

DELAWARE
RIVERKEEPER
NETWORK
FREQUENTLY
ASKED
QUESTIONS



For the Generations
Pure Water. Clean Air. Healthy Environment.

LEARN ABOUT THE PENNSYLVANIA SUPREME COURT'S DECISION

ROBINSON TOWNSHIP, DELAWARE RIVERKEEPER NETWORK, ET AL. V. COMMONWEALTH

Decided by the Pennsylvania Supreme Court Dec. 19, 2013

March, 2012, the Delaware Riverkeeper Network, seven municipalities, and Dr. Mehernosh Khan filed legal action challenging Act 13, which was signed into law by Governor Corbett on February 14, 2012. Act 13 amended the Pennsylvania Oil and Gas Act, and among other things, preempted municipal zoning of oil and gas development. The plaintiffs challenged the new law on the grounds it violated the Pennsylvania Constitution and endangered public health, natural resources, communities and the environment. On December 19, 2013, the Pennsylvania Supreme Court issued a final decision declaring portions of the law unconstitutional, giving the Environmental Rights Amendment of the Pennsylvania Constitution strong substantive importance, and remanding portions of the law for additional litigation. Since issuance of the PA Supreme Court decision there have been many questions asked about the substance, meaning and application of this precedent setting decision. The Delaware Riverkeeper Network and our legal counsel are working to answer these important questions for the community in a series of FAQ information sheets.

The Pennsylvania Supreme Court's decision in Robinson Township, Delaware Riverkeeper Network, et al. v. Commonwealth, 83 A.3d 901 (2013), reinforced that municipalities can validly zone oil and gas operations like any other industrial use. If a municipality has a zoning ordinance in place that identifies specific districts where this industrial activity is allowed, the municipality cannot allow drilling to occur where it is not permitted, even if a gas drilling company has a lease and even if the company has a permit from the Pennsylvania Department of Environmental Protection ("DEP").

In addition, when carrying out governmental functions, municipalities must comply with Article I, Section 27 of the Pennsylvania Constitution. This means that municipalities are restrained from unduly infringing on the individual environmental rights of citizens, just as municipalities may not unduly infringe on private property rights. Thus, municipalities cannot allow unchecked shale gas development at the expense of citizens' rights to clean air, pure water and a healthy environment.

Citizens who have been trying to protect their communities from unreasonable expansion of industrial gas development have confronted opposition from those who place corporate profits above public health and welfare. We hope that this series of FAQ responses helps strengthen community understanding of the PA Supreme Court decision.

FREQUENTLY ASKED QUESTIONS ABOUT THE CASE & ITS RAMIFICATIONS

Is the Pennsylvania Supreme Court's decision in the Act 13 case final?

Yes. Some people pushing for more drilling have apparently claimed that the Pennsylvania Supreme Court's recent decision in *Robinson Township, Delaware Riverkeeper Network, et al. v. Commonwealth*, 83 A.3d 901 (2013), might not be "final" and that it might still be overturned. There is no basis to any such suggestion.

The Act 13 decision declared Sections 3303 and 3304 of Act 13 of 2012 unconstitutional under Article I, Sections 1 and 27 of the Pennsylvania Constitution. When asked to reconsider this decision the Pennsylvania Supreme Court refused the opportunity to do so. Because the Pennsylvania Supreme Court is the highest court in the Commonwealth and because it was ruling on the subject of state law there is no court which can overturn the decisions rendered.

Section 3303 attempted to have state and federal environmental laws supersede municipal regulations. Section 3304 established a one-size-fits-all zoning framework that mandated every municipality to require industrial gas development in every zoning district in the Commonwealth. By finding these provisions unconstitutional, the Supreme Court reinforced that municipalities can validly zone oil and gas operations like any other industrial use. This was not the first case to reach this conclusion. Prior cases such as *Huntley & Huntley, Inc. v. Borough Council of the Borough of Oakmont*, 964 A.2d 855 (2009); *Range Res. Appalachia, LLC v. Salem Twp.*, 964 A.2d 869 (2009); and *Penneco Oil Company, Inc. v. County of Fayette*, 4 A.3d 722, 726 (Pa. Commw. Ct. 2010), cert. denied (Pa. 2012), each affirmed that municipalities can zone oil and gas development just like other industrial development.

It is beyond dispute that the Court's decision is final. On December 19, 2013, the Court issued its decision finding Sections 3303 and 3304 unconstitutional, and enjoining them. *Robinson Twp.*, 83 A.3d at 1000. On February 21, 2014, the Supreme Court reaffirmed its decision, denying the Commonwealth's request for reconsideration and their request to have the case reargued. February 21, 2014 Order of the Pennsylvania Supreme Court (Docket Nos. 63, 64, 72, and 73 MAP 2012). The Court remanded other issues to the Commonwealth Court that are separate from its final decision on Sections 3303 and 3304 of Act 13. *Robinson Twp., Delaware Riverkeeper Network, et al.*, 83 A.3d at 1000; March 13, 2014 Memorandum and Order of P.J.Pellegrini (Docket No. 284 MD 2012). Sections 3303 and 3304 remain enjoined as unconstitutional.

