

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, )

vs. )

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. )

Docket No.

TYPE OF PLEADING:

**PETITION FOR REVIEW IN THE  
NATURE OF A COMPLAINT FOR  
DECLARATORY JUDGMENT AND  
INJUNCTIVE RELIEF**

Filed on behalf of:

Petitioners

Counsel for Petitioners:

John M. Smith, Esquire  
Pa. I.D. No. 75663  
Smith Butz, LLC  
125 Technology Drive, Suite 202  
Bailey Center I, Southpointe  
Canonsburg, PA 15317  
(724) 745-5121

Jonathan M. Kamin, Esquire  
Pa. I.D. No. 81958  
Goldberg, Kamin & Garvin LLP  
1806 Frick Building  
Pittsburgh, PA 15219  
(412) 281-1119

Jordan B. Yeager, Esquire  
Pa. I.D. No. 72947  
Curtin & Heefner LLP  
Heritage Gateway Center  
1980 South Easton Road, Suite 220  
Doylestown, PA 18901  
(267) 898-0570

William A. Johnson, Esquire  
Pa. I.D. No. 14906  
23 East Beau Street  
Washington, PA 15301  
(724) 225-3955

Susan J. Kraham, Esquire  
Pa. I.D. No. 310292  
Columbia University School of Law  
435 West 116<sup>th</sup> Street  
New York, New York 10027  
(212) 854-500

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County, Pennsylvania, et al.	)	Docket No.
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	)	<b>NATURE OF A COMPLAINT FOR</b>
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PENNSYLVANIA, et al.	)	<b>INJUNCTIVE RELIEF</b>
Respondents.	)	
	)	

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You have been sued in court. If you wish to defend against the claims set forth in the following pages, you must take action within twenty (20) days after this complaint and notice are served, by entering a written appearance personally or by attorney and filing in writing with the court your defenses or objections to the claims set forth against you. You are warned that if you fail to do so the case may proceed without you and a judgment may be entered against you by the court without further notice for any money claimed in the complain or for any other claim or relief requested by the plaintiff. You may lose money or property or other rights important to you.

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Petitioners, )  
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COMMONWEALTH OF )  
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Respondents. )

**PETITION FOR REVIEW IN THE NATURE OF A COMPLAINT FOR  
DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF**

AND NOW, Petitioners, Robinson Township, Washington County, Pennsylvania, Brian Coppola, Peters Township, Washington County, Pennsylvania, David M. Ball, Township of Nockamixon, Bucks County, Township of Cecil, Washington County, Mount Pleasant Township, Washington County, Borough of Yardley, Bucks County, Township of South Fayette, Allegheny County, Delaware Riverkeeper Network, and Maya Van Rossum, the Delaware Riverkeeper, and Mehernosh Khan, M.D., by and through their attorneys, file the within Petition for Review in the Nature of a Complaint for Declaratory Judgment and Injunctive Relief against Respondents, Commonwealth of Pennsylvania, Pennsylvania Public Utility Commission, Robert F. Powelson, Office of the Attorney General of the Commonwealth of Pennsylvania, Linda L. Kelly, Pennsylvania Department of Environmental Protection and Michael L. Krancer, and in support thereof set forth as follows:

**INTRODUCTION**

1. On February 14, 2012, Pennsylvania Governor Thomas W. Corbett signed HB 1950 into law as Act 13 of 2012. (hereinafter, "Act 13"). Act 13 amends the Pennsylvania Oil and Gas Act (hereinafter, "Oil and Gas Act"), 58 P.S. § 601.101 et seq., to establish, in part, a

one-size-fits-all zoning scheme for oil and gas development that applies to every zoning district in every political subdivision in Pennsylvania.

2. Article I, Section 1 of the Pennsylvania Constitution guarantees individuals the ability to acquire, possess and protect property and to use that property as the individual sees fit without interference from the government. *See*, PA. CONST. Art. I, Sec 1. In certain limited circumstances, the Commonwealth may constitutionally employ its police powers in a manner that may infringe upon citizens' property rights. However, the powers of the Commonwealth are not unlimited and will be deemed an arbitrary exercise of the Commonwealth's police powers prohibited by Article I, Section 1 of the Pennsylvania Constitution if the enactment is not designed to protect the health, safety and welfare of the community. Moreover, if the law is designed to benefit or affect one industry or locality to the exclusion of others, it will be designated an unconstitutional "special law" in violation of Article III, Section 32 of the Pennsylvania Constitution. 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 [corporations] or favored localities." *Harrisburg School District v. Hickok*, 781 A.2d 221, 227 (Pa. Commw. Ct. 2001).

3. The Pennsylvania General Assembly enacted Act 13, in part, to overturn the Pennsylvania Supreme Court's 2009 decision in *Huntley & Huntley, Inc. v. Borough Council of the Borough of Oakmont*, 600 Pa. 207, 964 A.2d 855 (2009). The Court held that municipalities could use zoning powers to regulate the location of oil and gas development in their communities. The Pennsylvania Supreme Court was asked to consider whether the Oil and Gas Act preempted municipalities from enacting zoning ordinances to plan for the development of oil and gas drilling in various parts of the Borough of Oakmont. *Id.*

4. The Supreme Court drew a “where versus how” distinction between zoning and land use classifications that were enacted to preserve the character of neighborhoods and to plan for community development and the technical regulations governing the manner in which an industry operates. *Id.* at 224-25, 865-66. The Court held that:

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

*Id.* at 225, 865. (emphasis added).

5. Following the Court’s decision in *Huntley & Huntley*, the Pennsylvania Commonwealth Court in *Penneco Oil Company* followed the Pennsylvania Supreme Court’s rationale by finding that local zoning regulations relative to oil and gas activities are a proper use of the local governments’ police power stating that, “... the most salient objections underlying restrictions on oil and gas drilling in residential districts appeared to be those pertaining to preserving the character of residential neighborhoods and encouraging beneficial and compatible land uses.” *Penneco Oil Company, Inc. v. County of Fayette*, 4 A.3d 722, 726 (Pa. Commw. Ct. 2010) (*cert. denied*, Pa. Jan. 6, 2012).

6. Following the reasoning set forth by the Pennsylvania Supreme Court, the Commonwealth Court in *Penneco Oil Company* also found that the police powers’ objectives are served by proper local regulations regarding regulating drilling in residential areas that are enacted to serve the safety and welfare of its citizens, “encouraging the most appropriate use of the land throughout the borough, conserving the value of property, minimizing overcrowding, traffic, congestion and providing adequate open spaces.” *Id.*

7. In response to the holdings of *Huntley & Huntley* and *Penneco Oil Company*, the Pennsylvania General Assembly specifically inserted § 3304 in Act 13 that constrains municipalities' authority over "where" gas drilling operations may be located within the municipal borders.

8. Despite the General Assembly's efforts, Act 13 cannot override Petitioners' statutorily defined mandate of how zoning is implemented and approved at the local level, as defined in the Municipalities Planning Code (hereinafter, "MPC"), 53 P.S. § 10101 *et seq.* The MPC is the tool by which the Constitutional directives of the U.S. Supreme Court and Pennsylvania Supreme Court are accomplished.

9. In contrast to the Courts' decisions in *Huntley & Huntley* and *Penneco Oil Company* which define a proper use of the sovereign's police power, Act 13's broad brush approach and failure to account for the health, safety and welfare of citizens, the value of properties, adequate open spaces, traffic, congestion, the preservation of the character of residential neighborhoods and beneficial and compatible land uses, results in an improper use of the Commonwealth's police power and is therefore unconstitutional.

10. Act 13 cannot escape the Constitutional scrutiny that accompanies all zoning enactments. The Commonwealth's police power to zone is constitutionally limited to enacting regulations for the sole purpose of protecting the health, safety and welfare of its citizens.

11. By attempting to preempt and supersede local regulation of oil and gas operations, the Pennsylvania General Assembly, through Act 13, has assumed the power to zone for oil and gas operations, which is manifested through the promulgation of a uniform set of land-use regulations governing oil and gas operations throughout the Commonwealth. By crafting a single set of statewide zoning rules applicable to oil and gas drilling throughout the Commonwealth, the Pennsylvania General Assembly provided much sought-after predictability for the oil and gas

development industry. However, it did so at the expense of the predictability afforded to Petitioners and the citizens of Pennsylvania whose health, safety and welfare, community development objectives, zoning districts and concerns regarding property values were pushed aside to elevate the interests of out-of-state oil and gas companies and the owners of hydrocarbons underlying each property, who are frequently not the surface owners.<sup>1</sup>

12. In addition, Act 13 constitutes an unconstitutional “special law” in violation of the equal protection principles embodied in the Pennsylvania Constitution, Article III, Section 32. It creates a classification between the oil and gas industry and other taxpaying citizens, businesses and industries by giving the oil and gas industry special treatment and essentially exempting it from the local zoning controls and regulatory procedures otherwise applicable to all other applicants seeking to develop land within a municipality. Act 13 also serves to treat municipalities and its citizens differently depending upon a number of factors including population, physical location and budgetary constraints, violating equal protection principles. These distinctions bear no rational relationship to any legitimate state interest and cannot be justified on the basis of public health, safety or welfare.

13. Furthermore, Act 13 unconstitutionally violates Article I, Section 27 of the Pennsylvania Constitution by denying municipalities the ability to carry out their constitutional obligation to protect public natural resources. Municipalities are agents of the Commonwealth and are therefore trustees entrusted with the duty to conserve and maintain Pennsylvania’s public natural resources for the benefit of its citizens.

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<sup>1</sup> Because of Pennsylvania’s history of gas production, it is not unusual for subsurface interests to have been severed generations ago, resulting in the surface estate and oil and gas passing through separate chains of title. The person who owns the oil and gas rights underlying the property has the implied right to use the surface estate to access and extract these natural resources. *Consol. Coal Co. v. White*, 875 A.2d 318, 326 (Pa. Super. 2005). Under Pennsylvania law, the gas owner has the implied right to go upon the surface if it is necessary to access and remove the gas. *Chartiers Block Coal Co. v. Mellon*, 25 A. 597, 599 (Pa. 1893). This rule’s relationship to Act 13 serves to further frustrate zoning as non-taxpaying citizens of a municipality are free to develop a municipality as they and the industry see fit, leaving municipal officials to helplessly look on without any input or oversight.

14. Act 13 authorizes drilling activities, water impoundments and pipelines as “permitted” uses in all zoning districts. As municipalities can expect hundreds of wells, numerous impoundments, miles of pipeline, several compressor and processing plants, all within its borders, they will be left to plan around rather than plan for orderly growth. In this regard, zoning rules will no longer be applied for industrial drilling activities and zoning rules, comprehensive plans and orderly development within municipalities will now be the exception and no longer the rule.

15. Through Act 13, the Pennsylvania General Assembly has mandated that Municipal Petitioners must:

- a. modify their zoning laws in a manner that fail to give consideration to the character of the municipality, the needs of its citizens and the suitabilities and special nature of particular parts of the municipality; 53 P.S. § 10603(a).
- b. modify their zoning laws in a manner that would violate and contradict the goals and objectives of Petitioners’ comprehensive plans; 53 P.S. § 10605.
- c. modify zoning laws and create zoning districts that violate Petitioners’ constitutional duties to only enact zoning ordinances that protect the health, safety, morals and welfare of the community; *See*, 53 P.S. § 10604.
- d. conduct Public Hearings to gather citizen comments regarding authorized oil and gas development in residential and commercial districts as a permitted use by right even though such comments and evidence cannot be considered by Petitioners who, by state law, must approve the state’s zoning scheme regardless of the findings of the elected officials in violation of 53 P.S. § 10908.
- e. conduct Public Hearings negating citizens’ due process rights to meaningful participation in proceedings involving the adoption of a zoning ordinance; *Messina v. East Penn Twp.*, 995 A.2d 517 (Pa. Commw. Ct. 2010).
- f. pass zoning laws without affording its citizens due process that will result in the zoning laws being *void ab initio*; *Luke v. Cataldi*, 932 A.2d 45 (Pa. 2007).
- g. allow heavy industrial uses in all zoning districts, including residential areas, near homes, schools, churches and nursing homes in violation of 53 P.S. § 10605.
- h. must enact zoning laws that do not allow for the orderly development of their respective communities; and, *See*, 53 P.S. § 10605.



