[J-127A-D-2012] [OAJC: Castille, C.J.]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

ROBINSON TOWNSHIP, WASHINGTON COUNTY, PENNSYLVANIA, BRIAN COPPOLA, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS SUPERVISOR OF ROBINSON TOWNSHIP, TOWNSHIP OF NOCKAMIXON, BUCKS COUNTY, PENNSYLVANIA, TOWNSHIP OF SOUTH FAYETTE, ALLEGHENY COUNTY, PENNSYLVANIA, PETERS TOWNSHIP, WASHINGTON COUNTY, PENNSYLVANIA, DAVID M. BALL, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS COUNCILMAN OF PETERS TOWNSHIP, TOWNSHIP OF CECIL, WASHINGTON COUNTY, PENNSYLVANIA, MOUNT PLEASANT TOWNSHIP, WASHINGTON COUNTY, PENNSYLVANIA, BOROUGH OF YARDLEY, BUCKS COUNTY, PENNSYLVANIA, DELAWARE RIVERKEEPER NETWORK, MAYA VAN ROSSUM, THE DELAWARE RIVERKEEPER, MEHERNOSH KHAN, M.D.	: No. 63 MAP 2012 : : Appeal from the order of Commonwealth Court at No. 284 MD 2012 dated July 26, 2012. : : ARGUED: October 17, 2012
v.	:
COMMONWEALTH OF PENNSYLVANIA, PENNSYLVANIA PUBLIC UTILITY COMMISSION, ROBERT F. POWELSON, IN HIS OFFICIAL CAPACITY AS CHAIRMAN OF THE PUBLIC UTILITY COMMISSION, OFFICE OF THE ATTORNEY GENERAL OF PENNSYLVANIA, KATHLEEN KANE, IN HER OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA, PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION AND E. CHRISTOPHER ABRUZZO, IN HIS	:

OFFICIAL CAPACITY AS SECRETARY OF THE DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
APPEAL OF: PENNSYLVANIA PUBLIC UTILITY COMMISSION, ROBERT F. POWELSON, IN HIS OFFICIAL CAPACITY AS CHAIRMAN OF THE PUBLIC UTILITY COMMISSION & PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION AND E. CHRISTOPHER ABRUZZO, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
ROBINSON TOWNSHIP, WASHINGTON COUNTY, PENNSYLVANIA, BRIAN COPPOLA, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS SUPERVISOR OF ROBINSON TOWNSHIP, TOWNSHIP OF NOCKAMIXON, BUCKS COUNTY, PENNSYLVANIA, TOWNSHIP OF SOUTH FAYETTE, ALLEGHENY COUNTY, PENNSYLVANIA, PETERS TOWNSHIP, WASHINGTON COUNTY, PENNSYLVANIA, DAVID M. BALL, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS COUNCILMAN OF PETERS TOWNSHIP, TOWNSHIP OF CECIL, WASHINGTON COUNTY, PENNSYLVANIA, MOUNT PLEASANT TOWNSHIP, WASHINGTON COUNTY, PENNSYLVANIA, BOROUGH OF YARDLEY, BUCKS COUNTY, PENNSYLVANIA, DELAWARE RIVERKEEPER NETWORK, MAYA VAN ROSSUM, THE DELAWARE RIVERKEEPER, MEHERNOSH KHAN, M.D.	:	No. 64 MAP 2012
	:	Appeal from the order of Commonwealth Court at No. 284 MD 2012 dated July 26, 2012.
	:	ARGUED: October 17, 2012
v.	:	

COMMONWEALTH OF PENNSYLVANIA, PENNSYLVANIA PUBLIC UTILITY COMMISSION, ROBERT F. POWELSON, IN HIS OFFICIAL CAPACITY AS CHAIRMAN OF THE PUBLIC UTILITY COMMISSION, OFFICE OF THE ATTORNEY GENERAL OF PENNSYLVANIA, KATHLEEN KANE, IN HER OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA, PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION AND E. CHRISTOPHER ABRUZZO, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE DEPARTMENT OF ENVIRONMENTAL PROTECTION	:
APPEAL OF: OFFICE OF THE ATTORNEY GENERAL OF PENNSYLVANIA, KATHLEEN KANE, IN HER OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE COMMONWEALTH 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	: No. 72 MAP 2012 : Appeal from the order of Commonwealth Court at No. 284 MD 2012 dated July 26, 2012. : ARGUED: October 17, 2012

