

**IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT**

NOS. 63 & 64 MAP 2012

ROBINSON TOWNSHIP, Washington County, Pennsylvania; BRIAN COPPOLA, Individually and in his Official Capacity as Supervisor of Robinson Township; TOWNSHIP OF NOCKAMIXON, Bucks County, Pennsylvania; TOWNSHIP OF SOUTH FAYETTE, Allegheny County, Pennsylvania; PETERS TOWNSHIP, Washington County, Pennsylvania; DAVID M. BALL, Individually and in his Official Capacity as Councilman of Peters Township; TOWNSHIP OF CECIL, Washington County, Pennsylvania; MOUNT PLEASANT TOWNSHIP, Washington County, Pennsylvania; BOROUGH OF YARDLEY, Bucks County, Pennsylvania; DELAWARE RIVERKEEPER NETWORK, MAYA van ROSSUM, the Delaware Riverkeeper; and MEHERNOSH KHAN, M.D.
Appellees/Cross-Appellants

VS.

COMMONWEALTH OF PENNSYLVANIA; PENNSYLVANIA PUBLIC UTILITY COMMISSION, ROBERT F. POWELSON, in his Official Capacity as Chairman of the Public Utility Commission; OFFICE OF THE ATTORNEY GENERAL; LINDA L. KELLY, in her Official Capacity as Attorney General of the Commonwealth of Pennsylvania; PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION; and MICHAEL L. KRANCER, in his Official Capacity as Secretary of the Department of Environmental Protection
Appellants/Cross-Appellees

**AMICUS CURIAE BRIEF IN SUPPORT OF
ROBINSON TOWNSHIP, Washington County, Pennsylvania; BRIAN COPPOLA,
Individually and in his Official Capacity as Supervisor of Robinson Township;
TOWNSHIP OF NOCKAMIXON, Bucks County, Pennsylvania; TOWNSHIP OF SOUTH
FAYETTE, Allegheny County, Pennsylvania; PETERS TOWNSHIP, Washington County,
Pennsylvania; DAVID M. BALL, Individually and in his Official Capacity as Councilman
of Peters Township; TOWNSHIP OF CECIL, Washington County, Pennsylvania;
MOUNT PLEASANT TOWNSHIP, Washington County, Pennsylvania; BOROUGH OF
YARDLEY, Bucks County, Pennsylvania; DELAWARE RIVERKEEPER NETWORK,
MAYA van ROSSUM, the Delaware Riverkeeper; and MEHERNOSH KHAN, M.D.**

FILED BY THE MOUNTAIN WATERSHED ASSOCIATION

**APPEAL FROM THE COMMONWEALTH COURT ORDER OF JULY 26, 2012,
AT NO. 284 M.D. 2012**

BY: **ROBERT P. GING, JR., ESQUIRE**
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DATE: September 17, 2012

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INTRODUCTION

This Amicus Brief is filed on behalf of the Mountain Watershed Association in support of Robinson Township, et al., Appellees.

The Mountain Watershed Association was formed in 1994 in response to a deep mine proposal in the Indian Creek watershed in Fayette County, Pennsylvania. After the proposal was defeated, local citizens decided to form an organization dedicated to cleaning up the watershed after 150 years of poor mining practices.

Since 1994 Mountain Watershed Association has built five treatment systems and completed many other projects which have dramatically improved water quality in the Indian Creek watershed. In 2003 Mountain Watershed Association partnered with the International Waterkeeper Alliance to create Youghioghney Riverkeeper and its vision expanded into the larger Youghioghney River watershed.

Indian Creek originates in Forbes State Forest near the crest of the west flank of Laurel Hill and flows in a westerly direction along the Pennsylvania Turnpike. There are at least 21 named tributaries that flow into Indian Creek and ultimately into the Youghioghney River. Mountain Watershed Association is a non-profit organization governed by a volunteer board of directors having 1,200 members. Members of the Mountain Watershed Association live and recreate along the waterways of Indian Creek, and the Youghioghney River, some of which have already been exposed to Marcellus shale development.