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

16. The citizens of Petitioners' communities have purchased homes, built churches, daycare centers and hospitals in reliance upon zoning districts. These districts allow for orderly development and compatible uses, and serve to preserve the value of their investments, the nature of the district and their overall health, safety and welfare. Act 13, in violation of the U.S. Constitution and Pennsylvania Constitution, removes all of the aforementioned goals and protections and is an improper and arbitrary use of the Commonwealth's police power.

### **STATUTORY AUTHORITY AND JURISDICTION**

17. Petitioners bring the instant Petition for Review in the Nature of a Complaint for Declaratory Judgment and Injunctive Relief pursuant to the "Declaratory Judgments Act," 42 Pa.C.S. § 7531 et seq. and Pennsylvania Rules of Civil Procedure 1602 et seq.

18. Petitioners request that this Honorable Court declare that provisions of Act 13 violate the United States Constitution and the Pennsylvania Constitution and enjoin the implementation of the unconstitutional provisions of Act 13.

19. The Commonwealth Court has original jurisdiction over this action pursuant to 42 Pa.C.S. § 761 because this action has been filed against the Commonwealth government and officers thereof acting in their official capacities.

### **SUMMARY OF ARGUMENT**

20. In this Petition for Review in the Nature of a Complaint for Declaratory Judgment and Injunctive Relief, Petitioners assert that:

- a. Act 13 violates Article I, Section 1 of the Pennsylvania Constitution and Section 1 of the 14th Amendment to the United States Constitution as Act 13's zoning scheme is an improper exercise of the Commonwealth's police power that is not designed to protect the health, safety, morals and public welfare of the citizens of Pennsylvania;

- b. Act 13 violates Article I, Section 1 of the Pennsylvania Constitution because it allows for incompatible uses in like zoning districts in derogation of municipalities' comprehensive zoning plans and therefore constitutes an unconstitutional use of zoning districts.
- c. Act 13 violates Article I, Section 1 of the Pennsylvania Constitution as Act 13's allowance of oil and gas development activities as a permitted use by right in every zoning district renders it impossible for municipalities to create new or to follow existing comprehensive plans, zoning ordinances or zoning districts that protect the health, safety, morals and welfare of citizens and to provide for orderly development of the community in violation of the MPC resulting in an improper use of its police power;
- d. Act 13 violates Article III, Section 32 of the Pennsylvania Constitution because Act 13 is a "special law" that treats local governments differently and was enacted for the sole and unique benefit of the oil and gas industry;
- e. Act 13 is an unconstitutional taking for a private purpose and an improper exercise of the Commonwealth's eminent domain power in violation of Article I, Sections 1 and 10 of the Pennsylvania Constitution.
- f. Act 13 violates Article I, Section 27 of the Pennsylvania Constitution by denying municipalities the ability to carry out their constitutional obligation to protect public natural resources.;
- g. Act 13 violates the doctrine of Separation of Powers because, through its provision that allows for advisory opinions, Act 13 permits an Executive agency, the Pennsylvania Public Utility Commission, to play an integral role in the exclusively Legislative function of drafting legislation;
- h. Act 13 violates the doctrine of Separation of Powers because it entrusts an Executive agency, the Pennsylvania Public Utility Commission with the power to render opinions regarding the constitutionality of Legislative enactments, infringing on a judicial function. *See, Commonwealth v. Allshouse*, 33 A.3d 31 (Pa. Super. 2011);
- i. Act 13 unconstitutionally delegates power to the Pennsylvania Department of Environmental Protection without any definitive standards or authorizing language.
- j. Act 13 is unconstitutionally vague because its setback provisions and requirements for municipalities fail to provide the necessary information regarding what actions of a municipality are prohibited.
- k. Act 13 is unconstitutionally vague because its timing and permitting requirements for municipalities fail to provide the necessary information regarding what actions of a municipality are prohibited.

- l. Act 13 is an unconstitutional “special law” in violation of Article III, Section 32 of the Pennsylvania Constitution which restricts health professionals’ ability to disclose critical diagnostic information when dealing solely with information deemed proprietary by the natural gas industry.
- m. Act 13’s restriction on health professionals’ ability to disclose critical diagnostic information is an unconstitutional violation of the single-subject rule enunciated in Article III, Section 3 of the Pennsylvania Constitution.

### PARTIES

21. Petitioner, Robinson Township, Washington County, is a political subdivision of the Commonwealth of Pennsylvania, with an address of 8400 Noblestown Road, McDonald, Pennsylvania 15057.

22. Petitioner, Brian Coppola, in his official capacity, is the Chairman of the Board of Supervisors of Robinson Township, Washington County, Pennsylvania, maintains an official address of 8400 Noblestown Road, McDonald, Pennsylvania 15057. Petitioner Brian Coppola also files suit in his capacity as a citizen of the Commonwealth of Pennsylvania.

23. Petitioner, Peters Township, Washington County, is a political subdivision of the Commonwealth of Pennsylvania, with an address of 610 E. McMurray Road, McMurray, Pennsylvania, 15317.

24. Petitioner, David M. Ball, in his official capacity, is a Councilman of Peters Township, Washington County, Pennsylvania, maintains an official address of 610 E. McMurray Road, McMurray, Pennsylvania, 15317. Petitioner David Ball also files suit in his capacity as a citizen of the Commonwealth of Pennsylvania.

25. Petitioner, Township of South Fayette, Allegheny County, is a political subdivision of the Commonwealth of Pennsylvania, with an address of 515 Millers Run Road, Morgan, Pennsylvania, 15064.

26. Petitioner, Township of Cecil, Washington County, is a political subdivision of the Commonwealth of Pennsylvania, with an address of 3599 Millers Run Road, Cecil, Pennsylvania, 15321.

27. Petitioner, Mount Pleasant Township, Washington County, is a political subdivision of the Commonwealth of Pennsylvania, with an address of 31 McCarrell Road, Hickory, Pennsylvania, 15340.

28. Petitioner, Township of Nockamixon, Bucks County, is a political subdivision of the Commonwealth of Pennsylvania, with an address of 589 Lake Warren Road, Ferndale, Pennsylvania, 18921.

29. Petitioner, Borough of Yardley, Bucks County, is a political subdivision of the Commonwealth of Pennsylvania, with an address of 56 South Main Street, Yardley, Pennsylvania, 19067.

30. All of the foregoing Petitioners are referred to hereinafter as "Municipal Petitioners."

31. All the Municipal Petitioners have zoning ordinances in place that allow for oil and gas activities within its municipalities which provide for a balance between the safety of its citizens, orderly development of the community and the development of oil and gas drilling. Collectively, the Municipal Petitioners have close to 150 unconventional wells drilled within their borders.

32. Petitioner 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. 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.

33. Petitioner Maya van Rossum is the Delaware Riverkeeper, a full-time, privately funded ombudsman who is responsible for the protection of the waterways in the Delaware River Watershed. The Delaware Riverkeeper, Maya van Rossum, advocates for the protection and restoration of the ecological, recreational, commercial and aesthetic qualities of the Delaware River, its tributaries and habitats.

34. Both the Delaware Riverkeeper and DRN's members enjoy the water quality values of the Delaware River Basin. DRN members live, work, and recreate in the lands and waters of the Delaware River Basin. DRN members boat, fish, canoe, birdwatch, hike, and participate in other professional, commercial, scientific, and recreational activities near or on the Delaware River and its tributaries and throughout the watershed. Many of DRN's members obtain their water for domestic, agricultural, and other purposes from groundwaters, streams and other surface waters within the Delaware River Basin.

35. Petitioner Mehernosh Khan, M.D., is a practicing medical doctor and resident of the Commonwealth of Pennsylvania. 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. Dr. Khan will be adversely affected and irreparably harmed if Act 13's health care provider gag order provisions are allowed to take effect.

36. The Delaware Riverkeeper, DRN's members, and the other individual Petitioners will be adversely affected if Act 13 is allowed to take effect. Each have an interest in, *inter alia*, the preservation of their constitutional rights, the enactment of substantive valid zoning

provisions, and in Municipal Petitioners being able to carry out their constitutional authority, and in the maintenance of separation of powers. If Act 13 is allowed to take effect, it will cause irreparable harm to these interests.

37. Respondent, Commonwealth of Pennsylvania, has an address of 225 Main Capitol Building, Harrisburg, Pennsylvania, 17120.

38. Respondent, Pennsylvania Public Utility Commission, is a regulatory agency of the Commonwealth of Pennsylvania, with an address of 400 North Street, Keystone Building, Harrisburg, Pennsylvania, 17120.

39. Respondent, Robert F. Powelson, in his official capacity, is the Chairman of the Pennsylvania Public Utility Commission, with an official address of 400 North Street, Keystone Building, Harrisburg, Pennsylvania, 17120.

40. Respondent, Office of the Attorney General of Pennsylvania, is the law enforcement branch of the Commonwealth of Pennsylvania, with an address of 16<sup>th</sup> Floor, Strawberry Square, Harrisburg, Pennsylvania, 17120.

41. Respondent, Linda L. Kelly, in her official capacity, is the Attorney General of the Commonwealth of Pennsylvania, with an official address of 16<sup>th</sup> Floor, Strawberry Square, Harrisburg, Pennsylvania, 17120.

42. Respondent, Department of Environmental Protection, is an agency of the Commonwealth of Pennsylvania, with an address of 400 Market Street, Harrisburg, Pennsylvania 17101.

43. Respondent, Michael L. Krancer, in his official capacity, is the Secretary of the Department of Environmental Protection, with an official address of 400 Market Street, Harrisburg, Pennsylvania, 17120.

#### **LEGAL STANDING OF THE PETITIONERS**

44. The equitable jurisdiction of the Commonwealth Court allows parties to raise pre-enforcement challenges to the substantive validity of laws when the parties would otherwise be forced to either submit to the regulations and incur the cost and burden that the regulations would inevitably impose or simply defend themselves against sanctions for non-compliance with the law. *Commonwealth of Pennsylvania v. Locust Township*, 600 Pa. 533, 548, 968 A.2d 1263, 1272 (2009) citing *Arsenal Coal Co. v. Dept. of Environmental Resources*, 505 Pa. 198, 477 A.2d 1333, 1338 (1984).

45. Municipalities have legal standing to contest laws that have a direct, immediate and substantial impact on the interests, functions, powers and obligations of the municipal government. *City of Philadelphia v. Commonwealth of Pennsylvania*, 575 Pa. 542, 564, 838 A.2d 566, 580 (2003).

46. Individuals vested with legislative powers have legal standing to contest procedural infringements upon their legislative duties and functions. *Zemprelli v. Daniels*, 496 Pa. 247, 252 436 A.2d 1165, 1167-68 (1981); *Ritter v. Commonwealth*, 120 Pa. Commw. Ct. 374, 548 A.2d 1317 (1988), *aff'd Ritter v. Commonwealth*, 521 Pa. 536, 557 A.2d 1064 (1989) (per curiam).

47. Act 13 imposes substantial, direct, immediate and affirmative obligations upon the Municipal Petitioners to repeal, modify and amend existing zoning ordinances that regulate oil and gas development or Petitioners will be subject to sanction. Act 13 mandates that Petitioners:

(1) Shall allow well and pipeline location assessment operations, including seismic operations and related activities conducted in accordance with all applicable Federal and State laws and regulations relating to the storage and use of explosives throughout every local government. Act 13, § 3304(b)(1);

(2) May not impose conditions, requirements or limitations on the construction of oil and gas operations that are more stringent than

conditions, requirements or limitations imposed on construction activities for other industrial uses within the geographic boundaries of the local government. Act 13, § 3304(b)(2);

(3) **May not impose conditions**, requirements or limitations on the heights of structures, screening and fencing, lighting or noise relating to permanent oil and gas operations that are **more stringent** than the **conditions**, requirements or limitations **imposed on** other industrial uses or **other land development within the particular zoning district** where the oil and gas operations are situated within the local government. Act 13, § 3304(b)(3) (emphasis added);

(4) Shall have a review period for **permitted uses by right that does not exceed 30 days** for complete submissions or that **does not exceed 120 days for conditional uses**. Act 13, § 3304(b)(4) (emphasis added);

(5) Shall **authorize oil and gas operations**, other than activities at impoundment areas, compressor stations and processing plants, as a **permitted use by right** in all zoning districts. Act 13, § 3304(b)(5) (emphasis added);

(5.1) Notwithstanding section 3215 (relating to well location restrictions), may prohibit, or **permit** only as a **conditional use, wells or well sites** otherwise permitted under paragraph (5) within a **residential district** if the well site cannot be placed so that the **wellhead** is at least **500 feet** from any existing building. In a residential district, all of the following apply:

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

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

Act 13, § 3304(b)(5.1) (emphasis added)

(6) Shall authorize **impoundment areas** used for oil and gas operations as a **permitted use by right in all zoning districts**, provided that the edge of any impoundment area shall not be located closer than 300 feet from an existing building. Act 13, § 3304(b)(6) (emphasis added);

(7) Shall authorize **natural gas compressor stations** as a **permitted use by right** in agricultural and industrial zoning districts and as a **conditional use in all other zoning districts**, if the natural gas



compressor building meets the following standards:

- (i) is located 750 feet or more from the nearest existing building or 200 feet from the nearest lot line, whichever is greater, unless waived by the owner of the building or adjoining lot; and
- (ii) the noise level does not exceed a noise standard of 60dbA at the nearest property line or the applicable standard imposed by Federal law, whichever is less.

