

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

___ WAL 2019

PROTECT PT,
Petitioner

v.

PENN TOWNSHIP ZONING HEARING BOARD,
Respondent

v.

OLYMPUS ENERGY LLC, APEX ENERGY (PA), LLC, and THE
TOWNSHIP OF PENN,
Respondents

PETITION FOR ALLOWANCE OF APPEAL

Petition for Allowance of Appeal from the November 14, 2019 Published Opinion and Order of the Commonwealth Court of Pennsylvania at 1632 C.D. 2018 Affirming the November 9, 2018 Opinion and Order of the Court of Common Pleas of Westmoreland County (Smail, J.) at No. 3499 of 2017 Denying Protect PT's Appeal from the Penn Township Zoning Hearing Board's Deemed Denial of Protect PT's Substantive Validity Challenge to Penn Township Zoning Ordinance No. 912-2016 Chapter 190, As Amended

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TABLE OF CONTENTS

TABLE OF CITATIONS	ii
REPORTS DELIVERED IN THE COURTS BELOW	1
TEXT OF ORDER IN QUESTION	2
QUESTIONS PRESENTED FOR REVIEW	3
CONCISE STATEMENT OF THE CASE	4
CONCISE STATEMENT OF REASONS RELIED UPON FOR ALLOWANCE OF APPEAL	12
CONCLUSION	37

TABLE OF CITATIONS

CASES

<i>Bobov, Inc. v. Pike Cnty. Bd. Of Assessment Appeals</i> , 44 A.3d 3, 6 (Pa. 2012).....	4
<i>Buckwalter v. Borough of Phoenixville</i> , 958 A.2d 728, 730 (Pa. 2009)	4
<i>Delaware Riverkeeper Network v. Department of Environmental Protection & R.E. Gas Development, LLC</i> (EHB Docket Nos. 2014-142-B, 2015-157-B, filed May 11, 2018), 2018 WL 2294492	34
<i>Frederick v. Allegheny Twp. ZHB</i> , 196 A.3d 677 (Pa. Cmwlth. 2018) passim	
<i>Gorsline v. Bd. of Supervisors of Fairfield Twp.</i> , 186 A.3d 375 (Pa. 2018) 7, 12, 18, 19	
<i>Hertzberg v. Zoning Bd. of Adjustment of City of Pittsburgh</i> , 721 A.2d 43, 46 (Pa. 1998).....	4
<i>Pennsylvania Environmental Defense Foundation v. Commonwealth</i> , 161 A.3d 911 (Pa. 2017).....	29, 30, 31, 32
<i>Robinson Twp. v. Commonwealth</i> , 83 A.3d 901, 979 (Pa. 2013) (“ <i>Robinson I</i> ”)	passim

OTHER AUTHORITIES

Federal Judicial Center, <i>Judicial Writing Manual: A Pocket Guide for Judges</i> at 1 (2013), available at https://www.fjc.gov/sites/default/files/2014/Judicial-Writing-Manual-2D-FJC-2013.pdf	25
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RULES

Pa.R.A.P. 1114(b)(4)	passim
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CONSTITUTIONAL PROVISIONS

Pa. Const., Art. I § 27.	28
Pa. Const., Art. V § 9	25

REPORTS DELIVERED IN THE COURTS BELOW

The published opinion and order of the Commonwealth Court, authored by Senior Judge Robert Simpson, and joined by Judges P. Kevin Brobson and Christine Fizzano Cannon, entered on November 14, 2019, and docketed at 1632 C.D. 2018, is attached hereto as Appendix A.

The unreported Opinion and Order of the Court of Common Pleas, authored by Judge Harry F. Smail, Jr., entered on November 9, 2018, and docketed at No. 3499 of 2017 is attached hereto as Appendix B.

TEXT OF ORDER IN QUESTION

The Order of the Commonwealth Court reads as follows, in pertinent part:

ORDER

AND NOW, this 14th day of November 2019, for the reasons stated in the foregoing opinion, the order of the Court of Common Pleas of Westmoreland County is **AFFIRMED**.

Protect PT v. Penn Township Zoning Hearing Bd., 1632 C.D. 2018 (Pa. Cmwlth. order filed Nov. 14, 2019).

QUESTIONS PRESENTED FOR REVIEW

The questions presented for review are as follows:

1. Does the Commonwealth Court's treatment of whether fracking is a heavy industrial activity with negative impacts on nearby land as an open evidentiary matter in every case conflict with this Honorable Court's prior indications that it is and promote arbitrary, Balkanized determinations of the question from political subdivision to political subdivision, creating a proliferation of litigation and legal uncertainty, an issue of such substantial public importance as to warrant this Honorable Court's prompt and definitive resolution?
2. Is the Commonwealth Court's determination that although a trial court in determining whether fracking is a heavy industrial activity with negative impacts on nearby land must consider pre-production phases of fracking, a trial court's failure to do so is excused because it is free to consider them to a lesser degree in light of their relative brevity, defy logic and constitute such an abuse of discretion as to warrant this Honorable Court's exercise of its supervisory authority?
3. Is the Commonwealth Court's failure to address Protect PT's claim that the trial court erred by failing to consider lay testimony from landowners about the negative impacts of fracking on their land such a departure from accepted judicial practices as to warrant this Honorable Court's exercise of its supervisory authority?
4. Does the Commonwealth Court's application of a requirement that objectors to a zoning ordinance as violative of a locality's duties to act as a trustee with regard to its natural resources for the benefit of its citizens pursuant to the ERA prove that the ordinance permits negative impacts on nearby land and therefore unreasonably impairs their rights under the ERA conflict with the Commonwealth's trusteeship and the fundamental nature of rights pursuant to the ERA, a question of first impression for this Honorable Court, and conflict with earlier administrative and judicial pronouncements providing frameworks that are consistent with the Commonwealth's trusteeship and the fundamental nature of rights pursuant to the ERA, creating legal uncertainty concerning the proper evaluation of localities' obligations pursuant the ERA, an issue of such substantial public importance as to warrant this Honorable Court's prompt and definitive resolution?

CONCISE STATEMENT OF THE CASE

The factual and procedural history of this matter, as pertinent herein, and viewed in light of the applicable standard of review,¹ is relatively straightforward. For nearly a decade, Respondent Township of Penn (“Township”) has undertaken a series of efforts to permit fracking within its borders. In 2009, the Township began reevaluation of its zoning ordinance to permit fracking. See N.T. Evidentiary Hearing - Volume IV, 6/5/18, at 721 (R.R. at 691a). In February 2011, the Township introduced an ordinance that would permit fracking, but abandoned it when the General Assembly government enacted Act 13 of 2012, permitting fracking throughout Pennsylvania. See *id.* at 722 (R.R. at 691a). Yet, Act 13 was declared unconstitutional in this regard, see *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 979 (Pa. 2013) (“*Robinson I*”), and, in 2014, the Township again began reevaluation of its zoning ordinance to permit fracking. See N.T. Evidentiary Hearing - Volume IV, 6/5/18, at 722 (R.R. at 691a). From 2010 to 2016, various Township agencies addressed the issue of fracking at

¹ Protect PT did not prevail below; as such, although questions of law are reviewed *de novo* and with plenary scope, questions of fact are reviewed for an abuse of discretion or lack of substantial evidence, viewing the record in the light most favorable to Respondents. See, e.g., *Bobov, Inc. v. Pike Cnty. Bd. Of Assessment Appeals*, 44 A.3d 3, 6 (Pa. 2012); *Buckwalter v. Borough of Phoenixville*, 958 A.2d 728, 730 (Pa. 2009); *Hertzberg v. Zoning Bd. of Adjustment of City of Pittsburgh*, 721 A.2d 43, 46 (Pa. 1998).

numerous meetings, including two public hearings and a town hall meeting. During the latter portion of this process, Petitioner Protect PT (“Protect PT”), a non-profit organization with a membership including numerous Township landowners and residents, opposed the expansion of fracking into the Township in a way that would negatively impact its citizens health, safety, and welfare.² Nevertheless, the Township’s efforts came to fruition on September 19, 2016, when it enacted Ordinance 912-2016 (“Ordinance”), which created, as pertinent herein, a Rural Resource District (“RRD”), which is substantially overlapped by a Mineral Extraction Overlay District (“MEOD”). See *generally* Ordinance (R.R. at 797a *et seq.*); Ordinance § 190-301 (R.R. at 832a). Although the Ordinance provides that appropriate use of RRD land is essentially pastoral – primarily agricultural, low-density residential, and similarly low-impact purposes – it also provides that appropriate use of (again, substantially overlapping) MEOD land is fundamentally resource-exploitative: permitting as of right, *inter alia*, surface mining, rock excavation, and the storage of explosives, see Ordinance §§ 190-402, 407 (R.R. at 834a-837a, 850a-851a), and permitting, by special exception, fracking. See Ordinance § 407 (R.R. at 851a). Also pertinent

² Protect PT submitted a petition to the Township during this process which contained approximately 850 resident signatures objecting to permitting fracking outside industrial zones in close proximity to residential homes. R.R. at 626a.

herein, the Ordinance requires fracking companies to “demonstrate that its operations will not affect the health, safety, or welfare of” Township citizens “or any other potentially affected landowner” and to provide “reports from qualified Environmental individuals” to the Zoning Hearing Board (“ZHB”) that the location of their fracking will not violate nearby residents’ environmental rights pursuant to the Environmental Rights Amendment (“ERA”). See Ordinance § 641(D) (R.R. at 918a).

On April 26, 2017, Protect PT filed a substantive validity challenge to the Ordinance with the ZHB, asserting that the Ordinance, insofar as it subjected RRD landowners and residents to fracking’s heavy-industrial character and negative impacts on nearby land, (1) did so without any rational connection to health, safety, welfare, or morals, in violation of Township citizens’ state constitutional right to substantive due process; and (2) did so in violation of the Township’s duty to act as a trustee of its natural resources for the benefit of its citizens pursuant to, and thus in violation of its citizens’ rights under, the ERA.

On June 21, 2017, the ZHB issued a letter indicating it would not hold a hearing on the matter, effecting a deemed denial of Protect PT’s substantive validity challenge. On July 13, 2017, Protect PT appealed *de novo* to the Court of Common Pleas of Westmoreland County, reiterating its

claims. There, two fracking companies – Respondent Huntley and Huntley Energy Exploration, n/k/a Olympus Energy LLC (“Olympus”), and Respondent Apex Energy of Pennsylvania, LLC (“Apex”) – as well as the Township itself, sought and obtained intervention to participate in the appeal.

On April 9, April 10, June 4, and June 5, 2018, the parties proceeded to a multi-day bench trial before the Honorable Harry F. Smail, Jr. Therein, relevant to Protect PT’s first claim herein, although Protect PT had relied upon decisions in which this Honorable Court recognized that fracking is a heavy industrial activity with negative impacts on nearby land, *see, e.g.*, Notice of Appeal of Substantive Validity Challenge Deemed Denial, 7/13/17, at 11 (citing *Robinson I*); *see also Gorsline v. Bd. of Supervisors of Fairfield Twp.*, 186 A.3d 375 (Pa. 2018), the trial court nevertheless treated the question of whether fracking is a heavy industrial activity with negative impacts on nearby land as an open evidentiary matter. Thus, Protect PT and Respondents each offered expert and lay testimony on the subject.

Additionally, Protect PT offered significant expert and lay testimony as to how pre-production stages of fracking are heavy-industrial activities with negative impacts on nearby land, *see, e.g.*, N.T. Evidentiary Hearing - Volume I, 4/9/18, at 19-54 (R.R. at 23a-59a) (discussing, *inter alia*, "excavation and construction," "drilling," and "completion," phases of fracking

and associated negative impacts on nearby land); see *also* Evidentiary Hearing – Volume III, 6/4/18, at 596-605 (R.R. at 632a-634a) (discussing, *inter alia*, noise during completion stage of a nearby fracking well-pad).

Finally, Protect PT also offered significant lay testimony by Township landowners and/or residents as to how nearby fracking had already negatively affected their land, see, *e.g.*, *id.*

Ultimately, on November 9, 2018, the trial court entered an opinion and order, largely declining to credit Protect PT's witnesses and crediting Respondents' witnesses, and denying Protect PT's appeal from the ZHB's deemed denial of its substantive validity challenge. Essentially, the trial court determined that the evidence at trial showed that fracking is not a heavy industrial activity and has no negative impacts on nearby land and land use: indeed, it determined that fracking is "entirely compatible" with the otherwise-pastoral uses of RRD land and that Protect PT's evidence concerning fracking's potential harms to nearby land was "speculative and not indicative of any substantial, actual risk to the environment or health" of Township residents. Opinion and Order of Court, 11/9/18, at 20-21. The court acknowledged Protect PT's reliance on *Robinson I* and *Gorsline* for the contrary proposition, but found those cases to be distinguishable in terms of their specific facts and holdings. See *id.* at 21-22.

Additionally, the trial court rejected the proposition that it should consider the nature of pre-production phases of fracking and their negative impacts on nearby land, reasoning that the evidence was irrelevant because activity preceding production was not land use subject to local zoning regulation. *Id.* at 19-20.

Additionally, the trial court did not directly address Protect PT's lay testimony by Township landowners and/or residents as to how nearby fracking had already negatively affected their land, except to say that it was "sympathetic" but that their concerns were "considered as part of the Township's extensive balancing inquiry in adopting the Ordinance." *Id.* at 20.

Finally, the trial court also rejected Protect PT's claim that the Ordinance violated the Township's duties, and, thus, citizens' state constitutional rights pursuant to the ERA. The court found that its substantive due process analysis was equally applicable to Protect PT's claim under the ERA, and that the Township satisfied its duties under the ERA by enacting Section 641(D). *Id.* at 24-25.

On December 6, 2018, Protect PT appealed to the Commonwealth Court, asserting, *inter alia*, that (1) the trial court erred in failing to find that fracking is a heavy industrial activity with negative impacts on nearby land and land use, consistent with *Robinson I* and *Gorsline*; (2) the trial court erred

in failing to consider pre-production phases of fracking and their negative impacts on nearby land; (3) the trial court erred in failing to consider its lay witnesses' testimony; and (4) the trial court erred in finding that the Ordinance did not violate the Township's duties and, thus, citizens' state constitutional rights, pursuant to the ERA.

On November 14, 2019, in a published opinion authored by Senior Judge Robert Simpson and joined by Judges P. Kevin Brobson and Christine Fizzano Cannon, the Commonwealth Court affirmed. See *Protect PT v. Penn Twp. ZHB*, 1632 C.D. 2018 (Pa. Cmwlth. filed Nov. 14, 2019). Regarding Protect PT's first issue, the Commonwealth Court likewise treated the question of whether fracking is a heavy industrial activity with negative impacts on nearby land as an open evidentiary matter, relying essentially on its decision in *Frederick v. Allegheny Twp. ZHB*, 196 A.3d 677 (Pa. Cmwlth. 2018), which held as much, and finding the trial court's credibility judgments and weight-of-the-evidence determinations were supported by substantial evidence. *Protect PT*, 1632 C.D. 2018 at 32-34.

Regarding Protect PT's second issue, the Commonwealth Court agreed that the trial court was obligated to consider pre-production phases of fracking and their negative impacts on nearby land, see *id.* at 32, but found that the trial court's failure to do so was harmless because it was free to

consider such impacts to a lesser degree because of their relative brevity, see *id.* at 32-33.

Notably, the Commonwealth Court did not address Protect PT's claim that the trial court erred in failing to consider its lay witnesses' testimony.

Finally, regarding Protect PT's claim that the trial court erred in finding that the Ordinance did not violate the Township's duties and, thus, citizens' state constitutional rights, pursuant to the ERA, the Commonwealth Court found no error, reasoning that Protect PT failed to establish that the Ordinance permitted negative impacts on nearby land and therefore that it unreasonably impaired citizens' environmental rights under the ERA, noting such evaluative framework applies pursuant to *Frederick. Id.* at 44-45.

Protect PT now files this Petition for Allowance of Appeal.

CONCISE STATEMENT OF REASONS RELIED UPON FOR ALLOWANCE OF APPEAL

1. **The Commonwealth Court's treatment of whether fracking is a heavy industrial activity with negative impacts on nearby land as an open evidentiary matter in every case conflicts with this Honorable Court's prior indications in *Robinson I* and *Gorsline* that it is and promotes arbitrary, Balkanized determinations of the question from political subdivision to political subdivision, an issue of such substantial public importance as to warrant this Honorable Court's prompt and definitive resolution.**

First, as referred to above, although Protect PT relied below upon decisions in which this Honorable Court previously recognized that fracking is a heavy industrial activity with negative impacts on nearby land, *see, e.g.*, Notice of Appeal of Substantive Validity Challenge Deemed Denial, 7/13/17, at 11 (citing *Robinson I*); *see also Gorsline, supra*, the trial court, and, more relevant herein, the Commonwealth Court treated the question as an open evidentiary matter to be decided in every case, rejecting Protect PT's reliance on *Robinson I* and *Gorsline* for the contrary proposition as distinguishable in terms of their specific facts and holdings. *See* Opinion and Order of Court, 11/9/18, at 20-22; *Protect PT*, 1632 C.D. 2018 at 32-34. The Commonwealth Court in this regard relied upon its earlier decision in *Frederick*, which held that the question is an ordinary evidentiary one. *See Frederick*, 196 A.3d at 686-691, 694-95 (opining that plaintiffs bear the burden of demonstrating that a zoning ordinance is arbitrary and violates

substantive due process and/or “unreasonably impairs” their rights pursuant to, and thus violates, the ERA).

The Commonwealth Court’s course herein and in *Frederick*, however, conflicts with this Court’s prior indications in *Robinson* and *Gorsline* that fracking *is* a heavy industrial activity with negative impacts upon nearby land. By way of background, in *Robinson I*, numerous citizens challenged Act 13, in part because it permitted, and preempted local zoning restrictions upon, fracking throughout Pennsylvania, on, *inter alia*, the ground that its “one-size-fits-all” approach was arbitrary relative to the police power and, thus, violated their state constitutional right to substantive due process and represented a breach of the Commonwealth’s obligations to act as a trustee of its natural resources for the benefit of its citizens, and, thus, their rights pursuant to the ERA. *See Robinson I*, 83 A.3d at 913. Then-Chief Justice Castille, writing for a plurality of the Court, offered a tour-de-force detailing Pennsylvania’s long history of accommodating extractive industries for short term benefits, only to be faced with rampant environmental destruction and long-term remediation costs, *see id.* at 960-963, and describing with patent approval the citizens’ characterizations of fracking as a heavy-industrial activity with negative impacts on nearby land as follows:

Unconventional well sites are generally developed in different stages Initially a road is

constructed and a pad is cleared. The impact is typical of any . . . noisy, dusty construction site, and the process can take several months to complete. Upon completion of the pad, drilling generally entails twenty-four . . . hour operation of sizeable drilling rigs accompanied by numerous diesel engines to provide power to the site. There will also be a substantial amount of truck traffic to and from the drill site. Once completed, the well pads will include wellheads, condensate tanks, vapor destruction units with open flames, pipelines and metering stations. These are typically structures that vary tremendously in size, scale and appearance from dwellings or other buildings found in residential and commercial zoning districts. . . .

Natural gas extraction, . . . requires heavy truck traffic, open flames, workers living on-site, and the process unavoidably produces noise, odors, and harmful emissions, including volatile organic compounds of sulfur dioxide, a neurotoxin.

For example, one affidavit of record recounts the experience of a homeowner in a previously rural, non-industrialized area. . . . The homeowner, a nurse, leased her mineral rights and drilling operations (three wells, a fracking fluid impoundment, and a drill cuttings pit) began approximately 1,500 feet from her home. Access to the drilling site occurred mainly via a dirt road running approximately fifteen feet from her residence. The homeowner describes that, during the initial construction process, the access road was used daily and continuously by heavy truck traffic, causing structural damage to her home's foundation, road collapse, as well as large amounts of dust and deterioration to the air quality; . . . Moreover, and unsurprisingly, the 24-hour-a-day traffic caused significant noise pollution, which affected the homeowner's ability to enjoy her property.

Once drilling and fracking operations began, and over the next several years, the homeowner noticed significant degradation in the quality of the well water which had supplied her homestead and those of several neighbors with fresh and clean water during the century in which her family had owned the property. In the homeowner's words: "my well water began to stink like rotten eggs and garbage with a sulfur chemical smell[,] . . . when running water to take a bath, my bathtub filled with black sediment and again smelled like rotten eggs. . . . Air quality also became degraded, beginning to smell of rotten eggs, sulfur, and chemicals and seeping into the home and the owner's belongings. Several pets died as a result of their exposure to contaminated water. Finally, upon her physician's advice, the homeowner abandoned her family home because the exposure to the toxic water and air caused her and her children severe health problems such as constant and debilitating headaches, nosebleeds, nausea, difficulty and shortness of breath, skin rashes and lesions, bone and muscle pain, inability to concentrate, and severe fatigue.

