IN THE SUPREME COURT OF PENNSYLVANIA

Nos. 72 & 73 MAP 2012

ROBINSON TOWNSHIP, ET AL.
Cross-Appellants

v.

COMMONWEALTH OF PENNSYLVANIA, ET AL.
Cross-Appellees

BRIEF OF CROSS-APPELLANTS

Cross-Appeal From The Order Of The Commonwealth Court Entered
On July 26, 2012, Docket No. 284 M.D. 2012

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I. Statement of Jurisdiction

The Supreme Court of Pennsylvania has jurisdiction over this cross-appeal pursuant to 42 Pa.C.S. § 723(a) and Pa.R.A.P. 1101(a)(1). Section 723(a) provides the Supreme Court with "exclusive jurisdiction of appeals from final orders of the Commonwealth Court entered in any matter which was originally commenced in the Commonwealth Court." 42 Pa. C.S. § 723(a); see also Rule 1101(a)(1) (providing for an appeal as of right to the Supreme Court). Cross-Appellants commenced the action in the Commonwealth Court by way of a Petition for Review in the Nature of a Complaint for Declaratory Judgment and Injunctive Relief ("Petition") under the Court's original jurisdiction over civil actions brought against the Commonwealth. Petition, at 7; see 42 Pa.C.S. § 761(a)(1). Cross-appeals are permitted under Pa.R.A.P. 903(b).

This cross-appeal is taken from a final order of the Commonwealth Court pursuant to Pa.R.A.P. 341. A final order "disposes of all claims and of all parties," Pa.R.A.P. 341(b)(1), which the July 26 Order does. The order granted Cross-Appellants' motion for summary relief as to Counts I, II, III and VIII of the Petition, and dismissed the Petition's remaining Counts.

II. Order or Other Determination in Question

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.

/s/
DAN PELLEGRINI, President Judge

III. Statement of Scope and Standard of Review

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

IV. Statement of Questions Involved

1. Is Act 13 unconstitutional as a "special law" that treats local governments differently and that was enacted for the sole and unique benefit of the oil and gas industry?

Suggested Answer: Yes.

Answer Below: No.

2. Is Act 13 unconstitutional because it authorizes takings for private purposes?

Suggested Answer: Yes.

Answer Below: No.

3. Does Act 13 deny municipalities the ability to fulfill their constitutional obligations to protect public natural resources under Article I, Section 27 of the Pennsylvania Constitution?

Suggested Answer: Yes.

Answer Below: No.

4. Is Act 13 unconstitutional because it permits the PUC to play an integral role in the exclusively legislative function of drafting legislation and to render opinions regarding the constitutionality of legislative enactments, infringing on a judicial function?

Suggested Answer: Yes.

Answer Below: No.

5. Did the Commonwealth Court err in granting Preliminary Objections and dismissing the claims of Mehernosh Khan, M.D., the Delaware Riverkeeper Network and Maya van Rossum for lack of standing?

Suggested Answer: Yes.

Answer Below: No.

V. Statement of the Case

1. Form of Action and Procedural History

On February 14, 2012, Governor Corbett signed Act 13 of 2012 into law, codified as 58 Pa. C.S. §§ 2301-3504. Act 13 amends the Pennsylvania Oil and Gas Act to establish, in part, a uniform zoning scheme for oil and gas development that applies to every zoning district in every political subdivision in Pennsylvania, as well as a new zoning ordinance review process for only oil and gas matters.

On March 29, 2012, Cross-Appellants filed a fourteen-count Petition for Review in the Nature of a Complaint for Declaratory Judgment and Injunctive Relief ("Petition") in the Commonwealth Court's original jurisdiction over civil actions brought against the Commonwealth. The Petition challenged Act 13's constitutionality and sought declaratory and injunctive relief. The Cross-Appellants are as follows (hereinafter referred to collectively as, "Petitioners"):

- Robinson Township, Washington County, Pennsylvania;
- Brian Coppola, both individually and in his official capacity as a Supervisor of Robinson Township;
- Nockamixon Township, Bucks County, Pennsylvania;
- South Fayette Township, Allegheny County, Pennsylvania;
- Peters Township, Washington County, Pennsylvania;
- David M. Ball, both individually and in his official capacity as a Councilman of Peters Township;
- Cecil Township, Washington County, Pennsylvania;
- Mount Pleasant Township, Washington County, Pennsylvania;

- Yardley Borough, Bucks County, Pennsylvania;
- Delaware Riverkeeper Network;
- Maya Van Rossum, the Delaware Riverkeeper; and
- Mehernosh Khan, M.D.

The named Appellees are as follows (hereinafter collectively referred to as "Commonwealth"):

- Commonwealth of Pennsylvania;
- Pennsylvania Public Utility Commission ("PUC");
- Robert F. Powelson, in his official capacity as PUC Chairman;
- Office of the Attorney General of Pennsylvania;
- Linda L. Kelly, in her official capacity as the Attorney General of the Commonwealth of Pennsylvania;
- Pennsylvania Department of Environmental Protection ("DEP"); and
- Michael L. Krancer, in his official capacity as DEP Secretary.

On April 4, 2012, Petitioners filed a motion seeking a preliminary injunction, to which the Commonwealth responded on April 10, 2012. After a hearing, the Court granted, in part, Petitioners' Application for Preliminary Injunction, stating, in part,

> To the extent that Chapter 33 or any other provision of Act 13 may be interpreted to immediately pre-empt pre-existing local ordinances, a preliminary injunction is issued pending further order of Court. Additionally, the Court agrees with petitioners that 120 days is not sufficient time to allow for amendments of local ordinances and, therefore, will preliminarily enjoin the effective date of Section 3309 for a period of 120 days.

April 11, 2012 Order.[1]

[1] Petitions to intervene were also filed by several oil and gas companies and industry groups, as well as by Senator Scarnati and Representative Smith ("legislators"). These were filed on April 5, 2012, and April 16, 2012, respectively. After a hearing on April 17, 2012, Petitioners filed

On April 27, the Court denied the DEP and PUC's application to modify the April 11 Order. The Commonwealth filed appeals to this Court concerning the preliminary injunction order, docketed as Nos. 37 MAP 2012 and 40 MAP 2012. Petitioners have filed motions to dismiss those appeals as moot. The PUC and DEP have filed a motion to stay the appeal pending at Docket No. 40 MAP 2012.

On April 30, 2012, the Commonwealth filed preliminary objections to the Petition.

On May 7, 2012, Petitioners filed a motion for summary judgment, which by Order dated May 10, 2012, the Commonwealth Court converted into a motion for summary relief pursuant to Pa.R.A.P. 1532(b). On May 14, 2012, Petitioners filed an answer and brief in opposition to the Commonwealth's preliminary objections.

On May 21, 2012, the Commonwealth filed an answer and brief in opposition to Petitioners' motion for summary relief. The PUC, its Chairman, the DEP, and its Secretary ("PUC and DEP") also filed a cross-motion for summary relief on May 21, 2012. On June 4, 2012, Petitioners filed an answer to that cross-motion.

On June 6, 2012, an *en banc* panel of the Commonwealth Court heard oral argument on the Commonwealth's preliminary objections, Petitioners' motion for summary relief, and the PUC and DEP's cross-motion for summary relief.

On July 26, 2012, the Commonwealth Court entered an Opinion and Order ("July 26 Order"), which: (1) sustained the Commonwealth's preliminary objections as to Counts IV, V, VI, VII, IX, X, XI and XII of the Petition; (2) granted Petitioners' motion for summary relief as

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written objections to legislators' intervention, to which legislators responded. The Commonwealth Court denied both petitions to intervene in an opinion and order dated April 20, 2012. Legislators sought reargument in an application filed May 4, 2012, to which Petitioners answered and objected on May 11, 2012. Legislators appealed the April 20, 2012 order, and that appeal is docketed at No. 46 MAP 2012. The Commonwealth Court denied the reargument application on May 25, 2012.

to Counts I, II, III and VIII of the Petition; and (3) denied the Commonwealth's cross-motion for summary relief in its entirety.[2] The Commonwealth filed timely Notices of Appeal and Jurisdictional Statements, which are docketed as Nos. 63 MAP 2012 and 64 MAP 2012. On August 10, 2012, Petitioners filed a consent motion to consolidate these two appeals. On August 17, 2012, Petitioners filed corresponding cross-appeals, which are docketed at Nos. 72 MAP 2012 and 73 MAP 2012.

2. Prior Determinations

All prior determinations are listed above. The slip opinions for the July 26 Order are currently reported as Robinson Township v. Commonwealth, ___A.3d.____, 2012 WL 3030277 (Pa. Commw. 2012).

3. Judges Whose Determination Is To Be Reviewed

The July 26 Order was entered by an *en banc* panel of the Commonwealth Court in 284 MD 2012. The majority opinion was authored by President Judge Dan Pellegrini, who was joined by Judge Bernard L. McGinley, Judge Bonnie Brigance Leadbetter, and Judge Patricia A. McCullough. The dissenting opinion relating to Counts I-III was authored by Judge Kevin Brobson, who was joined by Judge Robert Simpson and Judge Anne E. Covey.[3]

4. Statement of Facts

a. Act 13's Zoning Provisions

As noted above, Act 13 amends the Pennsylvania Oil and Gas Act to establish, in part, a

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[2] This Brief only addresses those issues raised by Petitioners as Cross-Appellants and does not address the Commonwealth Court's decision concerning Counts I, II, III and VIII, as those will be addressed when Petitioners file their brief as Appellees.

[3] The opinion was filed pursuant to Section 256(b) of the Internal Operating Procedures of the Commonwealth Court. Judge Mary Hannah Leavitt recused herself from this case.

uniform zoning scheme for oil and gas development that applies to every zoning district in every political subdivision in Pennsylvania.

The Act's restrictions on local ordinances are threefold. First, Section 3302 resembles the former preemption provision in the old Oil and Gas Act and was "not intended to change or affect . . . section 602[4] of the Oil and Gas Act." 58 Pa. C.S. § 3302; Section 4(4) of HB 1950. Second, Section 3303 expands the Act's scope to preclude local regulation of oil and gas operations where operations are covered by "environmental acts"[5] — state environmental laws, or federal laws dealing with oil and gas operations — including where local governments are given the authority to regulate under those laws. 58 Pa. C.S. § 3303.

Third, Section 3304 creates a uniform zoning scheme for local ordinances dealing with "oil and gas operations." Specifically, it sets forth a list of requirements that a local ordinance must follow in order to provide for the required "reasonable development of oil and gas resources."[6] 58 Pa. Cons. Stat § 3304(a) & (b). Further, it defines "oil and gas operations" broadly to include, among other activities, well location assessment, drilling, hydraulic fracturing, pipeline operations, processing plants, compressor stations, and ancillary equipment. 58 Pa. Cons. Stat § 3301.

Section 3304 restricts a municipality's ability to specify which types of oil and gas

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

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

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

operations are permitted in which zoning districts, and how to classify those permitted uses. For example, each municipality must allow "oil and gas operations," except for natural gas processing plants, in all zoning districts. See 58 Pa. C.S. § 3304(b)(1) & (b)(5)-(b)(8). Municipalities must allow impoundment areas as uses permitted by-right in all zoning districts, including residential districts, so long as they are not closer than 300 feet from an existing building. 58 Pa. C.S. § 3304(b)(6). Operators often use impoundment areas to store thousands to millions of gallons of hydraulic fracturing wastewater. Under the Act, impoundment areas, because they are now uses permitted by-right in residential districts, receive similar treatment as residential uses such as single-family dwellings.

To illustrate, Municipal Petitioner Cecil Township's R-2 Medium Density Residential Zoning District allows as permitted uses by right farms, single-family dwellings, two-family dwellings, multi-family dwellings, planned residential developments, customary accessory uses such as satellite dishes and garages, home offices and essential services. Houses of Worship and Daycare Centers are conditional uses, which means that although the use may be authorized, the use may only be constructed upon demonstration to the Cecil Township Board of Supervisors that the development plans satisfy ordinance standards following a duly advertised public hearing allowing for participation by potentially affected landowners.

Now under Act 13, Municipal Petitioner Cecil Township must allow impoundment areas of hydraulic fracturing wastewater as permitted uses by right. The result is that the approval of construction of a church or daycare center in the R-2 Zoning District will require greater local scrutiny than the approval of wastewater impoundments because the latter will be not be subject to any local scrutiny at all. Likewise, under the Act, municipalities have a highly-restricted ability to prohibit or classify as a conditional use drilling operations in residential districts, and

this ability is limited to distances of 300 or 500 feet. As such, drill pad construction and drilling, hydraulic fracturing, and well completion operations are now also placed on par with residential uses by Act 13.

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

Also, municipalities cannot impose more stringent conditions, requirements, or limitations on the construction of oil and gas operations than those placed on construction activities for other industrial uses within the municipality's boundaries.[7] Similarly, municipalities cannot impose more stringent conditions or limitations on structure height, screening, fencing, lighting, or noise for permanent oil and gas operations than those imposed on other industrial uses or land development in the particular zoning district where the oil and gas operations are situated. See 58 Pa. C.S. § 3304(b)(7)(ii) & (b)(8)(ii).

Municipalities also cannot impose limits or conditions on subterranean operations, hours of operations of compressor stations and processing plants, or hours of operation for oil or gas well drilling, or for drilling rig assembly and disassembly. 58 Pa. C.S. § 3304(b)(10).

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

Municipalities cannot increase setbacks identified in the Act. 58 Pa. Cons. § 3304(b)(11).