OPINION BELOW

The Commonwealth Court heard arguments on June 6, 2012 and decided the case on July 26, 2012. *Robinson Township, et al. vs. Commonwealth of Pennsylvania, et al.*, 2012 Pa. Commw. Lexis 222 (2012).

SUMMARY OF ARGUMENT

Act 13 was enacted, inter alia, to strip political subdivisions, hereafter referred to as “municipalities”, of all zoning power when an oil and gas operation decides to locate within the municipalities’ borders. Act 13 unconstitutionally eviscerates the public trust duty of all municipalities under Article I, §27 of the Pennsylvania Constitution. Act 13 is a special law that unconstitutionally regulates the daily business of the municipalities, under Article III, §32 of the Pennsylvania Constitution and is a per se unconstitutional class of one that is closed. The pre-enactment and post enactment PUC reviews of the Act are unconstitutional violations of the municipalities’ procedural due process rights to a meaningful hearing. As a result, this Court should hold that Act 13 is unconstitutional under the Pennsylvania Constitution, and sustain the grant of summary relief by the Commonwealth Court as to Counts I, II, III and VIII of Appellees’ Petition for Review.

ARGUMENT

Act 13, 58 Pa. C.S. §§2301 - 3504 repealed Pennsylvania's Oil & Gas Act and was enacted on February 14, 2012. It required all political subdivisions to afford access to the oil and gas industry without regard to the zoning ordinances currently promulgated by the municipalities to all lands in the political subdivision. Act 13 unconstitutionally violates the Pennsylvania Constitution, Article I, §27 public trust concepts by preventing municipalities from acting as trustees of the natural resources of the Commonwealth. 58 Pa. C.S. §§3302 - 3304. *Payne vs. Kassab*, 11 Pa. Cmwlth 14, 312 A.2d 86 (1973). *Commonwealth by Shapp vs. National Gettysburg Battlefield Tower, Inc.*, 454 Pa. 193, 311 A.2d 588 (1973). *Community College of Delaware County vs. Fox*, 20 Pa.Cmwlth. 335, 342 A.2d 468(1975).

Act 13 violates Pennsylvania Constitution, Article III, §32, because Act 13 is a special law that regulates the affairs of municipalities and the gas extraction industry and is per se unconstitutional. *Haverford Township vs. Siegle*, 364 Pa. 1, 28 A.2d 786 (1942). *Wheeler vs. Philadelphia*, 77 Pa. 338 (1875). *Freezer Storage Inc. vs. Armstrong Cork Company*, 476 Pa. 270, 382 A.2d 715 (1978). Act 13 violates the due process rights of municipalities by denying municipalities a meaningful hearing in oil and gas zoning ordinance cases and destroying the rights of landowners. *Commonwealth Department of Transportation, Bureau of Driver Licensing vs. Clayton*, 546 Pa. 342, 351, 684 A.2d 1060 (1996). *In re: Realen Valley Forge Greener Associates*, 576 Pa. 115, 838 A.2d 718, 729 (2003) As a result, there is no genuine issue of material fact in the record that Act 13 does not violate the Pennsylvania and United States Constitution and, consequently, this Court should declare the Act unconstitutional.

I. ACT 13 VIOLATES PENNSYLVANIA CONSTITUTION ARTICLE I, §27 PUBLIC TRUST DOCTRINE BY PREVENTING MUNICIPALITIES FROM ACTING AS TRUSTEES OF THE NATURAL RESOURCES OF THE COMMONWEALTH.