What does the Pennsylvania Constitution say about environmental rights?

Article I, Section 27 of the Pennsylvania Constitution states:

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

In interpreting the plain language of Section 27, the Pennsylvania Supreme Court has explained that Section 27 has two components that may overlap at times. The first component is that of individual environmental rights, while the second is the public trust. We summarize each below.

a) Individual Environmental Rights

The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment.

- Art. 1, Sec. 27, cl.1

The first clause of Section 27 is a statement that the Pennsylvania Constitution protects individual environmental rights from governmental infringement. The term "the people" translates to a right "personal to each citizen," just as Article I, Section 8 has been interpreted to mean an individual right of privacy. *Id.* at 951 n.39. Thus, each citizen has an individual right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. The Pennsylvania Constitution protects these rights in the same way as all other inherent rights enshrined in Article I,

including the right to free speech and property rights. Id. at 953-54

“The corollary of the people’s Section 27 reservation of right to an environment of quality is an obligation on the government’s behalf to refrain from unduly infringing upon or violating the right, including by legislative enactment or executive action.” Id. at 952 (emphasis added). In other words, Section 27 protects individual environmental rights from undue governmental infringement, just like other rights such as free speech, due process, and property rights.

b) Public Trust

Pennsylvania’s public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.

-Art. I, Sec. 27, cls. 2 & 3.

Section 27 recognized a public trust over Pennsylvania’s public natural resources, and charged the Commonwealth and its political subdivisions, as trustees. Id. at 951-52, 956-57, 977-78. As trustees, state and local governments are constrained to conserve and maintain public natural resources for the benefit of all Pennsylvania citizens, including generations yet to come. Id. at 954-59. Public natural resources, which form the body or corpus of the trust, include both publicly-owned resources such as state forest lands and local parks, and “those resources not owned by the Commonwealth, which involve a public interest,” which might include resources like groundwater. 1970 Pa. Legislative Journal-House, at 2271-72; see also *Robinson Twp.* 83 A.3d at 955.

As a trustee, municipalities have fiduciary duties that they owe to both present and future Pennsylvanians. Id. at 956-57, 977-78. (plurality). “The plain meaning of the terms conserve and maintain implicates a duty to prevent and remedy the degradation, diminution, or depletion of our public natural resources. As a fiduciary, the Commonwealth has a duty to act toward the corpus of the trust — the public natural resources—with prudence, loyalty, and impartiality.” Id. at 957. Two primary duties are “implicit” in the fiduciary relationship set forth by Section 27. These duties are both “prohibitory” and affirmative. Most notably, Section 27 prohibits government:

from performing its trustee duties respecting the environment unreasonably, including via legislative enactments or executive action. As trustee, the Commonwealth has a duty to refrain from permitting or encouraging the degradation, diminution, or depletion of public natural resources, whether such degradation, diminution, or depletion would occur through direct state action or indirectly, e.g., because of the state’s failure to restrain the actions of private parties.

Id. (emphasis added). Section 27 also requires government “to act affirmatively to protect the environment, via legislative action.” Id. at 958.

As to present and future Pennsylvanians, who are the beneficiaries of Section 27’s public trust, state and local governments have fiduciary duties “to deal impartially with all beneficiaries and, second,... to balance the interests of present and future beneficiaries.” Id. at 959. The duty of impartiality “means that the trustee must treat all equitably in light of the purposes of the trust,” which can touch on “questions of access to and distribution of public natural resources.” Id. Further, to treat present and future beneficiaries equitably means to balance their interests; in other words, “the trustee cannot be shortsighted.” Id. at 959 (plurality).

Can a municipality refuse to allow industrial gas development even if the Pennsylvania Department of Environmental Protection grants a permit?

Yes. While some people have claimed that a municipality must allow industrial gas development if DEP has issued a permit, this is incorrect. DEP permits do not override local zoning. The fact that DEP has issued a permit does not in any way limit a municipality’s authority or responsibility to ensure compliance with local ordinances, including zoning and subdivision and land development ordinances.

If a municipality has a zoning ordinance in place that identifies specific districts where this industrial activity is allowed, the municipality cannot allow drilling to occur where it is not permitted, even if a gas drilling company has a permit from the DEP. A municipality’s zoning, subdivision, and land development

processes are separate from DEP's process and from private contractual decisions. Just like every other land use, the issuance of a DEP permit does not allow a shale gas developer to move forward without complying with local zoning requirements. Indeed, if a developer does move forward in violation of local zoning, it faces a substantial risk of a lawsuit under Section 617 of the Municipalities Planning Code. 53 P.S. § 10617.

