

Local Regulation of Oil & Gas: *Post Robinson*

Health & Shale Gas Development: State of the Science

HYATT REGENCY – PITTSBURGH INT'L AIRPORT

JUNE 10, 2016



Cabot Oil & Gas Drill Site

Scranton Times Tribune: <http://thetimes-tribune.com/news/business/marcellus-gas-companies-part-of-evolution-of-drilling-technology-1.1650111>









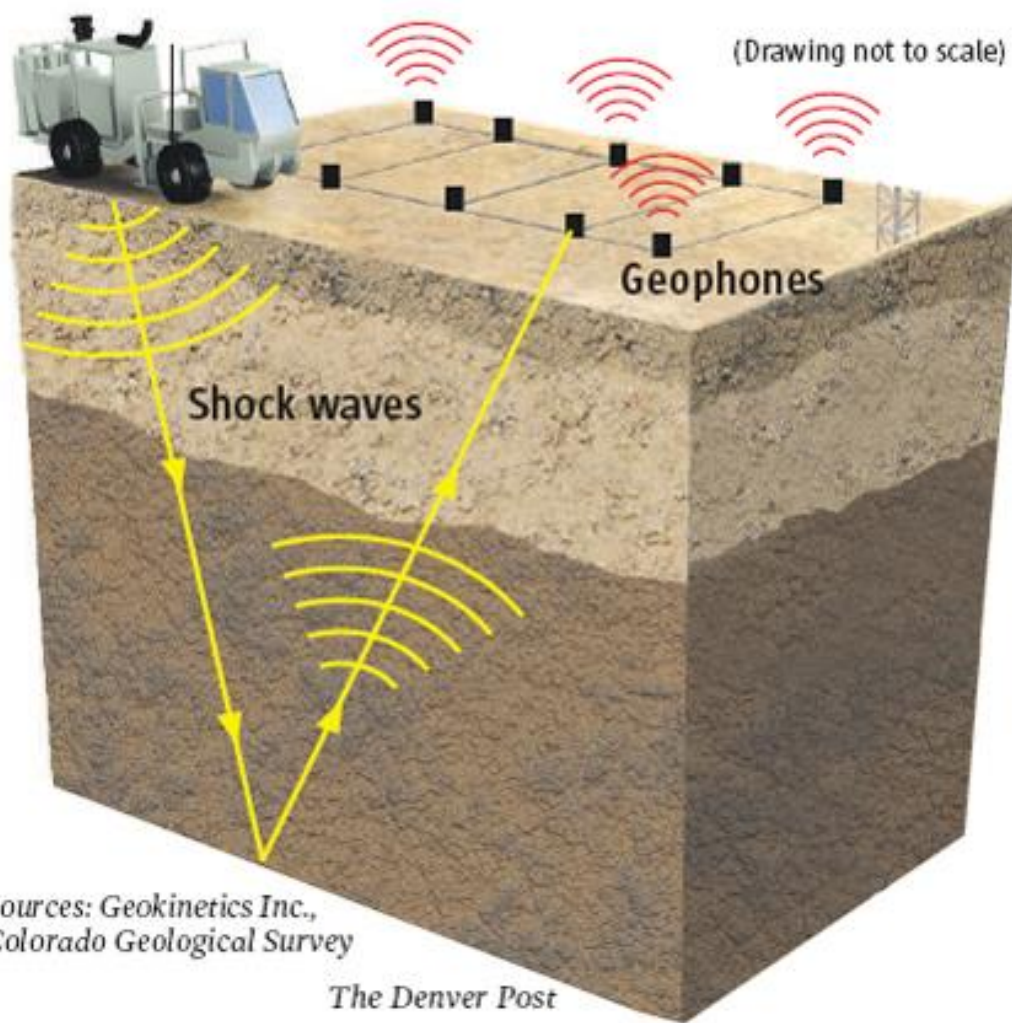






Seismic surveying

Seismic surveys are one way drillers search for oil. Large trucks, called "vibrators," shake the ground, sending shock waves deep into the earth. The waves bouncing back are captured by sensors, and signals create a snapshot of the geology.



Sources: Geokinetics Inc.,
Colorado Geological Survey
The Denver Post



Pa. to send out \$224 million from gas drilling impact fee

\$48 million in impact fees coming to Pittsburgh area, state PUC reveals

Drilling impact fees total \$223M for Pennsylvania communities

[PUC Posts Details on \\$223.5 Million in Gas Drilling Impact Fee Disbursements for 2014](#)

Lancaster County to get over \$500K in drilling impact fee



Why was it important to challenge
Act 13?