Moreover, . . . communities have a reasonable concern over the impact on property values due to the perceived or real risk associated with living near industrial activity. Property values . . . will decrease with the prospect of storing drilling wastewater less than a football field's distance from . . . homes and the prospect of contamination of the soil, air, and water supply. . . . In more sparsely-populated rural communities, the effect of Act 13 will be . . . unlimited drilling; drilling rigs and transportation of the same; flaring, including carcinogenic and hazardous emissions; damage to roads; an unbridled spider web of pipeline, installation, construction and placement of impoundment areas; compressor stations and processing plants; and unlimited hours

of operation, all of which may take place in residentially zoned areas.

Robinson I, 83 A.3d at 936-938 (citations, quotation marks, and footnotes omitted). Chief Justice Castille, again writing for a plurality, formally recognized fracking's heavy-industrial character and negative impacts on nearby land:

Act 13 . . . displaces development guidelines which offer strict limitations on industrial uses in sensitive zoning districts; instead, [it] 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 [it] 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. The entirely new legal regimen alters existing expectations of communities and property owners and substantially diminishes natural and esthetic values of the local environment, which contribute significantly to a quality of environmental life in Pennsylvania.

Id. at 979 (emphasis original). Indeed, Chief Justice Castille used fracking's industrial character and negative impacts as the predicate for his ensuing conclusion that Act 13 violated the ERA, see *id.* at 980-82, and suggested that no reasonable person could conclude that fracking did not inherently

pose risks to Pennsylvania's environment, see *id.* at 976 (“By any responsible account, the exploitation of the Marcellus Shale Formation will produce a detrimental effect on the environment, on the people, their children, and future generations, and potentially on the public purse, perhaps rivaling the environmental effects of coal extraction.”).

Additionally, although Chief Justice Castille's opinion is a plurality and, thus, not itself precedential, not a single Justice disputed his characterization of fracking as a heavy-industrial activity with negative impacts on nearby land, and, indeed, each Justice recognized its character and/or impacts. See *id.* at 1000-01 (Baer, J., concurring) (congratulating Chief Justice Castille for his “thorough, well-considered, and able” and “pioneering opinion,” but choosing to use fracking's industrial character and negative impacts on nearby land as a predicate for a conclusion that Act 13 violated substantive due process); *id.* at 1005 (noting fracking's “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 explosions and gas well blowouts”); *id.* at 1013 (Saylor, J. dissenting) (comparing fracking's environmental impacts to “every form of industry

essential to the Commonwealth's economic longevity and growth," including "under-regulated lumber and mining enterprises decimating Pennsylvania lands and resources," but opining the legislature was within its authority to promote such industries); *id.* at 1015 (Eakin, J., dissenting) (opining that the enactment was an effort to balance "the competing interests of local and individual prosperity, national need for energy and a desire for independence from foreign energy, and the unavoidable environmental impact of taking and using any resource from the ground" and within the legislature's authority).

Similarly, in *Gorsline*, several plaintiffs challenged a locality's decision to permit fracking within a district in which industrial uses were discouraged. See *Gorsline*, 186 A.3d at 377. In an opinion authored by Justice Donohue, this Court again recognized that fracking is a heavy-industrial use with negative impacts on nearby land, reiterating *Robinson I*'s recognition of that fact. Indeed, in a footnote to its very first sentence, this Honorable Court explained:

In *Robinson I*, a plurality of this Court described fracking operations as an industrial use involving "air, water, and soil pollution; persistent noise, lighting and heavy vehicle traffic; and the building of facilities incongruous with the surrounding landscape." *Robinson I.*, 83 A.3d at 979. In a concurring opinion, Justice Baer was even more descriptive, explaining that "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 explosions and gas well blowouts.” *Id.* at 1005 (Baer, J., concurring).

Id. at 377 n.1. Notably, the Court’s description in this regard again did not raise dissent.

The Commonwealth Court, for its part, rejected Protect PT’s reliance on *Robinson I* and *Gorsline*, essentially relying on its prior treatment of the question of whether fracking is a heavy-industrial activity with negative impacts on nearby land as an open evidentiary question in every case in *Frederick*. The Commonwealth Court’s reasoning in this regard is essentially nonresponsive, as, to the extent fracking’s heavy-industrial character and negative impacts on nearby land was resolved by this Honorable Court in *Robinson I* and/or *Gorsline*, that resolution plainly binds the Commonwealth Court and supersedes *Frederick*.

Taken together, *Robinson I* and *Gorsline* stand for the obvious, unremarkable proposition that fracking is a heavy-industrial activity and has negative impacts upon nearby land, including, but not limited to those this Honorable Court has identified. Thus, following *Robinson I* and *Gorsline*, it should be unnecessary to relitigate the question in each and every case: rather, litigation should be directed toward the question of whether fracking’s

undeniable character and impacts are properly situated to particular areas. Thus, if the trial court's and Commonwealth Court's failures to recognize as much are corrected, Protect PT's claim should be remanded to the trial court for a new trial and/or adjudication addressing that latter issue.

Additionally, Protect PT notes that the Commonwealth Court's determination that whether fracking is a heavy industrial activity with negative impacts on nearby property is an open evidentiary matter in each case essentially promotes arbitrary, Balkanized determinations of fracking's essential nature and impacts based on the parties to, counsel litigating, and zoning officer or common pleas court judge adjudicating, cases across the roughly 2,500 municipalities and 67 counties in the Commonwealth. Such decentralized adjudication of what this Court has repeatedly recognized is an obvious fact is not only logically untenable, but also promotes litigation regarding the question, together with its companionate landowner-versus-corporation resource and power deferential. Moreover, the uncertainty of what the essential nature and effects of fracking will be deemed to be from case to case creates derivative economic uncertainty for landowners and fracking companies alike, not only in the oil and gas market, but also, because fracking does, in fact, affect the valuation of nearby land, the real estate market as well. Thus, Protect PT submits that the issue of whether

fracking is a heavy industrial use with negative impacts on nearby land, as this Honorable Court has recognized, or, by contrast, may or may not be harmful depending on the parties, the adequacy of their counsel, the disposition of the local zoning hearing board and/or trial court judges, as the Commonwealth Court held herein, “is one of such substantial public importance as to require prompt and definitive resolution by” this Honorable Court.” Pa.R.A.P. 1114(b)(4).

- 2. The Commonwealth Court’s determination that although a trial court in determining whether fracking is a heavy industrial activity with negative impacts on nearby land must consider pre-production phases of fracking, a trial court’s failure to do so is excused because it is free to consider them to a lesser degree in light of their brevity, defies logic and constitutes such an abuse of discretion as to warrant this Honorable Court’s exercise of its supervisory authority.**

Next, as referred to above, at trial, Protect PT offered significant expert and lay testimony as to how pre-production stages of fracking are heavy-industrial in character and negatively impact nearby land, see, *e.g.*, N.T. Evidentiary Hearing - Volume I, 4/9/18, at 19-54 (R.R. at 23a-59a) (presenting testimony of Dr. Anthony Ingraffea as to “excavation and construction,” “drilling” and “completion” phases of fracking and their negative impacts on nearby land including but not limited to air emissions, light, noise, and traffic as well as significant likelihood that drilling and completion phases are repeated at same well site when new wells are

developed or existing wells are re-stimulated); N.T. Evidentiary Hearing – Volume III, 6/4/18, at; *id.* 596-605 (R.R. at 632a-634a) (offering testimony from Township resident Tracey Mason as to nearby fracking’s generation of light and noise making it extremely difficult to sleep in her home). The trial court refused to consider this evidence, reasoning that it was irrelevant because pre-production phases of fracking were not land use subject to local zoning regulation. See Opinion and Order of Court, 11/9/18, at 19-20. On appeal, Protect PT challenged the trial court’s determination in this regard, and the Commonwealth Court agreed that the trial court was obliged to consider pre-production phases of fracking. See *Protect PT*, 1632 C.D. 2018 at 32. Yet, the court found that the trial court’s failure to consider pre-production phases of fracking and their negative impacts on nearby land was somehow harmless because it was free to consider such impacts to a lesser degree in light of their relative brevity:

[N]o reversible error is evident here. This is because evidence of stage duration and of modest impacts during long-term production provides a sufficient factual basis upon which to distinguish the temporary industrial-type impacts during the much shorter pre-production stages from the incremental impacts during the majority lifespan of a [fracking] well. There is no abuse of discretion in affording less weight to evidence of temporary impacts.

Id. at 32-33 (footnote and citation omitted).

The Commonwealth Court's determination in this regard defies logic. Given that the trial court did not at all consider pre-production phases of fracking *at all*, it is of no moment that it was free to consider them *to a lesser degree – i.e.*, in a manner consistent with the fact that they are temporary. Protect PT posits that the Commonwealth Court's patent logical error renders its determination concerning Protect PT's second issue manifestly erroneous and unjust, warrants a remand to that Court for reconsideration of the issue, and falls below any appropriate standard of reasonableness for an intermediate court. Thus, Protect PT submits that the Commonwealth Court's error constitutes such a "depart[ure] from accepted judicial practices" and such an "abus[e] of discretion as to call for the exercise of" this Honorable Court's "supervisory authority" over that tribunal. Pa.R.A.P. 1114(b)(6).

3. **In any event, the Commonwealth Court's failure to address Protect PT's claim that the trial court in considering whether fracking has negative impacts on nearby land erred by failing to consider Protect PT's resident testimony about the negative impacts of fracking on their land such a departure from accepted judicial practices as to warrant this Honorable Court's exercise of its supervisory authority.**

Third, as referred to above, at trial, Protect PT offered significant lay testimony by Township landowners and/or residents as to how nearby fracking had already negatively affected their land. See, e.g., N.T.

Evidentiary Hearing – Volume III, 6/4/18, at; *id.* 596-605 (R.R. at 632a-634a) (offering testimony from Township resident Tracey Mason as to nearby fracking’s generation of light and noise making it extremely difficult to sleep in her home).³ Nevertheless, although the trial court in its opinion and order provided summaries of the witnesses’ testimony, see Opinion and Order of Court, 11/9/18, at 14-17, it did not further consider or evaluate it. On appeal, Protect PT claimed that the trial court erred in failing to consider its lay witnesses’ testimony, see Protect PT’s Commonwealth Court Brief at 28-32 (presenting the argument), and, although the Commonwealth Court acknowledged Protect PT’s issue in its summary of the parties contentions, see *Protect PT*, 1632 C.D. 2018 at 30-31, it completely failed to address it. See generally *id.* at 32-34.

The Commonwealth Court’s failure to even address Protect PT’s claim in this regard falls well below appropriate minimum standards for as-of-right appellate review. As the Federal Judicial Center teaches jurists throughout the nation:

³ See also *id.* at 614-636 (R.R. at 637a-642a) (offering testimony from Beth Jamison); *id.* at 637-642 (R.R. at 642a-644a) (offering testimony from Harold Baker); *id.* at 644-657 (R.R. at 644a-647a) (offering testimony from Patricia Emich); *id.* at 657-668 (R.R. at 647a-650a) (offering testimony from Judy Amorose); *id.* at 670-680 (R.R. at 651a- 653a) (offering testimony from Larry Irr); *id.* at 680-687 (R.R. at 653a-655a) (offering testimony from Douglas Chew); *id.* at 688-697 (R.R. at 655a-657a) (offering testimony from Patricia Wendell); *id.* at 697-713 (R.R. at 657a-661a) (offering testimony from Danielle LeJeune).

Judicial opinions serve three functions. First, written opinions communicate a court's conclusions and the reasons for them to the parties and their lawyers. Second, when published, opinions announce the law to judges, academics, other lawyers, and the interested public. Finally, the preparation of a written opinion imposes intellectual discipline on the author, requiring the judge to clarify his or her reasoning and assess the sufficiency of precedential support for it.

The opinion should fairly, clearly, and accurately state the significant facts and relevant rules of law and demonstrate by its analysis the reasonableness of its conclusions. . . . Unclear or ambiguous writing reflects [a] lack of clear thinking and defeats the opinion's purpose.

Federal Judicial Center, *Judicial Writing Manual: A Pocket Guide for Judges* at 1 (2013), *available at* <https://www.fjc.gov/sites/default/files/2014/Judicial-Writing-Manual-2D-FJC-2013.pdf>. In other words, an opinion like the Commonwealth Court's herein, which acknowledges but does not address a claim, much less evince the reasonableness of the court's conclusions, is the functional equivalent of no opinion at all as it relates to the parties, the bench, the bar, and the Court issuing it, a troubling circumstance, particularly in light of the Pennsylvania constitutional right to appeal. See Pa. Const., art. V § 9. Thus, Protect PT posits that the Commonwealth Court's failure to address its issue is manifest error, warrants a remand for consideration of the issue, and constitutes such a "depart[ure] from accepted judicial practices

. . . as to call for the exercise of” this Honorable Court’s “supervisory authority” over that court. Pa.R.A.P. 1114(b)(6).

4. **The Commonwealth Court’s application of a requirement that objectors to a zoning ordinance as violative of a locality’s duties to act as a trustee with regard to its natural resources for the benefit of its citizens pursuant to the ERA prove that the ordinance permits adverse impacts upon nearby land and therefore unreasonably impairs their rights under the ERA conflicts with the Commonwealth’s trusteeship and the fundamental nature of rights pursuant to the ERA, a question of first impression for this Honorable Court, and conflicts with earlier administrative and judicial pronouncements providing frameworks that are consistent the fundamental nature of rights pursuant to the ERA, creating legal uncertainty concerning the proper evaluation of localities’ obligations pursuant to the ERA, an issue of such substantial public importance as to warrant this Honorable Court’s prompt and definitive resolution.**

Fourth and finally, as referred to above, Protect PT presented a claim that the Ordinance violates the Township’s duties to act as a trustee with regard to its natural resources for the benefit of its citizens pursuant to, and thus its citizens rights under, the ERA, but the trial court rejected the claim on the ground that the Ordinance requires fracking companies to prove via environmental reports that their fracking will not violate citizens’ rights pursuant to the ERA. The Commonwealth Court, for its part, rejected the claim on a different basis: that Protect PT failed to prove at trial that the Ordinance “unreasonably impaired” its citizens’ rights, relying on *Frederick*:

In *Frederick*, we reviewed a similar situation elsewhere in Westmoreland County where the

objectors argued that the zoning ordinance violated the ERA by placing [fracking], and alleged industrial use, in agricultural areas. The objectors maintained that the [fracking] well would degrade the local environment in which people live, work and recreate, including the public natural resources on which people rely.

The objectors in *Frederick* advanced arguments nearly identical to those raised here. In rejecting these arguments, the fact-finder in *Frederick* relied on . . . testimony that oil and gas development safely coexisted with agricultural uses in the rural areas of the township. We noted in *Frederick* that the ERA does not call for a stagnant landscape or a derailment of economic development.

By failing to show with credible evidence that [fracking] would adversely affect neighboring property owners in the [RRD], Protect PT failed to establish that the . . . Ordinance “unreasonably impairs” the rights of Township residents under the ERA. See *Frederick*, 196 A.3d at 697 (emphasis added).

Protect PT, 1632 C.D. 2018 at 44-45. Indeed, the Commonwealth Court’s application of this framework derives from *Frederick*. In that case, several citizens challenged a township’s zoning ordinance permitting fracking in all its zoning districts as violative of, *inter alia*, the township’s duties, and, thus, the citizens’ rights, pursuant to the ERA. See *Frederick*, 196 A.3d at 679-80. After reviewing extant jurisprudence, the Commonwealth Court held that the citizens’ bore the burden of satisfying the following burden for claims that an ordinance violates the ERA:

Judicial review of the government's action requires an evidentiary hearing to determine, first, whether the values in the first clause of the Environmental Rights Amendment are implicated and, second, whether the governmental action unreasonably impairs those values.

Id. at 695.

Preliminarily, to the extent an appeal is granted with respect to Protect PT's other issues, a ruling in its favor would necessarily upset the trial court's factual determination herein, and, thus, whether and to what degree Protect PT proved that the Ordinance unreasonably impairs the Township's duties, and, thus, Township citizens' rights under, the ERA. Accordingly, to the extent an appeal is granted with respect to those issues, but not this one, Protect PT respectfully requests that this Honorable Court hold this one for reevaluation after the appeal's conclusion and, if appropriate, for remand.

In any event, the Commonwealth Court's above-detailed framework for evaluating claims that an ordinance violates the ERA is inconsistent with both the Commonwealth's trusteeship, and the fundamental nature of rights, under the ERA. By way of background, the ERA provides as follows:

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 nature resources are the common property of all the people, including the generations yet to come. As trustee of those

resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.

Pa. Const., art. I § 27. As then-Chief Justice Castille opined in *Robinson I* and this Honorable Court held in *Pennsylvania Environmental Defense Foundation v. Commonwealth*, 161 A.3d 911 (Pa. 2017) (“*PEDF*”), the ERA establishes essentially two rights:

The first right is contained in the first sentence, which is a prohibitory clause declaring the right of 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 legislation, any laws that unreasonably impair the right are unconstitutional.

The second right reserved . . . set forth in its second sentence, is the common ownership by the people, including future generations, of Pennsylvania’s public natural resources. . . . [T]he provision was initially drafted as “Pennsylvania’s natural resources, including the air, waters, fish, wildlife, and the public lands and property of the Commonwealth . . .” but was revised to remove the enumerated list and thereby discourage courts from limiting the scope of natural resources covered.

The third clause . . . 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.

PEDF, 161 A.3d at 931-33 (citations to *Robinson I* omitted). *PEDF* further explained that the Commonwealth’s duties to hold its natural resources,

including air, water, and esthetics, for the benefit of its citizens are essentially literal – *i.e.* that it does not hold a sovereign-subject relationship, but, rather, a trustee-beneficiary fiduciary relationship:

The terms “trust” and “trustee” carry their legal implications under Pennsylvania law at the time the amendment was adopted. . . . As a trustee, the Commonwealth must deal with its citizens as a fiduciary, measuring its successes by the benefits it bestows upon all its citizens in their utilization of natural resources under law.

Id. at 933 (citations and quotation marks omitted). Indeed, *PEDF* established that the Commonwealth has all of a trustee’s ordinary duties to its citizens as beneficiaries: *inter alia*, (1) a duty to “comply with the terms of the trust,” which “require the government to ‘conserve and maintain’” natural resources – *i.e.*, “to prevent and remedy the degradation, diminution, or depletion of our public natural resources”; (2) a duty of prudence – *i.e.*, “to exercise such care and skill as a man of ordinary prudence would exercise in dealing with his own property”; (3) a duty of loyalty – *i.e.*, a duty “to manage the corpus of the trust so as to accomplish the trust’s purposes for the benefit of the trust’s beneficiaries”; and (4) a duty of impartiality – *i.e.*, a duty “to manage the trust so as to give all the beneficiaries due regard for their respective interests in light of the purposes of the trust.” *Id.* (quoting in part *Robinson I*, 83 A.3d at

956-57). Thus, the Court summarized the Commonwealth's (and localities') duties pursuant to the ERA:

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. Second, the Commonwealth must act affirmatively via legislative action to protect the environment. 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. 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. at 933-34 (citations omitted).

The Commonwealth Court's framework herein and in *Frederick* fails to give full meaning to the Commonwealth's duties as a trustee to manage natural resources for the benefit of Pennsylvanians. Although a beneficiary concededly bears the burden of proving a trustee has violated a fiduciary duty, he need not prove that the fiduciary's breach "unreasonably impaired" his interests: rather, as *PEDF* articulated, he may prove a breach of any of the aforementioned duties. For example, a citizen may prove that a locality breached its duty to prohibit degradation of natural resources by permitting

land use that pollutes a waterway and thus “degrades” natural resources; he may prove that the Commonwealth or a locality failed to enact legislation necessary to protect natural resources; he may prove that the Commonwealth or a locality acted relative to its natural resources based on an ulterior purpose; he may prove that the Commonwealth or a locality was unreasonable in its management of its natural resources, all regardless of whether those actions “unreasonably impair” the beneficiary’s rights. See *id.*

Additionally, this Honorable Court in *PEDF* made clear that citizens’ rights pursuant to the ERA are *fundamental rights*, on par with even their political rights, and are designed to avoid exploitation of natural resources that leads to temporary benefit, but ensuing longstanding burdens. See *id.* at 91 (noting legislative power is limited by “fundamental rights reserved to the people” in Article I of the Pennsylvania Constitution, including rights pursuant to the ERA); see also *id.* at 918 (quoting *Robinson I*, 83 A.3d at 960-63) (noting that “[t]he decision to affirm the people’s environmental rights in a Declaration of Bill of Rights, alongside political rights, is relatively rare in American constitutional law,” and reflects “the Commonwealth’s experience of having the benefit of vast natural resources whose virtually unrestrained

exploitation, while initially a boon to investors, industry, and citizens, led to destructive and lasting consequences”).