Lastly, Act 13 mandates no more than a 30-day review period for uses permitted by-right where a complete application is submitted, and no more than a 120-day review period for conditional uses. 58 Pa. C.S. § 3304(b)(4).

b. Ordinance Review Process, Challenges, Timing

The Act creates a pre-enactment advisory role for the Pennsylvania Public Utilities Commission ("PUC"). It also establishes a local ordinance review process under which the PUC or the Commonwealth Court are the first reviewers of a zoning ordinance.[8]

Prior to enacting an ordinance, the Act empowers the PUC to provide advisory opinions to municipalities on whether a proposed local ordinance dealing with oil and gas operations violates either the MPC or the various restrictions on municipal authority contained in Act 13. 58 Pa. C.S. § 3305(a). The PUC's pre-enactment opinion is advisory in nature, and cannot be appealed. 58 Pa. C.S. § 3305(a)(3). The Act exempts the PUC from following Commonwealth agency, Sunshine Act, and PUC hearing procedures. 58 Pa. C.S. § 3305(c).

After an ordinance is enacted, an "aggrieved" oil and gas operation owner or operator, or an "aggrieved" individual in the particular municipality, can request a similar PUC review. 58 Pa. C.S. § 3305(b). Again, the Act exempts the PUC from following Commonwealth agency, Sunshine Act, and PUC hearing procedures. 58 Pa. C.S. § 3305(c). For post-enactment reviews, the PUC's order can be appealed to the Commonwealth Court. 58 Pa. C.S. § 3305(b)(4). Although the PUC's order becomes a record before the Court, the Court will conduct a *de novo* review. 58 Pa. C.S. § 3305(b)(4).

[8] For other validity challenges, the municipality's zoning hearing board would generally review the challenges first and they would not arrive at the Commonwealth Court until after an appeal from a Common Pleas Court decision.

Rather than utilize the PUC, or the typical municipal zoning hearing board process, any person aggrieved by an ordinance's enactment or enforcement can challenge the ordinance in Commonwealth Court without going to the PUC first. 58 Pa. C.S. § 3306(1) & (2)(granting private right of action). Any post-enactment determination by the PUC will become a part of the record before the Court. 58 Pa. C.S. § 3306(3).

The direct consequence of an invalid ordinance is that the municipality will lose access to impact fee funds until the ordinance is amended, or the municipality reverses an unfavorable determination on appeal. 58 Pa. C.S. § 3308. Also, a municipality faces the threat of paying the other party's attorney fees and costs if a court finds that the ordinance was enacted or enforced "with willful or reckless disregard" of the MPC and Act 13's limitations on local zoning authority. 58 Pa. C.S. § 3307 (1).

Under the Second Class Township Code, township supervisors can be assessed a surcharge by the township auditor, regardless of whether the supervisor intended to violate Act 13, the MPC, or the Pennsylvania or U.S. Constitutions. 53 P.S. § 65907. If found to have acted, or failed to act, in violation of the law, supervisors can face a summary offense. 53 P.S. § 65801.

Originally, all municipalities were required to bring all zoning ordinances into conformity with Act 13 *within 120 days* of the effective date of Act 13. 58 Pa. C.S. § 3309(b). The Commonwealth Court's preliminary injunction postponed the effective date of Section 3309 for 120 days from the April 11, 2012 order, providing municipalities more time to review and revise local ordinances. The Commonwealth Court, by Order of July 26, 2012 issued a permanent injunction, and by Order of August 15, 2012, granted relief from any automatic supersedeas caused by the Commonwealth's appeal to this Honorable Court.

c. Limits on Physician Disclosures

The Act includes provisions that require that doctors must agree to keep chemical information confidential as a condition of seeking access to that information in order to treat in emergency situations. 58 Pa. C.S. § 3222.1(b)(11). Further, doctors in non-emergency situations must provide a written statement of need and a confidentiality agreement before being able to receive the information. 58 Pa. C.S. § 3222.1(b)(10). The express language of the Act contains no exceptions for disclosure of the information given to the doctors. 58 Pa. C.S. § 3222.1(b)(10), (b)(11).

5. Order To Be Reviewed

The text of the July 26, 2012 Order is printed above.

6. Statement of Place of Raising or Preservation of Issues

Petitioners raised the questions presented for review to this Court most prominently in their Petition, as well as their motion for summary judgment, which was converted to a motion for summary relief, in their answers and briefs in opposition to preliminary objections, and also their response to the PUC and DEP's cross-motion for summary relief. Likewise, Petitioners argued these questions before an *en banc* panel of the Commonwealth Court on June 6, 2012.

The Commonwealth Court reviewed all questions raised in this appeal in its July 26, 2012 decision. As noted in the questions presented above, the Commonwealth Court decided each of these questions in the negative.

VI. Summary of Argument[9]

The Commonwealth Court erred to the limited extent that it dismissed Counts IV, V, VI, and VII and to the extent that ruled that Dr. Kahn, Delaware Riverkeeper Network and Ms. van Rossum, the Delaware Riverkeeper, lack standing.

Count IV should not have been dismissed because Act 13 violates Article III, Section 32 of the Pennsylvania Constitution. Act 13 is a special law that treats local governments differently and was enacted for the sole benefit of the oil and gas industry. The Commonwealth Court failed to provide any reasoning to justify each aspect of Act 13's differential treatment. The Court below committed an error of law because each difference provided for in the law must be justified on the basis of some legitimate state interest and there must be a reasonable relationship between the two.

The Commonwealth Court also erred in dismissing Count V because Section 3241 of Act 13 authorizes unconstitutional takings of private property in violation of Article I, Sections 1 and 10 of the Pennsylvania Constitution. Section 3241 is unconstitutional on its face because it authorizes private corporations to take interests in real property for the storage of natural gas without any public purpose being served.

Count VI should not have been dismissed because Act 13 denies municipalities the ability to fulfill their constitutional obligations to protect public natural resources under Article I, Section 27 of the Pennsylvania Constitution. Despite having initially recognized that, under Section 27, municipalities hold a responsibility to protect Pennsylvania's public natural resources, the Commonwealth Court's ultimate ruling ignored the fact that this is a

[9] As noted above, this Brief only addresses those issues raised by Petitioners as Cross-Appellants and does not address the Commonwealth Court's decision concerning Counts I, II, III and VIII, as those will be addressed when Petitioners file their brief as Appellees.

constitutionally mandated obligation. As such, despite the Court's suggestion that a ***statutory*** enactment – Act 13 – can eliminate a governmental body's ***constitutional*** obligations, the legislature cannot abrogate a constitutional directive. Act 13 does not withstand scrutiny because it causes municipalities to violate their constitutional obligations.

Further, the Commonwealth Court's decision to dismiss Count VII was in error because Act 13 violates the constitutionally-mandated separation of powers. Act 13 unconstitutionally permits the PUC to play an integral role in the exclusively legislative function of drafting legislation and to render opinions regarding the constitutionality of legislative enactments, infringing on a judicial function.

Finally, Dr. Kahn, DRN, and Ms. van Rossum each have a substantial, direct, and immediate interest in the controversy and, thus, each has standing. As a practicing doctor who diagnoses and treats patients in the state's gas drilling region, Act 13's confidentiality restrictions force Dr. Kahn to choose between multiple undesirable outcomes: harm patient health, risk medical malpractice, or violate record-keeping laws and other medical and ethical obligations. Because of the serious threat to patient health that results from the confidentiality restrictions, Dr. Khan does not have to wait until a patient arrives in his office to challenge Act 13's restrictions. Lastly, Maya van Rossum—the Delaware Riverkeeper—and DRN have a direct, substantial, and immediate interest in maintaining zoning protections in the Delaware River Basin where she and DRN's members live, work, and recreate. Like individual petitioners Ball and Coppola, whose standing was recognized below, DRN members and Ms. van Rossum rely on zoning ordinances that separate incompatible land uses to protect their property interests, homes, farms, water supplies, health, and recreational interests. They thus have standing to challenge Act 13, which would remove those protections, including public participation rights.

VII. Argument

1. Act 13 Is Unconstitutional As A "Special Law" That Treats Local Governments Differently And That Was Enacted For The Sole And Unique Benefit Of The Oil And Gas Industry

Act 13 violates Article III, Section 32 of the Pennsylvania Constitution because it is a special law that treats local governments differently and was enacted for the sole and unique benefit of the oil and gas industry. As such, the Commonwealth Court erred in dismissing Count IV.

Article III, Section 32 of the Pennsylvania Constitution provides:

> 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 schools districts,
>
> ***
>
> 7. Regulating labor, trade, mining or manufacturing.
>
> ***
>
> 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.

PA. CONST. Art. III, Sec. 32.

This constitutional provision requires that like persons in like circumstances be treated similarly. Pennsylvania Turnpike Com'n v. Com., 587 Pa. 347, 363-64, 899 A.2d 1085, 1094 (2006). The General Assembly is prohibited from passing any special law for the benefit of one group to the exclusion of others. Laplacca v. Philadelphia Rapid Transit Co., 265 Pa. 304, 108 A. 612 (1919). The intent of this provision was to end the enactment of privileged legislation for private purposes. Harrisburg School Dist. v. Hickok, 563 Pa. 391, 761 A.2d 1132 (2000).

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. Pennsylvania

Turnpike Com'n v. Com., 587 Pa. at 363-65, 899 A.2d at 1094-1095. A classification may be deemed per se unconstitutional if the class consists of one type of member and is substantially closed to other members. Id. A classification will violate the principles of equal protection if it does not rest upon a difference which bears a reasonable relationship to the purpose of the legislation. Cf. In re Williams, 210 Pa. Super. 388, 234 A.2d 37, 41 (1967).

"[M]anifest peculiarities within a legislative class . . . provide the only permissible justification for a legislative override of the uniformity required by Article III, Section 32." Wings Field Preserv. Ass'n., L.P. v. Com., Dept. of Transp., 776 A.2d 311, 317 (Pa. 2001). Those peculiarities "clearly distinguish[] those of one class from each of the other classes and imperatively demand[] legislation for each class separately that would be useless and detrimental to the others." Id., quoting Allegheny County v. Monzo, 500 A.2d 1096, 1105 (Pa. 1985).

With reference to Pennsylvania Turnpike Commission cited above, the Commonwealth Court's July 26 Opinion correctly recognized that "[a]ny 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." See July 26 Opinion, at p. 38. In addition, the Court properly acknowledged that, "... **Act 13 does treat the oil and gas industry different from other extraction industries**..." Id. (emphasis added).

However, the Commonwealth Court erred as a matter of law in concluding that this distinction is "constitutional" because it is "based on real differences that justify varied classifications for zoning purposes." Id. The Commonwealth Court came to this blanket conclusion without addressing what sort of "real differences" justify the specific kinds of preferential treatment offered to the oil and gas industry by Act 13. Likewise, the Court did not address why the numerous classifications explained below promote a legitimate public interest.

In order for any distinction creating such an unequal disparity to be constitutional, such a showing is required, at a minimum, by Pennsylvania Turnpike Commission.

Yet, the Commonwealth Court provided no reasoning to support its conclusion and offered no illustration of how the number of significant differences can each be individually justified. Moreover, in coming to its conclusion regarding constitutionality, the Commonwealth Court found no more than that *Section 3304* of Act 13 does not violate Article 3, § 32 of the Pennsylvania Constitution. The Commonwealth Court did not even address the constitutionality of the different treatment provided for in Act 13 that reach far beyond Section 3304 exclusively. Each and every difference provided for must be justified on the basis of some legitimate state interest and there must be a reasonable relationship between the two.

In a subsequent argument held in order to vacate an automatic supersedeas, the Commonwealth Court seemed to acknowledge that there appeared to be little justification to grant the oil and gas industry specialized zoning treatment:

> **Industry Participants**:[10] There are municipalities that do, in fact, have exclusionary zoning.
> **The Court**: So, just like every other, can't you challenge that through the normal zoning process?
> **Industry Participants**: Therein lies the problem, Your Honor. You're putting the industry in a situation where they have to go into each municipality, take on each ordinance, run it up through the Zoning Hearing Board, the Court of Common Pleas, this Court and the Supreme Court in a four or five year litigation nightmare in every municipality in this state that has preclusive effects on oil and gas operations.
> **The Court**: So in effect your argument is that you're special; that if there's – every other – I'm sure the Tavern Association of Pennsylvania would want to put a tavern everywhere. And I don't think every ordinance is exclusionary, but what you're in effect

[10] Counsel for the oil and gas industry parties was permitted to participate in oral argument held in the August 15, 2012 hearing to vacate the automatic supersedeas. After their request for intervention was denied by both the Commonwealth Court and this Honorable Court, these industry parties have participated as *amici curiae* in the instant matter.

> saying is that you just don't want to deal with local zoning because its – you don't want to follow – it would be more convenient for you to not have to do that but everybody else has to.

See R.1263a-64a.

The Commonwealth Court was unable to provide a reasonable and rational justification for the preferential treatment because the legislature itself could not provide one when enacting the law. It was, undoubtedly, privileged legislation enacted solely for the benefit of the Pennsylvania oil and gas industry. Harrisburg School Dist. v. Hickok, 563 Pa. 391, 761 A.2d 1132 (Pa. 2000). While it may be true that the oil and gas industry and, more importantly, the natural resources underlying the Commonwealth, have provided an economic boost to Pennsylvania communities, this alone cannot serve to justify the classifications and benefits given to the industry. As explained by the President Judge of the Commonwealth Court: "Before we had this act, we [had] a lot of gas drilling. I think the estimate is 20,000 permits were issued in the Commonwealth. ... [T]he industry was very successful before the act, and . . . employed a lot of people and . . . received thousands and thousands permits." R.1259a-60a. The unequal distinctions made certainly cannot be advanced as a reasonable nor rational means to an end when the industry was previously thriving without any special and exclusive statutory assistance. In effect, the General Assembly has created unequal treatment without the need for it and without good cause in violation of equal protection principles.

Petitioners concede that there may be inherent differences between the oil and gas industry and other extraction industries, as there are between all industries. Yet, Act 13's preferential zoning treatment does not relate to any such differences associated with oil and gas development. In other words, there is no rational relationship between the unique qualities and concerns solely associated with this particular industry and the preferential treatment Act 13

provides; the fit between the two is incongruous such that one does not even attempt to address the other.