Compressors (generalized)



SkyTruth Pits (generalized)



Violations (generalized)



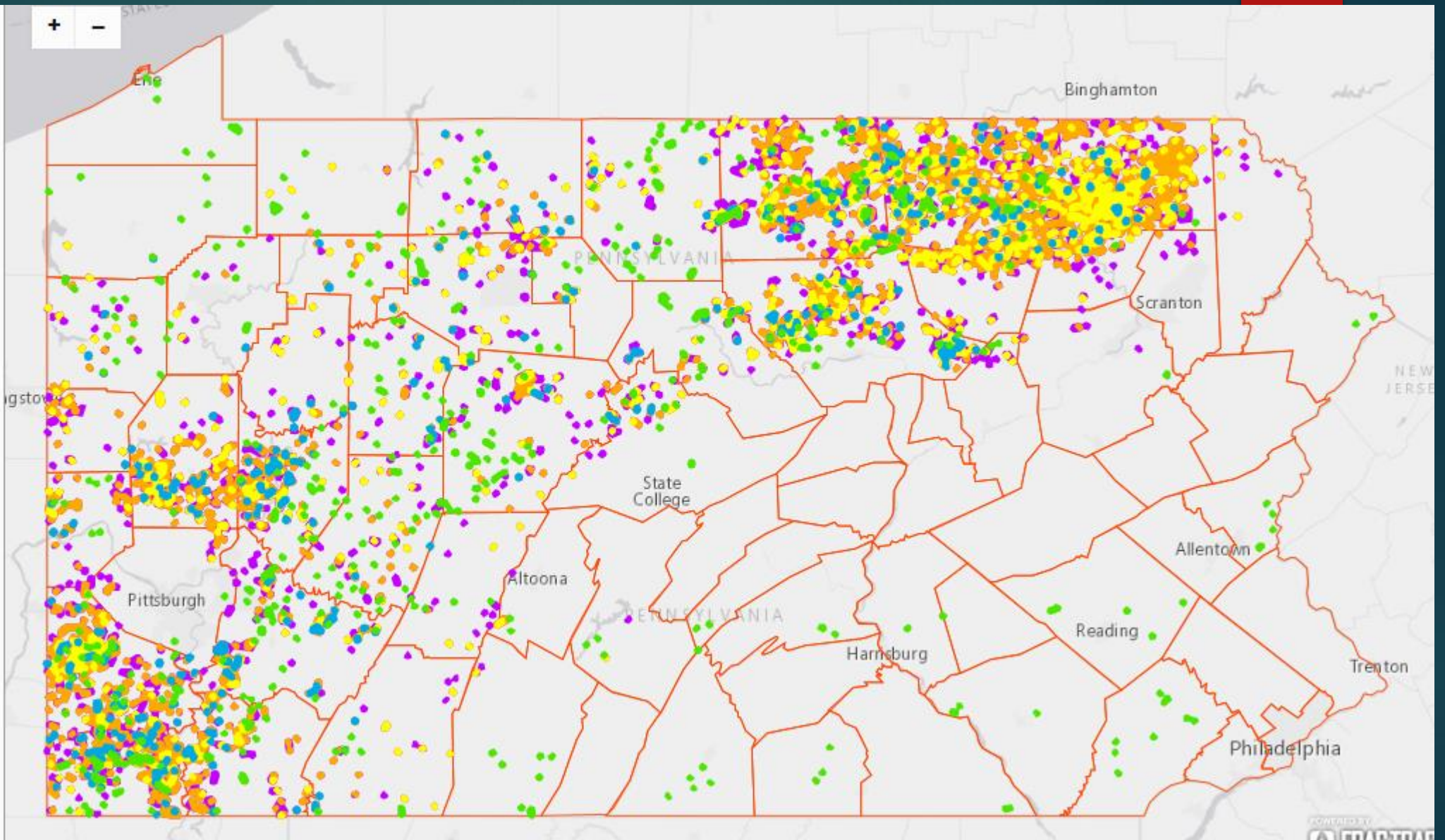
Drilled Wells (generalized)



Permits (generalized)



Counties



Fracking operator faces record \$8.9M fine for alleged water contamination

Chevron fined \$940,000 for fatal gas well fire in Greene County

DEP: Water Wells Were Contaminated by Drilling 243 Times

Chevron Fined \$939K for PA Well Fire/Death in Greene County, PA

Tsunami of Public Outrage Builds in Colorado as Fracking Invades Cities

Radiation found in Greene County stream near water supply

Biologist concerned about residents' health

Pennsylvania officials issue \$4.15 million fine to fracking company

Salem Township Pipeline Explosion 2016





Environ Health Perspect; DOI:10.1289/ehp.1307732

Proximity to Natural Gas Wells and Reported Health Status: Results of a Household Survey in Washington County, Pennsylvania

Peter M. Rabinowitz,^{1,2} Ilya B. Slizovskiy,^{1,3} Vanessa Lamers,^{3,4} Sally J. Trufan,^{1,2} Theodore R. Holford,³ James D. Dziura,³ Peter N. Peduzzi,³ Michael J. Kane,³ John S. Reif,⁵ Theresa R. Weiss,¹ and Meredith H. Stowe¹




ENVIRONMENTAL
HEALTH
PERSPECTIVES

<http://www.ehponline.org>


Adequacy of Current State Setbacks for Directional High-Volume Hydraulic Fracturing in the Marcellus, Barnett, and Niobrara Shale Plays