DEP permitting is a separate process from local zoning. In fact, rather than hamstringing local municipalities, DEP must consider and may rely on local zoning when it makes permitting decisions. Acts 67, 68, and 127 (see, e.g. 53 P.S. §§ 10619.2, 11006-A, 11105). Indeed, the courts have repeatedly cited the fact that DEP's process is focused on different issues than local zoning as a reason for why DEP permitting does not preempt local zoning. In striking down Section 3304 of Act 13, the Pennsylvania Commonwealth Court discussed the different purposes of zoning versus state environmental laws, saying that "our Supreme Court explained that while governmental interests involved in oil and gas development and in land-use control at times may overlap, the core interests in these legitimate governmental functions are quite distinct. The state's interest in oil and gas development is centered primarily on the efficient production and utilization of the natural resources in the state. Zoning, on the other hand, is to foster the orderly development and use of land in a manner consistent with local demographic and environmental concerns." *Robinson Twp., Delaware Riverkeeper Network, et al. v. Commonwealth*, 52 A.3d 463, 483 (Pa Commw. Ct. 2012) aff'd in part, rev'd in part by 83 A.3d 901 (Pa. 2013) (emphasis added).

The Pennsylvania Supreme Court in *Huntley & Huntley* stated:

By way of comparison, the purposes of zoning controls are both broader and narrower in scope. They are narrower because they ordinarily do not relate to matters of statewide concern, but pertain only to the specific attributes and developmental objectives of the locality in question. However, they are broader in terms of subject matter, as they deal with all potential land uses and generally incorporate an overall statement of community development objectives that is not limited solely to energy development. See 53 P.S. § 10606; see also *id.*, § 10603(b) (reflecting that, under the MPC zoning ordinances are permitted to restrict or regulate such things as the structures built upon land and watercourses and the density of the population in different areas). See generally *Tammy Hinshaw & Jaqualin Peterson*, 7 Summ. Pa. Jur.2d Property § 24:12 ("A zoning ordinance reflects a legislative judgment as to how land within a municipality should be utilized and where the lines of demarcation between the several use zones should be drawn."). More to the point, the intent underlying the Borough's ordinance in the present case includes serving police power objectives relating to the safety and welfare of its citizens, encouraging the most appropriate use of land throughout the borough, conserving the value of property, minimizing overcrowding and traffic congestion, and providing adequate open spaces. See Ordinance § 205-2(A).

Huntley & Huntley, Inc., 964 A.2d 855, 865 (Pa. 2009).

In the Act 13 decision, the Supreme Court affirmed that local conditions matter and must be considered when development is proposed for a property. In finding Sections 3303 and 3304 of Act 13 unconstitutional, the Court expressly found fault with the provisions' complete elimination of any local considerations, which traditionally has been accounted for at the local level via zoning. *Robinson Twp.*, 83 A.3d at 977-982 (plurality); *id.* at 1004-08 (Baer, J., concurring). As the court recognized, local environmental considerations are a crucial part of environmental decisionmaking in Pennsylvania that cannot be ignored without raising a significant risk of breaching trustee obligations. As the court stated:

In Pennsylvania, terrain and natural conditions frequently differ throughout a municipality, and from municipality to municipality. As a result, the impact on the quality, quantity, and well-being of our natural resources cannot reasonably be assessed on the basis of a statewide average. Protection of environmental values, in this respect, is a quintessential local issue that must be tailored to local conditions.

Id. at 979 (plurality).

Thus, the fact that DEP has issued a permit is not an excuse for a local municipality to ignore its own zoning regulations or shirk its constitutional obligations. When carrying out governmental functions, municipalities must comply with Article I, Section 27 of the Pennsylvania Constitution. This means that municipalities are restrained from unduly infringing on the individual environmental rights of citizens, just as municipalities may not unduly infringe on private property rights. Thus, municipalities cannot allow unchecked industrial shale gas development at the expense of citizens' rights to clean air and pure water. See, e.g., *Robinson Twp.*, 83 A.3d at 953-54, 960 (plurality); *Main St. Dev. Grp., Inc. v. Tinicum Twp. Bd. of Supervisors*, 19 A.3d 21 (Pa. Commw. Ct. 2011); rearg. denied (May 12, 2011), appeal denied 40 A.3d 123 (2012). Likewise, Section 27 restrains municipalities from allowing the unreasonable degradation, diminution, or depletion of public natural resources, including groundwater, surface water, aquatic life, and air quality. The Pennsylvania Constitution protects current and future citizens' rights to rely upon and enjoy these resources. *Id.*

Can a municipality lawfully prevent a leaseholder from having a gas well on his property?

Yes. People with gas leases sometimes level the threat that it would be an unconstitutional "taking" to limit unconventional gas development to industrial districts and that municipalities can't prevent anyone with a lease from having his/her minerals developed. This is simply untrue. In reality, a municipality exposes itself to a constitutional challenge if it were to cede to the demands of the drillers and turn the whole community into an industrial zone.