In an attempt to support its statement that legitimate classifications exist in the mineral extraction industry, the Commonwealth Court references case law concerning the Bituminous Coal Mines Act. See Read v. Clearfield Co., 12 Pa. Super. 419 (1900); see also Dufour v. Maize, 56 A.2d 675 (Pa. 1948). However, the distinctions provided for in that Act were reasonably related to characteristics that were entirely unique to the mining of bituminous coal. In particular, the Dufour court stated that, "[t]hese are substantial and real differences which, in our opinion, justify the classification made by the act." 56 A.2d at 677. Any such differences must be "founded on real distinctions in the subjects classified, and not on artificial or irrelevant ones used for the purpose of evading the constitutional prohibition." Id. This type of classification was justified as a proper use of **police power**; in other words, it provided protection for the health, safety and welfare of the community. Read, 12 Pa. Super. at 427.

Going beyond the Commonwealth Court's statement that "Act 13 does treat the oil and gas industry differently from other extraction industries," Act 13 goes even further to treat the oil and gas industry differently from **all** other industries in general and citizens alike. Certainly, the oil and gas industry is not the only business arena in Pennsylvania to create jobs and generate revenue. Again, as noted by the President Judge of the Commonwealth Court, "... jobs, while really important, [do] not justify the violation of the Constitution." See R.1276a. In order for a classification made in the law to be constitutional, there must be a legitimate state interest or public value at stake and the classification must bear a reasonable relationship to furthering that interest. The act of allowing a particular industry essentially total exemption from local zoning controls can never be a means to a public-interest end. Furthermore, a valid classification cannot

be one which is maintained by allowing for an unconstitutional infringement upon citizens' property and due process rights. The following specialized differences provided for by Act 13 represent clear preferential treatment and an unconstitutional judgment of the legislature which cannot be rationalized based upon the interplay between any of the distinctions and public values at issue herein.

A. Uniformity of Local Ordinances

No reasonable relationship exists between Act 13's classification and the public benefit. The Act creates a distinction between the oil and gas industry and all other industries in the Commonwealth. It even treats the oil and gas industry differently from other energy extraction and production industries. The purported reason for this difference was to give the oil and gas industry alone increased predictability and uniformity as it operates in various locales across the Commonwealth. See Commonwealth's Brief in Support of Preliminary Objections, at 6; compare 4/17/12 Hearing Transcript Regarding Petitions to Intervene, at 6-7 (discussing the need to intervene because of the "time, energy, and money" expended by industry members to "ensure uniformity and predictability" in local ordinances).

However, the oil and gas industry is not the only industry that operates statewide, and not even the only energy extraction and production industry that operates in numerous municipalities statewide. Further, the oil and gas industry is not alone in its ability to bring potential economic development to the Commonwealth. Also, to the extent the General Assembly assumed that the oil and gas industry was "new" in the Commonwealth, which it is not, it is certainly not the Commonwealth's only fledging industry, let alone the only new energy industry.

Under Act 13, the oil and gas industry is the *only industry* that is permitted to entirely bypass the statutory baselines underlying the constitutionality of zoning, including already-

established and designated zoning districts, comprehensive plans and orderly development of the community. No other citizen, business, or industry has been granted such "special treatment" for such intense industrial activity. Further, no other industry has been given *two* ways to bypass entirely the typical municipal zoning hearing board process in order to challenge a local ordinance—a special forum at the PUC exempted from due process procedures, *and* a private right of action in Commonwealth Court. 58 Pa. C.S. §§ 3305(b)-(c), 3306. The Commonwealth has given the oil and gas industry the power to bring significant financial hardship on a municipality under Act 13. Rather than losing a challenge and merely having to rewrite an ordinance, a municipality and its officials now face a threat both of paying an oil and gas operator's attorneys' fees and costs, and being subject to the threat of surcharges against local officials flowing from these municipal losses. See R.801a-17a & R.1142a-49a (Aff. of Brian Coppola); R.818a-27a & R.1150a-60a (Aff. of David Ball); R.945a-48a & R.1171a-74a (Aff. of William Sadow).

To further illustrate Act 13's special treatment of the oil and gas industry over all others, including other industries, Section 3304 of Act 13 provides a time limitation on municipalities when reviewing zoning applications. The local review period for oil and gas operations may not exceed thirty (30) days for uses permitted by right, or one hundred twenty (120) days for conditional uses. 58 Pa. C.S. § 3304(b)(4). All others who desire to develop land in a district are required to follow the time constraints and procedures already set forth in the MPC.

To pass zoning ordinances or approve applications, municipal officials must consider the evidence introduced from these review processes and base their decision on the information gathered. See, 53 P.S. §§ 10608-09, 10610, 10908, 10913.2. However, under Act 13, approval of the application or the zoning ordinance is mandated in some cases *regardless of the evidence*

gathered. As such, rather than base a decision on the evidence and public concern presented to them, municipalities will be forced to turn a blind eye to any evidence brought forth by a landowner in a public hearing.

Pennsylvania courts have recognized that landowners' property interests and due process rights may be violated by failing to give public notice or hold a public hearing in accordance with the MPC's zoning procedures. See Luke v. Cataldi, 593 Pa. 461, 932 A.2d 45 (2007); Glen-Gery Corp. v. Zoning Hearing Bd. of Dover Twp., 589 Pa. 135, 907 A.2d 1033 (2006); Messina v. East Penn Twp., 995 A.2d 517 (Pa. Commw. Ct. 2010). "The purpose of requiring compliance with the procedural requirements for enacting township ordinances is premised on the importance of notifying the public of impending changes in the law so that members of the public may comment on those changes and intervene when necessary." Schadler v. ZHB of Weisenberg Twp., 578 Pa. 177, 850 A.2d 619, 627 (2004). A landowner has a property interest in the quiet use and enjoyment of his property near any proposed use, as well as a right to participate in the governing body's hearings. In re McGlynn, 974 A.2d 525 (Pa. Commw. Ct. 2009). All other applicants, including all the taxpaying citizens of each municipality, must follow the local zoning procedures, appeals processes, and the time frame set out by the MPC, and employed for the protection of the community.[11]

There is no "manifest peculiarity" that provides a basis for enacting the sweeping changes in Chapter 33 solely for the benefit of the oil and gas industry, Wings Field Preservation

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

Associates, L.P., 776 A.2d at 317, as well as superseding the rights of all other citizens to participate and voice concerns about proposed development. See R.801a-817a & R.1142a-1149a (Aff. of Brian Coppola); R.818a-27a & R.1150a-60a (Aff. of David Ball) (discussing individual concerns, and the manner in which Act 13 overrides the public hearing and comment process); see also R.949a-56a & R.1175a-82a (Aff. of Maya van Rossum); R.1189a-90a; R.1196a, 1197a. Catering to an industry not in need of special protection was the initial catalyst for Article III, Section 32, which sought to ensure equal treatment of similarly-situated people. Harrisburg School Dist. v. Hickok, 563 Pa. 391, 397, 761 A.2d 1132, 1136 (2000). Act 13 therefore achieves precisely what Article III, Section 32 of the Pennsylvania Constitution prohibits.

Further, the Act creates an unconstitutional distinction between densely populated communities and more sparsely populated communities. Densely populated communities and their residents are afforded greater protection and/or privileges under Act 13 than more sparsely populated communities such as Municipal Petitioners.[12] By the passage of Act 13, the General Assembly has mandated that the full maximum capacity of drilling, vertical, horizontal, fracturing or otherwise (along with the corresponding pipelines, compressor stations, impoundments, processing plants, etc.) must be realized and permitted in every zoning district of a community, including residential areas. Due to their dense populations and build-out of real estate within their borders, densely populated communities are largely relieved of the burden of drilling by virtue of the set back requirements. A rural community such as Cecil Township has a tremendous amount of undeveloped land. As a result of this abundance of undeveloped land, Cecil is a prime drilling target for the oil and gas industry. With the passage of Act 13 and its "one-size-fits-all" approach to zoning, Cecil and other similarly situated Municipal Petitioners

[12] Municipal Petitioners include all seven municipalities, as well as David Ball and Brian Coppola in their official capacities only.

have been stripped of their ability to protect their residents through zoning. Unlike "built-out" and densely populated towns/cities, these rural communities will be forced to endure unlimited drilling; drilling rigs and transportation of the same; flaring, including carcinogenic and hazardous emissions; damage to roads; an unbridled spider web of pipeline; installation, construction and placement of impoundment areas; compressor stations and processing plants; and unlimited hours of operation, all of which may take place in residentially zoned areas.

Article III, Section 32 of the Pennsylvania Constitution was adopted to end "[t]he evil [of] interference of the legislature with local affairs without consulting the localities and the granting of special privileges and exemptions to individuals or favored localities." Harrisburg School District v. Hickok, 781 A.2d 221, 227 (Pa. Commw. Ct. 2001). By its application, Act 13 lacks uniformity and creates an unconstitutional distinction between densely populated communities and more sparsely populated communities in violation of Article III, Section 32 of the Pennsylvania Constitution. The difference in treatment between different regions in the Commonwealth is further exacerbated by the fact that shale and/or shale gas is not the same throughout Pennsylvania. As a result of this geological reality, Act 13 will not apply to certain areas in the same way it will apply to and affect the Petitioners. Because it treats similarly-situated municipalities differently, it violates Article III, Section 32 of the Pennsylvania Constitution.

B. Attorneys Fees And Costs

Section 3307 of Act 13 imposes attorney fees and costs upon any local government that "enacted or enforced a local ordinance with willful or reckless disregard" of the MPC or the zoning terms of the Act. These "penalty" provisions place excessive punishments upon local governments and do so exclusively when dealing with regulation of the oil and gas industry. For

other industries, a challenge to a local ordinance would merely result in the law being overturned. However, when dealing with local oil and gas ordinances, municipal officials face not only the possibility of the law being overturned, but also the possibility of payment of hundreds of thousands of dollars in attorneys' fees and costs.

In practice, this penalty works to discourage local officials such as Municipal Petitioners from passing laws regulating where oil and gas operations are appropriately conducted. This is so even if local officials believe such regulations would otherwise be in the best interests of the community and consistent with the law. With the possibility of being sanctioned with attorney fees and costs, local officials will be hesitant to regulate the drilling industry for fear of costing their taxpayers additional funds and potentially being found personally liable if a surcharge action is implemented. See R.801a-17a & R.1142a-49a (Aff. of Brian Coppola); R.818a-27a & R.1150a-60a (Aff. of David Ball); see also R.782a-87a & R.1114a-19a (Aff. of Mary Ann Stevenson) (describing financial burdens).

This threat is made more real by the fact that any advisory opinion or other opinion issued by the PUC becomes a part of the record before a court. Consequently, even if a municipality disagreed with the PUC's interpretation of the Act, it would face a difficult decision of whether to enact the ordinance anyway and risk substantial attorneys' fees and costs if litigation were to arise. No other industry could so strongly use state law to threaten great financial harm and do so with the goal of preventing a municipality from doing what it believes to be valid zoning regulation under the MPC.

There is no manifest legitimate justification for this classification whereby the oil and gas industry alone receives additional power to threaten a local municipality. Accordingly, Act 13 constitutes a "special law" in violation of the equal protection principles embodied in Article III,

Section 32 of the Pennsylvania Constitution. Petitioners are therefore entitled to judgment as a matter of law on this count of their Petition, and the Commonwealth Court's decision to the contrary should be reversed.

C. Notification to Public Drinking Water Systems - § 3218.1

Section 3218.1 of the Act 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 ..." As a result of this provision, potentially affected public drinking water facilities will be notified by the DEP in the event an oil and gas driller spills any of its hazardous contaminants on land or into water. Under the Act, no other notifications to any other drinking water sources are required after a spill and possible contamination. The Act creates an unconstitutional distinction between public drinking water supplies and private water wells in violation of equal protection principles.

The General Assembly has failed to provide any legitimate basis for the distinction between public and private drinking water supplies. While public drinking water has the benefit of receiving notification of a spill, it is also already routinely tested to ensure compatibility with drinking water standards. As a result, there are no special circumstances or need that would justify public drinking water supplies receiving the benefit of notification to the exclusion of private water wells. Quite the contrary, it is private water wells which can in fact demonstrate a special need for notification. Private water wells are neither publicly monitored nor routinely tested and are far more susceptible to contamination. As the majority of drilling is ongoing in more rural areas serviced by private water sources, the rationale for this exception suggests "special" treatment, different from all other uses in a municipality. This sort of special privilege afforded to a selected group rests on an entirely artificial and arbitrary distinction in violation of

Article III, Section 32. Consequently, Act 13 violates Article III, Section 32 of the Pennsylvania Constitution. The Commonwealth Court's decision granting judgment against Petitioners on Count IV should therefore be reversed. Instead, judgment should be entered on Count IV in favor of Petitioners.

2. Act 13 Is Unconstitutional Because It Authorizes Takings For Private Purposes

Section 3241 of Act 13 authorizes unconstitutional takings of private property for a private purpose in violation of Article I, Sections 1 and 10 of the Pennsylvania Constitution. The Commonwealth Court's decision dismissing Count V should therefore be reversed.

Section 3241 of Act 13, entitled "eminent domain," states, in part:

> [e]xcept 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.

In dismissing Petitioners' argument, the Commonwealth Court simply held that the "Petitioners failed 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." Robinson Tp. v. Com., --- A.3d ----, 2012 WL 3030277 *16-17 (Pa. Commw. 2012). The Court further stated that "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's power to take property is the filing of preliminary objections to a declaration of taking." Id.