**Marsha Haley, Michael McCawley, Anne C. Epstein,
Bob Arrington, and Elizabeth Ferrell Bjerke**


- 
- “The need for courts to fulfill their role of enforcing constitutional limitations is particularly acute where the interests or entitlements of individual citizens are at stake”
 - “But, the instant litigation does not challenge that power; it challenges whether, in the exercise of the power, the legislation produced by the policy runs afoul of constitutional command.”
 - “Reviewing the Amended Act, few could seriously dispute how remarkable a **revolution** is worked by this legislation upon the existing zoning regimen in Pennsylvania, including residential zones.”
 - -Robinson Twp. V. Commonwealth, 52 A.3d 463, 482 (Pa. Commw. Ct. 2012).

- 
- “The displacement of prior planning, and derivative expectations, regarding land use, zoning, and enjoyment of property is unprecedented”
 - “According to the citizens, this dispute is not about municipal power, statutory or otherwise, to develop local policy, but it is instead about compliance with constitutional duties. Unless the Declaration of Rights is to have no meaning, the citizens are correct.”

- “Act 13’s primary stated purpose is not to effectuate the ***constitutional obligation*** to protect and preserve Pennsylvania’s natural environment. Rather, the purpose of the statute is to provide a maximally favorable environment for industry operators to exploit Pennsylvania’s oil and natural gas resources, including those in the Marcellus Shale Formation”



“No principle of law permits us to suspend constitutional requirements for economic reasons, no matter how compelling those reasons may seem)). Moreover, the General Assembly has no authority to remove a political subdivision’s implicitly necessary authority to carry into effect its constitutional duties.”




Individuals' use of property
v.
Police power of the sovereign

The Right to Own and Use Property

- Article 1, Section 1 of the Pennsylvania Constitution guarantees individuals the right to acquire, possess and to protect property:
- ▶ “All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness.”

Pennsylvania Constitution, Article 1, Section 1

- 
- ▶ Zoning is an extension of the concept of public nuisance which protects property owners from activities that interfere with the use and enjoyment of their property. In City of Edmonds v. Oxford House, Inc., 514 U.S. 725, 732-33, The United States Supreme Court described the purpose of zoning as follow:

“Land use restrictions designate districts in which only compatible uses are allowed and incompatible uses are excluded. These restrictions typically categorize uses as a single-family residential, multiple-family residential, commercial, or industrial.”

- ▶ Robinson v. Commonwealth of PA., 52 A. 2d 463, 481 (Pa. Cmwlt. 2012). (en banc).

Limitations on Right to Use Property: the Police Power of the Sovereign

- Individuals' rights to use their property as they see fit is not absolute.
- Individuals' constitutional freedom to use of property is restricted by the "police power" of the sovereign.
- The basis of the police power is the reality that individuals live and interact in a community.

What is the Police Power?

- ▶ The basis of the sovereign's police power is to provide for the health, safety and welfare of the community.
- ▶ “All property is held under some conditions, among which are, that it is not to be used to another man's injury, and that the legislature **may impose restrictions for the public good.**” Commonwealth v. Alger, 61 Mass. 53 (Mass. 1851) (emphasis added).
- ▶ “Probably the most important function of government is the exercise of the police power for the purpose of preserving the public health, safety and morals, and it is true that, to accomplish that purpose, the legislature may limit the enjoyment of personal liberty and property.” Gambone v. Commonwealth, 101 A.2d 634, 636 (Pa. 1954).



Zoning and the Police Power of the Sovereign

What is Zoning?

- ▶ Zoning is rooted in the police power of the government:
“The [zoning] ordinance now under review, and all similar laws and regulations, must find their justification in some aspect of the police power, asserted for the public welfare.”

Euclid v. Ambler Realty Co., 272 U.S. 365, 387 (U.S. 1926)

- ▶ “[T]he legislative division of a community into areas in each of which only certain designated uses of land are permitted so that the community may develop in an orderly manner in accordance with a comprehensive plan.”

Best v. Zoning Board of Adjustment of the City of Pittsburgh, 141 A.2d 606, 610 (Pa. 1958).

How Zoning Works

“Like Uses in Like Places”

- ▶ “A typical zoning ordinance divides the municipality into districts in each of which uniform regulations are provided for the uses of buildings and land, the height of buildings, and the area or bulk of buildings and open spaces . . . Zoning Ordinances segregate industrial districts from residential districts, and there is segregation of the noises and odors necessarily incident to the operation of industry from those sections in which the homes are located.”

Robinson Twp. V. Commonwealth, 52 A.3d 463, 482 (Pa. Commw. Ct. 2012).



<http://boringpittsburgh.com/wp-content/uploads/2010/07/braddock-levis-view-1.jpg>

Is This Compatible With Residential Zoning?



Is This Compatible With Residential Zoning?