The Commonwealth Court’s framework herein and in *Frederick* conflicts with the fact that rights pursuant to the ERA are fundamental in nature. Indeed, this conflict was a principal predicate of a *Frederick* dissent authored by Judge Patricia McCullough, who cogently explained that, contrary to the majority’s adopted framework, legislation like that at issue in *Frederick*, affecting fundamental constitutional rights, is subject to strict scrutiny, whereby it is not the objector’s burden to prove its unconstitutionality, but, rather, the government’s burden to demonstrate that the legislation is narrowly tailored to a compelling governmental purpose. *See generally Frederick*, 196 A.3d at 702-711 (McCullough, J., dissenting).

Indeed, as Judge McCullough indicated:

The general rule is that the moving party carries the burden of proving that an ordinance is unconstitutional. However, when an ordinance “burdens,” “infringes,” or “significantly interferes” with a fundamental constitutional right (in this case, the ERA), strict scrutiny analysis is applicable, and the burden shifts to the government to prove that the ordinance furthers a compelling interest and is narrowly tailored to achieve that interest. [(citing, *inter alia*, *Nixon v. Commonwealth*, 839 A.2d 277, 287 (Pa. 2003) (“Where laws infringe upon certain rights considered fundamental, such as the right to privacy, the right to marry, and the right to procreate, courts apply a strict scrutiny test. Under that test, a

law may only be deemed constitutional if it is narrowly tailored to a compelling state interest.”)

Pursuant to this standard, the Landowners must first demonstrate that the . . . Ordinance . . . has the effect of burdening, infringing, or sufficiently implicating the rights of the ERA. . . . [If they do so], the Township should . . . shoulder the burden of demonstrating that the Ordinance is narrowly tailored to a compelling state interest. . . . If the Township could sustain this burden, then regardless of the degree to which the Ordinance burdens the rights conferred by the ERA, the Ordinance would be deemed to be constitutional.

Id. at 708 n. 11 (citations and quotations omitted).

In the event that this Honorable Court grants an appeal and determines that a framework other than that adopted herein and in *Frederick* applies to claims that an ordinance violates the ERA, Protect PT submits that this matter should be remanded to the trial court and/or the Commonwealth Court for a new trial and/or a new adjudication applying the newly-adopted framework.

Additionally, as far as the undersigneds’ research has gleaned, the question of the appropriate framework for evaluating a challenge to a zoning ordinance as violative of the ERA post-*PEDF* is a question of first impression for this Honorable Court. Thus, Protect PT submits that its fourth issue presents a “question of first impression,” warranting a grant of allocatur for this Court to resolve it. Pa.R.A.P. 1114(b)(3). Moreover, the Commonwealth

Court's framework herein and in *Frederick* creates jurisprudential tension not only with this Honorable Court's discussion of the ERA in *Robinson I* and *PEDF*, but also with the constitutional meta-principles identified by Judge McCullough's *Frederick* dissent, as well as a similar framework adopted by the Pennsylvania Environmental Hearing Board, see *Delaware Riverkeeper Network v. Department of Environmental Protection & R.E. Gas Development, LLC* (EHB Docket Nos. 2014-142-B, 2015-157-B, filed May 11, 2018), 2018 WL 2294492 (adopting a framework considering (1) whether the locality considered an enactment's environmental impacts; (2) whether it correctly determined that it would not result in unreasonable degradation, diminution, depletion or deterioration of the environment; and (3) whether the government fulfilled its duties of prudence, loyalty, and impartiality)).

Thus, while at present *Frederick* formally governs claims pursuant to the ERA, its tension with this Honorable Court's decisions, with the concept of trusteeship inherent in the ERA, the fundamental nature of rights pursuant to the ERA and with other pronouncements of the appropriate legal framework, give reasonable circumspection as to whether it is, or should remain, good law. Like the jurisprudential conflict attendant Protect PT's first issue, this tension gives rise to uncertainty governing the local regulation of fracking throughout Pennsylvania and all the same derivative economic

uncertainty for landowners and fracking companies alike, not only in the oil and gas market, but also in the real estate market as well. Thus, Protect PT submits that whether the Commonwealth Court's adjudicative framework applies to claims that ordinances violate the ERA "is one of such substantial public importance as to require prompt and definitive resolution by" this Honorable Court." Pa.R.A.P. 1114(b)(4).

CONCLUSION

Accordingly, Protect PT respectfully requests that this Honorable Court enter an order granting allowance of appeal regarding any and/or all of the foregoing issues, and such other relief as requested hereinabove or as this Honorable Court deems appropriate.

RESPECTFULLY SUBMITTED:

/s/ RYAN HAMILTON

RYAN E. HAMILTON, ESQ.

PA BAR # 318844

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PROTECT PT*

APPENDIX A:
COMMONWEALTH COURT OPINION

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Protect PT,	:	
	:	
Appellant	:	
	:	
v.	:	
	:	
Penn Township Zoning Hearing Board	:	No. 1632 C.D. 2018
	:	Argued: October 3, 2019
v.	:	
	:	
Olympus Energy LLC,	:	
Apex Energy (PA), LLC, and	:	
The Township of Penn	:	

BEFORE: HONORABLE P. KEVIN BROBSON, Judge
HONORABLE CHRISTINE FIZZANO CANNON, Judge
HONORABLE ROBERT SIMPSON, Senior Judge

OPINION

BY SENIOR JUDGE SIMPSON

FILED: November 14, 2019

I. Introduction

In this land use case, Protect PT appeals an order of the Court of Common Pleas of Westmoreland County (trial court)¹ that, after holding an extended hearing and receiving a large volume of evidence, denied Protect PT's substantive validity challenge to Penn Township's (Township) Ordinance No. 912-2016 Chapter 190 (Zoning), as amended (Zoning Ordinance). Notably, the Zoning Ordinance established five unique zoning districts and four overlay districts in the Township. In particular, the Zoning Ordinance established a Rural Resource (Resource) District and a Mineral Extraction Overlay (MEO) District. Protect PT specifically

¹ The Honorable Harry F. Smail, Jr., presided.

challenged the constitutionality of the MEO District to the extent it permits unconventional natural gas development (UNGD) in the Resource District, which also permits low-density residential properties.

Protect PT contends the Township's Resource District is essentially a growing suburban community and that UNGD is a heavy industrial activity incompatible with residential use and preservation of the environment. In rejecting Protect PT's contentions, the trial court determined the Zoning Ordinance does not violate either the substantive due process rights of the Township's residents or their rights under the Environmental Rights Amendment (ERA) in Article I, Section 27 of the Pennsylvania Constitution.² Therefore, the trial court held the Zoning Ordinance constitutionally valid.

More specifically, Protect PT asserts on appeal that the trial court erred or abused its discretion: (1) in failing to consider all phases of developing an UNGD well pad prior to the production phase in analyzing the validity of the Zoning Ordinance even though the drilling and completion phases continue indefinitely; (2) in failing to find that UNGD is a heavy industrial activity associated with impacts on neighboring residents similar to other heavy industrial activities including air pollution, water pollution, traffic congestion, noise, light and threats to public safety; (3) in finding that UNGD historically took place in the Township and is compatible with the Township's Comprehensive Plan and the agricultural and residential land uses authorized in the Resource District; (4) in finding the MEO District is an appropriate use of a zoning overlay even though it fails to impose specific and

² PA. CONST. art. I, §27.

targeted provisions tailored to local conditions without disturbing expectations created by the underlying district; (5) in finding that the enactment of the Zoning Ordinance did not violate the ERA where the Township Board of Commissioners (Commissioners) failed to account for the impact of UNGD on Township citizens' rights to clean air, pure water and the natural, scenic, historic, and esthetic values of the environment; and (6) in finding the Zoning Ordinance does not violate the substantive due process rights of Township citizens even though Protect PT demonstrated the Zoning Ordinance is arbitrary and unreasonable, and lacks any substantial relationship to promoting the public health, safety and welfare.

The present case raises similar issues to those recently addressed by this Court in Frederick v. Allegheny Township Zoning Hearing Board, 196 A.3d 677 (Pa. Cmwlth. 2018) (*en banc*), appeal denied, 208 A.3d 462 (Pa. 2019) (holding objectors failed to establish that UNGD was incompatible with other uses or that the ordinance violated substantive due process or the ERA), and Delaware Riverkeeper Network v. Middlesex Township Zoning Hearing Board (Delaware Riverkeeper (Middlesex)) (Pa. Cmwlth., No. 2609 C.D. 2015, filed June 26, 2019), 2019 WL 2605850 (unreported),³ (applying Frederick and denying the objectors' substantive validity and ERA challenges to a zoning ordinance allowing UNGD as a permitted use in a residential agricultural district). In light of our decisions in Frederick, Delaware Riverkeeper (Middlesex) and other applicable cases, we affirm the trial court's order denying Protect PT's challenges to the Zoning Ordinance.

³ Unreported cases, issued after January 15, 2008, may be cited for their persuasive value. See Section 414(a) of this Court's Internal Operating Procedures, 210 Pa. Code §69.414(a).

II. Background

A. Substantive Validity Challenge to Zoning Ordinance

In September 2016, the Commissioners enacted the Zoning Ordinance, which created five unique zoning districts in the Township. In addition to the Resource District, the Ordinance established the Mixed Density Residential District, the Neighborhood Commercial District, the Commercial Corridor District, and the Industrial Corridor District. The Ordinance also created four overlay districts. In addition to the MEO District, they include the Airport Overlay District, the Floodplain Overlay District and the Development Infill Overlay District. The MEO District, which permits UNGD, overlays the Industrial Commercial District (IC District) and the majority of the Resource District, with the exception of the densely populated Claridge area.

In April 2017, Protect PT, proceeding before the Township's Zoning Hearing Board (ZHB), filed a notice of substantive validity challenge under Section 916.1 of the Pennsylvania Municipalities Planning Code (MPC).⁴ In particular, Protect PT challenged the constitutionality of the MEO District. In June 2017, the ZHB issued a letter stating it did not intend to schedule a public hearing on Protect PT's validity challenge. This resulted in a deemed denial under the MPC.

In July 2017, Protect PT appealed the deemed denial to the trial court. Huntley & Huntley Energy Exploration, LLC (Huntley), an oil and gas exploration and production company operating in the Township, and Apex Energy of

⁴ Act of July 31, 1968, P.L. 805, as amended, added by the Act of December 21, 1988, P.L. 1329, 53 P.S. §10916.1.

Pennsylvania, LLC (Apex), an oil and gas company focused on UNGD, which also operates in the Township, were permitted to intervene. The Township also intervened in the appeal.⁵

B. Trial: General Overview

Where, as here, the trial court takes evidence on the merits, it must review the case *de novo*. Coal Gas Recovery, L.P. v. Franklin Twp. Zoning Hearing Bd., Greene Cty., 944 A.2d 832 (Pa. Cmwlth. 2008). This Court then reviews the trial court's findings of fact and legal conclusions for errors of law or an abuse of discretion. Id. An abuse of discretion occurs where the trial court's findings are not supported by substantial evidence. Id. Substantial evidence is such relevant evidence that a reasonable mind would accept as adequate to support a conclusion. Id.

Here, the trial court conducted a *de novo* trial and took evidence over four days in April and June 2018. During those proceedings, the trial court heard testimony from 21 witnesses, and admitted 93 exhibits into evidence. The parties also submitted briefs and proposed findings of fact.

In November 2018, the trial court issued a comprehensive opinion and order denying Protect PT's substantive validity challenge and holding the Zoning Ordinance constitutionally valid. In its findings of fact, the trial court noted that the Zoning Ordinance described the purpose of the Resource District as providing land

⁵ By order dated October 15, 2019, we granted an application by Huntley & Huntley Energy Exploration, LLC (Huntley) to amend the caption to reflect its new name, Olympus Energy, LLC. However, to avoid confusion regarding the briefs, record and prior decisions involved in this appeal, we will refer to this party as Huntley in this opinion.

for continuing agricultural operations, resource management, timber harvesting, outdoor recreation, public and private conservation areas, low density single family residential, and compatible support uses. Ord. §190-402(A). The court further noted the purpose of the MEO District is described as providing areas for the extraction of minerals where the population density is low and significant development is not projected for the near future. Ord. §190-407(A). Mining and conventional oil and natural gas drilling are listed as principal uses in the MEO District. *Unconventional* oil and natural gas drilling are listed as special exceptions. Ord. §§190-407(C), 190-407(D).

The trial court also recognized that UNGD is subject to numerous standards, including general development standards in the Zoning Ordinance and particular standards pertaining to the MEO District. To that end, the trial court noted:

Requirements include but are not limited to a prohibition on wastewater impound storage, dumping and seepage, regular removal of wastewater and hazardous and/or toxic waste, compliance with the Township's Subdivision and Land Development Ordinance, acquisition of relevant Pennsylvania Department of Environmental Protection ('DEP') permits, and a minimum lot size of [10] acres, as well as a [600] foot 'protected structure' setback and a 200 foot property line setback. [Ord.] §190-407(G). As [UNGD] is a special exception, the [ZHB] also has the right to impose additional conditions on the grant of the exception for purposes of promoting the health, safety and welfare of the Township's residents. [Trial Transcript pp.] 744-45).

Section 641(D) requires that the developer of a proposed UNGD well specifically 'demonstrate that the drill site operations will not violate the [Township citizens'] right to clean air and pure water as set forth in the [ERA] through the

submission of reports from ‘qualified environmental individuals’ stating that the proposed drilling will not negatively impact these rights. [Ord.] §190-641(D). Specifically required are ‘air modeling and hydrogeological studies as potential pathways that a spill or release of fluid may follow.’ [Ord.] §190-641(D).

Tr. Ct., slip op., 11/9/18, at 3-4 (emphasis added). The trial court also noted the subject of UNGD in the Zoning Ordinance was addressed at 19 Planning Commission meetings, 53 Commissioners’ meetings, 2 public meetings and a town hall meeting at which Protect PT presented 7 speakers, including its executive director. *Id.* at 4.

C. Protect PT’s Expert Witnesses

At trial, Protect PT presented testimony from three expert witnesses. Anthony Ingraffea, Ph.D. (Dr. Ingraffea) is an engineer and co-founder of Physicians, Scientists and Engineers for Healthy Energy (PSE). Ultimately, the trial court rejected Dr. Ingraffea’s opinion that UNGD causes significant adverse impacts to air and water quality, community development, human-induced seismicity, climate change, and animal health. The trial court also rejected Dr. Ingraffea’s opinion that UNGD is a heavy industrial activity. These credibility findings are material to our analysis.

Protect PT also presented testimony from Edward C. Ketyer, M.D. (Dr. Ketyer), a pediatrician in Washington County, and a consultant with the Southwest Pennsylvania Environmental Health Project, which solicits patients who believe they may have health symptoms as a result of oil and gas development. Dr. Ketyer is also a board member of Physicians for Social Responsibility, whose goal is to develop a fossil fuel free world. Ultimately, the trial court rejected Dr. Ketyer’s

opinion that emissions from UNGD presently pose a threat to human health. This credibility finding is also significant to our analysis.

Protect PT's third expert, Thomas Daniels, Ph.D. (Professor Daniels), is a professor of city and regional planning at the University of Pennsylvania. Professor Daniels testified regarding the Township's Comprehensive Plan. He noted that the MPC requires the reasonable development of minerals and gas. However, Professor Daniels opined that he considers UNGD to be a heavy industrial use and that the MEO District does not fulfill the purpose of the Comprehensive Plan because the Resource District is predominantly residential. He further stated that the MEO District as it exists resulted in a scattered pattern of wells with heavy truck traffic and inconvenience to the Township's residents. However, the trial court declined to adopt Professor Daniels' opinions that UNGD is a heavy industrial use that is incompatible with the Comprehensive Plan and agricultural areas in general. These credibility findings also impact our analysis.

D. Intervenor Huntley's Expert Witnesses

In response, Intervenor Huntley, an oil and gas exploration and production company operating in the Township, presented testimony from three experts. Huntley presented Samuel A. Flewelling, Ph.D. (Dr. Flewelling), an environmental science consultant and a member of the Geophysical Union and the Geological Society of America. Dr. Flewelling has extensive experience regarding the impact of hydraulic fracturing on groundwater and general matters of hydrogeology. Dr. Flewelling opined that both conventional and unconventional oil and gas development have an extensive history in Westmoreland County, dating back

over a hundred years. Between 1980 and 2017, approximately 5,380 conventional and 252 unconventional wells have been drilled in the county. Unconventional wells are more compact and produce more gas than conventional wells.

Dr. Flewelling stated that the risks of gas leaks into the drinking water are unlikely due to DEP casing and cementing requirements. Dr. Flewelling further indicated that contamination to drinking water is not likely through the deep hydraulically fractured rock as the fractures are normally lower than the aquifer. In addition, a low permeability layer creates a barrier, and there is no force driving the fluid upward. Important to our analysis, the trial court adopted Dr. Flewelling's above-expressed opinions regarding groundwater and hydrogeology.

Intervenor Huntley also presented expert testimony from Dr. Christopher Long (Dr. Long), who holds a doctoral degree in environmental health from Harvard University's School of Public Health. Dr. Long is a certified toxicologist. He routinely conducts human health risk assessments, and he has experience studying the air quality impacts and risks caused by UNGD. Without objection, the trial court qualified Dr. Long as an expert in toxicology, air emission exposure assessment and human health risk assessment.

Dr. Long testified that all air emissions associated with all phases of UNGD, excepting production, are transient and short-term. Various air pollutants associated with UNGD are ubiquitous in everyday life, such as fine particulate matter (FPM). Most persons are regularly exposed to the same on a short-term basis

from everyday activities. A large amount of air monitoring now occurs in the Marcellus Shale region near gas development and is conducted by various groups.

Dr. Long further testified that DEP monitored FPM in Greene, Bradford and Tioga Counties with no findings of elevated FPM levels. Also, monitors in Bradford, Tioga and Washington Counties found nitrogen dioxide levels far below the relevant national standard. Further, DEP monitors near UNGD in Washington, Wyoming and Susquehanna Counties all reported average benzene levels. In addition, the Allegheny County Health Department, which placed monitors for volatile organic compounds (VOC) near well pad activity, found VOC levels far below levels of concern for human health. Based on these and other VOC studies related to UNGD in Pennsylvania, the trial court adopted Dr. Long's expert opinions regarding toxicology, air emission exposure assessment and human health risk assessment. This credibility determination is material to our analysis. It is within the exclusive province of the trial court, as the fact-finder in a zoning case, to resolve all matters of witness credibility and evidentiary weight. See Penn St., L.P. v. E. Lampeter Twp. Zoning Hearing Bd., 84 A.3d 1114 (Pa. Cmwlth. 2014).

As its third expert witness, Intervenor Huntley presented Professor Ross Pifer (Professor Pifer), a professor at the Penn State School of Law. Professor Pifer is the director of the Center for Agriculture and Shale Law and Rural Economic Development Clinic. Professor Pifer, who also testified in Frederick, visited numerous UNGD sites during various stages of development. He focused his research on the interplay between UNGD and the community, especially in agricultural areas. Professor Pifer made over 300 presentations regarding oil and

gas development in the past 10 years. His expert testimony regarding the compatibility of oil and gas with rural and agricultural communities has been accepted by zoning hearing boards in Westmoreland, Lawrence and Washington Counties.

Professor Pifer further testified that UNGD primarily takes place in rural and semi-rural counties in the Commonwealth, and that Westmoreland County ranks ninth in the state for UNGD, with 283 wells already drilled. UNGD, in existence since 1947, provides more benefit to agricultural regions than conventional drilling. UNGD has less surface impact and can access more acreage.

Professor Pifer identified approximately 100 municipalities in Pennsylvania, some with zoning and some without, where UNGD, single-family homes, and agricultural uses coexist. In Westmoreland County, 24 municipalities have no zoning ordinances and allow UNGD throughout the entire municipality.

Professor Pifer further noted that Pennsylvania law explicitly encourages the coexistence of oil and gas development and agriculture through protections provided in the Pennsylvania Farmland and Forest Land Assessment Act of 1974, popularly known as the Clean and Green Act,⁶ and the Agricultural Area Security Law (AASL),⁷ which involve many farmers in the Township. The Clean and Green Act also recognizes that the financial benefits of UNGD from gas leasing enables farmers to maintain agricultural operations on their land throughout generations of farmers. This permits rural lands to remain rural and prevents the

⁶ Act of December 19, 1974, as amended, 72 P.S. §§5490.1-5490.13.