Lawful zoning balances the rights of all in the community, not just those with gas interests. The courts have repeatedly held that it is constitutional to use zoning to protect the character of a community, including its residential areas, agricultural lands, schools, hospitals, and natural resources. *Miller & Son Paving, Inc. v. Wrightstown Twp.*, 451 A.2d 1002, 1006 (Pa. 1982). Indeed, to be lawful, zoning "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." *In re Realen Valley Forge Greenes Associates*, 838 A.2d at 729.

As a general rule, in order to prove that zoning would constitute an unconstitutional "taking", the proponents of this industrial activity would have to show either: 1) that the zoning eliminates all economically beneficial or productive use of the property; *Machipongo Land & Coal Co., Inc. v. Com.*, 799 A.2d 751 (Pa. 2002); or 2) that the zoning is not substantially related to a valid exercise of government authority such as promoting the public health, safety or welfare. *In re Realen Valley Forge Greenes Associates*, 838 A.2d 718, 728 (Pa. 2003); *C & M Developers, Inc. v. Bedminster Township Zoning Hearing Board*, 820 A.2d 143, 150 (Pa. 2002) ("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."); *Machipongo Land & Coal Co., Inc. v. Com.*, 799 A.2d 751 (Pa. 2002); *Boundary Drive Associates v. Shrewsbury Twp. Bd. of Sup'rs*, 491 A.2d 86, 90 (Pa. 1985); *Gaebel v. Thornbury Tp., Delaware County*, 303 A.2d 57, 60 (Pa. Commw. Ct. 1973). Enacting zoning to protect the public health, safety, and welfare; the character of residential and other non-industrial zones; and local water supplies and open space would not meet either of these tests and therefore would not constitute an unconstitutional taking. See *Robinson Township, Delaware Riverkeeper Network, et al. v. Commonwealth*, 83 A.3d 901 (2013); *Robinson Twp., Delaware Riverkeeper Network, et al. v. Commonwealth*, 52 A.3d 463 (Pa. Commw. Ct. 2012); *Penneco Oil Company, Inc. v. County of Fayette*, 4 A.3d 722, 726 (Pa. Commw. Ct. 2010), cert. denied (Pa. 2012).

Having zoning limitations on surface unconventional gas development does not eliminate all economically beneficial or productive use of the properties in areas where surface development is prohibited. Many other lawful uses of the property will remain, including residential, agricultural, and commercial uses, depending on the district. No one has a constitutionally-protected right to put their land to the most profitable one. See *Rogin v. Bensalem Twp.*, 616 F.2d 680, 690, 692 (3d Cir. 1980); see also *Machipongo Land & Coal Co., Inc.*, 799 A.2d 751, 764 (Pa. 2002); *Miller & Son Paving, Inc. v. Wrightstown Twp.*, 451 A.2d 1002, 1006 (Pa. 1982).

Consequently, even if zoning were to prohibit gas drilling in all but industrial zoning districts, property owners could still use and enjoy their property in other ways. Indeed, the courts have long recognized that farmland has value and that the protection of agricultural land from development is a valid and appropriate basis for zoning. *In re Petition of Dolington Land Grp.*, 839 A.2d 1021, 1035 (Pa. 2003), *Boundary Drive Associates*, 491 A.2d at 90.

No one – not even those property owners with gas leases – can dispute that some economic use of these properties will exist under zoning that prohibits surface unconventional gas development in certain zoning districts. Indeed, a property owner who cannot engage in surface development of oil and gas owned could still receive royalties from her lease if the gas is accessed via a horizontal wellbore developed on a property outside of a protected zone. Compare Appeal of Mut. Supply Co., 77 A.2d 612, 614 (Pa. 1951). Further, just because a property owner signs a lease to allow a nuclear power plant to be built on her land, it does not mean the Township has to allow a nuclear power plant on that parcel. Likewise, just because someone has a contract to operate a quarry on their property does not mean the Township must allow that to occur in violation of existing zoning.

Furthermore, using zoning to limit shale gas development to locations deemed most appropriate by a Township is absolutely a clear, defensible and valid use of the police power in order to protect public health, safety, and welfare. The Pennsylvania Supreme Court and Commonwealth Court have repeatedly upheld the ability of municipalities to use zoning to place industrial development – including oil and gas development – in industrial zones and away from residential districts, agricultural zones, and sensitive natural resources. Robinson Township, Delaware Riverkeeper Network, et al. v. Commonwealth, 83 A.3d 901 (Pa. 2013); Huntley & Huntley, Inc. v. Borough Council of the Borough of Oakmont, 964 A.2d 855 (Pa. 2009); Range Res Appalachia, LLC v. Salem Twp., 964 A.2d 869 (2009); and Penneco Oil Company, Inc. v. County of Fayette, 4 A.3d 722, 726 (Pa. Commw. Ct. 2010), cert. denied (Pa. 2012).

