

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. 284 MD 2012

TYPE OF PLEADING:

**BRIEF IN SUPPORT OF MOTION
FOR PRELIMINARY INJUNCTION**

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 116th Street

New York, New York 10027

(212) 854-500

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

TOWNSHIP OF ROBINSON, Washington)	
County, Pennsylvania, et.al.)	Docket No. 284 MD 2012
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Petitioners,)	
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vs.)	
)	
COMMONWEALTH	OF)
PENNSYLVANIA, et al.)	
)	
Respondents.)	

BRIEF IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

AND NOW, Petitioners, Township of Robinson, Washington County, Pennsylvania, Brian Coppola, Peters Township, Washington County, Pennsylvania, David 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, Mehernosh Khan, M.D., by and through their attorneys, file the within Brief in Support of Motion for Preliminary Injunction 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 respectfully asks this Court to enter a Preliminary Injunction, and to grant the limited and narrowly tailored relief requested herein.

Petitioners seek the entry of a narrow special injunction to prevent the enactment of Act 13 until such time as a full Hearing can be held on Petitioners' Petition for Review in the Nature

of a Complaint for Declaratory Judgment and Injunctive Relief (“Petition for Review”) requesting 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. This case presents a real risk that, absent the entry of a special injunction, Petitioners and local municipal governments will “justice delayed will be justice denied”. Unless the Court enters an Order maintaining the status quo pending further proceedings, the Respondents will continue to engage in such conduct which allegedly violates the United States and Pennsylvania Constitutional and potentially force municipal governing bodies to operate without appropriate zoning in relation to oil and gas.

The key facts, all of which are set forth at length in Petitioners’ Petition for Review, are anticipated to be undisputed, and are as follows:

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. 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.

6. 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.

APPLICABLE LAW AND ARGUMENT

Petitioners can readily satisfy the pre-requisites for special injunctive relief. Petitioners can show 1) a likelihood of prevailing on the merits;¹ 2) that it will suffer irreparable injury without injunctive relief; 3) that injunctive relief will not substantially harm the Respondents or

¹Since special and injunctive relief serves as a temporary remedy pending a full hearing, the criteria for issuance is less demanding than requests for permanent relief. *LARA, Inc v Dorney Park Coaster Co, Inc*, 542 A.2d 220, 223 (Pa. Cmwlth 1998), app. denied, 559 A.2d 40 (1989). A party seeking preliminary relief is not required to prove its claim. *Boyle v PAA*, 676 A.2d 695, 699 (Pa. Cmwlth 1996), app. denied, 686 A.2d 1313 (1996). Rather, at the preliminary stage, the moving party is required to only establish that it has a reasonable likelihood of success on the merits if, and when, the case proceeds to a trial. *Santoro v Morse*, 781 A.2d 1220, 1229 (Pa. Super 2001).

the public and 4) that Respondents' conduct is actionable. Maritrans GP, Inc v Pepper Hamilton & Sheetz, 602 A.2d 1277, 1282-1283 (Pa. 1992). Thus, the requested limited and narrow injunctive relief is warranted.

A. Petitioners are likely to prevail on the merits of its claim.

Based on the evidence of record, including the averments contained in the Petition for Review, there can be little question that the Respondents have engaged in unconstitutional acts which violates the rights of Petitioners' rights.

Through Act 13, the Pennsylvania General Assembly has mandated that 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 Commonwealth's sovereign's police powers in violation of the U.S. Constitution and Pennsylvania Constitution.

In the Petition for Review, 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, removing municipalities' constitutionally mandated duty to protect the environment;
- 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.

Petitioners aver that these actions are in violation of their constitutional rights.³

B. Petitioners will continue to suffer irreparable harm unless an injunction is issued.

Without the grant of the requested injunctive relief, there is no question that the Petitioners will suffer irreparable harm. Pursuant to Section 9 of the Act, the mandatory effective date of the Act is April 14, 2012 (the “Effective Date”); *i.e.* 60 days from the approval date of February 14, 2012. Thereafter, pursuant to Section 3309 of the Act, a local government has 120 days from the Effective Date to review and amend its oil and gas ordinance to comply with the Act. Specifically, Section 3309 of the Act states:

³Where irreparable harm is threatened, Courts have enjoined a Defendant from continuing its unlawful conduct. *See Morgan’s Home Equipment v Martucci*, 136 A.2d 838, 847 Pa. 1957.

