

IN THE COURT OF COMMON PLEAS OF
WESTMORELAND COUNTY, PENNSYLVANIA

PROTECT PT,
Appellant,

v.

PENN TOWNSHIP ZONING
HEARING BOARD,
Appellee

)
) Civil Division
)
) No. 3499 of 2017
)
) NOTICE OF APPEAL OF SUBSTANTIVE
) VALIDITY CHALLENGE DEEMED
) DENIAL
)
) Filed on behalf of Appellants, Protect PT
)
) Counsel of Record for Land Use Appellant
) Ryan E. Hamilton, Esq.
) PA Attorney ID No. 318844
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)
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)

FILED IN
PROTHONOTARY'S OFFICE

JUL 13 2017

BY: 
CLERK

IN THE COURT OF COMMON PLEAS OF
WESTMORELAND COUNTY, PENNSYLVANIA

PROTECT PT,)	Civil Division
Appellant)	
)	No. _____ of 2017
v.)	
)	Notice of Appeal of Substantive Validity
PENN TOWNSHIP ZONING)	Challenge Deemed Denial
HEARING BOARD,)	
Appellee)	
)	

**NOTICE OF APPEAL OF
SUBSTANTIVE VALIDITY CHALLENGE DEEMED DENIAL**

AND NOW, Protect PT, through undersigned counsel Fair Shake Environmental Legal Services and pursuant to Article X-a of the Municipalities Planning Code (“MPC”), 53 P.S. §§ 11001-a – 11006-a, files this Notice of Land Use Appeal of a deemed denial decision from the Penn Township Zoning Hearing Board (the “Board”) in response to Protect PT’s Notice of Substantive Validity Challenge to the Penn Township Zoning Ordinance. In support, Protect PT avers the following:

Introduction

1. On April 26, 2017 Penn Township received Protect PT’s Notice of Substantive Validity Challenge filed with the Penn Township Zoning Hearing Board challenging the validity of the Penn Township Zoning Ordinance Number 912-2016 Chapter 190. (Exhibit A: Notice of Substantive Validity Challenge to Penn Township Zoning Hearing Board).
2. On June 21, 2017 the Zoning Hearing Board issued a letter stating the Board would not take action to schedule a hearing within the timeframe required by MPC §10916.1(d) and therefore, “the matter will be deemed denied pursuant to provisions of Section 10916.1 of

the MPC after expiration of 60 days from the date of application submission.” (Exhibit B: Board letter on deemed denial).

3. The Penn Township Board of Commissioners adopted Ordinance Number 912-2016 Chapter 190, as amended, on September 19, 2016 (the “Ordinance”).
4. Protect PT alleges that the Ordinance, and the included Mineral Extraction Overlay District (the “MEO District”) violates the rights of Penn Township residents to substantive due process guaranteed by Article 1, §1 of the Pennsylvania Constitution and the Fourteenth Amendment to the United States Constitution.
5. Protect PT alleges that the Ordinance as adopted with the MEO District contradicts the purposes and objectives of the Penn Township Ordinance, violates established standards for the appropriate use of an overlay district, and violates the rights of Penn Township residents to clean air, pure water, and the preservation of the natural, scenic, historic and esthetic values of the environment guaranteed by Article I, Section 27 of the Pennsylvania Constitution.

Jurisdiction

6. The Westmoreland County Court of Common Pleas has jurisdiction over this appeal pursuant to MPC § 11002-A(a) as this is the judicial district where the land at issue is located. 53 P.S. § 11002-A.

Standing

7. Protect PT is a nonprofit organization whose mission is to promote the safety, security and quality of life for residents in the Penn-Trafford and surrounding areas. Protect PT has a local address of P.O. Box 43, Trafford, Pennsylvania 15085.

8. Protect PT has members who are landowners and residents of Penn Township who have been or will be harmed by gas well sites existing within the Township and proposed or approved for the MEO District.
9. Protect PT members will be exposed to public health, property, and industrial impacts associated with shale gas development in the MEO District, and will suffer damage to the use and enjoyment of their property, and to their livelihood and economic interests. Further, the Penn Township Zoning Ordinance denies Protect PT members the protections afforded to them under the Due Process Clause of the state and federal Constitutions, and the environmental rights guaranteed by Art. 1 § 27 of the Pennsylvania Constitution.
10. Because of these adverse effects, Protect PT and members have a direct, substantial, and immediate interest in determining the substantive validity of Penn Township's Ordinance 912-2016 Chapter 190.

The Penn Township Ordinance

11. The Penn Township Zoning Ordinance Number 912-2016 Chapter 190, as amended, which the Penn Township Board of Commissioners adopted on September 19, 2016, establishes five zoned districts:
 - a. Rural Resource District (RR);
 - b. Mixed Density Residential District (MDR);
 - c. Neighborhood Commercial District (NC);
 - d. Commercial Corridor District (CC); and
 - e. Industrial Commerce District (IC).
12. In addition to the five underlying Districts, the Penn Township Zoning Ordinance also establishes four overlay districts:
 - f. Airport Overlay District (APO);
 - g. Floodplain Overlay District (FPO);

- h. Mineral Extraction Overlay District (MEO); and
- i. Development Infill Overlay District (DIO).

13. The purpose of the MEO District is “to provide 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.” § 190-407.
14. Unconventional oil and gas wells are also subject to § 190-635, Performance Standards, and § 190-641 which provides several conditions that must be met before obtaining approval for an unconventional gas well site.
15. Comparing the June 2016 Penn Township Zoning Map and the August 5, 2016 revised MEO Map, it is clear that the MEO overlays the entire Rural Resource District and the entire Industrial Commerce District.
16. The MEO allows for unconventional oil and gas drilling as a special exception use in the RR and IC Districts. §190-407(E).
17. The Ordinance allows for unconventional oil and gas wells in both the IC and RR Districts without imposing any different conditions in each district to account for the varying purposes, population density, and other uses allowed in each district.

**Unconventional Shale Gas Development Constitutes
an Industrial Land Use that Causes Pollution**

18. Unlike conventional mineral formations containing natural gas, shale rock has a low permeability that limits the flow of gas and fluids. In order to extract natural gas and other oil trapped in the shale, unconventional methods, in this instance horizontal drilling and high-volume, hydraulic fracturing, must be employed to fracture the rock so that gas and oil will flow from the rock. The process of producing natural gas from shale involves

a series of steps before and after hydraulic fracturing, all of which are industrial in nature, many of which have the potential to impact public health and the environment.