Act 13 unconstitutionally violates Article I, §27 by preventing municipalities from acting as trustees of the natural resources of the Commonwealth. 58 Pa. C.S. §§3302 - 3304. *Payne vs. Kassab*, 11 Pa. Cmwlth 14, 312 A.2d 86 (1973). *Commonwealth by Shapp vs. National Gettysburg Battlefield Tower, Inc.*, 454 Pa. 193, 311 A.2d 588 (1973). *Community College of Delaware County vs. Fox*, 20 Pa.Cmwlth. 335, 342 A.2d 468 (1975). Municipalities are trustees of the natural resources of the Commonwealth for future generations. As a result, there is no genuine issue of material fact in the record that Act 13 does not violate Article 1, §27 of the Pennsylvania Constitution and, consequently, this Court should grant a summary judgment in favor of the Appellees. *Community College of Delaware County vs. Fox*, 20 Pa.Cmwlth. 335 342 A.2d 468 (1975).

The first sentence of Article I, §27 clearly gives the right to the people to enjoy a clean and pure environment. *Fox*, at 342. A right without a duty is hollow. In *Community College of Delaware County vs. Fox*, 20 Pa.Cmwlth. 335; 342 A.2d 468 (1975), Mrs. Fox and the Natural Lands Trust filed an appeal to vacate a DER permit to allow a the municipal authority to install a 24 inch sewer pipe carrying 1,500,000 gallons of sewage per day along a tributary on the Fox property. *id.* at 339. Fox contended that the DER was the trustee of the natural resources of the Commonwealth, under the public trust doctrine of Article I, §27 of the Pennsylvania Constitution, and that it should not have approved the permit. The Court upheld the sewage permit because the DER was not the sole trustee of the natural resources of the Commonwealth, because the municipal authority was also a trustee. The Court reasoned that state agencies are not the sole trustee, but municipalities and other entities share the trustee role to protect the environment.

Act 13 clearly mandates in §3303 that municipalities do not share duties as trustees when

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Act 13 clearly mandates in §3303 that Municipalities do not share duties as trustees when

it comes to this environmental act. 58 Pa. C.S., §3303. Contrary to *Fox*, Act 13 places the sole trustee role on the Department of Environmental Protection and the PUC.

A key role of municipalities is to guard and protect the quality of life for all inhabitants. *Franklin Township vs. Commonwealth, Department of Environmental Resources*, 500 Pa. 1, 452 A.2d 718 (1982). In *Franklin Twp.*, the DER issued a landfill permit to Elwin Farms, Inc. for the disposal of toxic sludge and hazardous chemicals in Fayette County, Pennsylvania. The Environmental Hearing Board dismissed the case for lack standing with respect to the county. The Environmental Hearing Board reasoned that municipalities played no role in environmental matters. The Supreme Court of Pennsylvania ultimately held that the municipalities had standing because the municipalities were directly affected by the environment and a key function of municipalities was to promote and protect the quality of life for all inhabitants. The Court reasoned that the physical boundaries of the municipalities directly involved the municipalities with protecting the environment.

Act 13 declares that municipalities are not involved in protecting the quality of life for all inhabitants when oil and gas extraction is undertaken. The legislature has given the exclusive management of the local natural resources to a distant and removed agency, the DEP. Local governments are required to protect the citizens against local threats and harms. In *Franklin Township*, the Court held that a key role of municipalities is to protect the quality of life of all inhabitants, because the overall health and quality of life of the municipality is directly connected to the installation and operation of a hazardous waste landfill. Here, the Court should hold that municipalities do play a vital role in protecting the quality of life of all inhabitants because the effects of gas and oil drilling directly impact the health and quality of life of all inhabitants.

The legislature, by implication, recognized the municipalities role as trustees in promulgating the Solid Waste Management Act, mandating that municipalities assist the DEP in determining if a solid waste permit should be issued. 35 P.S. §6018.504.

35 P.S. §6018.504 states:

“Applications for a permit shall be reviewed by the appropriate county, county planning agency or county health department where they exist and the host municipality and they may recommend to the department conditions upon, revisions to, or disapproval of the permit only if specific cause is identified. In such case the department shall be required to publish in the Pennsylvania Bulletin its justification for overriding the county's recommendations. If the department does not receive comments within 60 days, the county shall be deemed to have waived its rights to review.”