YARDLEY, BUCKS COUNTY, PENNSYLVANIA, DELAWARE RIVERKEEPER NETWORK, MAYA VAN ROSSUM, THE DELAWARE RIVERKEEPER, MEHERNOSH KHAN, M.D., CROSS Appellants v. COMMONWEALTH OF PENNSYLVANIA, PENNSYLVANIA PUBLIC UTILITY COMMISSION, ROBERT F. POWELSON, IN HIS OFFICIAL CAPACITY AS CHAIRMAN OF THE PUBLIC UTILITY COMMISSION, OFFICE OF THE ATTORNEY GENERAL OF PENNSYLVANIA, KATHLEEN KANE, IN HER OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA, PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION AND E. CHRISTOPHER ABRUZZO, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE DEPARTMENT OF ENVIRONMENTAL PROTECTION, Appellees	:	
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	:	No. 73 MAP 2012 Appeal from the order of Commonwealth Court at No. 284 MD 2012 dated July 26, 2012. ARGUED: October 17, 2012

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., CROSS	:
Appellants	:
v.	:
COMMONWEALTH OF PENNSYLVANIA, PENNSYLVANIA PUBLIC UTILITY COMMISSION, ROBERT F. POWELSON, IN HIS OFFICIAL CAPACITY AS CHAIRMAN OF THE PUBLIC UTILITY COMMISSION, OFFICE OF THE ATTORNEY GENERAL OF PENNSYLVANIA, KATHLEEN KANE, IN HER OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA, PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION AND E. CHRISTOPHER ABRUZZO, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE DEPARTMENT OF ENVIRONMENTAL PROTECTION,	:
Appellees	:

CONCURRING OPINION

MR. JUSTICE BAER **Decided: December 19, 2013**

I compliment my colleague, Mr. Chief Justice Castille, for a thorough, well-considered, and able opinion. Indeed, I join Parts I, II, IV, and V of his opinion, and the disposition and mandate as described in Part VI(A), (B), (D), (E), (F), and (G). In regard

to the heart of the opinion, Part III (and its related section, Part VI(C) regarding mandate and disposition), I concur in the result that Sections 3215(b)(4) and (d), 3303, and 3304 of Act 13 of 2012[1] are unconstitutional. Like Messrs. Justice Saylor and Eakin, however, I respectfully view the primary argument of the challengers to Act 13[2] to be that the General Assembly has unconstitutionally, as a matter of substantive due process, usurped local municipalities' duty to impose and enforce community planning, and the concomitant reliance by property owners, citizens, and the like on that community planning.

Thus, and despite the pioneering opinion by the Chief Justice, I view the substantive due process contentions made by Challengers to be better developed and a narrower avenue to resolve this appeal. Indeed, I note that the Commonwealth acknowledges in a portion of its reply brief quoted by Justice Saylor that if the oil and gas industry were permitted to operate where it pleased, and neighbors to those permitting wells on their property were without recourse, "there would be good reason to

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[1] 58 Pa.C.S. §§ 3215(b)(4) & (d), 3303, and 3304. The Chief Justice cogently summarizes the relevant provisions of Act 13 in Part III(B) of his opinion, and I will not repeat that recitation here, except for my brief reiteration of pertinent components of the law, infra, pp.14-15. At this juncture, I merely note that the thrust of Act 13 is to establish a uniform, statewide oil and gas well permitting and zoning regimen, and to repudiate the ability of political subdivisions to enact or enforce land-use planning and zoning ordinances not in conformance therewith. My concurrence will address the constitutionality of the provisions contained within Sections 3215, 3303, and 3304.