Municipalities must balance a gas leaseholder’s property rights with constitutionally-protected rights to clean air and pure water, and with the rights of present and future generations to healthy public natural resources. Robinson Township, Delaware Riverkeeper Network, et al. v. Commonwealth, 83 A.3d 901 (Pa. 2013). Likewise, municipalities must balance the property rights of all those in a community, as all community members – not just those with gas leases – have a right to the use and enjoyment of their property. To comply with these constitutional mandates, a municipality simply cannot allow industrial gas development on every property where there is a lease.

Is unconventional shale gas development an industrial activity?

Yes. Unconventional gas development is a heavy industrial use that brings round-the-clock noise and light, dust, flaring, truck traffic, risks of explosion and industrial-scale emergencies, including evacuations.

Indeed, the nature and extent of unconventional shale gas development is markedly different than the vertical (“conventional”) wells that have at times been found in parts of Pennsylvania. In contrast to the relatively small footprint and simple process involved in conventional well drilling,¹ shale gas well development requires at least five (5) or more acres, multiple laterals, repeated high-volume hydraulic fracturing, staging areas, and all the equipment necessary to that development, including trucks, cranes, numerous compressors to supply the required horsepower for the fracking operations, chemicals, and explosives. There is significantly more waste and wastewater to handle because of the number of wellbores and the high-volume hydraulic fracturing process. Further, due to laterals, more opportunity exists for accidents such as the recent one in Connoquenessing Township, in which XTO drilled into a mine shaft, releasing mine drainage into a nearby creek.

The hydraulic fracturing process on an unconventional shale gas well requires explosive charges to perforate the well casing, and a mixture of millions of gallons of water, fine sand (or another type of “proppant”) to hold open the fractures, and large quantities of different chemicals, including many carcinogenic, toxic and hazardous substances. One unconventional well may use several million gallons of water. The process also requires an extraordinarily large amount of hydraulic horsepower² in order to pump the fracturing mixture into the approximately mile-deep wellbore and out through the perforated casing at a pressure high enough to fracture the shale and to allow gas to flow.

1 Fracking: A Look Back, “Likewise, the hydraulic horsepower (hhp) needed to pump fracking material has risen from an average of about 75 hhp in the early days to an average of more than 1,500 hhp today, with big jobs requiring more than 10,000 hhp.” <https://www.asme.org/engineering-topics/articles/fossil-power/fracking-a-look-back>; https://www.museumoftheearth.org/files/marcellus/Marcellus_issue6.pdf

2 Fracking: A Look Back, <https://www.asme.org/engineering-topics/articles/fossil-power/fracking-a-look-back> These greater horsepower requirements mean more emissions and noise per wellpad, given the compressor engines required for horsepower generation during the fracturing process.

An unconventional well can be fractured multiple times, and this process is then multiplied by the number of wells on a particular wellpad. Further, an operator may decide to return several years later to drill a well deeper and engage in additional high-volume hydraulic fracturing to gather more gas from an already-drilled well, creating disruptions well into the future. As a result, a single unconventional gas site with multiple wellbores may require, over the entire development process, thousands of water trucks, hundreds of chemical storage trailers, numerous compressor engines, storage of explosives, sand-mixing trucks, monitoring equipment, and other vehicles and equipment in order to execute the fracturing process and fully develop all the wells on the wellpad. During that time, the site may also contain large impoundments of hazardous wastewater. A shale gas wellpad could take at least a year, if not two or more, to develop from start to finish. The well site remains indefinitely with various pipes, valves, and tanks that require servicing throughout the life of each well.

Unconventional gas development has a lasting impact on the landscape and the community including by its fragmentation and destruction of agricultural and other open space land; the removal of land from other types of development or preservation; the continued ability to return to the well to frack it years later given the sharp decline of natural gas from unconventional gas wells; and a negative impact on property values, especially for those who rely on local groundwater supplies.

The Supreme Court's decision in the Act 13 case explicitly recognized the industrial nature of unconventional gas development. As the court noted:

The industry uses two techniques that enhance recovery of natural gas from these “unconventional” gas wells: hydraulic fracturing or “fracking” (usually slick-water fracking) and horizontal drilling. Both techniques inevitably do violence to the landscape. Slick-water fracking involves pumping at high pressure into the rock formation a mixture of sand and freshwater treated with a gel friction reducer, until the rock cracks, resulting in greater gas mobility. Horizontal drilling requires the drilling of a vertical hole to 5,500 to 6,500 feet - several hundred feet above the target natural gas pocket or reservoir - and then directing the drill bit through an arc until the drilling proceeds sideways or horizontally. One unconventional gas well in the Marcellus Shale uses several million gallons of water.