⁷ Act of June 30, 1981, P.L. 128, as amended, 3 P.S. §§901-915.

forced sale of farmlands to commercial or residential development. Ultimately, the trial court adopted Professor Pifer's opinion that UNGD is compatible with agricultural and rural land uses, both generally and as laid out in the MEO District under the Zoning Ordinance. See Tr. Ct., slip op., 11/9/18, at 12. This credibility finding is also critical to our analysis.

Intervenor Huntley also presented testimony from Jason Paul Gehringer (Analyst Gehringer), a primary Geographic Information System analyst. He testified to the existence of the Oakford Storage Field, a mostly depleted natural gas reservoir that lies beneath one-quarter of the Township's land mass. Analyst Gehringer calculated that upon taking into consideration all setbacks and regulatory requirements imposed by the Zoning Ordinance, only 9.46% of the Township's land mass is available for UNGD.

E. Apex Witness

Intervenor Apex presented testimony from Christopher James Hess (Hess), its general counsel, vice president of land development and corporate secretary. Hess oversees regulatory compliance, leasing and land functions. Apex leases about 7,509 acres and maintains exclusive rights to drill in the Marcellus Shale beneath the Oakford Storage Field in the Township. Apex received approval to develop the Quest UNGD well pad, which is now in production. Apex has seven other well pads planned in the Township.

Hess testified regarding the steps of development in UNGD, including leasing, design, permitting and construction. He described the measures taken by

Apex to prevent spills and releases at the site. Apex entered into an agreement with Westmoreland County to obtain water through municipal taps, thereby eliminating about 3,000 water trips per well. He also described DEP well permit requirements for protecting surrounding water sources and DEP permit requirements for surface disturbance and mitigation.

In sum, Hess testified that during the production phase, UNGD generates no light at the well site, and no noise audible at the property line. Truck traffic during the production phase is limited to two truck trips per day and a few waste-water truck visits per month. Hess noted that Apex has not received any noise, light or traffic complaints regarding the Quest well site since it entered the production phase.

F. Lay Witnesses

Protect PT presented lay testimony from its executive director, Gillian Graber (Graber). She described Protect PT's mission as the protection of Township residents in the Penn-Trafford area from the effects of UNGD. Protect PT members often engage in special exception hearings, meetings and other public forums. Graber testified that Protect PT has also placed noise and air quality monitors at residences around the Township at property owners' requests.

Protect PT also presented lay testimony from eight additional members or property owners living near proposed well sites in the Township. They expressed concerns regarding noise, light and air emissions, truck traffic, adverse effects on

groundwater and water pressure, adverse effects on property values, and other health and safety issues.

Conversely, Intervenor Huntley presented lay testimony from Richard J. Hajnosz and Adam Ferri (Ferri), two property owners who rely on UNGD lease and royalty payments to maintain their agricultural property and to avoid selling it for residential development. Ferri, a real estate developer who owns a 133-acre tract in the Resource District, testified residential development negatively impacts the agricultural nature of the property in the Resource District. Ferri testified that permanent impacts from residential development include traffic and impervious surface loss. See Notes of Testimony (N.T.), 6/4/18, at 844-45; Reproduced Record (R.R.) at 722a.

G. Trial Court's Discussion and Analysis

1. Generally

As discussed above, when reviewing a challenge to a zoning ordinance in which it takes evidence, the trial court performs a *de novo* review. Coal Gas Recovery Grp. Because a zoning ordinance is presumed valid, a challenger bears a heavy burden of establishing its invalidity. Woll v. Monaghan Twp., 948 A.2d 933 (Pa. Cmwlth. 2008). A validity challenge generally attacks zoning on substantive due process grounds, *i.e.*, whether an ordinance is substantially related to a legitimate interest. Plaxton v. Lycoming Cty. Zoning Hearing Bd., 986 A.2d 199 (Pa. Cmwlth. 2009). Where the validity of an ordinance is debatable, it must be upheld. Main Street Dev. Grp., Inc. v. Tincum Twp. Bd. of Supervisors, 19 A.3d 21 (Pa. Cmwlth. 2011).

In Pennsylvania, the constitutionality of a zoning ordinance is reviewed under a substantive due process analysis. Plaxton. Under such analysis, the party challenging the validity of the provisions of a zoning ordinance must establish that the challenged provisions are arbitrary or unreasonable and have no substantial relationship to promoting the public health, safety and welfare. Id. In examining whether the ordinance is a valid exercise of the police powers, reviewing courts must balance the public interest to be served by the ordinance against the confiscatory or exclusionary impact of the ordinance on individual rights. Delchester Developers, L.P. v. Zoning Hearing Bd. of London Grove, 161 A.3d 1081 (Pa. Cmwlth. 2017); Penn St.

Protect PT alleged the MEO District violates the Township residents' substantive due process rights, as well as their constitutional rights under the ERA in Article I, Section 27 of the Pennsylvania Constitution, by allowing UNGD in the Resource District. Protect PT alleged the Resource District is primarily residential. Protect PT claimed the MEO District is designed in such a way that UNGD is able to be developed in a haphazard manner, creating nuisances and health risks for neighboring property owners. Thus, Protect PT maintains the MEO District is invalid.

2. Substantive Due Process

Protect PT first argued that in enacting the Zoning Ordinance, the Township failed to consider the effects of UNGD on neighboring property owners. Protect PT maintained that UNGD is a heavy industrial use, and that allowing UNGD, in what Protect PT perceives as a majority of the Township, creates

nuisance, health and safety risks for neighboring property owners in the Resource District, thereby violating their substantive due process rights.

The trial court recognized UNGD is a lawful and not a disfavored use in Pennsylvania. Section 603(i) of the MPC states: “Zoning ordinances shall provide for the reasonable development of minerals in each municipality.” 53 P.S. §10603(i). An integral purpose of the Resource District is resource management. See Ord. §190-402(A). Section 107(a) of the MPC defines “minerals” as including “crude oil and natural gas.” 53 P.S. §10107(a). Notably, our Supreme Court determined that pursuant to Section 601 of the MPC, the governing body of a municipality may amend its zoning ordinances to permit oil and gas development in any or all of its zoning districts. Gorsline v. Bd. of Supervisors of Fairfield Twp. (Gorsline II), 186 A.3d 375 (Pa. 2018).

Here, the trial court observed that the Township carefully balanced its obligation to provide for the management and development of minerals with the inherent rights of the neighboring property owners in the MEO District.

The trial court further noted that under Pennsylvania law, zoning regulates only the *use* of the land, not the particulars of development and construction. Frederick; Gorsline v. Bd. of Supervisors of Fairfield Twp. (Gorsline I), 123 A.3d 1142 (Pa. Cmwlth. 2015), rev’d on other grounds, 186 A.3d 375 (Pa. 2018); Schatz v. New Britain Twp. Zoning Hearing Bd. of Adjustment, 596 A.2d 294 (Pa. Cmwlth. 1991). Therefore, the trial court reasoned, the development and construction of a well pad prior to its production phase or *use* phase, should not be

taken into account in analyzing the zoning ordinance in a validity challenge. Similarly, it would be improper to assess the industrial activities that take place during the construction of any commercial or residential property, prior to the structures being used.

3. Compatibility with Resource District

As Professor Pifer explained, a producing UNGD well pad is entirely compatible with the purpose of the Resource District, which provides for resource management and agricultural operations. In fact, UNGD can be beneficial to agricultural uses. Huntley's two lay witnesses, Ferri and Hajnosz, testified that the financial benefits of UNGD on their respective properties helps them preserve the agricultural nature of their land by promoting inter-generational farm transfers and allowing for the continuance of farming activity that might not be feasible otherwise.

4. Environmental & Health Concerns

With respect to Protect PT's environmental and health concerns, the trial court rejected the opinions of Protect PT's experts, Dr. Ingraffea and Dr. Ketyer, regarding the actual risks to Township residents. The trial court found their testimony speculative and not indicative of any substantial environmental or health risks.

The trial court found credible the testimony of Intervenor Huntley's expert witnesses, Dr. Long and Dr. Flewelling. Dr. Long presented significant amounts of actual air monitoring data showing no danger to public health related to widespread air emissions caused by UNGD. The trial court also credited the

testimony of Dr. Flewelling regarding the low risk of water contamination by UNGD and the abundant water protections already in place.

The trial court also expressed sympathy for the landowners' worries regarding the hypothetical diminution of property values, increases in noise and light, and other stated concerns. Nonetheless, the trial court noted that the Township adequately considered these concerns as part of an extensive balancing inquiry in adopting the Zoning Ordinance, which is far more protective of Township citizens than the previous zoning ordinance.

Further, the trial court rejected Protect PT's argument that the MEO District allows for UNGD in the majority of the Township's residential areas. The court noted the Township made a great effort to develop and refine the Zoning Ordinance to provide for UNGD only in specifically delineated areas. In considering the setbacks and other required considerations, UNGD can take place in approximately 9.46% of the Township. Given the Township's thorough analysis of the particulars of oil and gas development evidenced by the Zoning Ordinance's many drafts and revisions, and the countless public meetings from 2010 through 2016, the trial court determined that the Zoning Ordinance provides for an exceedingly heightened level of protection for neighboring property owners.

In concluding its substantive evidence analysis, the trial court recognized it must balance the public interest to be served by the Zoning Ordinance against the confiscatory or exclusionary impact on individual property rights. Delchester. The trial court found the Township carefully considered and balanced

the Township's residents' rights concerning their health and safety with the interests of neighboring landowners who rely on royalties and lease payments from UNGD to maintain the agricultural use of their property. In enacting the Zoning Ordinance, the Township established a series of rigorous requirements ensuring that UNGD in the Township complies with all state and federal mandates.

The Zoning Ordinance also imposed additional protections in the form of setbacks, acreage requirements, an exclusion of the most densely populated area of the Resource District, and the requirement that developers submit reports to the Township expressly representing that UNGD will not impact the residents' rights under the ERA. Based on the evidence presented, the trial court concluded that the Township fully considered the public health, safety and welfare of Township residents in enacting the Zoning Ordinance.

Summarizing, the trial court recognized that a determination of whether legislation is wise or whether it is the best means to achieve the desired result is best left to the governing body and not the courts. The governing body is presumed to have investigated the question and ascertained what is best for the good of the people. Khan v. State Bd. of Auctioneer Exam'rs, 842 A.2d 936 (Pa. 2004). Thus, the trial court reasoned, even if it was to disagree with the substance of the Zoning Ordinance, it is apparent that the Township exercised due diligence in ascertaining what it believed to be the best balance of protections for all its residents. Consequently, the trial court determined Protect PT did not meet its heavy burden of showing that the presumptively valid Zoning Ordinance is arbitrary and

unreasonable, or that it has no substantial relationship to promoting the public health, safety and welfare. Plaxton.

5. Robinson Township Cases; Gorsline II

Next, Protect PT cited Robinson Township, Washington County v. Commonwealth (Robinson II), 83 A.3d 901 (Pa. 2013), where the Supreme Court deemed several provisions of the amended Pennsylvania Oil and Gas Act (Oil and Gas Act)⁸ unconstitutional because they allowed for UNGD as of right in all areas of the Commonwealth, entirely preempting local zoning in the matter of oil and gas regulation. The trial court observed that the circumstances in Robinson II are entirely different from those in the present case. Rather, the situation in the present case is the situation that Robinson II intended to protect: a municipality making its own decisions regarding oil and gas regulation, uniquely tailored to local circumstances, and mindful of Pennsylvania citizens' constitutional rights. The trial court further noted that in Robinson Township, Washington County v. Commonwealth (Robinson IV), 147 A.3d 536 (Pa. 2016), the Supreme Court went out of its way to express the importance of locally tailored policy goals and the importance of considering local conditions and the needs of the residents in assessing oil and gas development at a municipal level.

The trial court also found our Supreme Court's decision in Gorsline II distinguishable from the present case. The relevant ordinance in Gorsline II delineated a residential-agricultural zoning district, in which UNGD was neither specifically allowed nor prohibited. The ordinance included a savings clause,

⁸ 58 Pa. C.S. §§2301-3504.

wherein a use could be allowed if shown to be similar to other uses permitted in that zoning district. Ultimately, in Gorsline II our Supreme Court reversed this Court's decision in Gorsline I holding that UNGD was similar to other uses in the district, specifically public service facilities and essential services.

Unlike the zoning ordinance at issue in Gorsline II, the trial court observed that here the Zoning Ordinance does not require a showing that UNGD is similar to public service facilities or any other uses permitted in the zoning district. Rather, under the Zoning Ordinance, UNGD is permitted in the MEO District as a special exception.

In particular, the trial court noted that the Supreme Court in Gorsline II emphasized that its decision should not be misconstrued as an indication that oil and gas development is never permitted in residential or agricultural districts, or that it is fundamentally incompatible with residential or agricultural uses. The Supreme Court also highlighted the importance of local municipalities tailoring ordinances to the particulars of local conditions in order to protect environmental values. In order to permit UNGD, a local government body must "actually amend its zoning ordinances to permit drilling in designated areas, setting forth whatever limitations and conditions it decides are appropriate for the protection of its citizenry." Gorsline II, 186 A.3d at 389. The trial court observed that this is precisely what occurred in the present case. The Township spent many years receiving input from various sources, including members and representatives of Protect PT. The Township then crafted an ordinance setting forth protective limitations and conditions.

6. Comprehensive Plan; Property Owner Expectations

In addition, Protect PT argued the MEO District directly contradicts the Township's community planning tools and directly conflicts with the purpose of the underlying districts. Protect PT alleged the MEO District disrupted the reasonable expectations of property owners in the Resource District. In rejecting Protect PT's contentions, the trial court recognized that the Township's Comprehensive Plan promotes both growing residential development and agricultural use. As noted above, the trial court credited Professor Pifer's testimony that UNGD and agricultural uses are inherently compatible. Therefore, the trial court decided the MEO District fits plainly within the goals of the Comprehensive Plan.

Further, even assuming the MEO District was incompatible with the Comprehensive Plan, Section 303(c) of the MPC provides that no action by the governing body of a municipality shall be invalid or be subject to challenge on appeal on the basis that such action is inconsistent with, or fails to comply with, the provisions of a comprehensive plan. 53 P.S. §10303(c).

With respect to the property owners' expectations, the trial court found that Protect PT failed to present any testimony from landowners indicating that they investigated the zoning ordinance in effect at the time of their purchase. In any case, even if a landowner purchased the property prior to the enactment of the Zoning Ordinance, the purchaser would have been afforded much less protection under the regulation of UNGD under prior ordinances, which were much less restrictive. Consequently, the trial court concluded that Protect PT cannot meet its heavy burden

of proof in a challenge to the MEO District as being in violation of the Comprehensive Plan or property owners' expectations.

7. Appropriate Use of Overlay District

Protect PT also argued that the MEO District violates established standards for the appropriate use of an overlay district in zoning. "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." Main St., 19 A.3d at 28. "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." Id. "In other words, overlay districts supplement existing zoning districts, they do not supersede them either in fact or in practice." Id.

Here, the trial court found the MEO District to be an appropriate use of the overlay district concept. The MEO District succeeded in creating specific and targeted provisions allowing for limited UNGD in sparsely populated areas without being overly burdensome or conflicting with the expectations of property owners in the Resource District. Thus, the trial court rejected Protect PT's claims that the MEO District disturbs the reasonable expectations of property owners in the Resource District.

8. ERA; Constitutionality

In its final substantive argument before the trial court, Protect PT asserted that the Township failed to fulfill its fiduciary obligation to protect its residents' environmental rights under Article I, Section 27 of the Pennsylvania Constitution, known as the ERA, which provides:

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.

PA. CONST. art. I, §27.

The trial court observed that Protect PT's constitutional challenge under the ERA largely mirrored its substantive due process argument. Protect PT cited our Supreme Court's decision in Pennsylvania Environmental Defense Foundation v. Commonwealth (PEDF), 161 A.3d 911 (Pa. 2017), for the proposition that "the Commonwealth has a duty to prevent 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." Id. at 933.

In rejecting Protect PT's argument, the trial court reasoned that the Township took into account the ERA's mandate. Pursuant to Section 190-641(D) of the Zoning Ordinance, the Township placed the burden on every UNGD developer to demonstrate that drill site operations will not violate Township's citizens' rights to clean air and clean water through the reports of qualified environmental individuals.

These reports must state that the proposed drilling will not negatively impact ERA rights.

Overall, the trial court noted, the Zoning Ordinance offers Township citizens more protections with regard to UNGD than many municipalities throughout the county and the Commonwealth. The trial court reasoned that to find the Zoning Ordinance in violation of the ERA would directly bring into question the constitutional compliance of every municipality in the Commonwealth which chooses to not enact zoning regulations, or which chooses to enact some less stringent regulation of oil and gas activity.

9. Frederick

The trial court found this Court's decision in Frederick particularly relevant to the present case. In Frederick, an *en banc* panel of this Court affirmed a decision of a zoning hearing board upholding UNGD, as a permitted use *by right*, in all of the township's zoning districts. In early 2015, the township's zoning hearing board conducted a hearing on a validity challenge raising substantive due process and ERA-based challenges similar to those raised by Protect PT in the present case. The zoning hearing board found oil and gas development to be consistent with rural and agricultural uses. Thus, the zoning hearing board rejected the objectors' ERA and substantive due process challenges. Notably, the zoning hearing board accepted and relied upon the opinions provided by Professor Pifer, which largely track the opinions he provided in the present case.

Here, the trial court focused on this Court's unequivocal holdings in Frederick that the township zoning ordinance did not violate either the objectors' substantive due process rights or their rights under the ERA. Ultimately, the trial court determined that it would be contrary to current precedent to conclude the Zoning Ordinance, a more stringent ordinance than the zoning ordinance in Frederick, violates either substantive due process or the ERA.

For these reasons, the trial court held that the Zoning Ordinance does not violate the substantive due process rights of the Township's residents or their rights under the ERA. Protect PT appeals.⁹

III. Discussion

A. Pre-Production Phases of UNGD; Heavy Industrial Activity

1. Contentions

a. Consideration of Pre-Production Phases of UNGD

Protect PT first contends the trial court erred or abused its discretion in failing to consider all phases of developing an UNGD well pad prior to the production phase in analyzing the validity of the Zoning Ordinance even though the drilling and completion phases are ongoing indefinitely. Therefore, Protect PT further asserts the trial court erred or abused its discretion in failing to find that UNGD is a heavy industrial activity associated with impacts on neighboring residents similar to other heavy industrial activities including air pollution, water pollution, traffic congestion, noise, light and threats to public safety.

⁹ Where, as here, the trial court takes additional evidence, our review is limited to determining whether the trial court abused its discretion or erred as a matter of law. Larock v. Bd. of Supervisors of Sugarloaf Twp., 961 A.2d 916 (Pa. Cmwith. 2008).

Protect PT argues that all phases of development or construction prior to the final production phase should be taken into account in analyzing the Zoning Ordinance. Protect PT asserts that the most impactful phases of development, drilling and completion may be repeated many times during the life of a well pad. The average number of wells on a well pad is five. However, Protect PT claims there are many pads in the U.S. that have 20 or more wells. Therefore, Protect PT maintains that the excavation and construction, drilling and fracking/completion phases are as much a part of the use of the land as the final production phase.

In support of its position, Protect PT asserts that courts have traditionally evaluated the drilling and fracking phases of UNGD as part of any applicable zoning analysis. In Gorsline II, the Supreme Court stated a proposed well pad is a purely industrial use of the type discouraged in the township's residential-agricultural district. In Robinson II, the Supreme Court, in ruling part of the Oil and Gas Act unconstitutional, noted the myriad of impacts from several different phases of UNGD. In particular, the Supreme Court noted that insofar as the Oil and Gas Act permitted fracking operations in every zoning district throughout the Commonwealth, fracking operations expose otherwise protected areas to environmental and habitability costs including "air, water, and soil pollution; persistent noise, lighting and heavy vehicle traffic; and the building of facilities incongruous with the surrounding landscape." Robinson II, 83 A.3d at 979. The Supreme Court further noted that "the exploitation of the Marcellus Shale Formation will produce a detrimental effect on the environment, on the people, their children, and future generations, and potentially on the public purse, perhaps rivaling the environmental effects of coal extraction." Id. at 976.

Protect PT also cites Section 603(b)(2) of the MPC, which states that zoning ordinances may permit, prohibit, regulate, restrict and determine “[s]ize, height, bulk, location, erection, construction, repair, maintenance, alteration, razing, removal and use of structures.” 53 P.S. §10603(b)(2). Thus, Protect PT asserts the MPC itself contemplated consideration of gas wells, tanks, drill rigs and other equipment on a well pad associated with the drilling and completion process.

