

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

Middle

Nos. 63, 64, 72 & 73 MAP 2012

ROBINSON TOWNSHIP, Washington County, Pennsylvania, BRIAN COPPOLA, Individually and in his Official Capacity as SUPERVISOR of ROBINSON TOWNSHIP, TOWNSHIP OF NOCKAMIXON, Bucks County, Pennsylvania, TOWNSHIP OF SOUTH FAYETTE, Allegheny County, Pennsylvania, PETERS TOWNSHIP, Washington County, Pennsylvania, DAVID M. BALL, Individually and in his Official Capacity as COUNCILMAN of PETERS TOWNSHIP, TOWNSHIP OF CECIL, Washington County, Pennsylvania, MOUNT PLEASANT TOWNSHIP, Washington County, Pennsylvania, BOROUGH OF YARDLEY, Bucks County, Pennsylvania, DELAWARE RIVERKEEPER NETWORK, MAYA VAN ROSSUM, the Delaware Riverkeeper, MEHERNOSH KHAN, M.D.,

v.

COMMONWEALTH OF PENNSYLVANIA, PENNSYLVANIA PUBLIC UTILITY COMMISSION, ROBERT F. POWELSON, in his Official Capacity as CHAIRMAN of the PUBLIC UTILITY COMMISSION, OFFICE OF THE ATTORNEY GENERAL OF PENNSYLVANIA, LINDA L. KELLY, in her Official Capacity as ATTORNEY GENERAL of the COMMONWEALTH OF PENNSYLVANIA, PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION and E. CHRISTOPHER ABRUZZO, in his Official Capacity as SECRETARY of the DEPARTMENT OF ENVIRONMENTAL PROTECTION,

**ANSWER TO APPELLANTS/CROSS -APPELLEES' APPLICATION FOR
RECONSIDERATION OF THE OPINIONS AND ORDER ENTERED BY
THE SUPREME COURT OF PENNSYLVANIA ON DECEMBER 19, 2013**

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Appellees/Cross-Appellants (“Citizens”) respectfully submit this Answer in opposition to the request for reconsideration (hereinafter, “reargument”) of Appellants/Cross-Appellees the Pennsylvania Public Utilities Commission, its Chairman, the Pennsylvania Department of Environmental Protection (“DEP”) and its Secretary (collectively, “Agencies”),¹ regarding the part of the December 19, 2013 Opinion Announcing the Judgment of the Court that garnered a plurality of votes (“OAJC”). Citizens respectfully request that this Honorable Court deny Agencies’ request.

I. INTRODUCTION

“Reargument before an appellate court is not a matter of right, but of sound judicial discretion, and reargument will be allowed only when there are *compelling* reasons therefor.” Pa.R.A.P. 2543 (emphasis added).² Agencies make interrelated claims in order to change the outcome of the well-reasoned and thorough OAJC: 1)

¹ Neither the Commonwealth nor the Attorney General sought reargument or sought to join Agencies’ request. It is well-settled that “the Attorney General is the Commonwealth official statutorily charged with defending the constitutionality of all enactments passed by the General Assembly.” *City of Philadelphia v. Com.*, 838 A.2d 566, 583 (Pa. 2003); see also 71 P.S. § 732-204(a)(3). By contrast, the DEP is charged with protecting this Commonwealth’s environment, yet rather than defend its Section 27 fiduciary duties, Agencies seek to undermine their constitutional role.

² Agencies filed an Application for “Reconsideration” citing Pa.R.A.P. 2541-44. (Agencies’ Request, at 1). However, Pa.R.A.P. 2541-44 deal solely with applications for reargument. It is unclear what appellate rules Agencies rely upon for the requested relief of “reconsideration” to “vacate [the Court’s] judgment and direct additional briefing” without reargument. Agencies effectively ask this Court for a “re-do” to present arguments that they failed to present earlier. This is the second time that Agencies have acted independently of the Commonwealth and Attorney General to seek extraordinary relief in this matter.

the OAJC announced a new standard under Article I, Section 27 (“Section 27”) of the Pennsylvania Constitution; 2) there are factual matters requiring review; and 3) the OAJC made factual determinations. As discussed below, Agencies present no compelling reasons for extraordinary relief.

