

**IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT**

Nos. 63 MAP 2012 and 64 MAP 2012

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, and MEHERNOSH KAHN, M.D., Appellees,

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, 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, Appellants.

Appeal of: PENNSYLVANIA PUBLIC UTILITY COMMISSION, Robert F. Powelson, in his Official Capacity as Chairman of the Public Utility Commission and PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION and Michael L. Krancer, in his Official Capacity as Secretary of the Department of Environmental Protection.

BRIEF OF *AMICI CURIAE*, BELL ACRES BOROUGH, EAST FINLEY TOWNSHIP, CITY OF BETHLEHEM, MUNICIPALITY OF MONROEVILLE, MUNICIPALITY OF MURRYSVILLE, TINICUM TOWNSHIP, AND WILKINS TOWNSHIP, IN SUPPORT OF APPELLEES

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STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici are a diverse group of municipalities from across the Commonwealth of Pennsylvania which differ in character, size, location, and prevalent political attitudes on the issue of natural gas development.¹ *Amici* are, however, unified in their conviction that all municipalities are entitled to the fundamental right to make land use determinations to protect individual community character and development goals. This is nowhere else more important than with regard to the locating of heavy industrial activities that have the potential to affect existing local character, health, or economic vitality, including hydraulic fracturing (“hydrofracking”).

Community character is of primary importance to all municipalities. It can either create the conditions for municipal health, happiness, and success or, conversely, encourage stress or hamper local economic goals. Land use patterns strongly influence community character, particularly in the case of industrial uses—such as hydrofracking—where incompatible placement within a community may have powerful negative effects. Because municipal residents are most familiar with and invested in the character of their community, they are in the best position to determine the most appropriate location of industrial uses—a fact central to zoning law, and recognized both in Pennsylvania statutory law and by this Court.

Act 13 of 2012, P.L. 87 (Feb. 14, 2012) (“Act 13”), affects the interest of *Amici* by eliminating their traditional authority to determine the location of a prevalent industrial use. In particular, Section 3304 of the act requires that all local zoning ordinances, including those of *Amici*, allow for natural gas drilling and associated industrial activities in virtually all areas of all

¹ *Amici* are Bell Acres Borough, City of Bethlehem, East Finley Township, Municipality of Monroeville, Municipality of Murrysville, Tinicum Township, and Wilkins Township. *Amici* submit this brief exclusively in connection with appeals Nos. 63 and 64 MAP 2012. Appellees’ briefs in response to those appeals are due on September 18, 2012, and, therefore, this brief in support of Appellees in those appeals is timely filed pursuant to Rule 531 of the Pennsylvania Rules of Appellate Procedure.

municipalities, risking potential harm to their health, welfare, and economic prospects. Because it is imperative for the protection of community character and the general welfare that municipalities exercise their traditional authority to determine where natural gas drilling activities may occur, *Amici* urge this Court to (1) to affirm the Commonwealth Court’s decision that Section 3304 of Act 13 is null and void for violating Article I, Section I of the Pennsylvania Constitution, Pa. Const., art. I, § 1, and (2) permanently to enjoin Section 3304 and all other provisions of Act 13 that enforce Section 3304.

STATEMENT OF FACTS

Amici adopt and incorporate by reference the Statements of Facts set forth in the Brief of Appellees, Nos. 63 & 64 MAP 2012 (filed Sept. 18, 2012).

ARGUMENT

I. Community Character is of Immense Importance to the Health, Identity, and Economic Viability of Pennsylvania’s Communities.

All Pennsylvanians are influenced by the character of the communities in which they live. Often described as a place’s “personality,” a community’s character has consequences for the aggregate health, happiness, identity, and economic well-being of community residents.

Community character is composed of physical inputs (e.g., land use patterns, natural resources, landscape and architectural features, and special historic or natural areas) and human inputs (demographics, employment mix, local history, cultural traditions). *See generally* American Planning Association, *Community Character: How Arts and Cultural Strategies Create, Reinforce, and Enhance a Sense of Place* (2011).² The interplay of these elements, as well as the sense of place or “feel” they engender in residents or visitors, creates the community’s character.

² Available at: <http://www.planning.org/research/arts/briefingpapers/character.htm>.

Community character is complex. The diverse elements of each community and the manner in which they are experienced by residents or visitors are unique from community to community. For this reason, a community's character is best understood by those who regularly experience it (or those who carefully study it, such as professional planners), and poorly understood by those with no experience of it.

While the character of a community is impossible to quantify, it has powerful and measurable effects on community identity, health, and economic viability. The sense of one's community and "home" is "bound-up" with personal identity, as well as personal welfare. Donna Jalbert Patalano, Note, *Police Power and the Public Trust: Prescriptive Zoning through the Conflation of Two Ancient Doctrines*, 28 B.C. Envtl. Aff. L. Rev. 683, 694 (2001) (quoting Mary Jane Radin, *Residential Rent Control*, 15 Phil. & Pub. Aff. 350, 362, 365 (1986)). See also Theodore Millon & Melvin J. Lerner, *5 Handbook of Psychology: Personality and Social Psychology* 421 (2003) [hereinafter "Psychology Handbook"] ("[Environment] is used to confer meaning, to promote identity, and to locate the person socially, culturally, and economically"). The degree to which residents are satisfied with a neighborhood—especially with regard to characteristics like green space, aesthetics, and degree of noise—has a studied effect on personal satisfaction and psychological well-being. Psychology Handbook at 425.