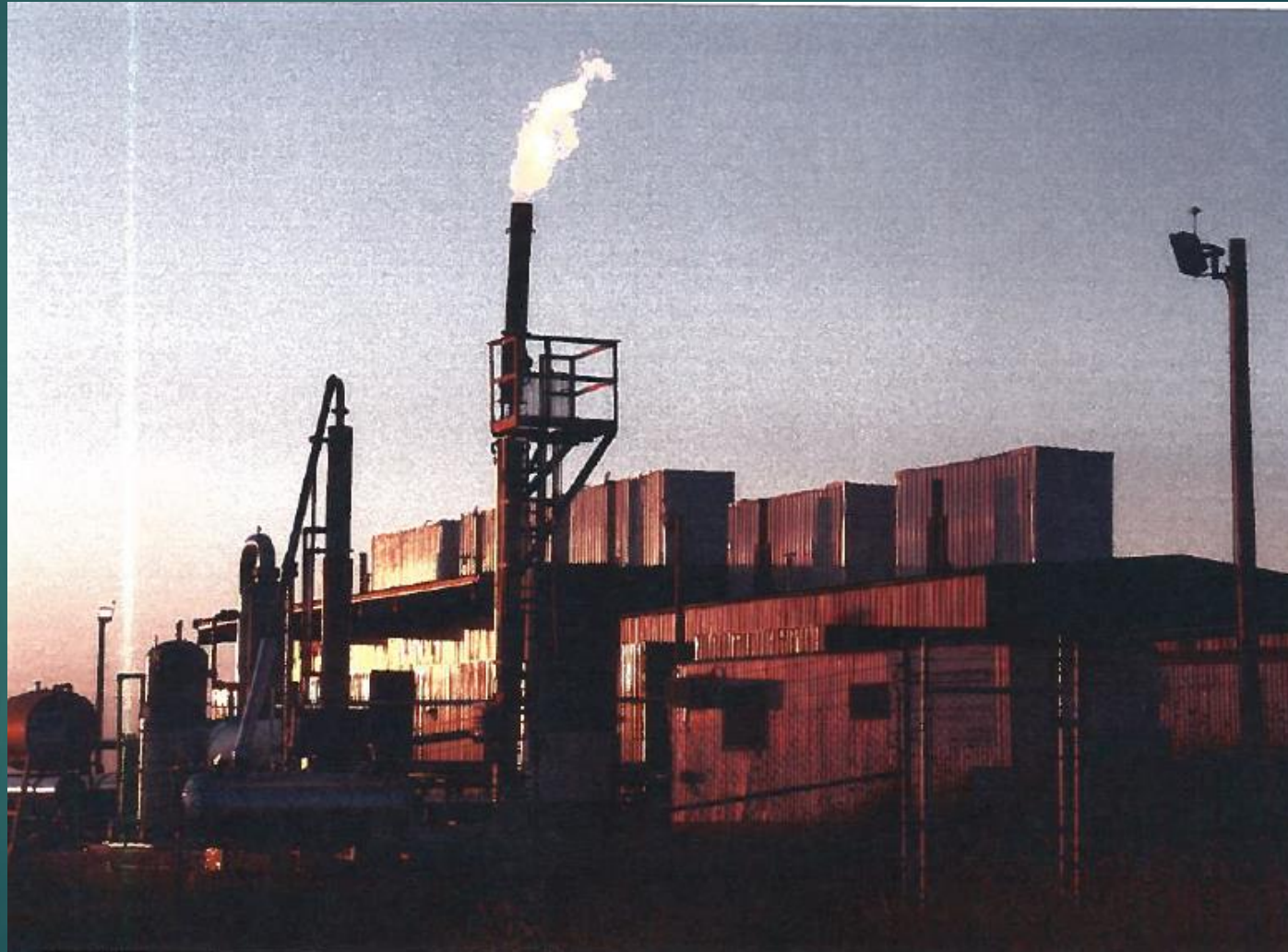
Is This Compatible With Residential Zoning?



Is This Compatible With Residential Zoning?



Is This Compatible With Residential Zoning?



Is This Compatible With Residential Zoning?



Municipalities Planning Code

- ▶ The provisions of all zoning ordinances may be classified so that different provisions may be applied to different classes of situations, uses and structures and to such various districts of the municipality as shall be described by a map made part of the zoning ordinance. **Where zoning districts are created, all provisions shall be uniform for each class of uses or structures, within each district**

53 P.S. § 10605 (emphasis added)

Why does zoning work?