19. The initial phase of shale gas development involves construction of an access road and well pad. The well pad must provide a stable base for large rigs, trucks, pumps, diesel engines, storage tanks, separation units and other equipment needed to drill, complete and operate the well. The size of the well pad depends on the number of wells that will be put on the pad.
20. Construction of the access road and well pad involves the operation of large, heavy machinery to grade and compact the site, transport and place large quantities of gravel on the ground, install an impermeable barrier, and potentially construct a large, lined impoundment for storage of water to be used in hydraulic fracturing. Each well pad, with associated roads and impoundments, consumes about five to fifteen acres of land.
21. Once the site has been prepared, equipment must be transported to the site and unloaded. Before the horizontal drill rig is assembled and powered up, another rig will be brought on site to drill the starter hole and vertical section of the well, anywhere from 5000 to 9,000 feet in depth. Portions of the vertical well section may be drilled using air, while other portions will be drilled using fluids or mud. The mud may be water-based, oil-based or synthetic based fluids, all of which must be stored on site. Drilling the vertical well produces about 750 tons or more of drill cuttings per hole. Depending on the drilling technique and depth of wellbore, the cuttings may contain contaminants such as pyrite, which with air and water generate acid mine drainage, high concentrations of chlorides, and other toxic constituents associated with the drilling mud. Drill cuttings must be stored and managed as a residual waste.

22. Thousands of feet of steel pipe must be transported onto the site to line the well.
23. Cementing operations are used on-site to seal the annulus after a casing string has been run, to seal a lost circulation zone, or set a plug before directional tools are used to push off from the vertical section of the well. A cementing crew uses special trucks, mixers and large hydraulic pumps to displace drilling fluids and place cement in the wellbore. Dry materials are ordinarily stored in silos on-site prior to mixing.
24. The large drill rig used to construct the horizontal portion of the wellbore must be transported in pieces to the site and assembled. The horizontal drilling occurs for another 3,000 to 10,000 feet further than the vertical portion of the well. The major components of the rig include mud tanks and pumps, the derrick, drawbacks, the rotary table, the drill string, power generation equipment – large electric, diesel or gas powered engines that drive turbines - and a variety of auxiliary equipment. During drilling of the horizontal section another 750 to 1000 tons of drill cuttings will be generated, depending on the length of the borehole. Drill cuttings from the horizontal section of the well contain various toxic contaminants, including benzene and naturally occurring radioactive materials such as R-226 and R-228. The drill cuttings must be stored and managed as a residual waste.
25. Well completion refers to the process of perforating the horizontal portion of the well casing, cement and rock with explosive charges to create communication between the formation and wellbore, and hydraulic fracturing of the reservoir to create high permeability pathways for the gas and oil to flow into the wellbore.

26. Hydraulic fracturing requires large volumes of liquids – on average 4.5 million gallons per well in Pennsylvania – to be transported to the well pad and pumped down the well under high pressure in order to fracture the target formation.
27. During stimulation, dozens of pump trucks and containers must be brought onto the well pad. The water is mixed with proppant and chemicals before being injected into the well. The proppant and chemicals must be brought to and stored on the well pad.
28. Once stimulation is completed, the internal pressure of the rock formation causes fluid to return to the surface through the wellbore, which is known as "flowback" or "produced water." This cleans the well bore and formation of debris and fracture fluid. The flowback contains the injected chemicals and naturally occurring materials, including brines, metals, hydrocarbons and radionuclides. Additional equipment such as separators, sand traps and tanks are used to capture and process the gas and condensate. The flowback water must be stored on-site and taken off-site for management as a residual waste.
29. When drilling and completion are complete, drilling equipment is removed from the site. There remains equipment needed for production such as separator units and condensate tanks. Maintenance vehicles must visit the site, and drill rigs may return to add wells to the pad or re-fracture existing wells. The existing wells must be tied into pipelines or other infrastructure to convey the gas to market.
30. Shale gas development causes noise pollution for persons residing near the well and along the truck routes that service the well pad. The most intensive noise from well pads will last about a month per well, and will recur when wells are reworked. The increased truck traffic associated with well development will impact residents throughout the

township. Increased noise pollution can contribute to stress and result in physical effects associated with excess stress such as annoyance, irritation, fatigue, headache, unease, and disturbed sleep.

31. Shale gas development causes air pollution. Development of a shale gas well typically requires 1000 to 1500 truck trips per well installed, which damages roads, and impacts the health of residents, especially in highly populated areas.
32. Trucks typically run on diesel engines, as do the engines that provide electricity to the drill rig and other auxiliary equipment. Diesel-powered vehicles and equipment account for nearly half of all nitrogen oxides (NO_x) and more than two-thirds of all particulate matter (PM) emissions from United States transportation sources. PM is comprised of hundreds of chemical elements, including sulfates, ammonium, nitrates, elemental carbon, condensed organic compounds, and carcinogenic compounds and heavy metals such as arsenic, selenium, cadmium and zinc.
33. Particulate matter irritates the eyes, nose, throat, and lungs, contributing to respiratory and cardiovascular illnesses and even premature death. Diesel exhaust has been classified a potential human carcinogen by the U.S. Environmental Protection Agency (EPA) and the International Agency for Research on Cancer.
34. Diesel emissions of nitrogen oxides contribute to the formation of ground level ozone, which irritates the respiratory system, causing coughing, choking, and reduced lung capacity.
35. Shale gas development causes light pollution. As with excess noise, the constant illumination of shale gas pads can contribute to stress among those living in areas exposed to constant artificial light from the well pad.