The Solid Waste Management Act specifically recognizes the importance of local government in the solid waste management process. Act 13 strips municipalities of the duty of trustee when addressing gas drilling even though other environmental laws, such as the Solid Waste Management, reaffirm the trustee role of the municipalities. As a result, this Court should hold that Act 13 is unconstitutional because Act 13 strips municipalities of the trustee duty that is mandated by Article I, §27 of the Pennsylvania Constitution.

The third line of Article I, § 27 states:

“As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.”

This Court has previously recognized that municipalities are vested with the duty of trustee of the public trust as a constitutional charge:

“What affects the natural environment within the borders of a township or county affects the very township or county itself. Toxic wastes which are deposited in the land irrevocably alter the fundamental nature of the land which in turn irrevocably alter the physical nature of the municipality and county of which the land is a part. It is clear that when land is changed , a serious risk of change to all other components of the environment arises. Such changes and threat of changes ostensibly conflict with the obligations townships and counties have to nature and quality of life. ... Aesthetic and environmental well-being are important aspects of the quality of life in our

society, and a key role of local government is to promote and protect life's quality for all of its inhabitants. ... Among the responsibilities of local government is the protection and enhancement of the quality of life of its citizens. Indeed, it is a constitutional charge which must be respected by all levels of government in the Commonwealth." *Franklin Township vs. Commonwealth, Department of Environmental Resources*, 499 Pa. 162 452 A.2d 718, 721-22 (1982).

The Pennsylvania Constitution does not confer on the legislature the power to determine which branch or portions of the branch of government are or are not trustees.

The Appellants also argue that the municipalities raise non-justiciable political issues which are barred by underlying principles of the separation of powers in the political question doctrine.

For a case to involve a political question there must be a texturally demonstrable Constitutional commitment of the issue to a coordinate political department or a lack of judicially discoverable and manageable standards for resolving the issue. *Baker vs. Carr*, 369 U.S. 186, 217 (1962). The Supreme Court has adopted and applied the standards set forth in *Baker vs. Carr*. *Sweeney vs. Tucker*, 473 Pa. 493, 508, 375 A.2d 698, 705 (1977). Here, the Court should hold that there is no political question involved and hold that Act 13 is unconstitutional because the Commonwealth is not Constitutionally granted exclusive power over the public trust.

The Commonwealth Court, in fact, found that there was a justiciable question in the challenge to Act 13 and not a political question and that it was not being required to intercede upon a legislative determination stating:

“Under the Commonwealth's reasoning, any action that the General Assembly would take [*36] under the police power would not be subject to a constitutional challenge. For example, if the General Assembly decided under the police power that to prevent crime, no one was allowed to own any kind of gun, the courts would be precluded to hear a challenge that the Act is

unconstitutional under Art. 1, §21 of the Pennsylvania Constitution, which provides, "The right of the citizens to bear arms in defense of themselves and the State shall not be questioned." Nothing in this case involves making a determination that would intrude upon a legislative determination or, for that matter, require the General Assembly to enact any legislation to implement any potential adverse order; what we are asked to do is to determine whether a portion of Act 13 is constitutional or not, a judicial function. Because we are not required to make any specific legislative policy determinations in order to come to a resolution of the matters before us, the issue of whether Act 13 violates the Pennsylvania Constitution is a justiciable question for this Court to resolve." *Robinson Township vs. Commonwealth*, 2012 Pa. Commw. Lexis 222 (2012).