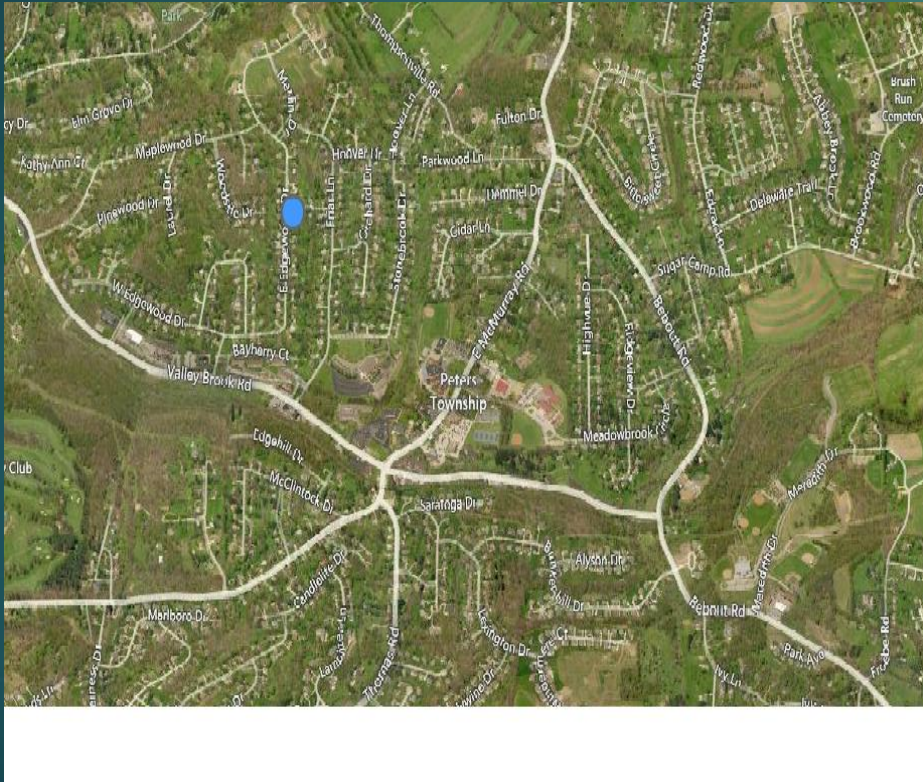
- Zoning regulations are appropriate uses of the police power because they are restrictions on conduct that are designed to benefit the health, safety and welfare of the general community.
- Under a zoning regime, individuals consent to give up certain property rights in exchange for the security that their neighbors will not use property in a detrimental manner.

“... [A] zoning ordinance implements a comprehensive zoning scheme; **each piece of property pays, in the form of reasonable regulation of its use, for the protection that the plan gives to all property lying within the boundaries of the plan.**”

Robinson Twp. V. Commonwealth, 52 A.3d 463, 482 (Pa. Commw. Ct. 2012) (emphasis added).

Zoning cannot be Arbitrary:


Importance of the character of each community



- ▶ Because the exercise of the police power limits constitutional rights, the police power may not be used in a manner that is arbitrary. Village of Euclid, Ohio v. Ambler Realty, Co., 272 U.S. 365, 395-96 (1926).
- ▶ “A regulatory zoning ordinance, which would be clearly valid as applied to the great cities, might be clearly invalid as applied to rural communities.” Village of Euclid, Ohio v. Ambler Realty, Co., 272 U.S. 365 (1926).
- ▶ “The very essence of [z]oning is the designation of certain areas for different use purposes.” Swade v. Zoning Hearing Board of Adjustment of Springfield Township, 140 A. 2d 597, 598 (Pa. 1958).

Unconstitutional zoning: Act 13

- ▶ In Section 3304 of Act 13, the General Assembly attempted to zone for oil and gas development across the entire state:
- ▶ **3304(a) General rule.** -- In addition to the restrictions contained in sections 3302 (relating to oil and gas operations regulated pursuant to Chapter 32) and 3303 (relating to oil and gas operations regulated by environmental acts), ***all local ordinances regulating oil and gas operations shall allow for the reasonable development of oil and gas resources.***



“Because 58 Pa. C.S. §3304 requires all oil and gas operations in all zoning districts, including residential districts, as a matter of law, we hold that 58 Pa. C.S. §3304 violates substantive due process because ***it allows incompatible uses in zoning districts and does not protect the interests of neighboring property owners from harm***, alters the character of the neighborhood, and makes irrational classifications.”

Robinson Twp. v. Commonwealth, 52 A.3d 463, 485, (Pa. Commw. Ct. 2012)

“... [A] new regulatory regime permitting industrial uses as a matter of right in every type of pre-existing zoning district is incapable of conserving or maintaining the constitutionally-protected aspects of the public environment and of a certain quality of life. 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. “

Robinson Twp. v. Commonwealth, 83 A.3d 901, 979 (Pa. 2013)



Purposes of Zoning Districts in South Strabane Township


-



South Strabane Township


A-1 Agricultural District Purpose

The purpose of this district is to **preserve productive agricultural land resources** and to provide for **low-density single-family residential development** that will be **compatible with agricultural pursuits and will preserve natural features** and to provide for accessory uses and compatible public and semipublic uses as conditional uses or uses by special exception.



South Strabane Township R-1 Neighborhood Residential District Purpose

The purpose of this district is to **preserve natural features and resources** while encouraging **low-density single-family residential development suited to the natural conditions** and to provide for accessory uses and compatible public and semipublic uses as conditional uses or uses by special exception.