36. Increased traffic caused by shale gas development will have both local and cumulative impacts because of the multiple projects that will be ongoing in the zoned districts, all of which will contribute to traffic due to construction, drilling, transport of wastewater, transport associated with hydraulic fracturing, as well as an overlap of development phases on different well pads.
37. Shale gas development may cause surface and groundwater contamination. Numerous polluting substances are transported to and from well pads, stored on well pads, and used in association with shale gas development. The mismanagement of these substances would result in surface or groundwater contamination from spills, leaks or accidents.
38. Faulty well construction, such as a bad cement job, can cause groundwater contamination that will affect private water wells, such as that experienced by the residents of Dimock, Pennsylvania.
39. In addition to well-pads, compressor stations and natural gas processing stations are major industrial operations.
40. Compressor stations consist of large reciprocating engines that compress gas in order to transport it through pipelines.
41. Compressor stations produce noise and air pollution.
42. Compressor station engines emit nitrogen oxides, volatile organic compounds, particulate matter, carbon monoxide, and other pollutants. When vented, compressor stations emit volatile organic compounds and methane.
43. Compressor stations emit noise that varies based on the number of engines and other factors such as frequency, topography, weather and wind speed. Compressor stations operate 24 hours a day, and seven days a week.

44. Gas processing plants extract natural gas from other longer chained hydrocarbons and contaminants produced from shale gas wells so that the natural gas complies with pipeline specifications. Processing plants may include fractionators and deethanators.
45. Shale gas processing emits greenhouse gases, as well as toxic air pollutants such as benzene, formaldehyde and hexane.
46. Shale gas wells, compressor stations, and processing facilities have a greater impact on more vulnerable populations such as school-aged children.
47. Air pollutants from all forms of shale gas development may interfere with brain development of children and more easily accumulate in their bodies as children cannot metabolize toxins at the same rate as adults.
48. Pollutants and impacts from shale gas development may also lead to an increased rate of development of asthma and other respiratory diseases in children.
49. The U.S. Department of Labor, Occupational Safety and Health Administration considers “Drilling Oil and Gas Wells” to fall within the Standard Industrial Classification (“SIC”) 1381, which is part of Industry Group 138 – Oil and Gas Field Services. Some of the potential hazards identified by OSHA that apply to SIC 1381, include:

Fire/Explosion/High Pressure Release and Hydrogen Sulfide Exposure. See U.S. Dept. of Labor, Occupational Safety and Health Admin., Office of General Industry Enforcement Profile Document: Oil and Gas Well Drilling and Servicing, available online:

https://www.osha.gov/dep/industry_profiles/p_profile-138.html (last visited April 14, 2017).
50. In *Robinson Township*, a plurality of the Pennsylvania Supreme Court stated that unconventional shale gas development was an industrial practice, and that “[b]y 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...” *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 975 (Pa. 2013) (plurality).

**The Penn Township Ordinance and MEO Violates the most basic
Substantive Due Process Principles that Apply to Zoning and
the Substantive Due Process Rights of Penn Township Residents**

51. Zoning derives its legitimacy from a municipality’s police power to promote public health, safety and welfare.
52. To determine whether zoning is constitutional, a substantive due process inquiry must take place. *Robinson Twp.*, 83 A.3d at 482.
53. Pennsylvania requires that for zoning to be constitutional it must promote the public health, safety, morals, and welfare, and be substantially related to protecting or furthering those interests. *In re Realen Valley Forge Greenes Assocs.*, 838 A.2d 718, 728 (Pa. 2003); *C & M Developers, Inc. v. Bedminster Twp. Zoning Hearing Board*, 820 A.2d 143, 150 (Pa. 2002); *Boundary Drive Assocs. v. Shrewbury Twp. Bd. Of Sup’rs*, 491 A.2d 86, 90 (Pa. 1985).
54. Zoning is an extension of the concept of public nuisance. Land use restrictions aim to prevent problems caused by the “pig in the parlor instead of the barnyard.” *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926).
55. Separating uses satisfies due process analysis because it is a permissible method of promoting public health, safety, and welfare. There is a clear and obvious public value to having heavy industrial activity separated from residences, schools, parks, and farms. For example, reserving land for single-family residences preserves the character of neighborhoods, securing “zones where family values, youth values, and the blessings of

quiet seclusion and clean air make the area a sanctuary for people.” *Village of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974).

56. The Real Estate Principle of Conformity states that “[t]he maximum value is realized when a property is in harmony with its surroundings and the use of land conforms to existing neighborhood standards. In single family residential neighborhoods, for example buildings should be similar in design, construction, size, and age.”
57. A zoning ordinance loses its legitimacy when it is not related to public health, safety, or welfare. A zoning ordinance is therefore invalid if it differentiates between uses in an irrational way or produces an “irrational scheme.”
58. Ordinance Number 912-2016 Chapter 190 produces such an irrational scheme by allowing unconventional natural gas wells – an industrial use – in an otherwise non-industrial zone.
59. The Ordinance also does not provide any stricter or varying conditions on oil and gas development between residential and industrial areas, indicating a disregard for the varying purposes of the different zoning districts.
60. Ordinance Number 912-2016 Chapter 190 was enacted without taking into account the effect of allowing industrial shale gas operations in the RR District on the public health, safety and welfare of its residents.
61. Ordinance Number 912-2016 Chapter 190 violates the substantive due process rights of Penn Township residents.

The Penn Township Ordinance is Substantively Invalid because the MEO District Directly and Irrationally Contradicts the Stated Purposes and Objectives of the Zoning Ordinance.

62. One of the purposes of the Township’s Zoning Ordinance is to not “restrict, control or place hardship upon the continued agricultural use of land within its area of jurisdiction

and control.” §190-102(A). Further, the purposes outlined in the Zoning Ordinance also identify community objectives, including: “to prevent haphazard growth that... undermines community values” and “maintain stability in each neighborhood and commercial area through an orderly general development pattern” and “[t]o recognize the Township’s image agricultural legacy and its evolution into a vibrant suburban community maintaining its small town and rural values” and “[t]o protect the natural environment and residential quality by preserving open space reference thereto and natural amenities.” §190-102(A)(1)-(4).

63. The enactment of Ordinance 912-2016 Chapter 190 failed to satisfy those objectives.

64. The Purpose of the Rural Resource District is “to provide land for continuing agricultural operations, resource management, timber harvesting, outdoor recreation, public and private conservation areas, low density single family residential, and compatible support uses.” §190-402(A).