As a housekeeping matter, I further note that my joinder of the aforementioned parts of the Chief Justice's opinion creates a majority opinion in those regards. To the extent that I concur only in the result of Parts III and VI(C), the Chief Justice's opinion is one announcing the judgment of the Court (OAJC). Accordingly, when reference to those portions of the opinion is required, I will designate to it as such.

[2] The challengers to Act 13 consistent of municipalities, non-profit environmental organizations, and individual citizens of the Commonwealth. For ease of discussion, I will refer to them collectively as "Challengers."

conclude that Act 13 violates . . . substantive due process . . . .” Reply Brief of the Office of Attorney General at 3, quoted in Dissenting Slip Op. at 9 (Saylor, J., dissenting). While Justice Saylor recognizes this concession, he ultimately concludes that the constraints on oil and gas development contained in Act 13, which are to be enforced by the Commonwealth rather than local municipalities, save the statute from the due process claim.

I, like the Commonwealth Court majority, after careful consideration, reach the opposite conclusion. I believe that in a state as large and diverse as Pennsylvania, meaningful protection of the acknowledged substantive due process right of an adjoining landowner to quiet enjoyment of his real property can only be carried out at the local level. Accordingly, differing from my esteemed colleague only in degree, I find merit in Challengers' claims in this regard, and would affirm the Commonwealth Court's determination that portions of Act 13 are unconstitutional largely on the basis that court described.

I.

Pursuant to Article I, Section 1 of the Pennsylvania Constitution, and the Fifth and Fourteenth Amendments to the United States Constitution, no person may be deprived of his private property without due process of law. In the early years of the Union, this constitutional guarantee translated into the general notion that a landowner had the right to do as he saw fit with his property. As modern American jurisprudence developed, however that constitutional guarantee developed an important limitation: *sic utere tuo ut alienum non laedas* - so use your own property as not to injure your neighbors. As early as 1907, one commentator noted that courts “are not disinclined” to impose damages upon a landowner for use of his property that causes an injustice to

his neighbor. G.A.I., Sic Utere Tuo ut Alienum Non Laedas, 5 MICH. L. REV., 673, 673 (Jun. 1907).[3]

Accordingly, governmental interference with private property, again otherwise forbidden under the above-stated constitutional provisions, has been permitted "by attempted regulations under the guise of the police power . . . ." Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 386 (1926). These "attempted regulations," commonly known today as zoning ordinances, were first seen in the United States around the beginning of the twentieth century to combat the complexities of rapidly developing urban and industrial life. Id. at 386-87. As evinced by this case, the advent of new technologies (such as horizontal hydrofracturing of the Marcellus Shale Formation to extract natural gas) mandates that notions of zoning remain malleable "to meet the new and different conditions which are constantly coming within the field of their operation." Id. at 387. Nevertheless, despite the changing conditions to which zoning ordinances and statutes may be aimed, any law "found clearly not to conform to the Constitution, of course, must fall." Id.[4]

From where, however, do local municipalities gain the ability to zone the private property contained within their borders? While, for all the reasons just explained, it is a constitutionally ordained mandate, zoning in Pennsylvania is implemented through the

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[3] More recently, the United States Supreme Court has further recognized that *sic utere tuo ut alienum non laedas* is closely related to the common law doctrine of nuisance: "no individual has a right to use his property so as to create a nuisance or otherwise harm others . . . ." Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 490 n.20 (1987); see also Lucas v. S. Carolina Coastal Council, 505 U.S. 1003 (1992).

[4] Indeed, this need for flexibility is one of the important considerations militating against statewide rules, and in favor of local municipality protection of the local citizenry's constitutional rights.

Municipalities Planning Code (MPC), which provides that "each municipality has the authority to enact, amend, and repeal zoning ordinances." Hoffman Mining Co., Inc. v. Zoning Hearing Bd. of Adams Tp., 32 A.3d 587, 603 (Pa. 2011). The MPC is obviously a state statute, passed by the General Assembly in 1968, and therefore just as obviously can be amended by the legislature. See Denbow v. Borough of Leetsdale, 729 A.2d 1113, 1118 (Pa. 1999) (quoting Knauer v. Commonwealth, 332 A.2d 589, 590 (Pa. Cmwlth. 1975)). "Municipal corporations have no inherent powers and may do only those things which the [l]egislature has expressly or by necessary implication placed within their power to do." Id. (quoting Knauer, 332 A.2d at 590). In other words, what the Commonwealth giveth to municipalities, the Commonwealth can taketh away, but with an important limitation: only when constitutionally permissible. Id.