Correspondingly, where neighborhood character is unsatisfactory or oppressive, it can impair psychological and physical health as well as behavior. See *id.* at 426; Carolyn E. Cutrona *et al.*, *Neighborhood Characteristics and Depression*, in *Current Directions in Psychological Science* 188 (2006).³ Common negative community character elements, such as excess traffic or the presence of hazardous waste sites, have been linked with biological and self-reported stress as well as depression. See Cutrona *et al.*; Tse-Chuan Yang and Stephen A. Matthews, *The Role*

³ Available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2186297/>.

of Social and Built Environments in Predicting Self-Rated Stress: A Multilevel Analysis in Philadelphia, 803-810, in 16 *Health & Place* 803 (2010).⁴

Community character also has significant economic consequences. On an individual level, negative community character inputs can depress home values, thus hampering what is often a resident's single largest investment. *See, e.g.,* Molly Espey & Hilary Lopez, *The Impact of Airport Noise and Proximity on Residential Property Values*, in 31 *Growth and Change* 408 (2000). These types of changes also diminish personal wealth not expressed in home prices, such as the value existing residents place on the present enjoyment of their surroundings. *See* Bradley C. Karkkainen, *Zoning: A Reply to the Critics*, 10 *J. Land Use & Envtl. L.* 45, 64-78 (1994) (discussing the "consumer surplus" not capitalized in home values) [hereinafter "Karkkainen"].⁵ On a broader scale, local character drives local economic vitality. Character of place is key to attracting investment and commerce. As discussed below, this is particularly relevant for communities dependent on industries based in aesthetics or outside perception, such as tourism or organic agriculture and food production.

II. Hydraulic Fracturing Is a Heavy Industrial Process with the Potential to Affect the Community Character and Development Goals of Pennsylvania's Local Communities.

Natural gas drilling employing the technique known as hydraulic fracturing ("hydrofracking") is, by its nature, an intense industrial activity. Hydrofracking shale deposits, like those underlying Pennsylvania, involves a process by which millions of gallons of fresh water are mixed with chemical additives and pumped at high pressure deep underground, where they disturb deposits of methane, salts, and naturally occurring radioactive materials. U.S. Dep't

⁴ Available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3200568/>.

⁵ This loss of value has personal as well as economic dimensions. As Karkkainen describes, the arrival of an incompatible use may signify that "the neighborhood is taking the first step toward becoming something other than the neighborhood where I chose to live. Although difficult to place in quantitative terms, the loss is great." *Id.* at 73.

of Energy, *Modern Shale Gas Development in the United States: A Primer* ES-3 to ES-5 (2009);⁶ N.Y. State Dep't of Envtl. Conservation (DEC), Revised Draft Supplemental Generic Environmental Impact Statement ES-6 to ES-8 (2011) [hereinafter "DSGEIS"];⁷ *The Pennsylvania Guide to Fracturing, or "Fracking"*, StateImpact (2012).⁸ Millions of gallons of wastewater return to the surface and must be stored or transported, and the methane itself must be captured, compressed, and piped across the countryside. Rebecca Hammer & Jeanne VanBriesen, Ph.D., NRDC, *In Fracking's Wake* 10-11 (2012);⁹ DSGEIS at 5-99 to 5-118 (discussing fluid return); 5-14, 5-142 to 5-143 (describing utility corridors and gas gathering and compression). Among the hallmarks of hydrofracking are land clearance, heavy truck traffic, air impacts, and noise.

Widespread hydrofracking of the expansive and gas-rich Marcellus and Utica Shales presents an unprecedented prospect of industrializing Pennsylvania communities that wish to preserve their unindustrialized nature, threatening short and long term damage to their community character and local resources.

A. Hydrofracking is an Industrial Activity.

The effects of hydrofracking are those associated with a heavy industrial activity. Wellheads, flare stacks, and condensate tanks emit volatile organic compounds, ozone, and other air pollutants into the atmosphere. *See* DSGEIS at 6-102 to 6-107, 6-169 to 6-171; Lisa M.

⁶ Available at http://www.netl.doe.gov/technologies/oil-gas/publications/epreports/shale_gas_primer_2009.pdf.

⁷ The DSGEIS is the New York Department of Environmental Conservation's review of the potential environmental impacts of New York State's proposed program for permitting hydrofracking activities in that state's portion of the Marcellus Shale. The approximately 1,500 page report includes a detailed explanation of the hydrofracking process as well as many of the environmental effects that would be similar, if not the same, in the development of Pennsylvania's portion of the Marcellus Shale. Available at <http://www.dec.ny.gov/energy/75370.html>.