§ 3309. Applicability.

(a) Ordinances. This chapter shall apply to the enforcement of local ordinances existing on the effective date of this chapter and to the enactment or enforcement of a local ordinance enacted on or after the effective date of this chapter.

(b) Local governments. A local government that has enacted a local ordinance relating to oil and gas operations prior to the effective date of this chapter shall have 120 days from the effective date of this chapter to review and amend an ordinance in order to comply with this chapter.

If the Act is not restrained, it will be impossible for municipalities to review and amend their zoning ordinances when considering the time constraints and requisites imposed by the Municipalities Planning Code. Act 13 requires that all zoning ordinances must be brought into conformity within 120 days of the Effective Date, which is April 14, 2012. *See*, Act 13, at § 3309(b)(4). However, industry has indicated that it will take action before that date in the event its permits or applications are denied under existing zoning ordinances. 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. 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.

Regarding the amendment of a zoning ordinance, there is a considerable amount of time and taxpayer funds in order to effectuate the same. Specifically, there is a substantial amount of time needed to consider and draft a proposed amendment. Once a proposed amendment is

drafted the requisites of the Municipalities Planning Code (53 P.S. §10609) must be complied with which are as follows:

- (a) Before voting on the enactment of an amendment, the governing body must hold a public hearing pursuant to public notice.
- (b) If the proposed amendment involves a zoning map change, notice of said public hearing shall be conspicuously posted by the municipality and notice of the public hearing must also be mailed by the municipality at least 30 days prior to the date of the hearing by first class mail to the addressees all real property located within the area being rezoned,
- (c) If the municipal planning commission does not prepare the zoning amendment, the municipal governing body must submit the proposed zoning amendment to municipal planning commission for recommendation at least thirty (30) days prior to the municipal governing body's public hearing.
- (d) If a county planning agency has been created for the county in which the municipality proposing the amendment is located, then at least thirty (30) days prior to the public hearing on the amendment by the local governing body, the municipality shall submit the proposed amendment to the county planning agency for recommendations.
- (e) If, after any public hearing held upon an amendment, the proposed amendment is changed substantially, or is revised, to include land previously not affected by it, the governing body shall hold another public hearing, pursuant to public notice, before proceeding to vote on the amendment.

A municipality **must** follow the requisites to the Municipalities Planning Code in order to amend its zoning ordinance. It will be impossible for a municipality to comply with the aforementioned procedure of the Municipalities Planning Code and its time constraints by the Effective Date, April 14, 2012. Any existing ordinance that does not already meet the terms of the Act will be considered non-complaint as of this date and will open municipalities up to the possibility of sanctions. With that said, it will be almost equally impossible to re-write a municipal zoning ordinance within the requisite 120 review period when considering the requisites imposed by the Municipalities Planning Code. 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. 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).

Furthermore, a challenge mounted against Municipal Petitioners during the 120 day review period may also compromise the municipality's ability to receive funds collected under Chapter 23 of Act 23. 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.

Even though a local government is granted 120 days from the effective date of the Act to review its ordinance for compliance and amend the same if deemed warranted, the oil and gas industry has taken the position that it has free reign for the installation of any and all of its infrastructure as of April 14, 2012. Said industry has taken the position that as of the Effective Date, it will in effect instruct the local government whether or not the local government's ordinance is proper or not. Industry has threatened local government officials that on the Effective Date, it may run to Commonwealth Court to invalidate said ordinance even if within the 120 day review period permitted by Act 13. Furthermore, within the 120 day review period,

industry has further threatened via Act 13 that it will seek to punish government officials through the payment of its legal fees if enforcement or enactment of a local ordinance does not follow the terms of either Act 13 **or the Municipalities Planning Code**. [See Section 3307(1) of Act 13]. Although a local government may have not completed its review during the 120 day period, industry has threaten to churn attorney fees and attempt to hold the taxpayers of the local government responsible for the same.