The public natural resources implicated by the “optimal” accommodation of industry here are resources essential to life, health, and liberty: surface and ground water, ambient air, and aspects of the natural environment in which the public has an interest. As the citizens illustrate, development of the natural gas industry in the Commonwealth unquestionably has and will have a lasting, and undeniably detrimental, impact on the quality of these core aspects of Pennsylvania's environment, which are part of the public trust.

By any responsible account, the exploitation of the Marcellus Shale Formation will produce a detrimental effect on the environment, on the people, their children, and future generations, and potentially on the public purse, perhaps rivaling the environmental effects of coal extraction.

Insofar as Section 3304 permits the fracking operations and exploitation of the Marcellus Shale at issue here, the provision compels exposure of otherwise protected areas to environmental and habitability costs associated with this particular industrial use: air, water, and soil pollution; persistent noise, lighting, and heavy vehicle traffic; and the building of facilities incongruous with the surrounding landscape.

Robinson Township, Delaware Riverkeeper Network, et al. v. Commonwealth, 83 A.3d 901, 915, 975, 976, 979 (Pa. 2013).

Municipalities must balance property rights with constitutionally-protected rights to clean air and pure water, and with the rights of present and future generations to healthy public natural resources. Robinson Township, Delaware Riverkeeper Network, et al. v. Commonwealth, 83 A.3d 901 (Pa. 2013). Likewise, municipalities must balance the property rights of all those in a community, as all community members - not just those with gas leases - have a right to the use and enjoyment of their property.

To comply with these constitutional mandates, a municipality simply cannot allow industrial gas development in non-industrial areas.

Are municipalities restricted from allowing industrial gas development activity in non-industrial zoning districts?

Yes. Municipal officials who allow industrial gas development in non-industrial zoning districts risk constitutional claims for violating citizens' due process rights and for violating citizens' rights under the Pennsylvania Constitution's Environmental Rights Amendment. Each of these issues will be addressed in turn.

a) Allowing industrial gas development in non-industrial zoning districts exposes municipal officials to constitutional claims for violation of property owners' due process rights

Allowing industrial uses in a non-industrial zoning district exposes municipal officials to claims that they have violated constitutional due process guarantees.

The Pennsylvania and United States Constitutions require that for any zoning to be constitutional it must promote the public health, safety, morals, or welfare, and be substantially related to the protecting or furthering that interest. In *re Realen Valley Forge Greenes Associates*, 838 A.2d 718, 728 (Pa. 2003); *C & M Developers, Inc. v. Bedminster Township Zoning Hearing Board*, 820 A.2d 143, 150 (Pa. 2002); *Boundary Drive Associates v. Shrewsbury Twp. Bd. of Sup'rs*, 491 A.2d 86, 90 (Pa. 1985). "Lawful zoning 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." In *re Realen Valley Forge Greenes Associates*, 838 A.2d 718, 729 (Pa. 2003). A municipality violates its constitutional obligations if it fails to balance citizens' sometimes competing constitutional rights to the use and enjoyment of property - both of those who would develop their properties, and those who wish to protect theirs. Article I, Section 1 of the Pennsylvania Constitution. *Robinson Twp.*, 83 A.3d at 1007-08 (Baer, J., concurring); *Robinson Twp. v. Com.*, 52 A.3d 463, 484-85 (Pa. Commw. Ct. 2012) *aff'd in part, rev'd in part sub nom. Robinson Twp., Delaware Riverkeeper Network, et al. v. Com.*, 83 A.3d 901 (Pa. 2013).

Allowing new industrial uses in a non-industrial zoning district can be the basis for a claim that municipal officials are violating these due process principles. Such municipal action injects uses that are incompatible with the purpose of the zoning district, thereby upsetting the established expectations of those who live there. See *Robinson Twp., Delaware Riverkeeper Network, et al. v. Com.*, 83 A.3d 901, 979 (Pa. 2013)(plurality); *id.* at 1004-05, 1006-07 (Baer, J., concurring); *Robinson Twp. v. Com.*, 52 A.3d 463, 484-85 (Pa. Commw. Ct. 2012) *aff'd in part, rev'd in part*, 83 A.3d 901 (Pa. 2013). Industrial uses, with detrimental impacts on health, safety, welfare, property values, and public natural resources, do not fit into zones set aside for other types of uses, including residential uses and conservation of natural resources for future generations. See *Robinson Twp. v. Com.*, 52 A.3d 463, 484-85 (Pa. Commw. Ct. 2012) *aff'd in part, rev'd in part*, 83 A.3d 901 (Pa. 2013). By allowing industrial operations in areas set aside for non-industrial land uses, the municipality fails to further the very purposes underlying the non-industrial zoning district, and makes the district irrational.