II. ACT 13 UNCONSTITUTIONALLY VIOLATES PENNSYLVANIA CONSTITUTION ARTICLE III, §32 BY ENACTING A SPECIAL LAW

Act 13 violates Article III, §32 of the Constitution, because Act 13 is a special law that is unconstitutional. *Haverford Township vs. Siegle*, 28 A.2d 786 (1942). *Wheeler vs. Philadelphia*, 77 Pa. 338 (1875). *Freezer Storage Inc. vs. Armstrong Cork Company*, 476 Pa. 270, 382 A.2d 715 (1978). In its Opinion sustaining the Commonwealth's preliminary objections to the challenge that Act 13 was not a special law, the Commonwealth Court conceded that Act 13 does treat the oil and gas industry differently from other extraction industries. The Court conceded that any distinction between groups must seek to promote a legitimate state interest or public value and very reasonable relationship to the object of the classification, citing *Pennsylvania Turnpike Commission vs. Commonwealth*, 587 Pa. 437, 899 A.2d 1085 (2004). Although Pennsylvania Courts have recognized legitimate classification of coal mines according to the nature of different kinds of coal and has legislated separately for each, that line of cases is distinguishable from the case currently before this Honorable Court, and the case of *Dufour vs. Maize*, 358 Pa. 309, 56 A.2d 675 (1948) because there has been no demonstration that Act 13 benefits any other industry except the oil and gas industry. There is no genuine issue of material fact in the record to dispute that Act 13 is unconstitutional.

A. ACT 13 VIOLATES PENNSYLVANIA CONSTITUTION ARTICLE III, §32 BY ENACTING A SPECIAL LAW BECAUSE THE ACT 13 CLASSIFICATION OF THE OIL AND GAS INDUSTRY AS A PROTECTED CLASS IS NOT REASONABLY RELATED TO ACCOMPLISHING AN ARTICULATED STATE INTEREST.

The common constitutional principle at the heart of the special legislation proscription is that like persons in like circumstances should be treated similarly by the sovereign. The prohibition against treating people differently under the law does not preclude the Commonwealth from resorting to legislative classifications, provided that those classifications are reasonable rather than arbitrary and bear a reasonable relationship to the object of the legislation; in other words, a classification must rest upon some ground of difference, which justifies the classification and has a fair and substantial relationship to the object of the legislation. Under a rational basis analysis, the General Assembly need not specifically articulate the purpose or rationale supporting its action. It is enough that some rationale may conceivably be the purpose and policy underlying the enactment. *Commonwealth vs. Albert*, 563 Pa. 133, 758 A.2d 1149 (2000).

Act 13 has separated the oil and gas industry from all other industries and businesses in the Commonwealth. No other industry is directly benefitted by Act 13. No rational relationship exists between the disparate treatment of Act 13 and the public benefit. The only arguable basis for Act 13 is to provide predictability and uniformity in oil and gas operations across the many municipalities in the Commonwealth. Commonwealth's Brief in Support of Preliminary Objections, at 6. The main purpose of Article III, §32 was "to put an end to the flood of privileged legislation for particular localities and for private purposes which was common in 1873." *Haverford Township*, 28 A.2d at 788. Here, the basis for Act 13 is purely private. Act 13 places restrictions on the municipalities and strong arms those local governments into allowing oil and gas facilities to locate where the residents are unwilling to allow such development. As a

result, no rational basis exists for the Act 13 and, consequently, this Court should hold that Act 13 is unconstitutional.

The prohibition against treating people differently under the law does not preclude the Commonwealth from resorting to legislative classifications, provided that those classifications are reasonable rather than arbitrary and bear a reasonable relationship to the object of the legislation. *Pennsylvania Turnpike Commission vs. Commonwealth*, 587 Pa. 347, 899 A.2d 1085 (2006). In *Pennsylvania Turnpike*, the state legislature enacted an employment law that drew a distinction between first level supervisors that worked for the Pennsylvania Turnpike and all other first level supervisors in the Commonwealth. The first level supervisors of the Pennsylvania Turnpike were required to enter into collective bargaining, but all other publicly employed first level supervisors were not. The Turnpike Commission filed suit on the grounds that although the state had a legitimate purpose of promoting employment, the statute was not rationally linked to the promotion of that interest. The Court held that the statute was unconstitutional because the distinction constructed between the two groups of first level supervisors was not reasonably related to the promotion of employment. The Court reasoned that the collective bargaining for one small part of the overall public employee work force in the Commonwealth would not have an impact on the overall public work force in the Commonwealth. As a result, the Court held the statute unconstitutional because the basis was not rationally related to the legitimate purpose.

