonwealth Court ordered expedited consideration of the petition for review. Specifically, the court ordered all Respondents to file responses to the petition on or before April 30 and ordered dispositive motions filed by May 7. In accordance with this order, the Commission and the Department filed preliminary objections to each count of the petition for review, arguing generally that none of the Petitioners has standing, all of the Petitioners' claims are non-justiciable political questions, and all of the Petitioners' claims are unripe. Further, the Commission and the Department advanced additional defects with each of the substantive counts. R.R. at 644a-683a.

On May 7, 2012, the Municipalities filed what they styled a motion for summary judgment. R.R. at 684a-699a. The Commission and the Department objected to the filing as premature, since, *inter alia*, the pleadings had not yet closed. The Commonwealth Court converted the motion into an application for summary relief. In response to that converted motion, the Commission and the Department re-asserted the positions from their preliminary objections, and also cross-filed for summary relief. R.R. at 1208a-1239a. The Commonwealth Court, sitting *en banc*, unanimously sustained the Commission's and the Department's preliminary objections as to Counts IV, V, VI, VII, IX, X, XI and XII of the petition for review. By an evenly divided vote of the non-recused commissioned judges, the Commonwealth Court, using the original panel's 4-3 vote, granted the Municipalities' application for summary relief as to Counts I, II and III. By a unanimous vote, the Commonwealth Court also granted the application for summary relief as to Count VIII.

The majority's opinion and order declared Sections 3304 and 3215(b)(4) of Act 13 of 2012, 58 Pa. C.S. §§ 3304, 3215(b)(4) (Exhibits B & C), unconstitutional, null and void, and

permanently enjoined the enforcement of Section 3304 of Act 13 of 2012, along with the remaining provisions of Chapter 33 of Act 13 that enforce Section 3304.

E. Brief Statement of the Order or Other Determination under Review

This is an appeal from the order entered by an *en banc* panel of the Commonwealth Court in 284 M.D. 2012 dated July 26, 2012, to the extent that order: (1) overruled the preliminary objections of the Commission and the Department and granted the application for summary relief of the Municipalities as to Counts I, II, III and VIII of the petition for review; (2) declared Sections 3304 and 3215(b)(4) of Act 13 of 2012, 58 Pa. C.S. §§ 3304, 3215(b)(4), to be unconstitutional, null and void; and (3) permanently enjoined the enforcement of Section 3304 of Act 13 of 2012, 58 Pa. C.S. § 3304, along with the remaining provisions of Chapter 33 of Act 13 that enforce Section 3304.

VI. SUMMARY OF ARGUMENT

Act 13 of 2012 is a legitimate exercise of the General Assembly's broad police powers and its ability to expand or, in this case, retract municipal powers, including in relation to zoning. In striking down the portions of Act 13 related to municipal zoning, including Section 3304, the Commonwealth Court failed to acknowledge and uphold the supreme authority of the Legislature, failed to give due deference to the presumption of constitutionality afforded to acts of the Legislature, and applied an incorrect standard of substantive due process.

The Commonwealth Court further erred in declaring 58 Pa. C.S. § 3215(b)(4) unconstitutional for violating the non-delegation provision of the Pennsylvania Constitution. In enacting Section 3215(b)(4), the General Assembly made basic policy choices about where unconventional wells may be drilled. The General Assembly also recognized that exceptions to its basic rule were necessary, and so it granted the Department of Environmental Protection

discretion to grant distance waivers, but only after setting standards to guide and restrain the Department's discretion.

In declaring unconstitutional these portions Act 13, the Commonwealth Court failed to recognize the authority of the General Assembly to make rational policy choices that balance the various and potentially conflicting purposes of Act 13 as set forth in Section 3302. Instead, the Commonwealth Court substituted its wisdom about the merits of Act 13 for that of the General Assembly, an action expressly prohibited by the Pennsylvania Constitution.

Finally, the court below relied on speculative, hypothetical "what ifs" as the basis for assuming jurisdiction to hear the Municipalities' claims. This was error as those "harms" are unripe and not fit for judicial review.

VII. ARGUMENT FOR APPELLANT

A. Section 3304 of Act 13 does not violate Article I, Section 1 of the Pennsylvania Constitution or the Fourteenth Amendment to the United States Constitution.

The Commonwealth Court readily acknowledged that the stated purposes of Act 13—including the need to promote the "optimal development of oil and gas resources in the Commonwealth" while protecting environmental, safety and property rights—"are sufficient to have the state exercise its police powers to promote the exploitation of oil and gas resources." Opinion at 32 (citing 58 Pa. C.S. § 3202) (Exhibit A). Notwithstanding that recognition, the lower court declared that Section 3304 of Act 13, which according to the court "mandates that all municipalities must enact zoning ordinances in accordance with its provisions," was unconstitutional, in violation of substantive due process in Article I, Section 1 of the Pennsylvania Constitution and the Fourteenth Amendment to the United States Constitution. Id. at 26, 35. According to the court, Section 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[.]" Id. at 33. The Commonwealth Court was correct in concluding that Act 13 as a whole is a valid exercise of the Commonwealth's police power. The court, however, erred in finding Section 3304 to be unconstitutional.

1. The constitutionality of Section 3304 must be evaluated in the framework of the relationship between the Commonwealth and its Municipalities.

Certain fundamental and unassailable precepts set the stage for this Court's analysis of the lower court's decision to strike Section 3304. It cannot be disputed, and the Municipalities did not contend otherwise below, that municipalities are established by the Commonwealth and their power derives solely from the 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) (citation omitted). With particular respect to the power of municipalities to adopt zoning ordinances, this Court has made clear that a municipality is "powerless to enact ordinances except as authorized by statute, and ordinances not in conformity with the municipality's enabling statute will be void." Pa. Gaming Control Bd. v. City Council of Philadelphia, 593 Pa. 241, 266, 928 A.2d 1255, 1270 (2007); see also Olon v. Com., 534 Pa. 90, 94-95, 626 A.2d 533, 535 (1993) (reversing the entry of an injunction that would have precluded the conversion of a former college into a prison, on the basis that a state statute authorizing the acquisition "overrode any local zoning and land use controls" under which "such use would violate the local zoning ordinances").

Of particular relevance here, the Commonwealth has delegated zoning powers to municipalities through the Pennsylvania Municipalities Planning Code ("MPC"), 53 P.S. § 10101 et seq. See In re Realen Valley Forge Greenes Assocs., 576 Pa. 115, 132-33, 838 A.2d 718, 729 (2003). 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 such as Act 13.

As discussed below, the Commonwealth Court's conclusion that Section 3304 is an unconstitutional deprivation of substantive due process fails, among other reasons, because it turns the relationship between the Legislature and municipalities upside-down by holding that the Act's zoning provisions are unconstitutional usurpations by the Commonwealth of the

municipalities' zoning power. Simply and correctly put, municipalities have no such power other than as expressly delegated to them by the Commonwealth.

2. Act 13 as a whole is a valid exercise of the State's police power.

As the Commonwealth Court itself correctly recognized, Act 13, in its entirety, is a valid exercise of the General Assembly's broad police power, i.e., "the inherent power of a body politic to enact and enforce laws for the promotion of the general welfare." Meitner v. Cheltenham Twp., 75 Pa. Cmwlth. 46, 52, 460 A.2d 1235, 1238 (1983). Act 13 is a comprehensive reform of the oil and gas laws of this Commonwealth driven by, among other things, policy determinations of promoting the development of the Commonwealth's vast natural gas reserves; encouraging economic development, job creation and energy self-sufficiency; providing for impact fees to benefit municipalities where unconventional gas well drilling occurs; ensuring uniformity of local zoning ordinances throughout the Commonwealth; and revising and updating the Commonwealth's environmental regulations related to the oil and gas industry. The stated purposes of Act 13 indisputably are valid state objectives: (a) promoting "optimal development of oil and gas resources of this Commonwealth," while protecting "the health, safety, environment and property of Pennsylvania Citizens"; (b) protecting workers employed in developing the Commonwealth's oil and gas resources; (c) protecting "the safety and property rights" of people living in areas where oil and natural gas operations take place; and (d) protecting "the natural resources, environmental rights and values secured by the Constitution of Pennsylvania." 58 Pa. C.S. § 3202.