Protect PT then summarizes a description offered by its expert, Dr. Ingraffea, of the various activities and impacts occurring during various phases of exploration, excavation and construction, drilling, fracking (completion), leading to the production phase. The drilling and fracking phases are particularly harmful, involving the use of heavy equipment, including drilling rigs, which operate 24 hours per day/7days per week and use large volumes of water mixed with chemicals and drilling mud. During the fracking/completion phase, which is extremely dirty, a well is stimulated, or brought into production, by injecting a massive amount of water mixed with chemicals (fracturing fluid) down a well bore to hydraulically fracture the rock in order to widen natural joints making it easier for the hydrocarbons to flow back up the well.

Moreover, Protect PT claims that 20% of the fracturing fluid injected into a well flows back up the well and is treated as residual waste. This waste is transported by truck, requiring hundreds or thousands of trips. As discussed above, the drilling and fracking phases may be repeated over and over again, depending on geology and the operator’s leasing agreements. Consequently, Protect PT argues that the trial court erred and abused its discretion in concluding that the drilling and

fracking phases are mere construction phases that should not be taken into account in analyzing the Zoning Ordinance in a validity challenge.

b. Heavy Industrial Activity; Weight of the Expert Evidence

Protect PT next contends the trial court erred or abused its discretion by failing to find UNGD is a heavy industrial activity that causes significant adverse impacts to air and water quality, community development, human-induced seismicity, and climate change, including animal health. Protect PT notes that the trial court declined to adopt the opinions of its experts, Dr. Ingraffea and Dr. Ketyer, who testified regarding the adverse impacts to human health caused by UNGD. Rather, the trial court credited the testimony of Huntley's expert, Dr. Long, who opined that exposure to air pollutants from UNGD is not a public health concern.

Nevertheless, Protect PT argues that the weight of the evidence introduced at trial suggests that UNGD produces harmful impacts on the health of persons living in proximity to UNGD. Protect PT cites Dr. Ketyer's testimony that UNGD generates toxic air pollution and increases stressors that impact health such as odors, noise, bright lights, and heavy truck traffic. Public health studies show that people living in proximity to shale development report adverse health effects including respiratory symptoms, increased fatigue, severe headaches, depression, dizziness, nausea, memory problems, skin irritation and sleep disturbances.

Protect PT further asserts many of the studies Huntley's witness, Dr. Long, relied upon suffered from significant deficiencies or simply do not support his conclusions. Conversely, Protect PT's witness, Dr. Ketyer, pointed to a study where

researchers found that chemicals associated with oil and gas development pose serious health risks to women and their babies during pregnancy. Rather than weighing Dr. Ketyer's testimony against the conclusory statements of Dr. Long, Protect PT asserts the trial court improperly chose to dismiss Dr. Ketyer's testimony in its entirety.

c. Township Residents' Testimony

Protect PT also contends the trial court failed to consider the testimony of Township residents who are directly affected by UNGD. Although UNGD only recently began in the Township, Protect PT received noise complaints regarding the Poseidon well. Tracey Mason, who lives less than a mile from the Quest well pad, testified that drilling noise and light from the site greatly impacted her townhouse and prevented her from sleeping. Mason provided a video that depicted flaring at the Quest well site. She recalled that this process sounded like a jet airplane over her house. Mason also testified regarding a spill of mercaptan, a foul-smelling chemical compound added to natural gas to detect leaks, at the Quest well site.

Danielle LeJeune, another Township resident and Protect PT member, also testified regarding her first-hand experience with UNGD. LeJeune, who frequently drove by the Quest well site during the drilling and fracking phases, noted the well site was brightly lit during drilling and very noisy. LeJeune testified that two well pads have been proposed for a site located very close to her home. LeJeune further testified that she and her family are looking to move out of the area to avoid the risks to their health and safety.

In light of this testimony, Protect PT argues the trial court, in determining UNGD is not a heavy industrial activity, abused its discretion by failing to weigh or consider the direct experience of Township residents.

d. Expert Land Use Planning Testimony

In addition, Protect PT contends the trial court erred in failing to find UNGD is a heavy industrial activity because the only expert land use testimony presented at the hearing characterized UNGD as heavy industrial land use. Protect PT's expert, Dr. Daniels, cited an article from the Journal of the American Planning Association defining hydraulic fracturing as a heavy industrial land use. Dr. Daniels testified that UNGD is a heavy industrial use.

Protect PT further asserts Justice Baer's concurring opinion in Robinson II supports Dr. Daniels' testimony that UNGD is an industrial land use generally incompatible with other non-industrial uses. It involves the "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 explosions and gas well blowouts." See Robinson II, 83 A.3d at 1005 (Baer, J., concurring).

Therefore, Protect PT argues that the trial court's failure to credit Dr. Daniels' testimony that UNGD is a heavy industrial activity, constitutes an error of law and an abuse of discretion.

2. Analysis

To begin, we recognize that the trial court, as the fact-finder in this case, is the ultimate judge of credibility and resolves all conflicts in the evidence. Frederick. As the fact-finder, the trial court may reject even uncontradicted testimony if it finds that testimony lacking in credibility. Id.

Here, the trial court rejected the testimony of Protect PT's experts, Dr. Ingraffea, Dr. Ketyer and Dr. Daniels, and the lay testimony of Township residents that UNGD is a heavy industrial activity inconsistent with the MEO District's underlying Resource District. Rather, the trial court adopted the opinion of Huntley's expert, Professor Pifer, who testified that a producing UNGD well pad is compatible with the purpose of the Resource District.

Further, we recognized in Frederick that zoning regulates the *use* of the land, not the particulars of development and construction. In other words, a municipality may use its zoning powers to regulate where UNGD takes place. Huntley & Huntley, Inc. v. Borough Council of the Borough of Oakmont, 964 A.2d 855 (Pa. 2009); Frederick. However, a municipality does not regulate how UNGD is done. Frederick. Therefore, complaints regarding harm to the environment from UNGD should have been addressed to the state agencies issuing permits for UNGD operations. Id.

Nevertheless, we question whether impacts from pre-production stages of UNGD can never be taken into consideration in a substantive validity challenge. The better jurisprudential articulation is that impacts from any stage can be taken into consideration by the fact-finder in a substantive validity analysis. However, no

reversible error is evident here. This is because evidence of stage duration¹⁰ and of modest impacts during long-term production provides a sufficient factual basis upon which to distinguish the temporary industrial-type impacts during the much shorter pre-production stages from the incremental impacts during the majority lifespan of an UNGD well. There is no abuse of discretion in affording less weight to evidence of temporary impacts. See Delaware Riverkeeper (Middlesex) (in substantive validity challenge, fact-finder rejected the testimony of Dr. Daniels, which focused on a temporary period of industrial development, in favor of expert testimony considering entire lifespan of UNGD well pad and post-reclamation period).

More generally, the facts in the present case are analogous to those in Frederick and Delaware Riverkeeper (Middlesex), where this Court rejected similar contentions that an UNGD well could only be permitted in an industrial zoning district. In Frederick, the objectors presented similar testimony that UNGD would have a negative impact on the surrounding community. The fact-finder rejected the objectors' testimony for several reasons, including their lack of knowledge of UNGD operations. In Frederick, we noted that the objectors, without any supporting evidence, presumed that UNGD, by its very nature, adversely affects property rights. However, this Court observed that the evidence showed that existing UNGD wells advanced, rather than impeded, the ability of farmers to continue to use their land for farming. In other words, oil and gas development and agricultural uses have a history of safe and beneficial co-existence in rural communities.

¹⁰ The trial court noted Dr. Ingraffea's testimony that the construction phase typically lasts for about 30 days, the drilling phase typically lasts about 2-3 weeks, and the completion phase typically lasts about 10 days. Dr. Ingraffea also admitted that the final production phase constitutes the majority lifespan of a UNGD well. See Tr. Ct., slip op., 11/9/18, at 5.

Also, in Frederick, we upheld the fact-finder's determination that the zoning ordinance, which allowed UNGD in every zoning district, did not violate substantive due process. We reached this conclusion because UNGD must satisfy exacting standards designed to protect neighboring property owners from cognizable injury. In short, we reasoned that the objectors' expressed concerns consisted of speculation of possible harms. Such speculation is insufficient to show the proposed UNGD well would be detrimental to the health, safety and welfare of the neighborhood.

Similarly here, the fact-finding trial court held that the Township, in determining that UNGD is a proper use in the MEO District overlaying sparsely populated areas of the Resource District, engaged in lengthy proceedings before enacting the Zoning Ordinance. The question of what best serves the public interest is primarily a question for the appropriate legislative body in a given situation. Plaxton. During these proceedings, the Township carefully and appropriately balanced its obligation to provide for property owners' development and management of minerals with its obligation to protect the health, safety and welfare of neighboring Resource District property owners. Based on our review of the record, we conclude the trial court's determinations are supported by substantial evidence.

B. Comprehensive Plan; Appropriate Use of Overlay District

1. Contentions

a. Comprehensive Plan; Residents' Expectations

Protect PT argues that UNGD is a new activity in the Township that is incompatible with the Township's Comprehensive Plan and residential land use expectations in the Resource District. It asserts the Commissioners failed to consider the Comprehensive Plan when enacting the MEO District, resulting in UNGD, a heavy industrial activity, being permitted across a majority of the Township. Rather than using available land use planning tools and data to determine the best location for an industrial activity UNGD and tailoring the Zoning Ordinance to local conditions, Protect PT contends the Township enacted a blanket overlay district that permits UNGD to spread out across the Township. Thus, Protect PT maintains the Township's decision to adopt the Zoning Ordinance was devoid of rational planning principles and therefore arbitrary. As such, Protect PT assigns error in the trial court's conclusion that the MEO District fits within the Comprehensive Plan's goals.

In support of its position, Protect PT developed a map identifying six schools, five daycare facilities, various recreational facilities, and a community pool in proximity to existing and proposed UNGD well pads. Protect PT also mapped public water lines and private water supplies in the Township in relation to the MEO District and proposed UNGD well pads. Protect PT maintains that the maps reflect that the MEO District encourages haphazard UNGD in the Resource District.

Protect PT's expert witness, Dr. Daniels, described the Resource District as essentially a rural residential district where agriculture is a permitted use.

Protect PT argues the Comprehensive Plan envisions an evolving vibrant suburban community. Dr. Daniels testified the Township's population density of 600 people per square mile is indicative of a suburban community. The Comprehensive Plan provides property owners a sense of how the community is expected to develop over the next 20 years.

In contrast, the Industrial Commerce District provides a place where both heavy and light industrial activities are really a preferred use. Protect PT therefore argues that the MEO District is introducing UNGD, a heavy industrial use, into an area designated for development in the Comprehensive Plan as an evolving suburban community.

Protect PT further argues that in the context of evaluating substantive validity claims related to exclusionary zoning, the reasonable development of minerals is only one of several factors listed in Section 603 of the MPC that should be considered. See Larock v. Bd. of Supervisors of Sugarloaf Twp., 866 A.2d 1208 (Pa. Cmwlth. 2005). Applying an equivalent standard in this case, Protect PT asserts, requires that a court consider how the Zoning Ordinance balances UNGD with the various other factors listed in Section 603, including protection of prime agricultural land, and protection of natural and historic resources. Protect PT argues the trial court's failure to balance these factors in tailoring the MEO District to local conditions is a substantial factor weighing in favor of invalidating the Zoning Ordinance.

Because the MEO District allows UNGD in the non-industrial Resource District, Protect PT asserts the MEO District clearly conflicts with the Township's community development objectives and Comprehensive Plan. Thus, Protect PT contends the Zoning Ordinance is arbitrary and unconstitutional in that it establishes an irrational zoning framework.

In sum, Protect PT argues that the purpose of zoning is to separate conflicting land uses, to protect the property value and to protect public health, safety and welfare. To fulfill that purpose, a municipality must identify uses that will cause conflicts, often based on factors such as noise, dust, odors, light and pollution. The municipality must then design an ordinance to minimize those conflicts.

Thus, Protect PT asserts the MEO District is an arbitrary zoning district which permits the haphazard development of UNGD, which will lead to land use conflicts with Township residents in the Resource District. As such, Protect PT argues the trial court erred and abused its discretion in concluding that UNGD has a long history in the Township, thereby making it compatible with residential land uses and the Comprehensive Plan.

b. MEO District Lacks Specific and Targeted Provisions

Protect PT next contends the MEO District is invalid because it does not have specific and targeted provisions tailored to local conditions. Rather, it authorizes industrial development over about 55% of the Township. The MEO authorizes deep mining, surface mining, sand, gravel and limestone excavation,

UNGD, conventional drilling and the storage of explosives and other hazardous or toxic materials.

The MEO District inexplicably overlays the Township's most intensive land use district, the IC District and its least intensive land use district, the Resource District. Given the Township's growing suburban population, Protect PT argues it is clear the MEO District was not tailored to local conditions. Rather, it blankets the IC and Resource Districts without any consideration for where it would be appropriate to locate UNGD. The purpose of an overlay district is to create specific provisions that conserve natural resources or realize development objectives without unduly disturbing the expectations created by the existing zoning ordinance. Protect PT contends that the IC District is the only location where UNGD is allowed in a manner sufficiently protective of a citizen's substantive due process rights.

In other words, the MEO District creates an industrial zone out of the Resource District, significantly changing the expectations of property owners in the Resource District. Citing Main Street and Robinson II, Protect PT argues the MEO's disruption of expectations created by the underlying Resource District violates both substantive due process principles and the standards for an appropriate overlay district.

Protect PT argues the purpose of the Resource District is to provide land for continuing agricultural operations, resource management, timber harvesting, outdoor recreation, and low density single-family residential development. Ord. §190-402(A). The testimony at the hearing established that

UNGD is a heavy industrial activity incompatible with the main purposes identified in the Resource District.

The MEO District is arbitrary because its purpose is to provide for the extraction of minerals where the population density is low and significant development is not projected for the near future. See Ord. §190-407(A). Protect PT claims the Township, which is a growing residential community, failed to establish where that growth is taking place, or where it is expected to occur in the future. Because the MEO District allows for UNGD to occur in the Resource District without any consideration of the long-term impact on neighboring residential properties, it is arbitrary. Therefore, Protect PT urges, the trial court's conclusions to the contrary must be reversed.

2. Analysis

First and foremost, in accord with Section 303(c) of the MPC, no action by the governing body of a municipality shall be invalid or be subject to challenge on appeal on the basis that such action is inconsistent with, or fails to comply with the provisions of a comprehensive plan. 53 P.S. §10303(c); Springwood Dev. Partners, L.P. v. Bd. of Supervisors of N. Cornwall Twp., 985 A.2d 298 (Pa. Cmwlth. 2009) (failure to conform to requirements of comprehensive plan does not invalidate a zoning amendment); Todrin v. Bd. of Supervisors of Charlestown Twp., 367 A.2d 332 (Pa. Cmwlth. 1976) (holding that governing body is not even bound by formally adopted comprehensive plan).

Further, the trial court credited Huntley's expert, Professor Pifer, that oil and gas development has more than a 100-year history in Westmoreland County. See Frederick (fact-finder accepted similar testimony by Professor Pifer). In addition, as discussed above, previous Township zoning ordinances offered much less regulation of oil and gas development than does the current Zoning Ordinance. In particular, the 1995 zoning ordinance authorized oil and gas drilling throughout the Township as a special exception with very few other requirements. In contrast, the Zoning Ordinance limits oil and gas drilling to the MEO District.

Notably, the Resource District primarily addresses resource management, not residential development. In addition, the MEO District does not blanket the Resource District. Rather, the MEO District specifically excludes areas of dense residential and commercial activity. The MEO District also increases some of the state-imposed setbacks. As a result of the increased setbacks, UNGD is limited to less than 10% of the Township.

The purpose of an overlay district is to craft provisions that conserve natural resources or realize development objectives without unduly disturbing the expectations created by the existing zoning district. Main St. The MEO District meets those objectives by providing for the preservation of agricultural operations and development opportunities for owners of mineral resources. In creating the MEO District, the Township properly balanced the rights of property owners seeking to develop their mineral resources with the need to ensure the health, safety and welfare of neighboring community members and property owners.

Furthermore, in the MEO District, 77.9% of the land is under oil and gas leases. In Gorsline II, our Supreme Court determined that municipalities are empowered to permit oil and gas development in any or all of its zoning districts. The Gorsline II Court, rather than relegating UNGD solely to industrial zones, instead noted that its decision should *not* be misconstrued as an indication that UNGD was fundamentally incompatible with agricultural and residential zoning districts. As discussed above, in Frederick we upheld the ZHB's determination that the objectors failed to prove that the zoning ordinance (which allowed UNGD in every zoning district) violated substantive due process. Regardless of the zoning district, we observed in Frederick that UNGD must satisfy exacting standards designed to protect neighboring property owners from cognizable injury.

Here, unlike Frederick, UNGD is permitted only in the MEO District, and only by special exception. As noted above, the trial court determined that UNGD is compatible with, and even beneficial to, the rural uses permitted in the Resource District. Although low-density residential properties are permitted in the Resource District, resource development uses are also permitted. Protect PT failed to present any credible evidence indicating UNGD would be harmful to the health, safety or welfare of properties neighboring UNGD operations.

Finally, our independent review of the 2005 Comprehensive Plan reveals concrete ways in which the process and result of the Zoning Ordinance are fundamentally compatible with the Plan. First, the Comprehensive Plan recommends more flexibility in regulating land use and land development. R.R. at 989a (addressing current and future land use). Among identified flexible zoning

techniques is the adoption of additional overlay zones. Id. Second, the Comprehensive Plan observes that future land use planning will be more likely to succeed if based upon broad consensus and citizen vision. Id. The extensive development process for the Zoning Ordinance is relevant in this regard. Third, the Comprehensive Plan specifically calls for consideration of a “Rural Resource Area” providing for extractive industries, among other uses. R.R. at 995a (addressing implementation goals to limit the impact of development on the natural environment). Notably, the Comprehensive Plan contains a map of then-existing gas and oil well locations. R.R. at 1046a.

Considering the foregoing, we reject Protect PT’s contention that the MEO District is invalid because it is inconsistent with the Comprehensive Plan or Resource District residents’ reasonable expectations. The Resource District clearly provides for resource development. We also reject Protect PT’s erroneous contention that the MEO District is invalid because it does not have specific and targeted provisions tailored to local conditions. To the contrary, the MEO District excludes densely populated areas. Further, Analyst Gehringer, Huntley’s expert, credibly testified that the Zoning Ordinance imposes 600-foot setbacks from protected structures and 200-foot setbacks from property lines, thereby limiting UNGD to less than 10% of the Township. See N.T., 6/5/18, at 868-70, R.R. at 728a.

C. ERA

1. Contentions

Protect PT next contends the Zoning Ordinance and the trial court’s decision fail to protect Township residents’ right to use, enjoy and protect their

property under Article I, Sections 1 and 2 of the Pennsylvania Constitution,¹¹ and their right to a healthy environment under the ERA.

Citing PEDF and Robinson II, Protect PT argues that under the language of the ERA, all government actors are trustees of the public's natural resources and are required to conserve and maintain those resources for the benefit of all people. Protect PT also cites The Delaware Riverkeeper Network v. Department of Environmental Protection & R.E. Gas Development, LLC (EHB Dkt. Nos. 2014-142-B, 2015-157-B, filed May 11, 2018), 2018 WL 2294492, a decision of the Pennsylvania Environmental Hearing Board (EHB). In that case, the EHB articulated a two-step process for determining compliance with the ERA. The first step involves an evaluation of whether the environmental impacts of the action were considered and whether there was a correct determination that the action would not result in unreasonable degradation, diminution, depletion or deterioration of the environment. The second step involves an evaluation of whether the government entity fulfilled its responsibilities as a trustee under the ERA by acting with prudence, loyalty, and impartiality with respect to the beneficiaries of the natural resources impacted by the action.

Protect PT asserts that although the Township held many meetings prior to enacting the Zoning Ordinance, there is no evidence in the record that the Township actually identified or evaluated the environmental impacts of its decision-making in creating the MEO District. Thus, Protect PT argues the Township, when

¹¹ Pursuant to Article I, Sections 1 and 2 of the Pennsylvania Constitution, all citizens of the Commonwealth enjoy the right to use, enjoy and protect their property. PA. CONST. art. I, §§1, 2.

it enacted the MEO District, failed to consider the environmental impacts of its decision.

Further, rather than acting with prudence, loyalty and impartiality on behalf of its citizens, Protect PT asserts the Township succumbed to the pressure of the very outside interests looking to conduct UNGD in the Township. In particular, Protect PT alleges the Township settled a \$300 million lawsuit brought against it by Intervenor Apex by imposing industry-preferred standards in the Zoning Ordinance. Protect PT thus maintains the Township's enactment of the MEO District violates the ERA and will result in unreasonable environmental degradation in the Township.

