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IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

Middle

Nos. 63, 64, 72 & 73 MAP 2012

ROBINSON TOWNSHIP, *et al.*,

v.

COMMONWEALTH OF PENNSYLVANIA, *et al.*,

APPLICATION FOR REARGUMENT

Application for reconsideration of the Opinions and Order entered by this Court on
December 19, 2013

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Per Pa.R.A.P. 2541-44, Appellants/Cross-Appellees the Pennsylvania Public Utility Commission and Chairman Robert F. Powelson (“Commission”), and the Pennsylvania Department of Environmental Protection and Secretary of Environmental Protection E. Christopher Abruzzo (“Department”), ask the Court to reconsider its Opinions and Order entered on December 19, and to broaden its remand for factual findings on disputed issues of material fact and supplemental briefing.

In addition, because the Court in its severability analysis misapprehended the intent and effect of certain subsections of 58 Pa.C.S. § 3215, the Court should vacate its judgment and direct additional briefing on those issues.

I. OPINIONS AND ORDER IN QUESTION

The Opinions and Order were entered in *Robinson Twp. v. Com.*, 2013 WL 6687290 (Pa. Dec. 19, 2013). The Opinion Announcing the Judgment of the Court (“OAJC”) concluded that several core provisions of Act 13 of 2012, 58 Pa.C.S. §§ 2301-3504, violate PA. CONST. art. I, § 27 (“Section 27”). OAJC, at *16-63.

Justice Baer concurred in the judgment, concluding instead that the same provisions of Act 13 violate the substantive due process rights of local municipalities and other petitioners. Concurring Opinion, at *77-85.

The Court remanded the matter to Commonwealth Court to address: (1) whether several other challenged provisions of Act 13 are constitutional; and (2)

whether any provision of Act 13 is severable from the provisions that have been declared, or are ultimately found, to be unconstitutional. OAJC, at *77.

II. POINTS OF LAW OR FACT OVERLOOKED OR MISAPPREHENDED

A. The Court’s¹ Article I, Section 27, Ruling Should Be Remanded “For Further Factual Development And Ultimate Determination Regarding [Act 13’s] Constitutionality.”

Once this Court concluded—as a matter of first impression—that Section 27 mandates a factual “balancing”, it should have followed the same course it took in connection with severability: “clarifying legal issue but remanding for further factual development and ultimate determination regarding statute’s constitutionality”. OAJC, at *76 (citing *Hosp. & Healthsystem Ass’n of Pa. v. Com.*, 77 A.3d 587, 606 (Pa. 2013)). Instead, the Court proceeded on its own (and without explanation) to issue broad factual findings about Act 13, apply those factual findings to its new “balancing” test, and declare various provisions of Act 13 to violate Section 27. However, there has been no evidentiary hearing and, therefore, no facts of record in this proceeding to support the broad factual findings that form the basis of the court’s determination that Act 13 fails the balancing test required under Section 27.

¹ “The Court” in this section refers to Part III of the OAJC, in which only three of the six participating justices joined. Because Part III of the OAJC is not precedential or otherwise binding, it is unknown whether the Commonwealth Court on remand will follow Part III of the OAJC, the Concurring Opinion, a combination thereof, or some other formulation of its own devise.

The Court's actions in issuing original findings of fact is unprecedented in a matter not involving original or extraordinary jurisdiction, and runs roughshod over the principle that this Court "does not sit as a trier of issues of fact, expecting to be persuaded that one or the other side is more credible." *Reed v. Universal C.I.T. Credit Corp.*, 253 A.2d 101, 104 (Pa. 1969). As this Court has emphasized, fact-finding is "a task for a trial court," and an "area of the judicial process" that this Court "would never invade." *Id.* Because the Court for the first time has "invade[d] that area of the judicial process" in this case, reconsideration is warranted.