II. ARGUMENT

Extraordinary relief is not warranted for four reasons. First, the OAJC contained a purely legal determination on Act 13’s constitutionality without any factual findings or new legal standards. Second, even if the OAJC contained factual findings, they were supported by a well-developed record and no material issues of fact were in dispute. Third, Section 3215(c) and (e) are related to Section 3215(b), which this Court enjoined, and their injunction does not impact protection of public natural resources. Lastly, Agencies’ requested relief would interfere with the finality of the Court’s determination.

A. **The OAJC contained a purely legal determination regarding Act 13’s constitutionality and contained no factual findings.**

The OAJC announced a purely legal determination that provisions of Act 13 violated the Pennsylvania Constitution as “Act 13 . . . commands municipalities to ignore their obligations under [Section 27].” Robinson Twp. v. Com., --- A.3d ----, 2013 WL 6687290, at *56 (December 19, 2013). The standard the OAJC used is the plain language of Section 27. Agencies had ample opportunity to address the standard. As Agencies previously recognized, Act 13’s constitutionality was a

question of law. Agencies now contradict their prior argument that no factual inquiry was necessary, and are judicially estopped from doing so.

1. The standard the OAJC used is the plain language of Section 27.

The OAJC's Section 27 analysis does not create a "new" standard. Rather, it follows the plain language of Section 27, which has been part of the Pennsylvania Constitution for over forty (40) years. Agencies clearly recognized this standard, conceding that the Commonwealth, as a trustee, has a duty under Section 27 to conserve and maintain public natural resources. R.1229a.³ Agencies also previously recognized that governmental agencies must "balance environmental and social concerns," and even argued that the General Assembly *did the appropriate balancing* when it enacted Act 13. R.1212a, 1214a, Agencies' Response Brief as Cross-Appellees, at 13 & 15.

Yet now, Agencies claim that they did not have an opportunity to show how Act 13 satisfies Section 27, and even argue ignorance of a balancing test. This directly contradicts Agencies' earlier arguments, which recognized the plain language standards that are a part of the OAJC's analysis. Further, Agencies' current claim that they were unaware of any need to provide facts reverses their prior argument, which acknowledged the need to "*balance* environmental and social

³ Citations are to the Reproduced Record in 72 & 73 MAP 2012.

concerns,” and argued that the Court could decide this case as a matter of law, which it did. *Id.*; R.1208a, Agencies’ Response Brief as Cross-Appellees, at 9, n.3.

Agencies’ *own* arguments, and the OAJC’s analysis, demonstrate that a Section 27 public trust analysis does not *per se* require any particular factual inquiry for balancing. The “balance” referenced in the OAJC is a balance that any governmental entity must undertake when enacting any law that might abridge the people’s rights as enumerated in the Pennsylvania Constitution. A court can, as the OAJC did here, review the language of a statute and find that it fails the basic constitutional command. That Act 13 did not satisfy the plain language standards of Section 27 does not transform the OAJC’s analysis into a “new” standard.

Lastly, Citizens’ arguments have consistently invoked Section 27’s plain language, the role of municipalities in carrying out Section 27 trustee obligations, and how Act 13 interfered with and prevented municipalities from carrying out those obligations.⁴ In response to Citizens’ arguments that Section 27 prevented municipalities from addressing risks of oil and gas operations, in accord with Section 27 trustee obligations, Agencies consistently dismissed the argument, claiming:

But Act 13 *represents the Legislature’s balancing* of economic, environmental, health, safety, and other factors implicated by the challenged provisions, and, as explained

⁴ Selected references: Petition for Review (R.117a-136a); Brief in Support of Motion for Summary Judgment (converted to Summary Relief) (R.754a-759a); Response to Preliminary Objections (R.1102a-1106a); see also Brief of Cross-Appellants at 31-39; Reply Brief of Cross-Appellants at 8-10.

above, it is for the Legislature, not Municipal Petitioners, to strike that balance. And *it is no violation of Article I, Section 27* for the Legislature to have done so.

R.671a (Agencies' Brief in Support of Preliminary Objections) (emphasis added).