Act 13 as a whole represents the General Assembly's informed judgment, as a matter of policy choices, on balancing those various and potentially conflicting purposes in a comprehensive, state-wide manner; and the Act is rationally related to those objectives on its face. Simply put, Act 13 is a non-arbitrary, non-discriminatory exercise of the General

Assembly's police powers designed to further both the economic and environmental interests of the Commonwealth and its citizens.

This Court has recognized that it may not substitute its own policy judgments for those of the General Assembly. Tosto v. Pa. Nursing Home Loan Agency, 460 Pa. 1, 9, 331 A.2d 198, 202 (1975); Mt. Lebanon v. Cty. Bd. of Elections of Allegheny Cty., 470 Pa. 317, 321, 368 A.2d 648, 649-50 (1977) ("We are not a Supreme, or even a Superior Legislature, and we have no power to redraw the Constitution or to rewrite Legislative Acts or Charters, desirable as that would sometimes be." (quotations removed)). As this Court has explained, "[t]he police power is one of the most essential and least limitable powers of the Commonwealth," and anyone challenging the exercise of that power must "overcome the heavy burden of proof necessary to demonstrate that the Commonwealth has exceeded the police power." Eagle Envtl. II, L.P. v. Com., Dep't of Envtl. Prot., 584 Pa. 494, 515, 884 A.2d 867, 882 (2005). Litigants "have a heavy burden of persuasion for there is a strong presumption that acts of the General Assembly are constitutional, and this Court will not declare such acts unconstitutional unless they 'clearly, palpably, and plainly' violate the constitution." Id.

3. Section 3304 is not unconstitutional.

In deciding to strike down Section 3304 as an unconstitutional violation of substantive due process, the Commonwealth Court based its decision on what it termed a "basic precept" of zoning law that, it believed, defines the parameters of a lawful zoning ordinance. Relying on a passage in the United States Supreme Court's decision in City of Edmonds v. Oxford House, Inc., 514 U.S. 725 (1995), the Commonwealth Court stated that, "[s]uccinctly, [Section] 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.'" Opinion at 33-34 (quoting City of Edmonds, 514 U.S. at 732). According to the

Commonwealth Court, by requiring municipalities to amend zoning ordinances to allow what the Court considered "incompatible" uses within zoning districts, Section 3304 requires municipalities to enact ordinances that would not withstand a substantive due process analysis, thereby rendering Section 3304 "irrational" and unconstitutional. Id. at 33.

The Commission and the Department respectfully submit that the Commonwealth Court erred in finding Section 3304 unconstitutional. In upholding Act 13 as a whole as a valid exercise of the Commonwealth's police power, while declaring that local zoning ordinances mandated by Section 3304, which requires that they be consistent with and further the goals of Act 13, would somehow be unconstitutional, the Commonwealth Court ignored, reversed and/or misapplied core principles of law that have been in place in the Commonwealth for decades, if not centuries.

First, the lower court failed to mention the highly deferential standard of review, noted above, that applies when a party attacks the constitutionality of a statute. See, e.g., Estate of Fridenberg v. Com., 33 A.3d 581, 591 (Pa. 2011) ("[w]e uphold the constitutionality of a statute unless it clearly, palpably, and plainly violates constitutional rights" (quotations omitted)). This failure to employ the correct standard is especially critical in the present case, where the commissioned judges of the Commonwealth Court evidently split 4-4 on the constitutionality of Section 3304. Such an even split reveals the substantial doubt that existed in the court below about the constitutionality of Act 13. But rather than such doubt being resolved in favor of *constitutionality*, as long-standing precedent requires, the lower court resolved the doubt in favor of *un*-constitutionality. Cf. Estate of Fridenberg, 33 A.3d at 591 ("Furthermore, [a]ll doubts are to be resolved in favor of finding that the legislative enactment passes constitutional muster." (quotations removed)).

Second, the Commonwealth ignored settled law in this state, including relevant principles in place "since the days of George Washington":

- "Municipalities are not sovereigns. Their powers are limited."
- "[I]n the absence of the granting of specific power from the Legislature municipalities do not have the authority to pass zoning ordinances."
- "[M]unicipal power to enact and enforce zoning regulations does not exist in the absence of statutory or constitutional authorization, express or implied; [and] the municipality has no inherent power to enact zoning ordinances[.]"
- "'Whatever may be the law in other states the decisions of our Supreme Court make it clear that in the absence of grant of power from the Legislature the municipalities of this Commonwealth do not possess the authority to pass [zoning ordinances].'"

Kline v. City of Harrisburg, 362 Pa. 438, 442-48, 68 A.2d 182, 184-87 (1949); accord Kelly v. City of Philadelphia, 382 Pa. 459, 469, 115 A.2d 238, 243 (1955). Moreover, "[i]t is of course self-evident that a municipal ordinance cannot be sustained to the extent that it is contradictory to, or inconsistent with, a state statute," and it has "long been the established general rule" that a "municipal corporation with subordinate power to act in the matter may make such additional regulations in aid and furtherance of the purpose of the general law as may seem appropriate to the necessities of the particular locality and which are not in themselves unreasonable." Western Pa. Restaurant Ass'n v. City of Pittsburgh, 366 Pa. 374, 381, 77 A.2d 616, 620 (1951). "But if the general tenor of the statute indicates an intention on the part of the legislature that it should not be supplemented by municipal bodies, that intention must be given effect and the attempted local legislation held invalid." Id.; see also Olon, 534 Pa. at 94-95, 626 A.2d at 535 (state statute authorizing conversion of former college into a prison overrode local zoning ordinances that permitted only educational/institutional or residential uses in that location).[6]

[6] These principles are not unique to Pennsylvania, but represent long-established and universally recognized principles of municipal zoning law. See 8 McQuillin Mun. Corp § 25.38 (3d ed. Westlaw database updated July 2012) ("[M]unicipal power of zoning must exist, if it does at all,

The Commonwealth Court's ruling literally does violence to every one of the foregoing bedrock principles of law. Since, as the that court recognized, Act 13 as a whole is a valid exercise of the police power, then Section 3304's mandate that local municipalities amend their zoning ordinances to advance and effectuate the express goals of Act 13 must also be within the state's police power, and zoning ordinances adopted "in aid and furtherance of the purpose of [Act 13]" would a fortiori also be valid. See Dep't of Licenses & Inspections, Bd. of License & Inspection Review v. Weber, 394 Pa. 466, 469, 147 A.2d 326, 327 (1959) (where Act of State Legislature "is silent as to monopolistic domination and a municipal ordinance provides for a localized procedure which furthers the salutary scope of the Act, the ordinance is welcomed as an ally, bringing reinforcements into the field of attainment of the statute's objectives").

Third, the Commonwealth Court neither recognized the proper substantive due process test to be applied to zoning laws, nor analyzed the validity of Section 3304 with that test in mind. As a general matter, where, as here, a statute is not alleged to "significantly interfere[] with the exercise of a fundamental right," the statute will withstand a due process challenge if it "seek[s] to achieve a valid state objective by means that are rationally related to that objective"; that is, if the statute has "a real and substantial relationship to the object sought to be obtained." Khan v. State Bd. of Auctioneer Exam'rs, 577 Pa. 166, 184, 842 A.2d 936, 946-47 (2004). This Court has established that local zoning laws are to be reviewed under essentially the same broad and deferential standard of substantive due process. Thus, "[a] zoning ordinance is a valid exercise

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by virtue of delegation from the state. Moreover, the delegation of the power of comprehensive zoning must be specific or necessarily implied and cannot, according to many authorities, be inferred from the usual grant of general or police power to municipal corporations. The zoning power is not essential to local government."); 1 Rathkopf's The Law of Zoning and Planning § 1:8 (4th ed. Westlaw database updated June 2012) ("Since a municipality's police power is delegated by the state, the general laws of the state remain supreme in the exercise of that power, even if the issue is a proper subject of municipal legislation. Thus, an ordinance enacted to promote the general welfare cannot be inconsistent with state law.").