The Petitioners do not allege that they have had property condemned nor do they argue that this is an eminent domain case. By its narrow holding on this issue, the Commonwealth Court is attempting to "sidestep" the thrust of Petitioner's argument that Section 3241 of Act 13 is unconstitutional on its face. This Honorable Court has the ultimate power to interpret the Constitution and determine what is constitutional. Mesivtah Eitz Chaim of Bobov, Inc. v. Pike County Bd. of Assessment Appeals, __ Pa. ____, 44 A.3d 3, 7 (2012). The General Assembly cannot alter the Constitution by purporting to define its terms in a manner inconsistent with judicial construction and interpretation. Id. at 7 (citing Pottstown School District v. Hill School, 786 A.2d 312, 319 (Pa. Commw. 2001)). To that end, this Court has clearly established that "private property can only be taken to serve a public purpose" and that "to satisfy this obligation, the public must be the primary and paramount beneficiary of the taking." In re Opening Private Road for Benefit of O'Reilly, 607 Pa. 280, 299, 5 A.3d 246, 258 (2010). On its face, Section 3241 of Act 13 does not meet this constitutional threshold.[13]

Act 13 is void of any expressly stated public purpose to be served by Section 3241. Act 13 authorizes private corporations to take interests in real property for the storage of natural gas

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[13] The United States and Pennsylvania Constitutions mandate that private property can only be taken to serve a ***public*** purpose. In re Opening Private Rd. for Benefit of O'Reilly, 607 Pa. 280, 5 A.3d 246 (2010). Private property cannot be taken for the benefit of another private property owner. Kelo v. City of New London, 545 U.S. 469 (2005). This Honorable Court has held that to satisfy this obligation of serving a "public purpose," the public must be the primary and paramount beneficiary of any taking. In re Opening Private Rd. for Benefit of O'Reilly, 607 Pa. at 299, 5 A.3d at 258. In considering whether a primary public purpose was properly invoked, the Pennsylvania Commonwealth Court has looked for the "real or fundamental purpose" behind a taking. In re Opening a Private Rd. for Benefit of O'Reilly Over Lands of (a) Hickory on Green Homeowners Ass'n & (b) Mary Lou Sorbara, 22 A.3d 291 (Pa. Commw. Ct. 2011) (on remand from the Pennsylvania Supreme Court) (citing Middletown Township v. Lands of Stone, 595 Pa. 607, 617, 939 A.2d 331, 337 (2007)). "Stated otherwise, the true purpose must primarily benefit the public." Id.

without any public purpose being served.[14] If this use is a "public purpose," which Petitioners do not concede, then any oil and gas corporation by analogy could have the right by use of eminent domain powers to acquire real property for storage reservoirs and for protective areas around those reservoirs.

Moreover, Section 3241 is inconsistent with the limitations on the use of eminent domain under the Property Rights Protection Act. 26 Pa. C.S. § 201 *et seq*. Pursuant to the Act, except as set forth in § 204(b), "the exercise by any condemnor of the power of eminent domain to take private property in order to use it for private enterprise is prohibited." 26 Pa. C.S. § 204(a). Specifically, the appropriation of an interest in real property by a corporation for the storage of natural or manufactured gas is not listed as an exception under § 204(b), nor clearly covered under the definition of "public utility," which are those entities allowed to engage in the transportation and sale of gas. See 66 Pa. C.S. § 102. Further, nothing in Section 3241 necessarily limits the eminent domain power to public utility corporations.

Because it cannot be justified on the basis of any paramount public purpose, Section 3241 of Act 13 authorizes unconstitutional takings of private property for a private purpose in violation of Article I, Sections 1 and 10 of the Pennsylvania Constitution. The Commonwealth Court's decision granting judgment against Petitioners on Count V should therefore be reversed. Instead, judgment should be entered on Count V in favor of Petitioners.

3. Act 13 Denies Municipalities The Ability To Fulfill Their Constitutional Obligations To Protect Public Natural Resources Under Article I, Section 27 Of The Pennsylvania Constitution

Act 13 violates Article I, Section 27 of the Pennsylvania Constitution by denying

[14] Petitioners recognize that this provision also existed in the Oil and Gas Act prior to the enactment of Act 13.

municipalities the ability to carry out their constitutional obligation to protect public natural resources. The Commonwealth Court misapplied controlling precedent and its decision dismissing Count VI should be reversed.

Article I, Section 27 of the Pennsylvania Constitution states the following:

> The people have a right to clean air, pure water, and to the preservation of 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 people.

Pa. Const. Art. I, Sec. 27 (the "Environmental Rights Amendment").

Municipalities, as agents of the Commonwealth, share duties as trustees to conserve and maintain Pennsylvania's public natural resources for the benefit of its citizens. United Artists Theater Circuit v. City of Philadelphia, 535 Pa. 370, 385, 635 A.2d 612, 620 (1993). "[M]unicipal agencies have the responsibility to apply the Section 27 mandate as they fulfill their respective roles in 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 ..." Community College of Delaware County v. Fox, 20 Pa. Commw. 335, 358, 342 A.2d 468, 482 (1975).

This Honorable Court has unequivocally recognized that municipalities have a duty to protect the environment:

> Whatever affects the natural environment within the borders of a township or county affects the very township or county itself. Toxic wastes which are deposited in the land irrevocably alter the fundamental nature of the land which in turn irrevocably alter the physical nature of the municipality and county of which the land is a part. It is clear that when land is changed, a serious risk of change to all other components of the environment arises. Such changes and threat of changes ostensibly conflict with the obligations townships and counties have to nature and the quality of life. ... Aesthetic and environmental well-being are important aspects of the quality of life in our society, *and a key role of local*

> *government is to promote and protect life's quality for all of its inhabitants.*
> ***
> [A]mong the responsibilities of local government is the protection and enhancement of the quality of life of its citizens. Indeed, it is a *constitutional charge* which must be respected by *all* levels of government in the Commonwealth.

Franklin Tp. v. Com., Dept. of Environmental Resources, 500 Pa. 1, 7-10, 452 A.2d 718, 721-22 (1982) (emphasis added); see also Community College of Delaware County v. Fox, 20 Pa. Commw. 335, 342 A.2d 468 (1975) (holding that DER could not consider aspects of planning and zoning, and did not have the authority to withhold a permit on non-statutory environmental and land use criteria; instead, these are the concern and responsibility of municipal agencies).

Furthermore, as this Court found in Payne v. Kassab, 468 Pa. 226, 361 A.2d 263 (1976):

> There can be no question that the Amendment itself declares and creates a public trust of public natural resources for the benefit of all the people (including future generations as yet unborn) and that the Commonwealth is made the trustee of said resources, commanded to conserve and maintain them. No implementing legislation is needed to enunciate these broad purposes and establish these relationships; the amendment does so by its own Ipse dixit.
>
> But merely to assert that one has a common right to a protected value under the trusteeship of the State, and that the value is about to be invaded, creates no automatic right to relief. The new amendment speaks in no such absolute terms. The Commonwealth as trustee, bound to conserve and maintain public natural resources for the benefit of all the people, is also required to perform other duties, such as the maintenance of an adequate public highway system, also for the benefit of all the people. See Sections 11 and 13(a) of Act 120, 71 P.S. 511, 513(a). ***It is manifest that a balancing must take place....***

Payne v. Kassab, 468 Pa. 226, 246, 245, 361 A.2d 263 (1976) (emphasis added); see Del-AWARE, Unlimited, Inc. v. Commonwealth Dep't of Envtl. Res., 96 Pa. Commw. 361, 508 A.2d 348 (1986); Pa. Envtl. Mgt. Serv., Inc. v. Commonwealth Dep't of Envtl. Res., 94 Pa.

Commw. 182, 184-187, 503 A.2d 477, 479-80 (1986).

By enacting Act 13, the General Assembly has removed from Pennsylvania municipalities the ability to strike that balance between oil and gas development and "the preservation of the natural, scenic, historic and esthetic values of the environment." The Act essentially requires a municipality to allow industrial uses in non-industrial areas with little ability to protect the surrounding resources and community.

Act 13 does so by effectively making local zoning authority over oil and gas operations meaningless, and by depriving municipalities of any meaningful role in state permitting, including eliminating municipalities' rights to appeal DEP permitting decisions for oil and gas well permits. 58 Pa. C.S. § 3215(d). The Act does not even require the DEP to consider municipal comments about local concerns submitted during the permitting process. 58 Pa. C.S. §§ 3212.1(b), 3215(d); see also 58 Pa. C.S. § 3212.1(c) (stating that the comment/response process cannot extend the default 45-day permit consideration period under Section 3211(e)).

Consequently, municipalities cannot strike the balance envisioned by this Court between development and protection of public natural resources. Act 13 therefore prevents municipalities from playing their constitutionally mandated public trust role and leaves a gap in regulatory protection that is contrary to dictates of the Environmental Rights Amendment.

Prior to Act 13, and consistent with the requirements of the Environmental Rights Amendment, state law has long mandated and authorized an active role for municipalities in utilizing zoning ordinances and other local regulations to protect their communities' natural, cultural and historic resources. Zoning is an important tool used by municipalities to protect public natural resources in accordance with the Environmental Rights Amendment. "The very essence of [z]oning is the designation of certain areas for different use purposes." Swade v.

Zoning Board of Adj. of Springfield Twp., 392 Pa. 269, 270, 140 A.2d 597, 598 (1958). Zoning ensures that local resources, community character, and present and future human and economic development patterns are provided for, given the constraints of each particular municipality. See 53 P.S. § 10603 (a).

For instance, municipalities use zoning to protect public natural resources in accordance with statutes such as the Appalachian Trail Act and the Wild and Scenic Rivers Act. See, e.g., R.1196a, R.1197a-1198a; R.1203a, R.1206a. Likewise, the MPC mandates that zoning ordinances be designed to "promote, protect and facilitate" public natural resources, including "the provision of a safe, reliable and adequate water supply for domestic, commercial, agricultural or industrial use," "the preservation of forests, wetlands, aquifers and floodplains," and "prime agricultural land" See 53 P.S. §§ 10603, 10604, 10605; see also, e.g., R.1188a-1189a.

Furthermore, zoning is a key tool for implementing the Environmental Master Plan, which envisions "shared responsibility with regional agencies and local governments to make the Environmental Master Plan a meaningful plan to guide and coordinate future statewide actions in an environmentally sensitive manner." 25 Pa. Code § 9.3(k); see, e.g., 25 Pa. Code § 9.126(a) ("Actions at the Commonwealth level are not able to provide fully for the protection of watersheds with high quality streams. The power to control land use directly is mainly in the hands of local governments."); 25 Pa. Code § 9.114(b) ("Land use controls ... shall be in support of environmentally sensitive land policy planning at all levels of governments"). As such, zoning accomplishes a number of objectives, and therefore allows municipalities to efficiently and effectively protect public natural resources in accordance with the Article I, Section 27.

As trustees, Municipal Petitioners have a fiduciary obligation to ensure that all decisions

affecting public trust resources meet the requirements of the Environmental Rights Amendment of the Pennsylvania Constitution. They further have a duty to evaluate the immediate and long-term impacts, both discrete and cumulative, on each element of the public trust resources and on the public's right to future enjoyment of these resources.

It is beyond dispute that each aspect of "oil and gas operations" presents risks, as illustrated in the Petition at R.123a-136a. Municipal Petitioners, as trustees, have a reasonable basis to conclude that the use of land within their communities for oil and gas operations will cause degradation and diminution of trust resources without proper zoning controls. Prior to Act 13, Municipal Petitioners could have addressed these risks and carried out their constitutional mandates through zoning provisions that address local community development objectives, local natural resources and existing land uses.

However, as illustrated in the Petition at R.123a-136a, Act 13 removed Municipal Petitioners' ability to act meaningfully on evaluations of the potential impacts of oil and gas operations, and consequently denied Municipal Petitioners the ability to carry out these constitutional obligations. Municipal Petitioners, under Act 13, have lost the fundamental ability to designate ***where*** oil and gas operations may go in a municipality, considering the need to protect public trust resources, allow for development in various forms, and protect public health. The very fact that the Act requires impoundments to be uses permitted by right in every zoning district eviscerates the purpose of having a resource protection district to allow only low-impact development in a sensitive water recharge area. See Petition at R.122a-123a.

The Act has also removed Municipal Petitioners' right to appeal a DEP oil and gas permitting decision. 58 Pa. C.S. § 3215(d). Permit appeals are not a substitute for considered land use planning, yet Act 13 strips Municipal Petitioners even of the ability to challenge an oil

and gas decision that harms public natural resources in their municipalities. The Act does not even require the DEP to consider comments submitted by Municipal Petitioners regarding the need to protect local public trust resources.

In light of the above, it is clear that the Commonwealth Court erred in dismissing Petitioners' Section 27 claim. In its analysis of this claim, the Court below started by correctly recognizing that municipalities share responsibility for the "preservation of the natural, scenic, historic and esthetic values enumerated" in Section 27. (Opinion at 42, quoting Community College of Delaware County v. Fox, 342 A.2d 468, 481-82 (Pa. Commw. Ct. 1975).

Despite recognizing that municipalities have constitutional obligations to protect public trust resources, the Commonwealth Court then looked at the purposes section of Chapter 32 of Act 13 and the preemption provisions of Section 3303. In particular, the Court looked to Section 3202 which declares one of the purposes of Act 13 to be to "[p]rotect the natural resources, environmental rights and values secured by the Constitution of Pennsylvania." 58 Pa. C. S. §3202. Section 3303, states: "Notwithstanding any other law to the contrary, environmental acts are of Statewide concern and, to the extent that 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." 58 Pa.C.S. §3303. The Commonwealth Court concluded that because of these legislative pronouncements, municipalities "were relieved of their responsibilities to strike a balance between oil and gas development and environmental concerns under the MPC." (Opinion at 43).