65. Industrial oil and gas activities do not fit any of the purposes identified in the RR District.

**The Penn Township Ordinance Number 912-2016 Chapter 190
Violates the Standards for an Appropriate Overlay District**

66. According to the Commonwealth Court, “[t]he purpose of an overlay district is to create specific and targeted provisions that conserve natural resources or realize development objectives *without unduly disturbing the expectations created by the existing zoning ordinance*. In other words, overlay districts supplement existing zoning districts; they do not supersede them either in fact or in practice.” *Main St. Dev. Grp., Inc. v. Tinicum Twp. Bd. of Supervisors*, 19 A.3d 21, 28 (Pa. Commw. Ct. 2011)(emphasis added).

67. The MEO was not sited in a “specific and targeted way” because it covers the entirety of the RR and IC Districts without any consideration for where it would be most appropriate to locate oil and gas development within the Township.
68. The Development Infill Overlay (“DIO”), while ostensibly created to “establish a health and safety buffer from surface related activities and facilities, specifically oil and natural gas extraction,” is only an inverse overlay of the MEO, so that together the two span the entirety of the Township. As the MEO is spread across the entire Township, the DIO fails to establish any real buffer that would protect health and safety of residents.
69. Without the MEO, the IC District alone would provide for the reasonable extraction of minerals in the Township, as required by the Municipalities Planning Code. The recently approved Huntley and Huntley Poseidon Well Pad, for example, is located in the IC District.
70. The MEO clearly disturbs the expectations created by the underlying RR District. In *Tinicum*, the Court held that it was unconstitutional when an overlay district “effectively create[d] agricultural districts out of districts with non-agricultural stated purposes, albeit through a different mechanism, completely changing the expectations created by the Ordinance in the non-agricultural districts.” *Tinicum Twp. Bd. of Supervisors*, 19 A.3d 21, 29 (Pa. Commw. Ct. 2011).
71. Similarly, the MEO effectively creates an industrial zone out of the RR zone, completely changing the expectations created by the underlying zoning district.

Ordinance Number 912-2016 Chapter 190 Violates the Rights of Residents Under Article 1, Section 27 of the Pennsylvania Constitution

72. Ordinance Number 912-2016 Chapter 190 violates the constitutional right of residents to a healthy environment in which to live and raise their children.

73. Ordinance Number 912-2016 Chapter 190 fails to properly account for the impact of industrial shale gas development on the local environment.
74. Under Article 1, Section 27 of the Pennsylvania Constitution, state and local government officials have an obligation to assess and determine whether any proposed project, law, regulation or ordinance would cause unreasonable “actual or likely” degradation of air and/or water quality or other protected features of the environment. *Robinson Twp.*, 83 A.3d at 951-955.
75. If a municipality fails to perform the analysis, or allows development to proceed that would cause unreasonable “actual or likely degradation,” the government action violates Article 1, Section 27. *Id.*
76. When government acts, the action must, on balance, reasonably account for the environmental features of the affected locale, if it is to pass constitutional muster. *Robinson Twp.*, 83 A.3d at 953.
77. The Township Commissioners also have fiduciary duties of prudence, loyalty, and impartiality that must be met in enacting legislation such as the Ordinance. *Pa. Env'tl. Defense Found'n. v. Com.* (“*PEDF*”), No. 10 MAP 2015, 2017 WL 2645417, at *14-15 (Pa. June 20, 2017). Further, this duty of loyalty “imposes an obligation to manage the corpus of the trust so as to accomplish the trust’s purposes for the benefit of the trust’s beneficiaries.” *PEDF*, 2017 WL 2645417 at *15. The trust’s beneficiaries include all present Township citizens (not just those with leases) and all future citizens. *Robinson Twp.*, 83 A.3d at 959, 980-81 (plurality).
78. The Township failed to account for the health, safety, and environmental concerns of its citizens and the differing environmental concerns of each zoning district, by allowing for

industrial shale gas development in the RR District, adjacent to residential developments, schools and other incompatible land uses.

79. The Township failed to treat residents equitably by allowing for shale gas development in the RR District, thereby placing a higher risk of harm to health and the environment on citizens, including Protect PT members, who live in the RR District.

80. By allowing shale gas development in the RR District, the Township exposed “otherwise protected areas to environmental and habitability costs associated with this particular industrial use; air, water, and soil pollution; persistent noise, lighting, and heavy vehicle traffic; and the building of facilities incongruous with the surrounding landscape.”

Robinson Twp., 83 A.3d at 979.

81. Article 1, Section 27 protects the rights and expectations of citizens to their environmental safety, and limits the ability of lawmakers to remove those protections. Ordinance Number 912-2016 Chapter 190 is invalid because the police power does not allow the township “to so fundamentally disrupt these expectations respecting the environment.” *Robinson Twp.*, 83 A.3d at 978.

82. By allowing industrial shale gas operations in the RR District, in contravention of the goals of that District and without acknowledging the distinct variations between the IC and RR Districts, the Township unreasonably infringed on the quality of life of residents and their right to clean air, pure water, and the natural, scenic, historic, and esthetic values of the environment, in violations of Article I, Section 27 of the Pennsylvania Constitution.

Relief Sought

83. Protect PT requests that the Court declare the Penn Township Ordinance Number 912-2016 Chapter 190 substantively invalid, and recommend to the Board of Commissioners that the Penn Township Zoning Ordinance be revised to limit unconventional oil and gas development to industrial zoned districts.

Respectfully Submitted,



Ryan E. Hamilton, Esq.
PA 318844

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Fair Shake Environmental Legal
Services

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Pittsburgh, PA 15201

Telephone: (412) 742-4615

Fax: (412) 291-1197

Counsel for Protect PT

Date: July 13, 2017

Exhibit A

Environmental Legal Services

April 25, 2017

Sent by Certified First Class U.S. Mail

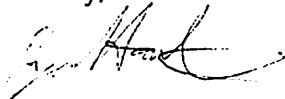
Attn: Jean Ann Greer
Penn Township Zoning Hearing Board
2001 Municipal Court
Harrison City, PA 15636

Re: Supplement to Notice of Substantive Validity Challenge to Penn Township's Ordinance
Number 912-2016 Chapter 190, as amended and adopted on September 19, 2016

Ms. Greer,

Please accept the enclosed supplement to Protect PT's Notice of Substantive Validity Challenge to Penn Township's Ordinance Number 912-2016 Chapter 190, as amended and adopted on September 19, 2016. Enclosed I included 1) the Validity Challenge Application, filled out as applicable and signed by the Executive Director of Protect PT, Gillian Graber, 2) a check for the \$1,000 filing fee made payable to Penn Township, and 3) seven copies of the application and notice of substantive validity challenge. As noted by Mr. Sweeney's April 19, 2017 letter, we will schedule a mid-June hearing date. Thank you for your assistance in filing this matter with the Zoning Hearing Board.