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." Boundary Drive Assocs. v. Shrewsbury Twp. Bd. of Supervisors, 507 Pa. 481, 489, 491 A.2d 86, 90 (1985). "[T]he 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." Id.

The Commonwealth Court's decision nonetheless to strike down Section 3304 was based on a palpably incorrect standard of constitutionality. The court's pronouncement of a "basic precept" of zoning law is unfounded and inconsistent with the standard that this Court has adopted for reviewing whether zoning laws comport with due process. This Court has never once cited to the United States Supreme Court's decision in City of Edmonds for any purpose. In fact, there is no Commonwealth Court decision (other than the one below) citing to the language in City of Edmonds on which the lower court relied in striking Section 3304. Additionally, apart from never citing to City of Edmonds, no decision of this 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.[7]

[7] The only Pennsylvania case cited by the Commonwealth Court in support of its "basic precept" of zoning law is Cleaver v. Bd. of Adjustment of Tredyffrin Twp., 414 Pa. 367, 200 A.2d 408 (1964). See Opinion at 28. But Cleaver does not provide support for the court's contention because this Court in Cleaver defined the zoning power in far broader terms, stating that "it is well settled that th[e] Constitutionally ordained right of property is and must be subject and subordinated to the Supreme Power of Government—generally known as the Police Power—to regulate or prohibit an owner's use of his property provided such regulation or prohibition is clearly or reasonably necessary to preserve or protect the health or safety or morals and general welfare of the people[.]" 414 Pa. at 378-79, 200 A.2d at 415. This Court also observed that "[m]unicipalities are not sovereigns; they have no original or fundamental power of legislation; a municipal or councilmanic body can enact only the ordinances and exercise only the zoning powers which are authorized by the Legislature, and the Legislature can delegate or grant only those legislative and zoning powers which are Constitutionally permitted[.]" Id. at 373, 200

As the Commonwealth Court's dissenting judges recognized, under the substantive due process standards the court should have applied, Section 3304—like Act 13 as a whole—is constitutional. See Opinion at PKB-5-8 (dissenting opinion in this matter, discussing Boundary Drive, and further noting that the words "'due process' appear nowhere" in City of Edmonds, that City of Edmonds involved the issue of whether a single-family zoning provision violated the Fair Housing Act, and that City of Edmonds provides "no support for th[e] broad legal proposition" that the majority draws from that case).

Finally, the Commonwealth Court's suggestion, stated just in a footnote, that Section 3304's mandate would necessarily lead to unconstitutional "spot zoning" lacks substance. Opinion at 30-35 & n.21, n.23. The very definition of "spot zoning" quoted in the majority opinion shows why the analogy fails. As the Commonwealth Court recited, unconstitutional spot zoning is "[a] singling out of one lot or a small area for different treatment from that accorded to similar surrounding land indistinguishable from it in character, for the economic benefit of the owner of that lot or to his detriment." Id. at 34-35 n.23 (quoting Appeal of Mulac, 418 Pa. 207, 210, 210 A.2d 275, 277 (1965)).

A.2d at 412. There is no language in Cleaver supporting the conclusion that under a "basic precept" of zoning law, the "constitutionally permitted" uses within zoning districts *must* only include uses that are "compatible," and cannot include any that might arguably be considered "incompatible."

In addition to the lack of support in the cases, there is nothing in the Municipalities Planning Code—which contains the necessary legislative grant of authority for Municipalities to adopt *any* zoning ordinances—supporting the lower court's conclusion. To the contrary, Section 603 of the MPC provides generally that zoning ordinances "may permit, prohibit, regulate, restrict and determine . . . [u]ses of land," and Section 604 of the MPC provides generally that "[t]he provisions of zoning ordinances shall be designed . . . [t]o promote, protect and facilitate any or all of the following: the public health, safety, morals, and the general welfare . . . ." 53 P.S. §§ 10603(b), 10604. Notably, the Commonwealth Court did not cite to any provision of the MPC in support of its conclusion that zoning ordinances adopted pursuant to Section 3304 of Act 13 would not withstand constitutional challenge.

Section 3304 does not "singl[e] out" any piece of land, whether small or otherwise. It is the polar opposite of the piecemeal, ad hoc approach to land use planning that is the hallmark of illegal spot zoning. Section 3304 applies across the Commonwealth to all municipal zoning ordinances. It is thus the antithesis of spot zoning, in which "the legislative focus narrows to a single property and the costs and benefits to be balanced are those of particular property owners." In re RealenValley Forge Greenes Associates, 576 Pa. 115, 133, 838 A.2d 718, 729 (2003). The geographic "legislative focus" of Section 3304, like Act 13 as a whole, is the Commonwealth. Thus, Section 3304's comprehensive, state-wide approach to furthering the uniformity of zoning ordinances to achieve the valid state objectives of Act 13 renders meritless the attempt to equate Section 3304 to spot zoning.

In short, the Commonwealth Court acknowledged that the purposes of Act 13 are constitutionally sufficient; thus, amendments to local zoning ordinances pursuant to Section 3304, expressly intended and required to further those same purposes, would also be valid exercises of the police power because it is up to the General Assembly to grant the power to adopt local zoning ordinances and to define their scope. Moreover, the substantive due process analysis in the case of state law and local ordinances is essentially the same. For these reasons, the Commonwealth Court's ruling that Section 3304 is unconstitutional was wrong and should be reversed.

B. Section 3215(b)(4) does not violate Article II, Section 1 of the Pennsylvania Constitution.

The Commonwealth Court erred in concluding that Section 3215(b)(4) of Act 13 is an unconstitutional delegation of legislative authority in violation of Article II, Section 1 of the Pennsylvania Constitution.[8] The court failed to identify the policy choices made by the General Assembly regarding the grant of well permits and the protections of Commonwealth waterways and failed to identify the clear limitations in Act 13 on the Department's authority to grant well permits. The court further required the General Assembly to provide all details of the Department's discretion under Section 3215(b)(4), in contravention of clear standards from this Court.

Historically, in contexts other than Act 13, the General Assembly has granted great flexibility to the Department to meet the specific policy goals set out in environmental legislation. The General Assembly recognizes that both changing scientific and technical knowledge and good engineering practice standards, as well as the unique economic and environmental impact of each regulated event, are best known by and left to the agency charged with carrying out the stated policies of environmental legislation. For instance, the Surface Mining Conservation and Reclamation Act ("SMCRA") provides limitation on the location of surface mining operations. 52 P.S. § 1396.4e. Specifically, Section 1396.4e(i) provides: "No operator shall conduct surface mining operations within one hundred feet of the bank of any stream. The department may, however, grant a variance from this distance requirement if the operator demonstrates beyond a reasonable doubt that there will be no adverse hydrologic or water quality impacts as a result of the variance. Such variance shall be issued as a written order

[8] "The 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.

specifying the methods and techniques that must be employed to prevent adverse impacts." 52 P.S. § 1396.4e(i). Comparable to Act 13, the Legislature established in the SMCRA an environmental performance standard as the limit on the Department's authority to grant an individual variance from a distance requirement.

In a similar grant of discretion, exercised nearly 30 years ago, the General Assembly enacted the Oil and Gas Act, P.L. 1140, No. 223 (Dec. 19, 1984), which conferred on the Department of Environmental Resources (as the Department was then named) oversight of oil-and-gas well permitting. Cognizant that the chapter and verse of environmental protection could not be enumerated at length, and cognizant that the Department was the administrative entity most knowledgeable about how best to protect the environment, the General Assembly established general waterway setback requirements for oil and gas wells while also affording the Department discretion to modify the restrictions upon an appropriate showing by a potential permittee. Consequently, Section 205 the Oil and Gas Act provided as follows:

> No well site may be prepared or well drilled within 100 feet measured horizontally from any stream, spring or body of water as identified on the most current 7 1/2 minute topographic quadrangle map of the United States Geological Survey or within 100 feet of any wetlands greater than one acre in size. *The department may waive such distance restrictions upon submission of a plan which shall identify the additional measures, facilities or practices to be employed during well site construction, drilling and operations. Such waiver, if granted, shall impose such permit conditions as are necessary to protect the waters of the Commonwealth.*

58 P.S. § 601.205(b) (emphasis added). In February of this year, Section 205(b) of the Oil and Gas Act was repealed by Act 13 and replaced by 58 Pa. C.S. § 3215(b).