Act 13, § 3304(b)(7) (emphasis added);

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

- (i) The natural gas processing plant building is located at the greater of at least 750 feet from the nearest existing building or at least 200 feet from the nearest lot line unless waived by the owner of the building or adjoining lot.
- (ii) The noise level of the natural gas processing plant building does not exceed a noise standard of 60dbA at the nearest property line or the applicable standard imposed by Federal law, whichever is less.

Act 13, § 3304(b)(8) (emphasis added);

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

Act 13, § 3304(b)(9);

(10) ***May not impose limits*** or conditions on subterranean operations or hours of operation of compressor stations and processing plants or ***hours of operation*** for the drilling of oil and gas wells or the assembly and disassembly of drilling rigs.

Act 13, § 3304(b)(10) (emphasis added); and

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

Act 13, § 3304(b)(11) (emphasis added).

48. In addition, Municipal Petitioners must bring all zoning ordinances into conformity with Act 13 *within 120 days* of the effective date of Act 13. See Act 13, at § 3309(b)(4). If Municipal Petitioners do not meet this deadline, they are subject to challenge by a

private party in front of the Pennsylvania Public Utilities Commission or this Court, which could result in Petitioners losing access to *any* funds collected under the impact fee until Petitioners are able to revise their ordinances. Act 13, at § 3308. Municipal Petitioners also face the threat of paying a plaintiff's attorney fees and costs in a court challenge, which poses a significant hindrance to municipalities already facing revenue difficulties. Act 13, at § 3307.

49. Act 13 imposes new, mandatory duties upon Municipal Petitioners that are radically different than and a complete departure from existing obligations imposed on the Municipal Petitioners by the MPC. For example, to implement the mandates of Act 13, Municipal Petitioners must completely re-write their comprehensive plans and zoning codes, including the existing zoning laws that are consistent with established municipal comprehensive plans.

50. Such action is required because these enactments must be consistent with one another and must be based on the protection of the health, safety, morals, general welfare and orderly development of the community. 53 P.S. §§ 10603(j); 10605. Act 13 provides Municipal Petitioners *120 days* to expend significant time, monies and resources to:

- a. develop entirely new comprehensive plans and ordinances;
- b. consult with their respective planning commissions and county planning commissions;
- c. submit formal copies of proposed ordinances to municipal and county planning commissions;
- d. submit the proposed ordinance to the Public Utility Commission for its review and direction;
- e. advertise public notice of public hearings;
- f. conduct public hearings;

- g. submit revised formal copies of proposed ordinances to the appropriate planning commissions if public hearings resulted in any substantial changes to the proposal; and
- h. publicly advertise for passage of the instruments and approve final ordinances and comprehensive plans.

51. Petitioners have legal standing to prosecute this action because Act 13 imposes a radically new set of unconstitutional mandates on Municipal Petitioners that must be accomplished in a very limited period of time, and Municipal Petitioners' failure to comply subjects them to sanctions. *Zemprelli v. Daniels*, 496 Pa. 247, 252 A.2d 1165, 1167-68 (1981); *Arsenal Coal Co. v. Dept. of Environmental Resources*, 505 Pa. 198, 477 A.2d 1333, 1338 (1984); *City of Philadelphia v. Commonwealth of Pennsylvania*, 575 Pa. 542, 564, 838 A.2d 566, 580 (2003); and *Commonwealth of Pennsylvania v. Locust Township*, 600 Pa. 533, 548, 968 A.2d 1263, 1272 (2009).

## **FACTUAL AND PROCEDURAL BACKGROUND**

### **A. Basis for Zoning Authority**

52. Article I, Section 1 of the Pennsylvania Constitution guarantees individuals' ability to acquire, possess and protect property and to use that property as the individual sees fit. *See*, PA. CONST. Art. I, Sec 1; *see also*, *Appeal of Girsh*, 437 Pa. 237, 241, 263 A.2d 395, 397, n. 3 (1970).

53. Individuals' constitutional rights to use their property as they see fit have traditionally been limited by the police power of the state, which is the exercise of the sovereign right of the government to take actions to protect the lives, health, morals, comfort and general welfare of the populace. *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 241, 98 S. Ct.

2716, 2721 (1978) (rehearing denied); *In re Appeal of Realen Valley Forge Greenes Associates*, 576 Pa. 115, 131, 838 A.2d 718, 728 (2003).

54. The sovereign's exercise of the police power to limit individuals' behavior is designed to *protect* citizens by ensuring that an individual's use of his or her real property will not cause harm to neighbors or infringe upon the neighbors' property rights and interests. *Hopewell Township Board of Supervisors v. Golla*, 499 Pa. 246, 452 A.2d 1337, 1341-42 (1982). The exercise of the police power over individuals' rights to use their real property as they choose is manifested through a legislative body's power to establish zoning districts. *Best v. Zoning Board of Adjustment of the City of Pittsburgh*, 393 Pa. 106, 111, 141 A.2d 606, 610 (1958).

55. Implementation of constitutionally valid zoning restrictions is based upon the recognition that some uses of land are incompatible with other uses of land. *Zoning allows a sovereign to designate distinct areas of a community where only certain, compatible uses of land are allowed, thereby protecting landowners because all property in a particular district is subject to the same restrictions.* *Village of Euclid, Ohio v. Ambler Realty, Co.* 272 U.S. 365, 388, 47 S.Ct. 114, 118 (1926) ("A nuisance may be merely a right thing in the wrong place."); *United Artists Theater Circuit, Inc. v. City of Philadelphia*, 528 Pa. 12, 595 A.2d 6 (1991) (reargument granted and reversed on other grounds 535 Pa. 370, 635 A.2d 612).

#### **B. Limits of Zoning Authority**

56. The sovereign's power and authority to zone is not unlimited. Exercise of the police power to regulate the use of real property through the enactment of zoning ordinances *is only constitutional when it promotes the public health, safety, morality and general welfare interests of the community and the regulations are substantially related to the purpose the ordinance purports to serve.* *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 47 S.Ct. 114 (1926); *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 68 101 S.Ct. 2176, 2182

(1981); *National Land and Investment Co. v. Easttown Township Board of Adjustment*, 419 Pa. 504, 215 A.2d 597, 607 (1966); *Boundary Drive Associates v. Shrewsbury Township Board of Supervisors*, 507 Pa. 481, 489, 491 A.2d 86, 90 (1985). When enacting zoning regulations, all public authorities, *including the Pennsylvania General Assembly*, must exercise this police power in furtherance of the public health, safety, morals and general welfare of the particular community. *See, Exton Quarries, Inc. v. Zoning Board of Adjustment of West Whiteland Township*, 425 Pa. 43, 66, 228 A.2d 169, 182 (1967) (concurring opinion of Chief Justice Bell) (emphasis added).

57. Also, establishment of zoning districts, and the associated restriction of certain uses in particular zones, must be done in conformance with a comprehensive plan for community growth and development so that the classifications will allow the community to develop in an orderly manner while observing the public interest of the community as a whole. *Swade v. Zoning Board of Adjustment of Springfield Twp.*, 140 A.2d 597, 598, (Pa. 1958); *Best v. Zoning Board of Adjustment of the City of Pittsburgh*, 393 Pa. 106, 111, 141 A.2d 606, 610 (1958); *In re Appeal of Realen Valley Forge Greenes Associates*, 576 Pa. 115, 133, 838 A.2d 718, 729 (2003).

58. The police power to zone cannot be exercised in an unreasonable or arbitrary manner and must be based upon the unique facts and circumstances present in each community. In *Village of Euclid, Ohio v. Ambler Realty, Co.* 272 U.S. 365, 387 (1926), the United States Supreme Court recognized that universal, or statewide zoning is impractical and constitutionally impermissible, “[a] regulatory zoning ordinance, which would be clearly valid as applied to the great cities, might be clearly invalid as applied to rural communities.” *See also, Eller v. Bd. of Adjustment*, 414 Pa. 1, 198 A.2d 863 (1964) (emphasis added).

59. Moreover, a private party's desire to use land in a certain manner does not rise to the level of public welfare to establish a valid basis for the exercise of the police power to zone. *National Land & Inv. Co. v. Kohn*, 419 Pa. 504, 530-31; 215 A.2d 597, 611 (1966).

60. When enacting and modifying zoning regulations, a sovereign is ***not permitted*** to ***confine*** its vision to just ***one isolated place or problem*** within the community, while disregarding a ***community-wide perspective*** and evaluation of the ***nature of compatible uses*** in zones. *Twp. of Plymouth v. County of Montgomery*, 109 Pa. Commw. Ct. 200, 531 A.2d 49, 57 (1987) (emphasis added). The Pennsylvania Supreme Court has unequivocally held that differential zoning of particular parcels or uses, without a reasonable basis for the differentiation in a zoning district that is not compatible with that use, commonly known as "spot zoning," is an unconstitutional abuse of the police powers entrusted in the sovereign. *In re Appeal of Realen Valley Forge Greenes Associates*, 576 Pa. 115, 133, 838 A.2d 718, 729 (2003).

### C. Role and Requirements of the Municipalities Planning Code

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

62. The MPC authorizes municipalities to enact local zoning regulations "in recognition of the ***unique expertise*** of municipal governing bodies to designate where ***different uses should be permitted*** in a manner that accounts for the community's ***development objectives***, its ***character***, and the suitabilities and ***special nature*** of particular parts of the community."

*Huntley & Huntley, Inc. v. Borough Council of the Borough of Oakmont*, 600 Pa. 207, 225, 964 A.2d 855, 866 (2009) (internal quotations omitted) (emphasis added).

63. In recognition of the constitutional limits of the sovereign's authority to exercise the police power, the MPC prescribes a detailed framework related to the enactment of zoning regulations, including, *inter alia*:

- a. Zoning ordinances should reflect the policy goals of the statement of community development objectives . . . and ***give consideration to the character of the municipality, the needs of the citizens and the suitabilities and special nature of particular parts of the municipality***. 53 P.S. § 10603(a) (emphasis added);
- b. The provisions of zoning ordinances shall be designed to ***promote, protect and facilitate*** any or all of the following: the ***public health, safety***, morals, and the ***general welfare; coordinated and practical community development*** and proper density of population; emergency management preparedness and operations, airports, and national defense facilities, the provisions of adequate light and air, access to incident solar energy, police protection, vehicle parking and loading space, transportation, water, sewerage, schools, recreational facilities, public grounds, ***the provision of a safe, reliable and adequate water supply for domestic, commercial, agricultural or industrial use***, and other public requirements; as well as preservation of the natural, scenic and historic values in the environment and preservation of forests, wetlands, aquifers and floodplains. 53 P.S. § 10604(1) (emphasis added);
- c. The provisions of zoning ordinances shall be ***designed to prevent*** . . . overcrowding of land, blight, danger and congestion in travel and transportation, ***loss of health, life or property from fire***, flood, panic or ***other dangers***. 53 P.S. § 10604(2) (emphasis added);
- d. The provisions of zoning ordinances shall be ***designed to accommodate reasonable overall community growth***, including population and employment growth, and opportunities for development of a variety of residential dwelling types and nonresidential uses. 53 P.S. § 10604(5) (emphasis added); and
- e. In any municipality . . . which enacts a zoning ordinance, no part of such municipality shall be left unzoned. The provisions of all zoning ordinances may be classified so that ***different provisions may be applied to different classes of situations, uses and structures*** and to such various districts of the municipality as shall be described by a map made part of the zoning ordinance. ***Where zoning districts are created, all provisions shall be***

*uniform for each class of uses or structures, within each district.* . . . 53  
P.S. § 10605 (emphasis added).