Sincerely,



Ryan E. Hamilton, Esq.

Enclosures

cc:

John K. Sweeney, Esq., by email only

Michael Korn, Esq., by email only





April 14, 2017

Sent by Certified First Class U.S. Mail

Penn Township Zoning Hearing Board
2001 Municipal Court
Harrison City, PA 15636

Re: Notice of Substantive Validity Challenge to Penn Township's Ordinance Number 912-2016 Chapter 190, as amended and adopted on September 19, 2016

Dear Zoning Hearing Board,

Please accept the enclosed Notice of Substantive Validity Challenge to Penn Township's Ordinance Number 912-2016 Chapter 190, as amended and adopted on September 19, 2016, submitted on behalf of Protect PT. We request that the Penn Township Zoning Hearing Board schedule and hold one or more hearings on this challenge. If a filing fee or additional application to request a hearing is required along with this Notice, please notify me immediately by calling 412-586-5681.

Sincerely,

Ryan E. Hamilton, Esq.

Enclosures

Cc:

John K. Sweeney, Esq.

Michael Korn, Esq.



**BEFORE THE ZONING HEARING BOARD OF PENN TOWNSHIP,
WESTMORELAND COUNTY, PENNSYLVANIA**

In Re: Substantive Validity Challenge of)
Protect PT to Penn Township's)
Ordinance Number 912-2016 Chapter 190,)
including the Mineral Extraction Overlay)
District

NOTICE OF SUBSTANTIVE VALIDITY CHALLENGE

1. Protect Penn-Trafford (“Protect PT”) challenges the substantive validity and constitutionality of the Penn Township Zoning Ordinance Number 912-2016 Chapter 190, as amended, which the Penn Township Board of Commissioners adopted on September 19, 2016 (“Ordinance 912-2016 Chapter 190” or “Penn Township Zoning Ordinance”).
2. Protect PT alleges that Ordinance 912-2016 Chapter 190 and the included Mineral Extraction Overlay (“MEO”) District violates the rights of Penn Township residents to substantive due process guaranteed by Article 1, §1 of the Pennsylvania Constitution and the Fourteenth Amendment to the United States Constitution.
3. Protect PT also alleges that Ordinance 912-2016 Chapter 190 contradicts the purposes and objectives of the Penn Township Zoning Ordinance, violates established standards for the appropriate use of an overlay district, and violates the rights of Penn Township residents to clean air, pure water, and the preservation of the natural, scenic, historic and esthetic values of the environment guaranteed by Article I, Section 27 of the Pennsylvania Constitution.

Board Jurisdiction

4. The Zoning Hearing Board of Penn Township (the “Board”) has jurisdiction over this challenge pursuant to sections 909.1(a)(1) and 916.1(b) of the Municipalities Planning Code (“MPC”), 53 P.S. §§ 10909.1(a)(1) and 10916.1(b), and §190-808(A) of the Penn Township Zoning Ordinance.

5. **Protect PT requests that the Board hold one or more hearings on this challenge.**
6. **The case is ripe for adjudication because unconventional natural gas well pads have been authorized for development pursuant to the Penn Township Zoning Ordinance and the Ordinance violates the rights of the residents of Penn Township.**

Standing

7. **Protect PT is a nonprofit organization whose mission is to promote the safety, security and quality of life for residents in the Penn-Trafford and surrounding areas. Protect PT has a local address of P.O. Box 43, Trafford, Pennsylvania 15085.**
8. **Protect PT has members who are landowners and residents of Penn Township who have been or will be harmed by gas well sites existing and proposed in the MEO District.**
9. **Protect PT members will be exposed to public health, property, and industrial impacts associated with shale gas development in the MEO District, and will suffer damage to the use and enjoyment of their property, and to their livelihood and economic interests. Further, the Penn Township Zoning Ordinance denies Protect PT members the protections afforded to them under the Due Process Clause of the state and federal Constitutions, and the environmental rights guaranteed by Art. 1 § 27 of the Pennsylvania Constitution.**
10. **Because of these adverse effects, Protect PT members have a direct, substantial, and immediate interest in determining the substantive validity of Penn Township's Ordinance 912-2016 Chapter 190.**

The Penn Township Ordinance

11. **The Penn Township Zoning Ordinance Number 912-2016 Chapter 190, as amended, which the Penn Township Board of Commissioners adopted on September 19, 2016, establishes five zoned districts:**

- a. Rural Resource District (RR);
- b. Mixed Density Residential District (MDR);
- c. Neighborhood Commercial District (NC);
- d. Commercial Corridor District (CC); and
- e. Industrial Commerce District (IC).

12. In addition to the five underlying Districts, the Penn Township Zoning Ordinance also establishes four overlay districts:

- a. Airport Overlay District (APO);
- b. Floodplain Overlay District (FPO);
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- d. Development Infill Overlay District (DIO).

13. The purpose of the MEO District is “to provide 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.” § 190-407.

14. Unconventional oil and gas wells are also subject to § 190-635, Performance Standards, and § 190-641 which provides several conditions that must be met before obtaining approval for an unconventional gas well site.

15. Comparing the June 2016 Penn Township Zoning Map and the August 5, 2016 revised MEO Map, it is clear that the MEO overlays the entire Rural Resource District and the entire Industrial Commerce District.

16. The MEO allows for unconventional oil and gas drilling as a special exception use in the RR and IC Districts. §190-407(E).

17. The Ordinance allows for unconventional oil and gas wells in both the IC and RR Districts without imposing any different conditions in each district to account for the varying purposes, population density, and other uses allowed in each district.