Section 3215 continues the successful two-decade-plus regime of the Department's review and consideration of permit proposals that contain provisions "necessary to protect the waters of this Commonwealth," providing nearly identical terms to the former Section 205(b):

> 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)(4).[9] Despite the Legislature now twice making basic policy choices about waterway protection, and now twice setting limits on what the Department can and cannot do in allowing particular variances from the general scheme, the Commonwealth Court erroneously struck down Section 3215(b)(4) as an unconstitutional delegation of legislative authority.

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[9] Section 3215(b) provides in total:

> (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 1/2 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 1/2 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.

As this Court has articulated the standard under Article II, Section 1, a legislative enactment is entitled to a strong presumption of constitutionality. See Eagle Envtl. II v. Com., Dep't of Envtl. Prot., 584 Pa. 494, 515, 884 A.2d 867, 880 (2005); see also Com. v. Parker White Metal Co., 512 Pa. 74, 96-97, 515 A.2d 1358, 1370 (1986) ("In declaring sections 606(a) and 606(b) of the Solid Waste Management Act unconstitutional [under Article II, Section 1], the lower court has given little, if any, consideration to the strong and fundamental presumption of constitutionality that must attend judicial review of a legislative enactment."). To overcome that presumption, a petitioner must make two showings: (1) that the Legislature failed to make basic policy choices; and (2) that the legislation does not contain "adequate standards which will guide and restrain the exercise of the delegated administrative functions." Eagle Envtl., 584 Pa. at 515, 884 A.2d at 880 (citing Gilligan v. Pa. Horse Racing Commission, 492 Pa. 92, 96, 422 A.2d 487, 489 (1980)). A legislative enactment does not need to contain "all details of administration" set forth "precisely or separately enumerated[.]" Id. Section 3215(b)(4) satisfies these standards.

1. Section 3215 reflects basic policy choices by the Legislature.

As with the Oil and Gas Act, with Section 3215(b) the General Assembly made basic policy choices about protecting Commonwealth waterways. The General Assembly articulated that it desires certain rigid setbacks from particular bodies, but also articulated that waters of the Commonwealth can be protected in individual cases when certain additional protective measures are employed: i.e., "additional measures" that are "necessary to protect the waters of this Commonwealth." § 3215(b)(4). However, recognizing that it is impossible to list every instance of what "additional measures" are and are not "necessary" under the varying geography of the Commonwealth, the General Assembly, relying on the agency's expertise, conferred some modest—but plainly allowable—discretion on the Department to evaluate particular permit applications and to grant variances from the rigid setbacks as appropriate. Cf. Eagle Envtl., 584

Pa. at 515, 884 A.2d at 880 (stating that Article II, Section 1 does not require that "all details of administration must be precisely or separately enumerated in the statute").

2. With Act 13, the Legislature appropriately guided the Department's discretion to grant distance waivers under Section 3215(b)(4).

Section 3215(b)(4), and more precisely, Act 13 as a whole, contains "adequate standards" to "guide and restrain" the Department's exercise of administrative functions. Cf. William Penn Parking Garage, Inc. v. City of Pittsburgh, 464 Pa. 168, 216, 346 A.2d 269, 293 (1975) ("In determining whether adequate standards have been established, we look to the entire Act; we are not limited to the mere letter of the law, but must look to the underlying purpose of the statute and its reasonable effect." (quotations removed)).

First, Section 3215(b)(4) itself sets forth specific requirements that a potential permittee must satisfy before the Department can exercise any discretion to grant a waiver: (1) the permittee must submit a plan; (2) identifying "additional measures, facilities, or practices to be employed during well site construction, drilling and operations"; and (3) which are "necessary to protect the waters of this Commonwealth."[10] Thus, at the outset, the Department is precluded from arbitrarily granting distance setbacks to whomever, wherever, and whenever it wants; instead, it must receive and review a meaningful plan.

Second, the Department is empowered to waive the distance requirements only when the potential permittee is employing measures "*necessary* to protect the waters of this Commonwealth." § 3215(b)(4) (emphasis added). As such, the Department is restrained from granting distance waivers for a driller who will not safeguard Commonwealth waters, and is

[10] Notably, under Section 3215(b)(4), the Department's "discretion" is restrained. The General Assembly has mandated that if a permittee satisfies the above three requirements, then the Department "*shall waive* the distance restrictions[.]" (Emphasis added.) Thus, far from impermissibly delegating broad legislative authority, the General Assembly narrowly defined the limits of Department discretion.

likewise restrained from withholding a permit when a potential driller has identified "necessary" additional measures but has not, for example, identified "extraordinary" additional measures to protect Commonwealth waters. In other words, 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.

Third, the Department is guided and restrained by Chapter 32's express, enumerated purposes. As articulated by the General Assembly, the purposes of all provisions of Chapter 32, which necessarily includes Section 3215(b)(4), are to

> (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. These articulations of policy and purpose further guide the Department in deciding what is or is not necessary to protect Commonwealth waters.

In spite of all of this, the Commonwealth Court found that Section 3215(b)(4) "lack[s]... guiding principles as to how DEP is to judge operator submissions" and "delegates the authority to DEP to disregard the other subsections and allow setbacks as close to the water source it deems feasible." Opinion at 52. But as shown above, this is plainly inaccurate. The touchstone for the exercise of the Department's discretion under Section 3215(b)(4) is set out by the General Assembly: protecting the natural resources of the Commonwealth and requiring that any

potential well permittee who wishes to drill closer to certain waterways than is expressly allowed commit to using measures "necessary to protect the waters of this Commonwealth." § 3215(b)(4).

Under the Commonwealth Court's faulty construction of Article II, Section 1, the General Assembly was required to set forth every detail of what is and is not "necessary" and exactly how close to Commonwealth waters a driller can or cannot go. But as this Court has repeatedly declared, the Pennsylvania Constitution does not require Napoleonic Code-like enactments—some and indeed many of the details of a general program can be left to the particular administrative agency. E.g., Dussia v. Barger, 466 Pa. 152, 160, 351 A.2d 667, 672 (1976) ("[I]it is generally agreed that the nondelegation principle does not require that all details of administration be precisely or separately enumerated in the statute. The legislature can delegate power when it establishes general standards according to which that power must be exercised."). Here, having made the basic policy choice that well drilling can be permitted within certain specific boundaries, but only when it satisfies additional requirements, the General Assembly has performed all that the Constitution requires. By requiring more of Section 3215(b)(4), the Commonwealth Court mistakenly ignored long-standing precedent to the contrary.

3. The Commonwealth Court improperly applied *Pennsylvanians Against Gambling Expansion Fund, Inc. v. Commonwealth.*

Section 3215(b)(4) is utterly unlike the statutory provision at issue in Pennsylvanians Against Gambling Expansion Fund, Inc. v. Commonwealth, 583 Pa. 275, 877 A.2d 383 (2005) ("PAGE"), on which the Commonwealth Court relied extensively. In PAGE, the petitioners, also relying on Article II, Section 1 of the Pennsylvania Constitution, challenged Section 1506 of The Pennsylvania Race Horse Development and Gaming Act, 4 Pa. C.S. § 1101 et seq., asserting

that the General Assembly unconstitutionally empowered the Gaming Control Board ("the Board") to act with unlimited discretion.

Section 1506 provided:

> The conduct of gaming as permitted under this part, including the physical location of any licensed 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 board may, in its discretion consider such local zoning ordinances when considering an application for a slot machine license.*** The board shall provide the political subdivision, within which an applicant for a slot machine license has proposed to locate a licensed gaming facility, a 60-day comment period prior to the board's final approval, condition or denial of approval of its application for a slot machine license. The political subdivision may make recommendations to the board for improvements to the applicant's proposed site plans that take into account the impact on the local community, including, but not limited to, land use and transportation impact. This section shall also apply to any proposed racetrack or licensed racetrack.