There are three errors in the Commonwealth Court's analysis. First, the Court below misapprehended the source of municipal responsibility, suggesting that it arises only under the

Municipalities Planning Code. In fact, municipal responsibility for Pennsylvania's public resources arises not simply from the MPC, but more directly from the Pennsylvania Constitution itself. Despite having initially recognized that municipalities hold a responsibility under Section 27, the Court's conclusion ignored the fact that municipalities are ***constitutionally*** obligated to protect our Commonwealth's shared public resources.

Second, the Court below suggested that a ***statutory*** enactment – Act 13 – can eliminate a governmental body's ***constitutional*** obligations. It is axiomatic that the legislature cannot abrogate a constitutional directive. No legislative action, like Act 13, which causes a municipality to violate its constitutional obligations, can withstand scrutiny. If a municipality fails to conserve and maintain Pennsylvania's public natural resources, it violates the Article I, Section 27 of the Pennsylvania Constitution. Under Act 13, a municipality with an important public resource can no longer create a meaningful resource protection district; instead, all districts, including resource protection districts, must allow oil and gas operations *by right*. Act 13 – by taking away municipal ability to designate *where* oil and gas development can take place -- takes away from municipalities the ability to carry out their constitutional obligation to "conserve and maintain" Pennsylvania's "public natural resources." As such, the Commonwealth Court erred in failing to declare Act 13 unconstitutional.

Third, the Commonwealth Court read too much into the preemption language of Section 3303. Section 3303, like the preemption provision of the Oil and Gas Act prior to Act 13, is limited to the regulation of oil and gas "operations." As this Honorable Court noted in Huntley & Huntley, Inc. v. Borough Council of Borough of Oakmont, 600 Pa. 207, 210, 964 A.2d 855, 857 (2009), this reflects a distinction between "how" and "where." Local regulations are preempted to the extent that they attempt to regulate "how" gas drilling is done, but not to the

extent that they seek to regulate "where" gas drilling is done. Thus, contrary to Commonwealth Court's conclusion, Section 3303 did not "relieve[] municipalities of their responsibilities to strike a balance between oil and gas development and environmental concerns under the MPC." (Opinion at 43). Instead, at its most, Section 3303 preempts environmental acts regulating ***operations*** (the "how"), but not regulating ***zoning*** (the "where"). If Section 3303 is interpreted as prohibiting municipalities from considering public natural resources as they carry out their zoning authority, then Section 3303, like the remainder of Chapter 33 of Act 13, would also violate Article I, Section 27 of the Pennsylvania Constitution. Section 3303 either must read narrowly or it too must be struck down. To be read narrowly, Section 3303 would, consistent with Article I, Section 27 of the Pennsylvania Constitution, allow municipalities – in regulating where gas development can take place – to consider impacts on public natural resources. If, on the other hand, Section 3303 is read to prohibit such considerations, then Section 3303, like the rest of Chapter 33 of Act 13, violates Article I, Section 27.

Act 13 has deprived Municipal Petitioners of their ability to carry out their obligations as trustees and to protect public trust resources as required by the Pennsylvania Constitution. As a result, Act 13 violates Article I, Section 27 of the Pennsylvania Constitution. The Commonwealth Court's decision granting judgment against Petitioners on Count VI should therefore be reversed. Instead, judgment should be entered on Count VI in favor of Petitioners.

4. Act 13 Is Unconstitutional Because It Permits The PUC, An Administrative Agency Whose Members Are Appointed By The Governor, To Render Opinions Regarding The Constitutionality Of Legislative Enactments, Infringing On A Judicial Function, And To Play A Critical Role In The Exclusively Legislative Function Of Drafting Legislation

The Commonwealth Court erred by sustaining the Commonwealth's Preliminary Objection to Count VII of the Petition for Review because Section 3305 of Act 13 violates the

Separation of Powers doctrine. Section 3305 of Act 13 unconstitutionally transforms the PUC, an Administrative agency whose members are appointed by the Governor, into a "hybrid" governmental body that simultaneously exercises powers that are within the exclusive purviews of the judicial and legislative branches of government, respectively. By concentrating judicial and legislative powers in the PUC, an Administrative agency under the control of the Executive, the General Assembly through Section 3305 of Act 13 dramatically upsets the principle of separation of powers and checks and balances that have been a fundamental feature of the governments of the United States and the Commonwealth since the 1780s. Wayman v. Southard, 23 U.S. 1 (1825); see Marbury v. Madison, 5 U.S. 137, 176-77 (1803).

A. Section 3305(b) Of Act 13 Is An Unconstitutional Violation Of The Separation Of Powers Of Government Doctrine Because It Allows the PUC, an Administrative Body, to Determine The Constitutionality Of Laws

The freedom of individuals to use their private property as they see fit is recognized in both the United States and Pennsylvania constitutions. Zoning restrictions infringe on these rights. Because zoning ordinances restrict the use of private property, an evaluation of the validity of a zoning ordinance is necessarily an analysis of whether the ordinance is constitutional or not. A zoning ordinance enacted by a legislative body — whether local or otherwise — is constitutional only if it is designed to promote the health, safety, morals and general welfare of the community. Village of Euclid, Ohio v. Ambler Realty, Co., 272 U.S. 365 (1926); Boundary Drive Associates v. Shrewsbury Twp. Bd. of Sup'rs, 507 Pa. 481, 489, 491 A.2d 86, 90 (1985). Only the judicial branch of government has the authority to pass judgment on the constitutionality of legislative enactments. Marbury v. Madison, 5 U.S. 137, 177 (1803), First Judicial Dist. of Pennsylvania v. Pennsylvania Human Relations Commission, 556 Pa. 258, 727 A.2d 1110, 1112 (1999); Commonwealth v. Mockaitis, 575 Pa. 5, 834 A.2d 488, 499 (2003);

cf.In re Investigation by Dauphin County Grand Jury, September 1938, 332 Pa. 342, 352-53, 2 A.2d 804, 807 (1938). The Commonwealth Court erred when it ignored this well-settled law and dismissed Count VII of the Petition for Review.

In its Opinion, the Commonwealth Court concluded that no constitutional norms were violated by Section 3305 of Act 13, which empowers the PUC to pass judgment on the propriety of zoning ordinances. In support of this conclusion, the Commonwealth Court reasoned that:

> 58 Pa.C.S §3305(a) does not give the [PUC] any authority over [the Commonwealth Court] to render opinions regarding the constitutionality of legislative enactments. 58 Pa.C.S. § 3305(a) merely allows the [PUC] 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 [the Commonwealth Court] *de novo* review of a [PUC] final *order* so there is no violation of the Separation of Power doctrine.

(Opinion at p. 46).

This reasoning evidences the fundamental error of the Commonwealth Court; its focus on the effect of the PUC's exercise of this power, rather than conducting the threshold analysis of whether the PUC is constitutionally permitted to exercise these powers at all. There is no legal basis for the PUC to pass judgment on the validity of zoning ordinances and therefore, the Commonwealth Court was required to overrule the Commonwealth's Preliminary Objection to Count VII of the Petition for Review.

As its rationale suggests, the Commonwealth Court did not recognize that the analysis of the validity of a zoning ordinance is necessarily an evaluation of the **constitutionality** of the zoning ordinance. To be valid, a zoning ordinance must satisfy the constitutional test that the ordinance promotes the health, safety, general welfare and morals of a community. See Euclid; Boundary Drive Associates v. Shrewsbury Twp. Bd. of Sup'rs, 507 Pa. 481, 489, 491 A.2d 86, 90 (1985). These fundamental prerequisites -- which must be observed for zoning to pass

constitutional muster -- are codified in the MPC. 53 P.S. § 10604 ("The provisions of zoning ordinances shall be designed: (1) To promote, protect and facilitate any or all of the following: the public health, safety, morals, and the general welfare . . ."). By empowering the PUC to render determinations on the validity of zoning ordinances, Act 13 requires the PUC to consider whether a zoning ordinance violates *inter alia* the MPC. Accordingly, not only does the evaluation of the validity of a zoning ordinance implicitly involve a constitutional analysis but, per the plain language of Section 3305 of Act 13, the PUC is also obligated determine if an ordinance violates the MPC, which includes the Euclid constitutionality test. Only judicial bodies are permitted to make any determination about the constitutionality of a zoning ordinance. First Judicial Dist. of Pennsylvania v. Pennsylvania Human Relations Commission, 556 Pa. 258, 727 A.2d 1110, 1112 (1999).

Unquestionably, the PUC is not a court. Moreover, the PUC is not a quasi-judicial body that is entrusted with rendering determinations on the validity of zoning issues. In contrast, under the MPC, a municipality's zoning hearing board is vested with exclusive jurisdiction to hear and render final adjudications to the substantive challenges to the validity of any land use ordinance. See 53 P.S. § 10909.1(a).[15] Municipal zoning hearing boards are considered to be quasi-judicial bodies. See Urbano v. Meneses, 288 Pa.Super. 103, 431 A.2d 308 (1981). As an agency of a political subdivision, a zoning hearing board is a "tribunal" as defined in the Judicial Code. Kallmann v. Carlisle Zoning Hearing Bd., 117 Pa. Commw. 499, 503-504, 543 A.2d 1273, 1275 (1988).[16] "The test to determine if a function is 'quasi-judicial' is whether it involves the

[15] Excepted and reserved out are validity challenges brought before the municipal governing body pursuant to sections 609.1 and 916.1(a)(2) of the MPC.

[16] A "tribunal" is defined as "[a] court, magisterial district judge or other judicial officer vested with the power to enter an order in a matter. The term includes a government unit, other than the

exercise of discretion and requires notice and a hearing." Urbano, 288 Pa.Super.at 109, 431 A.2d at 311. To ensure that proceedings are conducted with the due process of law, municipal zoning hearing boards are obligated to adhere to statutorily-prescribed procedures including, notice, opportunity to be heard, basic evidentiary limits, restrictions on ex-parte communications, and a written decision with findings. See 53 P.S. § 10908. It is the conformity with these standards and the compliance with due process of law that allows these bodies to exercise quasi-judicial power and to render determinations regarding the validity and constitutionality of zoning ordinances.

With the passage of Act 13, the means of rendering determinations regarding the constitutionality and validity of municipal zoning ordinances related solely to oil and gas development no longer follows the procedure noted above. Instead, per Section 3305 of Act 13, the PUC has been entrusted with these decisions. The PUC is an independent administrative agency appointed by the Governor, the head of the executive branch.[17] Act 13 **exempts** the PUC from complying with procedures that are characteristic of governmental bodies exercising quasi-judicial powers. Unlike municipal zoning hearing boards, the PUC does not have follow: 1) a requirement that on-the-record proceedings be referred to an administrative law judge, 66 Pa. C.S. § 331(b); 2) **due process requirements**, 2 Pa. C.S. § 504; 3) rules regarding *ex-parte* communications, 66 Pa. C.S. § 334(b) & (c); 4) a required opportunity for cross-examination, 2 Pa. C.S. § 505; 5) evidentiary rules, 66 Pa. C.S. § 332; and 6) a requirement of a written decision containing findings and reasons for the decision, 2 Pa. C.S. § 507. Furthermore, the Act **exempts** these proceedings from a variety of Commonwealth agency procedures, PUC

General Assembly and its officers and agencies, when performing quasi-judicial functions." 42 Pa. Cons. Stat. § 102.

[17] See 66 Pa. C.S. § 301.

procedures, and the Sunshine Act. 58 Pa. C.S. §3305(c). Additionally, there is no means for any party to appeal procedural or substantive errors that the PUC committed when rendering its determination. 58 Pa.C.S. §3305. As is clear from Act 13, the PUC is not exercising quasi-judicial power; in fact, it is merely being used as a means to strong-arm financially-strapped municipalities into accepting a slanted administrative ruling regarding their ordinances. See R.786a-87a & 1118a-19a.

Because the PUC is not part of the judiciary and does not operate here as a quasi-judicial body such as a municipal zoning hearing board, the PUC has no authority to render any determination as to the validity, and therefore constitutionality, of zoning ordinances. The Commonwealth Court was obligated to have conducted this analysis but failed to do so, thereby committing an error of law.

Even if one puts this fatal oversight in the Commonwealth Court's opinion aside, the Commonwealth Court also erred in its evaluation of the impact of vesting the PUC with the authority to render determinations concerning the validity of zoning ordinances. The Commonwealth Court only focused on the precedential effect that PUC determinations would have on the Commonwealth Court. However, the Commonwealth Court did not appreciate the fact that Act 13 was specifically crafted to ensure that the PUC, an administrative agency controlled by a pro-industry Governor, rather than the courts, considered the constitutionality of zoning ordinances. The Commonwealth Court did not recognize that Section 3305 of Act 13 does not stand alone. Rather, it is part of a larger, thinly veiled scheme whereby control over oil and gas development is concentrated in the state, led by a pro-industry executive and enforced by the PUC that dissuades municipalities from taking actions to protect their citizens and instead coerces municipalities to present their zoning ordinances to the PUC for review and to accede to

the PUC's determinations.