Unconventional Shale Gas Development Constitutes an Industrial Land Use that Causes Pollution

18. Unlike conventional mineral formations containing natural gas, shale rock has a low permeability that limits the flow of gas and fluids. In order to extract natural gas and other oil trapped in the shale, unconventional methods, in this instance horizontal drilling and high-volume, hydraulic fracturing, must be employed to fracture the rock so that gas and oil will flow from the rock. The process of producing natural gas from shale involves a series of steps before and after hydraulic fracturing, all of which are industrial in nature, many of which have the potential to impact public health and the environment.
19. The initial phase of shale gas development involves construction of an access road and well pad. The well pad must provide a stable base for large rigs, trucks, pumps, diesel engines, storage tanks, separation units and other equipment needed to drill, complete and operate the well. The size of the well pad depends on the number of wells that will be put on the pad.
20. Construction of the access road and well pad involves the operation of large, heavy machinery to grade and compact the site, transport and place large quantities of gravel on the ground, install an impermeable barrier, and potentially construct a large, lined impoundment for storage of water to be used in hydraulic fracturing. Each well pad, with associated roads and impoundments, consumes about five to fifteen acres of land.
21. Once the site has been prepared, equipment must be transported to the site and unloaded. Before the horizontal drill rig is assembled and powered up, another rig will be brought on site to drill the starter hole and vertical section of the well, anywhere from 5000 to 9,000 feet in depth. Portions of the vertical well section may be drilled using air, while other portions will be drilled using fluids or mud. The mud may be water-based, oil-based or synthetic based fluids, all of which must be stored on site. Drilling the vertical well produces about 750 tons

or more of drill cuttings per hole. Depending on the drilling technique and depth of wellbore, the cuttings may contain contaminants such as pyrite, which with air and water generate acid mine drainage, high concentrations of chlorides, and other toxic constituents associated with the drilling mud. Drill cuttings must be stored and managed as a residual waste.

22. Thousands of feet of steel pipe must be transported onto the site to line the well.
23. Cementing operations are used on-site to seal the annulus after a casing string has been run, to seal a lost circulation zone, or set a plug before directional tools are used to push off from the vertical section of the well. A cementing crew uses special trucks, mixers and large hydraulic pumps to displace drilling fluids and place cement in the wellbore. Dry materials are ordinarily stored in silos on-site prior to mixing.
24. The large drill rig used to construct the horizontal portion of the wellbore must be transported in pieces to the site and assembled. The horizontal drilling occurs for another 3,000 to 10,000 feet further than the vertical portion of the well. The major components of the rig include mud tanks and pumps, the derrick, drawbacks, the rotary table, the drill string, power generation equipment – large electric, diesel or gas powered engines that drive turbines - and a variety of auxiliary equipment. During drilling of the horizontal section another 750 to 1000 tons of drill cuttings will be generated, depending on the length of the borehole. Drill cuttings from the horizontal section of the well contain various toxic contaminants, including benzene and naturally occurring radioactive materials such as R-226 and R-228. The drill cuttings must be stored and managed as a residual waste.
25. Well completion refers to the process of perforating the horizontal portion of the well casing, cement and rock with explosive charges to create communication between the formation and

wellbore, and hydraulic fracturing of the reservoir to create high permeability pathways for the gas and oil to flow into the wellbore.

26. Hydraulic fracturing requires large volumes of liquids – on average 4.5 million gallons per well in Pennsylvania – to be transported to the well pad and pumped down the well under high pressure in order to fracture the target formation.
27. During stimulation, dozens of pump trucks and containers must be brought onto the well pad. The water is mixed with proppant and chemicals before being injected into the well. The proppant and chemicals must be brought to and stored on the well pad.
28. Once stimulation is completed, the internal pressure of the rock formation causes fluid to return to the surface through the wellbore, which is known as "flowback" or "produced water." This cleans the well bore and formation of debris and fracture fluid. The flowback contains the injected chemicals and naturally occurring materials, including brines, metals, hydrocarbons and radionuclides. Additional equipment such as separators, sand traps and tanks are used to capture and process the gas and condensate. The flowback water must be stored on-site and taken off-site for management as a residual waste.
29. When drilling and completion are complete, drilling equipment is removed from the site. There remains equipment needed for production such as separator units and condensate tanks. Maintenance vehicles must visit the site, and drill rigs may return to add wells to the pad or re-fracture existing wells. The existing wells must be tied into pipelines or other infrastructure to convey the gas to market.
30. Shale gas development causes noise pollution for persons residing near the well and along the truck routes that service the well pad. The most intensive noise from well pads will last about a month per well, and will recur when wells are reworked. The increased truck traffic

associated with well development will impact residents throughout the township. Increased noise pollution can contribute to stress and result in physical effects associated with excess stress such as annoyance, irritation, fatigue, headache, unease, and disturbed sleep.

31. Shale gas development causes air pollution. Development of a shale gas well typically requires 1000 to 1500 truck trips per well installed, which damages roads, and impacts the health of residents, especially in highly populated areas.
32. Trucks typically run on diesel engines, as do the engines that provide electricity to the drill rig and other auxiliary equipment. Diesel-powered vehicles and equipment account for nearly half of all nitrogen oxides (NO_x) and more than two-thirds of all particulate matter (PM) emissions from United States transportation sources. PM is comprised of hundreds of chemical elements, including sulfates, ammonium, nitrates, elemental carbon, condensed organic compounds, and carcinogenic compounds and heavy metals such as arsenic, selenium, cadmium and zinc.
33. Particulate matter irritates the eyes, nose, throat, and lungs, contributing to respiratory and cardiovascular illnesses and even premature death. Diesel exhaust has been classified a potential human carcinogen by the U.S. Environmental Protection Agency (EPA) and the International Agency for Research on Cancer.
34. Diesel emissions of nitrogen oxides contribute to the formation of ground level ozone, which irritates the respiratory system, causing coughing, choking, and reduced lung capacity.
35. Shale gas development causes light pollution. As with excess noise, the constant illumination of shale gas pads can contribute to stress among those living in areas exposed to constant artificial light from the well pad.

