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MEMORANDUM

To: Delaware Riverkeeper Network

From: Jordan B. Yeager, Curtin & Heefner LLP

Date: January 12, 2017

Re: Review of Proposed Newtown-Wrightstown-Upper Makefield Joint Municipal Zoning Ordinance Amendments Concerning Oil and Gas Operations

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We have reviewed the proposed revisions to the Newtown-Wrightstown-Upper Makefield Joint Municipal Zoning Ordinance ("JMZO") regarding oil and gas operations. There are substantial deficiencies with the draft as proposed and with the process the Jointure has pursued. We advise against approval of the proposal unless and until these issues are addressed. In the discussion below we address the following: 1) an overview of our relevant qualifications; 2) vulnerability to challenge for failure to respect the Pennsylvania Constitution's Environmental Rights Amendment; 3) vulnerability to challenge for violating substantive due process principles; 4) failure to adequately address impoundments, tank sites, compressor stations, processing facilities, and unregulated pipelines; 5) failure to include sufficient setbacks; 6) lack of other protections in the ordinance; and 7) need to modify the purpose sections for the RI-A and QA-A districts.

I. Overview of Relevant Qualifications

I am a partner with Curtin & Heefner LLP in Doylestown, PA, where I chair the firm's Public Sector and Environmental practice groups. I serve as Solicitor to Nockamixon Township, Solebury Township, Yardley Borough, Doylestown Borough, and the Morrisville Borough Zoning Hearing Board. I also serve as special counsel to municipalities across the Commonwealth, including the City of Pittsburgh.

I have been a leader, statewide, in addressing municipal zoning of oil and gas development activities. Most notably, in the landmark case *Robinson Township, Delaware Riverkeeper Network, et al. v. Commonwealth of Pennsylvania*, I successfully argued before the Pennsylvania Supreme Court that Act 13 of 2012, amending the state's Oil & Gas law, violated Article I, Section 27 of the PA Constitution (Environmental Rights Amendment). The Supreme Court's opinion adopting our arguments upheld the role of local governments in land use and

environmental matters and has been widely recognized as revitalizing the Environmental Rights Amendment.

On the Delaware Riverkeeper Network's behalf, I am currently involved in cases before the Pennsylvania Supreme Court and the Pennsylvania Commonwealth Court which address the next generation of issues involving both the zoning of gas development activities and the general applicability of the Environmental Rights Amendment. In the *Pennsylvania Environmental Defense Foundation* case (discussed further below), I am lead counsel on a "friend of the court" brief concerning the appropriate standard of review for analyses under the Environmental Rights Amendment. In the *Gorsline* case, I am lead counsel on another "friend of the court" brief addressing a conditional use approval of a unconventional gas wellsite in a non-industrial zoning district. In a case out of Middlesex Township, Butler County, I have been lead counsel, beginning with a series of eight Zoning Hearing Board hearings, on behalf of Delaware Riverkeeper Network and others who brought a substantive validity challenge to an ordinance that allows unconventional gas development in a residential-agricultural area in close proximity to a community's main public school complex, where over 3,000 children attend school. The case is currently before Commonwealth Court.[1]

I have lectured frequently on these issues including the following continuing legal education seminars and presentations:

> *Environmental Rights Amendment Past & Present,* Pennsylvania Bar Institute, Land Use Institute (July 2016).
>
> *Municipal Law Seminar: Robinson Township and Article I, Sec. 27 of the PA Constitution*, Bucks County Bar Association, Bench-Bar Conference (September 2015).
>
> *What Every Municipal Lawyer Needs to Know About the Environmental Rights Amendment*, Pennsylvania State Association of Boroughs (August 2015).
>
> *Current and Future Litigation Issues*, Pennsylvania Bar Institute, Environmental Law Forum (April 2015).
>
> *Keynote Address*, Watershed Congress (March 2015).
>
> *The Supreme Court's Decision in Robinson Township and the Future of Zoning in the Commonwealth - What Every Municipal and Land Use Lawyer Needs to Know*, Pennsylvania Bar Institute (September 2014).

[1] I have been litigating these issues since unconventional gas development arrived in Pennsylvania in 2008. I handled the case *Arbor Res., LLC v. Nockamixon Twp.*, 973 A.2d 1036 (Pa. Commw. 2009), in which we successfully defended a zoning ordinance regulating gas development. In 2009 I was also lead counsel on friend of the court briefs in the PA Supreme Court in the *Huntley v. Borough of Oakmont* and *Range Resources v. Salem Township* cases which are discussed further below.

Robinson Township vs. Commonwealth (Act 13), Pennsylvania Bar Institute, Land Use Institute (June 2014).

Local Land Use Regulation, Pennsylvania Bar Institute, Environmental Law Forum (April 2014).

Private Water Supply & Toxic Torts Claims, Pennsylvania Bar Institute, Environmental Law Forum (April 2014).

Zoning and Act 13, American Law Institute - Environmental Law Institute CLE, Role of Localities & the Public in Shaping Drilling's Future (January 2013).

Will Northeast PA Get It Right this Time? WVIA-TV, State of Pennsylvania (May 2011).