To illustrate, allowing a new asphalt plant, a surface coal mine, or a quarry into an agricultural zone would destroy soils set aside for agriculture and would increase the risk of water contamination and depletion. In agricultural zones, water resources are important for irrigation, livestock, and drinking water. Such new industrial land uses would also bring truck traffic, dust, and the risk of industrial accidents that could threaten the lives and livelihoods of those who live and work nearby.

Similarly, placing a refinery in an open space zone would upset the expectation that the zone will be set aside for resource protection, recreation, and/or scenic values. Further, those who moved into the zone, and invested in their properties with the expectation that the surrounding land uses would be compatible would now face a situation in which their investments are diminished more so than their neighbors who happen not to live next to the property where the incompatible use is allowed. *Robinson Twp., Delaware Riverkeeper Network, et al. v. Com.*, 52 A.3d at 484-85 (Pa. Commw. Ct. 2012) *aff'd in part, rev'd in part*, 83 A.3d 901 (Pa. 2013).

Likewise, allowing an unconventional gas well into a residential zone would bring non-stop lighting, flaring, truck traffic, dust, noise, chemical emissions, and other materials that disrupt the zone's purpose of being set aside for quiet, low-traffic areas where children can play, and people can rest after a hard day's work. See *Robinson Twp.*, 83 A.3d at 1005 (Baer, J., concurring).

Allowing incompatible uses together makes the zoning classifications arbitrary, undermines the rationality of the ordinance, and is therefore vulnerable to constitutional challenge. It is irrational to allow an incompatible land use in a zone that was established to achieve a non-industrial character, development and conservation goals. *Id.*; *Robinson Twp.*, 83 A.3d at 1005, 1007-08 (Baer, J., concurring).

b) Allowing industrial gas development in non-industrial zoning districts exposes municipal officials to legal challenge for violating the Pennsylvania Constitution's Environmental Rights Amendment

Allowing industrial uses in a non-industrial zoning district exposes municipal officials to claims that they have violated the Pennsylvania Constitution's Environmental Rights Amendment.

Municipalities have constitutional obligations to respect their citizens' constitutional right to "an environment of quality" and their constitutional "right to benefit from" their public natural resources. Pa. Const. Article I, Section 27; *Robinson Twp., Delaware Riverkeeper Network, et al. v. Com.*, 83 A.3d 901, 976 (Pa. 2013). Municipal officials also have fiduciary duties as trustees of the public's public natural resources "to refrain from permitting or encouraging the degradation, diminution, or depletion of public natural resources, whether such degradation, diminution, or depletion would occur through direct state action or indirectly, e.g., because of the state's failure to restrain the actions of private parties." *Robinson Twp.*, 83 A.3d at 957 (plurality).

In *Robinson Township*, the Supreme Court struck down a state law that would have placed industrial activity in every zoning district in every municipality. The Court found that such legislation violates the Environmental Rights Amendment. In reaching this holding, the Court stated, "a new regulatory regime permitting industrial uses as a matter of right in every type of pre-existing zoning district [including residential and agricultural] is incapable of conserving or maintaining the constitutionally-protected aspects of the public environment and of a certain quality of life." *Robinson Twp.*, 83 A.3d at 979.

Placing industrial uses in areas designated for non-industrial uses degrades the local environment in which people live, work, and recreate, including the public natural resources on which people rely. It does so by exposing "otherwise protected areas to environmental and habitability costs associated with this particular industrial use: air, water, and soil pollution; persistent noise, lighting, and heavy vehicle traffic; and the building of facilities incongruous with the surrounding landscape." *Robinson Twp.*, 83 A.3d at 979. In addition, "some properties and communities will carry much heavier environmental and habitability burdens than others" by virtue of the haphazard placement of industrial operations. *Id.* at 980. "This disparate effect is irreconcilable with the express command that the trustee will manage the corpus of the trust for the benefit of 'all the people.' Pa. Const. Art. I, § 27." *Id.*

Municipalities cannot simply allow unfettered development. Municipalities must balance development against conserving the natural resources. The courts will strike down municipal zoning ordinances that do not strike an appropriate balance. *Main St. Dev. Grp., Inc. v. Tinicum Twp. Bd. of Supervisors*, 19 A.3d 21 (Pa. Commw. Ct. 2011); reargument denied (May 12, 2011), appeal denied 40 A.3d 123 (2012). Municipalities must balance competing interests and cannot favor some to the exclusion of others. See, e.g., *Robinson Twp.*, 83 A.3d 901, 953-54, 960 (plurality). Allowing industrial development throughout a municipality simply fails to reflect that municipal officials have conducted the constitutionally-required balancing.

Such a failure exposes municipalities and their officials to a legal challenge for violation of citizens' constitutional environmental rights. *Robinson Twp.*, 83 A.3d at 951-52, 956-57, 974-75, 977-78. As the Supreme Court held in *Robinson*, the rights guaranteed in the Environmental Rights Amendment are on a par with our other inherent political rights, including our private property and free speech rights. *Id.* at 953-54. Just as citizens may vindicate those political rights in the courts, so too may citizens vindicate their rights and hold government officials accountable under the Environmental Rights Amendment. *Id.* at 951-52, 956-57, 974-75, 977-78.