⁸ Available at <http://stateimpact.npr.org/pennsylvania/tag/fracking/>.

⁹ Available at <http://www.nrdc.org/energy/files/Fracking-Wastewater-FullReport.pdf>.

McKenzie *et al.*, Colo. Sch. of Pub. Health, *Human Health Risk Assessment of Air Emissions from Development of Unconventional Natural Gas Resources* (2012) (discussing increased cancer as well as chronic and acute non-cancer risks for residents living near hydrofracking operations) [hereinafter “CO Air Study”]. See also Wendy Koch, *Wyoming’s smog exceeds Los Angeles’ due to gas drilling*, USA Today’s Green House Blog (Mar. 09, 2011, 11:52 AM).¹⁰

High-volume fresh water withdrawals can affect the health of local waterbodies by diminishing stream flows and concentrating pollution from preexisting sources. See U.S. Env’tl. Protection Agency, *Plan to Study the Potential Impacts of Hydraulic Fracturing on Drinking Water Resources* 27 (2011);¹¹ DSGEIS at 6-2 to 6-6. And the thousand plus heavy truck trips—necessary to carry water, heavy machinery, chemicals, and waste required for each drilled well at a well pad—may crowd and damage local roads. DSGEIS at 6-301 to 6-303, 6-307 to 6-312.

Phases in the hydrofracking process include site preparation, drilling, actual hydrofracking, wastewater management, and gas recovery—all of which have potential community character impacts. Initial creation of the well requires “four to five weeks of drilling 24 hours per day to complete,” during which operational noise is commonly audible for thousands of feet. DSGEIS at 6-274, 6-293 to 6-296. Large drill rigs—about 150 feet high—must be illuminated at night; and during well production, elevated flare stacks burn excess gas above the tree line. DSGEIS at 6-274 (noting the “high visibility” of such activities). Actual hydrofracking of the well requires two to five days of up to “20 diesel-pumper trucks operating simultaneously,” generating noise levels of up to 84 decibels—the equivalent of a busy Manhattan street. *Id.* at 6-296; N.Y.C. Dep’t of Env’tl. Protection, *A Guide to New York City’s*

¹⁰ Available at <http://content.usatoday.com/communities/greenhouse/post/2011/03/wyomings-smog-exceeds-los-angeles-due-to-gas-drilling/1#.UFEBVo2PWJE>.

¹¹ Available at http://water.epa.gov/type/groundwater/uic/class2/hydraulicfracturing/upload/hf_study_plan_110211_final_508.pdf.

Noise Code 2 (2011).¹² And each well pad is capable of holding up to twelve individual wells, with each well capable of being hydrofracked multiple times. Jim Ladlee & Jeffrey Jacquet, *The Implications of Multi-Well Pads in the Marcellus Shale*, in 43 Cornell University & Penn State Research and Policy Brief Series (2011);¹³ DSGEIS at 5-22 to 5-23 (projecting six to eight wells per pad for drilling of Marcellus wells in New York), 5-98 to 5-99 (refracturing). As such, the productive life of a single well pad may bring, cumulatively, over a year's worth of around-the-clock community disturbance.

Accidents associated with hydrofracking are also commonplace. While the most nationally visible of these involve failures of improperly cemented well casings, which can lead to contamination of community drinking water, well site accidents are a frequent occurrence. *See, e.g., Pa. Land Trust Ass'n, Marcellus Shale Drillers in Pennsylvania Amass 1614 Violations Since 2008* (2010);¹⁴ Riverkeeper, *Fractured Communities: Case Studies of the Environmental Impacts of Industrial Gas Drilling* (2010) [hereinafter "Fractured Communities"].¹⁵ Such routine incidents include well explosions (termed "blowouts"), soil and groundwater contamination from mismanagement of chemical fracking fluids and wastewater, and explosive levels of gas migrating into private homes. *See Pa. Dep't of Env'tl. Protection, Bureau of Oil and Gas*

¹² Available at http://www.nyc.gov/html/dep/pdf/noise_code_guide.pdf.

¹³ The average numbers of wells per pad for Marcellus drilling in Pennsylvania has been increasing since the start of shale drilling. In 2010, the average number of wells per pad was 2.15, and "analysis suggests that in most cases operators are not drilling single wells instead of multi-well pads, as only about 6% of pads with 1, 2, or 3 wells were drilled within 1500 of feet of another well pad. The lack of nearby wells may indicate the early stages of a longer term infill strategy." Available at <http://devsoc.cals.cornell.edu/cals/devsoc/outreach/cardi/publications/loader.cfm?csModule=security/getfile&PageID=1016988>.

¹⁴ Available at <http://conserveland.org/violationsrpt>.

¹⁵ Available at <http://www.riverkeeper.org/wp-content/uploads/2010/09/Fractured-Communities-FINAL-September-2010.pdf>.