Thus, this appeal presents a conundrum. May the General Assembly, through a law applicable statewide, remove *en toto* from local municipalities the apparatus it provided to vindicate the individual substantive due process rights of Pennsylvanian landowners? Justices Saylor and Eakin would seem to say "yes," so long as the legislature substitutes adequate alternative safeguards, which they believe it did through Act 13. The Commonwealth Court, in the decision below, said "no," reasoning that by requiring municipalities to forego their established zoning restrictions regarding, for example, oil and gas drilling and production, the General Assembly forced municipalities to "violat[e] substantive due process because [municipalities can no longer] protect the interests of neighboring property owners from harm," and further because Act 13 "alters the character of neighborhoods, and makes irrational classifications . . . ." Robinson Tp. v. Commonwealth, 52 A.3d 463, 485 (Pa. Cmwlth. 2012) (*en banc*). As previously stated, I find myself largely in agreement with the Commonwealth Court's conclusion. While I acknowledge that it might be possible, I am skeptical that the legislature could

devise a scheme of statewide scope that sufficiently protects substantive due process; and, while it can certainly amend the MPC and related statutes, it must do so with full respect and deference to the constitutional underpinning of those laws.

II.

Thus, where my dissenting colleagues and I apparently differ centers upon whether Act 13's provisions protect the substantive due process rights of Pennsylvania landowners. "In reviewing zoning ordinances, this Court has stated that an ordinance must bear a substantial relationship to the health, safety, morals, or general welfare of the community." Hopewell Tp. Bd. of Supervisors v. Golla, 452 A.2d 1337, 1342 (Pa. 1982) (quoting Surrick v. Zoning Hearing Bd. of Upper Providence Tp., 382 A.2d 105, 108 (Pa. 1977)). No constitutional or statutory law prohibits the Commonwealth from establishing itself in the field of statewide zoning and, to the extent it did so here, it hoped to provide for the health, safety, morals, and general welfare of the citizens of the Commonwealth by enumerating setbacks, environmental standards, and permit specifications within Act 13.

Indeed, as Justice Saylor notes in his dissent, the Commonwealth argues that the setback requirements established in Act 13 permissibly substitute for the regulations and standards established by local government officials as they relate to oil and gas development. Reply Brief of the Office of Attorney General at 3, quoted in Dissenting Slip Op. at 9-10 (Saylor, J., dissenting). In the Commonwealth's view, Challengers' assertions that residential neighborhoods will be "torn apart by the indiscriminate placement of gas wells," and of neighboring landowners who are "victims [with] no rights and no recourse" are simply inaccurate. Id., quoted in Dissenting Slip Op. at 9 (Saylor, J., dissenting). Indeed, as I referenced earlier in this concurrence, the Commonwealth concedes that the tearing apart of neighborhoods without recourse would

unquestionably lead to the "conclu[sion] that Act 13 violates the substantive due process rights of Pennsylvania's citizens." Id., quoted in Dissenting Slip Op. at 9 (Saylor, J., dissenting). The Commonwealth contends, however, that this will not occur because Act 13 contains restrictions which are rationally related to the statewide production of natural gas and oil, and simultaneously provides adequate safeguards to Pennsylvania residents.

Indeed, the Commonwealth goes even further in its advocacy. It asserts that the Commonwealth Court created a constitutional right where one does not exist. In the Commonwealth's view, the majority below relied upon an unexpressed and fundamentally flawed premise that the private property rights found in the United States and Pennsylvania Constitutions may be used as swords by one neighbor upon another. To the Commonwealth, the maxim of *sic utere tuo ut alienum non laedas* cannot be used to establish constitutional due process violations, as a landowner cannot violate the due process rights of his neighbor; only government can infringe upon constitutional rights. Thus, it asserts that the Fifth and Fourteenth Amendments, and Article I, Section 1 are shields against governmental action only, and to the extent a landowner wants to drill for gas on his own land, his neighbor does not have a constitutional argument to voice. Similarly, Article I of the Pennsylvania Constitution does not confer enforceable rights upon municipalities; and, thus, cities, boroughs, and townships cannot assert a violation of Article I rights on behalf of their citizenries.