583 Pa. at 328-329, 877 A.2d at 415 (emphasis added). This Court struck down the provision as unconstitutional because the statute did not provide the Board with "definite standards, policies and limitations to guide its decision-making regarding zoning issues." 583 Pa. at 334, 877 A.2d at 418. The Court found that "[w]hile Section 1506 allows the Board in its discretion to consider local zoning ordinances when reviewing an application for a slot machine license and to provide a 60-day public comment period prior to final approval, the Board is not given any guidance as to the import of the same." Id. The Court concluded that while there were eligibility requirements and additional criteria to determine whether to approve a license, those requirements and criteria did not provide adequate standards upon which the Board may rely in considering the local zoning and land use provision for the site of the facility. Id.

Contrary to PAGE, Section 3215(b)(4) provides standards and guidelines upon which the Department may rely when making a determination on a waiver request. In PAGE, the Court

found Section 1506 unconstitutional because it merely directed the Board to consider local zoning ordinances. Here, Section 3215(b)(4) provides that the Department shall issue waivers if (1) a certain process with specified guidelines is followed, namely that the operator submits a plan identifying additional measures, facilities or practices to be employed during well site construction, drilling and operations; and (2) a specific performance standard is satisfied, namely that the plan demonstrates that waters of the Commonwealth will be protected.

Further, despite the Commonwealth Court's conclusions based on PAGE, this case is much closer to Eagle Environmental II v. Commonwealth, Department of Environmental Protection, 584 Pa. 494, 884 A.2d 867 (2005). In Eagle Environmental, the appellants challenged whether the General Assembly impermissibly delegated discretion to the Environmental Quality Board ("EQB") with respect to the regulation of landfills under the Solid Waste Management Act ("SWMA") and the Municipal Waste Planning, Recycling, and Waste Reduction Act ("MWPRWRA"). Id. at 515-16, 884 A.2d at 880-81. Specifically, they challenged whether the EQB had the constitutional authority to adopt a harms/benefits test by regulation, under which the EQB would only grant landfill permits where the applicant demonstrated that the benefits of the project outweighed the environmental harms. Id. at 500, 514, 884 A.2d at 871, 880. The appellants argued that the harms/benefits test was a basic policy choice that only the Legislature could make. Id. at 515, 884 A.2d at 880.

This Court disagreed, holding instead, that "[t]he legislature made the basic policy decision that, although landfills potentially create significant dangers to the public and the environment, they are nonetheless a public necessity." Id. This Court further held, unlike the Commonwealth Court below here, that the legislature in making this policy choice did not need to "set forth specific rules and regulations to determine how to protect the environment or the

public; instead it appropriately delegated those to the EQB." Id. The Court was content that EQB's discretion was appropriately restrained by the express statutory goals of the SWMA and the MWPRWRA, which, were to "protect the 'safety, health, welfare and property of the public' as well as the Commonwealth's natural resources from the 'public health hazards, environmental pollution, and economic loss' that may result from improper and inadequate solid waste disposal by private enterprise as needed by the public." Id. (citing 35 P.S. § 6018.102; 53 P.S. § 4000.102); cf. 58 Pa. C.S. § 3202 (goals of Act 13).

Act 13, like the statutes at issue in Eagle Environmental and unlike the statute at issue in PAGE, goes beyond providing general criteria and indefinite standards, and instead dictates terms for guiding the Department's discretion. The Pennsylvania Constitution simply does not require the General Assembly to go through every possible instance of when a plan submitted pursuant to Section 3215(b)(4) would protect Commonwealth waters and when it would not. Cf. Eagle Envtl., 584 Pa. at 515, 884 A.2d at 880 (holding that Legislature did not need to set forth "specific rules and regulations" concerning landfills, finding it constitutionally sound that rule-making authority delegated to the EQB). As such, the General Assembly laid down the definite standard—necessary to protect Commonwealth waters—and set forth the various criteria that figure into the calculus of what is or is not "necessary." See, e.g., § 3202 (express statutory purposes of each provision of Chapter 32); § 3215(b)(4) (requiring a detailed well plan).

At the end of the day, the "necessary to protect Commonwealth waters" standard is at once permissive and restrictive: it permits drilling within certain areas, but only if adequate provisions have been made to protect our natural resources. In light of all of this, Section 3215(b)(4) is plainly constitutional, having set forth basic policy choices by the General

Assembly and guiding and limiting the Department's discretion in carrying those choices out. The Commonwealth Court erred in concluding the contrary.

C. The Commonwealth Court improperly engaged in judicial second-guessing of non-justiciable political questions reserved for the Legislature.

In declaring certain provisions of Act 13 unconstitutional, the Commonwealth Court went beyond merely assessing the constitutionality of Act 13. The court substituted its own policy judgments and preferences for those made by the Legislature in passing Act 13, and dictated to the General Assembly how it should exercise its police powers and how it should provide for local government—functions that have been constitutionally committed to the Legislative Branch of government (and not to the Judicial Branch). See Pa. Const. Art. I, § 27; Pa. Const. Art. IX, § 1. Such is not the role of the judiciary in our tripartite system, and the political question doctrine expressly bars such judicial activism.

The political question doctrine derives from the legal principle of separation of powers, i.e., the notion that the Executive, Judicial and Legislative Branches are co-equal, independent branches of government. Pa. Sch. Bds. Ass'n v. Com. Ass'n of Sch. Adm'rs, 569 Pa. 436, 451, 805 A.2d 476, 484-85 (2002). Under the political question doctrine, separation of powers principles mandate that the judiciary refrain from revisiting, second-guessing and intruding into those functions and powers constitutionally reserved to the other branches of government. 569 Pa. at 451, 805 A.2d at 485 (citing Sweeney v. Tucker, 473 Pa. 493, 375 A.2d 698 (1977)).[11]

In the matter *sub judice*, the court below determined that this case did not present any non-justiciable political questions because all "we are asked to do is to determine whether a portion of Act 13 is constitutional or not, [which] is a judicial function." Opinion at 24. In

[11] In Sweeney, this Court adopted the standard announced by the U.S. Supreme Court in the seminal case of Baker v. Carr, 369 U.S. 186 (1962), for determining whether a case involves non-justiciable political questions.

assessing the constitutionality of Act 13, however, the Commonwealth Court went beyond merely assessing the constitutionality of Act 13 and exceeded its "judicial function" in at least two ways.

First, the Commonwealth Court engaged in judicial second-guessing of the General Assembly's admittedly valid exercise of its constitutionally entrusted police powers. Article I, Section 27 of the Pennsylvania Constitution provides that the Commonwealth is the "trustee" of Pennsylvania's natural resources and "the Commonwealth shall conserve and maintain them for the benefit of all the people." Pa. Const. Art. I, § 27. This constitutional provision entrusts the General Assembly with the authority to make policy determinations and exercise its police powers in order to determine the most efficient and productive way to develop Pennsylvania's natural resources, while also preserving and protecting the environment.

The police power, i.e., "the inherent power of a body politic to enact and enforce laws for the promotion of the general welfare," is constitutionally vested in the legislature. Meitner v. Cheltenham Twp., 75 Pa. Cmwlth. 46, 52 460 A.2d 1235, 1238 (1983). As this Court has recognized, the legislature must be respected in its attempt to exercise its police powers and the power of judicial review must not be used as a means by which courts might act as a "super-legislature" and substitute their judgment as to public policy for that of the legislature. Parker v. Children's Hosp. of Phila., 483 Pa. 106, 116, 394 A.2d 932, 937 (1978). Courts must not reassess, revisit or concern themselves with the wisdom, reasonableness, propriety, equity or expediency of the policy or motives behind a legislative enactment, nor question whether the best of all alternative methods of solving public problems has been selected. Tosto v. Pa. Nursing Home Loan Agency, 460 Pa. 1, 9, 331 A.2d 198, 202 (1975); Mt. Lebanon v. Cty. Bd. of Elections of Allegheny Cty., 470 Pa. 317, 321, 368 A.2d 648, 649-50 (1977) ("We are not a

Supreme, or even a Superior Legislature, and we have no power to redraw the Constitution or to rewrite Legislative Acts or Charters, desirable as that would sometimes be." (quotations removed)).