As a result, Agencies had ample opportunity to defend the constitutionality of Act 13 when evaluated against Section 27 standards by bringing all potential arguments to the table. Agencies could have demonstrated specifically how the Commonwealth fulfilled its fiduciary obligations, beyond merely proclaiming that it did. Agencies chose not to, and instead chose consistently to contend that Act 13 met Section 27 standards, brushing aside Citizens' arguments, saying, essentially, that there was nothing for either this Court or the Commonwealth Court to see. To the extent Agencies failed to raise arguments in defense of Act 13, they cannot do so now.

Neither Agencies' failure to raise supportive arguments nor the OAJC's acceptance of Citizens' arguments converts the Section 27 standards as discussed in the OAJC into a "new" standard. Likewise, it does not allow Agencies to re-defend Act 13 when their chosen strategy failed. Agencies present no compelling reason for reargument.

2. This Court properly declared Act 13 unconstitutional as a matter of law.

Because the OAJC made a purely legal determination based on the plain language of the Pennsylvania Constitution, with no factual findings, remand would

not contribute to the resolution of this constitutional question. Further, Agencies are judicially estopped from arguing that factual review is necessary, as this directly contradicts their prior contentions.

a. The challenged provisions of Act 13 are unconstitutional as a matter of law.

This Court properly determined that certain provisions of Act 13 overstepped constitutional protections. The Court expressly explained, “The constitutional validity of Act 13 presents a pure question of law ...” Robinson Twp., --- A.3d ----, 2013 WL 6687290, at *26. This question did not rely upon or require factual findings, but relied instead on the plain language of Section 27, and Act 13. Indeed, both the Commonwealth Court and this Court looked directly at the plain language of Act 13 and found it constitutionally infirm.⁵

At its core, the OAJC re-affirmed that municipalities have trustee obligations under Section 27, and that Act 13, *on its face*, prevented municipalities from engaging in the requisite balancing and complying with Section 27. A majority of the Court recognized that Act 13 reflected that the General Assembly made no effort to account for local concerns or to mitigate localized impacts of shale gas

⁵ Agencies did not challenge as factual findings statements made by the Commonwealth Court in its Article I, Section 1 analysis that are similar to statements Agencies challenge in the Section 27 analysis. Request at 4, Robinson Twp. v. Com., 52 A.3d 463, 484 & n.21 (Pa. Commw. Ct. 2012). Agencies argued that the Commonwealth Court applied the wrong legal standards, not that it made incorrect factual findings, further showing that this matter involved a pure question of law. Agencies’ Brief as Appellants, at 14-23.

development on the people and their public natural resources. Id. at *56, *58-*59 (plurality); Id. at *84 (Baer, J., concurring). Act 13 was clear that municipalities were reduced instead to “*pro forma* accommodation.” Id. at *50 & n.58 (plurality); accord Id. at *84 (Baer, J., concurring). Further, Act 13 was clear on its face that the General Assembly itself did no balancing of local environmental and social concerns because the statutory language disregarded varied local conditions in favor of uniformity for the gas industry. Id. at *48-*51, *58-60 (plurality); accord Id. at *82 (Baer, J., concurring). The OAJC plainly explained that “Act 13’s primary stated purpose is not to effectuate the constitutional obligation to protect and preserve Pennsylvania’s natural environment. Rather, the purpose of the statute is to provide a maximally favorable environment for industry operators...” Id. at *54.

Neither the Commonwealth Court nor this Court required factual findings to conclude that statutory language allowing heavy industrial activity next to homes, schools, and sensitive natural resources without consideration of local conditions and preventing municipalities from ameliorating adverse impacts violated the people’s inherent rights as guaranteed under the Pennsylvania Constitution. Further, the cases Agencies cite in support of remand are factually distinguishable. Request, at 5-6. In each, either the Court determined that there were facts material to the question of constitutionality, or the case involved a question of whether a statute

applied to a given set of facts, not a constitutional question. In contrast, here, the Court found that Act 13, on its face, violated the Pennsylvania Constitution.

b. Agencies are judicially estopped from newly claiming factual matters require review.

Agencies consistently argued that this matter did not require the Court to make factual findings to determine Act 13's constitutionality. It is only now, after the OAJC's thorough analysis of the plain language of Act 13 and of Section 27, that Agencies claim that factual matters require further development in order to change the outcome in their favor. Such a late request for factual review, which is directly contradictory to Agencies' prior contentions and the legal standard correctly utilized by the Court, does not present a compelling reason for reargument.⁶ Agencies are judicially estopped from raising it.