Challengers counter these assertions by first recognizing that a landowner's right to use his property how he sees fit has been judicially limited through the doctrine of *sic utere tuo ut alienum non laedas* and the attendant notion of zoning. Challengers read this maxim and the zoning cases developed thereunder as being inextricably linked with the constitutional, due process rights associated with private property. In Challengers'

view, the MPC and zoning ordinances are designed to prohibit the proverbial "pig in the parlor instead of the barnyard," Village of Euclid, 272 U.S. at 388, as municipalities have a constitutional duty to "preserv[e] the character of neighborhoods, securing 'zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.'" City of Edmonds v. Oxford House, Inc., 514 U.S. 725, 732-33 (1995) (quoting Village of Belle Terre v. Boraas, 416 U.S. 1, 9 (1974)). Absent zoning ordinances, communities, especially in urban areas, will not develop or continue in ordered fashions. Accord Swade v. Zoning Bd. of Adjustment of Springfield Tp., 140 A.2d 597, 598 (Pa. 1958) (*per curiam*).

Challengers thus assert that the municipalities of Pennsylvania have a constitutional obligation to enforce ordered zoning in accord with Village of Euclid and Edmonds, and the General Assembly's mandate, through Act 13, that they permit oil and gas drilling in residential and agricultural areas forces municipalities to breach that constitutional responsibility. Accord Denbow, 729 A.2d at 1118 (providing that legislature may not force a municipal corporation to perform an unconstitutional act). As Challengers point out, Act 13 makes it easier for Chevron to establish a drilling rig in the middle of a corn field than a church to build a small ten-pew worship space in the same field. Act 13 simply removes from municipalities the discretion of their zoning hearing boards to decide whether drilling, hydrofracturing, pipeline operations, compressor plants and stations, wastewater impoundment areas, commercial truck traffic, and other oil and gas operations belong in agriculturally and/or heavily residentially-zoned areas. In Challengers' view, zoning, per the aforementioned constitutional concerns, must be inherently a local consideration.

III.

In analyzing the parties' various positions, a certain disconnect is presented by this appeal because, in a "run of the mill" zoning case, a citizen challenges a local zoning ordinance or a decision by a municipality's zoning hearing board as being violative of the constitutional prohibition against the diminution of his private property rights without due process of law. The constitutions, both federal and state, protect each citizen's right to enjoy private property without governmental interference, and any interference therewith must be in accord with due process of law. See, e.g., Hopewell Tp., 452 A.2d at 1341. Zoning is inherently a governmental interference, but is designed to afford the concomitant right of quiet enjoyment by one's neighbor; again, it serves as a regulatory process within the doctrine of *sic utere tuo ut alienum non laedas*. However, the right to enjoy one's land as one sees fit is the preeminent factor in a private property action, and therefore any governmental interference therewith "must bear a substantial relationship to the health, safety, morals, or general welfare of the community." Id. (quoting Surrick, 382 A.2d at 108). Given this, a governmental regulation related to zoning will not afford a property owner due process of law vis-à-vis his enjoyment of private property if it lacks this substantial relationship. Id.

"Hence, the function of judicial review, when the validity of a [generic] zoning ordinance [or statute] is challenged, is to engage in a meaningful inquiry into the reasonableness of the restriction on land use in light of the deprivation of landowner's freedom thereby incurred." Id. at 1342. Essentially, to satisfy the necessity of due process for the encroachment by government into private property, the aforementioned governmental purpose must "adequately outweigh" the private property interest. Id.