Section 3306 of Act 13 allows individuals who are "aggrieved by the enactment or enforcement" of a zoning ordinance to initiate a legal action seeking the Commonwealth Court to render a determination regarding whether the zoning ordinance complies with the MPC or Chapters 32 or 33 of Act 13. 58 Pa.C.S. § 3306. If the Commonwealth Court concludes that the zoning ordinance in question was enacted or enforced with "willful or reckless disregard" of the MPC or Chapters 32 or 33 of Act 13, the complaining party may be entitled to its attorneys' fees and costs that must be paid by the municipality that enacted or enforced the ordinance. 58 Pa.C.S. § 3307. Moreover, if the Commonwealth Court or this Court determines that a local ordinance violates the MPC or Chapters 32 or 33 of Act 13, the municipality that enacted or enforced the ordinance will be ineligible to receive impact fee funds. 58 Pa.C.S. § 3308. When viewed together, Sections 3305 through 3308 constitute a "carrot and stick" approach to compel municipalities to abide by the wishes of the state. The "stick" is obviously the threat of the sanctions in Sections 3306 through 3308. The "carrot" is the unstated premise that if municipalities abide by what the state, through the PUC, states, no sanctions will be imposed.[18]

This dynamic imposes a *de facto* obligation on municipal officials and the solicitors that advise them to submit proposed zoning ordinances to the PUC for review and to accept and incorporate the conclusions of the PUC so as to avoid subjecting themselves and their municipality to liability. If municipalities choose not to submit a proposed ordinance to the PUC for review and it is later determined by the Commonwealth Court in a subsequent proceeding

[18] As stated elsewhere, and as will be discussed in more detail in Petitioners' brief as Appellees' in the companion appeals filed by the Commonwealth, municipalities that accede to the demands of the industry and state will face claims that they have violated the constitution by enacting zoning provisions that are inconsistent with municipal comprehensive plans and that deny residents due process.

that the enactment or enforcement of that ordinance violated the MPC or Chapters 32 or 33 of Act 13 in a "willful or reckless" manner, the municipality may be liable for the attorneys' fees and costs of its opponent. 58 Pa.C.S. § 3307. In such a scenario, elected officials and their legal advisors could be subject to personal liability for not only subjecting the municipality to pay for an adversary's attorneys' fees and costs but, more importantly, for deliberately refusing seek feedback from the PUC that could have avoided future litigation, the obligation to pay an opponent's attorneys' fees and costs and the loss of impact fee revenue. Because PUC determinations are not appealable, municipalities would have no basis to identify procedural or substantive errors that were part of the PUC decisions. Therefore, to protect themselves, municipalities, through their elected officials, have little choice but to submit ordinances to the PUC for review, which will, as noted *supra,* necessarily involve a determination of the constitutionality of the ordinance.

Not only are Sections 3305 through 3308 of Act 13 designed to cause municipalities to submit proposed ordinances to the PUC for review, but this scheme is also designed to cause municipalities to accept and adopt the recommendations of the PUC. If a landowner institutes a proceeding before the PUC challenging the validity of a zoning ordinance, the PUC's determination automatically becomes part of the record if the matter moves on to the Commonwealth Court. 58 Pa.C.S. § 3305(b)(4). Similarly, if the PUC renders an opinion that a municipal zoning ordinance violates the MPC and/or Chapters 32 and 33 of Act 13 and the municipality does not change the ordinance, this would be presented against a municipality in a proceeding before the Commonwealth Court and would serve as evidence of the municipality's "willful or reckless" conduct that could result in the municipality being forced to pay attorneys' fees and costs. In essence, Sections 3305 through 3308 of Act 13 are specifically designed so

that if a municipality fails to accept and adopt the opinions of the PUC, the municipality and its elected officials and legal advisors place themselves and their communities at significant risk for an adverse legal decision in the future. This risk is so great that it has the practical effect of dissuading any municipality from disagreeing with the PUC whose decisions, as discussed *supra,* cannot be appealed and therefore will serve as the first, last and only determination about the constitutionality of the zoning ordinance.

As a result of this carefully planned statutory scheme, few, if any proceedings concerning the validity and constitutionality of oil and gas ordinances would reach the Commonwealth Court or this Court. Municipalities would simply accede to PUC recommended standards, similar to those set forth in Act 13 which were blessed by the industry and therefore, there would be little objection to the ordinances. Thus, the practical effect that PUC determinations will have is far greater than their precedential impact on the Commonwealth Court. Although the Commonwealth Court may not be obligated to accept PUC conclusions, the reality is that Sections 3305 through 3308 of Act 13 are designed so that issues that the PUC passes judgment upon never reach the Commonwealth Court.[19] In this way, PUC determinations will not simply be "advisory opinions" but instead will be the first and only pronouncement as to the validity and constitutionality of zoning ordinances. This actual effect of Sections 3305 through 3308 of Act 13, when read together, allows the Executive, through the PUC, to exercise almost unlimited

[19] The Commonwealth Court assumed that it will have an opportunity to review an ordinance following the PUC's review thereby removing any usurpation of the judicial function from the judicial branch. The Court reasoned that, because of this process which allows for appeal to the Commonwealth Court, the PUC will not ultimately determine the constitutionality of any ordinances. However, the Commonwealth Court's assumption is predicated upon the fact that the PUC's determination will in fact be appealed to the Commonwealth Court. In many cases, a municipality may choose to not appeal and allow the PUC determination to stand out of concerns for costs, sanctions or attorney's fees being imposed. In those cases, the PUC will be the final word on the validity of a municipal ordinance and, as a result, will determine this constitutional question. The Commonwealth Court's decision fails to account for this likely occurrence.

control in determinations about the constitutionality and validity of legislative enactments. This is not what the founders intended and is contrary to the system of government in the United States and Commonwealth of Pennsylvania.

B. Section 3305(a) Of Act 13 Is An Unconstitutional Violation Of The Separation Of Powers Of Government Because It Allows the PUC To Play An Integral Role In The Crafting Of Legislation

Not only does Section 3305 allow the PUC to impermissibly pass judgment on the validity and constitutionality of zoning ordinances, but it also injects the PUC into the exclusively legislative arena of drafting laws. It is a hallmark of the United States and the Commonwealth of Pennsylvania that each branch of government has its own unique powers that are not shared with other branches. Citizens' Savings and Loan Ass'n v. City of Topeka, 87 U.S. 655 (1874). Zoning is a uniquely legislative act. Best v. Zoning Board of Adjustment of the City of Pittsburgh, 393 Pa. 106, 111, 141 A.2d 606, 610 (1958). The legislative function of zoning, by Pennsylvania law, has been vested in municipalities. See 53 P.S. § 10601. Now, pursuant to Chapter 33 of Act 13, the PUC, an Administrative agency under the control of the Executive branch of government, plays an integral role in the formulation of legislation. The Commonwealth Court erred by failing to address this in its evaluation of the propriety of the Preliminary Objection to Count VII of the Petition for Review.

Section 3305 impermissibly inserts the PUC into the legislative process and encourages the legislature to rely on the PUC and its opinions prior to the passage of legislation. Under Section 3305(a), municipalities creating zoning ordinances may submit their draft legislation to the PUC for it to review "prior to the enactment of a local zoning ordinance." 58 Pa.C.S. § 3305(a)(1). After receipt of "a ***proposed*** local ordinance," the PUC will inform the municipality whether the proposed ordinance violates the MPC and/or Chapters 32 and 33 of Act 13. 58 Pa.

C.S. § 3305(a)(1).

The PUC's intrusion into the legislative process through the rendering of advisory opinions is designed to cause municipalities to follow the advice of the PUC because municipalities will be anxious to seek the PUC's guidance to avoid the sanctions described *supra*. However, Pennsylvania courts have consistently rendered determinations that are designed to prevent legislative bodies from referring to or relying on outside entities for guidance during the legislative process. For example, courts have traditionally refused to become involved in questions about the validity of legislation without the existence of a concrete dispute because such advisory opinions have been found to "encourage legislative irresponsibility." Cf. Township of Whitehall, v. Oswald, 400 Pa. 65, 67-68, 161 A.2d 348, 349 (1960). Section 3305 runs against this principle and invites such legislative irresponsibility, namely municipalities' reliance on the PUC. This reliance on the PUC accomplishes the goal of state-centered control over oil and gas operations, led by the pro-industry Executive, that stands at the center of Act 13.

Zoning is a legislative function and neither the United States Constitution nor the Pennsylvania Constitution allows an administrative agency, whose members are appointed by the Executive, to involve itself in this process by rendering guidance and opinions on legislation before its passage. The Commonwealth Court erred when it failed to address this issue before sustaining the Commonwealth's Preliminary Objection to Count VII of the Petition for Review.

The Commonwealth Court's decision granting judgment against Petitioners on Count VII should therefore be reversed. Instead, judgment should be entered on Count VII in favor of Petitioners.

5. The Commonwealth Court Erred In Granting Preliminary Objections And Dismissing The Claims Of Mehernosh Khan, M.D., The Delaware Riverkeeper Network And Maya Van Rossum For Lack Of Standing

The Commonwealth Court abused its discretion and committed an error of law in granting the Commonwealth's preliminary objections on standing grounds.

The standard for preliminary objections is well established.

> Our scope of review of preliminary objections in the nature of a demurer is to determine whether on the facts alleged, the law states with certainty that no recovery is possible. Rouse & Associates-Ship Road Land Limited Partnership v. Pennsylvania Environmental Quality Board, 164 Pa. Commw. 326, 642 A.2d 642 (1994). In ruling on the preliminary objections, the Court must consider the evidence in the light most favorable on the non-moving party, i.e., Applicants. Derman v. Wilair Services, Inc., 404 Pa. Super. 136, 590 A.2d 317, petition for allowance of appeal denied, 529 Pa. 621, 600 A.2d 537 (1991). If the grant of preliminary objections will result in the dismissal of the case, the objection should be sustained only if it is clear and free from doubt. Zinc Corporation of America v. Dept. of Environmental Resources, 145 Pa. Commw. 363, 603 A.2d 288 (1992), aff'd, 533 Pa. 319, 623 A.2d 321 (1993).

Kocher v. Bickley, 722 A.2d 756, 758 (Pa. Commw. Ct. 1999).

In dismissing the claims of DRN, Ms. van Rossum, and Dr. Kahn, the Commonwealth Court not only granted the Commonwealth's preliminary objections, it also denied Petitioners' alternative request for leave to file an Amended Petition for Review in the Nature of a Complaint for Declaratory and Injunctive Relief. R.1113a.

> It has long been held in this Commonwealth that parties are liberally granted leave to amend their pleadings. Biglan v. Biglan, 330 Pa.Super. 512, 519-20, 479 A.2d 1021, 1025 (1984); MacGregor v. Mediq Inc., 395 Pa.Super. 221, 227, 576 A.2d 1123, 1126 (1990). Although the determination of whether to grant leave to amend is within the sound discretion of the trial court, leave should be granted at any stage of the proceedings, unless such amendment violates the law or unfairly prejudices the rights of the opposing party. Id., 395 Pa. Super. Ct. at 227, 576 A.2d at 1126.

Frey v. Pennsylvania Elec. Co., 414 Pa. Super. 535, 538, 607 A.2d 796, 797 (1992).

The Commonwealth Court erred in dismissing the claims of Dr. Kahn, the Delaware Riverkeeper Network and Maya van Rossum for lack of standing. The preliminary objections should have been overruled because there was no certainty that no recovery is possible. Likewise, Petitioners' alternative motion for leave to amend should have been granted because such amendment would not have violated the law or unfairly prejudiced the rights of the opposing parties. In the discussion that follows, we will address: a) the standard for standing; b) Dr. Kahn's standing; c) the standing of Delaware Riverkeeper Network and the Delaware Riverkeeper, Maya van Rossum.

A. Standard for Standing

In order to maintain standing to challenge a governmental action, the aggrieved party must show a substantial, direct and immediate interest in the controversy. See, e.g., William Penn Parking Garage, Inc. v. City of Pittsburgh, 464 Pa. 168, 202, 346 A.2d 269, 286 (1975); Harrisburg School District v. Hickok, 762 A.2d 398, 404 (Pa. Commw. Ct. 2000). A *substantial* interest requires that the aggrieved party have an interest in the case's outcome beyond that of the general public. See Harrisburg, 762 A.2d at 404. A *direct* interest requires that the harm suffered by the aggrieved party be caused by the challenged governmental action. Id. An *immediate* interest requires a sufficiently close, non-remote causal connection between the challenged governmental action and the harm suffered by the aggrieved party. Id. There is no requirement that an aggrieved party's interest be a "legal right" in order for that party to have standing to challenge a governmental action. William Penn, 464 Pa. at 199-202, 346 A.2d at 284-86 ("The requirement of a 'legal interest' tends to conceal the necessary construction of the legal rules relied upon by the challenger and therefore is not a useful guide to the determination of

standing questions").

While the substantial-direct-immediate test is the general rule for determining standing in Pennsylvania courts, a policy-based relaxation of the general rule has sometimes been applied in "taxpayer standing" cases when a government action would otherwise go unchallenged. See, Application of Biester, 487 Pa. 438, 445, 409 A.2d 848, 852 (1979).

B. Dr. Kahn's Standing

Contrary to the decision of the Commonwealth Court, Mehernosh Khan, M.D. ("Dr. Khan") has standing to challenge the constitutionality of Act 13 because he has a direct, substantial and immediate interest in the controversy and his ability to effectively and treat his patients.

Dr. Khan is a practicing medical doctor and resident of the Commonwealth of Pennsylvania. Petition for Review at R.065a. Dr. Khan 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. Id. Dr. Khan will be adversely affected and irreparably harmed if Act 13's restrictions on health care providers are allowed to remain in effect. Id.

This case is analogous to Pennsylvania Dental Ass'n v. Com., Dept. of Health, 75 Pa. Commw. 7, 461 A.2d 329 (1983), in which the court held that the Pennsylvania Dental Association had standing to raise a constitutional challenge concerning an alleged violation of privacy interests of dental patients.

> One may not claim standing, ordinarily, to vindicate the constitutional rights of some third party, McGowan v. Maryland, 366 U.S. 420 (1961), but where the relationship of the litigant and the third party is inextricably bound up with the activity the litigant seeks to pursue and where there is some obstacle to the assertion by the third party of his own right, the general rule does not apply. Singleton v. Wulff, 428 U.S. 106 (1976) and Harrisburg School District v. Harrisburg Education Association, 32 Pa. Commw. Ct.

> 348, 379 A.2d 893 (1977). In the instant case, unless individual patients had some means of knowing that the effect of the PBS regulation may be to disclose some medical information which they may be entitled to withhold by invoking their constitutional claim of privacy, the only way those rights could be protected would be by the dentist who is responsible for the patient's records. We are of the opinion that the exceptions set forth in Singleton applies and that PDA has standing to raise this issue.

