



**SMITH BUTZ**  
A LIMITED LIABILITY COMPANY  
ATTORNEYS AT LAW

125 Technology Drive, Suite 202, Bailey Center I, Southpointe  
Canonsburg, PA 15317

May 13, 2019

**VIA U.S. FIRST CLASS MAIL**

Supervisors of Indiana Township  
3710 Saxonburg, Blvd.  
Pittsburgh, PA 15238

**RE: Indiana Township Proposed Oil and Gas Ordinance Amendment**

Dear Township Supervisors:

Various citizens have engaged the services of our law firm to review and provide our legal opinion regarding the Township of Indiana's proposed amendment to its oil and gas ordinance. As a municipal Solicitor I am actively involved in dealing with oil and gas issues and in drafting, defending, and challenging oil and gas ordinances. As lead counsel for the local governments in the *Robinson Township v. Commonwealth* case, I am often called upon to explain the legal rationale that resulted in various provisions of state law Act 13 to be found unconstitutional and to apply those constitutional directives to local oil and gas ordinances.

At the outset it should be noted that Indiana Township's attempt to remedy its current oil and gas ordinance is warranted and within your power. There are many provisions included in the amendment that were thoughtfully invoked and advanced in this draft ordinance that are protective of your citizens' public health, safety, and welfare, and for that your efforts should be applauded. Having undertaken these types of analysis for years in various municipalities, the issue is always the same. Municipalities want to be protective of their citizens' public health, but at the same time allow unconventional drilling to occur mainly to ensure citizens that seek to profit economically from the activity have the ability to do so.

The typical problem most local governments get caught up in is when it attempts to allow this industrial use to stray from industrial zoning districts and when municipal ordinances are not protective of their citizens' constitutional right to clean air and pure water. Prior to addressing unconventional oil and gas by zoning ordinance, Indiana Township utilized its police power to create various zoning districts and defined the purposes of those zoning districts. Citizens relied upon those zoning districts and the protections and restrictions associated with the zoning districts. These expectations are not merely a laudable purpose or goal, but have their underpinnings in the Pennsylvania Constitution which serves to protect citizens rights and restrict governments from infringing on those rights. In my opinion, there seems to be little basis

or support to allow unconventional drilling as a conditional use outside of your industrial zoning district. The basis for that opinion and other thoughts on various sections of the proposed ordinance are set forth below.

### **Unconventional Drilling is an Industrial Land Use**

While the industrial nature of unconventional drilling is obvious, often times opponents try to minimize or re-characterize the use in recognition of the fact that industrial uses are not compatible with residential uses. Both the Commonwealth Court and the Pennsylvania Supreme Court in *Robinson Township* recognized that the size, scope, intensity and character of shale gas drilling constitutes an “industrial use” contrasting the use with residential and agricultural uses, “these industrial like operations include blasting of rock and other material, noise from the running of diesel engines, sometimes nonstop for days, traffic from construction vehicles, tankers, and other heavy duty machinery, the storage of hazardous materials, constant bright lighting at night, and the potential for life and property threatening explosion and gas well blowouts.” *Robinson Township*, 83 A.3d at 1005 (Justice Baer, concurring).

More recently in the 2018 *Snyder Brothers* decision, the Pennsylvania Supreme Court has been even more explicit in this interpretation, noting that “[a]s our Court has previously observed, the process of drilling and operating an unconventional gas well utilizing the fracking process – **an industrial land use** – has significant effects on the communities in which it occurs.” *Snyder Bros., Inc. v. Pennsylvania Pub. Util. Comm'n*, 198 A.3d 1056, 1074 (Pa. 2018), *order amended on reconsideration*, No. 47 WAP 2017, 2019 WL 1074546 (Pa. Mar. 7, 2019) (emphasis added). A majority of the Pennsylvania Supreme Court found that “communities in which such well drilling and extraction occur [i.e. Indiana Township] suffer environmental and habitability costs associated with this particular use; air, water and soil pollution; persistent noise, lighting, and heavy vehicle traffic and the building of facilities incongruous with the surrounding landscape.” *Id.*