South Strabane Township R-2 Suburban Residential District Purpose

The purpose of this district is to encourage **single-family developments at suburban densities in locations in the Township where utilities and transportation facilities exist or are anticipated in the future** and to provide for accessory uses and compatible public and semipublic uses as conditional uses and uses by special exception.



South Strabane Township R-3 Medium-Low Density Residential District Purpose

The purpose of this district is to provide for medium-density single-family development and to provide multifamily housing opportunities in planned residential developments in areas served by public sewers and other public services and to provide for compatible public, semipublic and accessory uses as conditional uses or uses by special exception.



South Strabane Township R-4 Medium-Density Residential District Purpose

The purpose of this district is to protect older, established neighborhoods comprised primarily of single-family dwellings on small lots, to provide opportunities for limited commercial development on properties that front on arterial or collector roads, to provide services to the immediate neighborhoods and local traffic, and to provide for compatible public, semipublic and accessory uses as conditional uses or uses by special exception.



South Strabane Township C-1 Neighborhood Commercial District Purpose

The purpose of this district is to provide retail shopping and service facilities, to serve immediate household needs, that are **of a limited type and size appropriate to smaller properties, that do not generate large amounts of traffic and that do not adversely impact neighboring residential uses.**



South Strabane Township C-2 General Commercial District Purpose

The purpose of this district is to provide for commercial uses for the convenience of areawide consumers that depend on access to an arterial highway, **that may generate truck traffic and that may not be compatible with commercial areas devoted primarily to serving the household needs of the residents of the immediate area.**



South Strabane Township C-3 Mixed Use District Purpose

The purpose of this district is to accommodate a mixture of land uses and supporting facilities in areas immediately accessible to the regional highway network and the Meadows Race Track.



South Strabane Township I-1 Light Industrial District Purpose

The purpose of this district is to encourage development of **light industrial uses in appropriate locations in the Township, consistent with sound planning and environmental controls.**



South Strabane Township I-2 General Industrial District Purpose

The purpose of this district is to **provide sites for major industrial, mining and related activities in appropriate locations in the Township, where large sites are available to accommodate their operations and where the more intense activities can be separated from developed residential areas.**



► Oil & Gas Drilling is an
Industrial Use of Land



Marcellus-Shale.us: <http://www.marcellus-shale.us/fracking.htm>

Pa. Supreme Court: Oil and Gas development is Industrial

- ▶ “. . . Act 13 permits industrial oil and gas operations as a use "of right" in **every zoning district throughout the Commonwealth**, including in residential, commercial, and agricultural districts. Insofar as Section 3304 permits the fracking operations and exploitation of the Marcellus Shale at issue here, the provision compels exposure of 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. v. Commonwealth, 83 A.3d 901, 979 (Pa. 2013)

Specific Risks Associated with Oil and Gas Development

- ▶ “Though they occasionally were able to get close to the pad, Wild Well personnel weren't able to explore enough of the area to locate the missing worker from Houston-based Cameron International Corp.”

Pittsburgh Tribune Review, February 13, 2014



WPXI: <http://www.wpxi.com/news/news/crews-battling-large-gas-well-fire-greene-county/ndKqH/>

Oil and Gas Development Only in Industrial Districts

- ▶ The Pennsylvania Supreme Court has recognized that oil and gas development is an industrial use of land.
- ▶ Placement of industrial oil and gas operations in zones with other industrial uses of land is in-keeping with basic tenets of zoning, which focus on placing “like” uses together
- ▶ This is the simplest and most straightforward option.

Oil and Gas Development on a Parcel by Parcel Basis

- ▶ Local governments *could* consider re-zoning areas of their municipalities to provide for oil and gas development in new areas that are not presently industrial districts.
- ▶ This Option is not recommended absent a comprehensive re-zoning.
- ▶ Zoning activities that are specific to one tract and are not comprehensive in nature are known as illegal “spot zoning”.

Impermissible Spot Zoning

- ▶ Spot zoning occurs when "zoning provisions adopted to control the use of a specific area of land without regard to the relationship of those land use controls to the overall plan and the general welfare of the community."

Baker v. Chartiers Twp. Zoning Hearing Bd., 677 A.2d 1274, 1277 (Pa. Commw. Ct. 1996)

- ▶ "The key point is that when a municipal governing body puts on blinders and ***confines its vision to just one isolated place or problem within the community, disregarding a community-wide perspective, that body is not engaged in lawful zoning***, which necessarily requires that the picture of the whole community be kept in mind while dividing it into compatibly related zones by ordinance enactments. In other words, legislating as to a spot is the antithesis of zoning, which necessarily functions within a community-wide framework."

Plymouth v. County of Montgomery, 531 A.2d 49, 57 (Pa. Commw. Ct. 1987)

What is a Zoning Overlay?

