Frequently Asked Question 6:
Are Municipalities Restricted from Allowing Industrial Gas Development Activity in Non-Industrial Zoning Districts?

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.
Are municipalities restricted from allowing industrial gas development activity in non-industrial zoning districts?

Yes. Municipal officials who allow industrial gas development in non-industrial zoning districts risk constitutional claims for violating citizens’ due process rights and for violating citizens’ rights under the Pennsylvania Constitution’s Environmental Rights Amendment. Each of these issues will be addressed in turn.

a) Allowing industrial gas development in non-industrial zoning districts exposes municipal officials to constitutional claims for violation of property owners’ due process rights

Allowing industrial uses in a non-industrial zoning district exposes municipal officials to claims that they have violated constitutional due process guarantees.


Allowing new industrial uses in a non-industrial zoning district can be the basis for a claim that municipal officials are violating these due process principles. Such municipal action injects uses that are incompatible with the purpose of the zoning district, thereby upsetting the established expectations of those who live there. See Robinson Twp., Delaware Riverkeeper Network, et al. v. Com., 83 A.3d 901, 979 (Pa. 2013)(plurality); id. at 1004-05, 1006-07 (Baer, J., concurring); Robinson Twp. v. Com., 52 A.3d 463, 484-85 (Pa. Commw. Ct. 2012) aff’d in part, rev’d in part, 83 A.3d 901 (Pa. 2013). Industrial uses, with 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 and conservation of natural resources for future generations. See Robinson Twp. v. Com., 52 A.3d 463, 484-85 (Pa. Commw. Ct. 2012) aff’d in part, rev’d in part, 83 A.3d 901 (Pa. 2013). By allowing industrial operations in areas set aside for non-industrial land uses, the municipality fails to further the very purposes underlying the non-industrial zoning district, and makes the district irrational.

To illustrate, allowing a new asphalt plant, a surface coal mine, or a quarry into an agricultural zone would destroy soils set aside for agriculture and would increase the risk of water contamination and depletion. In agricultural zones, water resources are important for irrigation, livestock, and drinking water. Such new industrial land uses would also bring truck traffic, dust, and the risk of industrial accidents that could threaten the lives and livelihoods of those who live and work nearby.
Similarly, placing a refinery in an open space zone would upset the expectation that the zone will be set aside for resource protection, recreation, and/or scenic values. Further, those who moved into the zone, and invested in their properties with the expectation that the surrounding land uses would be compatible would now face a situation in which their investments are diminished more so than their neighbors who happen not to live next to the property where the incompatible use is allowed. Robinson Twp., Delaware Riverkeeper Network, et al. v. Com., 52 A.3d at 484-85 (Pa. Commw. Ct. 2012) aff’d in part, rev’d in part, 83 A.3d 901 (Pa. 2013).

Likewise, allowing an unconventional gas well into a residential zone would bring non-stop lighting, flaring, truck traffic, dust, noise, chemical emissions, and other materials that disrupt the zone’s purpose of being set aside for quiet, low-traffic areas where children can play, and people can rest after a hard day’s work. See Robinson Twp., 83 A.3d at 1005 (Baer, J., concurring).

Allowing incompatible uses together makes the zoning classifications arbitrary, undermines the rationality of the ordinance, and is therefore vulnerable to constitutional challenge. It is irrational to allow an incompatible land use in a zone that was established to achieve a non-industrial character, development and conservation goals. Id.; Robinson Twp., 83 A.3d at 1005, 1007-08 (Baer, J., concurring).

b) Allowing industrial gas development in non-industrial zoning districts exposes municipal officials to legal challenge for violating the Pennsylvania Constitution’s Environmental Rights Amendment

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 citizens’ constitutional right to “an environment of quality” and their constitutional “right to benefit from” their public natural resources. Pa. Const. Article I, Section 27; Robinson Twp., Delaware Riverkeeper Network, et al. v. Com., 83 A.3d 901, 976 (Pa. 2013). Municipal officials also have fiduciary duties as trustees of the public’s public natural resources “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 of private parties.” Robinson Twp., 83 A.3d at 957 (plurality).

In Robinson Township, the Supreme Court struck down a state law that would have placed industrial activity in every zoning district in every municipality. The 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.” Robinson Twp., 83 A.3d at 979.

Placing industrial uses in areas designated for non-industrial uses degrades the local environment in which people live, work, and recreate, including the public natural resources on which people rely. It does so by exposing “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.” Robinson Twp., 83 A.3d at 979. In addition, “some properties and communities will carry much heavier environmental and habitability burdens than others” by virtue of the haphazard placement of industrial operations. Id. at 980. “This 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.” Id.


Such a failure exposes municipalities and their officials to a legal challenge for violation of citizens’ constitutional environmental rights. Robinson Twp., 83 A.3d at 951-52, 956-57, 974-75, 977-78. As the Supreme Court held in Robinson, the rights guaranteed in the Environmental Rights Amendment are on a par with our other inherent political rights, including our private property and free speech rights. Id. at 953-54. Just as citizens may vindicate those political rights in the courts, so too may citizens vindicate their rights and hold government officials accountable under the Environmental Rights Amendment. Id. at 951-52, 956-57, 974-75, 977-78.

Primary author of this document is attorney Jordan Yeager. Jordan Yeager is Partner and Chair of the Environmental and Public Sector Section at Curtin & Heefner LLP. Jordan was lead counsel for the Delaware Riverkeeper Network in the case: Robinson Township, Delaware Riverkeeper Network, et al. v. Commonwealth, 83 A.3d 901 (2013). Jordan was lead counsel on the issues involving the Delaware Riverkeeper and the Delaware Riverkeeper Network’s standing and the Environmental Rights Amendment (Article I, Section 27) of the Pennsylvania Constitution.

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