The oil and gas industry's position is illustrated in a March 12, 2012, correspondence sent by the legal counsel of MarkWest Liberty Midstream & Resources, LLC¹ to Cecil Township (a Petitioner herein). As stated therein, MarkWest takes the position that as of April 14, 2012, Cecil Township (a Petitioner herein) must authorize the MarkWest natural gas compressor as proposed. Specifically, it argues that the "proposed [MarkWest] facility will be a permitted use as a matter of law on April 14, 2012, the effective date of Act 13". MarkWest argues that even through there is 120 day review period, on April 14, 2012, it may institute a legal challenge in Commonwealth Court to invalidate the Cecil Township Ordinance and seek "attorneys fees in connection with such action". A true and correct copy of the March 12, 2012, MarkWest correspondence is attached hereto as Exhibit A.

Using Act 13 as their weapon, the oil and gas industry is attempting to bully and strong-arm local elected officials to basically invalidate existing zoning regulations and operate with no zoning on this issue whatsoever after the Effective Date.

C. The injunctive relief requested will not harm the Respondents or the public

1. Petitioners' request is narrowly tailored.

¹ MarkWest Liberty Midstream & Resources, L.L.C. operates in the natural gas midstream business. It provides natural gas gathering, transportation, and processing of natural gas, the transportation, fractionation, marketing, and storage of natural gas liquids; and the gathering and transportation of crude oil. It has extensive natural gas gathering, processing, and transmission operations in the northeast regions of the United States, including Pennsylvania and the Marcellus Shale region. It is the largest natural gas processor in the Appalachian region.

The relief requested by the Petitioners is narrow and required to avoid irreparable harm herein noted above. Petitioners have merely requested that an entry of a narrow special injunction to prevent the enactment of Act 13 until such time as a full Hearing can be held on Petitioners' Petition for Review in the Nature of a Complaint for Declaratory Judgment and Injunctive Relief.

2. Greater injury will be inflicted upon Petitioners by the denial of injunctive relief than will be experienced by Respondents or the public by granting it.

The harm that Petitioners will suffer without injunctive relief has been described herein. Respondents, on the other hand, will suffer no legal harm if the injunction is entered other than the postponement of the enactment of Act 13 pending the outcome of this challenge.

There is also no harm to the public if the relief requested herein is granted. Rather, the public is protected by the grant of the injunction. A municipality must follow the requisites to the Municipal Planning Code in order to amend its zoning ordinance. It will be impossible for a municipality to comply with the aforementioned procedure of the Municipalities Planning Code and its time constraints by April 14, 2012. To accept the industry's position would equate to basically forcing a municipal governing body to operate with absolute no zoning on this issue whatsoever.

The balancing of the equities tilts decidedly in favor of the entry of the requested injunctive relief, particularly because it is the only reasonable means by which the status quo can be achieved.

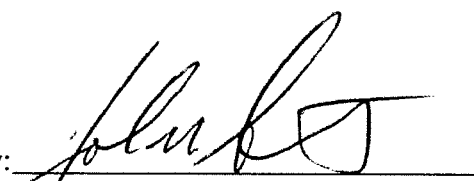
D. Respondents' conduct is actionable.

As set forth above, Petitioners aver that the General Assembly has violated both the United States and Pennsylvania Constitution. Given the foregoing, and the evidence presented in

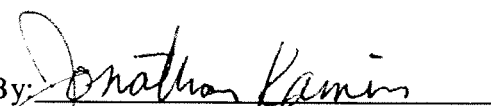
the Verified Petitioner for Review, Petitioners have met their burden to establish that the Respondents' conduct is actionable.

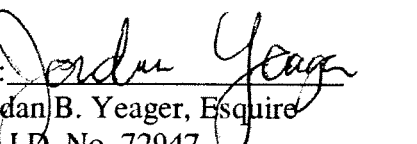
CONCLUSION

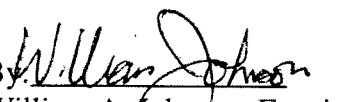
This case is precisely the type of case in which injunctive relief can and should be granted. Petitioners have satisfied its burden to establish the necessary elements for injunctive relief and Petitioners respectfully requests that this Court enter a special injunction in the form of the Proposed Order submitted with its Motion.