### **Zoning Districts**

In recognition that unconventional drilling is an industrial land use, the obvious next step is to determine where the previously determined zoning districts allow for industrial uses. Indiana Township proposes to allow unconventional drilling in two of its zoning districts by way of conditional use. First, the light industrial district is proposed. As it appears that Indiana Township does not have a heavy industrial district, this is most likely the most compatible of zoning districts to house this industrial use. This zoning district does allow for commercial and manufacturing activities and is most compatible with the proposed oil and gas activities by conditional use. Typically, municipalities have smaller industrial districts within its borders that reflects its comprehensive planning goals. This determination of where industrial uses can and should be placed was made years earlier and as new uses like drilling seek to set up shop in Indiana Township, the use should be treated the same as all other industrial uses. For instance, South Fayette, Peters Township and Belle Acres, to name a few municipalities, have smaller industrial zoning districts and have all limited unconventional oil and gas operations, an industrial use, to their pre-determined industrial zoning districts only.

By contrast, the second zoning district selected is the “Residential Estate (RE) District.” The name itself should provide a red flag as residential uses are already segregated from industrial uses by Indiana Township in its given zoning districts. Allowing industrial uses in this district would be contrary to the Township’s Comprehensive Plan, the Township’s defined purpose of the zoning district, and the expectations of citizens that have either purchase land or constructed upscale, high-end residential housing consistent with the purpose and protections of the zoning district. The purpose of the RE district is defined as follows:

This land use classification provides for the preservation of existing environmental features. The majority of land in this classification is sparsely populated due to environmental constraints such as topography, lack of public utilities, and lands used for agricultural purposes. This land use category promotes large lots suitable for upscale high-end housing.

The Pennsylvania Supreme Court recently held, only weeks ago, that “the very benefit of and purpose behind the creation of residential zoning districts was to create residential neighborhoods in which the residents may develop a sense of community and a shared commitment to the common good of that community.” *Slice of Life LLC et.al, v. Hamilton Township Zoning Hearing Board and Hamilton Township*, ....A.3d.....(Pa Supreme Ct. April 26, (2019) (P6-7). The Pennsylvania Supreme Court went on to hold that residential zoning districts “serve to insulate areas intended for residential living from increased noise and traffic, protect children living there and their ability to utilize quiet, open spaces for play, and to maintain the “residential character of the neighborhood.” *Id.*, at 2.

### **Constitutional Protections to Citizens and Restrictions on Governments**

To understand why zoning districts and segregation of uses by Indiana Township is not only sound public policy but required by the Pennsylvania and United States Constitutions as necessary to ensure citizen rights are protected, a discussion of the constitutional basis of zoning is warranted.

#### **A. Substantive Due Process**

Article I, Section 1 of the Pennsylvania Constitution vests the citizens of Indiana Township with the ability to use, enjoy and develop their property as they see fit. *See*, PA. CONST. Art. I, Sec 1. As the Pennsylvania Supreme Court has remarked, “[t]he right of private property, together with the right of freedom of speech, freedom of religion, and freedom of the press are the Hallmarks of western civilization.” *Cleaver v. Board of Adjustment of Tredyffrin Township*, 200 A.2d 408 (Pa. 1964). “Pursuant to Article I, Section 1 of the Pennsylvania Constitution and the Fifth and Fourteenth Amendments to the United States Constitution, no person may be deprived of his private property without due process of law. In the early years of the Union, this constitutional guarantee translated into the general notion that a landowner had the right to do as he saw fit with his property. As modern American jurisprudence developed,

however that constitutional guarantee developed an important limitation: *sic utere tuo ut alienum non laedas*—so use your own property as not to injure your neighbors.” *Robinson Township v. Commonwealth*, 83 A.3d 901, 1001 (Pa. 2013) (plurality) (Justice Baer, concurring).

Courts have recognized that individuals’ abilities to use their properties as they see fit can be limited by the exercise of the police power, which is exercised through the implementation of zoning regulations. See, *Best v. Zoning Board of Adjustment of the City of Pittsburgh*, 141 A.2d 606, 610 (Pa. 1958). As zoning regulations directly impact the constitutionally protected right to the use and enjoyment of property, zoning regulations only pass constitutional muster if they are designed to protect the lives, health, morals, comfort and general welfare of the populace. *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 241, (1978) (rehearing denied); *In re Appeal of Realen Valley Forge Greenes Associates*, 838 A.2d 718, 728 (Pa. 2003). The Pennsylvania Supreme Court has defined zoning as, “**the 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 Bd. of Adjustment of City of Pittsburgh*, 141 A.2d 606, 609 (Pa. 1958) (emphasis added).