Management, *Stray Natural Gas Migration Associated with Oil and Gas Wells* (2009);¹⁶
Fractured Communities at 6-12, 18-19, 22-24.

For many localities where hydrofracking is allowed indiscriminately, its effects are felt by the entire community. Because shale deposits are vast and leaseholds are owned by multiple operators, economic incentives encourage community-wide and uncoordinated operations. Multiple simultaneous operations compound community character injuries: exacerbating air impacts, truck traffic, and the potential for aquifer contamination. Additionally, distribution of well pads throughout a community (approximately four acres each and often requiring the construction of new roads) contributes to increased soil erosion and the destruction of forestland and wildlife habitat—effects compounded by the construction of necessary support infrastructure, such as compressor stations and pipelines. *See generally* U.S. Geological Survey, *Landscape Consequences of Natural Gas Extraction in Bradford and Washington Counties, Pennsylvania, 2004–2010*, (2012) [hereinafter “USGS Landscape Report”];¹⁷ DSGEIS at 6-14 to 6-15 (erosion), 6-68 to 6-69, 6-72 to 6-76 (habitat fragmentation).

B. Hydrofracking Poses Potential Risks to the Character of Pennsylvania’s Diverse Communities.

The effects and costs hydrofracking exacts on a particular community must be evaluated locally, because they vary with the character and development goals of each community. At the most general level, one variable driving impacts on community character from hydrofracking will be local differences in land use composition and population density. The closer industrial pollution is to residences and workplaces, the greater the potential injury. *See, e.g.*, CO Air

¹⁶ Available at:
http://www.dep.state.pa.us/dep/subject/advoun/oil_gas/2009/Stray%20Gas%20Migration%20Cases.pdf.

¹⁷ Available at <http://pubs.usgs.gov/of/2012/1154/of2012-1154.pdf>.

Study (air impacts higher as proximity to wells increases). As such, dense municipalities that are primarily residential or commercial in character may be largely incompatible with hydrofracking.

Community costs can also be great for municipalities whose local economy depends on its charming or bucolic character. In 2010, tourism supported 452,340 jobs in Pennsylvania and generated \$35.9 billion dollars for the state economy, much of which was related to touring and outdoor recreation. Tourism Economics, *The Economic Impact of Travel and Tourism in Pennsylvania: Tourism Satellite Account, Calendar Year 2010* 15 (2012),¹⁸ Longwoods Int'l, *Pennsylvania's Annual Traveler Profile 2010 Travel Year* 37, 40 (2012) (touring and outdoor recreation approximately a third of all marketable trips).¹⁹ Revenue streams from tourists and outdoor recreationists—vital to the economic livelihood of many Pennsylvania communities home to the commonwealth's historic landmarks and rich wildlands—may be uniquely threatened by hydrofracking activities. Pennsylvania's world-class trout streams and wildlife refuges may be less appealing to weekend flyfishers and hunters when located next to noisy drill rigs, and a day trip out to a historic Pennsylvania battlefield may not be worth the increased truck traffic and smog.

Hydrofracking may also threaten communities which depend on agriculture. Studies have linked hydrofracking with negative health impacts on livestock and degradation of soil health. Michelle Bamberger & Robert E. Oswald, *Impacts of Gas Drilling on Human And Animal Health*, in *22 New Solutions* 51, 51-77, 72 (2012);²⁰ Rebecca Lesser, *New Test Assesses*

¹⁸ Available at http://cdn.visitpa.com/sites/visitpa.com/files/PA%20Travel%20Industry%20Economic%20Impact%202010%20FINAL_Feb2012_0.pdf.

¹⁹ Available at http://cdn.visitpa.com/sites/visitpa.com/files/Pennsylvania%20Annual%20Travel%20Profile%20for%202010%20Travel%20Year_Final%20Report.pdf.

²⁰ Available at http://ecowatch.org/wp-content/uploads/2012/01/Bamberger_Oswald_NS22_in_press.pdf.

Impact of Gas Drilling, Pipeline Construction on Soil Health, Chronicle Online, Cornell University (March 31, 2010) (fallow agricultural lands “were found to have marked negative effects from pipeline construction”).²¹ The specter of hydrofracking can also endanger the market for local exports of goods that rely on the actual or perceived purity of local natural resources, such as specialty food production and organic farming—one of the fastest growing segments of U.S. agriculture. Organic Trade Ass’n, *2011 Organic Industry Survey 5* (2011).²² In New York State, consumer contamination fears have already driven one major purchaser, the Park Slope Food Cooperative, which buys upward of \$3 million worth of organic farm products, to stop buying products from areas with hydrofracking. Mary Esch, *Fracking Poses Mixed Bag for Farmers in New York*, Associated Press, May 21, 2012. Similar trends in Pennsylvania could hamper communities heavily invested in organic farming.