Although the Commission and the Department do not agree with the Court's pronouncement of the legal framework required under Section 27, they agree with the Court that the "General Assembly unquestionably possesses" the power to adopt statewide environmental legislation. The dispute is whether the General Assembly did so "inconsistent with the constitutional mandate" imposed by Section 27. OAJC, at *84. Under the Court's analysis, that determination calls for a "balancing" of various facts and interests.²

² As the Court wrote: "The citizens recognize that asserting a Section 27 claim does not entitle them to automatic relief, but they argue a 'balancing must take place'" OAJC, at *23; "Clause one of Section 27 requires each branch of government to consider in advance of proceeding the environmental effect of any proposed action on the constitutionally protected features," *id.* at *33; "when government acts, the action must, on balance, reasonably account for the environmental features of the affected locale," *id.* at *35; "to achieve recognition of the environmental rights enumerated in the first clause of Section 27 as 'inviolable' necessarily implies that economic development cannot take place at the expense of an unreasonable

After pronouncing the new balancing test to be used under Section 27, the Court proceeded to make sweeping factual conclusions, leading the Court ultimately to hold that Act 13 fails to meet the newly-minted “balancing” test, *to wit*:

- “By any reasonable 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.” *Id.* at *55.
- “The entirely new legal regimen alters existing expectations of communities and property owners and substantially diminishes natural and esthetic values of the local environment.” *Id.* at *58.
- The General Assembly has “sanctioned a direct and harmful degradation of the environmental quality of life in these communities and zoning districts.” *Id.*
- “[T]he outright ban on local regulation of oil and gas operations ... propagates serious detrimental and disparate effects on the corpus of the trust.” *Id.* at *59.
- Act 13 “permit[s] development with such an immediate, disruptive effect upon how Pennsylvanians live their lives.” *Id.* at *60.
- The Court is “constrained to hold that the degradation of the corpus of the trust and the disparate impact on some citizens sanctioned by Section 3304 of Act 13 are incompatible with [Section 27].” *Id.*

degradation of the environment,” *id.*; “the duties to conserve and maintain are tempered by legitimate development tending to improve upon the lot of Pennsylvania’s citizenry, with the evident goal of promoting sustainable development,” *id.* at *39; and Section 27 “offers protection equally against actions with immediate severe impact on public natural resources and against actions with minimal or insignificant present consequences that are actually likely to likely to have significant or irreversible effects in the short or long term.” *Id.* at *40.

Because Commonwealth Court neither conducted a factual hearing nor issued factual findings, however, none of these broad factual statements finds support in the proceedings below. This Court should follow its own established precedent and remand to Commonwealth Court for development of facts, application of this Court's newly-pronounced standards to the facts found by the Commonwealth Court, and a final determination whether Act 13 violates Section 27 based on a full record and formal factual findings. *HHAP, supra; Mars Emergency Med. Servs., Inc. v. Twp. of Adams*, 740 A.2d 193, 196-97 (Pa. 1999) (Castille, J.) (after determining that whether municipal action violated the Emergency Medical Services Act required analysis of "the effect on the safety of the residents of the township and borough by the [municipality's] designation of [a particular medical provider] as the primary provider," "remanded to the trial court for findings of fact" because the "trial court made no factual findings"); *Pa. Nat. Mut. Cas. Ins. Co. v. Dep't of Labor & Indus.*, 715 A.2d 1068, 1075 (Pa. 1998) (case remanded for "specific findings of fact" where lower court "did not hold an evidentiary hearing but merely accepted documentary evidence," on basis "a detailed factual foundation is a necessary predicate to resolving this complex issue which will have an enormous impact"); *see also United Bldg. and Const. Trades Council v. Mayor of Camden*, 465 U.S. 208, 223 (1984) ("[W]e find it impossible to evaluate Camden's justification on the record as it now stands. No trial has ever

been held in the case. No findings of fact have been made.” “It would not be appropriate for this Court either to make factual determinations as an initial matter or to take judicial notice of Camden’s decay.”³

It appears that the Court based its sweeping factual conclusions, at least in part, on affidavits submitted below by municipalities and their proxies in support of their request for summary relief, which are referred to in the OAJC at *22 & nn. 26, 27. The Commission and the Department moved below to strike those affidavits on the basis, *inter alia*, that summary relief could not be granted based on them under *Borough of Nanty-Glo v. Am. Sur. Co. of New York*, 163 A. 523 (Pa. 1932). *See* R. 039a (May 10, 2013 *Per Curiam* Order of Commonwealth Court; Expedited Application to Strike Petitioners’ Motion for Summary Judgment at 4 (citing *Nanty-Glo*)). Though Commonwealth Court did not formally rule on that application, it also did not conduct a factual hearing, cite to the affidavits in its decision, or otherwise make any findings of fact.