(A)

However, Act 13 is not, in the common sense, a governmental intrusion into private property. Arguably, it expands private property rights by mandating that individual municipalities permit property owners in residentially or agriculturally zoned areas to bring oil and gas operations onto their land. As Challengers duly note, these industrial-like operations include blasting of rock and other material, noise from the running of diesel engines, sometimes nonstop for days, traffic from construction vehicles, tankers, and other heavy-duty machinery, the storage of hazardous materials, constant bright lighting at night, and the potential for life- and property-threatening explosions and gas well blowouts.

Thus, the governmental intrusion, at least on the individual citizen level, is to the neighbor of the landowner who wishes to have oil and gas operations on his land. Essentially, through Act 13, the General Assembly is mandating that municipalities pass land-use and zoning ordinances, which permit landowners, statewide, to violate *sic utere tuo ut alienum non laedas*. While some neighbors may not object to the operation of oil and gas wells, compressor stations, and the like on private property adjacent to their own, I am compelled to note what the plain language of Act 13 explicitly permits within residentially and agriculturally zoned areas:

> - Well sites for drilling within 500 feet of existing buildings or water wells, and 300 feet from the nearest property line. 58 Pa.C.S. §§ 3215(a) & 3304(b)(5.1).
>
> - Natural gas compressor stations within 750 feet of existing buildings, and 200 feet from the nearest property line. 58 Pa.C.S. § 3304(b)(7).
>
> - Natural gas processing plants in agricultural zones within 750 feet of existing buildings, and 200 feet from the nearest property line. 58 Pa.C.S. § 3304(b)(8).

- No restrictions on vehicles unless overweight as defined by the Vehicle Code or the MPC. 58 Pa.C.S. § 3304 (b)(9).

- No noise, light, or hours of operation restrictions on any of the above activities, with the exception of decibel limits imposed for compressor stations and processing plants. 58 Pa.C.S. § 3304(b)(10).

Individual municipalities have no ability to alter these requirements, even for pressing, local environmental concerns, 58 Pa.C.S. § 3303, with the exception of, in some instances, decreasing the enumerated setbacks upon application by a property owner or oil and gas leaseholder. 58 Pa.C.S. § 3304(b)(5.1)(i)-(ii). Perhaps even more disturbing, Section 3215(b)(4) mandates that the Department of Environmental Protection "waive the distance restrictions upon submission of a plan" by the oil and gas well operator, which outlines theoretical protections of any potentially affected water sources. Neither neighboring landowners nor municipality zoning boards have any statutory ability to object or comment meaningfully upon these waivers, nor may they appeal or seek review from the Department's granting of a waiver. 58 Pa.C.S. § 3215(d).

(B)

In my respectful view, and inherent within several decisions of courts of this Commonwealth, the federal bench, and sister states, once a state authorizes political subdivisions to zone for the "best interests of the health, safety and character of their communities," Cohen v. Bd. of Appeals of Village of Saddle Rock, 795 N.E.2d 619, 624 (N.Y. 2003) (emphasis added); see also City of Edmonds, 514 U.S. at 732; Village of Euclid, 272 U.S. at 388; Hopewell Tp., 452 A.2d at 1343, and zoning ordinances are enacted and relied upon by the residents of a community, the state may not alter or invalidate those ordinances, given their constitutional underpinning. This is so even if

the state seeks their invalidation with the compelling justification of improving its economic development.

In this regard I note Pennsylvania's extreme diversity. We are a state of 46,000 square miles and 12.76 million people. Our largest county (Philadelphia) contains 1.55 million residents, and our smallest (Forest) has 7,667 inhabitants. The population density of Philadelphia is 11,450 people per square mile, while in Cameron County it is 13 people per square mile. The northwestern and southeastern corners of our state are flat; however, the 745 square miles of Allegheny County are uniformly hill and dale, and the Appalachians, one of the oldest mountain ranges on Earth, run right through the middle of our great Commonwealth. How can the legislature's "one size fits all" within Act 13 possibly protect the constitutional rights of the landowners of this diverse citizenry and geography? Zoning provisions "should . . . 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." Hoffman Mining, 32 A.3d at 603 (quoting 53 P.S. § 10603(a)); see also Village of Euclid, 272 U.S. at 388 (providing that constitutionally apt zoning occurs not "by an abstract consideration of . . . the thing, [but] by considering it in connection with the circumstances and the locality" affected) (emphasis added). Act 13 simply does not.