Overall, some of the greatest damage may come from a community’s loss of rural identity and desirability as a place to live. *Cf.* Karkkainen at 73 (quoted at fn. 5). Hydrofracking wells, along with new development necessary to support those wells (e.g., impoundment pits, pipelines, compressor stations, waste treatment facilities, and natural gas processing plants) can alter the landscape of a formerly rural or forested area. *See* USGS Landscape Report at 3 (“With the accompanying areas of disturbance, well pads, new roads, and pipelines from [Marcellus Shale and coal bed methane wells], the effect on the landscape is often dramatic”). Many Pennsylvania families have invested their lives, as well as their finances, into living in a rural community, and simply do not want to live next door to hydrofracking activities.

²¹ Available at <http://www.news.cornell.edu/stories/March10/soiltestdrilling.html>.

²² Overview available at <http://www.ota.com/pics/documents/2011OrganicIndustrySurvey.pdf>. In Pennsylvania alone, there are over 37,000 acres of pasture and cropland dedicated to organics, and more than 350 organic farms. *See* U.S. Dep’t of Agric, Econ. Research Service, *Table 4: Certified organic pasture and cropland, 2008, by State*, Available at <http://www.ers.usda.gov/Data/Organic/>.

Loss of rural aesthetic can also result in tangible economic injury. Industrialization of communities, especially those largely dependent on well water, can lower local property values, thereby diminishing what is often a family's most valuable asset. Lucija Muehlenbachs *et al.*, *The Drill and the Bill: Shale Gas Development and Property Values*, in *Canadian Journal of Economics* 1 (2012). In situations where hydrofracking does decrease the value of neighboring properties, royalty revenues received by leasing landowners will not address or compensate the measurable and non-monetizable losses suffered by the rest of community. For some communities, the multi-generational wealth potential of existing economies or property may be more valuable than the temporary gains accruing to selected residents.

III. Municipal Zoning and Comprehensive Planning Protect Community Character from Conflicting or Inappropriate Uses, Such as Hydrofracking, and Promote Productive Development.

Municipal zoning is Pennsylvania's principal method for identifying and safeguarding community character against incompatible and potentially destructive development, such as hydrofracking. Since its origins, zoning has played a central role in the protection and promotion of the health and vibrancy of the state's diverse communities.

A. The Foundations of Zoning Are Rooted In Communities' Rights to Protect Themselves Against New Industrial Uses.

Zoning initially arose to protect communities against the new harms posed by the rapid industrialization and urbanization of the late nineteenth and early twentieth centuries. Harmful spillover effects from new uses, such as skyscrapers and manufacturing facilities, especially in residential neighborhoods, demanded solutions beyond traditional, after-the-fact tort and nuisance remedies. *See generally* Edward Bassett, *Zoning* 316 (1922) [hereinafter "Zoning"].²³ Factories and livery stables intruded into residential neighborhoods and "bright business streets,"

²³ Edward Bassett was Chairman of New York City's first zoning commission.

sickening residents and driving away customers. Zoning at 316. The recognized need for land use controls that would manage development according to the “character of the district and its suitability for particular uses” paved the way for the nation’s first highly-publicized, comprehensive zoning ordinance in 1916. U.S. Dept. of Commerce, *A Standard State Zoning Enabling Act* §3 (1926);²⁴ New York City. *Building Zone Resolution* (1916).²⁵

The United States Supreme Court recognized the utility of this and other early ordinances in *Vill. of Euclid, Ohio v. Ambler Realty Co.*, where it upheld use of state-delegated police power to enact zoning laws designed to benefit the “public health, safety, morals, and general welfare”—an inquiry heavily dependent on community character. 272 U.S. 365, 395, 47 S.Ct. 114, 121 (1926). Analogizing to the context-based nature of nuisance law, the Court held that to benefit the public welfare, municipalities may determine incompatible or hurtful uses for exclusion from certain areas “not by . . . abstract consideration . . . but by considering it in connection with the circumstances and the locality.” *Id.* at 388 (famously stating that an excludable “nuisance may be merely a right thing in the wrong place,—like a pig in the parlor instead of the barnyard.”). Under this rubric, the more noxious the use, the greater the discretion a municipality may exercise in excluding it from an area with sensitive community character. Accordingly, the “serious question” in *Euclid* was whether municipalities could exclude less noxious uses, such as apartment buildings and businesses, from lower density residential areas; the court found “no difficulty” in sustaining zoning regulations designed to “divert an industrial

²⁴ The quoted language comes from § 3 of the Standard State Zoning Enabling Act, a model act published by the U.S. Department of Commerce that codified many early zoning principles.

²⁵ Available at http://www.nyc.gov/html/dcp/pdf/history_project/1916_zoning_resolution.pdf. The 1916 ordinance famously divided the entire city into three use districts—“residence,” “business,” and “unrestricted”—to separate neighborhoods of a sensitive character from uses with the greatest potential for harm. This purpose allowed some conceptual flexibility. Residence districts enumerated “farming” as a permissible use, but excluded business and industry. *Id.* at § 3. Likewise, “business districts” only completely excluded the most noxious industrial uses, such as “gas . . . manufacture or storage” and “petroleum refining,” *Id.* at § 4(a).

flow from the course which it would follow.” *Id.* at 390. Although zoning law has changed significantly in the nearly 100 years since the first ordinance, and the nearly 90 years since *Euclid*, the separation of industrial uses from sensitive community areas has always been a central and uncontroversial principal of zoning.