- ▶ “An overlay district creates a framework for conservation or development allowing for a new type of development or imposing restrictions that is superimposed over the zoning districts on all or part of a municipality. ***The purpose of an overlay district is to create specific and targeted provisions that conserve natural resources or realize development objectives without unduly disturbing the expectations created by the existing zoning ordinance.*** In other words, overlay districts supplement existing zoning districts; they do not supersede them either in fact or practice.”

Main St. Dev. Group, Inc. v. Tinicum Twp. Bd. of Supervisors, 19 A.3d 21, 28 (Pa. Commw. Ct. 2011) (internal citations omitted).

- ▶ “A zoning district that encompasses one (1) or more underlying zoning districts and that imposes additional requirements or provisions above that required by the underlying zoning district.”

Peters Township Code of Ordinances

Propriety of oil and gas extraction overlay districts after Robinson Township

- ▶ Zoning overlay districts are intended to impose additional restrictions on the use of land beyond what is found in underlying zoning districts.
 - ▶ An oil and gas/mineral extraction overlay district may reduce restrictions on the use of land that are found in the underlying zoning ordinance by allowing more uses to occur in a particular area.



R-1

Residential District

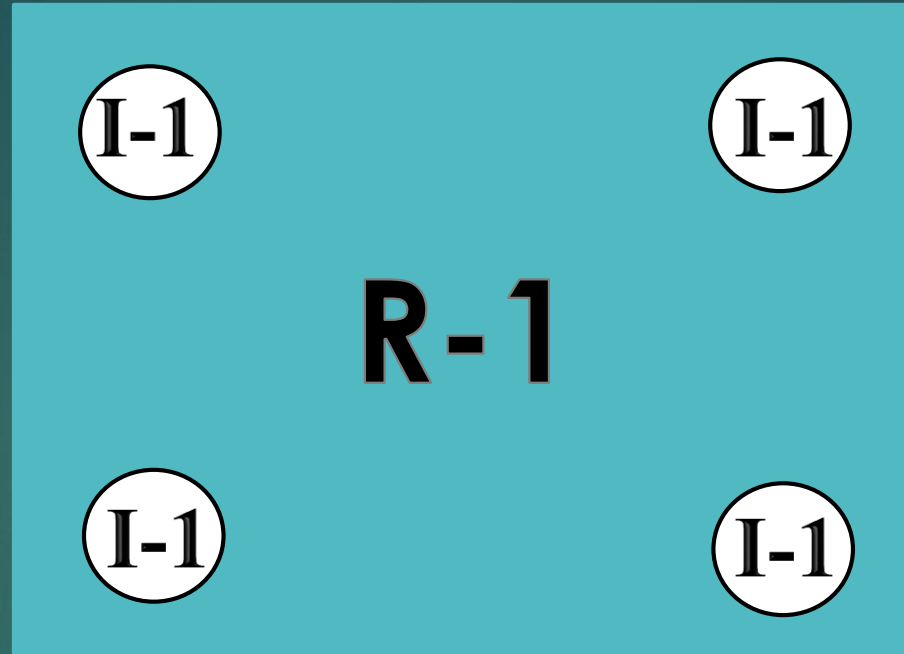
- ▶ Constitution- Protects
- ▶ Public Health, Safety
- ▶ Welfare- Compatible
- ▶ Residential Uses



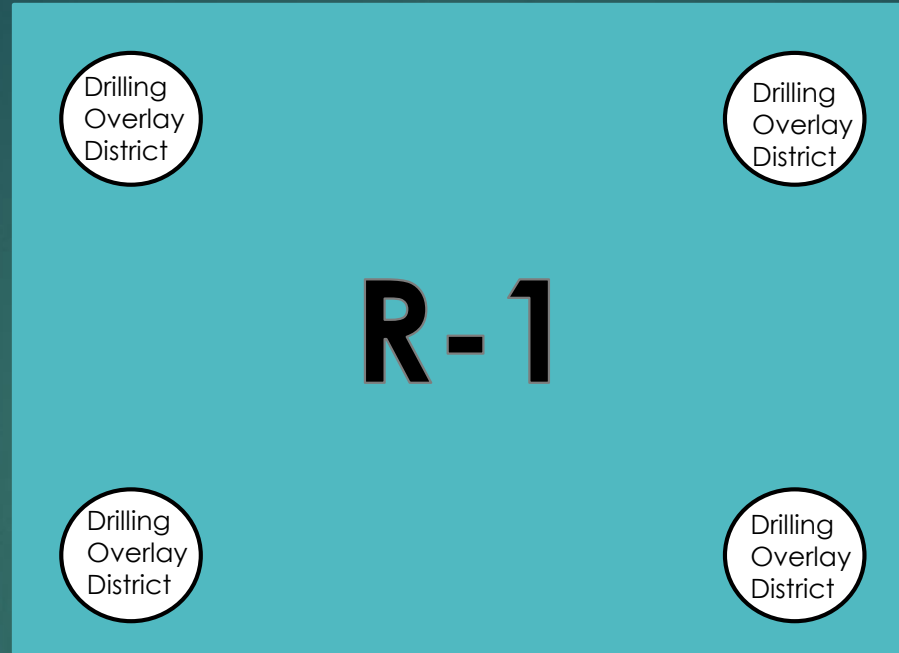
R-1

Drill Sites in a Residential District, as permitted uses

- ▶ Unconstitutional
- ▶ Not Compatible- not consistent with public health and safety
- ▶ Not Proper use of police force
- ▶ “Spot use”