³ The Court’s decision to issue its own findings of fact is not explained by the line of precedent holding that “[w]hen a finding of fact is simply a deduction from other facts and the ultimate fact in question is purely a result of reasoning, the appellate court may draw its own inferences and arrive at its own conclusions from the facts as established.” *In re McKinley’s Estate*, 337 A.2d 851, 853 n.1 (Pa. 1975) (citations omitted). As the Court explained in *In re Dorrance’s Estate*, 163 A. 303, 304 (Pa. 1932), “where a finding of fact is simply a deduction from other facts reported by the tribunal under review, and the ultimate fact in question is purely the result of reasoning, we are competent to judge of its correctness and will draw our own conclusions from the facts as reported.” (Emphasis added). Research has revealed no case where this Court relied on this precedent to issue original factual findings in any of the following circumstances, all of which are present here: where the lower court did not conduct a factual inquiry or issue any findings of fact; where only one side submitted evidence below; or where the case involved a complex scientific subject matter.

Thus, this Court issued its own factual findings on appeal, where the trial court made no findings of fact and only one side had presented a modicum of evidence. Fundamental fairness to a co-equal branch of government, as well as adherence to this Court's precedent and established procedure, mandates that the Commission and the Department be afforded a reasonable opportunity to present evidence before any judicial proclamation is made about whether Act 13 satisfies the newly-mandated balancing test under Section 27. Indeed, given the unprecedented nature of the Court's ruling in this case, the precise contours and proper application of the new balancing test should be revisited after a complete factual record has been presented on remand, findings of fact have been made, and conventional appellate review may proceed.⁴

⁴ The evidence that the Commission and the Department would present on remand is neither trivial nor insubstantial. To the contrary, the Commission and the Department would present, among other evidence, serious scientific and scholarly testimony and documents that would refute unsubstantiated and factually incorrect conclusions such as these: (1) "[E]xploitation of the Marcellus Shale Formation will produce a detrimental effect on the environment...and potentially on the public purse"; (2) Act 13 will "substantially diminish[] natural and esthetic values of the local environment"; and (3) Act 13 will have "an immediate, disruptive effect upon how Pennsylvanians live their lives[.]" OAJC, at *55-60.

For instance, a fact finder should consider (1) a university study demonstrating the environmental safety of unconventional drilling, such as a 2011 Penn State University study showing no statistically significant link between unconventional drilling and hydraulic fracturing on nearby water wells (*see* Elizabeth W. Boyer, *et al.*, *The Impact of Marcellus Gas Drilling on Rural Drinking Water Supplies*, Penn. St. Marcellus Center Outreach & Res. (Mar. 2012), http://www.marcellus.psu.edu/resources/PDFs/swistock_water.pdf); (2) a 2013 University of Texas-Austin and Environmental Defense Fund study demonstrating that new natural gas wells captured 99% of all escaping methane (David T. Allen, *et al.*, *Measurements of Methane Emissions at Natural Gas Production Sites in the United States*, Proc. Nat'l Acad. Sci. Online (Aug. 19, 2013), <http://www.pnas.org/content/early/2013/09/10/1304880110>); (3) the September 2013 State Review of Oil and Gas Environmental Regulations, Inc.'s "Pennsylvania Follow-Up

In summary, though this matter was handled expeditiously in Commonwealth Court in recognition of the manifest importance and substantial effects of the legislation at issue through much of the Commonwealth, the ultimate decision on its constitutionality should be made only after all parties have had a full and fair opportunity to present their cases based on the law as pronounced by this Court. In other words, after the Court concluded that Section 27 mandates a factual analysis and application of a balancing of interests, due process and prudence require remand for the creation of a comprehensive record and the development of findings of facts and conclusions of law by Commonwealth Court, followed by appropriate appellate review by this Court based on a full record.

State Review,” in which the multi-stakeholder STRONGER (which includes industry and environmental groups) concluded that Pennsylvania’s environmental regulatory program, with respect to unconventional oil and gas operations, “is, over all, well-managed, professional and meeting its program objectives” (*Pennsylvania Follow-up State Review*, St. Rev. Oil & Nat. Gas Evtl. Reg. (Sept. 2013), <http://strongerinc.org/sites/all/themes/stronger02/downloads/Final%20Report%20of%20Pennsylvania%20State%20Review%20Approved%20for%20Publication.pdf>); and (4) potential testimony from individuals like University of California, Berkeley physicist and climate scientist Dr. Richard Muller, and Professor Emeritus of Petroleum Engineering at Texas A&M Dr. Stephen Holditch, who recently co-authored a letter opposing an outright ban on hydraulic fracturing because nothing in their research “suggest[s] that shale development poses risks that are unknown or cannot be managed with available technologies, best practices and smart regulation.” (Stephen A. Holditch, *et al.*, *Letter to Governor Jerry Brown*, *Energy in Depth* (Dec. 18, 2013), <http://energyindepth.org/wp-content/uploads/2013/12/Letter-to-Governor-Brown-Dec-18.pdf>). The development of a full evidentiary record by a trial court, including expert testimony and data of the kind just described, would be far more beneficial to everyone concerned with this important law than having appellate justices review an incomplete, one-sided record and reaching their own factual conclusions.

