“[I]t should be borne in mind that although ‘zoning is a means by which a governmental body can plan for the future -- it may not be used as a means to deny the future.’”


I. Intro

The Pennsylvania Supreme Court recently held that some portions of Act 13 of 20121 are unconstitutional. This ruling returned the right to zone for shale gas activities to the local municipal governments, allowing them to zone as they feel necessary. As a result, many communities located in these areas of existing or potential shale gas development will likely revisit their current zoning ordinances.

While revisiting these ordinances, different viewpoints will surely play a role in determining how zoning will regulate shale gas activities. Any revisions or new enactments of zoning ordinances must be within the police power of the municipality. The courts have developed a framework of analysis to be used when determining such. This analysis must consider the interaction between environmental law, environmental concerns, property law, and community concerns. How these factors weigh will likely decide what future development is regulated.

This article gives a broad overview of this interaction. It briefly discusses Act 13, the effect it had on zoning, and how Robinson Township affects this interaction. Next, it outlines the common regulatory scheme of zoning ordinances. It discusses the power municipalities have, allowing them to zone and police the land within their boundaries. Finally, it discusses how those

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regulatory schemes may be limited in their powers. These limits include the inability to engage in exclusionary zoning, including *de facto* exclusionary zoning.

II. Robinson Township

*Robinson Township v. Commonwealth of Pennsylvania*\(^2\) challenged certain sections of Act 13 of 2012. Act 13 required that municipalities allow for the permitting of well activities in residentially zoned areas.\(^3\) One of the several challenges made against Act 13 in *Robinson Township* was the “uniform and statewide regulatory regime.”\(^4\) The decision that followed this challenge was one of the most environmentally conscious opinions of recent times. The Supreme Court of Pennsylvania’s plurality opinion discussed Pennsylvania’s history with natural resource development, and noted a need for sustainable development. This decision also brought attention back to *Article 1, Section 27 of the Pennsylvania Constitution* and the public trust doctrine.\(^5\)

The holding in *Robinson Township* returned police power to the municipalities. The Court ruled Section 3304 of Act 13 unconstitutional. Section 3304 had established a statewide regulatory scheme allowing shale gas activities in every area of zoning, including residential areas.\(^6\) With this police power returned, many communities will likely revisit zoning ordinances directed at regulating shale gas to ensure they are regulating in the way the community and local government feels appropriate. Public movements and political debates regarding these ordinances and the allowance of shale gas development, including fracking, will steer these

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\(^3\) Act No. 13, § 3304.

\(^4\) *Robinson Twp*, 83 A.3d at 931.

\(^5\) The public trust doctrine is embodied in the final sentence of Article 1 Section 27 of the Pennsylvania Constitution. With respect to the Commonwealth’s natural resources, this doctrine designates the Commonwealth as trustee, and the people of Pennsylvania as its beneficiaries. *Robinson Twp.*, 83 A.3d at 956. This trustee – beneficiary relationship requires the Commonwealth to treat its citizens as fiduciaries, in turn utilizing natural resources with this in mind. *Id.*

\(^6\) It is important to note that shale gas activities are not limited simply to the drilling and operation of a shale gas well. It includes compressor stations and other industrial uses associated with natural gas production.
discussions. Shale gas development and fracking were frequently debated topics even prior to the enactment of Act 13. In fact, many of those communities who participated in *Robinson Township* were at the forefront of those movements and debates, fighting to retain their municipality’s right to regulate shale gas activities. This debate will now return to the local governments, where communities may decide to regulate or promote natural gas development through their zoning ordinances.

### III. Property Rights

Property rights are protected by both the Pennsylvania Constitution and the United States Constitution. Article 1 Section 1 of the Pennsylvania Constitution protects a property owner’s right to the enjoyment of, and to profit from, their private property, as well as protection from governmental interference with these rights.\(^7\) The Fifth and Fourteenth Amendments of the United States Constitution also provide protection through the right to due process.\(^8\) Municipalities are afforded the ability to regulate land use as needed, while property rights remain inherent to the people and citizens of Pennsylvania. Property rights may be “reasonably limited by zoning ordinances” enacted by local municipalities.\(^9\)

A court will engage in a substantive due process inquiry in order to determine whether an ordinance restricting constitutionally guaranteed rights is constitutional.\(^10\) Here, the court will balance the landowner’s rights against the public interest the municipality seeks to protect through its exercise of police power.\(^11\) However, a municipality’s freedom to regulate does have its limits. These limits include both exclusionary zoning and *de facto* exclusionary zoning.

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\(^8\) *Id.*

\(^9\) *Id.*

\(^10\) *Id.*

\(^11\) *Id.*
At its broadest level, exclusionary zoning raises the issue of “whether an ordinance is unconstitutionally exclusionary.” 12 An ordinance is likely unconstitutional if it does not make reasonable allowances for legitimate uses. 13 The courts have commonly struck down zoning ordinances that have completely banned a particular use from the municipality. 14 The court in *Norate Corporation, Inc. v. Zoning Board of Adjustment* 15 struck down a complete ban on off-size advertising. Similarly, the court in *In re Smith Auto Co. Appeal* 16 struck down a complete ban on flashing red lights. In both cases, the court reasoned that the applicable ordinance did not make reasonable allowances for a legitimate use. 17