Gas and Our Water: Legal Tools for Advocates Dealing with Drilling in the Marcellus Shale, PennFuture Watershed Conference (2011).

Gas Drilling Litigation Case Study: Arbor Resources v. Nockamixon Township, National People's Oil & Gas Summit (2010).

Among the many published articles and treatise chapters I have authored, the following are an example of those specifically related to these issues:

Zoning & Municipal Regulation (Chapter), Law of Oil & Gas in Pennsylvania, Pennsylvania Bar Institute (2nd Ed. September 2016).

Zoning & Municipal Regulation (Chapter), Law of Oil & Gas in Pennsylvania, Pennsylvania Bar Institute (1st Ed. 2014).

Natural Gas Regulation in the Municipal Government Context, The Legal Intelligencer (July 2011).

Due Process, Preemption, Property Rights and the Battle Over Local Regulation of Gas Drilling, PA Bar Association's Environmental & Energy Law Section Newsletter, Vol. 1, Issue 1 (2011).

I was also one of the authors of the Delaware Riverkeeper Network's handbook, "Defending the Environmental Rights of PA Communities," which is available for download here: http://www.delawareriverkeeper.org/reports. This publication is specifically designed for communities facing decisions re fracking ordinances.

II. The Proposed Ordinance is Vulnerable to Challenge for Failure to Respect the Pennsylvania Constitution's Environmental Rights Amendment

The proposed ordinance, if adopted, would be vulnerable to a substantive validity

challenge for failure to respect the Pennsylvania Constitution's Environmental Rights Amendment ("Section 27"). In particular, the proposed ordinance has not been prepared in accordance with the Jointure Townships' obligations as trustees of the community's natural resources. There has been no science-based decisionmaking process. There has been no determination that the activities identified can be carried out in a manner that is protective of human health and the environment. Indeed, the existing regulatory regime is inadequate to support any such conclusion.

In order to understand these conclusions, we need to provide a brief primer on Section 27. In the Pennsylvania Supreme Court's decision in the Act 13 case ("*Robinson Township, Delaware Riverkeeper Network v. Commonwealth")*, the lead opinion provided an exhaustive discussion of the Environmental Rights Amendment ("Section 27") and affirmed that municipalities have the authority and the *obligation* to act as trustee of the people's public natural resources, and to respect the individual environmental rights of residents. These principles were largely echoed by the Commonwealth Court in its 2015 *en banc* decision in *Pennsylvania Envt'l Defense Foundation v. Commonwealth* ("*PEDF*").[2]

As the Supreme Court explained in the Act 13 case, Section 27 has two components, one of individual environmental rights, and the second recognizing public trust obligations. Each will be discussed in turn.

A. Individual Environmental Rights

The first clause of Section 27 declares,

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

Pa. Const. art. I, § 27, cl. 1.

The first clause of Article I, Section 27 is a statement of individual environmental rights. The term "the people" translates to a right "personal to each citizen," just as Article I, Section 8 has been interpreted to mean an individual right of privacy.[3] Thus, each citizen has an individual right to clean air, pure water, and to the preservation of the natural, scenic, historic, and esthetic values of the environment. The Pennsylvania Constitution protects these rights in the same way as all other inherent rights enshrined in Article I, including the right to free speech and property rights. "The corollary of the people's Section 27 reservation of right to an environment of quality is an obligation on the government's behalf to refrain from unduly infringing upon or violating

[2] *Pennsylvania Envtl. Def. Found. v. Com. ("PEDF")*, 108 A.3d 140, 170 (Pa. Commw. Ct. 2015).
[3] *Robinson Twp., Delaware Riverkeeper Network et al. v. Com. ("Robinson"),* 83 A.3d 901, 951, n.39 (Pa. 2013).

the right, including by legislative enactment or executive action."[4]

B. Public Trust Obligations

The second and third clauses of Section 27 declare as follows:

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

Pa. Const. art. I, § 27, cls. 2–3.

The public trust component of Article I, Section 27 was central to the Supreme Court's determination that Act 13 was unconstitutional. Section 27 declares a public trust over Pennsylvania's public natural resources, and charges the Commonwealth and its political subdivisions, as trustees, with the conservation and maintenance of these resources for the benefit of all Pennsylvanians, including generations yet to come.[5] Section 27 is the people's "expressed reservation of a right to benefit from the Commonwealth's duty of management of our public natural resources."[6] The public natural resources that form the body or *corpus* of the trust include both publicly-owned resources such as state forest lands and local parks, and "those resources not owned by the Commonwealth, which involve a public interest."[7]

As a trustee, state and local governments have fiduciary duties that they owe to both present and future Pennsylvanians.[8] "The plain meaning of the terms conserve and maintain implicates a duty to prevent and remedy the degradation, diminution, or depletion of our public natural resources. As a fiduciary, the Commonwealth has a duty to act toward the corpus of the trust—the public natural resources—with prudence, loyalty, and impartiality."[9] These duties are both "prohibitory" and affirmative. Section 27 prohibits government:

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

[4] *Id*. at 952.
[5] *Id*.
[6] *Id*. at 976; see also *id*. at 956, discussing difference between government as proprietor and government as trustee.
[7] 1970 Pa. Legis. J.—House, 2271–72; see also *Robinson Township*, 83 A.3d at 956–57.
[8] *Robinson Township*, 83 A.3d at 957.
[9] *Id*.

of private parties.[10]

Section 27 also requires the government "to act affirmatively to protect the environment, via legislative action."[11]

As to present and future Pennsylvanians, who are the beneficiaries of Section 27's public trust, state and local governments have fiduciary duties "to deal impartially with all beneficiaries and, second, . . . to balance the interests of present and future beneficiaries."[12] The duty of impartiality "means that the trustee must treat all equitably in light of the purpose of the trust."[13] Further, to treat present and future beneficiaries equitably means to balance their interests; in other words, "the trustee cannot be short-sighted."[14]

C. Requirement to Engage in Pre-Action Science-Based Decisionmaking

The Supreme Court plurality in the Act 13 case explained that performing investigation and analysis in advance of acting, and taking seriously the outcome of those analyses, is part of the trustee's obligation under the Constitution. This action is required to avoid infringing on each person's right to a clean, healthy environment, and to act as a trustee (a fiduciary) of the people's public natural resources. In *PEDF*, the Commonwealth Court, sitting *en banc*, adopted this approach.[15]

To respect individual environmental rights, a governmental entity must evaluate whether a proposed course of action would cause unreasonable actual or likely degradation of the environment in violation of Section 27. First, a governmental entity must engage in a *pre-action* analysis — an examination of the impact on the environment — to determine whether a proposed course of action will infringe on a citizen's constitutionally protected environmental rights. This evaluation must reasonably account for local conditions.[16] Second, a governmental entity must consider, as part of that pre-action analysis, whether a proposed course of action would cause unreasonable "actual or likely degradation" of air or water quality, or other protected constitutional features, such as natural and scenic values of the environment.[17] If a governmental entity fails to perform the analysis, or allows development to proceed that would cause unreasonable "actual or likely degradation," it risks a claim by residents for violation of the Environmental Rights Amendment.[18]

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[10] *Id.*
[11] *Id*. at 958.
[12] *Id*. at 959.
[13] *Id*.
[14] *Id.*
[15] See, e.g., *PEDF*, 108 A.3d at 156-57, 168, 172.
[16] *Robinson Township*, 83 A.3d at 953 ("[W]hen government acts, the action must, on balance, reasonably account for the environmental features of the affected locale . . . if it is to pass constitutional muster").
[17] *Id.*
[18] *Id.* at 952 ("The failure to obtain information regarding environmental effects does not excuse

As a trustee, state and local governments must consider before acting whether the proposed action (for example, enacting an ordinance) will lead to the "degradation, diminution, or depletion" of the people's public natural resources either now or in the future.[19] Likewise, the trustee must consider whether proposed action places higher environmental burdens on some residents than others, which would violate a trustee's duty of impartiality to treat the beneficiaries "equitably in light of the purposes of the trust."[20]

"The Environmental Rights Amendment offers protection equally against actions with immediate severe impact on public natural resources and against actions with minimal or insignificant present consequences that are actually or likely to have significant or irreversible effects in the short or long term."[21] Consequently, any pre-action analysis must account for the range of present and future impacts of proposed activities or courses of action.

In *PEDF*, the Commonwealth Court echoed these principles. The court recgonzied that government officials are "vested by law with the duty to protect and preserve our natural resources," and "the people of Pennsylvania are entitled to expect that those officials will 'support, obey and defend' Article I, Section 27 of the Pennsylvania Constitution in the discharge of their powers and duties …."[22] The court noted that government officials having taken an oath to support the Pennsylvania Constitution must discharge their duties in accordance with Section 27.

The court affirmed that these duties require that government officials at all levels avoid unduly infringing on residents' rights to "clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment."[23] To avoid infringing on the people's inherent individual environmental rights, officials must engage in science-based decision-making. As the Commonwealth Court noted, quoting directly from *Robinson Township, Deleware Riverkeeper Network,* "The first clause of the Environmental Rights Amendment 'requires each branch of government to consider in advance of proceeding the

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the constitutional obligation because the obligation exists *a priori* to any statute purporting to create a cause of action"); see also *id.* at 951 (stating that clause 1 "implicates a holistic analytical approach to ensure both the protection from harm or damage and to ensure the maintenance and perpetuation of an environment of quality for the benefit of future generations").

[19] *Id*. at 957; see also 20 Pa.C.S. 7203(a) and (c)(5); *In re Scheidmantel*, 868 A.2d 464, 492 (Pa.Super. 2005) ("trustee's action must represent an actual and honest exercise of judgment predicated on a genuine consideration of existing conditions"); 20 Pa.C.S. 7773.

[20] *Robinson Township*, 83 A.3d at 959; see also *id.* at 980 (finding that section 3304 of Act 13 ran afoul of the trustee's duty of impartiality because "Section 3304's requirement that local government permit industrial uses in all zoning districts [means] that some properties and communities will carry much heavier environmental and habitability burdens than others").

[21] *Id.* at 959.

[22] *PEDF*, 108 A.3d 140, 171-172 (Pa. Commw. Ct. 2015).