Here, by enacting Act 13, the General Assembly validly exercised its constitutionally entrusted power to make policy determinations and to enact and enforce laws for the betterment of the public health, safety and general welfare of the citizens of the Commonwealth. Indeed, the Commonwealth Court readily acknowledged that the stated purposes of Act 13—including the need to promote the "optimal development of oil and gas resources in the Commonwealth" while protecting environmental, safety and property rights—"are sufficient to have the state exercise its police powers to promote the exploitation of oil and gas resources." Opinion at 32 (citing 58 Pa. C.S. § 3202). Yet the Commonwealth Court did not end its inquiry there. It took its analysis one step further and did what this Court warned against in Tosto—it reassessed the wisdom, reasonableness and propriety of the General Assembly's policy motives behind Act 13 and questioned whether Act 13 was the best of all alternative methods of managing the development of Pennsylvania's oil and gas resources while protecting the environment.

The on-the-record comments of the author of the Commonwealth Court's majority opinion support the conclusion that the majority went beyond its limited role in ruling on the constitutionality of Act 13. According to the majority opinion's author:

> When I was doing the opinion, I looked at the Huntley case. And the Huntley case referred to Colorado. And so when I was reviewing the case, ***I looked at the Colorado law.*** And I wanted to see what the Supreme Court was saying. ***They don't have this—they don't require—preempt local zoning at all.*** And then I said—I looked at—***and then I went to Texas***, and I looked at the Texas cases. ***Texas preempts—doesn't preempt local zoning at all.***
>
> ***And I looked—and there may be other ones, but I couldn't find one state that preempted local zoning.*** But yet the Marcellus Shale gas is throughout the country and it didn't adversely impact.

* * *

Looking at other states, as I mentioned, I looked at the Huntley case. ***Other states that have thriving industries haven't preempted or haven't required the enactment by the local municipality of ordinances of—of the—of this type.***

R.R. at 1264a:25-1265a:11; 1275a:15-19 (August 15 hearing transcript) (emphasis added). This dialogue during oral argument suggests that the majority's opinion below was founded, at least in part, on the court substituting its own policy judgments for those of the General Assembly.[12] Whether or not other states' legislatures have adopted policy choices of preempting local zoning or, more importantly, whether other states "have thriving industries" because of the state legislatures' policy choices is certainly not relevant to an analysis of whether Act 13 violates Pennsylvania's Constitution.[13] As this Court is keenly aware, it is the duty of the legislature to set public policy and the duty of the courts to enforce that policy, particularly where, as here, the legislature has acted within its constitutional bounds and the Court below conceded as much. See Program Admin. Servs., Inc. v. Dauphin Cty. Gen. Auth., 593 Pa. 184, 193, 928 A.2d 1013, 1018 (2007).

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[12] The comments quoted in the text also show that this policy substitution was based on flawed premises. As noted, the majority opinion's author observed that "I couldn't find one state that preempted local zoning." See R.R. at 1265a:8-9. As pointed out in the Commission's and the Department's brief in support of their preliminary objections, however, other states with Marcellus Shale formations do in fact preempt local zoning: West Virginia has entirely preempted local zoning as it relates to oil and gas, and Ohio has near total preemption of local zoning. See W.Va. Code § 22-6A-6(b); Ohio Rev. Code § 1509.02; see also R.R. at 660a n.13 (Commission and Department preliminary objections brief citing same).

[13] The Commonwealth Court's majority opinion makes a strained analogy of comparing the justiciability of this case with a hypothetical case in which the Court would be asked to review the General Assembly's exercise of its police powers to totally ban gun ownership by anyone. Opinion at 23. Not only is the hypothetical factually extreme and inapposite, it also is legally deficient because, as discussed above, the Court did not limit its review to whether Act 13 is a valid exercise of the General Assembly's police powers but extended its inquiry to the policy choices surrounding that exercise.

Second, the Commonwealth Court improperly encroached upon the General Assembly's exclusive power to provide for local government. Article IX, Section 1 of the Pennsylvania Constitution states: "The General Assembly ***shall*** provide by general law for local government within the Commonwealth." Pa. Const. Art. IX, § 1 (emphasis added). To this end, the General Assembly exclusively is vested with the constitutionally delegated power to make, alter and repeal laws related to municipalities. As noted above, municipalities are creations of the General Assembly and, therefore, "[m]unicipalities 'possess only such powers of government as are expressly granted to them and as are necessary to carry the same into effect.'" Holt's Cigar Co. v. City of Phila., 608 Pa. 146, 153, 10 A.3d 902, 906 (2011) (quoting Huntley & Huntley, Inc. v. Borough Council of the Borough of Oakmont, 600 Pa. 207, 964 A.2d 855, 862 (2009)). Consequently, the powers of municipal corporations are "subject to change, repeal, or total abolition at [the General Assembly's] will. They have no vested rights in their offices, their charters, their corporate powers, or even their corporate existence. This is the universal rule of constitutional law, and in no state has it been more clearly expressed and more uniformly applied than in Pennsylvania." Com. ex rel. Elkin v. Moir, 199 Pa. 534, 541, 49 A. 351, 352 (1901).

Here, with Act 13, the General Assembly made a policy determination to retract powers of municipalities across this Commonwealth to regulate oil and gas operations, as is within the General Assembly's exclusive province under Article IX, Section 1 of the Pennsylvania Constitution. This policy determination by the General Assembly was a mere retraction of rights previously granted by the General Assembly to its municipal-agents. The Commonwealth Court may not, as it did in this case, sit as a super-legislature to judge the wisdom or desirability of the General Assembly's policy decision to retract those rights. See Mercurio v. Allegheny Cty. Redev. Auth., 839 A.2d 1196, 1203 (Pa. Cmwlth. 2003); see also Com. ex rel. Woods v. Walker,

305 Pa. 31, 34, 156 A. 340, 341 (1931) ("Restraints on the legislative power of control over its political subdivisions must be found in the constitution or they must rest in legislative discretion. A municipality cannot question the state's authority or discretion when dealing with affairs relating to government or the care of its property.").

Additional on-the-record comments of the author of the Commonwealth Court's majority opinion are inconsistent with the General Assembly's authority to expand or retract municipal powers without obtaining the consent of the affected municipality or, more importantly, without judicial interference or intervention. As stated by the majority opinion's author:

> I don't—I didn't address this, but ***local municipalities are not creatures of the General Assembly. They're creatures of the Constitution, which is—which is a difference.***
>
> ***Coming out of local government, I always appreciated that difference.*** There's a whole constitutional framework dealing with local government.

R.R. at 1266a:1-7 (emphasis added).

This observation suggests that the majority opinion below was founded, at least in part, on the incorrect premise that the powers of local municipalities are somehow constitutionally protected. Again, although Article IX, Section 1 of the Pennsylvania Constitution provides for the creation of municipalities at the discretion of the General Assembly, it does not grant municipalities any constitutionally protected powers and, instead, explicitly provides that the General Assembly is solely responsible for creating municipalities *and* determining the extent of their powers. The judiciary has no role in this process and, under the political question doctrine, should refrain from interjecting itself into that process as the Commonwealth Court majority did here, in order to second guess those policy determinations constitutionally reserved to the General Assembly.

The Commonwealth Court overstepped its constitutional bounds and substituted its policy judgments for those of the General Assembly. Accordingly, the Commonwealth Court's majority decision should be reversed and judgment should be entered in favor of the Commission and the Department on all claims.

D. The Commonwealth Court improperly considered the Municipalities' unripe claims based on speculative and unfounded harms.

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. The Municipalities have done nothing more in this case than set forth a wholly speculative "parade of horribles" that they contend might occur in the future following full implementation of Act 13. They have wholly failed to establish any direct or immediate harm to justify a court entertaining jurisdiction over clearly unripe claims.