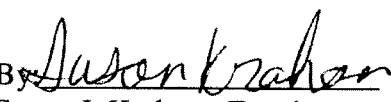
By: 
John M. Smith, Esquire
Pa. I.D. No. 75663
Jennifer Fahnestock, Esquire
Pa. I.D. No. 311650
Smith Butz, LLC
125 Technology Drive, Suite 202
Bailey Center I, Southpointe
Canonsburg, PA 15317
jmsmith@smithbutzlaw.com
Counsel for Petitioners

Respectfully submitted,

By: 
Jonathan M. Kamin, Esquire
Pa. I.D. No. 81958
John Arminas, Esquire
Pa. I.D. No. 87699
Goldberg, Kamin & Garvin LLP
1806 Frick Building
Pittsburgh, PA 15219
jonathank@gkgattorneys.com
Counsel for Petitioners

By: 
Jordan B. Yeager, Esquire
Pa. I.D. No. 72947
Lauren M. Williams, Esquire
Pa. I.D. No. 311369
Curtin & Heefner LLP
Heritage Gateway Center
1980 South Easton Road, Suite 220
Doylestown, PA 18901
JBY@curtinheefner.com
Counsel for Petitioners

By: 
William A. Johnson, Esquire
Pa. I.D. No. 14906
23 East Beau Street
Washington, PA 15301
wajohnsonesq@yahoo.com
Counsel for Petitioners

By: 
Susan J. Kraham, Esquire
Pa. I.D. No. 310292
Columbia U. School of Law
Environmental Law Clinic
435 West 116th Street
New York, New York 10027
Counsel for Petitioners

March 1, 2012

Walter A. Bunt, Jr.
D 412.355.8906
F 412.355.6501
walter.bunt@klgates.com

Via First Class Mail and E-Mail

Patricia L. McGrail
The Law Offices of Patricia L. McGrail, LLC
1714 Lincoln Way
White Oak, PA 15131

John M. Smith
Smith Butz, LLC
Bailey Center I, Southpointe
125 Technology Drive, Suite 202
Canonsburg, PA 15317

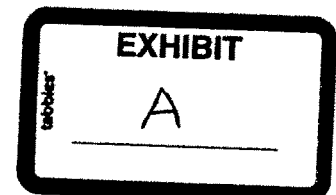
Re: MarkWest Liberty Midstream & Resources, LLC v. Cecil
Township Zoning Hearing Board; Civil Division; No. 2011-2645
Court of Common Pleas of Washington County

Dear Counsel:

On February 14, 2012, Governor Corbett signed into law Act 13 of 2012 (“Act 13”), which makes a series of reforms to Pennsylvania’s Oil and Gas Act (the “old Act”). Chapter 33 of Act 13 amends the old Act with respect to uniformity of local ordinances and requires that local ordinances authorize natural gas compressor stations, such as MarkWest’s proposed facility, as a permitted use in industrial zoning districts.¹ Consequently, the enactment of Act 13 is dispositive on this appeal, and obviates the need for the parties to proceed. Because Pennsylvania law now requires local ordinances authorize natural gas compressor stations as a permitted use in industrial areas, MarkWest proposes the following:

- The parties cancel the mediation scheduled for March 14, 2012;
- The board issue MarkWest a permit for the proposed facility, effective April 14, 2012; and
- The parties enter into a stipulation of dismissal, and request that the appeal be marked settled and discontinued.

¹ Chapter 33 of Act 13 takes effect on April 14, 2012. Act 13, Section 9.



Patricia L. McGrail
John M. Smith
March 1, 2012
Page 2

Chapter 33 of Act 13 provides that “. . . all local ordinances regulating oil and gas operations² shall allow for the *reasonable development of oil and gas resources*.” 58 Pa.C.S. § 3304(a) (emphasis added). “In order to allow for the reasonable development of oil and gas resources, a local ordinance . . . *shall* authorize natural gas compressor stations as a permitted use in agricultural and industrial zoning districts . . .” if the natural gas compressor station (i) is located at least 750 feet from the nearest existing building, and (ii) the noise level does not exceed 60dbA at the nearest property line. 58 Pa.C.S. § 3304(7)(emphasis added).

The proposed facility meets both requirements. First, mapping data provided by the Township engineer establishes that proposed facility is at least 1,000 feet from the nearest existing building. (Hearings on special exception application, Exs. 9, 12; Tr. pp. 458-459, 467.) Second, MarkWest committed to a noise level at the property line that will not exceed 60 dbA. (Hearings on special exception application, Tr. pp. 42, 72, 74-75.)