[23] PA Const. Art. I, Sec. 27.

environmental effect of any proposed action on the constitutionally protected features.'"[24]

The *PEDF* Court also agreed that Section 27 makes every level and branch of government a trustee of public natural resources.[25] The *en banc* court in *PEDF* gave a broad reading to the term, "public natural resources." The court held that "public natural resources" include both publicly-owned land, and "resources that implicate the public interest, such as ambient air, surface and ground water, wild flora, and fauna (including fish) that are outside the scope of purely private property."[26]

The *PEDF* Court held that governmental entities – as trustee of public natural resources -- must analyze, in advance of acting, whether a proposed governmental action will cause unreasonable degradation, diminution, or depletion of public natural resources, either because of the governmental entity's actions itself, or by the failure to restrain third parties.[27]

The *PEDF* Court likewise found that, as a trustee under Section 27, a governmental entity has a duty of prudence, and as part of that duty, it cannot perform its obligations unreasonably.[28] As the Superior Court has said, "[T]he trustee's action must represent an actual and honest exercise of judgment predicated on a genuine consideration of existing conditions."[29]

PEDF also recognized that "when environmental concerns of development are juxtaposed with economic benefits of development, the Environmental Rights Amendment is a thumb on the scale, giving greater weight to the environmental concerns in the decision-making process."[30]

D. The Jointure's Failure to Engage in Science-Based Decisionmaking

There is no indication that the Jointure as a whole – or any of its members – has evaluated whether the proposed ordinance would cause actual or likely degradation of the environment in violation of Section 27. There is no indication that there has been any examination of the impact of the proposed ordinance on the environment, to determine whether

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[24] *PEDF*, 108 A.3d at 156 (quoting *Robinson Twp. v. Com.,* 83 A.3d 901, 952 (Pa. 2013)(plurality)).
[25] *Id.* at 156, 160; *Robinson Twp. v. Com.,* 83 A.3d 901, 919-21 (Pa. 2013)(majority); id. at 956-57, 977-78 (plurality); *Franklin Tp. v. Com., Dept. of Envt'l Res.,* 452 A.2d 718, 721-22 (1982)(plurality; affirmed by majority in *Susquehanna Cnty. by Susquehanna Cnty. Bd. of Comm'rs v. Com., Dep't of Envtl. Res*., 458 A.2d 929 (Pa. 1983).
[26] *Id.* at 167-168 (quoting *Robinson Twp.,* 83 A.3d at 955).
[27] *Id*. at 157; see also id. at 172 (state agency must consider whether further gas development consistent with Section 27 obligations, and not simply rely on lease protections); see also Robinson Twp., 83 A.3d at 957.
[28] *Id*. at 168; *Robinson Twp*., 83 A.3d at 957.
[29] *In re Scheidmantel*, 868 A.2d 464, 492 (Pa. Super. Ct. 2005); see also *PEDF*, 108 A.3d at 167 (quoting *In re Estate of Warden*, 2 A.3d 565, 572 (Pa.Super.2010)) ("The primary duty of a trustee is the preservation of the assets of the trust and the safety of the trust principal").
[30] *Id.* at 170.

its adoption and implementation will infringe on a citizen's constitutionally protected environmental rights. There has been no accounting for local conditions. There has been no science-based assessment of whether development under the proposed ordinance would cause – either now or in the future -- unreasonable "actual or likely degradation" of air or water quality, or other protected constitutional features, such as natural and scenic values of the environment. As noted above, if a governmental entity allows development to proceed without such an analysis that demonstrates that the proposed action can proceed without causing such unreasonable degradation, it risks a claim by residents for violation of the Environmental Rights Amendment.

While there are a host of environmental risks associated with deep shale development, one example of the type of analysis available to the Jointure is through engaging a Professional Geologist. Among other things, a geologist can inform the Jointure as to whether there are any site-specific features that make unconventional gas development in the areas proposed particularly risky. For example, we are involved in a case in Western Pennsylvania, where shale gas wells have been proposed for a location with geologic features (including a Cross-strike Structural Discontinuity) and a large number of abandoned or orphaned wells, leading to an exceptionally heightened risk of gas migration, contamination and possible explosion.[31]

Having not conducted any evaluation of local conditions, the Jointure is not able to determine that the proposed ordinance can be implemented without causing unreasonable degradation of the environment. This failure exposes the Jointure to a potential substantive validity challenge under Article I, Section 27 of the Pennsylvania Constitution.

E. Failure to Consider Evidence that Unconventional Gas Development Cannot Be Carried Out as Proposed in a Manner that is Protective of Human Health and the Environment

There is a growing body of scientific evidence that unconventional gas development cannot be carried out in a manner that is protective of human health and the environment.

While a full analysis of the scientific literature is beyond the scope of this memo, we direct readers to the website of Physicians, Scientists and Engineers for Healthy Energy ("PSE Healthy Energy), which can be found at http://www.psehealthyenergy.org/. PSE Healthy Energy has, as part of its mission, to "generate, translate, and disseminate scientific research to promote the adoption of evidence-based energy policies."