64. Because the zoning power may only be exercised to promote the health, safety, morals and welfare of the community and to protect individuals from the harmful effects of neighbors' incompatible property uses, Zoning Districts are only found to pass constitutional scrutiny if each district only allows uses of land that are of the same character and are compatible with one another. *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 47 S.Ct. 114 (1926); *Hopewell Township Board of Supervisors v. Golla*, 499 Pa. 246, 452 A.2d 1337, 1341-42 (1982).

65. Municipal Petitioners have established multiple zoning districts within their municipal boundaries, such as residential, commercial and industrial districts, based upon a review of numerous factors, including density of populations, compatibility of uses, topography, road access and existing development patterns. Within each zoning district, Municipal Petitioners have provided for certain, limited types of use, to ensure that development of land within each district was of the same general character, in order to protect the health, safety morals and welfare of the community. *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365 (1926).

66. As a necessary component to establishing Zoning Districts, Municipal Petitioners have also classified land uses in each particular district according to the intensity of the use. Permitted uses by right of land are absolutely and unconditionally allowed in a zoning district. *Aldridge v. Jackson Twp.*, 983 A.2d 247 (Pa. Commw. Ct. 2009). Conditional Uses of land are allowed in a district, though with greater scrutiny, as they are analyzed on a case-by-case basis. *Ligo v. Slippery Rock Township*, 936 A.2d 1236, 1242 (Pa. Commw. Ct. 2007). To obtain Conditional Use approval, a party must file an application with the governing body, demonstrate that the use satisfies enumerated standards set forth in the zoning ordinance and a public hearing



is held for potentially affected landowners to learn about or to raise concerns or objections regarding the proposal. 53 P.S. § 10913.2. Finally, like a Conditional Use, a Special Exception in a zoning ordinance describes a use that is allowed in a particular zoning district, subject to the explicit standards and criteria in the zoning ordinance and case-by-case review by the municipality's Zoning Hearing Board. *Kotzin v. Plymouth Township Zoning Bd. of Adjustment*, 395 Pa. 125, 127, 149 A.2d 116, 117 (1959); *Broussard v. Zoning Bd. of Adjustment of City of Pittsburgh*, 907 A.2d 494 (Pa. 2006). 53 P.S. § 10912.1.

67. As a matter of example, Petitioner, Cecil Township, a growing Township of about 11,000 residents has established a series of general residential zoning districts within its corporate limits, divided by the varying intensities of residential development allowed in each zone. In the R-2 Medium Density Residential Zoning District, Permitted Uses by Right are 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. *See*, Cecil Township Unified Development Ordinance, Ordinance 5-00, at Part 9, §903(A), attached hereto as Exhibit 1. Houses of Worship and Daycare Centers are Conditional Uses in the Cecil township R-2 Medium Density Residential Zoning District, which means that although the use may be authorized, they 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 comments or objections from the general public, including potentially affected landowners. *See*, Exhibit 1 at Section 903 (B).

68. Pursuant to Act 13, Cecil Township's R-2 Medium Density Zoning District will also allow for natural gas drill sites and several million gallon hazardous wastewater impoundments 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 and oversight than the approval of construction of heavy industrial uses of natural gas drill sites and hazardous wastewater impoundments; the latter will be not be subject to any local scrutiny at all.

#### **D. Pennsylvania Oil and Gas Drilling Activities**

69. Natural gas drill sites develop in different stages and are on average several acres in size. Initially, a road is constructed, a pad is cleared and vertical drilling can begin. This activity is noisy, dusty and will take several months to complete. *See*, Photographs of Drill Pad, attached hereto as Exhibit 2. The second phase will result in twenty-four (24) hour operation of sizeable drilling rigs accompanied by numerous diesel engines to provide power to the site. *See*, Diesel Engines at Drill Site, attached hereto as Exhibit 3. The horizontal drilling is very rigorous and will take months to complete or longer depending upon how many wells are initiated. Once completed, there will be hazardous chemicals brought to the site, and mixed and utilized to fracture the shale. This “frac fluid” flows back to the surface which is then utilized or disposed of in various ways. This process takes several weeks and is extremely noisy. It results in hundreds of heavy tanker-trucks going to and from the site twenty-four (24) hours a day. *See*, Photographs of Truck Traffic, attached hereto as Exhibit 4. Once all the wells have been fractured and casing is completed, flaring typically will occur which will result in an open flame for up to several weeks in duration. *See*, Photographs of Flaring, attached hereto as Exhibit 5. Soon thereafter the wells may be completed.

70. The wells will be serviced and the final pad may have a number of features more than one (1) acre in size. These features include wellheads, condensate tanks, vapor destruction units with open flames, pipelines, and metering stations. All of these items require ongoing truck traffic and maintenance for the life of the site. *See*, Completed Site Photographs, attached hereto

as Exhibit 6, (demonstrating these features of a site with two (2) wells in Robinson Township, Pennsylvania, that is currently being remediated because of a leak).

71. As some municipalities have several different layers of shale, i.e., the Marcellus, Utica, and Upper Devonian, this process will be repeated several times, tripling the industrial activities. Moreover, companies may decide to return to rework existing wells or to drill more on the pad. This ongoing activity shows the massive industrial activity which is now brought into all communities by Act 13.

72. Petitioner, Mount Pleasant Township, already has 108 Marcellus wells drilled with 97 of those wells being active. It is home to two (2) compressor stations, one (1) dew point control facility, four (4) impoundments and miles of pipelines. In the future, an additional eight (8) well pads are planned. As a result of these oil and gas activities, the Township has experienced an overturned tanker, an explosion, spills, chemical leaks and fires, specifically including 7 (seven) fires at well sites. *See*, Photographs of Fire and Explosion at Compressor Station, attached hereto as Exhibit 7. Furthermore, Mount Pleasant Township has had to close two (2) roads that became impassable in residential areas due to heavy truck traffic. Eleven (11) tractor trailer accident reports were received for the period of 2010 to 2011. Upon realization of this onslaught of industrial activity, citizens' complaints received by the Township were at an all time high.

73. Similarly, wastewater impoundments, which are not necessary to gas drilling operations but may be preferred by some companies, contain hazardous waste exempted from the designation by name only (*See*, Safe Drinking Water Act, at § 322), could be used for a decade or longer and requiring twenty-four (24) hour a day truck traffic and operations. *See*, Photographs of Wastewater Impoundments, attached hereto as Exhibit 8. These "impoundments" retain millions of gallons of fluids that include a cocktail of chemicals, some of which are

carcinogenic. These sites will additionally use trucks and pipelines to move this hazardous material unfettered through all communities. As a point of contrast, Cecil Township's ordinance provides for chemical storage facilities as a Special Exception in the I-2 Heavy Industrial District, i.e. subject to the greatest scrutiny in the most use-intensive district. *See*, Exhibit 1 at §912(D). As noted *supra*, the Commonwealth has determined by virtue of Act 13 that these uses are akin to residential housing and are more in keeping with the character and nature of permitted uses by right in residential areas than other installations, like churches and daycare centers which require municipal oversight and approval.

74. For decades, Municipal Petitioners and other municipalities have used their aforementioned zoning powers to further their respective community objectives, and to provide for orderly development. Municipal Petitioners have also allowed for the production of natural resources, including oil and gas development, while simultaneously protecting the health, safety, morals and general welfare of the community. Traditionally, the Commonwealth's interest in oil and gas development has been centered on the efficient production and utilization of the natural resources in the Commonwealth, while in contrast, municipalities' interests have been focused on the orderly development and use of land in a manner consistent with local demographic and environmental concerns. *Huntley & Huntley, Inc. v. Borough Council of the Borough of Oakmont*, 600 Pa. 207, 225, 964 A.2d 855, 865 (2009).

75. Despite the Pennsylvania Supreme Court's recognition of municipalities' unique expertise to enact zoning regulations tailored to individual community development objectives and character as well as the years of expansion of oil and gas development under the oversight of municipal zoning ordinances consistent with the United States Constitution and the Pennsylvania Constitution, the Pennsylvania General Assembly, through Act 13, has expressly preempted and

superseded all municipal zoning ordinances related to the location of oil and gas development activities. *See, Huntley & Huntley, Inc.*

76. Pennsylvania has 2,563 municipalities, ranging from the densely populated cities of Philadelphia and Pittsburgh to mountainous, rural communities, such as Elk Lick Township, Somerset County, location of Mount Davis, the highest point in the Commonwealth. Despite each municipality's unique geography, topography, wind conditions, population density, existing land use practices, community development objectives and comprehensive plans, Section 3304 of Act 13 creates one set of zoning standards governing oil and gas development. This one-size-fits-all scheme applies uniformly to every zoning district in every municipality in the entire Commonwealth. *See, Act 13, § 3304; supra at ¶ 25.* As such, Act 13 violates the U.S. Constitution and Pennsylvania Constitution.

## ARGUMENT

### COUNT I – DECLARATORY JUDGMENT

#### **Robinson Township et al. v. Commonwealth of Pennsylvania et al.**

- I. Petitioners seek a declaration that through Act 13 the Pennsylvania General Assembly has engaged in unconstitutional statewide zoning, by way of an improper use of its police powers and by enacting zoning regulations without consideration of zoning districts, comprehensive plans or how the zoning enactments would serve to protect the health, safety, morals or welfare of local communities in violation of Article I, Section 1 of the Pennsylvania Constitution and Section 1 of the 14<sup>th</sup> amendment of the United States Constitution.**

77. All other paragraphs of this Petition are incorporated by reference as though set forth fully herein.

78. The Commonwealth created local government entities to manage municipalities at a local level, recognizing that local officials will have a better understanding of the distinct characteristics and needs of the locality they govern. Municipal governments have been entrusted by the Commonwealth with zoning powers. "Municipal corporations are agents of the state,

invested with certain subordinate governmental functions for reasons of convenience and public policy.” *Commonwealth v. Moir*, 49 A. 351, 351 (Pa. 1901). Pennsylvania courts have consistently held that land use and zoning responsibilities are shared by municipal governments. *See, Community College of Delaware County v. Fox*, 342 A.2d 468 (Pa. Commw. Ct. 1975)

79. It is manifest that “[i]n promulgating a zoning ordinance, ordinance legislators are to provide for **uniform uses** in respect to zoning districts pursuant to Section 605 of the Municipalities Planning Code.” *Ludwig v. Zoning Hearing Bd. of Earl Twp.*, 658 A.2d 836, 838 (Pa. Commw. Ct. 1995) (emphasis added). The “very essence of zoning is the designation of certain areas for different use purposes.” *Swade v. Zoning Bd. of Adjustment of Springfield Twp.*, 140 A.2d 597, 598 (Pa. 1958).

80. Section 605 of the Municipalities Planning Code (“MPC”) explicitly states, “...The provisions of all zoning ordinances may be classified so that different provisions may be applied to different classes of situations, uses and structures and to such various districts of the municipality as shall be described by a map made part of the zoning ordinance. **Where zoning districts are created, all provisions shall be uniform for each class of uses or structures, within each district** ...” 53 P.S. § 10605 (emphasis added).

81. The Pennsylvania Supreme Court has defined zoning as “the legislative division of a community into areas in each of which only certain designated uses of land are permitted so that the community may develop in an orderly manner in accordance with a comprehensive plan.” *Best v. Zoning Bd. of Adjustment of City of Pittsburgh*, 141 A.2d 606, 609 (Pa. 1958). Consequently, municipal officials have been required to zone in a manner that is consistent with its police power, zoning districts and the comprehensive plan for the community.

82. Zoning districts may be constitutionally created when they are part of a comprehensive plan designed to serve the public benefit. Such an aim is accomplished by

allowing different intents and uses by right in varied districts and ultimately keeping compatible uses grouped together in a designated area. Each use classified within a zoning district is subject to assorted levels of scrutiny and approval processes based on its conformity and compatibility with other designated uses in the zone.