Agencies stated that Citizens' claims could be decided as a matter of law. R.1208a, Agencies' Response Brief as Cross-Appellees, at 9, n.3.⁷ As a variant of this argument, Agencies have also previously contended that, even if a court were to

⁶ The alleged evidence Agencies proffer in footnote 4 is irrelevant to Act 13's constitutionality. The majority of material cited was published in 2013 and would not have been available to inform the trustee's decisions when Act 13 was enacted. A trustee cannot justify its decisions with after-the-fact information; rather a trustee must investigate impacts on the trust corpus and beneficiaries before acting. See 20 Pa.C.S. § 7203(a) & (c)(5); In re Scheidmantel, 868 A.2d 464, 492 (Pa. Super. Ct. 2005); see also 20 Pa.C.S. § 7773. For any information that the trustee could have considered, Agencies had ample opportunity to cite that earlier, but failed to do so. This failure is not a compelling reason for reargument.

⁷ All of Agencies' preliminary objections to the counts in the Petition for Review (excluding non-merits issues) claimed legal insufficiencies.

consider Citizens' affidavits, the affidavits would be inadequate to overcome legal insufficiencies. R.1209a; Agencies' Brief as Appellants, at 41. At no earlier point did Agencies request a hearing or posit that factual review was necessary. Rather, Agencies have consistently argued that the factual evidence Citizens offered was irrelevant to the constitutional challenges presented. R.1214a.

Agencies are judicially estopped from assuming a position inconsistent with their previous assertions. The test for judicial estoppel is: (1) did a party assume an inconsistent position, and (2) was his contention successfully maintained? Trowbridge v. Scranton Artificial Limb Company, 747 A.2d 862, 864 (Pa. 2000). Agencies argued that this matter could be decided as a matter of law, and were successful in that argument. It is inconsistent with their prior successful position to now argue that a factual hearing is required, and Agencies are judicially estopped from making such an assertion.

B. Even if, *arguendo*, factual findings were necessary, the record was well-developed and no issues of material fact were in dispute.

Even if factual findings were necessary to the outcome, the record was well-developed to support the Court's decision, and there were no material issues of fact in dispute.

Citizens provided various materials, photographs, and citations describing the risks and impacts of the shale gas development process, including impacts on the

people's public natural resources.⁸ R.78a-80a; R.123a-134a; R.229a-604a; R.1114a-1206a. Agencies have themselves acknowledged that there are environmental risks associated with shale gas development. R.655a, Agencies' Brief as Appellants, at 7. Indeed, a majority of this Court recognized that shale gas development has inevitable impacts, and *Agencies have not challenged* that recognition. Robinson Twp., --- A.3d ----, 2013 WL 6687290, at *2.⁹

In accord with the undisputed facts of record about the shale gas development process and its risks, the OAJC reasonably concluded that Act 13 would impact the people and their public natural resources protected by Section 27 because it “remove[d] a political subdivision’s implicitly necessary authority to carry into effect its constitutional duties” to protect public natural resources, and failed to account for local conditions in the absence of municipal balancing. *Id.* at *55, see also *59 n.58. Thus, Act 13 did not pass constitutional muster because

⁸ For example, the uncontradicted record reflects that a well site for an unconventional well has a number of features, including wellheads, condensate tanks, vapor destruction units with open flames, pipelines, and metering stations and may be more than one (1) acre in size. (R.77a.) The record also reflects that as a result of oil and gas activities, Petitioner Mount Pleasant Township experienced chemical leaks and seven (7) fires at well sites, and that shale gas development includes drilling rig operation and transport; flaring; road damage; pipelines; installation, construction, and placement of impoundments; compressor stations; processing plants; and noise, emissions, and constant operations. (R.78a, R.107a.)

⁹ Both dissenting opinions appear to concede this point. Robinson Twp., --- A.3d ----, 2013 WL 6687290, at *89 (Saylor, J., dissenting); *id.* at *90 (Eakin, J., dissenting).

“constitutional commands regarding municipalities’ obligations and duties to their citizens cannot be abrogated by statute.” Id.