We also direct readers to the docket in a matter before the Pennsylvania Environmental Hearing Board, *Delaware Riverkeeper Network, et al. v. Commonwealth of Pennsylvania Department of Environmental Protection and R.E. Gas Development, LLL*, EHB Docket No.

[31] Indeed, the Jointure has not even determined whether there is a credible basis to conclude that there are developable oil or gas resources in any of the member Townships. We note that Solebury Township has engaged Dr. Jay Parrish, the former State Geologist, to conduct a geologic assessment of whether there are mineable reserves in Solebury that would warrant regulations for potential oil and gas development.

2014-142-B. (*http://ehb.courtapps.com/public/document_shower_pub.php?docketNumber=2014142*). This is a DEP permit appeal that recently went to a hearing. The testimony of DEP personnel was very revealing. Each of the individuals involved in the DEP permit approval process admitted under oath that, other than confirming that the minimum setback standards are not violated, the Department makes no effort to determine whether a wellsite can be developed in a manner consistent with human health and the environment. Dr. Jerome Paulson, a world-renowned pediatrician and expert in environmental health, testified that if wellsites are developed within a mile of families and children, as proposed in that case, it would result in increased incidence of cancer, asthma, and other life-threatening diseases. Likewise, Dr. Ranajit Sahu, testified that the Department's regulations and permitting process do not address, much less minimize, the known risk of cancer and other life-threatening diseases associated with air emissions from unconventional gas development activities. Information on Dr. Paulson and Dr. Sahu is available here *http://publichealth.gwu.edu/departments/environmental-and-occupational-health/jerome-paulson* and here *https://www.puc.nh.gov/Regulatory/CASEFILE/2011/11-250/TRANSCRIPTS-OFFICIAL%20EXHIBITS-CLERKS%20REPORT/11-250%202014-10-14%20EXH%2019%20ATT_SAHU%20TESTIMONY.PDF*.

In short, any assumption that the protection of public health and safety can be left to the state is naively misplaced.

III. The Proposed Ordinance is Vulnerable to Challenge for Violating Substantive Due Process Principles

The proposed ordinance would allow unconventional gas development in the QA District. There is a significant risk that the inclusion of the QA District would result in allowing such development in a residential zone. This is because the purpose statement for the QA District contemplates potential conversion of the district to an R-1 District after quarrying is completed. (Section 305.T.). The inclusion of oil and gas operations, particularly facilities such as compressor stations and processing facilities, conflicts with that intent and exposes the Jointure to a substantive due process claim.

Following the Supreme Court's decision in *Robinson Township, Deleware Riverkeeper Network, et al.*, ordinances that allow industrial gas development in non-industrial zoning districts are vulnerable to substantive validity challenges for violating residents' due process rights.

The Pennsylvania and United States Constitutions require that for any zoning to be constitutional it must promote the public health, safety, morals, or welfare, and be substantially related to protecting or furthering that interest.[32] "[L]awful zoning must be directed toward the community as a whole, concerned with the public interest generally, and justified by a balancing

[32] *In re Realen Valley Forge Greenes Assocs.*, 838 A.2d 718, 729 (Pa. 2003); *C&M Developers, Inc. v. Bedminster Twp. Zoning Hearing Bd.*, 820 A.2d 143, 150 (Pa. 2002); *Boundary Drive Assocs. v. Shrewsbury Twp. Bd. of Supervisors*, 491 A.2d 86, 90 (Pa. 1985).

of community costs and benefits."[33] A municipality violates its constitutional obligations if it fails to balance residents' sometimes competing constitutional rights to the use and enjoyment of property—both of those who would develop their properties, and those who wish to protect theirs (Article I, Section 1 of the Pennsylvania Constitution).[34]

Municipalities frequently face claims by developers that a particular ordinance is too restrictive. Municipalities are likewise at risk if their ordinances undermine the reciprocal property rights of neighbors; in other words, a municipality must get the balance right—it cannot allow too little or too much development.

Allowing new industrial uses in a non-industrial zoning district could provide the basis for a claim that municipal officials are violating these due process principles. When a municipality allows uses that are incompatible with the purpose of the zoning district, it upsets the established expectations of those who live there.[35] Challengers can argue that industrial uses, with their detrimental impacts on health, safety, welfare, property values, and public natural resources, do not fit into zones set aside for other types of uses, including residential uses.[36] By allowing industrial operations in areas set aside for non-industrial land uses, municipalities face the risk that challengers could claim that the municipality fails to further the very purposes underlying the non-industrial zoning district, making the district irrational.[37]

Allowing incompatible uses together places a municipality at risk of a determination that the zoning classifications are arbitrary, undermine the rationality of the ordinance, and are therefore vulnerable to constitutional challenge. In other words, the municipality risks a challenge that it is irrational to allow an incompatible land use in a zone that was established to achieve a non-industrial character and non-industrial development and conservation goals.[38] Such challenges are currently being litigated in Commonwealth Court in two cases from Western Pennsylvania.