B. Pennsylvania’s Municipalities Planning Code Is Designed to Enable Municipalities to Effectively Protect the Character of Their Communities and Promote Important Development Goals.

Today, municipal zoning authority over land use, as delegated by the Pennsylvania Municipalities Planning Code (MPC), Act of July 31, 1968 P.L. 805, as re-enacted and amended by Section 1 of the Act of December 21, 1988, P.L. 1329, 53 P.S. § 10101, *et. seq.*, is a central tool for protecting community character and promoting the productive development of the commonwealth. *See* 53 P.S. §§ 10101-11202, 10105 (purposes of MPC, *inter alia*, are “to protect and promote safety, health and morals; to accomplish coordinated development; . . . [and] to promote the preservation of this Commonwealth's natural and historic resources and prime agricultural land”); Pa. Dep’t of Community and Economic Dev., *The Comprehensive Plan in Pennsylvania 2* (2001) (“Local government is the backbone of Pennsylvania’s governmental structure and has the responsibility to plan and take charge rather than doing nothing.”) [hereinafter “The Comprehensive Plan ”]. The MPC carefully delegates land use authority in a manner that accounts for and protects community character. *Id.*

First and foremost, Pennsylvania requires all local governments to consider community character in all land use decisions by requiring that land use authority be exercised only in accordance either with a “comprehensive plan” or with a duly enacted “statement of community development objectives.” 53 P.S. §§ 10301, 10303, 10603(a), (j), 10606. A comprehensive plan examines the unique development needs of a community as a whole by carefully inventorying

the elements of its character. *See* 53 P.S. § 10301.2; The Comprehensive Plan at 6-10 (common plan components include a detailed description of the community’s topography, natural and water resources, historic features, demographic and residential trends, agricultural lands, and economic composition). These elements then inform the local government’s own development goals and identification of compatible and incompatible development. *See* 53 P.S. § 10301(a)(2) (comprehensive plan must include, *inter alia*, a statement of future development objectives; a plan for “amount, intensity, character and timing of land use proposed for residence, industry, business . . . [and] preservation of prime agricultural lands, flood plains and *other areas of special hazards*,” and may consider interaction of various plan components on environmental, fiscal, and economic development issues in the community (emphasis added)). Likewise, statements of community development objectives adopted in lieu of a comprehensive plan must also consider local character in determining community development goals. 53 P.S. § 10606 (statement requires legislative findings “with respect to land use; density of population; the need for housing, commerce and industry; . . . [and] the need for preserving agricultural land and protecting natural resources”).

By requiring decision makers to zone in accordance with holistic, well-considered goals, the MPC ensures that all land use decisions consider “the character of the municipality, the needs of the citizens and the suitabilities and special nature of particular parts of the municipality.” 53 P.S. § 10603(a). The MPC similarly encourages consideration of distinct regional character: empowering municipalities to enter into inter-municipal zoning and planning arrangements and requiring that zoning and planning authority be exercised consistently with such arrangements or with county comprehensive plans. *See* 53 P.S. §§ 10301.4(a), 10603(j), 10801-A-10821-A, 11101-11107. By these means “coordinated and practical community development” is

encouraged from the outset, and haphazard and inconsistent zoning decisions with injurious long-term consequences are deterred. 53 P.S. § 10604(1).

The MPC is especially wary of injury to particularly sensitive community areas. Accordingly, all zoning ordinances “shall protect prime agricultural land” and “shall provide for the protection of natural and historic features and resources.” 53 P.S. § 10603(g). And the state’s interest in safeguarding such vulnerable resources is demonstrated elsewhere throughout the act. *See e.g.* 53 P.S. §§ 10105 (purpose of act to “promote the preservation of this Commonwealth’s natural and historic resources and prime agricultural land”); 10301(a)(6) (comprehensive plans must include “a plan for the protection of natural and historic resources”); 10603(c)(7) (ordinances may contain “provisions to promote and preserve prime agricultural land, environmentally sensitive areas and areas of historic significance”); 10604(1) (purpose of zoning to preserve “the natural, scenic and historic values in the environment and preservation of forests, wetlands, aquifers and floodplains”). *See also e.g.* 53 P.S. §§ 10603(b)(5), 10605(2)(vi), (vii); 10609.1(c)(3), (4), (5); 11103(a)(6).

As a whole, the MPC employs municipalities to perform land use planning that cannot be effectively done at the state level. Because municipal decision makers have both a strong understanding of the local characteristics most important to community vitality and a personal stake in its improvement, they occupy an ideal position to identify compatible as well as detrimental development. Even if state actors could be equally effective in such determinations, the administrative burden of individually and comprehensively planning and zoning for each of the commonwealth’s two thousand plus municipalities is beyond that of any existing state agency. This is no doubt why the MPC also requires state agencies to consider local

comprehensive plans, and implementing zoning ordinances, when funding or permitting development projects that impact land use. 53 P.S. §§ 10619.2(a); 11105.