36. Increased traffic caused by shale gas development will have both local and cumulative impacts because of the multiple projects that will be ongoing in the zoned districts, all of which will contribute to traffic due to construction, drilling, transport of wastewater, transport associated with hydraulic fracturing, as well as an overlap of development phases on different well pads.
37. Shale gas development may cause surface and groundwater contamination. Numerous polluting substances are transported to and from well pads, stored on well pads, and used in association with shale gas development. The mismanagement of these substances would result in surface or groundwater contamination from spills, leaks or accidents.
38. Faulty well construction, such as a bad cement job, can cause groundwater contamination that will affect private water wells, such as that experienced by the residents of Dimock, Pennsylvania.
39. In addition to well-pads, compressor stations and natural gas processing stations are major industrial operations.
40. Compressor stations consist of large reciprocating engines that compress gas in order to transport it through pipelines.
41. Compressor stations produce noise and air pollution.
42. Compressor station engines emit nitrogen oxides, volatile organic compounds, particulate matter, carbon monoxide, and other pollutants. When vented, compressor stations emit volatile organic compounds and methane.
43. Compressor stations emit noise that varies based on the number of engines and other factors such as frequency, topography, weather and wind speed. Compressor stations operate 24 hours a day, and seven days a week.

44. Gas processing plants extract natural gas from other longer chained hydrocarbons and contaminants produced from shale gas wells so that the natural gas complies with pipeline specifications. Processing plants may include fractionators and deethanators.
45. Shale gas processing emits greenhouse gases, as well as toxic air pollutants such as benzene, formaldehyde and hexane.
46. Shale gas wells, compressor stations, and processing facilities have a greater impact on more vulnerable populations such as school-aged children.
47. Air pollutants from all forms of shale gas development may interfere with brain development of children and more easily accumulate in their bodies as children cannot metabolize toxins at the same rate as adults.
48. Pollutants and impacts from shale gas development may also lead to an increased rate of development of asthma and other respiratory diseases in children.
49. The U.S. Department of Labor, Occupational Safety and Health Administration considers “Drilling Oil and Gas Wells” to fall within the Standard Industrial Classification (“SIC”) 1381, which is part of Industry Group 138 – Oil and Gas Field Services. Some of the potential hazards identified by OSHA that apply to SIC 1381, include: Fire/Explosion/High Pressure Release and Hydrogen Sulfide Exposure. See U.S. Dept. of Labor, Occupational Safety and Health Admin., Profile: Oil and Gas Well Drilling and Servicing, available online: https://www.osha.gov/dep/industry_profiles/p_profile-138.html (last visited April 14, 2017).
50. In *Robinson Township*, a plurality of the Supreme Court stated that unconventional shale gas development was an industrial practice, and that “[b]y 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...” *Robinson Twp. v.*

Commonwealth, 83 A.3d 901, 975 (Pa. 2013) (plurality).

The Penn Township Ordinance and MEO Violates the most basic Substantive Due Process Principles that Apply to Zoning and the Substantive Due Process Rights of Penn Township Residents

51. Zoning derives its legitimacy from a municipality’s police power to promote public health, safety and welfare.
52. To determine whether zoning is constitutional, a substantive due process inquiry must take place. *Robinson Twp.* 83 A.3d at 482.
53. Pennsylvania requires that for zoning to be constitutional it must promote the public health, safety, morals, and welfare, and be substantially related to protecting or furthering those interests. *In re Realen Valley Forge Greenes Associates*, 838 A.2d 718, 728 (Pa. 2003); *C & M Developers, Inc. v. Bedminster Township Zoning Hearing Board*, 820 A.2d 143, 150 (Pa. 2002); *Boundary Drive Associates v. Shrewbury Twp. Bd. Of Sup’rs*, 491 A. 2d 86, 90 (Pa. 1985)
54. Zoning is an extension of the concept of public nuisance. Land use restrictions aim to prevent problems caused by the “pig in the parlor instead of the barnyard.” *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926).
55. Separating uses satisfies due process analysis because it is a permissible method of promoting public health, safety, and welfare. There is a clear and obvious public value to having heavy industrial activity separated from residences, schools, parks, and farms. For example, reserving land for single-family residences preserves the character of neighborhoods, securing “zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.” *Village of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974).

56. The Real Estate Principle of Conformity states that “[t]he maximum value is realized when a property is in harmony with its surroundings and the use of land conforms to existing neighborhood standards. In single family residential neighborhoods, for example buildings should be similar in design, construction, size, and age.”

57. A zoning ordinance loses its legitimacy when it is not related to public health, safety, or welfare. A zoning ordinance is therefore invalid if it differentiates between uses in an irrational way or produces an “irrational scheme.”

58. Ordinance Number 912-2016 Chapter 190 produces just such an irrational scheme by allowing unconventional natural gas wells – an industrial use – in an otherwise non-industrial zone.

59. The Ordinance also does not provide any stricter or varying conditions on oil and gas development between residential and industrial areas, indicating a disregard for the varying purposes of the different zoning districts.

60. Ordinance Number 912-2016 Chapter 190 was enacted without taking into account the effect of allowing industrial shale gas operations in the RR District on the public health, safety and welfare of its residents.

61. Ordinance Number 912-2016 Chapter 190 violates the substantive due process rights of Penn Township residents.

The Penn Township Ordinance is Substantively Invalid because the MEO District Directly and Irrationally Contradicts the Stated Purposes and Objectives of the Zoning Ordinance.

62. One of the purposes of the Township’s Zoning Ordinance is to not “restrict, control or place hardship upon the continued agricultural use of land within its area of jurisdiction and control.” §190-102(A). Further, the purposes outlined in the Zoning Ordinance also identify community objectives, including: “to prevent haphazard growth that... undermines

community values” and “maintain stability in each neighborhood and commercial area through an orderly general development pattern” and “[t]o recognize the Township’s image agricultural legacy and its evolution into a vibrant suburban community maintaining its small town and rural values” and “[t]o protect the natural environment and residential quality by preserving open space reference thereto and natural amenities.” §190-102(A)(1)-(4).

63. The enactment of Ordinance 912-2016 Chapter 190 failed to satisfy those objectives.

64. The Purpose of the Rural Resource District is “to provide land for continuing agricultural operations, resource management, timber harvesting, outdoor recreation, public and private conservation areas, low density single family residential, and compatible support uses.” §190-402(A).

65. Industrial oil and gas activities do not fit any of the purposes identified in the RR District.

The Penn Township Ordinance Number 912-2016 Chapter 190 Violates the Standards for an Appropriate Overlay District

66. According to the Commonwealth Court, “[t]he purpose of an overlay district is to create specific and targeted provisions that conserve natural resources or realize development objectives *without unduly disturbing the expectations created by the existing zoning ordinance*. In other words, overlay districts supplement existing zoning districts; they do not supersede them either in fact or in practice.” *Main St. Dev. Grp., Inc. v. Tinicum Twp. Bd. of Supervisors*, 19 A.3d 21, 28 (Pa. Commw. 2011)(emphasis added).