83. In the case of Act 13, the Pennsylvania General Assembly itself has engaged in statewide zoning, creating a “one-size-fits-all” standard for local zoning ordinances regarding the industrial activity of the oil and gas drilling industry, usurping municipalities ability to undertake its statutory and constitutional obligation to provide compatible uses in its zoning districts, protect key resources and districts in its community and to act in the best interests of its residents. *See*, 53 P.S. § 10604.

84. Under the Act, each municipality is required to allow the industrial activity of “oil and gas operations,” except for natural gas processing plants and compressor stations, as a permitted use by right in **all** zoning districts. *See*, Act 13, at § 3304(b)(5); *see also*, Photographs of Drill Sites, attached hereto as Exhibit 9. “Oil and gas operations” is broadly defined and includes activities such as location assessment, seismic testing<sup>2</sup>, drilling, fracturing, and pipeline operations. *See*, Act 13, at § 3301.

85. In addition, municipalities are required to allow impoundments for drilling wastewater in **all** zoning districts, including **residential** districts, as long as they are not closer than three-hundred (300) feet from an existing building. *See*, Act 13, at § 3304(b)(6); *see also*, Photographs of Impoundments, attached hereto as Exhibit 10.

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<sup>2</sup> Pursuant to Act 13, seismic testing is a permitted use throughout a municipality despite the fact that some or all of Petitioners’ municipalities have been undermined by coal operations years ago. Some residents have as little as twenty (20) to thirty (30) feet of cover over an abandoned mine. Likewise, when thumper trucks are used on roadways, some residents’ foundations only a matter of feet away may be impacted. Yet, local officials who are aware of these unique potential problems cannot protect their citizens as it must permit the activities without further conditions or oversight.

86. Natural gas compressor stations **must** be a permitted use by right in agricultural and industrial zoning districts regardless of the designation of light or heavy industrial, and a conditional use in all other districts, as long as they are not closer than seven-hundred fifty (750) feet from an existing building and two-hundred (200) feet from any property line. *See*, Act 13, at § 3304(b)(7); *see also*, Compressor Station Photograph, attached hereto as Exhibit 11.

87. Natural gas processing plants must be a permitted use by right in all industrial zoning districts and a conditional use in agricultural zoning districts, as long as they are not closer than seven-hundred fifty (750) feet from an existing building and two-hundred (200) feet from any property line. *See*, Act 13, at § 3304(b)(8); *see also*, Processing Plant Photograph, attached hereto as Exhibit 12.

88. The terms of Act 13 now include impoundments or “frac-water ponds” and drill sites in the mix of **permitted** uses by right in residential districts. Conceivably, as long as the minimum setback requirement of three-hundred (300) feet has been met or waived, an oil and gas driller could place a centralized impoundment in the middle of a residential neighborhood or beside an elementary school. *See*, Act 13, at § 3304.

89. Act 13 essentially zones each municipality in the Commonwealth in an identical manner allowing for industrial uses in non-industrial areas. Separate zoning districts providing for orderly development can no longer be effective. Further, existing zoning districts risk constitutional challenge because incompatible land uses are being introduced into otherwise homogenous zoning districts.

90. The Pennsylvania Supreme Court has explicitly recognized the rights of landowners in this regard as embodied in Article I, Section 1 of the Pennsylvania Constitution, “[t]he right of landowners in this Commonwealth to use their property as they wish, unfettered by governmental influence except as **necessary** to protect the interests of the public **and of**



**neighboring property owners**, is of ancient origin, recognized in the Magna Carta, and now memorialized in Article I, Section 1 of the Pennsylvania Constitution.” *In re Realen Valley Forge Greenes Associates*, 838 A.2d 718, 727 (Pa. 2003) (emphasis added).

91. Despite this basic premise, selected infringements on a person’s constitutionally protected property rights will be permitted and deemed constitutional under certain circumstances. “Property owners have a constitutionally protected right to enjoy their property ... That right, however, may be reasonably limited by zoning ordinances that are enacted by municipalities pursuant to their police power, i.e., governmental action taken to protect or preserve the public health, safety, morality and welfare.” *In re Realen Valley Forge Greenes Associates*, 838 A.2d 718, 727 (Pa. 2003).

92. Therefore, it is well-settled law that zoning regulations may constitutionally limit otherwise unalienable property rights only when enacted pursuant to the police power and for the health, safety, morality and welfare of local communities. “Where there is a particular public health, safety, morality or welfare interest in a community, the municipality may utilize zoning measures that are substantially related to the protection and preservation of such an interest ...(zoning ordinances should reflect the needs of citizens and **the suitability and specific nature of particular parts of the municipality**).” *In re Realen Valley Forge Greenes Associates*, 838 A.2d 718, 728 (Pa. 2003) (citing *C & M Developers, Inc. v. Bedminster Township Zoning Hearing Board*, 820 A.2d 143, 150 (2002) (emphasis added) (internal citations omitted). “[Z]oning acts and ordinances are valid and constitutional as structural or general legislation whenever they are necessary for the preservation of public health, safety, morals or general welfare.” *Appeal of Lord*, 81 A.2d 533, 535 (Pa. 1951).

93. Regardless of whether a zoning regulation comes in the form of a municipal ordinance or a state statute, this burden does not change – it must be substantially related to the

public health, safety, morals or general welfare. *Best v. Zoning Bd. of Adjustment of City of Pittsburgh*, 141 A.2d 606, 611 (Pa. 1958).

94. Pursuant to Article I, Section 25 of the Pennsylvania Constitution, not even the Pennsylvania General Assembly has the authority to transgress the rights set forth in Article I. Furthermore, "...property owners have certain rights which are ordained, protected and preserved in our Constitution and which neither zeal nor worthwhile objectives can impinge upon or abolish." *In re Realen Valley Forge Greenes Associates*, 838 A.2d 718, 728 (Pa. 2003) (citing *Cleaver v. Bd. of Adjustment*, 200 A.2d 408, 413 n. 4 (Pa. 1964)).

95. When engaged in zoning, the Commonwealth must follow the same Constitutional mandate imposed upon municipalities when enacting zoning ordinances. Any limitations on what a landowner can do with their property, whether flowing from the state or local level, must be imposed directly for the benefit of the health, safety, morality or welfare of the surrounding community. "**[T]he test of constitutionality of a zoning ordinance is whether the health, safety, morals or general welfare of the inhabitants of the part of the community affected will be promoted by the application of the ordinances.**" *Best v. Zoning Bd. of Adjustment of City of Pittsburgh*, 141 A.2d 606, 610 (Pa. 1958) (emphasis added).

96. The Commonwealth's zoning regulations enacted pursuant to Act 13 allowing for drilling and impoundments as permitted uses by right in all zoning districts are unconstitutional under Article I, Section 1 of the Pennsylvania Constitution as an arbitrary act, and an unnecessary and unreasonable interference with property rights when enacted in violation of the Commonwealth's police power. Prior to enacting these zoning provisions, the Commonwealth failed to undertake **any** localized analysis attempting to comply with any municipal or state comprehensive plans, acknowledge or respect zoning districts, or adhere to the compulsory

constitutional considerations explained above when enacting legislation pursuant to its police power.

97. Because the Constitution protects property rights, the Commonwealth is empowered to infringe upon those rights through zoning powers only when such zoning will benefit the individual community. The Commonwealth **must** undertake an analysis to determine how the zoning regulation will benefit the local community's health, safety, morals or general welfare before any zoning regulation may be justified as an enactment pursuant to the Commonwealth's police power. This Constitutional "zoning standard" applies to all levels of government alike; the Commonwealth is likewise limited by constitutional restraints. *Exton Quarries, Inc. v. Zoning Bd. of Adjustment of West Whiteland Twp.*, 228 A.2d 169, 182 (Pa. 1967) (concurring opinion).

98. In order for zoning to be "lawful" and constitutional under Article I, Section 1, it "must be directed toward the community as a whole, concerned with the public interest generally, and justified by a balancing of community costs and benefits. These considerations have been summarized as requiring that **zoning be in conformance with a comprehensive plan** for growth and development of the community." *In re Realen Valley Forge Greenes Associates*, 838 A.2d 718, 729 (Pa. 2003). Zoning is not a mechanical exercise that can be accomplished without a diligent inquiry into the land and community to be zoned.

99. Because Act 13 has zoned the industrial activity of oil and gas operations in the same manner across the entire Commonwealth, it was entirely impossible for the legislature to undertake a truthful and meaningful analysis of how these activities would affect the health, safety and welfare each individual community in the Commonwealth. Clearly, what benefits a rural community on the Western side of the Commonwealth may be detrimental to an urban community on the Eastern side of the Commonwealth. "A regulatory zoning ordinance, which

would be clearly valid as applied to the great cities, might be clearly invalid as applied to rural communities.” *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387 (1926). Municipalities across Pennsylvania vary greatly in many respects, including topography, wind conditions, population density, and infrastructure. Yet, through Act 13, the Commonwealth has failed to account for or undertake any analysis regarding these drastic distinctions between various Commonwealth communities, essentially removing separate zoning districts that have been created at the direction of the same legislature pursuant to the MPC in violation of its police power.

100. There is no substantial relationship between: 1) the provisions of the Act that authorize industrial activity in residential and commercial zoning districts as permitted uses by right; and 2) each community’s comprehensive plan for orderly development. To the contrary, examination of the considerations used by the General Assembly to promote the legislation weigh in favor of the **oil and gas industry itself** rather than those property owners and citizens whose rights are constitutionally guaranteed and protected. The Pennsylvania legislature set out to create predictability and ease for the oil and gas industry as it navigates its business endeavors within the borders of local municipalities. Beyond its attempt to protect one particular industry, the legislature failed to otherwise demonstrate that the Act is a necessary tool to preserve public health, safety, morals or general welfare of Pennsylvania citizens. *Appeal of Lord*, 81 A.2d 533, 537 (Pa. 1951) (stating that property regulations must be “clearly necessary”). By contrast, the state of Texas also has been successfully experiencing shale drilling for years, yet local zoning remains in place demonstrating the lack of necessity for Act 13 and the obvious desire of the Pennsylvania legislature to demonstrate favorable treatment in Pennsylvania.

101. Act 13 thrusts upon municipalities the mandate that industrial uses be allowed in residential, agricultural, resource protection and commercial zones, frustrating the constitutional

rationale for the creation of separate zones. “The establishment of such districts or zones may, among other things, prevent congestion of population, secure quiet residence districts, expedite local transportation and facilitate the suppression of disorder, the extinguishment of fires, and the enforcement of traffic and sanitary regulations. The danger of fire and of contagion are often lessened by the exclusion of [industrial activities] from areas devoted to residences, and, in consequence, the safety and health of the community may be promoted.” *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 392 (1926).

102. Furthermore, any investigation into the individualized benefit of the law must encompass an accurate examination of the potential negative effects that inevitably come with introducing an industrial activity into varied residential, agricultural and commercial areas. Scientific evidence has shown that noise, odors, heavy truck traffic, open flames, workers living on-site, and potential harmful emissions may flow from those industrial sites into residential neighborhoods. Moreover, Washington County residential homeowners have requested and received reductions in the real estate tax assessment values of these homes when industrial applications associated with the oil and gas industry have moved within proximity. This will result in the future strain for a municipalities’ duty to maintain property values and a valid tax base.

103. In doing an evaluation on the effects of the health, safety, and general welfare of local communities while zoning, the Commonwealth failed to consider the following localized concerns associated with oil and gas operations, including:

a. **Condensate Tanks** (Pursuant to Act 13, tank batteries can be placed 300 feet from residential uses.)

i. Condensates are hydrocarbons in a semi-liquid state that are produced along with the natural gas at the well. Condensates are also composed of aromatic hydrocarbons such as benzene, toluene, xylene and ethyl-

benzene (“BTEX”). *See*, Sources of Oil and Gas Air Pollution, attached hereto as Exhibit 13.