Do government officials have an obligation - before acting - to determine whether the proposed action will cause an unreasonable degradation of our air and water?

Yes. The Pennsylvania Constitution limits government officials from acting when they have not determined in advance whether the proposed activity will cause an unreasonable degradation of our environment.

Under Article I, Section 27 of the Pennsylvania Constitution, state and local government officials have an obligation to assess whether any proposed project, law, regulation or ordinance would cause unreasonable “actual or likely degradation” of air or water quality, or other protected constitutional features, such as natural and scenic values of the environment. *Robinson Twp. v. Com.*, 83 A.3d 901, 951-955 (Pa. 2013)(plurality). If a governmental entity fails to perform the analysis, or allows development to proceed that would cause unreasonable “actual or likely degradation,” it raises a significant risk of a Section 27 challenge by citizens. *Id.* (“The failure to obtain information regarding environmental effects does not excuse the constitutional obligation because the obligation exists a priori to any statute purporting to create a cause of action.”); see also *id.* at 951 (stating that clause 1 “implicates a holistic analytical approach to ensure both the protection from harm or damage and to ensure the maintenance and perpetuation of an environment of quality for the benefit of future generations.”)

Further, as a trustee, government officials must consider before acting whether the proposed action will lead to the “degradation, diminution, or depletion” of the people’s public natural resources either now, or in the future. *Id.* at 952, 957, 959 & n.46; see also *id.* at 959 n.45, 20 Pa.C.S. § 7203(a) & (c) (5); *In re Scheidmantel*, 868 A.2d 464, 492 (Pa. Super. Ct. 2005) (“trustee’s action must represent an actual and honest exercise of judgment predicated on a genuine consideration of existing conditions”); 20 Pa.C.S. § 7773. Likewise, government officials must consider whether the proposed action places higher environmental burdens on some citizens than others, which would violate a trustee’s duty of impartiality to treat the beneficiaries “equitably in light of the purposes of the trust.” *Id.* at 957, 959, 980. Section 27 specifically establishes a preference for protecting the natural quality of the environment and its benefits over development and disturbance, requiring that the government officials take the same focus and care in their actions. *Id.* at 973 n.55.

But simply performing the analysis is not enough – it is not enough to undertake the exercise of considering environmental impacts, the court’s decision also includes an affirmative obligation to ensure protection of the public’s environmental rights. As a trustee, municipalities have fiduciary duties that they owe to both present and future Pennsylvanians. *Id.* at 956-57, 977-78. (plurality). “The plain meaning of the terms conserve and maintain implicates a duty to prevent and remedy the degradation, diminution, or depletion of our public natural resources. As a fiduciary, the Commonwealth has a duty to act toward the corpus of the trust — the public natural resources — with prudence, loyalty, and impartiality.” *Id.* at 957. Two primary duties are “implicit” in the fiduciary relationship set forth by Section 27. These duties are both “prohibitory” and affirmative. Most notably, Section 27 prohibits government: from performing its trustee duties respecting the environment unreasonably, including via legislative enactments or executive action. As trustee, the Commonwealth has a duty to refrain from permitting or encouraging the degradation, diminution, or depletion of public natural resources, whether such degradation, diminution, or depletion would occur through direct state action or indirectly, e.g., because of the state’s failure to restrain the actions of private parties.

Id. (emphasis added).Section 27 also requires government “to act affirmatively to protect the environment, via legislative action.” *Id.* at 958.

Primary author of this document is attorney Jordan Yeager. Jordan Yeager is Partner and Chair of the Environmental and Public Sector Section at Curtin & Heefner LLP. Jordan was lead counsel for the Delaware Riverkeeper Network in the case: *Robinson Township, Delaware Riverkeeper Network, et al. v. Commonwealth*, 83 A.3d 901 (2013). Jordan was lead counsel on the issues involving the Delaware Riverkeeper and the Delaware Riverkeeper Network’s standing and the Environmental Rights Amendment (Article I, Section 27) of the Pennsylvania Constitution.

Disclaimer: This information is intended to assist you in learning more about these important issues. Each situation is unique and the law is frequently changing, so you should consult with an attorney concerning your particular situation before taking any action or making any decisions.

Date: June 19, 2014



For the Generations

Our right to pure water, clean air and a healthy environment are inherent, inalienable and fundamental rights retained by the people of all Generations. There can be no life, liberty or happiness without a healthy environment.

www.forthegenerations.org

Facebook: For The Generations Phone: 215.369.1188

c/o Delaware Riverkeeper Network
925 Canal Street 7th Fl Suite 3701
Bristol, Pennsylvania 19007