Pursuant to the ripeness doctrine, courts must refrain from addressing the constitutionality of any statutory provision as applied to a speculative, hypothetical set of facts. Pa. Power & Light Co. v. Pa. Pub. Util. Comm'n, 43 Pa. Cmwlth. 252, 256-57, 401 A.2d 1255, 1257-58 (1979); Com. v. Bucks Cty., 8 Pa. Cmwlth. 295, 302 A.2d 897, 900-01 (1973) ("The rendering of advisory opinions on hypothetical facts is no part of the judicial function."). As this Court has recognized: "A court will take jurisdiction only in a case in which a challenged statute . . . has been actually applied to a litigant; it does not undertake to decide academically the unconstitutionality or other alleged invalidity of legislation until it is brought into operation so as to impinge upon the rights of some person or persons." Knup v. City of Phila., 386 Pa. 350, 353, 126 A.2d 399, 400 (1956). Whether a matter is ripe for judicial review is a question of law. Twp. of Derry v. Pa. Dep't of Labor & Indus., 593 Pa. 480, 485, 932 A.2d 56, 59 (2007).

In the matter *sub judice*, the Commonwealth Court summarily dismissed the ripeness argument in a footnote. Although it acknowledged that the Municipalities' claims were unripe, the Commonwealth Court majority cited to this Court's alleged approval of the Commonwealth Court exercising "equitable jurisdiction" to allow "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."[14] Opinion at 24 n.17. According to the Commonwealth Court, this case comes within its "equitable" review of otherwise unripe claims because "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." Opinion at 24 n.17. This conclusion is factually and legally flawed for several reasons.

First, it is nowhere alleged in the record, let alone established factually, that municipalities "***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." Opinion at 24 n.17 (emphasis added). This specific allegation is not pled in the Petition for Review. And no discovery has occurred in this matter and no evidentiary hearings have been held to make this allegation a proven fact of record. In fact, none of the Municipalities' briefs in this case has cited to 58 Pa. C.S. § 3255 as a basis on which to argue a direct or immediate threat. The Municipalities cannot point to a single instance in which they have been "required to modify their zoning codes" or a single instance in which they even have been threatened with, or otherwise "subject[ed,] to penalties and/or prosecution under 58 Pa. C.S. § 3255." These

[14] Despite referencing "our Supreme Court" for this proposition, the Commonwealth Court's majority opinion does not actually cite to any decision of this Court in support of its "equitable jurisdiction" analysis. Opinion at 24 n.17.

unfounded and purely speculative allegations of harm appear to have been raised by the court below sua sponte.

Second, the "penalties and/or prosecution [provided] under 58 Pa. C.S. § 3255" are not even applicable to Chapter 33's uniformity of local ordinances provision contained in Section 3304. Section 3255 is located within Chapter 32 of Title 58, which relates to development of oil and gas resources. Section 3255, titled "Penalties," is expressly limited to violations involving only Chapter 32, i.e., the chapter in which it is found. See 58 Pa. C.S. § 3255(a) ("A person violating a provision of ***this chapter*** commits a summary offense..." (emphasis added)); 58 Pa. C.S. § 3255(b) ("A person willfully violating a provision of ***this chapter*** or an order of the department issued under ***this chapter*** commits a misdemeanor...." (emphasis added)). Thus, the sanctions set forth in 58 Pa. C.S. § 3255 expressly are not applicable to alleged violations of Chapter 33 of Title 58, titled "Local Ordinances Relating to Oil and Gas Operation." Accordingly, the legally unsupportable threat of sanctions under 58 Pa. C.S. § 3255 could not possibly constitute direct or immediate harm to the municipalities to warrant the exercise of "extraordinary jurisdiction."

Third, the Commonwealth Court misstates and unduly expands the scope of its alleged ability to exercise "equitable jurisdiction" in pre-enforcement challenges. In Arsenal Coal Co. v. Department of Environmental Resources, 505 Pa. 198, 477 A.2d 1333 (1984), this Court recognized the availability of a pre-enforcement challenge in the *regulatory* context, and created an exception to the general rule requiring exhaustion of administrative remedies. However, Arsenal Coal in no way created a carte blanche exception for courts to exercise "equitable jurisdiction" in any and all pre-enforcement challenges. Arsenal Coal and its progeny concern pre-enforcement challenges to agency regulations and do not address the exercise of "equitable

jurisdiction" over statutory provisions promulgated by the General Assembly. Moreover, Arsenal Coal and its progeny require the establishment of some type of direct and immediate harm justifying the court's exercise of its "original jurisdiction," which, as discussed above, the Municipalities have not shown, nor can they. See Grand Cent. Sanitary Landfill, Inc. v. Com., Dep't of Envtl. Res., 123 Pa. Cmwlth. 498, 502, 554 A.2d 182, 184 (1989) ("absent any allegation by [petitioner] that it is currently in violation of the [agency's] regulations, or is immediately threatened by specific circumstances, the direct and immediate harm contemplated by our Supreme Court in Arsenal is nonexistent").

Finally, the Commonwealth Court's purported exercise of "equitable jurisdiction" in this case appears to have been expressly limited to Act 13's requirement that municipal zoning ordinances be modified for uniformity under Section 3304 of the Act. Again, the court's stated justification for entertaining the Municipalities' otherwise unripe claims was its faulty conclusion that "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." Opinion at 24 n.17. Yet, the court below also declared null and void Section 3215(b)(4) of Act 13 as an unconstitutional delegation of legislative authority to the Department. The Commonwealth Court, however, provided no justification for entertaining this unripe claim, which, on its face, has nothing to do with municipalities having to modify their zoning ordinances or allegedly being sanctioned for failing doing to do so. Accordingly, the Commonwealth Court should not have reached the merits of this clearly unripe claim.

VIII. CONCLUSION

For the reasons expressed above, this Honorable Court should reverse the July 26, 2012 order of the Commonwealth Court and direct that the case be dismissed in its entirety with prejudice.

Respectfully submitted,

CONRAD O'BRIEN PC

Dated: September 4, 2012

By:_____

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CERTIFICATE OF SERVICE

I, Mathew H. Haverstick, hereby certify that I served the foregoing Brief of Appellants and Reproduced Record on the following parties via Federal Express and email:

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Dated: September 4, 2012

Matthew H. Haverstick

Exhibit A

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	:	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

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,

[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

[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]

[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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(continued...)

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

(Footnote continued on next page...)

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]

(continued...)

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

(continued...)

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

[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:

(Footnote continued on next page...)

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

[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

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

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

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

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(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.

Exhibit B

Effective: April 16, 2012

Purdon's Pennsylvania Statutes and Consolidated Statutes Currentness
Title 58 Pa.C.S.A. Oil and Gas
Part III. Utilization
Chapter 33. Local Ordinances Relating to Oil and Gas Operation (Refs & Annos)
§ 3304. Uniformity of local ordinances

(a) General rule.--In addition to the restrictions contained in sections 3302 (relating to oil and gas operations regulated pursuant to Chapter 32) and 3303 (relating to oil and gas operations regulated by environmental acts), all local ordinances regulating oil and gas operations shall allow for the reasonable development of oil and gas resources.

(b) Reasonable development of oil and gas resources.--In order to allow the for the reasonable development of oil and gas resources, a local ordinance:

(1) Shall allow well and pipeline location assessment operations, including seismic operations and related activities conducted in accordance with all applicable Federal and State laws and regulations relating to the storage and use of explosives throughout every local government.

(2) May not impose conditions, requirements or limitations on the construction of oil and gas operations that are more stringent than conditions, requirements or limitations imposed on construction activities for other industrial uses within the geographic boundaries of the local government.

(3) May not impose conditions, requirements or limitations on the heights of structures, screening and fencing, lighting or noise relating to permanent oil and gas operations that are more stringent than the conditions, requirements or limitations imposed on other industrial uses or other land development within the particular zoning district where the oil and gas operations are situated within the local government.

(4) Shall have a review period for permitted uses that does not exceed 30 days for complete submissions or that does not exceed 120 days for conditional uses.