- ii. The vapors of benzene, toluene and xylene are heavier than air and will accumulate in low lying areas. *Id.*
- iii. Toluene affects the reproductive and central nervous system. *See*, IARC Monograph of Toluene, attached hereto as Exhibit 14; *see also*, New York Dept. of Environmental Conservation, Division of Mineral Resources, Draft Supplemental Generic Environmental Impact Statement on the Oil, Gas and Solution Mining Regulatory Program, attached hereto as Exhibit 15.
- iv. Ethyl-benzene and xylene can have respiratory and neurological effects. *See*, IARC Monograph of Ethyl-Benzene, attached hereto as Exhibit 16; *see also*, IARC Monograph of Xylene, attached hereto as Exhibit 17; *see also*, TEDX, Health Effects Summary Statement, January 5, 2011, attached hereto as Exhibit 18.
- v. Children are particularly susceptible to chemical exposures and chemical exposures can cause severe, and in many cases irreversible, health effects. *See*, World Health Organization, Environmental Health Criteria 237, Principles for Evaluating Health Risks in Children Associated with Exposure to Chemicals, attached hereto as Exhibit 19; *see also*, American Academy of Pediatrics, Ambient Air Pollution: Health Hazards to Children, 2004, attached hereto as Exhibit 20.

**b. Glycol Dehydrates & Compressor Stations**

- i. Compressor stations remove water from the gas and compress gas to move it along pipelines, transporting it from site to site.
- ii. Compressor stations release aromatic organic chemicals into the air and also release benzene, toluene along with other volatile organic compounds. *See*, Sources of Oil and Gas Air Pollution, attached hereto as Exhibit 13.
- iii. A compressor station operator appearing before the Zoning Hearing Board for Petitioner, Cecil Township, testified as follows:

Q: Are there VOCs [volatile organic compounds] at compressor sites?

A: Yes, there is.

Q: And do you know how many tons per year are emitted from a compressor site?

A: I can tell you what our final build out would be for this site with eight engines and a maximum load it would be 19-and-a-half tons of VOCs a year.

....

Q: Do you know how far those emissions travel?

A: It would depend on your topography and upon the meteorological conditions whether it's a windy day or not. And then you say how far they could travel, you know, you would be talking about a certain concentration that could be associated with that.

*See, Cecil Township January 31, 2011 Zoning Hearing Board Transcript, attached hereto as Exhibit 21.*

c. **Flaring** (Pursuant to Act 13, can take place on a well pad that is 300 feet from residential uses.)

- i. Flaring is the practice of burning gas that is deemed uneconomical to collect and sell. Flaring is also used to burn gases that would otherwise present a safety problem. *See, Final Project Reprint: Oil and Gas Emission Inventories in Western States, Western Governors' Association, attached hereto as Exhibit 22.*
- ii. Flaring creates air pollution and releases of benzene, formaldehyde, polycyclic aromatic hydrocarbons (PAHs, including haphthalene), acetaldehyde, acrolein, propylene, toluene, xylenes, ethyl-benzene and hexane, many of which are listed hazardous substances and cancer causing agents. *Id.*
- iii. Sulfur dioxide is emitted during flaring of natural gas. It is regulated by the EPA as a criteria air pollutant and can cause severe health effects including, lung damage, respiratory illness, heart conditions and premature death. *Id.*
- iv. In fact, sulfur dioxide, also a neurotoxin, is so pervasive in drilling activities, a study in Texas demonstrated exposure to it could cause such severe health effects, based upon air disbursement mobility, that setbacks are recommended at least one (1) mile from all schools. *See, Fort Worth League of Neighborhoods, Recommendation for Policy Changes for Gas Drilling Near Schools, February 2011, attached hereto as Exhibit 23.*

d. **Impoundments** (Pursuant to Act 13, can be built as close as 300 feet to residential uses.)

- i. Impoundments are earthen pits several acres in size that contain flowback or produced water which can contain more than seven-hundred (700) chemicals from the hydraulic fracturing process, including extremely toxic and cancer-causing agents.
- ii. Such cancer-causing agents include, but are not limited to, benzene, lead, toluene, ethyl-benzene, xylene, 2-butoxyethanol, methanol (a hazardous air pollutant), and diesel fuel. *See, U.S. House of Representatives*

Committee on Energy and Commerce Minority Staff Report on Chemicals used in Hydraulic Fracturing, April 2011, attached hereto as Exhibit 24.

- iii. Additionally, many more chemicals that end up in these impoundments are completely unknown as to their toxicity, ability to cause cancer in human beings or acute health problems, because the companies injecting these fluids containing chemicals do not have access to the proprietary information about the products themselves. *Id.*
- iv. Over thirty-two (32) million gallons of diesel fuel or products containing diesel fuel has been injected as hydraulic fracturing fluid in nineteen (19) states in the United States between 2005 and 2009, including Pennsylvania. This fluid ultimately ends up in these open impoundments. *See, Fracking Investigation Reveals Millions of Gallons of Diesel Fuel Injected into Ground across the United States, attached hereto as Exhibit 25.*
- v. In spite of the known toxicity of diesel fuel components, namely BTEX (benzene, toluene, ethyl-benzene and xylene), companies performing hydraulic fracturing using diesel fuel have done so without a permit under the Safe Drinking Water Act, in violation of federal law. *Id.*
- vi. Hydraulic fracturing fluids also contain petroleum distillates, which have been found to contain up to ninety-three (93) times more benzene. Benzene is known to cause acute myeloid leukemia (“AML”) within as short a period of time as five (5) years from the date of a person’s first exposure to it. *See, Drilling around the Law, Environmental Working Group, EPA attached hereto as Exhibit 26; see also, IARC Monograph on Benzene, attached hereto as Exhibit 27.*
- vii. Many of the lighter more volatile chemicals and compounds being held in the impoundments, such as benzene, toluene and hydrogen sulfide, will escape from the fracturing fluid in the impoundment into the air. These chemicals may then be transported through the air, into nearby neighborhoods. *See, Final Project Reprint: Oil and Gas Emission Inventories in Western States, Western Governors’ Association, attached hereto as Exhibit 22; see also, Chemical and Biological Risk Assessment for Natural Gas Extraction in New York, attached hereto as Exhibit 28.*
- viii. Other significant contaminants created at these impoundment sites include carbon monoxide, hydrogen sulfide, nitrogen oxides, ozone, particulate matter, sulfide dioxide and volatile organic compounds. *Id.* Because of the release of these pollutants, hydrogen sulfide in particular, impoundments are associated with strong noxious odors smelling similar to rotten-eggs.



- ix. As a result of various factors, including hydrogen sulfide problems at impoundments, some impoundment operators use aeration systems that serve to further mobilize VOC's into the surrounding community.
- x. The Pennsylvania DEP itself conducted an air quality study which found benzene in the air around an impoundment above acceptable levels. *See*, Southwestern Pennsylvania DEP Study, attached hereto as Exhibit 29.

e. **Resources on general health effects**

- i. EPA Pavillion, Wyoming Study, attached hereto as Exhibit 30.
- ii. Earth Justice letter to Lisa P. Jackson, Administrator, EPA, August 4, 2011, attached hereto as Exhibit 31.
- iii. Human Health Risk Assessment of Air Emissions from Development of Unconventional Natural Gas Resources, Science of the Total Environment, attached hereto as Exhibit 32.

104. For Municipal Petitioners, such evidence should weigh heavily against allowing oil and gas operations as a permitted use by right in any district but industrial districts, including residential zoning districts, at times only a maximum of three-hundred (300) feet away from schools, playgrounds and homes.<sup>3</sup>

105. Additionally, other than the minimum setbacks written into the Act, the Commonwealth imposes no further restrictions on drilling activities – for example, there is no limitation to the number of impoundments or compressor stations that may be placed in any particular district; there is no limitation on the hours of operations of drill sites, impoundments and other facilities; and there is no limitation on the heavy truck traffic to and from these sites. *See*, Photographs of Multiple Impoundments and Compressor Stations, attached hereto as Exhibit 33. Impoundments can be typically expected to be in place for five (5) to ten (10) years or more. Moreover, as a permitted use by right, there is no forum or means for a municipality to minimize any negative consequences from surrounding uses.

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<sup>3</sup> The threat of explosions, fires, and spills of hazardous substances from oil and gas operations is well documented within the Commonwealth. *See*, *Commonwealth v. Fitzmartin*, 102 A.2d 893 (Pa. 1954).

106. As further evidence of the foregoing, the following is a sampling of recent headlines since Marcellus Shale drilling has entered the area:

- a. *DEP: Cabot Drilling Caused Methane in Lenox Water Wells*, January 9, 2012, The Times-Tribune, attached hereto as Exhibit 34.
- b. *Firm Continues Cleanup of Methanol Spill*, October 11, 2011, Pittsburgh Post-Gazette, attached hereto as Exhibit 35.
- c. *Danger Above and Below: Man Dies on the Job at Gas Well Site*, July 31, 2011, Pittsburgh Post-Gazette, attached hereto as Exhibit 36.
- d. *Marcellus Firm Fined for Failing to Report Spill*, June 28, 2011, Pittsburgh Post-Gazette, attached hereto as Exhibit 37.
- e. *Trucking Danger: The Drilling Industry Must Improve its Vehicles*, June 23, 2011, Pittsburgh Post-Gazette, attached hereto as Exhibit 38.
- f. *Pa. Report Links Gas Well Sites to Health Risks; Development Near Kids, Patients Cited*, May 6, 2011, Pittsburgh Post-Gazette, attached hereto as Exhibit 39.
- g. *Bradford County Shale Well Spews Fluids*, April 21, 2011, Pittsburgh Post-Gazette, attached hereto as Exhibit 40.
- h. *Three Burned at Marcellus Shale Drilling Site near Avella*, February 24, 2011, Pittsburgh Tribune-Review, attached hereto as Exhibit 41; *See also*, Photograph of Fire at Avella Drill Site, attached hereto as Exhibit 42.
- i. *Marcellus gas flare may burn for days*, June 9, 2010, Pittsburgh Post-Gazette, attached hereto as Exhibit 43.

107. The Commonwealth was constitutionally required to consider all of these variables prior to enacting any zoning regulation in a localized context in violation of its police power that serve to infringe on the health, safety and welfare of its citizens. Rather, in the case of Act 13, not only did the Commonwealth fail to adhere to the constitutionally mandated standard in recognition of its police powers – it failed to apply any standard whatsoever. Despite entering into the realm of zoning, it plainly ignored the Constitutional oversight and scrutiny that accompanies zoning activities. It would be a near impossibility to undertake the required analysis on a statewide basis, which highlights the logic and rationale for entrusting local governments to engage in all other zoning activities that allow for a localized analysis of the health, safety, morals and general welfare of their communities and comport with the Constitutional requirements of zoning as set forth in the MPC. Through Act 13, however, the Commonwealth has effectively usurped this responsibility from local governments and handed it over to the oil

and gas industry and oil and gas owners, many of who may not even be residents of the Commonwealth.<sup>4</sup> Through Act 13 the Commonwealth has zoned in a manner that fails to recognize community comprehensive plans, local community development objectives, varied zoning districts and consideration of the health, safety, welfare and morals of local communities. As a result, Act 13 is an improper use of the Commonwealth's police power and violates Article I, Section 1 of Pennsylvania Constitution and the 14<sup>th</sup> Amendment of the U.S. Constitution.

WHEREFORE, pursuant to Pa. R. Civ. Pro. 1602 and the Declaratory Judgments Act, 42 Pa.C.S.A. § 7532, *et seq.*, Petitioners respectfully demand judgment in their favor and against the Defendants as follows:

- I. For a decree declaring and adjudging that Act 13 is an unconstitutional violation of Article I, Section 1 of the Pennsylvania Constitution;
- II. For a decree to permanently enjoin future application of Act 13; and
- III. For such other relief as the Court may deem just and proper, including attorneys fees and costs.

## **COUNT II – DECLARATORY JUDGMENT**

### **Robinson Township et al. v. Commonwealth of Pennsylvania et al.**

- II. **Petitioners seek a declaration that Act 13 allows for incompatible uses in like zoning districts in derogation of municipalities' comprehensive zoning plans and therefore constitutes an unconstitutional use of zoning districts.**

108. All other paragraphs of this Petition are incorporated by reference as though set forth fully herein.

109. When zoning is constitutionally performed with the aim of benefitting the health, safety, morals or general welfare of a community, such a goal is routinely accomplished by placing compatible uses in like districts. *See, Village of Euclid v. Ambler Realty Co.*, 272 U.S.