- ▶ Re- Zoning Same Areas to I-1
- ▶ Unconstitutional
- ▶ “Spot Zone”



- ▶ Unconstitutional- Can't escape
- ▶ Constitutional scrutiny by skipping re-zoning and overlaying the underlying district

The Government is a Trustee of Environmental Resources

- ▶ In Robinson Township, the Pennsylvania Supreme Court resuscitated the importance of the “Environmental Rights Amendment” to the Pennsylvania Constitution:
 - ▶ “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. 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.”
- Pennsylvania Constitution, Article 1, Section 27
- ▶ All governments, including municipalities, assume the role of trustee:
 - ▶ “Moreover . . . [t]he constitutional obligation binds all government, state or local, concurrently.”

Robinson Twp. v. Commonwealth, 83 A.3d 901, 952 (Pa. 2013)

Significance of Government as Fiduciary of Environmental Resources

- ▶ “As trustee, the Commonwealth is a fiduciary obligated to comply with the terms of the trust and with standards governing a fiduciary's conduct. The explicit terms of the trust require the government to “conserve and maintain” the corpus of the trust. 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.”

Robinson Twp. v. Commonwealth, 83 A.3d 901, 957 (Pa. 2013)

- ▶ When zoning, a government is **obliged to carry out its obligations as a fiduciary** of environmental resources, which the General Assembly did not do in Act 13:
 - ▶ “Insofar as Section 3304 permits the fracking operations and exploitation of the Marcellus Shale at issue here, the provision compels exposure of 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. v. Commonwealth, 83 A.3d 901, 97 (Pa. 2013)

Reservations with Mineral Extraction Overlay

- ▶ A mineral extraction/oil & gas overlay district has potential legal hurdles.
- ▶ Property owners rely on the zoning classification of their property, which may be changed through an overlay to allow different uses.
- ▶ A mineral extraction/oil & gas overlay district that allows for industrial oil and gas operations outside of industrial zoning districts subjects non-industrial areas to industrial activities.
 - ▶ If the purpose of zoning is to place “like uses” together, then how can an industrial use be extended into non-industrial areas?
 - ▶ If government is a trustee of the environment and natural resources, such as clean air, then how can a government satisfy its fiduciary obligation to protect such resources by allowing industrial, polluting activities into areas that are not industrial?
 - ▶ “The establishment of such districts or zones may, among other things, prevent congestion of population, secure quiet residence districts, expedite local transportation and facilitate the suppression of disorder, the extinguishment of fires, and the enforcement of traffic and sanitary regulations. The danger of fire and of contagion are often lessened by the exclusion of [industrial activities] from areas devoted to residences and, in consequence, the safety and health of the community may be promoted.”

Village of Euclid, Ohio v. Ambler Realty Co., 272 U.S. 365, 392 (1926).

Issues Still Before the Pennsylvania Supreme Court

- ▶ Several issues are still before the Pennsylvania Supreme Court:
 - ▶ The Court is considering the constitutionality of Section 3218.1, which provides that the distinction that public water well owners but not private water suppliers are to receive notice of a spill resulting from drilling operations.
 - ▶ The Court is considering whether Sections 3305-3309, which deal with the jurisdiction of the Public Utility Commission, are severable from the provisions in Act 13 found to be unconstitutional. Resolution of this issue will address whether municipal zoning ordinances may be challenged and whether attorneys' fees may be awarded to a prevailing party.
 - ▶ The Court is considering whether Section 3241 (a), which provides that a corporation transporting, selling or storing natural or manufactured gas, represents an unconstitutional taking of private property.
 - ▶ The Court is considering the constitutionality of Section 3222.1 which deals with non-disclosure of chemicals by health care professionals.

Specific Additional Matters

- ▶ Property Owners' Rights: Any modification to zoning ordinances to provide for oil and gas operations will impact owners of all types of properties, who rely on zoning classifications to protect their property interests.
- ▶ Environmental Regulations: Previously, municipalities were not permitted to include environmental standards in zoning ordinances related to oil and gas development. That appears to have changed in Robinson Township.
- ▶ Impact Fees: The remaining issues before the Pennsylvania Supreme Court do not involve impact fees.
- ▶ Ability to Prohibit Use Entirely: Governments do not have an obligation to provide areas for all conceivable uses of land, due to topography and space issues. However, to the extent that uses may be accommodated in districts with similar uses, whether industrial, commercial or residential, it is advised that no such use be prohibited.
- ▶ Setbacks- Not Preempted -> What is a proper setback? How do you know? Tailored to local conditions?