Similarly, allowing industrial uses in a non-industrial zoning district exposes municipal officials to claims that they have violated the Pennsylvania Constitution's Environmental Rights Amendment. Municipalities have constitutional obligations to respect their residents' constitutional right to "an environment of quality" and their constitutional "right to benefit from" their public natural resources.[39] Municipal officials also have fiduciary duties as trustees of the public's public natural resources "to refrain from permitting or encouraging the degradation,

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[33] *In re Realen Valley Forge Greenes Assocs.*, 838 A.2d 718, 729 (Pa. 2003).
[34] *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 1007–08 (Pa. 2013) (Baer, J., concurring); *Robinson Twp. v. Commonwealth*, 52 A.3d 463, 484–85 (Pa.Commw. 2012), aff'd in part and rev'd in part sub nom., 83 A.3d 901 (Pa. 2013).
[35] See *Robinson Twp.*, 83 A.3d at 979 (plurality); id. at 1004–05, 1006–07 (Baer, J., concurring); *Robinson Twp.*, 52 A.3d at 484–85, aff'd in part and rev'd in part, 83 A.3d 901 (Pa. 2013).
[36] See *Robinson Twp.*, 52 A.3d at 484–85, aff'd in part and rev'd in part, 83 A.3d 901 (Pa. 2013).
[37] See *id.*; see also *Robinson Twp.*, 83 A.3d at 1005 (Baer, J., concurring).
[38] See *Robinson Twp.*, 52 A.3d at 484–85; *Robinson Twp.*, 83 A.3d at 1005, 1007–08 (Baer, J., concurring).
[39] Pa. Const. art. I, § 27; *Robinson Twp.*, 83 A.3d at 976.

diminution, or depletion of public natural resources, whether such degradation, diminution, or depletion would occur through direct state action or indirectly, *e.g.*, because of the state's failure to restrain the actions of private parties."[40]

In *Robinson Township, Deleware Riverkeeper Network, et al.*, both the Commonwealth Court and Supreme Court struck down a state law that would have placed industrial activity in every zoning district in every municipality. The Commonwealth Court did so under Article I, Section 1, finding that the provisions violated substantive due process and resulted in irrational zoning. It specifically noted that "If a municipality cannot constitutionally include allowing oil and gas operations, it is no more constitutional just because the Commonwealth requires that it be done."[41]

The Supreme Court found that such legislation violates the Environmental Rights Amendment. In reaching this holding, the court stated, "a new regulatory regime permitting industrial uses as a matter of right in every type of pre-existing zoning district [including residential and agricultural] is incapable of conserving or maintaining the constitutionally-protected aspects of the public environment and of a certain quality of life."[42]

In challenging ordinances that allow industrial uses in areas designated for non-industrial uses residents in other jurisdictions are currently arguing that such ordinances violate due process and unreasonably degrade the local environment. The plurality opinion of the Supreme Court in the Act 13 case supports such a claim. The court found fault with Act 13's provisions that exposed "otherwise protected areas to environmental and habitability costs associated with this particular industrial use: air, water, and soil pollution; persistent noise, lighting, and heavy vehicle traffic; and the building of facilities incongruous with the surrounding landscape."[43] In addition, the court noted that "some properties and communities will carry much heavier environmental and habitability burdens than others" by virtue of the haphazard placement of industrial operations[44] and that "[t]his disparate effect is irreconcilable with the express command that the trustee will manage the corpus of the trust for the benefit of 'all the people.' Pa. Const. art. I, 27."[45]

IV. Failure to Adequately Address Impoundments, Tank Sites, Compressor Stations, Processing Facilities, and Unregulated Pipelines

The proposed ordinance groups all oil and gas operations together under "gas and oil drilling, processing, and transport." Regulations under the use appear to contemplate some measure of processing and compressor station activity, but focus almost exclusively on wellpad development and operations connected with wellpad development. Further, the definition of the

[40] *Robinson Twp.*, 83 A.3d at 957.
[41] *Robinson Twp. v. Com.*, 52 A.3d 463, 485 (Pa. Commw. Ct. 2012) aff'd in part, rev'd in part sub nom. *Robinson Twp. v. Com*., 83 A.3d 901 (Pa. 2013).
[42] *Id.* at 979.
[43] *Id.*
[44] *Id.* at 980.
[45] *Id.*

use appears to suggest that the only processing and transport regulated is when an entity is already engaging in wellpad development on a property. Specifically, "[t]hese are activities limited to the extraction, recovery, and removal of subsurface oil and gas deposits through direct on-site drilling . . . . ."

This approach reflects a lack of understanding of how the industry operates and carries with it significant risks. Risks include: 1) being read as not addressing compressor stations, pipeline facilities, and processing plants/facilities as uses independent from oil and gas wellpad development; and/or 2) under-regulating compressor stations, processing facilities, and pipeline facilities. Given that there is a greater risk of compressor stations, processing facilities, and pipeline facilities independent of wellpad development, the lack of attention in the ordinance poses a substantial risk to residents.[46]

A Transco line runs through the Newtown area near Tyler State Park and generally bisects the Jointure from west-southwest to east-northeast, with a segment that branches off and heads southward through Churchville. This line could potentially receive gas from the proposed Atlantic Sunrise line if that line were to be built, raising the question of whether Transco might engage in upgrades on that line. A Sunoco hazardous liquids line also runs near that same area, generally from the southwest to northeast. As such, there is a genuine risk of compressor stations, processing facilities, and other pipeline facilities in the area.