2. Analysis

Section 190-641(D) of the Zoning Ordinance, specifically relating to a UNGD applicant's obligation to comply with the ERA, provides:

The applicant shall demonstrate that the drill site operations will not violate the citizens of Penn Township's right to clean air and pure water as set forth in [Article I, Section 27] of the Pennsylvania Constitution (the Environmental Rights Amendment). The applicant shall have the burden to demonstrate that its operations will not affect the health, safety and welfare of the citizens of Penn Township or any other potentially affected land owner. The application submitted shall include reports from qualified Environmental individuals attesting that the proposed location will not negatively impact the Township residents' Environmental Rights; and will include air modelling and hydrogeological studies as potential pathways that a spill or release of fluid may follow.

Ord. §190-641(D); R.R. at 918a (emphasis added).

As reflected by Section 190-641(D) of the Zoning Ordinance, the Township did consider its residents' rights under the ERA. Contrary to Protect PT's contention that the Township's settlement imposed industry-preferred standards in the Zoning Ordinance, a realistic assessment of the consent judgment indicates that the settlement did not contravene the Zoning Ordinance. Rather, it actually provides for additional controls on UNGD operations. See R.R. at 1265a-91a.

In Frederick, we reviewed a similar situation elsewhere in Westmoreland County where the objectors argued that the zoning ordinance violated the ERA by placing UNGD, an alleged industrial use, in agricultural areas. The objectors maintained that the UNGD well would degrade the local environment in which people live, work and recreate, including the public natural resources on which people rely.

The objectors in Frederick advanced arguments nearly identical to those raised here. In rejecting these arguments, the fact-finder in Frederick relied on Professor Pifer's testimony that oil and gas development safely coexisted with agricultural uses in the rural areas of the township. We noted in Frederick that the ERA does not call for a stagnant landscape or a derailment of economic development.

By failing to show with credible evidence that UNGD would adversely affect neighboring property owners in the Resource District, Protect PT failed to establish that the Zoning Ordinance "unreasonably impairs" the rights of Township residents under the ERA. See Frederick, 196 A.3d at 697 (emphasis added).

Further, the plurality in Robinson II stated that the ERA does not impose express duties on municipalities to enact specific affirmative measures to promote clean air, pure water and the preservation of different values of our environment. As we recognized in Frederick, municipalities lack the authority to replicate the environmental oversight that the General Assembly conferred upon DEP and other state agencies. The preemption language in Section 3302 of the Oil and Gas Act, left intact after Robinson II, specifically states that a municipality lacks the authority to regulate how gas wells operate. 58 Pa. C.S. §3302; Frederick. Rather, a zoning ordinance must balance the public interests of the community with the due process rights of private property owners. Frederick.

Additionally, the Zoning Ordinance is more stringent than the zoning ordinance in Frederick. See Tr. Ct., slip op. at 25-27. In particular, Section 190-641(D) of the Zoning Ordinance mandates that an UNGD application shall include reports from qualified environmental individuals attesting that the proposed development will not negatively impact the Township residents' ERA rights. Ord. §190-641(D). Consequently, our decision in Frederick is equally applicable here.

In sum, the trial court did not err or abuse its discretion by failing to find that the Zoning Ordinance violated Township residents' rights under the ERA. Frederick; Delaware Riverkeeper (Middlesex).

D. Substantive Due Process

1. Contentions

With respect to its substantive validity challenge, Protect PT argues it met its burden of showing that the Zoning Ordinance is arbitrary and unreasonable and bears no substantial relationship to promoting the public health, safety and welfare. Relying on Dr. Daniels' testimony, Protect PT asserts it established that the location of the proposed well pads in the MEO District overlay of the Resource District is scattered and haphazard. Protect PT further claims the Township failed to identify specific and targeted areas where UNGD would be compatible with similar uses and failed to balance neighboring property owners' reasonable expectations and constitutional rights.

Citing Gorsline II, Protect PT contends that in this case, the Township failed to tailor the Zoning Ordinance to local conditions in the Resource District and instead utilized a blanket overlay district that effectively permits UNGD throughout a majority of the Township's residential areas without any consideration for the adverse impacts that this heavy industrial activity would have on neighboring property owners. Protect PT argues that placing heavy industrial uses in clearly non-industrial areas violates residents' substantive due process rights and rights under the ERA.

2. Analysis

As we noted in Frederick, a substantive due process analysis requires a balancing of the public interest served by the zoning ordinance against the confiscatory or exclusionary impact of regulation on individual rights. Here, Protect PT essentially relies upon expert testimony rejected by the fact-finder. As discussed

above, the trial court fully explained its reasons for its determination that UNGD will not adversely affect the health, safety or welfare of neighboring property owners in the MEO District. As a result, Protect PT failed to satisfy its heavy evidentiary burden of proof in a substantive validity challenge. Frederick.

Similar to the fact-finder in Frederick, the trial court here recognized that natural gas extraction operations were historically commonplace in the Township. Conventional wells are a principal permitted use in the Resource District. See R.R. at 835a. UNGD wells are permitted as a special exception only in the MEO District and are subject to seven pages of various restrictions. See Ord. §§190-407 (R.R. at 850a-53a), 190-641 (R.R. at 915a-18a).

In short, the Zoning Ordinance properly balances the rights of citizens to benefit economically from UNGD, which helps them sustain their agricultural-based livelihoods, with the interests of the general public by adopting an extensive regulatory scheme far beyond that imposed on any other use. The Zoning Ordinance addresses issues such as minimum lot size, required yards, setbacks, wastewater, health and safety, access routes, erosion and sediment control, security, site reclamation, road use, and compliance with the ERA. Also, because the Zoning Ordinance regulates UNGD as a special exception, the Township can impose additional conditions.

As discussed above, Protect PT failed to establish that UNGD posed any substantial actual risk to the environment or health of Township residents. To the contrary, the trial court accepted testimony from Huntley's expert, Professor

Pifer, that UNGD is compatible with the rural and agricultural uses in the Resource District. Consequently, the trial court properly determined that the Zoning Ordinance, and in particular, the MEO District, which permits UNGD in specific and targeted areas of the Resource District that are rural and not densely populated, did not violate substantive due process. Frederick.

IV. Conclusion

Discerning no error, abuse of discretion or constitutional violations in the trial court's opinion and order, we affirm.



ROBERT SIMPSON, Senior Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Protect PT, :
Appellant :
v. : No. 1632 C.D. 2018
Penn Township Zoning Hearing Board :
v. :
Olympus Energy LLC, :
Apex Energy (PA), LLC, and :
The Township of Penn :

ORDER

AND NOW, this 14th day of November 2019, for the reasons stated in the foregoing opinion, the order of the Court of Common Pleas of Westmoreland County is **AFFIRMED**.



ROBERT SIMPSON Senior Judge

Certified from the Record

NOV 14 2019

And Order Exit

APPENDIX B:
TRIAL COURT OPINION

IN THE COURT OF COMMON PLEAS OF WESTMORELAND COUNTY,
PENNSYLVANIA
CIVIL ACTION – LAW

PROTECT PT,

Appellant,

vs.

PENN TOWNSHIP ZONING
HEARING BOARD,

Appellee,

No. 3499 of 2017

vs.

HUNTLEY & HUNTLEY
ENERGY EXPLORATION, LLC, APEX
ENERGY (PA), LLC, and
THE TOWNSHIP OF PENN,

Appellees/Intervenors.

OPINION AND ORDER OF COURT

By Harry F. Smail, Jr., Judge:

This matter is before the Court on a substantive validity challenge filed by Appellant, Protect PT, challenging Ordinance Number 912-2016 Chapter 190, as amended (the “Ordinance”), which was enacted by Appellee, Penn Township Hearing Board (the “Board”), on September 19, 2016. Protect PT specifically challenges the constitutionality of the Ordinance’s Mineral Extraction Overlay District (“MEO District”) inasmuch as it permits unconventional oil and gas development in Penn Township’s Rural Resource District (“RR District”).

By way of procedural background, on April 26, 2017, a *Notice of Substantive Validity Challenge* to the Ordinance was filed with the Board by Protect PT. The Board issued a letter dated June 21, 2017 which indicated that the Board did not intend to take action on the challenge, and so the same was deemed denied. On July 13, 2017, Protect PT filed a *Notice of*

Appeal of Substantive Validity Challenge Deemed Denial, seeking a *de novo* review from this Court. Huntley and Huntley Exploration, LLC (“Huntley”), Apex Energy (PA), LLC (“Apex”) and the Township of Penn (the “Township”) subsequently intervened in this matter. A trial *de novo* was held before this Court on April 9, April 10, June 4, and June 5, 2018. Testimony was received from twenty-one witnesses over the four days of trial, and ninety-three exhibits were moved into evidence. The Court ordered proposed findings of fact, conclusions of law, and proposed orders of court from the parties, along with supporting briefs, and the same were timely submitted and duly considered by this Court in rendering the within Opinion and Order.

FINDINGS OF FACT

The Township of Penn is a first-class township located in Westmoreland County, Pennsylvania, and it contains approximately 20,000 residents. (Trial Transcript p. 752). The Township’s Comprehensive Plan was last updated in 2005, and describes the two primary planning principles for the Township as preserving the area’s rural character and encouraging quality neighborhood scale development. (Exhibit 5). On September 19, 2016, the Township enacted Ordinance No. 912-2106, Chapter 190. The Ordinance established five unique zoning districts in the Township, being the Rural Resource District, the Mixed Density Residential District, the Neighborhood Commercial District, the Commercial Corridor District, and the Industrial Commercial District. (Ex. 1). The Ordinance also created four “overlay” districts, being the Airport Overlay District, the Floodplain Overlay District, the Development Infill Overlay District, and the Mineral Extraction Overlay District. (Ex. EEE).

The MEO District overlays the Industrial Commercial District and the majority of the RR District, with the exception of the densely populated Claridge area. (T.T. p. 795-96, 823). The purpose of the RR District is described as providing “land for continuing agricultural operations, resource management, timber harvesting, outdoor recreation, public and private conservations

areas, low density single family residential, and compatible support uses.” Ordinance § 190-402(A). The purpose of the MEO District is described as providing “areas for the extraction of minerals as defined by the Commonwealth, where the population density is low and significant development is not projected for the near future.” Ordinance § 190-407(A). Mining and conventional oil and natural gas drilling are listed as permitted principal uses in the MEO District, and unconventional oil and natural gas drilling are listed as special exceptions. Ordinance § 190-407(C) and § 190-407(D).

Unconventional gas drilling is subject to the Ordinance’s general development standards, as well as standards particular to the MEO District. Ordinance § 190-635 and § 190-407(G). Requirements include but are not limited to a prohibition on wastewater impoundment storage, dumping and seepage, regular removal of wastewater and hazardous and/or toxic waste, compliance with the Township’s Subdivision and Land Development Ordinance, acquisition of relevant Pennsylvania Department of Environmental Protection (“DEP”) permits, and a minimum lot size of ten acres, as well as a six hundred foot “protected structure” setback and a 200 foot property line setback. Ordinance § 190-407(G). As unconventional gas drilling is a special exception, the Board also has the right to impose additional conditions on the grant of the exception for the purpose of promoting the health, safety and welfare of the Township’s residents. (T.T. p. 744-45).

Section 641(D) requires that the developer of a proposed unconventional natural gas well specifically “demonstrate that the drill site operations will not violate the citizens of Penn Township’s right to clean air and pure water as set forth in Art. 1 Sec. 27 of the Pennsylvania Constitution” through the submission of reports from “qualified environmental individuals” stating that the proposed drilling will not negatively impact these rights. Ordinance § 190-

641(D). Specifically required are “air modeling and hydrogeological studies as potential pathways that a spill or release of fluid may follow.” Ordinance § 190-641(D).

Historically in Penn Township, oil and gas drilling were permitted by ordinance “as of right” since 1977. (T.T. p. 817-18). In 1995, the zoning ordinance began listing oil and gas drilling throughout the entirety of the Township as a special exception subject to four explicit criteria, including setbacks of no further than 200 feet. (T.T. p. 277, 818). Mr. William Roberts, community development director for the Township, testified as to the process of amending the 1995 Ordinance. (T.T. p. 719). A new revision of the zoning ordinance began in 2009, with discussions regarding unconventional natural gas development (“UNGD”) beginning in November of 2010. (T.T. p. 721-25). Enactment of an oil and gas ordinance was stalled by the passage of Act 13 and the subsequent *Robinson Township* legislation. (T.T. p. 727-29). Progress resumed in 2014, and a pending ordinance was placed into effect on October 20, 2014, which underwent at least six drafts and one official amendment. (T.T. p. 734, Ex. DDD). The current version of the Ordinance was enacted on September 19, 2016. Between 2010 and the final adoption of the Ordinance in 2016, the subject of UNGD was addressed at a minimum of nineteen Planning Commission meetings, fifty-three Board of Commissioners meetings, three Board of Commissioners meetings dealing specially with oil and gas issues, a joint Planning Commission/Board of Commissioners meeting, a town hall meeting organized by the Board of Commissioners, and two public hearings before the Board of Commissioners. (Ex. CCC). The public town hall meeting listed seven speakers invited by Protect PT, including its executive director, Ms. Gillian Graber. (Ex. CCC).

At trial, Protect PT presented expert testimony from Anthony Ingraffea, Ph.D., Edward C. Ketyer, M.D., and Thomas L. Daniels, Ph.D. Dr. Ingraffea is an engineer and co-founder of Physicians, Scientists and Engineers for Healthy Energy (“PSE”). (T.T. p. 10, 57). He

expressed his full opposition to shale gas development. (T.T. p. 60). He stated that he testifies as an expert witness in order to stop or slow down shale gas development, and in this particular case, in order to slow it down. (T.T. p. 63).

Dr. Ingraffea testified that until the present century, it was not economically or technologically feasible to remove gas from shale on a large scale, in what is now known as UNGD. (T.T. p. 17). He described the different phases of UNGD after exploration and investigation, and conceded that the first phase, "construction," usually lasts around thirty days, and produces air emissions and dust. (T.T. p. 20-22, 80). He conceded that this phase is similar in nature to and can also be exceeded by the construction necessary for many types of commercial and residential development. (T.T. p. 80-82). He agreed that the actual "drilling" phase can last from two to three weeks, and he testified that this phase generates dust, noise, light, and various emissions. (T.T. p. 22-23, 86). He described the "completion" phase where hydraulic fracturing occurs, which produces noise, air emissions and massive amounts of waste water, and he agreed that this phase could be completed in approximately ten days. (T.T. p. 34, 87). He additionally conceded that the last phase, the "production" phase, is the majority of the lifespan of an unconventional gas well, after the well is fully constructed, all equipment is installed, and the well begins producing gas. (T.T. p. 87, 93). He testified to a reduction in truck traffic during the production phase, associating it only with "normal maintenance activities and removal of any materials being produced on the well by trucks, if there are any." (T.T. p. 87).

Throughout his testimony, Dr. Ingraffea testified to what he considered heavy industrial activity during the construction, drilling, and completion phases of UNGD, however he did not testify that a completed and in-production unconventional natural gas well constituted this same type of heavy industrial activity. (T.T. p. 27-28, 36-37, 40-41). Dr. Ingraffea additionally acknowledged that since 2014 venting and flaring is no longer permissible in Pennsylvania, and

that condensate tanks will not be used in the Township, two concerns which were brought up earlier in his testimony. (T.T. p. 68, 69). Dr. Ingraffea cited to high levels of well integrity issues, but conceded that the figures he used in determining well integrity issues were skewed by numbers from northeastern Pennsylvania, which has historically had an 8.5 times greater issue with well integrity compared to the rest of the Commonwealth. (T.T. p. 71-72). Dr. Ingraffea also cited to numerous DEP water supply determinations to indicate the dangers of UNGD, however he acknowledged that only 22 of the 294 historical determinations presented were located in southwestern Pennsylvania, and a number of these concerned conventional wells. (T.T. p. 73-77). Based upon the foregoing factual findings, the Court declines to adopt Dr. Ingraffea's opinion that UNGD causes significant adverse impacts to air and water quality, community development, human-induced seismicity, climate change, and animal health, as well as Dr. Ingraffea's opinion that UNGD is a heavy industrial activity.

Dr. Ketyer is a pediatrician in Washington County, Pennsylvania. (T.T. p. 113). He is not qualified to do formal human health risk assessments. (T.T. p. 134). Dr. Ketyer is a consultant with the Southwest Pennsylvania Environmental Health Project ("SPEHP"). (T.T. p. 134). The SPEHP solicits patients who believe they may have health symptoms as a result of oil and gas development. (T.T. p. 137-8). Dr. Ketyer is also a board member of the Physicians for Social Responsibility, whose goal is to develop "a fossil fuel free world." (T.T. p. 142-43).

Dr. Ketyer testified that exposure to environmental pollutants and contaminants can have a variety of negative health impacts. (T.T. p. 115-16). In preparing his expert report, he relied on studies from Steinzor, Rabinowitz, Weinberger, and Tustin, all of which showed a correlation between self-reported adverse health effects and proximity to natural gas wells. (T.T. p. 118-123). Dr. Ketyer also reviewed the Webb, Casey, Stacy and McKenzie studies, which demonstrated correlations between adverse pregnancy and birth effects and proximity to natural

gas wells. (T.T. p. 123-26). Dr. Ketyer opined that UNGD “endangers public health and safety,” particularly that of those especially close to the activity and vulnerable populations. (T.T. p. 130-31).

Dr. Ketyer noted that he did not review a significant amount of the published data regarding actual levels of air emissions near UNGD, including the Maskrey, Goetz and Paulik studies which contradicted the findings of the above studies, as well as DEP and Allegheny County air monitoring data. (T.T. p. 150-58). Dr. Ketyer additionally conceded that any potential harm from air pollutants is dose dependent, and that the studies relied upon in his report only track correlation and do not prove causation. (T.T. p. 149-50, 161). Additionally, the Steinzor study was done by Earthworks, a group opposed to UNGD, and the Rabinowitz and Weinberger studies were conducted either in areas where the SPEHP solicited patients (Rabinowitz) or through a consultant with the SPEHP (Weinberger). (T.T. p. 164-71). Finally, Dr. Ketyer noted that the birth outcome studies used in his report did not use actual exposure data, instead relying on exposure surrogates, and that these studies did, in fact, reach inconsistent results with some failing to find the statistical correlations linking adverse outcomes and proximity to UNGD. (T.T. p. 171-73). Based upon the foregoing factual findings, the Court declines to adopt Dr. Ketyer’s opinion that emissions from unconventional natural gas development presently pose a threat to human health.

Protect PT next provided testimony from Thomas Daniels, Ph.D., Professor of City and Regional Planning at the University of Pennsylvania. (T.T. p. 207). Dr. Daniels testified as to the Township’s zoning and its comprehensive plan. (T.T. p. 218-25). He testified that Pennsylvania’s Municipalities Planning Code requires the reasonable development of minerals and gas. (T.T. p. 233). Dr. Daniels opined to the Court that he considers UNGD to be a “heavy industrial use” and that the MEO district does not fulfill the purpose of the Township’s

comprehensive plan as the RR district is “predominantly residential.” (T.T. p. 233-35). He stated that the MEO as it exists has led to a “scattered pattern of wells” with heavy truck traffic and inconvenience to the Township’s residents. (T.T. p. 236).

Dr. Daniels acknowledged that farming could also be considered an “industrial activity,” as it involves chemicals, odors, dust, noise and heavy machinery. (T.T. p. 252-53). He also acknowledged that farming can create much more surface impact than UNGD. (T.T. p. 253). He conceded that oil and gas development is a legal and not undesirable use in Pennsylvania. (T.T. p. 275). Dr. Daniels acknowledged that the Pennsylvania Agricultural Security Act and the Pennsylvania Clean and Green Law both explicitly provide for oil and gas development in agricultural areas for the benefit of Pennsylvania’s farmers, and that properties in the Township are currently enrolled in these programs. (T.T. p. 265-668). Based upon the foregoing factual findings, the Court declines to adopt Dr. Daniels’ opinions that UNGD is a “heavy industrial use” that is incompatible with both the Township’s comprehensive plan and agricultural areas in general.

Appellees presented expert testimony from Samuel A. Flewelling, Ph.D., Dr. Christopher M. Long, and Ross Pifer, J.D., LL.M. Dr. Flewelling, an expert offered by Huntley, is an environmental at-risk science consultant for the Gradient firm, and is a member of the American Geophysical Union and the Geological Society of America. (T T. p. 310). He holds a Ph.D. of environmental science from the University of Virginia, and has extensive experience regarding the impact of hydraulic fracturing on groundwater as well as general matters of hydrogeology. (T.T. p. 310-315).