The zoning district is the central feature of a zoning scheme. See, *Best*, 141 A.2d at 609. The *sine qua non* of a zoning scheme is the grouping of compatible uses together within a zoning district and the exclusion of incompatible land uses from that zoning district. See, *Village of Euclid v. Ambler Realty Company*, 272 U.S. 365, 388 (1926); See also, *Palm Partners, LLC v. City of Oakland Park*, 102 F. Supp. 3d 1334 (S.D. Fl. 2015) citing, *Schwarz v. City of Treasure Island*, 544 F.3d 1201, 1220 (11<sup>th</sup> Cir. 2008). The land uses within a zoning district must be compatible with one another. *Plymouth Township v. Montgomery County*, 531 A.2d 49 (Pa. Commw. Ct. 1987). The United States Supreme Court has held that proper zoning is completed by the creation of “**districts in which only compatible uses are allowed and incompatible uses are excluded.**” *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 732-33 (1995) (emphasis added).

The constitutionality of a zoning ordinance is reviewed under a substantive due process analysis. See, *Boundary Drive Associates v. Shrewsbury Township Board of Supervisors*, 491 A.2d 86 (Pa. 1985). In that analysis:

[Courts] must engage in a meaningful inquiry into the reasonableness of the restriction on land use in light of the deprivation of landowner’s freedom thereby incurred. A conclusion that an ordinance is valid necessitates a determination that the public purpose served [by the ordinance] adequately outweighs the landowner’s right to do as he sees fit with his property, so as to satisfy the requirements of due process.

*C&M Developers, Inc. v. Bedminster Township Zoning Hearing Board*, 820 A.2d 143, 151 (Pa. 2002) citing, *Hopewell Township Board of Supervisors v. Golla*, 452 A.2d 1337, 1342 (Pa. 1982).

A “significant factor” in determining if a zoning restriction is reasonable is whether the particular restriction is “**consistent with the stated purpose of the particular zoning district.**” *Hock v. Board of Supervisors of Mount Pleasant Township*, 622 A.2d 431, 434 (Pa. Commw. Ct. 434) (emphasis added). While the Municipality can certainly amend its zoning ordinances, “it must do so with full respect and deference to the constitutional underpinning of those laws.” *Robinson Township*, 83 A.3d at 1003 (Justice Baer, concurring).

As the Commonwealth court held in *Robinson Township v. Commonwealth*, “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.” In order to comply with the constitutional basis of zoning, in my opinion unconventional drilling cannot be allowed in any residential zoning district, especially one like Indiana Township that sets forth a stated purpose that is opposite to unconventional drilling.

In *Gorsline*, the Pennsylvania Supreme Court recently overturned the Commonwealth Court and found that the unconventional drilling was improperly authorized in the Residential – Agricultural zoning district. The Supreme Court focused on the municipality’s defined purpose of the zoning district that was to “conserve and stabilize the value of property; provide adequate open spaces for light and air;...zones are meant to be quiet, of medium density, and supportive of residential and agricultural development...” *Gorsline v. Board of Supervisors of Fairfield Township*, 186 A.3d 375, 387 (2018). The Court found unconventional drilling was not of the same character as the purpose of the zoning district and held that “it is purely industrial use of the type the Ordinance expressly discourages in the R-A district.” *Id.* at 388.