(C)

To that end, my thoughts further echo those of the Commonwealth Court majority below:

> [B]y requiring municipalities to violate their comprehensive plans for growth and development, [Act 13] violates substantive due process because it does not protect the interests of neighboring property owners from harm, alters the character of neighborhoods and makes irrational classifications - irrational because it requires municipalities

> to allow […] drilling operations and impoundments, gas compressor stations, storage[,] and use of explosives in all zoning districts, and applies industrial criteria to restrictions on height of structures, screening and fencing, lighting[,] and noise. Succinctly, 58 Pa.C.S. § 3304 is a requirement that zoning ordinances be amended in violation of the basic precept that "Land-use restrictions designate districts in which only compatible uses are allowed and incompatible uses are excluded."

Robinson Tp., 52 A.3d at 484-85 (quoting City of Edmonds, 514 U.S. at 732).

Similarly, this Court has observed that the constitutional protections afforded by zoning under the guise of "general welfare" of the community have come in varying contexts, and to mean different things. In Hopewell Township, we noted that to some jurists, ensuring the general well-being of a municipality could range anywhere from the "absolute, unqualified Constitutional right to liberty and property," to "what the [z]oning [b]oard or a [c]ourt believes is best for the community . . . involved," to the overarching right of the government "to set aside millions of acres of open land for the benefit of our Country." 452 A.2d at 1342. Whatever the proffered reason for the benefit of the community may be, it remains unassailable that the hallmark of an unconstitutional zoning ordinance or statute is "an arbitrary and discriminatory impact on different landowners." Id. at 1343; see also In re Petition of Dolington Land Group, 839 A.2d 1021, 1035 (Pa. 2003).

I respect the view that the General Assembly, in its wisdom as the policy-setting branch of government, "has decided to supersede some of the duties and responsibilities municipalities previously have exercised in related to land-use planning and the environment." Dissenting Slip Op. at 8 (Saylor, J., dissenting). However, mandating to municipalities that they enact land-use and zoning ordinances in compliance with the ineffective, yet absolute, "protections" afforded within Act 13,

without any available mechanism for objection or remedy by the citizenry consistent with the individualized concerns of each municipality, zoning district, or resident, is the epitome of arbitrary and discriminatory impact.[5]

Indeed, the lead opinion by the Chief Justice, albeit in the context of the Environmental Rights provision of the Pennsylvania Constitution, Article I, Section 27, recognized these same inequalities associated with the "uniform application" of Act 13 statewide:

> A second difficulty arising from Section 3304's requirement that local government permit industrial uses in all zoning districts is that some properties and communities will carry much heavier environmental and habitability burdens than others. […] This disparate effect is irreconcilable with the express command that the trustee [of the Commonwealth's environmental resources] will manage the corpus of the trust for the benefit of "all the people."

OAJC at 125-26 (internal citations omitted). The OAJC continues that Act 13 "disabl[es] local government from mitigating the impact of oil and gas development at the local level." Id. at 126. Such prohibitions on local government by Act 13 include remediation for water and air pollution, protection of the natural aesthetics of the local environment, and ensuring quality of life in residential and scholastic areas. Id. at 127-28. "The local government's zoning role is reduced to *pro forma* accommodation" of the wishes of the

[5] Put differently, while the placement of a gas well in a mountain surrounded valley, hidden from all humanity, in central Pennsylvania might be appropriate for one municipality, the same may not be said for the erection of a similar well in the flatlands of southeastern Pennsylvania. The harsh reality that such arbitrariness will undoubtedly occur statewide, without recourse for affected landowners, perfectly exemplifies the constitutionally prohibited discriminatory effect necessarily caused by the universal nature of Act 13's proscriptions.

General Assembly, id. at 111, while concomitantly prohibiting local government from protecting the individual characteristics of its community and residents, and the unwanted and unconstitutional and diminution of enjoyment of one's private property.