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<sup>4</sup> The subsurface estate, including oil and gas, may be severed and owned separately and apart from the surface. As such, in many places within the Commonwealth oil and gas is owned by out-of-state individuals who have leased their oil and gas to out-of-state oil and gas companies. *Chartiers Block Coal Co. v. Mellon*, 25 A. 597, 599 (Pa. 1893).

365 (1926). An example of this can be seen through any traditional residential district which allowed for only traditionally residential activities as permitted uses by right within the district. Local ordinances which grouped together residential uses and disallowed industrial uses as a permitted use by right by right, including oil and gas drilling, withstand constitutional scrutiny and were previously designated as a valid use of the sovereign's police power prior to the enactment of Act 13. *See, Huntley & Huntley v. Borough of Oakmont*, 964 A.2d 855 (Pa. 2009).

110. In order for zoning to be constitutional and valid, it must be "in accordance with a rational and well considered approach to promoting safety, health and morals and a coordinated development of the whole municipality." *Atherton Development Company v. Township of Ferguson*, 29 A.3d 1197, 1204 (Pa. Commw. Ct. 2011) (quoting *Twp. of Plymouth v. Cnty. Of Montgomery*, 109 Pa. Commw. Ct. 200, 531 A.2d 49, 57 (1987)). Accordingly, lawful zoning "necessarily requires that the picture of the whole community be kept in mind while dividing it into **compatibly related zones** by ordinance enactments." *Id.*

111. When incompatible uses are placed in zoning districts with uses that are otherwise in conformity with each other, the Pennsylvania Supreme Court has termed the results as "spot zoning" and consistently held such zoning efforts unconstitutional. Specifically, "spot zoning ... is an arbitrary exercise of police powers that is prohibited by our Constitution. ... [T]he most important factor in an analysis of a spot zoning question is whether the rezoned land is being treated unjustifiably different from similar surrounding land." *In re Realen Valley Forge Greenes Associates*, 838 A.2d 718, 729 (Pa. 2003)(internal citations and quotations omitted). "[W]hen a municipal governing body puts on blinders and confines its vision to just one isolated place or problem within the community, disregarding a community-wide perspective, that body is not engaged in lawful zoning...." *Atherton Development Company*, 29 A.3d at 1204 (citing *Twp. of Plymouth v. Cnty. of Montgomery*, 531 A.2d 49, 57 (1987)).

112. The logical and practical extent of Act 13 will have the same effect as “spot zoning” in that it inevitably allows uses entirely incompatible with existing uses that are similar and compatible throughout varied zoning districts in the Commonwealth. As such, Act 13’s unjustified and unsupported forced injection of the industrial uses of oil and gas and related operations into every single zoning district in the Commonwealth is analogous to unconstitutional “spot zoning” and therefore subject to the same rationale. Allowing oil and gas operations as a permitted use by right in residential zoning districts is a “differing zoning treatment . . . which cannot be justified with reference to any of the community-wide concerns that serve as the legitimate basis for zoning in conformance with a comprehensive plan.” *In re Realen Valley Forge Greenes Associates*, 838 A.2d 718, 731n.7 (Pa. 2003).

113. The question becomes, “whether the lands at issue are a single, integrated unit and whether any difference in their zoning from that of adjoining properties can be justified with reference to the characteristics of the tract and its environs.” *In re Realen Valley Forge Greenes Associates*, 838 A.2d 718, 730 (Pa. 2003). Neither the General Assembly nor the legislation itself offers any justification for permitting incompatible, non-uniform uses within local zoning districts. There is no explanation as to why each particular locality within the Commonwealth is well suited to handle the introduction of industrial oil and gas operations into each and every one of its already-classified zones as a permitted use by right which affords no local analysis or due process rights for its citizens regarding potential negative consequences. As horizontal drilling allows for operations to take place over a distance of one (1) mile, and as impoundments are not necessary or even used by many drilling companies, the need to place such uses in non-compatible districts with no local oversight that could serve to add protective conditions unique to the area and terrain or deny the use, makes zoning laws and rules for this industry the exception and not the rule.

114. Despite the well-settled rule of law, Act 13 has unlawfully created a non-uniform class by mandating industrial activities in residential and other non-industrial areas. In any other instance, allowing and storing hazardous waste in an otherwise residential area would amount to unconstitutional “spot zoning.” The U.S. Supreme Court has stated that, “...the exclusion of buildings devoted to business, trade, etc., from residential districts bears a rational relation to the health and safety of the community. Some grounds for this conclusion are promotion of the health and security from injury of children and others by separating dwelling houses from territory devoted to trade and industry ... aiding the health and safety of the community, by excluding from residential areas the confusion and danger of fire, contagion, and disorder, which in greater or less degree attach to the location of stores, shops and factories.” *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 391 (1926). The inclusion of industrial uses in residential areas would have precisely the opposite effect and no longer be related to the protection of health, safety and welfare of the community or be seen as a proper use of the Commonwealth’s police power.

115. By allowing for oil and gas activities as a permitted use by right, the legislation essentially places drilling on par with other uses that are permitted within any zoning district. The inevitable result, however, is quite significant. For instance, because the density of oil and gas activities is not restricted, a single family home in a district zoned as residential could potentially end up surrounded by impoundments holding frack or flow-back water and dangerous chemicals only three-hundred (300) feet away on all sides essentially resulting in a “taking” by a municipality. Prior to Act 13, a municipality could have controlled such a scenario to ensure that the uses are compatible with the particular zoning district. Act 13 wholly strips this ability from the municipalities and denies local governments the ability to fulfill its statutory obligation to protect the health, safety and welfare of its citizens.

116. Rather than creating uniform classes within each zoning district as required by Section 605 of the MPC and Article I, Section 1 of the Pennsylvania Constitution, Act 13 singles out the oil and gas industry for special treatment necessarily leads to the anomaly of oil and gas drilling as permitted in nearly all zoning districts whether the other uses are compatible or not. Whereas other industrial uses are confined to industrial districts with like uses, according to the terms of Act 13, drilling activities which are inherently industrial in nature will now transcend all zoning boundaries.

117. The zoning classifications made in Act 13 are in direct contradiction to the zoning mandates laid down by the General Assembly, the U.S. and Pennsylvania Supreme Courts and memorialized in the MPC. 53 P.S. § 10101 et seq. Most importantly, because Act 13 allows zoning districts to contain entirely incompatible uses, it is an unconstitutional legislative act in violation of Article I, Section 1 of the Pennsylvania Constitution, is an arbitrary exercise of the Commonwealth's police power and serves to frustrate the Constitutional basis for zoning districts as it no longer bears a rational relation to the health, safety and welfare of the community.

WHEREFORE, pursuant to Pa. R. Civ. Pro. 1602 and the Declaratory Judgments Act, 42 Pa.C.S.A. § 7532, *et seq.*, Petitioners respectfully demand judgment in their favor and against the Defendants as follows:

- I. For a decree declaring and adjudging that Act 13 is an unconstitutional violation of Article I, Section 1 of the Pennsylvania Constitution;
- II. For a decree to permanently enjoin future application of Act 13; and
- III. For such other relief as the Court may deem just and proper, including attorneys fees and costs.

### **COUNT III – DECLARATORY JUDGMENT**

**Robinson Township et al. v. Commonwealth of Pennsylvania et al.**

**III. Petitioner seeks a declaration that Act 13 prevents local municipalities from meeting their Constitutional and statutory obligation to protect the health, safety, morals or welfare of local communities through zoning regulations in violation of the Municipalities Planning Code and Article I, Section 1 of the Pennsylvania Constitution.**

118. All other paragraphs of this Petition are incorporated by reference as though set forth fully herein.

119. In enacting zoning ordinances, the Commonwealth legislature through the MPC requires that the ordinance “give consideration to the character of the municipality, the needs of the citizens and the suitabilities and special nature of particular parts of the municipality.” 53 P.S. § 10603(a). If an individual municipality cannot designate which areas in its own community are appropriate for the development of oil and gas activities, it will lose the ability to carry out this statutory mandate encompassed by the MPC. Consequently, Act 13 prevents municipalities from meeting their obligations under the MPC.

120. The MPC places strict limitations on municipal officials requiring that zoning ordinances be enacted for only specific purposes in recognition of the property rights guaranteed by Article I, Section 1 of the Pennsylvania Constitution. *See*, 53 P.S. § 10604.

121. In permitting oil and gas and related operations essentially **everywhere in a municipality** Act 13 is inconsistent with existing Pennsylvania laws which recognize the principal role of **local government** in land use matters. Such laws are based upon the rationale that local governments are in the best position to make determinations of how to protect and promote the health, safety, welfare and morals of the community. The effect is that **all existing local ordinances, zoning schemes and comprehensive plans fall apart**. That is because the Commonwealth has made nearly all oil and gas operations permitted everywhere through Act 13, and consequently has placed the decision of where oil and gas operations will occur solely in the hands of individual gas owners and the oil and gas industry. Thus, a comprehensive zoning plan,



which fundamentally depends upon the predictability of like uses in certain districts and the ability of local governments to control the orderly development of their communities, ceases to function. As individual municipalities can now be faced with the prospect of having hundreds and thousands of wells, miles of pipeline, compressor stations and processing plants, and unlimited hazardous impoundments, zoning fails to serve its once deemed Constitutional function to protect the health and safety of the community by creating zoning districts that serve to separate non-compatible uses.

122. Act 13 usurps Pennsylvania's municipalities' ability to constitutionally employ their police power consistent with the mandates of the MPC to protect important community areas, such as residential neighborhoods, schools, community centers, lakes, cemeteries and parks. For instance, future plans for main street developments will be frustrated given the fact that industrial oil and gas activities may appear anywhere as permitted uses by right, especially if the gas owner is different from the surface owner. Yet, zoning regulations must be designed "[t]o accommodate reasonable overall community growth, including population and employment growth and opportunities for development of a variety of residential dwelling types and non-residential uses." *In re Realen Valley Forge Greenes Associates*, 838 A.2d 718, 729 (Pa. 2003) (citing 53 P.S. § 10604(5)) (emphasis added).<sup>5</sup>

123. Perhaps more significantly, because of Act 13's effect of undermining comprehensive plans and existing zoning districts, the General Assembly has placed municipalities in the unenviable and impossible position of having to choose between complying with Act 13 or taking actions to promote and protect the health, safety, welfare and morals of their citizens as mandated by the Pennsylvania Constitution and the MPC. Without question,

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<sup>5</sup> For instance, Mount Pleasant Township, which is the birthplace of the first Marcellus Shale well, has over one-hundred (100) wells drilled, numerous compressor stations and miles of pipeline. Allowing these operations without zoning controls negates orderly development, overall community growth and the ability or desire to increase residential housing in violation of the MPC.

complying with Act 13 and enacting ordinances that permit by right or allow conditionally industrial oil and gas operations, except processing facilities, in **every district** does not serve to benefit the health, safety, welfare and morals of citizens, frustrates orderly development and comprehensive plans required by the MPC, and therefore is not a Constitutional basis for zoning. As such, Act 13 places municipalities in an untenable position. By enacting laws consistent with Act 13, each municipality will violate its duties under the Pennsylvania Constitution and the MPC to zone for the benefit of the community and consistent with a comprehensive plan for orderly development. By enacting ordinances that violate Act 13, municipalities will face monetary sanctions that could bankrupt their communities.

124. To further illustrate the shift in power from local governments to the oil and gas industry, should an oil and gas company violate a local regulation, the MPC limits fines that a municipality may levy to no more than \$500.00 per day. 53 P.S. § 10617.2. By contrast, should the local government be found in violation of Act 13, the local government could be sanctioned with attorney's fees by the industry in excess of possibly \$1000.00 dollars per hour or more.

125. Where municipal officials previously exercised their proper police powers to ensure the safety of their residents, the oil and gas industry has been given a blank check and the ability to develop municipalities as industry deems fit without oversight or any regard for a municipalities' comprehensive plan, the tax base, orderly development or the people of the local community.

WHEREFORE, pursuant to Pa. R. Civ. Pro. 1602 and the Declaratory Judgments Act, 42 Pa.C.S.A. § 7532, *et seq.*, Petitioners respectfully demand judgment in their favor and against the Defendants as follows:

- I. For a decree declaring and adjudging that Act 13 is an unconstitutional violation of Article I, Section 1 of the Pennsylvania Constitution;
- II. For a decree to permanently enjoin future application of Act 13; and

- III. For such other relief as the Court may deem just and proper, including attorneys fees and costs.