Section 3309 of Act 13 specifically provides that Chapter 33 will apply to existing ordinances, such as the UDO. 58 Pa.C.S. § 3309(a) (“[t]his chapter shall apply to the enforcement of local ordinances existing on the effective date of this chapter and to the enactment or enforcement of a local ordinance enacted on or after the effective date of this chapter.”)

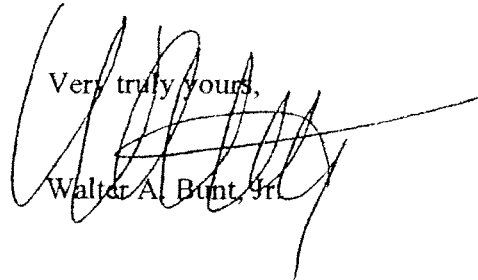
Act 13 recognizes that ordinances that do not provide for natural gas compressor stations as a permitted use in industrial zones will be non-compliant with Act 13 as of the effective date, April 14, 2012. Although section 3309(b) allows a local government 120 days to amend its ordinance to bring it into compliance, such an ordinance is, nevertheless, non-compliant with Chapter 33 of Act 13 as of the effective date. 58 Pa.C.S. § 3309(b). Moreover, on the effective date, an operator can bring an action in the Commonwealth Court to invalidate an ordinance that is enforced by a local government which runs afoul of Chapter 33 of Act 13. 58 Pa.C.S. § 3306(1). If the Commonwealth Court determines that the local government enforced an ordinance with willful or reckless disregard of Chapter 33 of Act 13, it may order the local government to pay the plaintiff’s attorneys’ fees in connection with such action. 58 Pa.C.S. § 3307(1).

Because MarkWest’s proposed facility will be a permitted use as a matter of law on April 14, 2012, the effective date of Act 13, it appears to be a fruitless exercise for the parties to proceed with the appeal in this matter.

² “Oil and gas operations” includes the “construction, installation, use, maintenance and repair of natural gas compressor stations.” 58 Pa.C.S. § 3301.

Patricia L. McGrail
John M. Smith
March 1, 2012
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Given the close proximity to the mediation, we request that the Township and/or Board convene special meetings to address this matter and that you respond to this letter on or before March 6, 2012.

Very truly yours,

Walter A. Bunt, Jr.

WAB:bdr
cc: Megan E. Smith Miller

CERTIFICATE OF SERVICE

I, John M. Smith, do hereby certify that a true and correct copy of the foregoing Brief in Support of Motion for Preliminary Injunction was served via United States First-Class Mail on this 2nd day of April 2012, to the following:

Commonwealth of Pennsylvania
c/o Linda L. Kelly, Attorney General
16th Floor, Strawberry Square
Harrisburg, PA 17120

Pennsylvania Public Utility Commission
c/o Robert F. Powelson, Chairman
400 North Street, Keystone Building
Harrisburg, PA 17120

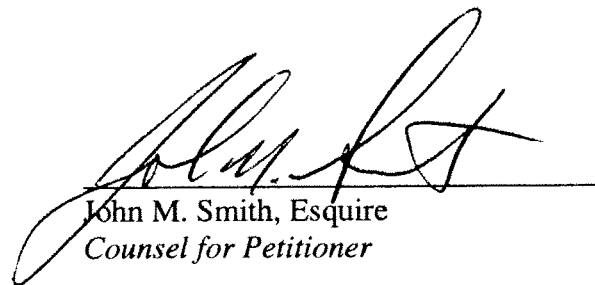
Robert F. Powelson
Pennsylvania Public Utility Commission
Chairman
400 North Street, Keystone Building
Harrisburg, PA 17120

Office of the Attorney General of Pennsylvania
16th Floor, Strawberry Square
Harrisburg, PA 17120

Linda L. Kelly
Attorney General, Commonwealth of
Pennsylvania
16th Floor, Strawberry Square
Harrisburg, PA 17120

Pennsylvania Department of
Environmental Protection
c/o Michael L. Krancer, Secretary
400 Market Street
Harrisburg, PA 17120

Michael L. Krancer
Pennsylvania Department of Environmental
Protection, Secretary
400 Market Street
Harrisburg, PA 17120


John M. Smith, Esquire
Counsel for Petitioner

Pa.I.D. 75663
Smith Butz, LLC
125 Technology Drive, Suite 202
Bailey Center I, Southpointe
Canonsburg, PA 15317
(724) 745-5121
jmsmith@smithbutzlaw.com