

Rodger Kendall
1620 Valleyview
Bulger, PA 15019

August 23, 2012

Chairman Powelson
Pennsylvania Public Utility Commission
PO Box 3265
Harrisburg, PA 17105-3265

Dear Chairman Powelson,

I would like to request that the Public Utility Commission review §27-1811, Oil and Gas Well Drilling (see attached), of the zoning ordinance of Robinson Township, Washington County pursuant to 58 Pa. C.S.A. §3305(b)(1). As a landowner residing within Robinson Township ("Township") I believe that enforcement of the current municipal ordinance has prevented the development of oil and gas from taking place. Additionally, I am requesting that the Public Utility Commission ("PUC") withhold any impact fees that the Township would receive under 58 Pa. C.S.A. §3308 until either adjudication can be made or compliance be achieved.

The PUC possesses the authority to withhold impact fee payments if "an ordinance violates the MPC, this chapter or Chapter 32..." under 58 Pa. C.S.A. §3308. *Compare with Brad Hundt, Court rules part of Act 13 unconstitutional*, Observer-Reporter (July 27, 2102) <http://www.observer-reporter.com/or/story/11/Act-13-ruling>. "Because of the Commonwealth Court decision, local ordinances can remain intact, according to John Smith, the solicitor for Cecil and Robinson townships." Though the Commonwealth Court ruled against parts of Act 13 of 2012 ("Act") the ruling only impacted the PUC's ability to adjudicate on 58 Pa. C.S.A. §3304. "Other than 58 Pa. C.S. §§3301 through 3303, which remain in full force and effect, the remaining provisions of Chapter 33 that enforce 58 Pa. C.S. §3304 are similarly enjoined." *Robinson Township, et al. v. Commonwealth of Pennsylvania, et al.*, No. 284 M.D. 2012. The PUC may still provide orders and opinions on submitted ordinances by way of 58 Pa. C.S.A.

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§3305 but may not use 58 Pa. C.S.A. §3304 to determine compliance. Accordingly, the PUC would be eligible to both review an ordinance and withhold funds based on noncompliance.

Robinson Township imposes multiple requirements upon developers of oil and gas that are either in violation of the Municipalities Planning Code (“MPC”) or Act 13 or both. In particular,

1) §27-1811.1(C)

(C) All activities shall be conducted in conformance with an approved environmental plan designed to minimize damage to natural features. This plan shall include provisions for the containment of spillage, removal of any associated by-products, preservation of viable farmland, wooded areas and other related amenities.

This section of the Township’s ordinance attempts to regulate and enforce environmental laws even though both the Legislature and Courts have determined that administration and regulation of environmental laws is the sole purview of the Commonwealth per 58 Pa. C.S.A. §3303

Notwithstanding any other law to the contrary, environmental acts are of Statewide concern and, to the extent that they regulate oil and gas operations, occupy the entire field of regulation, to the exclusion of all local ordinances. The Commonwealth by this section, preempts and supersedes the local regulation of oil and gas operations regulated by the environmental acts, as provided in this chapter.”

The Commonwealth has addressed all of the concerns of the Township through existing environmental acts to include Chapter 32 of the Act. Spill containment is addressed in 58 Pa. C.S.A. §3218.2(a) stating that “Unconventional well sites shall be designed and constructed to prevent spills to the ground surface or spills off the well site.” 25 Pa. Code §§78.60 through 63 regulate discharge of fluids and disposal of cuttings and residual waste. 58 Pa. C.S.A. §3215 establishes setbacks protecting the natural resources of the Commonwealth and limits the locations available for development. Additional considerations beyond setbacks are factored into permitting at 58 Pa. C.S.A. §§3215(c)(1)-(6) requiring the DEP to consider the impact of development on :

- (1) Publicly owned parks, forests, game lands and wildlife areas.
- (2) National or State scenic rivers.
- (3) National natural landmarks.
- (4) Habitats of rare and endangered flora and fauna and other critical communities.
- (5) Historical and archaeological sites listed on the Federal or State list of historic places.
- (6) Sources used for public drinking supplies in accordance with subsection (b).

The combined effect of the aforementioned site restrictions of 58 Pa. C.S.A. §3215 and the restoration requirements of §3216 ensures “preservation of viable farmland, wooded areas and other related amenities” through the enforcement of existing state environmental acts. For the Township to attempt to control these areas duplicates the legislative efforts of the

Commonwealth and also places the municipality in the position of regulating and enforcing environmental acts. I would request this section of the ordinance to be invalidated.

2. §27-1811.1(D)

§27-1911.1 Oil and Gas well drilling may be approved as conditional uses in all zoning districts except the Floodplain Overlay District, pursuant to the following standards:

(D) Such other factors and criteria as the Zoning Hearing Board deems appropriate.

Subsection D establishes no reasonable or objective criteria that an operator of oil and gas would be able to predict or follow in advance of application. Any conditions adopted as a result of this section would be arbitrary and could be used to impede development by continually requiring an operator of oil and gas to modify their plan to come into compliance. The vague nature is in direct contrast to the requirements of the MPC, 53 P.S. 10603(c)(2) whereby:

(c) Zoning ordinances may contain:

(2) provisions for conditional uses to be allowed or denied by the governing body after recommendations by the planning agency and hearing, **pursuant to express standards and criteria set forth in the zoning ordinance.** (emphasis added)

No express standards or criteria exist within §27-1811.1(D) that could provide any degree of guidance that would allow for uniform interpretation. Case law has also shown that ordinance language must provide guidance that would not render it open to multiple forms of interpretation. In *Farley v. Zoning Hearing Board of Lower Merion Township*, 161 Pa. Cmwlth. 229, 636 A.2d 1239 (1994) the Court described the standards applicable to a claim of vagueness in the following terms