Given the facts of record, “[w]ith respect to (a) inferences and deductions from facts and (b) conclusions of law, [the courts] . . . have the power to draw their own inferences and make their own deductions and conclusions.” Foulke v. Miller, 112 A.2d 124, 126-27 (Pa. 1955) (internal citations omitted). The OAJC’s determination that Act 13 denied municipalities the ability to strike a balance between shale gas development and Section 27 obligations was a legal conclusion, based upon facts of record that were not in genuine dispute.

C. The Court should reject reconsideration on Sections 3215(c) & (e).

Reconsideration as to Section 3215(c) and (e) is not warranted. Contrary to Agencies’ contentions, Section 3215(c)(6) (sources used for public drinking supplies) expressly relates back to Section 3215(b), which this Court enjoined. Likewise, Section 3215(e)(discussing regulations, conditions, and DEP’s burden) is connected to Section 3215(c). The Court only needed to look at Act 13’s plain language to see how the subsections are interconnected.

Also, Section 3215(c) merely restates what the DEP’s obligation would otherwise be under Section 27, which is to protect the people’s public natural resources. Thus, enjoining this provision does not eliminate DEP’s authority. Likewise, the Court’s action as to Section 3215(e) does not impact DEP’s ability to

protect public natural resources. Even without Section 3215(e), the Environmental Quality Board can craft regulations to protect public natural resources. 58 Pa.C.S. § 3274. And, even without DEP's actions, because of this Court's decision, local land use regulations can protect the people's public natural resources.

D. Agencies' request for reconsideration should be rejected because it would compromise the finality of the Court's decision.

Pennsylvania courts have long maintained that our judicial system should ensure a degree of finality to maintain judicial economy and efficiency. Salerno v. Philadelphia Newspapers, Inc., 546 A.2d 1168, 1170 (Pa. Super. 1988) (quoting, Commonwealth v. Eck, 416 A.2d 520, 522 (Pa. Super. 1979)). Furthermore, the Court should not sanction an approach to the resolution of cases that does not comport with basic fairness and ultimately erodes finality and judicial economy. Golden v. Dion, 600 A.2d 568 (Pa. Super. 1991). Because no compelling reason exists to justify reconsideration, Agencies' current request fosters undue delay and creates the specter of uncertainty regarding the outcome and effect of this landmark case which has now been established. The OAJC supplied Citizens and all other municipalities and citizens throughout the Commonwealth a resolution that allows them to plan in accordance with the Pennsylvania Constitution. To remand for further factual development would conflict with the Commonwealth's long-standing policy of judicial economy.

III. CONCLUSION

For these reasons, Citizens respectfully request that this Honorable Court deny Agencies' Application for Reconsideration.

Respectfully Submitted:

DATE: Jan. 14, 2014

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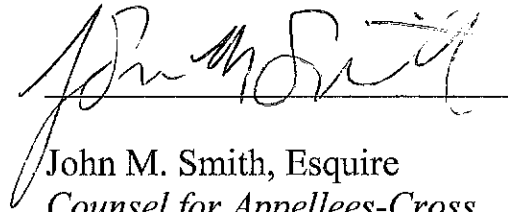
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CERTIFICATE OF COMPLIANCE

I, John M. Smith, certify that, based on the word count system used to prepare the foregoing Answer to Appellants' Application for Reconsideration, the Answer to Appellants' Application for Reconsideration contains 2998 words, exclusive of the cover page, the Table of Contents, the Table of Citations, the signature block, and the certifications. This submission therefore complies with the word count limits of Pa.R.A.P. 2544(c).

DATE: Jan. 14, 2014

A handwritten signature in black ink, appearing to read "John M. Smith", is written over a horizontal line.

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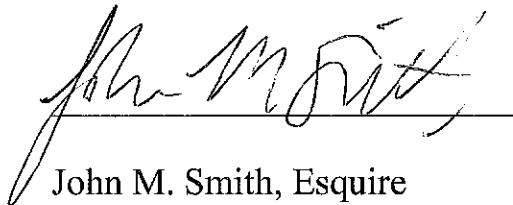
I, John M. Smith, do hereby certify that a true and correct copy of the foregoing Answer to Appellants' Application for Reconsideration was served via United States First-Class Mail on this 14th day of January, 2014, to the following:

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