Act 13 classifies industries in Pennsylvania into two categories: the oil and gas industry and everyone else. The oil and gas industry face the same types of uncertainty and unpredictability that every business experiences when dealing with any governmental agency. But, the zoning ordinances of the municipalities are published and reasonable assumptions can be made as to the ease of permitting for different locations.

This Court should hold that Act 13 is unconstitutional because the classification of the oil and gas industry separate from all other industries is not rationally related to promoting the economic health of the Commonwealth. The classification of the oil and gas industry in Act 13 will serve to promote private interests in direct violation of the Article III, §32 of the Pennsylvania Constitution. As in *Pennsylvania Turnpike*, there are no discernible distinctions between the oil and gas industry and other industries that would create a rational basis for Act 13.

Any law that benefits one group while excluding others is an unconstitutional special law. *Laplacca vs. Philadelphia Rapid Transit Co.*, 265 Pa. 304, 309, 108 A. 612 (1919). In *Laplacca*, an attorney was seeking recovery of legal fees through a lien provision under the Act of 1915. The Act created a lien against any compensation awarded to the client for the attorney's services. The Court held that the Act was unconstitutional because the Act created a new right in favor of the attorneys of record without a showing of a material difference between attorneys and other professional classes. In addition, the Court stated that many different groups face similar challenges in recovering monies earned. Consequently, the Court held that the Act was unconstitutional because there was no material difference between the classes to grant one class a right at the exclusion of the other classes.

Although oil, gas, coal, and other minerals and natural resources are not mobile and must be extracted at the deposit site, many other industries share similar issues when locating a suitable site for industrial use. In *Laplacca*, the Court held that the Act of 1915 was unconstitutional because no material difference existed between the classes. *id.* at 309. This Court should hold that Act 13 is an unconstitutional special law because the oil and gas industry faces the same issues with locating their wells and support operations as does any other industry. The oil and gas industry does have to drill where the resource exists, but many industries and

commercial uses face similar hurdles.

A steel mill requires access to transportation, electricity, and water. Roads and electric lines can be built to place a steel mill outside a residential area, but water is not as simple. Take for example, a steel mill that desires to locate in a small town in rural Pennsylvania. The town is located near the interstate highway and has an adequate electrical supply, but only one water source. The source is a lake in the middle of town. Although the lake could sustain a steel operation the community where the lake exists is zoned R-1 for residential only. The steel mill must locate at or near a large water source to produce steel efficiently, but the town will not give the mill an MPC conditional use variance. Can the steel mill win? No, because the use does not match the local overall development objectives. *Huntley and Huntley, Inc. vs. Borough Council of the Borough of Oakmont*, 600 Pa. 207, 224; 964 A. 2d 855 (2009). But, if the steel industry had an Act 13 to unconstitutionally dislodge a municipality's duty to zone for local developmental and demographic objectives, the steel industry could put a plate mill in a school yard. Act 13 does not call for a general grant of conditional variances for all industries. Act 13 is enacted for the benefit of the oil and gas industry. Act 13 gives a grant to a class that is not premised on discernable distinctions. *Dufour vs. Maize*, 358 Pa. 309, 56 A.2d 675 (1948). Consequently, this Court should hold that Act 13 is unconstitutional because the Act is a special law enacted for the sole benefit of the oil and gas industry at the detriment of all other industries and commercial businesses in the Commonwealth.

The Commonwealth argues that *Durkin vs. Kingston Coal Co.*, 171 Pa. 193, 33 A. 237, supports the theory that the legislature could pass health and safety laws unique to an industry. The legislature did separate the different types of coal mining methods into classes, but the mining acts in question were reasonably related to the class distinction. Open pit mining faced many different dangers than underground mining. In the case sub judice, Act 13 covers many

areas that are not unique to the oil and gas industry. Many industries deal with transportation issues in residential areas and the traffic from those industries is normally routed away from the residential areas. The issues of noise, light, dust, around the clock schedules, etc. are not unique to the gas extraction industry. This Court should hold that Act 13 is unconstitutional because the class created is not based on distinctions that are unique to the class created.

