



**Robinson Township, Delaware Riverkeeper Network, et al. v. Commonwealth**  
***Decided by the Pennsylvania Supreme Court Dec. 19, 2013***

**Frequently Asked Question 4:**

**Can a Municipality Lawfully Prevent a Leaseholder from Having a Gas Well on His Property?**

March, 2012, the Delaware Riverkeeper Network, seven municipalities, and Dr. Mehernosh Khan filed legal action challenging Act 13, which was signed into law by Governor Corbett on February 14, 2012. Act 13 amended the Pennsylvania Oil and Gas Act, and among other things, preempted municipal zoning of oil and gas development. The plaintiffs challenged the new law on the grounds it violated the Pennsylvania and Constitution and endangered public health, natural resources, communities and the environment. On December 19, 2013, the Pennsylvania Supreme Court issued a final decision declaring portions of the law unconstitutional, giving the Environmental Rights Amendment of the Pennsylvania Constitution strong substantive importance, and remanding portions of the law for additional litigation.



Since issuance of the PA Supreme Court decision there have been many questions asked about the substance, meaning and application of this precedent setting decision. The Delaware Riverkeeper Network and our legal counsel are working to answer these important questions for the community in a series of FAQ information sheets.

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

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

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

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

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

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

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

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

Consequently, even if zoning were to prohibit gas drilling in all but industrial zoning districts, property owners could still use and enjoy their property in other ways. Indeed, the courts have long recognized that farmland has value and that the protection of agricultural land from development is a valid

and appropriate basis for zoning. In re Petition of Dolington Land Grp., 839 A.2d 1021, 1035 (Pa. 2003), Boundary Drive Associates, 491 A.2d at 90.

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

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

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

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

*Date: June 19, 2014*