#### COUNT IV – DECLARATORY JUDGMENT

##### **Robinson Township et al. v. Commonwealth of Pennsylvania et al.**

- IV. **Petitioners seek a declaration that Act 13 is a “special law” which creates unconstitutional distinctions between Pennsylvania municipalities and the drilling industry and other industries in violation of Article III, Section 32 of the Pennsylvania Constitution.**

126. All other paragraphs of this Petition are incorporated by reference as though set forth fully herein.

127. 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.

128. Article III, Section 32 of the Pennsylvania Constitution has been interpreted to require that like persons in like circumstances are treated similarly. *Pennsylvania Turnpike Com’n v. Com.*, 899 A.2d 1085, 1094 (Pa. 2006). Therefore, the General Assembly is prohibited from passing any “special law” for the benefit of one group to the exclusion of others. *See, Laplacca v. Philadelphia Rapid Transit Co.*, 108 A. 612 (Pa. 1919). The prohibition against special laws in the Pennsylvania Constitution is understood to include principles of equal protection. *Laudenberger v. Port Authority of Allegheny County*, 436 A.2d 147, 155 (Pa. 1981).

129. Any classification or distinction between groups made in the law 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.*, 899 A.2d 1085, 1094-1095 (Pa. 2006). In other words, 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. *In re Williams*, 234 A.2d 37, 41 (Pa. Super. 1967).

130. A classification may be deemed per se unconstitutional if the classified class consists of one type of member and is substantially closed to other members. *See, In re Williams*, 234 A.2d 37 (Pa. Super. 1967). Where the class to which a statute is made applicable is unnecessarily restricted or improperly selected, the law is “special,” and will be considered unconstitutional. When reviewing special legislation, a court is free to hypothesize the reasons the General Assembly might have had for employing the classification of certain groups. *Pennsylvania Turnpike Com’n v. Com.*, 899 A.2d 1085, 1095 (Pa. 2006).

131. The constitutional prohibition against special laws was adopted to put an end to privileged legislation enacted for private purposes. *Harrisburg School Dist. v. Hickok*, 761 A.2d 1132 (Pa. 2000).

#### **A. Uniformity of Local Ordinances - § 3304**

132. Section 3304 of Act 13 creates an unconstitutional distinction in violation of equal protection principles. Unlike every other citizen, business or industry seeking to establish operations in a local municipality, the oil and gas industry is not subject to different zoning standards as all other industrial uses are in the same municipality. For instance, all other industrial uses are generally confined to industrial districts. However, oil and gas companies are permitted to put an industrial use in any zoning district without any additional oversight or procedural constraints placed upon them. Moreover, unlike citizens who have limitations on how

they can develop parcels in residential districts, the oil and gas industry has been afforded greater rights. Such special treatment for a selected interest is the cornerstone of an unconstitutional “special law.”

133. The oil and gas industry is the only industry that is permitted to develop land in violation of the Pennsylvania Constitution and the MPC §§ 10601-10605. It can 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. Even more, unlike any other industry, the oil and gas industry has been permitted to develop without regard for the localized consideration of the health, safety, and general welfare of surrounding citizens and communities. *See*, § 10604. No other citizen, business, or industry has been granted such “special treatment” to act without any consideration for Constitutional considerations and their statutory embodiments set forth in the MPC<sup>6</sup>.

134. Section 3304 additionally provides that the local review period for oil and gas resources may not exceed thirty (30) days for permitted uses or one-hundred twenty (120) days for conditional uses. Therefore, Act 13 has the effect of requiring local permits to be issued within thirty (30) days in most cases. All other citizens or entities that desire to develop land in a district are required to follow the time constraints and procedures already set forth in the MPC. This special treatment demonstrates that the law benefits one group to the exclusion of others.

135. Although a use may be classified as “permitted” within a given zoning district, applications must still be filed; there are procedures that must be adhered to and standards of review that must be met. A thirty (30) day or one-hundred twenty (120) day time constraint

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<sup>6</sup> Furthermore, municipalities have the statutory ability to regulate air pollution. *See*, 35 P.S. § 4012(a) (“Nothing in this act shall prevent counties, cities, towns, townships or boroughs from enacting ordinances with respect to air pollution which will not be less stringent than the provisions of this act, the Clean Air Act ...”). Act 13 has removed this statutory power granted to municipalities to assist in the protection of the environment relative to regulations that may impact solely industrial oil and gas activities.

placed on municipalities essentially eliminates the opportunity for the subdivision and land development application process, eliminates any meaningful review by the municipality and the recourse for landowners to bring timely challenges. *See*, 53 P.S. § 10913.2. The designation of or approval of a “use” is the first step in the approval process that requires multiple reviews and oversight by elected officials, including necessary subdivision and land development review and preliminary and final site plan review by engineers, solicitors, planning commissions and elected officials.

136. In order to pass zoning ordinances or approve applications, municipal officials are required to consider the evidence introduced from these review processes and base their decision off the information gathered. If approval or the zoning ordinance is mandated regardless of the evidence gathered, rather than base the decision of the considerations provided, municipalities will be forced to turn a blind eye to any evidence brought forth in by a landowner in a public hearing or otherwise.

137. Pennsylvania courts have generally held 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 zoning procedures mandated by the MPC. *See, Luke v. Cataldi*, 932 A.2d 45 (Pa. 2007); *Glen-Gery Corp. v. Zoning Hearing Bd. of Dover Twp.*, 907 A.2d 1033 (Pa. 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*, 850 A.2d at 627. 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).

138. The effect of the Act's provision will be to permit landowners to retain their constitutionally protected due process and appeal rights for all zoning decisions **with the exception of those made regarding oil and gas activities where any such rights have been negated** as the thirty (30) day provision seems to suggest the thirty (30) day time period is dispositive and no appeal can follow, and that there is no meaningful participation in Public Hearings.

139. All other applicants, including all the taxpaying citizens of each municipality, must follow the process and the time frame set out by the MPC. Pursuant to the time constraints and directives of Act 13, the subdivision and land development application processes will become moot and the appeal process will be different for only one industry. For instance, when considering a conditional use application, the governing body is permitted to hold **hearings** (more than one) in order to determine whether a use will fit within established standards and criteria, and then render a written decision within forty-five (45) days of the last hearing. 53 P.S. § 10913.2. These provisions of the MPC will not apply to the oil and gas industry in light of Act 13. For all other applicants, there is no one-hundred (120) day limitation for conditional use approval or thirty (30) day timetable for permitted use appeals.

140. There exists no valid constitutional justification for making a classification which effectively exempts the oil and gas industry from local zoning procedures and appeal processes which are employed for the protection of the community. There are plenty of citizens and applicants that would welcome a pass from municipal oversight yet only the oil and gas industry has received such "special treatment."

141. The legislative history for Act 13 reveals that Act supporters touted the benefits of § 3304 as giving the oil and gas industry increased predictability and uniformity as it operates in various locales across the Commonwealth. However, the oil and gas industry is clearly not the

only industry that operates statewide and must comply with differing local regulations. Allowing the oil and gas industry to bypass that which others must comply with as a regular incident of doing business is a “special” consideration and distinction that cannot be justified on any legitimate, rational or constitutionally sufficient basis. The General Assembly has granted favor to an industry by providing it with special treatment not otherwise afforded to other industries or citizens.

142. The legislature cannot provide a reasonable relationship between the classification and the public benefit. When Article III, Section 32 became part of Pennsylvania’s Constitution in 1873, its purpose was to prevent the General Assembly from creating classifications in order to grant privileges to one person, one company or one county. *Wings Field Preservation Associates, L.P. v. Com. Dept. of Transportation*, 776 A.2d 311, 316 (Pa. Commw. Ct. 2001). Catering to an industry not in need of special protection was the initial catalyst for the Pennsylvanian equal protection constitutional amendment. *Harrisburg School Dist. v. Hickok*, 761 A.2d 1132, 1136 (Pa. 2000). Act 13 therefore achieves precisely what the Constitution prohibits.

143. The Act also creates an unconstitutional distinction between densely populated communities such as the City of Pittsburgh and more sparsely populated communities such as many of the Municipal Petitioners. Densely populated communities such as the City of Pittsburgh and its residents are afforded greater protection and/or privileges under Act 13 than more sparsely populated communities such as Municipal Petitioners and the residents therein.

144. The General Assembly has now mandated by the passage of Act 13 that the full maximum capacity of drilling activity – vertical and horizontal drilling or fracturing, along with the corresponding pipelines, compressor stations, impoundments, processing plants, etc. – must be permitted in nearly 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 basically relieved of the burden of drilling by virtue of the set back requirements. In effect, the more sparsely populated communities have now been directed by the General Assembly to shoulder this burden.

145. 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, these more densely populated communities and their residents are improperly selected to receive special or favorable treatment pursuant to Act 13 while more sparsely populated communities and their residents are left to bear the burden of “oil and gas operations.”

146. As set forth in great length herein, this burden includes, but is not limited to: drilling; drilling rigs and transportation of the same; flaring, including carcinogenic and hazardous emissions; damage to roads; an unbridled spider web of pipelines; 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.

147. The application of Act 13 impermissibly favors densely populated communities, such as the City of Pittsburgh or the City of Philadelphia, and their residents and affords greater protection and/or privileges in relation to oil and gas operations. Being that municipal governments are not permitted to prohibit drilling by way of zoning in residential districts, Act 13 lacks uniformity in violation of Article III, Section 32 of the Pennsylvania Constitution.

148. 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, nor does it exist in all parts of the Commonwealth. 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.

149. Any classification or distinction between groups or localities in law must seek to promote a legitimate state interest or public value, and bear a “reasonable relationship” to the object of the classification. *Pennsylvania Turnpike Commission, v. Com.*, 899 A.2d 1085, 1094-1095 (Pa. 2006). A classification will be struck down if it is based upon artificial or irrelevant distinctions used for the purpose of evading the constitutional prohibition. *See, Harrisburg School District v. Hickok*, 761 A.2d 1132, 1136 (Pa. 2000). The General Assembly has failed to set forth any basis whatsoever for the distinction between the diverse regions of the Commonwealth, including that between densely populated communities and sparsely populated communities.

#### **B. Attorney Fees and Costs - § 3307**

150. Section 3307 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 terms of the Act relating to local ordinances.

151. Given Act 13’s local ordinance review provisions, the Act’s “penalty” provisions place excessively onerous punishments upon local governments exclusively when dealing with regulation of the oil and gas industry. In most other cases, 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 the possibility of payment of hundreds of thousands of dollars in attorney’s fees and costs..

152. The practical effect of such penalty terms is to discourage local officials from passing laws regulating the oil and gas industry, even though they believe such regulations

would otherwise be in the best interests of the community and consistent with the law, which is their statutorily imposed duty. *See generally*, MPC, *supra*. 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 ultimately potentially being found personally liable if a surcharge action is implemented for failing to follow the strict statutory directives of Act 13.

153. Furthermore, Act 13 sets up a draconian scheme which makes it nearly impossible for local officials to comply with its terms. All zoning ordinances must comply with Act 13 within one-hundred twenty (120) days of its effective date. *See*, Act 13, at § 3309(b)(4). Failure to comply will result in Municipal Petitioners being subjected to enforcement actions with the threat of incurred costs and fees looming. Yet, Municipal Petitioners are also encouraged to submit their ordinances to the Public Utility Commission for an advisory opinion to determine whether it complies with the terms of Act 13. The Public Utility Commission has **one-hundred twenty (120) days** in which to render its decision. *See*, Act 13, at § 3305. Even if an ordinance is deemed valid by the Public Utility Commission at the end of its consideration period, municipalities still must comply with local advertising and hearing requirements before an ordinance can be amended or passed. Undoubtedly, municipalities will not be able to bring their ordinances into compliance within the allotted time frame. Not only are municipal officials forced to pass a new law, they are prohibited from enforcing current laws on the books leaving them without any viable option to avoid sanctions. This scheme virtually ensures that municipalities may be assessed penalties in any attempt to regulate the oil and industry, **even when it is done in compliance with the terms of Act 13.**

154. In addition, the sanction of attorney's fees is even more pronounced because of how Act 13's local ordinance review provisions interact. Section 3305(b) of Act 13 grants