Any continuing failure to address compressor stations, processing facilities, and pipeline facilities as separate uses, independent of wellpad development, runs the risk of having these facilities deemed "lawful uses not otherwise permitted" in districts, such as an R-2 District, where they are not compatible with other existing uses.[47] A second risk is that a landowner would challenge the ordinance for excluding these uses entirely and, if it obtained site-specific relief, place the use somewhere in the three municipalities where a heavy industrial use was never contemplated, such as Jericho Mountain.

The same risks are present as to impoundments and centralized tank sites for storage of production fluids and/or other regulated substances, which are often used independent of any wellpad. Centralized impoundments and tank sites, despite changes in state regulations, still pose a substantial risk to groundwater through liner leaks, overflows, off-gassing and other problems. Such impoundments and tank sites should be kept away from sensitive natural resources and from drinking water sources. If, as the Jointure's consultants apparently claim, there is a genuine risk of imminent gas development activity in the Jointure municipalities – which we dispute – failing to address these uses in the proposed ordinance significantly risks a

[46] While the siting of some pipeline facilities are subject to federal and state preemption, there remain unregulated pipelines that are subject to local zoning.

[47] The Table of Uses in the JMZO available online lists G-16 as a conditional use in the R2, LI, and PC Districts, but the ordinance appears to omit these uses from the pertinent sections of the ordinance. A prospective oil and gas operator would likely argue that the ambiguity in the ordinance should be interpreted in its favor, citing the Municipalities Planning Code, 53 P.S. § 10603.1.

challenger obtaining site-specific relief and putting such a use in an area ill-suited to an impoundment or storage tank site.[48]

Further, there are significantly more oil and gas land uses that have not been addressed, including seismic operations, water withdrawal facilities, equipment storage/staging areas, etc.. The proposed ordinance simply fails to comprehensively addresses all potential oil and gas uses.

Indeed, the proposed ordinance contains almost no regulations for uses apart from wellpad development. For example, the proposed ordinance fails to specify *any* setbacks from processing and pipeline facilities, compressor stations, tank sites or impoundments.[49] This is a substantial oversight given the noise, air emissions, explosion risks and other disturbances associated with such operations. Other regulations specific to these uses are simply absent, such as drainage and infiltration, lot size, visual protections, screening, and emergency response and planning.

V. The Proposed Ordinance Contains Insufficient Setbacks

The proposed ordinance specifies a setback of six hundred (600) feet from "all drilling and production operations" along with associated equipment, from certain buildings, such as dwellings, churches, schools, and nonresidential structures where the owners are not the applicant, lessors to the applicant, or a party to the oil and gas instrument.

First, excluding those involved in the operation from protections under the zoning simply because they or their predecessor signed a lease is not consistent with how land use protections typically are applied.

Second, current scientific studies counsel that six hundred (600) feet is insufficient protection for neighboring structures like homes, schools, childcare facilities, or other places where children, the elderly, or chronically ill may live, go to school, or otherwise be on a regular basis. Indeed, just last month, DEP officials testified that there was no scientific basis to the state's five hundred (500) foot minimum setback standard and that they did not have any basis to conclude that it is adequate to protect public health or the environment. The Jointure has an opportunity to put in place real, science-based protections through its ordinance, and should take advantage of that. Published literature can provide guidance on determining any proper distance from structures.

On a broader level beyond setbacks, the proposed ordinance does not give detailed thought to buffering or other protections that would be needed to minimize or mitigate conflict

[48] We understand that there has been some suggestion that, even though there are state and DRBC moratoria in place, a gas development company could seek to sign leases with Township property owners. While this is inconsistent with the current state of industry practices, even if a property owner signs a lease, any such lease would not create any vested rights to use the property in a manner that is inconsistent with current zoning.

[49] For pipelines, we recommend setting setbacks in relation to the Potential Impact Radius ("PIR"). There is no recognition of this concept in the draft ordinance.

with neighboring land uses, particularly in neighboring zoning districts. Such provisions might be different screening, buffering, or lighting requirements, greater setbacks, more protective noise regulations, or greater wildlife and habitat protections. Thought should be given to what is needed to manage the transitions between these industrial uses and neighboring non-industrial districts. For example, there is a native plant nursery in the CM district, right across 2nd Street Pike from the RI district. Penns Park also borders that general area of the RI. There may be additional water protections, air, and/or noise protections needed in this area to preserve the character and the expectations set by the zoning ordinance for these districts.

