Frequently Asked Question 3:
Can a Municipality Refuse to Allow Industrial Gas Development Even if the Pennsylvania Department of Environmental Protection Grants a Permit?

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 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.
Can a municipality refuse to allow industrial gas development even if the Pennsylvania Department of Environmental Protection grants a permit?

Yes. While some people have claimed that a municipality must allow industrial gas development if DEP has issued a permit, this is incorrect. DEP permits do not override local zoning. The fact that DEP has issued a permit does not in any way limit a municipality’s authority or responsibility to ensure compliance with local ordinances, including zoning and subdivision and land development ordinances.

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 permit from the Pennsylvania Department of Environmental Protection ("DEP"). A municipality’s zoning, subdivision, and land development processes are separate from DEP’s process and from private contractual decisions. Just like every other land use, the issuance of a DEP permit does not allow a shale gas developer to move forward without complying with local zoning requirements. Indeed, if a developer does move forward in violation of local zoning, it faces a substantial risk of a lawsuit under Section 617 of the Municipalities Planning Code. 53 P.S. § 10617.

DEP permitting is a separate process from local zoning. In fact, rather than hamstringing local municipalities, DEP must consider and may rely on local zoning when it makes permitting decisions. Acts 67, 68, and 127 (see, e.g. 53 P.S. §§ 10619.2, 11006-A, 11105). Indeed, the courts have repeatedly cited the fact that DEP’s process is focused on different issues than local zoning as a reason for why DEP permitting does not preempt local zoning. In striking down Section 3304 of Act 13, the Pennsylvania Commonwealth Court discussed the different purposes of zoning versus state environmental laws, saying that “our Supreme Court explained that while governmental interests involved in oil and gas development and in land-use control at times may overlap, the core interests in these legitimate governmental functions are quite distinct. The state’s interest in oil and gas development is centered primarily on the efficient production and utilization of the natural resources in the state. Zoning, on the other hand, is to foster the orderly development and use of land in a manner consistent with local demographic and environmental concerns.” Robinson Twp., Delaware Riverkeeper Network, et al. v. Commonwealth, 52 A.3d 463, 483 (Pa. Commw. Ct. 2012) aff’d in part, rev’d in part by 83 A.3d 901 (Pa. 2013) (emphasis added).

The Pennsylvania Supreme Court in Huntley & Huntley stated:

By way of comparison, the purposes of zoning controls are both broader and narrower in scope. They are narrower because they ordinarily do not relate to matters of statewide concern, but pertain only to the specific attributes and developmental objectives of the locality in question. However, they are broader in terms of subject matter, as they deal with all potential land uses and generally incorporate an overall statement of community development objectives that is not limited solely to energy development. See 53 P.S. § 10606; see also id., § 10603(b) (reflecting that, under the MPC zoning ordinances are permitted to restrict or regulate such things as the structures built upon land and watercourses and the density of the population in different areas). See generally Tammy Hinshaw & Jaqualin Peterson, 7 Summ. Pa. Jur.2d PropertyY § 24:12 (“A zoning ordinance reflects a legislative judgment as to how land within a municipality should be utilized and where the lines of demarcation between
the several use zones should be drawn.”). More to the point, the intent underlying the Borough’s ordinance in the present case includes serving police power objectives relating to the safety and welfare of its citizens, encouraging the most appropriate use of land throughout the borough, conserving the value of property, minimizing overcrowding and traffic congestion, and providing adequate open spaces. See Ordinance § 205–2(A).


In the Act 13 decision, the Supreme Court affirmed that local conditions matter and must be considered when development is proposed for a property. In finding Sections 3303 and 3304 of Act 13 unconstitutional, the Court expressly found fault with the provisions’ complete elimination of any local considerations, which traditionally has been accounted for at the local level via zoning. Robinson Twp., 83 A.3d at 977-982 (plurality); id. at 1004-08 (Baer, J., concurring). As the court recognized, local environmental considerations are a crucial part of environmental decisionmaking in Pennsylvania that cannot be ignored without raising a significant risk of breaching trustee obligations. As the court stated:

In Pennsylvania, terrain and natural conditions frequently differ throughout a municipality, and from municipality to municipality. As a result, the impact on the quality, quantity, and well-being of our natural resources cannot reasonably be assessed on the basis of a statewide average. Protection of environmental values, in this respect, is a quintessential local issue that must be tailored to local conditions.

Id. at 979 (plurality).

Thus, the fact that DEP has issued a permit is not an excuse for a local municipality to ignore its own zoning regulations or shirk its constitutional obligations. 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 industrial shale gas development at the expense of citizens’ rights to clean air and pure water. See, e.g., Robinson Twp., 83 A.3d at 953-54, 960 (plurality); Main St. Dev. Grp., Inc. v. Tinicum Twp. Bd. of Supervisors, 19 A.3d 21 (Pa. Commw. Ct. 2011); rearg. denied (May 12, 2011), appeal denied 40 A.3d 123 (2012). Likewise, Section 27 restrains municipalities from allowing the unreasonable degradation, diminution, or depletion of public natural resources, including groundwater, surface water, aquatic life, and air quality. The Pennsylvania Constitution protects current and future citizens’ rights to rely upon and enjoy these resources. Id.