## **B. Protected Rights Under Article 1, Section 27 of the Pennsylvania Constitution**

Indiana Township also must be certain to pass no law that would affect its citizen’s rights Under Article 1, Section 27 of the Pennsylvania Constitution. Article I, Section 27 of the Pennsylvania Constitution declares that residents of the Commonwealth have an inherent right to clean air, pure water, and the preservation of the natural, scenic, historic and esthetic values of the environment. *See*, PA. CONST. Art. I, Sec 27. Article I, Section 27 places a limitation on Indiana Township’s power to act contrary to the right to clean air, pure water, and the preservation of the natural, scenic, historic and esthetic values of the environment. The *PEDF* Court has categorized citizens’ rights as “inherent and infeasible.” *Pennsylvania Environmental Defense Foundation v. Commonwealth of Pennsylvania*, 161 A.3d 931 (Pa. 2017). The *PEDF* Court explained Article I, Section 27 and provided that:

This constitutional provision grants two separate rights to the people of this Commonwealth. The first right is contained in the first sentence, which is a prohibitory clause declaring the right of the citizens to clean air and pure water, and to the preservation of natural, scenic, historic and esthetic values of the environment. This clause places a limitation on the state’s power to act contrary to this right, and while the subject of this right may be amenable to

regulation, any laws that unreasonably impair the right are unconstitutional.

*Id.* at 930 – 931.

As expressed by the Pennsylvania Commonwealth Court, the creation of a law that impacts the rights protected by Article I, Section 27 of the Pennsylvania Constitution requires that “**each branch of government [must] consider in advance of proceeding the environmental effect of any proposed action.**” See, *Pennsylvania Environmental Defense Foundation v. Commonwealth of Pennsylvania*, 108 A.3d 140 (Pa. Commw. Ct. 2015) (emphasis added) citing *Robinson Township*, 83 A.3d at 952. The Court has further identified that “[b]ut, when government acts, the action must, on balance, reasonably account for the environmental features of the affected locale, as further explained in this decision, if it is to pass constitutional muster.” *Robinson Twp., Washington Cty. v. Com.*, 623 Pa. 564, 650, 83 A.3d 901, 953 (2013).

Article I, Section 27 also establishes a public trust, pursuant to which the natural resources are the corpus of the trust, the Commonwealth is the trustee, and the people are the named beneficiaries. See *Robinson* at 955 – 956. “Pennsylvania’s environmental trust thus imposes two basic duties on the Commonwealth as the trustee. First, the Commonwealth has a duty to prohibit the degradation, diminution, and depletion of our public natural resources, whether these harms might result from direct state action or from the actions of private parties. *Robinson Twp.*, 83 A.3d at 957.

Second, the Commonwealth must act affirmatively via legislative action to protect the environment. *Id.* at 958 (citing *Geer v. Connecticut*, 161 U.S. 519, 534, 16 S.Ct. 600, 40 L.Ed. 793 (1896) (trusteeship for the benefit of state’s people implies legislative duty “to enact such laws as will best preserve the subject of the trust, and secure its beneficial use in the future to the people of the state”)). Although a trustee is empowered to exercise discretion with respect to the proper treatment of the corpus of the trust, that discretion is limited by the purpose of the trust and the trustee’s fiduciary duties, and does not equate “to mere subjective judgment.” *Id.* at 978 (citing *Struthers Coal & Coke Co. v. Union Trust Co.*, 227 Pa. 29, 75 A. 986, 988 (1910); *In re Sparks’ Estate*, 328 Pa. 384, 196 A. 48, 57 (1938)). The trustee may use the assets of the trust “only for purposes authorized by the trust or necessary for the preservation of the trust; other uses are beyond the scope of the discretion conferred, even where the trustee claims to be acting solely to advance other discrete interests of the beneficiaries.” *Id.* (citing *Metzger*, 69 A. at 1038); see also *Hartje’s Estate*, 28 A.2d at 910 (“giving of [an] unrestricted bond” was “neither ‘necessary’ nor ‘appropriate’ to the carrying out of the purposes of the trust; hence, the existence of [trustee’s] power to do so by inference must be denied”).” *Pennsylvania Env’tl. Def. Found. v. Commonwealth*, 640 Pa. 55, 91–92, 161 A.3d 911, 933 (2017).