These factors, cogently cited within the OAJC, are precisely why Act 13 encroaches upon the substantive due process rights found in Article I, Section 1 of the Pennsylvania Constitution, and the Fifth and Fourteenth Amendments to the United States Constitution. Different landowners, in different parts of the Commonwealth (indeed, different neighborhoods in the same municipality), will be arbitrarily impacted by the imposition of Act 13 upon our political subdivisions. Accord Hopewell Tp., 452 A.2d at 1343. Individual landowners and municipalities alike will be unable to acclimatize to the fledgling world of Marcellus Shale hydrofracturing and drilling and the continuing fluidity of its development, and will be unable to seek recourse for the unquestionable damage to their private enjoyment of property.

Rather, Act 13 promotes and mandates the opposite - it sets static commandments to the municipalities of the Commonwealth in a vacuum, without due consideration for any effect upon those municipalities and the related doctrine of *sic utere tuo ut alienum non laedas*. Indeed, it sets absolute standards rather than minimal guidelines that all municipalities and residents must abide by, without providing for any remedy when the inevitable damage to the enjoyment of private property occurs. Sections 3215(b)(4) and (d), 3303, and 3304 not only allow entry of the pigs into the parlor, but further decree that local governments enact zoning ordinances that expressly permit those intrusions, without exception. Accordingly, because these statutes force municipalities to enact zoning ordinances, which violate the substantive due process rights of their citizenries, they cannot survive constitutional scrutiny.

IV.

Finally, as contemplated within the Chief Justice's Opinion, I must address severability of the various provisions of Act 13.

(A)

The thrust of Challengers' substantive due process arguments centered upon Sections 3303 and 3304 of Act 13, which, respectively, set forth: the prohibition of local governments to impose environmental regulations upon oil and gas production; and the zoning-type provisions that every municipality in the Commonwealth must uniformly adhere to for the development of oil and gas resources. Like the OAJC, albeit under my substantive due process analysis, I explicitly find that these provisions are unconstitutional. To that end, and for the reasoning given in Part V of the lead opinion, I would further enjoin the entirety of Sections 3305 through 3309 as "incapable of execution" upon the striking of Sections 3303 and 3304.

(B)

The lead opinion also finds Section 3215(b)(4) and (d), providing for the automatic approval of setback waivers by DEP without the ability for meaningful objection or appeal by affected landowners or municipalities, to be unconstitutional under Article I, Section 27. I note that the Commonwealth Court below found Section 3215(b)(4) to be unconstitutional not under substantive due process or Article I, Section 27, but rather as a violation of the non-delegation rule of Article II, Section 1. For the reasons described above, I would affirm this holding, albeit on the alternative ground of a violation of substantive due process. Regarding subsection (d), the Commonwealth Court denied relief, and Challengers appealed that decision based upon Article I, Section 27. The OAJC agrees with Challengers in this regard, and reverses the Commonwealth Court. For the reasons outlined herein, I would find that Section

3215(d) violates substantive due process; however, Challengers did not preserve to this Court a due process challenge concerning Section 3215(d). I therefore concur only in the result reached by the lead Justices that Section 3215(d) is unconstitutional. Given that I would strike Section 3215(b)(4) and (d), I further agree with the lead opinion that the entirety of subsection (b), as well as subsections (c) and (e) would be "incapable of execution" and must be enjoined. To this, however, I would also enjoin subsection (a) of Section 3215 (providing for the actual setbacks from water sources) as also being "incapable of execution."[6]

I join the Chief Justice's Opinion in regard to Parts I, II, IV, V, and VI(A), (B), (D), (E), (F), and (G) in full. For the above-stated reasons, I concur in the result of Parts III and VI(C), and would further enjoin enforcement of 58 Pa.C.S. § 3215(a).

[6] In substance, I would find subsection (a) to violate substantive due process for the same reason that Sections 3215(b)(4) and (d), 3303, and 3304 do. However, the Commonwealth Court did not find subsection (a) as violative of the constitutions, and Challengers have not raised any constitutional challenge to subsection (a) before this Court. Nevertheless, given that subsection (a) describes the setback requirements for which subsection (b)(4) provides the approval of waivers, I find them inextricably linked and therefore must be enjoined.