Pennsylvania Dental Ass'n v. Com., Dept. of Health, 75 Pa. Commw. 7, 10-11, 461 A.2d 329, 331 (1983).

Similarly, Act 13 restricts health professionals' ability to disclose critical diagnostic information when dealing with information deemed proprietary by the natural gas industry. Dr. Khan's interest in the outcome of this litigation is neither speculative nor premature. He is a doctor and treating physician who practices medicine in an area where drilling activities are taking place and whose ability to adequately serve his patients is currently inhibited. In order for a physician to completely and properly treat a patient, it is imperative that the physician properly and correctly diagnose the aliment. To do so, a doctor must consider all of the patient's symptoms as well as his/her complete occupational, social, medical and environmental history.

A physician's ability to share both diagnostic test results, like MRIs, x-rays, or blood tests, *and* a patient's history of exposure to specific chemicals and the dose and duration of the patient's exposure to those chemicals, even if only qualitative, is necessary to properly treat and diagnose a patient. It is also an essential tool of practicing competent medicine. Without complete information, such as a full chemical exposure history, a doctor could improperly diagnose and treat a patient, making the patient's illness worse and risking a claim of medical malpractice.

Pennsylvania law emphasizes the importance of openness among health professionals in the process of evaluating and treating illness. It imposes numerous affirmative duties on health

professionals to ensure that critical and essential information related to the treatment of human illnesses is shared and readily available. Further, Pennsylvania law imposes mandatory obligations on health professionals to report their findings in their medical records, which can be shared with other health care professionals. 35 P.S. §§ 563.1-563.13. See Pennsylvania Record Keeping Requirements, Petition for Review at R.595a-604a. As a result, the terms of Act 13 place not only an unethical mandate upon Dr. Khan, but also place a mandate upon him to act unlawfully.

Dr. Khan does not need to wait until he encounters a patient who has come into contact with drilling-related diseases to be conferred with standing. Bayada Nurses, Inc. v. Com. of Pennsylvania, Dept. of Labor and Industry, 607 Pa. 527, 542-45, 8 A.3d 866, 875-876 (2010). This Honorable Court has unequivocally stated that a pre-enforcement regulatory challenge is appropriate where there is a "direct and immediate regulatory impact on the governed industry" that causes "hardship" or other "uncertainty." Id. at 875; see also Arsenal Coal Co. v. Com., Dept. of Envtl. Res., 505 Pa. 198, 209-10, 477 A.2d 1333, 1339-40 (1984).

Such hardship is present here. Unlike the gun ownership cases cited by the Commonwealth Court, neither Dr. Khan nor his patients can wait for a determination by the Court when issues of immediate medical care are at stake. The health of Dr. Khan's patients and his ability to competently practice medicine are immediately at risk when a individual ill from fracking operations visits Dr. Khan's medical practice. Because of how Act 13 impacts Dr. Khan, he cannot wait to challenge the Act's confidentiality restrictions until a patient arrives in his office with serious exposure to fracking chemicals. This is a very real problem given his location. Dr. Khan cannot ask his patient to wait while he challenges the Act, which restricts him from treating effectively that patient, because the patient could die in the interim or suffer

serious health complications. As a practicing doctor in the Commonwealth of Pennsylvania, Dr. Khan is clearly subject to the Act's confidentiality restrictions, which force him to choose between any number of undesirable outcomes: harm patient health, risk medical malpractice, or violate record-keeping laws and other medical and ethical obligations. As such, the law directly impinges on him as a practicing physician in the heart of "gas drilling country." See Arsenal Coal Co., 505 Pa. at 209-10, 477 A.2d at 1339-40.

In the gun cases relied on by the Commonwealth Court, no harm occurred at the moment the gun was stolen, but rather would only occur *if* the plaintiffs failed to report the gun's disappearance and *if* they were then prosecuted for it. Nat'l Rifle Ass'n v. City of Pittsburgh, 999 A.2d 1256, 1259 (Pa. Commw. Ct. 2010), reargument denied (Aug. 18, 2010), appeal denied, 611 Pa. 629, 23 A.3d 543 (2011); id. (describing National Rifle Association v. City of Philadelphia, CCP Philadelphia County, April Term, 2008, No. 1472, filed July 1, 2008, slip opinion at 7–9, 2008 WL 5746554, *aff'd* Nat'l Rifle Ass'n v. City of Philadelphia, 977 A.2d 78, 81 (Pa. Commw. Ct. 2009)).

In contrast, for Dr. Khan, the harm is immediate the moment an individual visits Dr. Khan's office with a serious illness or other reaction due to exposure to chemicals from hydraulic fracturing operations. This is because Act 13—*regardless* of whether a situation is an emergency or not—*requires* doctors to keep chemical information confidential. Under emergency situations, the doctor *must* verbally agree to keep the information, and may also need to put that in writing. 58 Pa.C.S. § 3222.1(b)(11). In non-emergency situations, the doctor *must* execute a confidentiality agreement and must also state a need for the information. 58 Pa.C.S. § 3222.1(b)(10). As such, Dr. Khan faces a choice: (1) referring the patient to a capable specialist, yet without the chemical information Dr. Khan has received and consequently delaying crucial

medical care;[20] or (2) attempting to treat the patient himself because he has the information, and yet risking malpractice. He also, in the process, would immediately violate his record keeping obligations under Pennsylvania law. Petition, at R.154a-55a, at R.595a-604a.

This harm is also both direct and substantial as Dr. Khan's practice is located in Allegheny County, which includes and is surrounded by communities dealing with hydraulic fracturing operations and direct and ambient exposure to chemicals released from these operations. Unlike a doctor in an area not experiencing prolific shale gas extraction, Dr. Khan faces the very real threat of violating his legal obligations as a doctor, of medical malpractice, and of harming the health of his patients because of Act 13's confidentiality restrictions. Dr. Khan is therefore directly affected by the provision of the law he seeks to challenge, unlike the DUI cases cited by the Court below. Opinion, at 21 (citing Commonwealth v. Ciccola and Commonwealth v. Semuta).

For these reasons, Dr. Khan has a direct, substantial, and immediate interest in Act 13's restrictions on him and his lawful duty to uninhibitedly diagnose, treat, and serve his patients and to comply with his obligations under Pennsylvania law. The Commonwealth Court therefore erred in granting the Commonwealth's preliminary objections, denying Petitioners' alternative motion for leave to amend, and dismissing Counts XI and XII for lack of standing.

C. The Delaware Riverkeeper Network and Maya van Rossum's Standing

Contrary to the decision of the Commonwealth Court, Maya van Rossum—the Delaware Riverkeeper—and the Delaware Riverkeeper Network ("DRN") have standing to challenge the constitutionality of Act 13 because she and the organization's members have a direct, substantial

[20] Further, the specialist to whom Dr. Khan refers the patient then has to contact the oil and gas operator again. All of this takes time, which is particularly dangerous in serious cases of chemical exposure.

and immediate interest in the availability of zoning provisions for protecting the Delaware River Basin where they live, work, and recreate.

"It is well settled that an association, as a representative of its members, may have standing to bring a cause of action even in the absence of injury to itself." Pennsylvania Social Servs. Union, Local 668 v. Commonwealth of Pennsylvania, 699 A.2d 807, 810 (Pa. Commw. Ct. 1997). Accordingly, an association has standing as a "representative of its members" as long as the organization can show 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." Energy Conservation Council of Pennsylvania v. Public Utility Com'n., 995 A.2d 465, 476 (Pa. Commw. Ct. 2010) (rejecting the Pennsylvania Public Utilities Commission's argument that an environmental group lacked standing to challenge its decision to approve an electrical utility project); Pennsylvania Social Servs., 699 A.2d at 810.

Ms. van Rossum's and DRN members' interests would be directly, immediately, and substantially harmed by Act 13's removal of local zoning protections. Like the other individual Petitioners below, DRN members live, work, recreate, and own property in municipalities with protective zoning ordinances that will be eviscerated by Act 13, and therefore are specifically impacted by Act 13 and its threat to local zoning ordinances. See Energy Conservation Council of Pennsylvania, 995 A.2d at 476 (finding that an association's members, as property owners and rate payers, held "more than just the interest shared by all citizens" in the matter). This harm would be immediately remedied upon a decision by this Court agreeing and determining that the

Act's restrictions on local zoning authority are unconstitutional. See Merlino v. Delaware County, 711 A.2d 1100, 1106 (Pa. Commw. 1998)[21]

The interests of DRN members are identical to the interests of Petitioners Ball and Coppola whom the Commonwealth Court unanimously found had standing. Cf. R.814a & R.1145a.; R.822a-23a; R.1155a-56a; Robinson Township v. Commonwealth, ___A.3d.____, 2012 WL 3030277, at *7 (Pa. Commw. 2012). The Commonwealth Court noted that Messrs. Coppola and Ball "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." (Opinion at 16). DRN members state the exact same interests.

For instance, two DRN members own and operate an organic farm on properties currently protected by local zoning in the Delaware River watershed. R.1191a-99a (Aff. of Greg Swartz); R.1200a-06a (Aff. of Tannis Kowalchuk). These members irrigate one of their farm properties with well water, and with water from Hollister Creek. R.1191a, R.1192a, R.1197a., 1200a. They irrigate their other farm field next to the Delaware River with water from river. R.1197a. Further, they rely on their well water for drinking, cooking, and bathing. R.1197a, 1205a.

Having compatible land uses surrounding the properties where they live and work is crucial for their businesses, including the presence and perception of clean water. R.1192a, R.1193a-95a, R.1197a; R.1201a, R.1202a-05a. In fact, an exploratory well was drilled a half-mile from their farm in the summer of 2010, and the drilling rig could be seen by customers

[21] "Clearly, the interests of Petitioners in this case are *more **specific** and **direct*** than those of the plaintiffs in *Douros* and *Sierra Club*, and *the **relief** . . . sought by Petitioners **would not be a remote consequence*** of the duty Petitioners would have the County fulfill. As the Supreme Court noted in the seminal case of *William Penn Parking Garage, Inc. v. City of Pittsburgh*, 464 Pa. 168, 346 A.2d 269 (1975), plaintiffs seeking to enforce a public duty are not precluded from doing so simply because many others have suffered similar injuries from the government's failure to satisfy that duty."(emphasis added).

coming to their farm to pick up CSA[22] shares. R.1195a; see also R.1202a, R.1204a. As Mr. Swartz explained, "CSA members *almost uniformly* commented on the well and *expressed their concerns* about the well site's proximity to my farm where they get their food. Even now, my customers raise concerns about the prospect of drilling." R.1195a (emphasis added); see also R.1204a ("Those customers who came to the farm to pick up produce (as do all members of our Community Supported Agriculture program) while the . . . well was under construction were clearly uncomfortable seeing the rig so close to our farm.")

These two DRN members live in Damascus Township, which has a zoning ordinance that seeks to comply with the River Management Plan implemented under the federal Wild and Scenic Rivers Act. R.1196a; see also R.955a-56a & R.1181a-82a. This means that the ordinance specifically disallows new industrial uses in the Upper Delaware Scenic and Recreational River Corridor. R.1196a. Under the Township's ordinance, this area in the River Corridor is termed the River District. R.1196a. One of these DRN members' two properties is located in this district, and is used for farming purposes. R.1191a, R.1196a. Their home and twelve-acre farm property are zoned Rural Residential, where drilling is allowed as a conditional use. R.1196a., R.1197a. This gives these members an opportunity to participate in decisions on projects that would negatively impact their properties, their health, and their livelihoods. R.1196a., R.1197a.

Under Act 13, the zoning protections afforded to these DRN members and their properties will be eliminated, including Damascus Township's protections over the River Corridor. R.1197a-98a, R.1206a. For instance, under Act 13, a wastewater impoundment can be located a mere three-hundred (300) feet (less than a football field) from Mr. Swartz & Ms. Kowalchuk's properties *by-right*. R.1196a; 58 Pa.C.S. § 3304(b)(6). Drilling operations would

[22] "CSA" stands for "Community Supported Agriculture," see R.1192a, R.1204a, which is a model of farming in which members pay a fee for a share of the farms' harvest.

be permitted *by-right* less than a tenth of a mile from their home and farm, despite the disruptions from noise, light, and ground vibrations caused by the 2010 exploratory well, which was a half-mile away. R.1195a, R.1202a-03a; 58 Pa.C.S. § 3304(b)(5)-(b)(5.1).

Given how crucial it is to their businesses to have compatible land uses and a clean environment surrounding their properties, Act 13 directly threatens the investments Mr. Swartz and Ms. Kowalchuk made in their farm. R.1192a-93a, 1196a-99a, 1200a-12005a.

Other DRN members would similarly suffer this fate. Sharon Mendelson lives in Nockamixon Township in a residential area protected by the Township's zoning ordinance, which allows drilling in the Quarry and Industrial districts by conditional use. R.1187a, R.1189a. Ms. Mendelson moved to the Township "for its quiet, rural character" and has stayed in the Township for that reason. R.1187a. She relies on well water in a township with a number of "sensitive ground water areas, rivers, and streams." R.1188a, R.1189a.