“...An ordinance is unconstitutionally vague and violates due process when persons of common intelligence must guess at its meaning [citations omitted]. Vague ordinances ‘proscribe activity in terms so ambiguous that reasonable people may differ as to what is actually prohibited,’ and invite arbitrary and discriminatory enforcement because they do not set reasonably clear guidelines for law officials and courts. (citation omitted) Difficulty in establishing whether a situation falls within the penumbra of statutory language which is challenged as vague does not render the language unconstitutional unless it ‘fails to convey sufficiently definite warning as to proscribed conduct when measured against common understanding and practices.’ (citation omitted)

Given the latitude and discretion left within this section of the zoning ordinance the only certainty is that different individuals would provide different interpretations as to what an appropriate setback would be from the listed areas. An ordinary person would be unable to ascertain what “factors or criteria” are “deem[ed] appropriate” as would any developer applying to engage in oil and gas development. Furthermore, “the power to impose conditions is not unfettered” and “a zoning board cannot use conditions to achieve a non-zoning purpose.” Ryan,

Pennsylvania Zoning Law and Practice §9.4.18 (2011), (*construing Van Sciver v. Zoning Board of Adjustment*, 396 Pa. 646, 152 A.2d 717 (1959)). The vague nature of this section of the Township's zoning ordinance lends itself to the establishment of conditions prohibited by the Court in *Van Sciver*. Absent criteria to provide guidance any and all manner of imagined conditions could be imposed with the applicant then responsible for contesting the imposed conditions adding extra cost and time.

I would request that the PUC review these sections that violate both the Act and MPC and refrain from disbursing any funds that Robinson Township would receive as a result of the impact fee until either adjudication or compliance can be achieved.

Sincerely,

A handwritten signature in cursive script that reads "Roger Kendall". The signature is written in black ink and is positioned below the word "Sincerely,".

Roger Kendall

entrance, shall be constructed in a manner which will prevent access by children of tender age.

27-1809.2. Portable pools and children's pools which are twelve feet (12') or less in diameter shall be exempt from the fencing requirement, provided the depth capacity of any such pool is less than thirty inches (30") at the point of maximum depth. However, said pools shall be adequately covered or protected in a manner to prevent access by unsupervised persons during any period that the pool is unattended.

27-1809.3. The strict interpretation and application of the fencing and enclosure requirements may be revised in the case of farm ponds, lakes, commercial and municipal recreation areas or commercial or industrial operations, by special exceptions granted by the Zoning Hearing Board. In authorizing any such departure from the restrictions imposed by this Chapter, the Zoning Hearing Board shall consider the following:

- A. Documentation of undue hardship which would be involved.
- B. Whether the degree of specific hardship is such as to warrant the departure.
- C. Proximity to residential areas.
- D. Alternative provisions which are available to mitigate the potential dangers involved.

(Ord. 1-83, 11/7/1983, §21.8)

27-1810. ANTENNA INSTALLATIONS AND WIND GENERATORS.

27-1810.1. Non-cellular communication tower antennas and wind generators may be approved as conditional uses in all zoning districts except the Floodplain Overlay District pursuant to the following standards:

- A. All installations shall meet applicable setback and yard requirements.
- B. No installations shall be permitted in required front yard areas.
- C. Nuisance factors such as excessive lighting, noise and the blocking of views shall be cause for denial.

(Ord. 1-83, 11/7/1983, §21.9; as amended by Ord. 1-85, 9/9/1985)

27-1811. OIL AND GAS WELL DRILLING.

27-1811.1. Oil and gas well drilling may be approved as conditional uses in all zoning districts except the Floodplain Overlay District, pursuant to the following standards:

- A. No drilling shall be permitted within fifty feet (50') of any property line.
- B. No drilling shall be permitted within three hundred feet (300') of an adjoining property owner's residence.
- C. All activities shall be conducted in conformance with an approved environmental plan designed to minimize damage to natural features.

This plan shall include provisions for the containment of spillage, removal of any associated by-products, preservation of viable farmland, wooded areas and other related amenities.

- D. Such other factors and criteria as the Zoning Hearing Board deems appropriate.

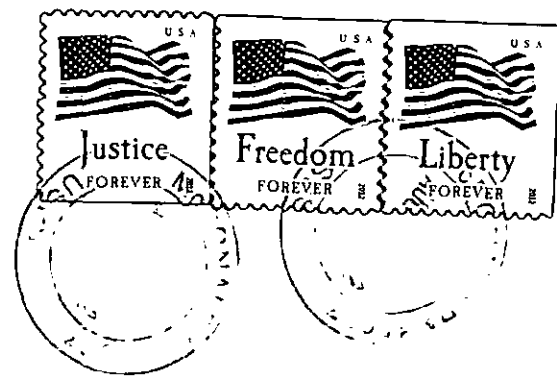
(Ord. 1-83, 11/7/1983, §21.10)

27-1812. LANDSCAPING AND BUFFERYARDS.

Planted screen buffers, as defined in Part 3 of this Chapter shall be provided as part of all C-1, C-2 and I District developments which abut any R-A or R District. Such required buffers shall be bordered on all sides by a planted strip of at least ten feet (10') width, or of such greater width, which in the opinion of the Planning Commission, may be necessary for the adequate protection of adjoining premises and highways. The plant material shall have initially a height and compactness of not less than fifty percent (50%) of the ultimately required height and compactness. (Ord. 1-83, 11/7/1983, §21.11)

The screened buffers shall be comprised of a fifty/fifty (50/50) mix of deciduous and evergreen trees planted ten feet (10') on center, with a minimum two inch (2") caliper at DBH (Diameter at Breast Height).

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