While Indiana Township acknowledges its desire and obligation to only create laws that are protective and not violative of the Environmental Rights Amendment, the ordinance in its current form falls short of reaching that goal. First, by authorizing this use in a residential zoning district, the township is implying that this use will not affect its citizens’ constitutional rights to clean air and pure water, yet the Township has received no evidence to support such an

implication. The ordinance attempts to remedy that shortcoming by requiring an applicant to provide an Environmental Impact Analysis, air study, and a hydrological study. While these provisions are warranted, they are not a substitute for knowing this information prior to authorizing the use in a residential zoning district, especially when the purpose of the zoning district does not allow for or expect such a use. Please note that only the hydrological study section of the proposed amendment appears to provide the Board of Supervisors an ability to deny a conditional use application based on the study, the air studies do not. As an aside, section "p. ii." regarding post-hydraulic fracturing testing should be expanded in time due to flowback and produced water timelines that happen for up to a year or more following fracing. The definition of "hydraulic fracturing activities" should also be expanded beyond the mere "fracing" of a well.

The reason the environmental studies should be done in advance of the enactment of a zoning ordinance is perhaps best illustrated by paragraph "n." that provides setbacks of 500 feet from protected structures and 200 feet from property lines. How were those setbacks derived? How are those setbacks protective of public health and your citizens' rights to clean air? The problem with this condition is that when oil and gas operators make applications and meet this setback, the law implies that it is consistent with public health. "Once the applicant for conditional use establishes that its proposed use meets the ordinance's objective criteria [Indiana Township's setbacks] it is presumed that the proposed use is consistent with the general welfare of the community." *D. Kasun Associates v. Manheim township Board of Supervisors*, 879 A.2d 830, 834 (Pa. Cmmwlth. 2005).

As your ordinance will enjoy the presumption of constitutionality, operators will be sure to use their setback compliance to show its operations are protective of public health as the Township essentially says so. Indiana Township may create a clash between the requirement of environmental studies and an applicant's compliance with the setbacks. That is why it is essential that the setbacks reflect reality and be in keeping with constitutional constraints on the Township that impairs the Township's ability to pass a law that could serve to affect citizens' constitutional rights to clean air. Lastly, under Section 8, "Hazards," please note that requiring a list of all chemicals used in drilling and fracing be provided to the Township cannot and will not be met by the applicant. The Pennsylvania Supreme Court has held that: "the word "all" needs no definition; it includes everything, and excludes nothing. There is no more comprehensive word in the language..." *Cannon v. Bresch*, 160 A. 595 (Pa. 1932).

Oil and gas operators are not aware of all of the chemicals they use, as manufacturers regularly hold back such disclosures as proprietary trade secrets. A mere glimpse at frac focus will provide the Township with this known chemical disclosure shortcoming. Without full disclosure of all chemicals, how can the Township undertake or evaluate air or water testing or studies? This is where an operator may merely point to meeting the Township's required setback as evidence that it is protective of public health as the Township, if it enacts such a regulation, is essentially providing that shelter, albeit without scientific basis.

### **Special Laws**

Lastly, I bring to the Township's attention the restriction found in Article III, Section 32 of the Pennsylvania Constitution. Essentially, that constitutional provision provides that governments cannot pass special laws for one industry. Does Indiana Township allow other uses like cement factories, steel mills, or manufacturing facilities into its residential districts? By authorizing one industry to sidestep industrial zoning boundaries, it is treating the oil & gas industry different and exempting that one industry from the zoning district constraints that all other uses must comply with. When doing so, the proposed ordinance violates the provision of Act III, Section 32 of the Pennsylvania Constitution. This provision states that:

The General Assembly shall pass no local or special law in any case which has been or can be provided for by general law and specifically the General Assembly shall not pass any local or special law:

1. Regulating the affairs of counties, cities, townships, wards, boroughs, or schools districts,

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7. Regulating labor, trade, mining or manufacturing.

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Nor shall the General Assembly indirectly enact any special or local law by the partial repeal of a general law; but laws repealing local or special acts may be passed.

PA. CONST. Art. III, Sec 32.

Article III, Section 32 has been likened to the Equal Protection Clause of the United States Constitution as it "has been recognized as implicating the principle 'that like persons in like circumstances should be treated similarly by the sovereign.'" *Pennsylvania Turnpike Commission v. Commonwealth*, 899 A.2d 1085, 1094 (Pa. 2006). Building on this concept, Article III, Section 32 was designed to combat "[t]he evil [of] interference of the legislature with local affairs without consulting the localities and the granting of special privileges and exemptions to individuals or favored localities." *Harrisburg School District v. Hickok*, 781 A.2d 221, 227 (Pa. Commw. Ct. 2001).