However, Act 13 would inject industrial oil and gas operations into all areas of Nockamixon Township, including where Ms. Mendelson lives. R.1188a-89a. Like Mr. Swartz and Ms. Kowalchuk, Ms. Mendelson now faces the significant threat of a wastewater impoundment 300 feet from her home, and drilling operations not much further away. R.1189a; 58 Pa.C.S. § 3304(b)(5), (5.1), & (6). Such incompatible land uses threaten the integrity of Ms. Mendelson's well water and the value of her property. R.1189a, R.1190a. In addition, Nockamixon Township has sought to protect sensitive ground water areas in its borders through zoning. R.1188a-89a. However, Act 13 would remove these protections as well. See R.1188a-89a. This further raises the threat of contamination and danger to residents like Ms. Mendelson who rely on well water. R.1189a, R.1190a. "Act 13 assumes that a heavy industrial operation is just as suitable near my home and my drinking water, as it is in the Industrial and Quarry

districts." R.1189a. The Act also removes Ms. Mendelson's ability to participate as an interested neighboring landowner in challenges at the PUC. R.1189a. "I am concerned about such a drastic change of zoning and participation rights, and what it will mean for my property and our shared public resources, such as our streams." R.1190a.

Further, DRN has over 10,000 members that rely on a clean river ecosystem in the Delaware River watershed for farming, fishing for food, gardening, cooking, and drinking; for boating, fishing, and ecotourism businesses; for outdoor activities such as hiking, swimming, and bird-watching; and for the value that the beauty and natural areas in their communities bring to their lives. R.950a-951a & R.1176a-1177a; see R.1187a-90a (Aff. of Sharon Mendelson); R.1191a-99a (Aff. of Greg Swartz); R.1200a-06a (Aff. of Tannis Kowalchuk). Local ordinances in DRN members' communities and throughout the watershed protect these interests and would be immediately threatened by Act 13's drastic changes in local zoning.

"[A]esthetic and environmental well-being, *like economic well-being*, are important ingredients of the quality of life in our society, and the fact that particular environmental interests are shared by the many rather than the few *does not make them less deserving of legal protection* through the judicial process." Unified Sportsmen of Penn. ex rel. Their Members v. Pa. Game Comm'n, 903 A.2d 117, 122-24 (Pa. Commw. Ct. 2006) (citing Sierra Club v. C.B. Morton, 405 U.S. 727, 734 (1972)) (emphasis added). Further, "environmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons 'for whom the aesthetic and recreational values of the area will be lessened' by the challenged activity." Friends of the Earth, Inc. v. Laidlaw Envtl. Services (TOC), Inc., 528 U.S. 167, 183 (2000) (citing Sierra Club v. Morton, 405 U.S. 727, 735 (1972); see also Lujan v. Defenders of Wildlife, 504 U.S.

555, 565-566 (1992). As such, individual DRN members will be directly affected, in addition to the group's special interest in the subject.

Mr. Swartz and Ms. Kowalchuk, in addition to their interests as business and property owners, and their health interests, enjoy swimming in the Delaware River at least once a week in the summer with their three-year-old son. R.1198a, R.1200a, 1205a. They also canoe in the river, take walks along it, and watch eagles nest in the area. Id. They eat fish from the river as well. Id. Further, they enjoy the scenic resources immediately surrounding their property, and are invested in their community, which "has a rich history of having a river culture" with the Delaware River as the "centerpiece." R.1193a, 1198a-99a, R.1201a, R.1204a-05a. "The River is what draws new community members . . . and what causes old ones to stay. The River is really that one thing that we all have together—we are joined by an appreciation of its natural beauty and have purposefully ordered our lives around it." R.1205a. As DRN member Sharon Mendelson expressed, she is "concerned that gas drilling in this area without the protections of local zoning . . . will have a negative impact on this region, its natural beauty and irreplaceable environmental resources." R.1187a.

Similarly, like other DRN members, Maya van Rossum individually states:

> I am also often out on the water myself, in a boat, walking or viewing from a vehicle, keeping an eye on the watershed looking for signs of pollution and illegal activity related to natural gas drilling (pipeline construction, exploratory well water withdrawals, etc.) .... *I also personally visit the lower, middle and upper portions of the Delaware River and tributary streams* in the watershed by myself, with colleagues, and with my family and friends for recreational purposes, including among other things, hiking, swimming, and boating, as well as for professional purposes.

See R.952a, R.954a & R.1178a, R.1180a (emphasis added). She also notes, "I enjoy my visits to

all of these areas whether in my professional or personal capacities. I have a great appreciation for the parks and the scenery contained within the watershed and plan on continuing this use as long as it is safe to do so." R.955a & R.1181a.

Each of these interests is protected by zoning ordinance provisions that protect the River Corridor from the dangers associated with incompatible land uses. As a result, each of these interests is threatened by Act 13, which eliminates communities' ability to utilize zoning ordinances to protect their River corridors from incompatible industrial activity.

Also, as the Delaware Riverkeeper and the executive director and lead advocate for DRN, Ms. van Rossum has performed numerous activities in relation to gas drilling issues in the Delaware River Basin, including: gathering data through formal requests, drafting documents and comments, providing testimony, crafting and overseeing the expansion of our water quality monitoring, initiating the inclusion of the restoration program, participating in our litigation program, touring the watershed to identify specific impacts of gas drilling and associated development, conducting photo-documentation and initiating the expansion of our video documentation program including for gas drilling, and traveling outside the watershed to photograph gas rigs and to view potential harms from natural gas drilling activities. See R.951a-52a & R.1177a-78a. These activities inform Ms. van Rossum's understanding of the threat to her recreational and aesthetic interests in the watershed, and the crucial role local ordinances, as well as local public participation rights, play in protecting those interests. See R.954a-55a & R.1180a-81a.

Act 13, by removing local zoning protections and public participation rights, threatens harm to DRN members' businesses, their properties, their health, and their recreational and aesthetic enjoyment both of their own land and of the river environs currently protected by local

zoning ordinances. R.1191a-99a (Aff. of Greg Swartz); R.1200a-06a (Aff. of Tannis Kowalchuk); see also R.951-52a, R.954a-R.955a & R.1180-82a & R.1177a-78a, R.1187a, R.1188a-90a. DRN members have relied on municipal zoning ordinances to mitigate the impact of industrial gas drilling activities, both through a local understanding of the best-suited places for oil and gas development in a municipality, and the ability to participate at a local level. R.1194a, R.1197a; R.1201a-02a; see also R.954a, R.955a & R.1180a, R.1181a.; R.1188a-90a. They also have relied on these ordinances to provide security for their investments in their properties, businesses, and their communities, as well for their own health and daily activities. R.1191a-99a (Aff. of Greg Swartz); R.1200a-06a (Aff. of Tannis Kowalchuk).

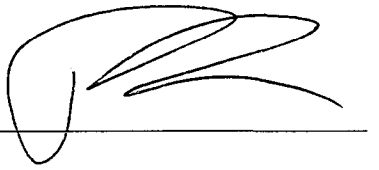
A determination that Act 13 is unconstitutional immediately remedies the harms caused by Act 13's allowance of heavy industrial activity in resource protection districts, such as the River Corridor district in the Upper Delaware region.. This directly distinguishes DRN and its members from plaintiffs in other cases such as those in which there was "no evidence to suggest that the printing of the proposed regulation will in any way obviate [the plaintiff's] . . . respiratory health problems." Sierra Club v. Hartman, 529 Pa. 454, 457, 605 A.2d 309, 311 (1992). Rather "the interests of Petitioners . . . are *more **specific and direct*** than those of the plaintiffs in *Douros* and *Sierra Club*, and *the **relief** . . . sought by Petitioners **would not be a remote consequence***" of a determination that Act 13 is unconstitutional. Merlino v. Delaware County, 711 A.2d 1100, 1106 (Pa. Commw. 1998) (emphasis added).

For these reasons, DRN and Ms. van Rossum have a direct, substantial, and immediate interest in Act 13's zoning provisions. The Commonwealth Court therefore erred in granting the Commonwealth's preliminary objections, denying Petitioners' alternative motion for leave to amend, and dismissing DRN and Ms. van Rossum for lack of standing.

VIII. Conclusion

For the reasons stated above, Petitioners respectfully request that this Honorable Court reverse the decision of the Commonwealth Court to the limited extent that it: (A) granted Respondents' Preliminary Objections as to Counts IV, V, VI, and VII; and (B) granted Respondents' Preliminary Objections concerning the standing of Dr. Kahn, DRN and Ms. van Rossum and dismissed Counts XI and XII. Petitioners further respectfully request the Court enter judgment in favor of Petitioners on Counts IV, V, VI, VII, XI and XII.

Respectfully Submitted,

BY: 

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APPENDIX A

Copy of July 26, 2012, Opinion and Order as amended
Currently reported as
Robinson Township v. Commonwealth,
___A.3d.____, 2012 WL 3030277
(Pa. Commw. 2012)

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 Argued: June 6, 2012
Petitioners,	:	
v.	:	
Commonwealth of Pennsylvania, Pennsylvania Public Utility Commission, Robert F. Powelson, in His Official Capacity as Chairman of the Public Utility Commission, Office of the Attorney General of Pennsylvania, Linda L. Kelly, in Her Official Capacity as Attorney General of the Commonwealth of Pennsylvania, Pennsylvania Department of Environmental Protection and Michael L. Krancer, in His Official Capacity as Secretary of the Department of Environmental Protection,	:	
Respondents	:	

AMENDING ORDER

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

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

A corrected copy of the opinion and order is attached.

P. KEVIN BROBSON, Judge

Certified from the Record

JUL 31 2012

and Order Exit

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Robinson Township, Washington County, Pennsylvania, Brian Coppola, Individually and in his Official Capacity as Supervisor of Robinson Township, Township of Nockamixon, Bucks County, Pennsylvania, Township of South Fayette, Allegheny County, Pennsylvania, Peters Township, Washington County, Pennsylvania, David M. Ball, Individually and in his Official Capacity as Councilman of Peters Township, Township of Cecil, Washington County, Pennsylvania, Mount Pleasant Township, Washington County, Pennsylvania, Borough of Yardley, Bucks County, Pennsylvania, Delaware Riverkeeper Network, Maya Van Rossum, the Delaware Riverkeeper, Mehernosh Khan, M.D., Petitioners	:	
v.	:	No. 284 M.D. 2012
Commonwealth of Pennsylvania, 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

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

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

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

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

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

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

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

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

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

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

II.

JUSTICIABILITY

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

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

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

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

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

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

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

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

III.

FAILURE TO STATE A CLAIM

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

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

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

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

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

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

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

A.

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

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

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

(Footnote continued on next page...)

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

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

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

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

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

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

B.

To determine whether a zoning ordinance is unconstitutional under Article 1, §1 of the Pennsylvania Constitution and Fourteenth Amendment to the United States Constitution, a substantive due process inquiry must take place. When making that inquiry, we take into consideration the rights of all property owners subject to the zoning and the public interests sought to be protected. Quoting from *Hopewell Township Board of Supervisors v. Golla*, 499 Pa. 246, 255, 452 A.2d 1337, 1341-42 (1982), our Supreme Court in *In re Realen Valley Forge Greenes Assocs.*, 576 Pa. 718, 729, 838 A.2d 718, 728 (2003), stated that:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C.

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

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

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

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

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

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

> **Certain local and special laws.**
>
> The General Assembly shall pass no local or special law in any case which has been or can be provided for by general law and specifically the General Assembly shall not pass any local or special law:
>
> 1. Regulating the affairs of counties, cities, townships, wards, boroughs or school districts:
>
> 2. Vacating roads, town plats, streets or alleys:
>
> 3. Locating or changing county seats, erecting new counties or changing county lines:
>
> 4. Erecting new townships or boroughs, changing township lines, borough limits or school districts:
>
> 5. Remitting fines, penalties and forfeitures, or refunding moneys legally paid into the treasury:
>
> 6. Exempting property from taxation:
>
> 7. Regulating labor, trade, mining or manufacturing:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Article 1, §27 of the Pennsylvania Constitution provides:

Natural resources and the public estate

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

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

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

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

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

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

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

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

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

Counts VII - Violation of Separation of Powers - Commission

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

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

58 Pa. C.S. §3305(a) provides:

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

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

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

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

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

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

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

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

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

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

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

Count VIII - Violation of Non-Delegation Doctrine – DEP

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

(b) **Limitation.—**

(1) No well site may be prepared or well drilled within 100 feet or, in the case of an unconventional well, 300 feet from the vertical well bore or 100 feet from the edge of the well site, whichever is greater, measured horizontally from any solid blue lined stream, spring or body of water as identified on the most current 7 ½ minute topographic quadrangle map of the United States Geological Survey.

(2) The edge of the disturbed area associated with any unconventional well site must maintain a 100-foot setback from the edge of any solid blue lined stream, spring or body of water as identified on the most current 7 ½ minute topographic quadrangle map of the United States Geological Survey.

(3) No unconventional well may be drilled within 300 feet of any wetlands greater than one acre in size, and the edge of the disturbed area of any well site must maintain a 100-foot setback from the boundary of the wetlands.

(4) *The department shall waive the distance restrictions upon submission of a plan identifying additional measures, facilities or practices to be employed during well site construction, drilling and operations necessary to protect the waters of this Commonwealth.* The waiver, if granted, shall include additional terms and conditions required by the department necessary to protect the waters of this Commonwealth. Notwithstanding section 3211(e), if a waiver request has been submitted, the department may extend its permit review period for up to 15 days upon notification to the applicant of the reasons for the extension.

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

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

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

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

[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).

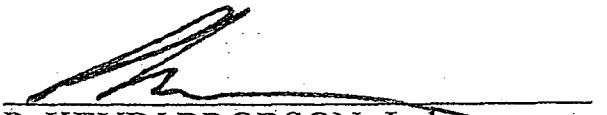
> The stated legislative purposes of Act 13 include:
>
> > (1) [permitting] optimal development of oil and gas resources of this Commonwealth consistent with the health, safety, environment and property of Pennsylvania citizens[;]
> >
> > (2) [protecting] the safety of personnel and facilities employed 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.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that two true and correct copies of the foregoing were served via Electronic Mail and First Class Mail on this date to the following:

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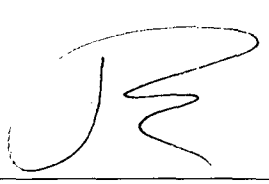

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