He opined that both conventional and unconventional oil and gas development have an extensive history in Westmoreland County, Pennsylvania dating back over one hundred years, with approximately 5,384 conventional wells and 252 unconventional wells drilled in the county

between 1980 and 2017. (T.T. p. 323-24). He noted that unconventional wells are more compact than conventional wells, and also produce more gas. (T.T. p. 324-25). He stated that risks of gas leaks into the local drinking water are unlikely due to Department of Environmental Protection casing and cementing requirements. (T.T. p. 325-32, 359). He also noted that contamination to drinking water is not likely through the deep hydraulically fractured rock as the fractures are normally lower than the aquifer; a low permeability layer creates a barrier, and there is no force driving the fluid upward. (T.T. p. 359-61). Based upon the foregoing factual findings, the Court adopts Dr. Flewelling's expert opinions including with respect to groundwater and hydrogeology as expounded upon both above and on the record in this matter.

Huntley next provided the expert testimony of Dr. Christopher Long. Dr. Long holds a Doctoral Degree in Environmental Health from the Harvard School of Public Health, and he is a certified toxicologist. (T.T. p. 370). He routinely conducts human health risk assessments and has experience studying the air quality impacts and risks caused by UNGD. (T.T. p. 371-72). He was qualified by this Court without objection as an expert in toxicology, air emission exposure assessment and human health risk assessment. (T.T. p. 372, 376).

Dr. Long testified that all air emissions associated with all phases of UNGD excepting production are transient and short-term. (T.T. p. 377). Various air pollutants associated with UNGD are ubiquitous in everyday life, such as fine particulate matter ("PM_{2.5}"), and all persons are regularly exposed to the same on a short term basis from everyday activities. (T.T. p. 378-79). A large amount of air monitoring presently occurs in the Marcellus Shale region near gas development and is conducted by various groups. (T.T. p. 382-83). The DEP has monitored PM_{2.5} levels in Greene, Bradford and Tioga Counties, with no findings of elevated PM_{2.5} levels. (T.T. p. 383-86). The Bradford and Tioga air monitors, as well as a monitor in Washington County found nitrogen dioxide levels far below the relevant national standard. (T.T. p. 386-89).

DEP monitors near UNGD in Washington, Wyoming and Susquehanna Counties all report average benzene levels. (T.T. p. 389-92). The Allegheny County Health Department has placed two monitors for Volatile Organic Compounds (“VOCs”) near well pad activity, which have found VOC levels far below levels of concern for human health. (T.T. p. 392-94).

Dr. Long also noted the Maskrey study, which found VOC levels during periods of UNGD activity to be generally comparable to control measurements. (T.T. p. 395-98). He cited the Goetz study, which found a lack of elevated VOCs which present toxicity to humans at the fence lines of UNGD sites throughout Pennsylvania during various stages of development. (T.T. p. 398-400). He noted several other studies with similar findings relative to VOCs, and he noted that all of the studies relied upon by Dr. Ketyer were not based on actual air monitoring data, but rather exposure surrogates and/or proxies. (T.T. p. 400-412). Dr. Long concluded that there now exists a large body of reputable scientific data based on actual air monitoring studies which demonstrates a lack of merit to claims of air exposures to pollutants caused by UNGD which would cause public health concerns. (T.T. p. 456). Based upon the foregoing factual findings, the Court adopts Dr. Long’s expert opinions including with respect to toxicology, air emission exposure assessment and human health risk assessment as expounded upon both above and on the record in this matter.

Huntley’s final expert witness in this matter, Professor Ross Pifer, is a professor at the Pennsylvania State University School of Law, director of the Center for Agriculture and Shale Law and director of the Rural Economic Development Clinic. (T.T. p. 460-61). Professor Pifer has visited UNGD sites between fifty to seventy five times during various stages of development, and has focused his scholarly research on the interplay between UNGD and the community, especially agricultural areas. (T.T. p. 466-72). Professor Pifer has made over three hundred presentations regarding oil and gas development in the past ten years, and his expert

testimony regarding the compatibility of oil and gas with rural and agricultural communities has been accepted by zoning hearing boards in Westmoreland, Lawrence and Washington counties. (T.T. p. 467-71).

Professor Pifer testified that oil and gas development in Westmoreland County dates back to approximately 1859, and that by the beginning of the 1900s, Pennsylvania was a key producer of natural gas in the nation. (T.T. p. 476-77). As of 2017, one hundred and twenty four conventional natural gas wells were active in Penn Township. (T.T. p. 478). UNGD primarily takes place in rural and semi-rural counties in the Commonwealth, and Westmoreland County presently ranks ninth in the state for UNGD, with 283 wells already drilled. (T.T. p. 479-80). Hydraulic fracturing technology has been in existence since 1947. (T.T. p. 480). UNGD provides more benefit to agricultural regions than conventional gas drilling, as it has a lower surface impact; where a conventional well may be able to access twenty to forty acres, an unconventional well can access 1,280 or more acres. (T.T. p. 481-82). Professor Pifer identified approximately one hundred municipalities (some with zoning ordinances and some without) in Pennsylvania where UNGD, single family homes, and agricultural uses all currently coexist. (T.T. p. 484-88). Twenty two reviewed ordinances allow UNGD in all zoning districts. (T.T. p. 489). Twenty four municipalities in Westmoreland County alone have no zoning whatsoever, allowing UNGD throughout the entire municipality. (T.T. p. 491-93).

Professor Pifer also noted that Pennsylvania law explicitly encourages coexistence of oil and gas development and agriculture through protections provided in the Clean and Green Law and the Agricultural Area Security Law, which many farmers throughout the Township have participated in and relied upon. (T.T. p. 497-99, 72 P.S. Section 5490, 3 Pa.C.S.A. Section 901). Additionally, Professor Pifer noted the benefits of UNGD to agricultural landowners, including financial benefits from gas leasing that enable the farmers to maintain agricultural operations on

their land throughout generations of farmers. (T.T. p. 495-96). This allows the rural lands to maintain their agricultural character, and prevents the forced sale of farmlands for the development of commercial and/or residential areas. (T.T. p. 495-96). Professor Pifer opined definitively that UNGD is compatible with agricultural and rural land uses, both generally and specifically as laid out in the MEO District under the Ordinance. (T.T. p. 500-01). Based upon the foregoing factual findings, the Court finds Professor Pifer qualified as an expert specifically with regard to the compatibility of UNGD and agricultural and rural uses in Pennsylvania, and adopts Professor Pifer's expert opinions regarding the same as expounded upon both above and on the record in this matter.

Huntley additionally presented testimony from Jason Paul Gehringer, primary Geographic Information System ("GIS") analyst for the land development, construction, and regulatory departments for Huntley. (T.T. p. 861-62). Mr. Gehringer testified to the existence of the existence of the Oakford Storage Field, a depleted natural gas reservoir that lies beneath approximately one quarter of the Township's land mass. (T.T. p. 855-66). Three interstate pipelines currently transport gas in and out of the Storage Field. (T.T. p. 859). Mr. Gehringer also reported to the historical existence of 218 convention gas wells in the Township, 132 of which are still in operation. (T.T. p. 861).

Mr. Gehringer's general job functions include overseeing GIS analysis to ensure Huntley's compliance with all applicable state and municipal regulations, including those in Penn Township. (T.T. p. 861-62). After taking into consideration all setbacks, regulations, and the general dimensions of the zoning districts, Mr. Gehringer calculated that only approximately 9.46 percent of the Township's land mass is available for mineral extraction. (T.T. p. 864-68). Mr. Gehringer determined that 12,911 acres of land in the Township are subject to oil and gas leases, being 65.56 percent of the total land area of the Township. (T.T. p. 869-70).

Additionally, 8,412 acres of land in the MEO district are subject to oil and gas leases, making up 77.9 percent of total land in the MEO District. (T.T. p. 869-70)

Apex presented testimony from Christopher James Hess, general counsel, vice-president of land development, and corporate secretary for Apex. (T.T. p. 883). Mr. Hess oversees regulatory compliance, as well as leasing and land functions for the company. (T.T. p. 883). Apex presently leases approximately 7,509 acres in the Township. (T.T. p. 885). Apex maintains exclusive rights to drill in the Marcellus Shale beneath the Oakford Storage Field. (T.T. p. 887-88). Apex received approval to develop the Quest well pad in 2015, and the well pad has been developed and is currently in production. (T.T. p. 923). Apex currently has the White, Beattie, and Draftina well pad sites planned over the area of the Oakford Storage Field. (T.T. p. 887-88). Apex has four other pending sites in the Township, being the Deutsch, Drakulic, Numis and Backus well pads. (T.T. p. 923).

Mr. Hess identified the steps of development in UNGD, including leasing, design, permitting, and construction. (T.T. p. 891-92). He described the measures taken by the company to prevent spills and releases at the site. (T.T. p. 893-95, 902). He testified to the agreement Apex currently maintains with Westmoreland County to obtain water through municipal taps, eliminating approximately 3,000 water truck trips per well. (T.T. p. 898-99). He noted the various permits required from the Township, specifically the special exception permit and the preliminary and final land development approvals, along with any potential roadway-use agreements. (T.T. p. 903). He described the DEP required well permit which requires various protections for surrounding water sources. (T.T. p. 904-06). He testified to the DEP required ESCGP-2 permit, which describes a comprehensive plan for surface disturbance and mitigation. (T.T. p. 904-06). He also described the PennDOT required highway occupancy permit, required when a state road is used or a curb cut into a state road is required. (T.T. p. 910-11).

Mr. Hess testified that during the production phase no light is generated at the well site, and no noise is audible at the property line. (T.T. p. 901). He noted that in the production phase, the normal traffic requires only two truck trips per day, with a waste water truck visiting the site a few times per month. (T.T. p. 901). He stated that Apex has not received any noise, light, or traffic complaints regarding the Quest site since the well has entered the production phase. (T.T. p. 901-02).

Testimony was provided by Protect PT executive director, Gillian Graber. (T.T. p. 536). She testified that the mission of Protect PT is to protect the residents of the Penn-Trafford Area from the effects of UNGD. (T.T. p. 538). Protect PT members often engage in the local civic process, including involvement in special exception hearings, meetings, and other public forums. (T.T. p. 538-40). Ms. Graber presented a map showing the locations of the residences of Protect PT members relative to proposed and developed well pads and water lines and sources. (T.T. p. 541-50). Protect PT has also placed noise and air quality monitors at residences around the Township at property owners' requests. (T.T. p. 573).

Lay testimony was provided by eight additional Protect PT members, the first being Ms. Tracey Mason. Ms. Mason has lived in the Mixed Density Residential ("MDR") District for eight years. (T.T. p. 596-97). She stated that she noticed noise and light and had difficulty sleeping during the Quest well pad drilling phase. (T.T. p. 598, 605). She noted that now that the well pad is in production, there are no permanent lights and vehicle traffic to the pad is minimal. (T.T. p. 610-11).

Ms. Beth Jamison, president of the board of directors of Protect PT, also testified. (T.T. p. 615). Ms. Jamison has lived in the Township in the RR District for twenty six years. (T.T. p. 615). She noted that she did not examine the existing zoning ordinance at the time of the purchase of her home. (T.T. p. 634). Ms. Jamison indicated that four well pads have been

developed or proposed near her home, being Draftina and White in Penn Township and Stewart and McIlvaine in neighboring Salem Township. (T.T. p. 617-618). She noted that light and noise during the development of the Stewart well pad (a Salem Township well pad) caused disruption of her peace and quiet and affected her sleep. (T.T. p. 620-22). She stated that UNGD in the MEO District was incompatible and “disrupted the zoning I bought the property for.” (T.T. p. 627).

Mr. Harold Baker next provided testimony. Mr. Baker has resided in the Township for sixty seven years, and lives in the present MEO District. (T.T. p. 637). His property is located approximately 700 feet from the Beattie well pad, and he stated that he is concerned for the air and water quality, quiet nature of his property, and traffic levels. (T.T. p. 639-40).

Testimony was next provided by Ms. Patricia Emich, a Protect PT member who has lived at her address in the MDR District for three years. (T.T. p. 644-45). Her home is located near the Poseidon, Numis and Backus well pads. (T.T. p. 646). Poseidon, which has already been constructed, drilled and hydraulically fractured, is located in the Industrial Commercial District. (T.T. p. 646). She did not note any impacts from this development. (T.T. p. 654-55). Numis and Backus have not yet been developed, but Ms. Emich worries about noise, light and air emissions from these sites, as well as water quality. (T.T. p. 647).

Lay testimony was provided by Ms. Judy Amorose, a Protect PT member who has lived in Salem Township for approximately fourteen years. (T.T. p. 668). She lives approximately one mile from the Quest well pad. (T.T. p. 658-59). She has been impacted by traffic, emissions, air quality, light and noise from the development of UNGD in Salem Township. (T.T. p. 661-62). She worries that the proximity of well pads will cause a devaluation of her property. (T.T. p. 664-65).

Lay testimony was next provided by Dr. Lawrence Irr, a Protect PT member who has lived in Trafford, Pennsylvania for over eight years. (T.T. p. 670-71). He lives approximately one half mile from the Drakulic well pad. (T.T. p. 672). He is concerned with the impact that drilling may have on water pressure, groundwater, traffic, emissions, noise, property values, and radioactivity. (T.T. p. 673-76). He has not had any experience as to this point with negative effects from the current work on the Drakulic well pad. (T.T. p. 677). He also noted that he did not review the Township Zoning Ordinance prior to purchasing his property. (T.T. p. 678).

Mr. Douglas Chew also provided testimony. Mr. Chew is a Protect PT member whose family farm is located in the RR District. (T.T. p. 680-81). He currently owns a small interest in the property, which is subject to an oil and gas lease on which the Draftina well pad has been proposed. (T.T. p. 681-82). Mr. Chew testified that he would prefer the Draftina well pad not be constructed, as his family is considering transferring all ownership interest in the farm to him, and he would like to use it to raise grass fed beef and/or as a wedding venue; having a gas well would make this almost impossible. (T.T. p. 681-85).

Lay testimony was next provided by Ms. Patricia Wendell, a Protect PT member and property owner of thirteen years in the MDR District. (T.T. p. 688). Three well pads have been proposed near her home, with only the Poseidon well currently under development. (T.T. p. 690-93). She stated that she did not hear any noise during its construction phase, but did hear noise when the “fracking” began. (T.T. p. 690-91). She cannot see the Poseidon well pad from her home, but can see it from the cart path in her residential community, as a “large swath” of land has been cleared for another residential development. (T.T. p. 691-95). She stated that she did not review the Township zoning ordinance prior to purchasing her property. (T.T. p. 693).

The final Protect PT lay witness to testify was Ms. Danielle LeJeune. Ms. LeJeune has lived in the RR District for nine years. (T.T. p. 697-98). Two well pads (Gaia and Metis) along

with a staging pad and impoundment area have been proposed 2,000 to 2,500 feet from her home. (T.T. p. 700-701). She testified that a previous well was drilled approximately 1,500 feet from her home and caused concerns regarding noise and light pollution, truck traffic, property devaluation, and health and safety issues. (T.T. p. 699-700). She is concerned with potential health impacts, air emissions, light and noise pollution, property devaluation and truck traffic concerning the present well pads. (T.T. p. 701-703). She did not review the Township zoning ordinance prior to the purchase of her home. (T.T. p. 703).

Huntley also presented lay testimony from two Township property owners. Mr. Richard Joseph Hajnosz has lived in the Township since 1944 on a 170 acre property near the Gaia and Metis well pad sites. (T.T. p. 701-703). Mr. Hajnosz participates in the Conservation Reserve Enhancement Program (“CREP”), wherein he receives an annual lease payment in exchange for planting various trees and crops to preserve the local watershed and provide food and homes for wildlife. (T.T. p. 832-34). This lease payment is potentially not enough to maintain the property and pay the property taxes, and so he is relying on an oil and gas lease with Huntley to provide royalties from the Gaia pad (in addition to an up-front bonus) so that he can maintain his land under the CREP program and avoid selling his property for residential development, thus diminishing the agricultural character of the land. (T.T. p. 834-35).

Lay testimony was also provided by Mr. Adam Ferri. Mr. Ferri’s family owns approximately 133 acres in the Township which has been farmed since 1975, and where his parents have lived since the early 1980s. (T.T. p. 840-41). Mr. Ferri’s family currently has an oil and gas lease through Huntley, and they have received an up-front bonus payment on which they have relied financially. (T.T. p. 842). If they are not able to receive royalties from the projected gas development, the family will have to consider selling the property for residential development, which would negatively impact the rural and agricultural nature of the property,

and create greater permanent impacts such as vehicle traffic and impervious surface loss. (T.T. p. 843-55).

DISCUSSION AND ANALYSIS

When reviewing a challenge to a zoning ordinance in which additional evidence was taken by the trial court, the standard of review is *de novo*. *Larock v. Board of Supervisors*, 961 A.2d 916, 926-927 (Pa. Commw. Ct. 2008). A challenger to a zoning ordinance has a heavy burden, as zoning ordinances are presumed valid. *Woll v. Monaghan Township*, 948 A.2d 933 (Pa. Cmwlth. 2008), *appeal denied*, 967 A.2d 962 (Pa. 2009). An inquiry into the constitutionality of a zoning ordinance specifically requires a substantive due process analysis. *Plaxton v. Lycoming Cty. Zoning Hearing Bd.*, 986 A.2d 199, 205 (Pa. Commw. Ct. 2009). “Under such analysis, the party challenging the validity of provisions of the zoning ordinance must establish that they are arbitrary and unreasonable and have no substantial relationship to promoting the public health, safety and welfare.” *Id.* Additionally, the Court must balance “the public interest to be served by the ordinance against the confiscatory or exclusionary impact of the ordinance on individual property rights...” *Delchester Developers, L.P. v. Zoning Hearing Bd. Twp. London Grove*, 161 A.3d 1081, 1091-92 (Pa. Commw. Ct. 2017).

Appellant, Protect PT, alleges that the MEO District violates the Township residents’ substantive due process rights, as well as their constitutional rights under Pennsylvania’s Environmental Rights Amendment, by allowing UNGD to take place in the RR District, which it considers primarily residential. Protect PT claims that the MEO District is designed in such a way that UNGD is able to be developed in a haphazard manner, creating nuisances and health risks for property owners, and is thus invalid. The Court will address Protect PT’s major arguments in turn.

SUBSTANTIVE DUE PROCESS

Protect PT first argues that the Township failed to consider the effects of UNGD on neighboring property owners in constructing and enacting the Ordinance. Protect PT contends that UNGD is a heavy industrial use, and that allowing for UNGD in what Protect PT perceives as a majority of the township constitutes a nuisance and/or health and safety risk for neighboring property owners in the RR District, thereby violating their substantive due process rights.

It is undisputed that UNGD is a lawful and not disfavored use in the Commonwealth of Pennsylvania. According to Pennsylvania's Municipalities Planning Code ("MPC"), "[z]oning ordinances shall provide for the reasonable development of minerals in each municipality." 53 Pa. Stat. Ann. § 10603(i) (West 2016). An integral purpose of the RR District is resource management. Ordinance § 190-402(A). This includes the management of minerals, and "minerals" are defined by the MPC to include natural gas. 53 P.S. § 10107(a) (West 2016). Indeed, the MPC "permits the governing body of a municipality to amend its zoning ordinances to permit oil and gas development in any or all of its districts." *Gorsline v. Board of Supervisors of Fairfield Township*, 186 A.3d 375, 389 (Pa. 2018). In determining that UNGD is appropriate in the MEO District, the municipality carefully and appropriately balanced its obligation to provide for the management and development of minerals, along with the inherent rights of property owners, against all of the Township residents' health, safety and welfare.

It is important to note that, under Pennsylvania law, "zoning only regulates the *use* of the land and not the particulars of development and construction." *Schatz v. New Britain Twp. Zoning Hearing Bd. of Adj.*, 596 A.2d 294, 298 (Pa. Commw. Ct. 1992). As such, all phases of the development and construction of a well pad prior to its production phase should not be taken into account in analyzing the zoning ordinance, just as it would be improper to assess the industrial activities which take place during the development and construction of any commercial

or residential property. Looking to the Court's findings of facts above, it is clear that a producing well pad is entirely compatible with the purpose of the RR District, and that oil and gas development can coexist with and even be beneficial to agricultural uses, as credibly explained by Professor Pifer. Concrete benefits to UNGD in the RR District were additionally described through the lay testimony of Mr. Ferri and Mr. Hajnosz; these benefits include not only the direct financial benefit to landowners, but also preservation of the agricultural nature of the land by promoting inter-generational farm transfers and allowing for the continuance of important farming and conservation activity that may not be feasible otherwise.