**B. ACT 13 IS PER SE UNCONSTITUTIONAL BECAUSE ACT 13
CREATES A CLASS OF ONE AND THE CLASS IS CLOSED.**

Act 13 is per se unconstitutional because Act 13 creates a class of one and the class is closed. Act 13 has placed the gas extraction industry in a class of one. The class of one is closed to all other industries other than the oil and gas industry. The Act has given the gas extraction industry a distinct advantage, by forcing municipalities to approve permits without taking the time required under the MPC. 58 Pa. C.S. 3305.

A class is open if more members can be added. In *Wheeler vs. City of Philadelphia*, the state legislature divided Pennsylvania cities into three classes for purpose of legislation regarding municipal governmental matters. *Wheeler vs. City of Philadelphia*, 77 Pa. 338, 340 (Pa. 1975). Philadelphia was the only city at that time to qualify as a first class city. The taxpayers of Philadelphia filed an injunction against the City of Philadelphia, on the grounds that the law was a special law and unconstitutional under Article III, §32. The Court held that the law was constitutional because the Court reasoned that other cities' populations could rise above 300,000 and become first class cities. Because the class was open to members if those members met the 300,000 population, the law was held constitutional. This Court later explained the *Wheeler* holding in *Haverford Township* as follows: "the fact that Philadelphia was the only member of a class did not make the act local, since it provided for a class as such, into which other members might come." *Haverford Township*, 346 Pa. 1, 28 A.2d 786 at 789 (1942). As a result, the Court held that the law classifying Philadelphia as a city of the first class constitutional because the law

created a class that was open to other members.

Act 13 has placed the oil and gas industry in a class of one. The class of one is closed to all other industries other than the oil and gas industry. A law that creates a class of one that is closed is a special law and is unconstitutional. Consequently, this Court should hold that Act 13 is per se unconstitutional because Act 13 is a special law in violation of Article III, §32 of the Pennsylvania Constitution.

III. ACT 13 DEPRIVES MUNICIPALITIES OF PROCEDURAL DUE PROCESS.

Act 13 unconstitutionally strips municipalities of procedural due process guaranteed them under the Constitution by not allowing a meaningful hearing because of closed meetings and ex parte communications. *Commonwealth Department of Transportation, Bureau of Driver Licensing vs. Clayton*, 546 Pa. 342, 351, 684 A.2d 1060 (1996). This Court should hold that Act 13 unconstitutionally deprives the municipalities of their procedural due process rights and, consequently, hold that Act 13 is unconstitutional.

The hearing required by the due process clause must be “meaningful” and “appropriate” to the nature of the case. *Commonwealth Department of Transportation, Bureau of Driver Licensing*, supra, 546 Pa. at 351. In *Clayton*, the driver of a car had an epileptic seizure and lost the driving license due to a regulation that removed a person’s license for one year after an epileptic seizure. Clayton brought suit against the Bureau of Licensing claiming the regulation was unconstitutional because Clayton was not allowed to present evidence to dispute the Bureau’s decision. The Court held that the regulation was unconstitutional because Clayton was not given a meaningful opportunity to defend the position that Clayton could operate a motor vehicle safely and retain the license. The Court reasoned that opportunity must be given to meaningfully defend.

Act 13 deprives the municipality of the right to appeal the decision of the DEP to approve a permit for an oil and gas well because the municipality is not considered an aggrieved party. The municipalities' check on this loss of legal right would normally fall within the zoning powers designated to the municipality under the MPC, but ACT 13 requires that all zoning decisions regarding oil and gas must be handled by the PUC. On its face, this hearing appears to be meaningful, but the ex parte underlying nature and penalties imposed on the municipality and its officers deter the municipality from meaningfully protecting itself and its citizens.