Because this Court's decision to make its own ultimate factual conclusions in the course of deciding the constitutionality of the statute under Section 27 preempted regular judicial order, and foreclosed the Commonwealth's opportunity to demonstrate how Act 13 meets the Court's Section 27 test, the Court should reconsider its judgment and remand the entire matter to Commonwealth Court for proceedings consistent with this Court's decision.

B. The Court's Severability Ruling Misapprehends Section 3215, And That Issue Should be Remanded.

As this Court clearly noted, the Department has a fundamental duty to protect the Commonwealth's public resources. However, the Court's holding that subsections 3215(c) and (e) are not severable from subsection 3215(b) misapprehends Section 3215 and bears further review on remand. Without allowing a fuller evaluation of how subsections (c) and (e) operate within Section 3215, the Department's ability to fulfill its duties is unnecessarily constrained by this Court's ruling.

Subsections 3215(c) and (e) are severable from subsection 3215(b) because they are not "part of the Section 3215(b) decisional process." These subsections address different and unique types of public resource concerns beyond the water quality concerns that are the subject of subsection (b).

Section 3215 of Act 13 contains several separate and distinct provisions regarding well location restrictions. Subsection (a) is aimed at protecting drinking

water supplies. *See* 58 Pa.C.S. § 3215(a). Subsection (b) is aimed at protecting water quality generally.⁵ *See* 58 Pa.C.S. § 3215(b). The OAJC struck down Section 3215(b) as purportedly violative of Section 27. OAJC, at *60-62.

In contrast, subsection 3215(c) is not aimed at protecting water quality, but instead at protecting what are separately defined as other “public resources”. 58 Pa.C.S. § 3215(c) (*e.g.*, listing “[p]ublicly owned park, forests, game lands and wildlife areas,” “[h]abitats of rare and endangered flora and fauna,” and “[h]istorical and archeological sites”). There is no single statute or regulatory program administered by the Department aimed primarily at protecting these *other* types of “public resources.” *See id.*

Moreover, subsection 3215(c), and only subsection (c), operates in tandem with subsection 3215(e). *See* 58 Pa.C.S. § 3215(e). Under subsection (e), the Department is authorized to include conditions in permits that address probable impacts to “public resources identified under subsection (c)” only *after* the Environmental Quality Board develops regulations. 58 Pa.C.S. § 3215(e). These regulations necessarily would contain substantive requirements for the unique “public resources” identified in Section 3215(c), which are fundamentally distinct

⁵ The statutory framework under which the Department regulates drinking water supplies on the one hand, and water quality on the other, involves separate statutes and regulatory programs. For example, drinking water supplies are protected primarily by The Pennsylvania Safe Drinking Water Act, 35 P.S. § 721.1 *et seq.*, while water quality is protected principally by the Clean Streams Law, 35 P.S. § 691.1 *et seq.*

from the requirements in Section 3215(b) for conditioning well permits to protect water quality.

Yet, the Court found that subsections (c) and (e) are not severable from Section 3215(b), reasoning they “are part of the Section 3215(b) decisional process.” OAJC, at *76. That legal issue was not fully developed below.

To ensure that the Department’s ability to protect important public resources is not needlessly eliminated by this Court’s ruling that Section 3215(b) is unconstitutional, the continued viability of subsections (c) and (e) of Section 3215 warrants review on remand, along with the other severability issues that the Court remanded for consideration by Commonwealth Court.


III. CONCLUSION

For the foregoing reasons, reconsideration should be granted.

Respectfully submitted,

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Dated: January 2, 2014


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CERTIFICATE OF COMPLIANCE

I, Matthew H. Haverstick, certify that, based on the word count system used to prepare this submission, the above Application for Reconsideration contains 2954 words, exclusive of the cover page, the table of contents, the table of authorities, and the signature block. This brief, therefore, complies with the word count limits of Pa.R.A.P. 2544(c).

Dated: January 2, 2014



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