As to the possibility of environmental and health concerns, the Court finds the testimony presented by Dr. Ingraffea and Dr. Ketyer to be speculative and not indicative of any substantial, actual risk to the environment or health of the residents of Penn Township, as detailed in the factual findings above. The Court found credible the testimony of Dr. Daniels who presented significant amounts of actual air monitoring data showing no danger to public health via widespread air emissions caused by UNGD, as well as the testimony of Dr. Flewelling, who explained the low risk of water contamination and the abundant protections already in place to prevent the same. Finally, while the Court is sympathetic to landowners' worries regarding hypothetical diminution of property values, increases in noise and light, and other stated concerns, all of these concerns were considered as part of the Township's extensive balancing inquiry in adopting the Ordinance.

The Court additionally does not find persuasive the argument that the MEO district allows for UNGD in the majority of the Township's residential areas. It appears that the Township here took great effort in developing and refining the Ordinance to provide for UNGD only in particularly delineated areas; when considering the setbacks and other required considerations, UNGD can only take place in approximately 9.46 percent of the Township, as

described by GIS analyst Jason Gehringer. The Township's thorough analysis of the particulars of oil and gas development is evidenced by the Ordinance's many drafts and revisions, as well as the countless meetings and allowances for public input over the time period from 2010 through 2016. It is also without question that the Ordinance provides an exceedingly heightened level of protection for neighboring property owners as compared to the previous 1995 Ordinance.

In conducting a substantive due process analysis, the court must balance "the public interest to be served by the ordinance against the confiscatory or exclusionary impact of the ordinance on individual property rights..." *Delchester*, 161 A 3d 1081, 1091-92 (Pa. Commw. Ct. 2017). The Court finds that the Township here carefully considered and balanced the Township residents' rights concerning their health safety and welfare with neighboring landowners' interests in using and maintaining the agricultural characteristics of their property. The Township weighed the evidence presented to it, and enacted a series of rigorous requirements ensuring that UNGD in the Township complies with all stringent state and federal mandates. It also imposed additional protections in the form of setbacks, acreage requirements, exclusion of the most densely populated area of the RR District, and requirements that developers submit reports to the Township expressly representing that the UNGD will not impact residents' environmental rights. Based on the evidence presented, the Township took into full consideration the public health, safety and welfare, and enacted an ordinance far more protective of the citizens of Penn Township than the prior ordinance.

"Whether a statute is wise or whether it is the best means to achieve the desired result are matters left to the [governing body] and not the courts. Moreover, the [governing body] is presumed to have investigated the question and ascertained what is best for... the good of the people." *Khan v. State Board of Auctioneer Examiners*, 842 A.2d 936, 947 (Pa. 2004). Even if the Court were to disagree with the substance of the Ordinance, it is apparent from the record

that the Township did its due diligence in ascertaining what it believes to be the best balance of protections for all of its citizens. Appellants have not met the heavy burden of showing that the presumptively valid Ordinance is “arbitrary and unreasonable and ha[s] no substantial relationship to promoting the public health, safety and welfare.” *Plaxton*, 986 A.2d at 205.

ROBINSON TOWNSHIP CASES AND GORSLINE

Appellants rely on *Robinson Township v. Commonwealth* for the proposition that UNGD is incompatible with the current RR District. 83 A.3d 901 (Pa. 2013). (“*Robinson II*”). In *Robinson II*, the Pennsylvania Supreme Court deemed unconstitutional “Act 13,” a *state* legislative enactment which allowed for UNGD as of right in all areas of the Commonwealth, entirely preempting *local* zoning in the matter of oil and gas regulation. *Id.* at 978. The holding in *Robinson II* is entirely distinguishable from the case at bar. This case describes exactly the situation that *Robinson II* intended to protect, namely a municipality making its own decisions regarding oil and gas regulation, uniquely tailored to local circumstances and mindful of Pennsylvania citizens’ constitutional rights. In fact, in the 2016 case known as *Robinson IV*, the Pennsylvania Supreme Court went out of its way to express the importance of “locally tailored policy goals” and the importance of considering “local conditions and the needs of residents” in assessing oil and gas development at a municipal level. *Robinson Township v. Commonwealth*, 147 A.3d 536 (Pa. 2016).

Appellant also relies on the *Gorsline* case in differentiating the characteristics of UNGD from other uses. 185 A.3d 375. The relevant ordinance in *Gorsline* delineated a Residential-Agricultural (“R-A”) zoning district, in which UNGD was not specifically allowed or prohibited. *Id.* at 379. The ordinance contained a “savings clause” wherein a use could be allowed, provided that it was shown to be “similar to” other uses permitted in the zoning district. *Id.* The Pennsylvania Supreme Court reversed the prior decision of the Commonwealth Court which

found that UNGD was “similar to” other permitted uses in the R-A District, specifically “public service facilities” and “essential services.” *Id.* at 386. This is entirely distinguishable from the case at bar, which does not require any showing that UNGD is similar to public service facilities or services, because UNGD is explicitly permitted in the MEO District as a special exception.

The Court in *Gorsline* emphasized that the “decision should not be misconstrued as an indication that oil and gas development is never permitted in residential/agricultural districts, or that it is fundamentally incompatible with residential or agricultural uses.” *Id.* at 389. The Court highlighted the importance of local municipalities tailoring ordinances to the particulars of local conditions in order to protect environmental values. *Id.* In order to permit UNGD, a local government body must “actually amend its zoning ordinances to permit drilling in designated areas, setting forth whatever limitations and conditions it decides are appropriate for the protection of its citizenry.” *Id.* That is precisely what occurred in the present case. The Township spent many years receiving input from various sources, including members and representatives of Protect PT, and carefully crafted an ordinance setting forth protective limitations and conditions.

COMPREHENSIVE PLAN AND PROPERTY OWNER EXPECTATIONS

Protect PT next argues that the MEO District directly contradicts Penn Township’s community planning tools and directly conflicts with the purpose of the underlying districts, and thereby disrupts the reasonable expectations of Penn Township property owners. The Court notes that the Township’s comprehensive plan promotes both growing residential development as well as agricultural use. As described above, this Court credits Professor Pifer’s testimony that oil and gas development and agricultural uses are inherently compatible, and as such, the MEO District fits plainly within the goals of the Township’s comprehensive plan. Even if the Court were to find that the MEO District is incompatible with the comprehensive plan, it is the

clear law in Pennsylvania that “[n]otwithstanding any other provisions of this act, no action by the governing body of a municipality shall be invalid nor shall the same be subject to challenge on appeal on the basis that such action is inconsistent with, or fails to comply with the provision of a comprehensive plan.” 53 P.S. Section 10303(c).

Concerning property owners’ expectations, Protect PT was unable to present any testimony from landowners suggesting that they investigated the Township’s relevant zoning ordinance prior to or at the time of the purchase of their land and subsequently developed any expectation that is now being disrupted. In any case, if the land was purchased prior to the enactment of the current Ordinance, the purchaser would have been afforded much *less* protection with regard to the regulation of UNGD, as it is uncontroverted that the prior ordinances were much less restrictive. As such, the Appellant cannot meet the heavy burden required under a challenge to a zoning ordinance on this basis.

APPROPRIATE USE OF OVERLAY DISTRICT

Protect PT next contends that the MEO District violates established standards for the appropriate use of an overlay district in zoning. “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.” *Main St. Dev. Grp., Inc. v. Tincum Twp. Bd. of Supervisors*, 19 A.3d 21, 28 (Pa. Commw. Ct. 2011) (citation omitted).

Protect PT argues that the MEO District disturbs the reasonable expectations created by the bounds of the underlying RR District, and claims support from the *Robinson II* case. As described above, the Court finds *Robinson II* entirely distinguishable, and finds that the MEO

District does succeed in creating “specific and targeted provisions” which allow for limited UNGD in the Township without being overly burdensome or conflicting with the purposes and expectations of the underlying RR District. As such, the Court finds the MEO District to be an entirely appropriate use of the overlay district concept.

ENVIRONMENTAL RIGHTS AMENDMENT CONSTITUTIONALITY

The final substantive basis for appeal in this matter is Protect PT’s contention that, in enacting the Ordinance, the Township failed to fulfill its fiduciary obligation to protect its citizen’s environment rights under Article I, Section 27 of the Pennsylvania Constitution, known as the Environmental Rights Amendment. The ERA reads as follows:

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.

Pa. Const. art. I, § 27.

Protect PT’s arguments here largely mirror those set forth with regard to substantive due process, and the Court adopts the same rationale developed above. Protect PT additionally cites to the *Pennsylvania Environmental Defense Foundation v. Commonwealth* case for the proposition that “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.” 161 A.3d 911, 933 (Pa. 2017). In enacting the present Ordinance, the Township directly took into account this mandate, by placing the burden on every UNGD developer to “demonstrate that the drill site operations will not violate the citizens of Penn Township’s right to clean air and pure water as set forth in Art. 1 Sec. 27 of the Pennsylvania Constitution” through the submission of reports from “qualified environmental individuals” stating that the proposed drilling will not negatively impact ERA rights. Ordinance

§ 190-641(D). Overall, it is clear that the Ordinance offers Penn Township citizens more protections with regard to UNGD than many municipalities throughout both the county and the Commonwealth. Finding this particular Ordinance to be in violation of the ERA would directly bring into question the constitutional compliance of every municipality in the Commonwealth which chooses not to enact zoning regulation, or which chooses to enact some, less stringent regulation of oil and gas activity.

THE FREDERICK CASE

Of particular importance to the entirety of this case is the Commonwealth Court's recent decision in *Frederick v. Allegheny Township Zoning Hearing Board*, 2018 WL 5303462 (Pa. Commw. Ct. 2018). In *Frederick*, the Commonwealth Court affirmed a decision of the Court of Common Pleas of Westmoreland County upholding a zoning ordinance which authorized UNGD as a permitted use by right in all districts. *Id.* In early 2015, the Allegheny Township Zoning Hearing Board conducted a protracted hearing on a validity challenge to the ordinance that raised substantive due process and ERA-based constitutional arguments which are nearly identical to those currently at bar. *Id.* at *2, *8, *11. The Zoning Hearing Board found oil and gas development to be consistent with rural and agricultural uses, and rejected the Appellants' ERA and due process based constitutional challenges. *Id.* at *5. Notably, the Board accepted and relied upon opinions provided by Dr. Pifer which largely track with those he provided in the present case. *Id.*

On appeal to the Court of Common Pleas, the Honorable Richard E. McCormick, Jr. upheld the Board's decision, concluding that the ordinance did aim to protect township residents' health and safety, and that the ordinance appropriately balanced these interests with the interests of landowners looking to benefit from oil and gas leases. *Id.* at *7. The Court additionally

concluded that the Board found correctly that the Appellants in the case failed to prove a concrete injury sufficient to sustain a substantive due process claim. *Id.*

This Court notes the Commonwealth Court's unequivocal holdings that the zoning ordinance in *Frederick* is not in violation of either substantive due process or the ERA. *Id.* at *11, *17. As such, it would be entirely contrary to the current precedential authority of the Commonwealth of Pennsylvania to find a more stringent zoning ordinance in violation of substantive due process and/or the ERA. For all of the foregoing reasons, this Court must necessarily hold that the Penn Township Ordinance does not violate the substantive due process rights of Penn Township's citizens, and it does not violate Pennsylvania's ERA.

Accordingly, this Court enters the following Order:

IN THE COURT OF COMMON PLEAS OF WESTMORELAND COUNTY,
PENNSYLVANIA

CIVIL ACTION – LAW

PROTECT PT,

Appellant,

vs.

PENN TOWNSHIP ZONING
HEARING BOARD,

Appellee,


No. 3499 of 2017

vs.

HUNTLEY & HUNTLEY
ENERGY EXPLORATION, LLC, APEX
ENERGY (PA), LLC, and
THE TOWNSHIP OF PENN,

Appellees/Intervenors.

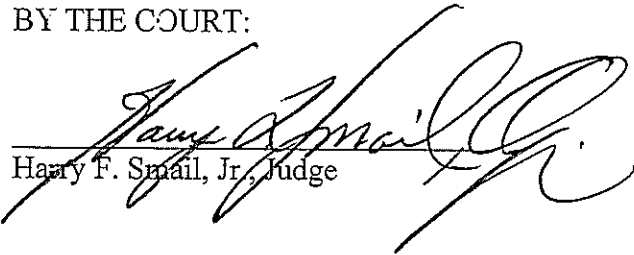
ORDER OF COURT

AND NOW, to wit, this  day of November, 2018, consistent with the foregoing analysis, and after careful consideration, it is hereby ORDERED, ADJUDGED and DECREED as follows:

1. The Substantive Validity Challenge filed by Appellant, Protect PT, is hereby DENIED in accord with the rationale contained in the foregoing Opinion;
2. Ordinance 912-2016 of Penn Township, Westmoreland County, as amended, is constitutionally valid;

3. In accord with Pa.R.C.P. 236(a)(2)(b), the Prothonotary is DIRECTED to note in the docket that the individuals listed below have been given notice of this Order.

BY THE COURT:



Harry F. Smail, Jr., Judge

ATTEST:

Prothonotary

cc: Ryan E. Hamilton, Esq.
John K. Sweeney, Esq.
Jeffrey G. Wilhelm, Esq.
Blaine A. Lucas, Esq.
Michael Korn, Esq.

APPENDICES ET SEQ:

RULE 1114; Article I, § 27; and Article V, § 9

Pa. R.A.P. 1114

Pennsylvania State Court Rules reflect amendments received September 15, 2019.

PA - Pennsylvania Local, State & Federal Court Rules > PENNSYLVANIA RULES OF APPELLATE PROCEDURE > ARTICLE II. APPELLATE PROCEDURE > CHAPTER 11. APPEALS FROM COMMONWEALTH COURT AND SUPERIOR COURT > PETITION FOR ALLOWANCE OF APPEAL

Rule 1114. Standards Governing Allowance of Appeal

(a)General Rule. Except as prescribed in *Pa.R.A.P. 1101* (appeals as of right from the Commonwealth Court), review of a final order of the Superior Court or the Commonwealth Court is not a matter of right, but of sound judicial discretion, and an appeal will be allowed only when there are special and important reasons therefor.

(b)Standards. A petition for allowance of appeal may be granted for any of the following reasons:

- (1)**the holding of the intermediate appellate court conflicts with another intermediate appellate court opinion;
- (2)**the holding of the intermediate appellate court conflicts with a holding of the Pennsylvania Supreme Court or the United States Supreme Court on the same legal question;
- (3)**the question presented is one of first impression;
- (4)**the question presented is one of such substantial public importance as to require prompt and definitive resolution by the Pennsylvania Supreme Court;
- (5)**the issue involves the constitutionality of a statute of the Commonwealth;
- (6)**the intermediate appellate court has so far departed from accepted judicial practices or so abused its discretion as to call for the exercise of the Pennsylvania Supreme Court's supervisory authority; or
- (7)**the intermediate appellate court has erroneously entered an order quashing or dismissing an appeal.

Note: The petition for allowance of appeal is synonymous with a

petition for allocatur. *Pa.R.A.P. 1114(b)(7)* supersedes the practice

described in [Vaccone v. Syken, 587 Pa. 380, 384 n.2, 899 A.2d 1103,](#)

1106 n.2 (2006).

Annotations

Case Notes

Civil Procedure : Appeals : Appellate Jurisdiction : Final Judgment Rule

Civil Procedure : Appeals : Appellate Jurisdiction : Interlocutory Orders

Civil Procedure : Appeals : Appellate Jurisdiction : State Court Review

Civil Procedure : Appeals : Frivolous Appeals

Civil Procedure : Appeals : Reviewability : General Overview

Civil Procedure : Appeals : Reviewability : Preservation for Review

Criminal Law & Procedure : Counsel : Effective Assistance : Appeals

[Pa. Const. Art. I, § 27](#)

Pa.C.S. documents are current through 2019 Regular Session Act 72; P.S. documents are current through 2019 Regular Session Act 72

Pennsylvania Constitution, Annotated by LexisNexis® > Constitution of the Commonwealth of Pennsylvania > Article I. Declaration of Rights

§ 27. Natural resources and the public estate.

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.

Annotations

LexisNexis® Notes

Notes

EDITOR'S NOTES.

Joint Resolution 1971-3 (P.L. 769) added section 27 on May 18, 1971.

Case Notes

Administrative Law: Agency Rulemaking: Rule Application & Interpretation: Validity

Administrative Law: Judicial Review: Reviewability: Standing

Administrative Law: Separation of Powers: Constitutional Controls: General Overview

Administrative Law: Separation of Powers: Legislative Controls: General Overview

Civil Procedure: Justiciability: Political Questions: Separation of Powers

Civil Procedure: Jurisdiction: Subject Matter Jurisdiction: Jurisdiction Over Actions: Exclusive Jurisdiction

Civil Procedure: Pleading & Practice: Defenses, Demurrers & Objections: Failures to State Claims

Pa. Const. Art. V, § 9

Pa.C.S. documents are current through 2019 Regular Session Act 72; P.S. documents are current through 2019 Regular Session Act 72

Pennsylvania Constitution, Annotated by LexisNexis® > Constitution of the Commonwealth of Pennsylvania > Article V. The Judiciary

§ 9. Right of appeal.

There shall be a right of appeal in all cases to a court of record from a court not of record; and there shall also be a right of appeal from a court of record or from an administrative agency to a court of record or to an appellate court, the selection of such court to be as provided by law; and there shall be such other rights of appeal as may be provided by law.

Annotations

LexisNexis® Notes

Case Notes

In an energy company's challenge to a penalty imposed by the state utility commission for overcharging customers, the penalty did not impermissibly punish the company for pursuing its right to litigate instead of settling, because, inter alia, there was no showing that the commission compelled it to litigate. Comparison of penalties imposed on settling companies was difficult to assess because records of cases that settle tend to include less evidentiary information. *HIKO Energy, LLC v. Pa. PUC*, 209 A.3d 246, 2019 Pa. LEXIS 3139 (Pa. 2019).

Where the employer challenges a fee determination of the Medical Fee Review Section for the stated reason that the medical service was not rendered by a "provider" within the meaning of the Workers' Compensation Act, that threshold question must be decided by the Hearing Office. [*Armour Pharm. v. Bureau of Workers' \(Wegman's Food Markets, Inc.\)*, 206 A.3d 660, 2019 Pa. Commw. LEXIS 291 \(Pa. Commw. Ct. 2019\).](#)

It was for the Hearing Office to conduct a hearing on whether a person invoking the remedy in [*77 P.S. § 531*](#) was a provider under the Workers' Compensation Act and it offended due process and the Act's scheme for resolving fee disputes to place the question of whether a putative provider was actually a "provider" beyond the reach of judicial review. Where the employer challenged a fee determination of the Medical Fee Review Section because the medical service was not rendered by a "provider," that threshold question must be decided by the Hearing Office. [*Armour Pharm. v. Bureau of Workers' \(Wegman's Food Markets, Inc.\)*, 206 A.3d 660, 2019 Pa. Commw. LEXIS 291 \(Pa. Commw. Ct. 2019\).](#)

Postconviction relief court properly denied the inmate postconviction relief because he failed to distinguish between a technically deficient waiver colloquy and a constitutionally deficient waiver colloquy, and he did not argue that the instant case presented an example of the latter. Although, despite the inmate's failure to cooperate with a waiver colloquy, the trial court granted his request to represent himself, the deprivation of the colloquy, did not share the

CERTIFICATE OF COMPLIANCE WITH PA.R.A.P. 127

I certify that this filing complies with the provisions of the *Case Records and Public Access Policy of the Unified Judicial System of Pennsylvania* that require filing confidential information and documents differently than non-confidential information and documents.

RESPECTFULLY SUBMITTED:

/s/ RYAN HAMILTON

RYAN E. HAMILTON, ESQ.

PA BAR # 318844

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TELEPHONE: (412) 742-4615

Counsel of Record

*COUNSEL FOR PETITIONER,
PROTECT PT*

**CERTIFICATE OF COMPLIANCE WITH WORD-COUNT LIMITS OF
PA.R.A.P. 1115**

I hereby certify that this petition for allowance of appeal complies with
the word-count limits of Pa.R.A.P. 1115.

RESPECTFULLY SUBMITTED:

/s/ RYAN HAMILTON

RYAN E. HAMILTON, ESQ.

PA BAR # 318844

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PROOF OF SERVICE

I hereby certify that I am this day serving the foregoing document upon the persons indicated below, via the Court's electronic PAC File system, which service satisfies the requirements of Pa.R.A.P. 121:

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Counsel for Olympus Energy LLC

Date: December 13, 2019

RESPECTFULLY SUBMITTED:

/s/ RYAN HAMILTON
RYAN E. HAMILTON, ESQ.