(5) Shall authorize oil and gas operations, other than activities at impoundment areas, compressor stations and processing plants, as a permitted use in all zoning districts.

(5.1) Notwithstanding section 3215 (relating to well location restrictions), may prohibit, or permit only as a

conditional use, wells or well sites otherwise permitted under paragraph (5) within a residential district if the well site cannot be placed so that the wellhead is at least 500 feet from any existing building. In a residential district, all of the following apply:

(i) A well site may not be located so that the outer edge of the well pad is closer than 300 feet from an existing building.

(ii) Except as set forth in paragraph (5) and this paragraph, oil and gas operations, other than the placement, use and repair of oil and gas pipelines, water pipelines, access roads or security facilities, may not take place within 300 feet of an existing building.

(6) Shall authorize impoundment areas used for oil and gas operations as a permitted use in all zoning districts, provided that the edge of any impoundment area shall not be located closer than 300 feet from an existing building.

(7) Shall authorize natural gas compressor stations as a permitted use in agricultural and industrial zoning districts and as a conditional use in all other zoning districts, if the natural gas compressor building meets the following standards:

(i) is located 750 feet or more from the nearest existing building or 200 feet from the nearest lot line, whichever is greater, unless waived by the owner of the building or adjoining lot; and

(ii) the noise level does not exceed a noise standard of 60dbA at the nearest property line or the applicable standard imposed by Federal law, whichever is less.

(8) Shall authorize a natural gas processing plant as a permitted use in an industrial zoning district and as conditional uses in agricultural zoning districts if all of the following apply:

(i) The natural gas processing plant building is located at the greater of at least 750 feet from the nearest existing building or at least 200 feet from the nearest lot line unless waived by the owner of the building or adjoining lot.

(ii) The noise level of the natural gas processing plant building does not exceed a noise standard of 60dbA at the nearest property line or the applicable standard imposed by Federal law, whichever is less.

(9) Shall impose restrictions on vehicular access routes for overweight vehicles only as authorized under 75 Pa.C.S. (relating to vehicles) or the MPC.

(10) May not impose limits or conditions on subterranean operations or hours of operation of compressor sta-

tions and processing plants or hours of operation for the drilling of oil and gas wells or the assembly and disassembly of drilling rigs.

(11) May not increase setback distances set forth in Chapter 32 (relating to development) or this chapter. A local ordinance may impose setback distances that are not regulated by or set forth in Chapter 32 or this chapter if the setbacks are no more stringent than those for other industrial uses within the geographic boundaries of the local government.

CREDIT(S)

2012, Feb. 14, P.L. 87, No. 13, § 1, effective in 60 days [April 16, 2012].

58 Pa.C.S.A. § 3304, PA ST 58 Pa.C.S.A. § 3304

Current through 2012 Regular Session Acts 60, 62 to 83, 89, 90, 92, 96, 100, 101, 105 to 107, 109 to 111, 115, 117 to 121, 131, 134, 135, 137 and 140 to 142

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Exhibit C

Effective: April 16, 2012

Purdon's Pennsylvania Statutes and Consolidated Statutes Currentness
Title 58 Pa.C.S.A. Oil and Gas
Part III. Utilization
Chapter 32. Development (Refs & Annos)
Subchapter B. General Requirements
§ 3215. Well location restrictions

(a) General rule.--Wells may not be drilled within 200 feet, or, in the case of an unconventional gas well, 500 feet, measured horizontally from the vertical well bore to a building or water well, existing when the copy of the plat is mailed as required by section 3211(b) (relating to well permits) without written consent of the owner of the building or water well. Unconventional gas wells may not be drilled within 1,000 feet measured horizontally from the vertical well bore to any existing water well, surface water intake, reservoir or other water supply extraction point used by a water purveyor without the written consent of the water purveyor. If consent is not obtained and the distance restriction would deprive the owner of the oil and gas rights of the right to produce or share in the oil or gas underlying the surface tract, the well operator shall be granted a variance from the distance restriction upon submission of a plan identifying the additional measures, facilities or practices as prescribed by the department to be employed during well site construction, drilling and operations. The variance shall include additional terms and conditions required by the department to ensure safety and protection of affected persons and property, including insurance, bonding, indemnification and technical requirements. Notwithstanding section 3211(e), if a variance 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.

(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 1/2 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 1/2 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.

(c) Impact.--On making a determination on a well permit, the department shall consider the impact of the proposed well on public resources, including, but not limited to:

(1) Publicly owned parks, forests, game lands and wildlife areas.

(2) National or State scenic rivers.

(3) National natural landmarks.

(4) Habitats of rare and endangered flora and fauna and other critical communities.

(5) Historical and archaeological sites listed on the Federal or State list of historic places.

(6) Sources used for public drinking supplies in accordance with subsection (b).

(d) Consideration of municipality and storage operator comments.--The department may consider the comments submitted under section 3212.1 (relating to comments by municipalities and storage operators) in making a determination on a well permit. Notwithstanding any other law, no municipality or storage operator shall have a right of appeal or other form of review from the department's decision.

(d.1) Additional protective measures.--The department may establish additional protective measures for storage of hazardous chemicals and materials intended to be used or that have been used on an unconventional well drilling site within 750 feet of a solid blue lined stream, spring or body of water identified on the most current 7 1/2 minute topographic quadrangle map of the United States Geological Survey.

(e) Regulation criteria.--The Environmental Quality Board shall develop by regulation criteria:

(1) For the department to utilize for conditioning a well permit based on its impact to the public resources identified under subsection (c) and for ensuring optimal development of oil and gas resources and respecting property rights of oil and gas owners.

(2) For appeal to the Environmental Hearing Board of a permit containing conditions imposed by the depart-

ment. The regulations shall also provide that the department has the burden of proving that the conditions were necessary to protect against a probable harmful impact of the public resources.

(f) Floodplains.--

(1) No well site may be prepared or well drilled within any floodplain if the well site will have:

(i) a pit or impoundment containing drilling cuttings, flowback water, produced water or hazardous materials, chemicals or wastes within the floodplain; or

(ii) a tank containing hazardous materials, chemicals, condensate, wastes, flowback or produced water within the floodway.

(2) A well site shall not be eligible for a floodplain restriction waiver if the well site will have a tank containing condensate, flowback or produced water within the flood fringe unless all the tanks have adequate floodproofing in accordance with the National Flood Insurance Program standards and accepted engineering practices.

(3) The department may waive restrictions upon submission of a plan that shall identify the additional measures, facilities or practices to be employed during well site construction, drilling and operations. The waiver, if granted, shall impose permit conditions necessary to protect the waters of this Commonwealth.

(4) Best practices as determined by the department to ensure the protection of the waters of this Commonwealth must be utilized for the storage and handling of all water, chemicals, fuels, hazardous materials or solid waste on a well site located in a floodplain. The department may request that the well site operator submit a plan for the storage and handling of the materials for approval by the department and may impose conditions or amend permits to include permit conditions as are necessary to protect the environment, public health and safety.

(5) Unless otherwise specified by the department, the boundary of the floodplain shall be as indicated on maps and flood insurance studies provided by the Federal Emergency Management Agency. In an area where no Federal Emergency Management Agency maps or studies have defined the boundary of the 100-year frequency floodplain, absent evidence to the contrary, the floodplain shall extend from:

(i) any perennial stream up to 100 feet horizontally from the top of the bank of the perennial stream; or

(ii) from any intermittent stream up to 50 feet horizontally from the top of the bank of the intermittent stream.

(g) Applicability.--

(1) This section shall not apply to a well proposed to be drilled on an existing well site for which at least one well permit has been issued prior to the effective date of this section.

(2) Nothing in this section shall alter or abridge the terms of any contract, mortgage or other agreement entered into prior to the effective date of this section.

CREDIT(S)

2012, Feb. 14, P.L. 87, No. 13, § 1, effective in 60 days [April 16, 2012].

Current through 2012 Regular Session Acts 60, 62 to 83, 89, 90, 92, 96, 100, 101, 105 to 107, 109 to 111, 115, 117 to 121, 131, 134, 135, 137 and 140 to 142

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