The test for exclusionary zoning does allow for an exception. A total ban on a legitimate use must have a “reasonable relationship to public health, safety, morals and general welfare” for it to avoid being invalidated. 18 There must be “a more substantial relationship” to these factors than the alternative of simply designating the use to a specific area. 19 Simply labeling an ordinance as necessary for the preservation of health, safety, and general welfare is not enough. 20 Such a standard works, in part, to prevent a municipality from ignoring their responsibility to carry the burdens associated with development and population growth. 21 A municipality should be used for development if it is the logical place for such. 22

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13 *Id.*
14 *Id.*
17 *Norate Corp.*, 207 A.2d at 895; *In re Smith Auto Co.*, 223 A.2d at 685.
18 *In Re Appeal of Elocin*, 461 A.2d at 772-73.
20 *Id.* at 186.
22 *Id.*
An ordinance may still qualify as *de facto* exclusionary zoning, even in the absence of language expressing a complete ban. Here, the courts will rely more on a “fair share” test.\(^{23}\) This test requires municipalities to “absorb” the increased economic burdens and responsibilities that occur with natural growth.\(^{24}\) The issue in these cases is often whether the ordinance provides reasonable accommodations for the use in question.\(^{25}\) However, a challenger will not be successful by simply pointing out the fact that only a small area is designated for that use; they must also meet the heavy burden of showing that the residents are not being adequately served.\(^{26}\)

Overall, where an ordinance expressly bans a use or designates an area so small that the use cannot be engaged in, a court will likely invalidate the ordinance, finding it to be a form of exclusionary zoning. Such is identified by the courts as *de facto* exclusionary zoning.

### IV. Sample Application to Sample Ordinances

A wide array of zoning language directed at shale gas development will likely emerge as municipalities examine and revise their existing zoning ordinances. The following analysis is a brief overview of what may be proposed, and how the exclusionary zoning framework may affect it. The examples look at sample language that is aggressive towards limiting shale gas exploration, language that takes a neutral approach, and lastly, language that favors shale gas exploration.

An ordinance in its most aggressive stance will likely use the following language: “It shall be unlawful for any person or company to engage in the extraction of natural gas within this municipality” and “it is the intent of the ordinance to ban the commercial extraction of such natural gas because it threatens the health, safety, and welfare of residents.” As discussed above,

\(^{24}\) *Id.* at 588.
\(^{25}\) *Id.*
\(^{26}\) *Id.* at 587-88.
expressly banning a use places that ordinance in a highly questionable light. Such an ordinance could be challenged on the grounds that it is unconstitutionally exclusionary because the extraction of natural gas can surely be considered a legitimate use. A property owner may not only receive economic gain from the extraction of natural gas on his property, but members of the immediate and surrounding communities may ultimately enjoy lower natural gas prices as well. Furthermore, the extracted natural gas may serve as a cleaner alternative to coal. Many electric generators have considered, if not already converted, from coal to natural gas as a means of generating electricity.

The municipality could argue that the ban is necessary for the preservation of health, safety, and general welfare, but this argument will most likely fail. There are currently few topics more highly contested than the claims that natural gas extraction is unsafe and unhealthy. Health, safety, and welfare are all factors in dispute. A court would likely identify numerous areas within the municipality that could be used for shale gas activities. It may also find that there is no substantial relationship between the complete ban and the necessity to preserve health, safety, and general welfare because there is no conclusive evidence to support these claims. The mere labeling of an ordinance as necessary to accomplish these goals and concerns is not enough. Therefore, even if a municipality includes this language as their rationale for a ban, a court will likely invalidate the ordinance.

A more neutral ordinance may seek to regulate, but not completely ban, natural gas development. The language may designate shale gas development as a conditional use, which the local government may permit if certain conditions are met. These conditions may include sound barriers, increased setbacks, and restricted hours of road use (just to name a few). While this form of ordinance may seek to regulate the use, it does not create a ban. Courts will likely find
these ordinances to be valid. These ordinances do not expressly ban a use, but rather, provide land for development and allow leaseholders to realize profits from their private property. However, if the conditions of use become so onerous that they are unreasonable, then the ordinance starts to resemble *de facto* exclusionary zoning. Conditions may be tailored to allow for a responsible framework of development, but not to the extent that it makes development impossible.

Finally, language favoring shale gas exploration will seek to allow for unfettered exploration within the municipality. Such ordinances would have no trouble surviving an exclusionary zoning ordinance, as there is no restriction on the use. This may, however, raise other legal challenges.

**V. Conclusion**

The *Robinson Township* decision will likely cause communities to reevaluate their zoning ordinances. Many individuals and groups will consider ways in which they can regulate, promote, or prohibit natural gas extraction in their community. What follows will be an intermingling of environmental law, property law, and community influence.

Both sides will have strong, well-reasoned arguments. One side may argue in favor of property development and the economic gains that come with it, while an opposing side may argue that environmental protection and ecocentrism are better policies to follow. The debate between these viewpoints is already underway, and the effect on shale gas development remains uncertain. Rather than allow these uncertainties to exist, the parties involved should expand their viewpoints in hopes of recognizing a responsible framework of development and regulation. Our nation would not be what it is today if it did not undergo numerous stages of development.
The Pennsylvania Supreme Court has done the hard part. They have acknowledged that not all development has been perfect, and in some cases, it has even been unfortunate. It is now up to us, as both legal professionals and citizens of Pennsylvania, to effectuate that Court’s sentiment. We must recognize that development will help us grow. And when development is done right, not only will we grow, we will flourish.