VI. Lack of Other Protections in the Ordinance

The proposed ordinance is lacking other much needed protections, including:

a. General lack of water protections for groundwater and surface water

The proposed ordinance generally points to state law for water quality protections. The Jointure can do more than this, particularly after the successful challenge to the constitutionality of Section 3303 of Act 13 which purported to impose broad preemption for all environmental regulations. The RI and QA districts are near Mill Creek and Neshaminy Creek, but the proposed ordinance does not address risks to these waterway systems. Because of the other uses allowed in these districts, and the other non-industrial districts nearby, such protections are important for those dependent on groundwater for domestic, business, and agricultural uses.

b. Lack of steep slope protections

A review of other parts of the JMZO reveals no steep slope protections that would deal with, for instance, someone attempting to place a wellpad on a steep slope where heavy rains could easily lead to a landslide. Given the slopes in the general area of the RI and QA Districts, slopes and the risks posed by heavy industrial operations placed on steep slopes must be accounted for to protect public health, safety, welfare, and water quality in the nearby creeks.

c. Lack of setbacks from non-structure areas such as parks, playgrounds, livestock or grazing areas, and outdoor nurseries that lack structures

To adequately protect neighboring land uses and the public health, safety, and welfare, these types of setbacks or similar buffer area protections should be included.

d. No application of the Environmental Impact Assessment provisions in Appendix A

The JMZO contains Appendix A, which addresses Environmental Impact Assessment ("EIA") for certain uses, namely asphalt and concrete plants, and other lawful uses not otherwise provided for. The EIA should be required for all heavy industrial uses including oil and gas operations. The EIA provisions allow for a comprehensive, site-specific assessment of the potential issues that may result from

locating a use in a given location. While the provisions can still be improved upon (see below), they at least provide a starting point for trying to ensure that the impact of a heavy industrial use is indeed on par with what is expected of the use.

e. No requirements for air emissions or other studies (e.g. geology, groundwater impacts, light and noise pollution)

Oil and gas operations, including wellpad development, processing facilities, and compressor stations, introduce inevitable air pollution, water contamination, and noise and light pollution. Consistent with its constitutional obligations as discussed above, the Jointure should require applicants to produce studies detailing how any activity would be carried out without causing an unreasonable degradation of the environment. Rather than simply requiring applicants to discuss the impacts that will result, a requirement of studies and hard evidence from the applicant would allow the Jointure municipalities (and their residents) to see ahead of time whether compliance with constitutional standards can be obtained. Best practices in preparing regulations for the types of land uses that are the subject of this draft ordinance include requiring emissions dispersion modeling. The draft ordinance contains no such requirement.

For example, in the Environmental Protection Standards section of the JMZO, there are standards limiting how much toxic matter can go beyond the property boundary. (s. 904.B.5.b.(2)) As part of their EIA submittals, applicants should be required to demonstrate how they would actually achieve such standards. This would allow Jointure members to determine whether the impact of the use is on par with what is expected of the use generally, and if not, whether additional conditions should be imposed, or whether denial is appropriate.

VII. Need to Modify the Purpose Sections for the Rural Industrial – A (RI-A) and Quarry Agricultural – A (QA-A) Districts

The proposed ordinance contemplates oil and gas operations in the Quarry Agricultural (QA) and Rural Industrial (RI) districts[50] while excluding them from the Rural Industrial – A (RI-A) District and the Quarry Agricultural – A (QA-A) districts.

The purpose sections for the RI and RI-A districts reflect that the only contemplated difference in the JMZO between the RI and RI-A Districts is that the RI-A provides a place for refuse and recycling facilities, whereas the RI does not. (Section 305.R. & 305.U.). There is no distinction made between the districts' purposes in terms of mineral extraction. The purpose section for the RI-A district should be amended to clarify the intent to exclude gas development and related land uses. This is particularly important considering the inclusion in the district of Use G-16, which allows for "Lawful Uses Not Otherwise Permitted." (Section 704.A.2.hh.).

[50] As a housekeeping matter, we note that the ordinance should specifically amend the QA and RI District provisions and the Table of Uses to insert the uses as conditional uses.

The same problems exist with regard to the QA and QA-A Districts. The only difference in the purpose statements between the two districts is that the QA-A District is intended to provide "a safe location for the sale of consumer fireworks." (Section 305.Z.) The purpose section of the QA-A district should be amended to clarify that gas development and related uses are not intended for the district.

In Main Street Development Grp., Inc. v. Tinicum Township, the Commonwealth Court invalidated an overlay district designed to protect agricultural soils, finding it "effectively create[d] agricultural districts out of districts with non-agricultural stated purposes … completely changing the expectations created by the Ordinance in the non-agricultural districts."[51] The overlay "unreasonably disturb[ed] expectations created by the existing zoning ordinance."[52] Likewise, in Hock v. Bd. of Sup'rs of Mount Pleasant Twp.,[53] the Commonwealth Court recognized that "[a] significant factor in determining the reasonableness of a land use restriction is whether the restriction is consistent with the stated purpose of the particular zoning district." Thus, unless the purposes section of the RI-A and QA-A districts are changed, there is a risk that these districts could also see oil and gas development proceed, despite the currently stated intentions of the municipalities.

VIII. Conclusion

This memorandum outlines some of the most substantial deficiencies in the Jointure's proposal to move forward with the draft ordinance. Passage of this ordinance, at least as currently drafted, is ill-advised and would expose the Jointure and its members to the risk of substantive validity challenges raising both substantive due process and environmental rights claims.

[51] 19 A.3d 21, 29 (Pa. Commw. Ct. 2011).
[52] *Id.* at 28-29.
[53] 622 A.2d 431, 434 (Pa. Commw. Ct. 1993).