Whereas, in this particular case, it is not the General Assembly granting specific legislation to favored industries or localities, it would be Indiana Township that has determined that the oil and gas industry constitutes a favored industry and that the zoning regulations, zoning districts, community objectives, comprehensive plan, and the stated purposes of the zoning districts, which are applicable to all other landowners, including the citizens of Indiana Township, are not applicable to the oil and gas industry.

President Judge Pellegrini recognized the irrationality of zoning by means of a legislative determination to promote the oil and gas industry and allowing the industrial use outside of residential zoning districts when he delivered the Commonwealth Court's *en banc* majority opinion in *Robinson Township*, where he wrote:



If the Commonwealth-proffered reasons are sufficient, then the Legislature could make similar findings requiring coal portals, tipples, washing plants, limestone and coal strip mines, steel mills, industrial chicken farms, rendering plants and fireworks plants in residential zones for a variety of police power reasons advancing those interests in their development. It would allow the proverbial “pig in the parlor instead of the barnyard.”

*Robinson Township*, 52 A.3d at 484.

For a law to pass constitutional muster under Article III, Section 32, the classification or distinction must seek to promote a legitimate state interest or public value, and bear a “reasonable relationship” to the object of the classification. *Pennsylvania Turnpike Commission*, 899 A.2d at 1094-1095. A classification will violate the principles of equal protection if it does not rest upon a difference which bears a reasonable relationship to the purpose of the classification. *Cf. In re Williams*, 234 A.2d 37, 41 (Pa. Super. 1967). Thus, Indiana Township is prohibited from passing any “special law” for the benefit of one group to the exclusion of others that are similarly-situated. See, *Laplacca v. Philadelphia Rapid Transit Company*, 108 A. 612 (Pa. 1919).

Here, there is no rational underpinning of the differing treatment of oil and gas operators versus other industrial uses. To construct and operate an equipment storage yard, heavy manufacturing, or an industrial park in an area that is presently zoned Residential Estate, a landowner or developer would either need to seek a variance from this body, or a re-zoning from the Supervisors to change the zoning district or land to industrial. The re-zoning inquiry would necessarily involve a spot zoning review and, indeed, such an application would necessarily fail as an unconstitutional “spot zone.” See, *BPG Real Estate Investors – Straw Party II, L.P. v. Board of Supervisors of Newton Township*, (990 A.2d 140, 150 (Pa. Commw. Ct. 2010) (“Spot zoning is the unreasonable or arbitrary classification of a small parcel of land, dissected or set apart from surrounding properties, with no reasonable basis for the differential zoning.”).

While Indiana Township may want to see certain residents prosper from unconventional oil and gas operations, it cannot do so if it would violate the constitutional rights of all of its citizens. In *Robinson Township v. Commonwealth*, the court held that: “we recognize that development promoting the economic well-being of the citizenry obviously is a legitimate state interest ... [b]ut, to achieve recognition of the environmental rights enumerated in the first clause of Section 27 as “inviolable” necessarily implies that economic development cannot take place at the expense of an unreasonable degradation of the environment. No principal of law permits us to suspend constitutional requirements for economic reasons, no matter how compelling those reasons may seem.” *Id.*

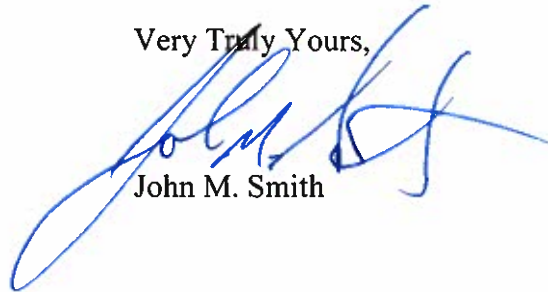
Indiana Township Supervisors

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After you have had the chance to thoroughly review this letter, please call or e-mail me with any questions.

Very Truly Yours,

A handwritten signature in blue ink, appearing to read 'John M. Smith', written over the typed name.

John M. Smith