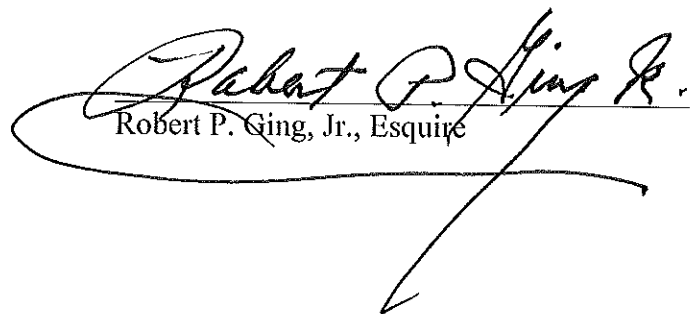
The hearings before the PUC can be ex parte communications, which would offend the common notion of "fairness" and "meaningful". 58 Pa. C.S., §3305(c)(3). The decision of the PUC is final and cannot be appealed. 58 Pa. C.S., §3305(c). In the alternative, if the municipality does not proceed in the PUC advisory process to defend a zoning decision that disallows an oil and gas use, the municipality could face paying the opposing parties' attorney fees and court costs. 58 Pa. C.S. §3307(1). As in *Clayton*, where the Court held that the regulation was unconstitutional because the regulation did not provide for a meaningful hearing, here, Act 13 does not provide the municipalities with the opportunity for a meaningful hearing. Consequently, the conditions created by Act 13 fully deprive municipalities of the procedural due process rights to a meaningful hearing, and this Court should hold that Act 13 is unconstitutional.

CONCLUSION

In closing, Act 13 unconstitutionally violates Pennsylvania Constitution Article I, §27 public trust doctrine by preventing municipalities from acting as trustees of the natural resources of the Commonwealth. Pa. C.S. §§3302 - 3304. *Payne vs. Kassab*, 11 Pa. Cmwlt. 14, 312 A.2d 86 (1973). *Commonwealth by Shapp vs. National Gettysburg Battlefield Tower, Inc.*, 454 Pa. 193, 311 A.2d 588 (1973). *Community College of Delaware County vs. Fox*, 20 Pa.Cmwlt. 335, 342 A.2d 468 (1975). Act 13 violates Pennsylvania Constitution Article III, §32, because Act 13 is a special law and is per se unconstitutional by denying municipalities a meaningful hearing in oil and gas zoning ordinance cases. *Commonwealth Department of Transportation, Bureau of Driver Licensing vs. Clayton*, 546 Pa. 342, 351, 684 A.2d 1060 (1996). As a result, there is no genuine issue of material fact in the record to dispute the fact that Act 13 does violate the Pennsylvania Constitution and, consequently, this Court should strike the legislation.

For the aforementioned reasons, this Court should hold that Act 13 is unconstitutional under Article I, §27 and Article III, §32 of the Pennsylvania Constitution and sustain the Order of the Commonwealth Court granting summary relief in favor of the Appellees as to Counts I, II, III, and VIII of their Petition for Review.

Respectfully submitted,


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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Amicus Brief filed on behalf of the Mountain Watershed Association was served on the following parties at their respective addresses on this date via U. S. First Class, Postage Pre-Paid Mail.

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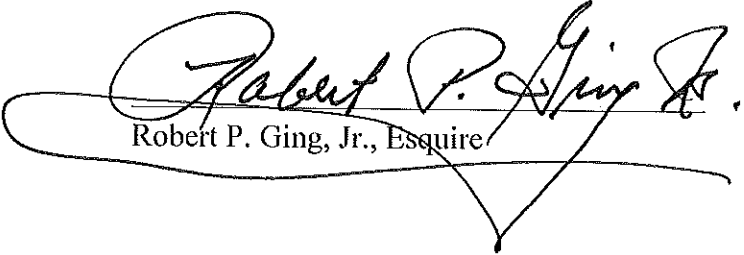
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