C. Courts Have Recognized the Important Role of Municipal Land Use Decision Making in Pennsylvania.

Pennsylvania courts recognize the unique responsibilities and vital role that municipalities play in the Commonwealth's system for land use regulation. *Huntley & Huntley, Inc. v. Borough Council of Borough of Oakmont*, 600 Pa. 207, 225, 964 A.2d 855, 866 (2009) (“the MPC's authorization of local zoning laws is provided in recognition of the unique expertise of municipal governing bodies to designate where different uses should be permitted in a manner that accounts for the community's development objectives, its character, and the ‘suitabilities and special nature of particular parts of the community.’” (quoting 53 P.S. § 10603(a)); *Hoffman Min. Co., Inc. v. Zoning Hearing Bd. of Adams Twp., Cambria County*, 32 A.3d 587, 605 (Pa. 2011) (“traditional and historical prerogative of local zoning authorities” is to zone in accordance with character and particular needs of municipality (citing 53 P.S. § 10603(a); *Miller & Son Paving, Inc. v. Wrightstown Twp.*, 499 Pa. 80, 88, 451 A.2d 1002, 1006 (1982)). As such, municipal zoning and planning decisions are given great respect. *Schubach v. Silver*, 461 Pa. 366, 386, 336 A.2d 328, 338 (1975) (“to promote the orderly development of a community the zoning authorities must be allowed to put a piece of property to the use which is most beneficial to the comprehensive plan, i.e., establish a land use which best blends in with surrounding different uses”).

Given municipal expertise with respect to land use decisions, Pennsylvania courts have allowed municipal decision makers broad discretion to address community character issues, such as community appearance and safety. *See Adams Outdoor Adver., LP v. Zoning Hearing Bd. of Smithfield Twp.*, 909 A.2d 469, 477-78 (Pa. Commw. Ct. 2006) (a municipality “can establish

rigorous objective standards in its ordinance for size, placement, materials, or coloration of signs to insure that their offensiveness is minimized as much as possible” (quoting *Atl. Ref. & Mktg. Corp. v. Bd. of Com'rs of York Twp.*, 147 Pa. Cmwlth. 418, 422, 608 A.2d 592, 594 (1992))). Similarly, courts have upheld land use regulations aimed at protecting open space, valuable agricultural land, and the “environmental integrity of the community.” See *G.M.P. Land Co., Inc. v. Bd. of Sup'rs of Hegins Twp.*, 72 Pa. Cmwlth. 591, 600-01, 457 A.2d 989, 994-95 (1983) (allowing zoning regulation prohibiting strip mining in incompatible districts); *In re Petition of Dolington Land Group*, 576 Pa. 519, 538, 839 A.2d 1021, 1033, 1036-37 (2003) (permitting the use of municipal conservation management districts to preserve agriculture within a municipality); *Crystal Forest Associates, LP v. Buckingham Twp. Sup'rs*, 872 A.2d 206, 215-18 (Pa. Commw. Ct. 2005) (upholding use of agricultural preservation districts requiring 50% of a parcel therein to remain open space); *accord Keinath v. Twp. of Edgmont*, 964 A.2d 458 (Pa. Commw. Ct. 2009).

Where land use regulations regarding an activity with significant potential to injure community character is at issue, deference to municipal expertise is at its strongest. For example, although an ordinance’s presumption of validity is generally overcome where it completely excludes a legitimate use, regulations limiting or excluding “particularly objectionable” activities such as those “generally known to give off noxious odors, disturb the tranquility of a large area by making loud noises, [and] have the obvious potential of poisoning the air or the water of the area” have been presumed valid. *Beaver Gasoline Co. v. Zoning Hearing Bd. of Borough of Osborne*, 445 Pa. 571, 576-77, 285 A.2d 501, 504-05 (1971) (noting permissibility of excluding such uses, while invalidating particular ordinance at issue). See also *S. Whitford Associates, Inc. v. Zoning Hearing Bd. of W. Whiteland Twp.*, 157 Pa. Cmwlth. 387,

395-400, 630 A.2d 903, 907-09 (1993); *Bluebell Associates v. Twp. Eng'r for Whitpain Twp.*, 45 Pa. Cmwlth. 599, 606-09, 405 A.2d 1070, 1073-74 (1979) (ordinance completely excluding airports presumed valid). Additionally, in cases interpreting municipal preemption clauses of commonwealth environmental regulatory statutes, ambiguous preemptive language has been construed in favor of traditional municipal authority to control the location of industrial or nuisance-like activities, including hydrofracking activities. *Huntley*, 600 Pa. at 222-26, 964 A.2d at 864-66; *Hoffman Min. Co., Inc.*, 32 A.3d at 598-607.