67. The MEO was not sited in a “specific and targeted way” because it covers the entirety of the RR and IC Districts without any consideration for where it would be most appropriate to locate oil and gas development within the Township.

68. The Development Infill Overlay (“DIO”), while ostensibly created to “establish a health and safety buffer from surface related activities and facilities, specifically oil and natural gas

extraction,” is only an inverse overlay of the MEO. As the MEO spans the entire Township, the DIO fails to establish any buffer that would protect health and safety of residents.

69. Without the MEO, the IC District alone would provide for the reasonable extraction of minerals in the Township, as required by the Municipalities Planning Code. The recently approved Huntley and Huntley Poseidon Well Pad, for example, is located in the IC District.
70. The MEO clearly disturbs the expectations created by the underlying RR District. In *Tinicum*, the Court held that it was unconstitutional when an overlay district “effectively create[d] agricultural districts out of districts with non-agricultural stated purposes, albeit through a different mechanism, completely changing the expectations created by the Ordinance in the non-agricultural districts.” *Tinicum Twp. Bd. of Supervisors*, 19 A.3d 21, 29 (Pa. Commw. Ct. 2011).
71. Similarly, the MEO effectively creates an industrial zone out of the RR zone, completely changing the expectations created by the underlying zoning district.

Ordinance Number 912-2016 Chapter 190 Violates the Rights of Residents Under Article 1, Section 27 of the Pennsylvania Constitution

72. Ordinance Number 912-2016 Chapter 190 violates the constitutional right of residents to a healthy local environment in which to live and raise their children.
73. Ordinance Number 912-2016 Chapter 190 fails to properly account for the impact of industrial shale gas development on the local environment.
74. Under Article 1, Section 27 of the Pennsylvania Constitution, state and local government officials have an obligation to assess and determine whether any proposed project, law, regulation or ordinance would cause unreasonable “actual or likely” degradation of air and/or water quality or other protected features of the environment. *Robinson Twp.* 83 A.3d at 951-955.

75. If a municipality fails to perform the analysis, or allows development to proceed that would cause unreasonable “actual or likely degradation,” the government action violates Article 1, Section 27. *Id.*
76. When government acts, the action must, on balance, reasonably account for the environmental features of the affected locale, if it is to pass constitutional muster. *Robinson Twp.* 83 A.3d at 953.
77. The Township failed to account for the health, safety, and environmental concerns of its citizens and the differing environmental concerns of each zoning district, by allowing for industrial shale gas development in the RR District, adjacent to residential developments, schools and other incompatible land uses.
78. The Township failed to treat residents equitably by allowing for shale gas development in the RR District, thereby placing a higher burden of harm to health and the environment on citizens, including Protect PT members, who live in the RR District.
79. By allowing shale gas development in the RR District, the Township exposed “otherwise protected areas to environmental and habitability costs associated with this particular industrial use; air, water, and soil pollution; persistent noise, lighting, and heavy vehicle traffic; and the building of facilities incongruous with the surrounding landscape.” *Robinson Twp.* 83 A.3d at 979.
80. Article 1, Section 27 protects the rights and expectations of citizens to their environmental safety, and limits the ability of lawmakers to remove those protections. Ordinance Number 912-2016 Chapter 190 is invalid because the police power does not allow the township “to so fundamentally disrupt these expectations respecting the environment.” *Robinson Twp.* 83 A.3d at 978.

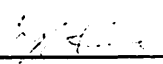
81. By allowing industrial shale gas operations in the RR District, in contravention of the goals of that District and without acknowledging the distinct variations between the IC and RR Districts, the Township unreasonably infringed on the quality of life of residents and their right to clean air, pure water, and the natural, scenic, historic, and esthetic values of the environment, in violations of Article I, Section 27 of the Pennsylvania Constitution.

Relief Sought

82. Protect PT requests that the Board declare the Penn Township Ordinance Number 912-2016 Chapter 190 substantively invalid, and recommend to the Board of Commissioners that the Penn Township Zoning Ordinance be revised to limit unconventional oil and gas development to industrial zoned districts.

83. In addition, pursuant to the MPC §915.1, Protect PT requests that the Board halt all consideration of special exception or other permits for industrial shale gas development under the ordinance, until this substantive validity challenge is resolved.

Respectfully Submitted,



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Counsel for Protect PT

Date: April 14, 2017

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Notice of Substantive Validity Challenge to Penn Township's Ordinance Number 912-2016 Chapter 190 was served upon the following parties on April 14, 2017, in the manner indicated below:

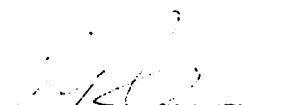
By Certified First Class U.S. Mail

Penn Township Zoning Hearing Board
2001 Municipal Court
Harrison City, PA 15636

Courtesy Copy by First Class U.S. Mail and email

John K. Sweeney, Esq.
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Greensburg, PA 15601

Michael Korn, Esq.
Avolio Law Group, LLC
117 N. Main Street
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Ryan E. Hamilton

Exhibit B

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June 21, 2017

via email only

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RE: Protect PT Validity Challenge

Gentlemen:

The sixty-day window for the Zoning Hearing Board to act on the validity challenge filed by Protect PT will expire within the next few days, I believe on June 25, 2017. In response to inquiries of counsel, please be advised that no action will be taken by the Board regarding the challenge within the time mandate. As a result, the matter will be deemed denied pursuant to provisions of Section 10916.1 of the MPC after expiration of 60 days from the date of application submission.

Please inform your clients accordingly. Thank you for your courtesies throughout.

Yours very truly,

John K. Sweeney, Esquire

JKS/ks

cc: A. Graziani
J. Greer
J. Wilhelm, Esq.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this NOTICE OF APPEAL OF SUBSTANTIVE VALIDITY CHALLENGE DEEMED DENIAL was served upon the following parties on July 13, 2017, in the manner indicated below:

By Certified First Class U.S. Mail and email

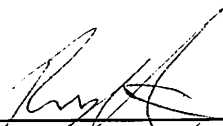
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