IV. Act 13 Fails to Address the Damage that Hydrofracking Will Inflict on the Character and Locally Important Resources of Many Pennsylvania Communities.

The attempted statewide zoning and well location provisions of Act 13 would have the effect of permitting indiscriminate and communitywide hydrofracking in nearly all of Pennsylvania's communities, risking potential negative effects on local character, resources, and economies. 58 P.S. § 3215, 3301-3309. This wholesale expansion of industrial activity without individual consideration of community suitability is contrary to Pennsylvania's tradition of local land use planning and the historic purposes of zoning.

Under Act 13, municipalities would retain virtually no authority to determine the appropriate location of hydrofracking activities or moderate their negative effects because all ordinances would be required to allow most hydrofracking activities as-of-right and as-is in all zones. 58 P.S. § 3304(a), (b)(5)-(8). While municipalities would be able to exclude *wells* from residential areas—provided a wellhead could be placed at least 500 feet from an existing building—this authority would not apply to other attendant uses, such as well pads (must be allowed as close as 300 feet from an existing building), impoundment ponds (same), or pipelines

(no restrictions). *Id.* at (b)(5.1), (6).²⁶ Other zones, such as agricultural zones, receive even less protection. *Id.* at (b)(7), (8) (natural gas compressor stations permitted in all agricultural and industrial zones; natural gas processing plants permitted in agricultural zones if 200 feet from nearest lot line and do not exceed noise standard of 60dbA at that line). Once hydrofracking activities are located, Act 13 also strips municipalities of traditional authority to impose fencing requirements or prevent light or noise pollution. *Id.* at (b)(3), (10). All light, noise, and fencing restrictions applicable to industrial hydrofracking activities would also need to apply to all “other land development” within the same zone—even in residential zones—detering municipalities from enacting such restrictions. *Id.* at (b)(3).²⁷ Limitations on hours of operation for many hydrofracking activities would be forbidden. *Id.* at (b)(10).²⁸

It is easy to see where these mandatory limitations would leave municipalities exposed to potentially serious and long-term damages from hydrofracking. On a macro level, Act 13 provides no method by which to account for community character or long-term municipal development goals. With no community input, the statute essentially amends all municipal land development plans to allow for the conversion of any landscape—including formerly tranquil rural, residential, and agricultural areas—into *de facto* industrial zones, placing preexisting local jobs and the welfare and property values of landowners at risk.

²⁶ 58 P.S. § 3304(b)(5) seems to allow exclusion of “activities at impoundment areas” from some zones. These “activities,” however, are nowhere defined, and impoundment areas themselves are mandatory permitted uses in all zones under 58 P.S. § 3304(b)(6).

²⁷ “Other land development” is not defined in Act 13, but, presumably, “land development” in a residential zone would include residences. This would imply that fencing requirements around a hazardous impoundment pond must be the same as those for any residential property.

²⁸ Municipalities “[m]ay not impose limits or conditions on subterranean operations or hours of operation of compressor stations and processing plants or hours of operation for the drilling of oil and gas wells or the assembly and disassembly of drilling rigs.” 58 P.S. § 3304(b)(10). While the term “subterranean operations” is not defined in the act, presumably this term would apply to the actual pumping process involved in hydrofracking.

At a more intimate level, Act 13 prevents communities from taking even the most remedial measures to protect resident health and property. For example, most setbacks for hydrofracking activities are from buildings, not property lines, allowing these activities to be placed, in certain circumstances, immediately adjacent to livestock areas, residential backyards, or school playgrounds. *See* 58 P.S. § 3304.


To suppose that blanket authorization of a potentially injurious industrial activity—with no specialized attention to its effects on particular community areas or the community at large—represents an effective and sufficiently protective statewide land use “plan” for hydrofracking ignores not only the fine points of comprehensive land use planning, but even the basic public health foundations of land use law—the separation of people from pollution. In short, Act 13 fails to protect Pennsylvania’s communities from hydrofracking, and sets a bad precedent for similar permissive treatment of other industrial activities in incompatible areas.

CONCLUSION

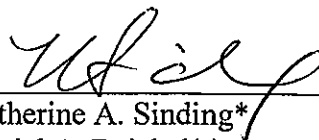
For the foregoing reasons, and the reasons stated by Appellees, this Court should affirm the decision of the Commonwealth Court that Section 3304 of Act 13 is null and void for violating Article I, Section I of the Pennsylvania Constitution, Pa. Const., art. I, § 1, and permanently enjoin Section 3304 and all other provisions of Act 13 that enforce Section 3304.

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CERTIFICATE OF SERVICE

I hereby certify that on September 18th, 2012, I served two true and correct copies of the foregoing Brief of *Amici Curiae* in support of Appellees, Bell Acres Borough, City of Bethlehem, East Finley Township, Municipality of Monroeville, Municipality of Murrysville, Tincum Township, and Wilkins Township, by first-class mail upon each of the addressees listed below.

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