

ORIGINAL

IN THE SUPREME COURT OF THE STATE OF OHIO

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STATE OF OHIO ex rel. JACK	)	
MORRISON, JR., LAW DIRECTOR, CITY OF	)	
MUNROE FALLS, OHIO, et al.	)	
	)	Case No. 2013-0465
Plaintiffs-Appellants,	)	
	)	Appeal from the Summit County Court
v.	)	of Appeals, Ninth Appellate District,
	)	Case No. 25953
BECK ENERGY COMPANY, et al.	)	
	)	
Defendants-Appellees.	)	

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BRIEF OF AMICI CURIAE HEALTH PROFESSIONALS  
IN SUPPORT OF APPELLANTS

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FILED
SEP 06 2013
CLERK OF COURT
SUPREME COURT OF OHIO

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## **STATEMENT OF THE INTERESTS AND IDENTITIES OF AMICI CURIAE**

The health professionals whose interests and identities are described below (“Amici”) respectfully submit this brief in support of Appellant City of Munroe Falls. Amici ask this Court to read Ohio Revised Code Chapter 1509 (“Chapter 1509”) narrowly, so as to preserve the traditional power of municipalities to enact and enforce zoning laws that separate incompatible property uses into different districts. Amici recognize that Chapter 1509 confers upon the State of Ohio the exclusive right to regulate the technical methods of oil and gas extraction, but urge this Court to uphold the constitutionally delegated home rule power of municipalities to regulate land use, which they do through comprehensive planning and zoning laws that protect both private property and public welfare. Adopting such an interpretation of Chapter 1509 will enable the Court to avoid constitutional questions that will arise if the statute is read to create special exceptions from local zoning requirements for the preferential benefit of oil and gas operators.

Amici take an interest in this case, because zoning laws not only foster orderly economic development and uphold the value of private property but also protect public health and safety from the adverse impacts of oil and gas activities. In particular, forcing municipalities to allow oil and gas drilling in every district – including residential, commercial, and park districts, where families live, run their businesses, and enjoy recreational activities – unnecessarily creates risks of emergency medical problems from industrial accidents. Siting drilling and other heavy industrial operations in those districts also increases public health threats – especially to vulnerable populations, such as children and the elderly – from toxic air emissions, contaminated wastewater, and stressful night-time noise and light. For these reasons, Amici urge the Court to adopt Proposition of Law One and to reverse the decision of the Court of Appeals.

**Peggy Ann Berry, MSN, RN, COHN-S, SPHR**, is President of the Ohio Association of Occupational Health Nurses. As an occupational health nurse, Ms. Berry is concerned about the unknown chemicals and potential for drinking water contamination associated with oil and gas well activities. She has an interest in local control over industrial operations that may impact drinking water and public health.

**Samuel Kocoshis, MD**, is a Professor of Pediatrics at the University of Cincinnati College of Medicine and the Medical Director of the Intestinal Care and Intestinal Transplantation Center at the Cincinnati Children's Hospital Medical Center. Dr. Kocoshis is aware of the chemicals and pollution associated with oil and gas activities and believes that municipalities have the right to protect their citizens from environmental toxins. Dr. Kocoshis has an interest in the authority of municipalities to zone property within their boundaries to protect public health and safety.

**Deborah Cowden, MD**, is a physician specializing in family medicine, who works at the Knox County Health Department. Dr. Cowden was trained in the treatment of chronic disease, specifically on the body's ability to detoxify and process chemicals. She has testified before both the U.S. Environmental Protection Agency and the Ohio House of Representatives on unconventional gas extraction and its impacts. Dr. Cowden successfully sponsored an Ohio State Medical Association resolution urging the state of Ohio to give health professionals and first responders access to information on all chemicals located at operations associated with hydraulic fracturing. Dr. Cowden supports the right of localities to decide where unconventional gas extraction should be permitted within their borders.

**Katie Huffling, RN, MS, CNM**, is the Director of Programs at the Alliance of Nurses for Healthy Environments. Ms. Huffling works with nurses and national nursing organizations

on environmental health issues, including chemical policy. Ms. Huffling is the author of a number of peer-reviewed articles on environmental health issues as they relate to pregnancy. Ms. Huffling supports the ability of localities to decide where oil and gas development may be located in order to protect the public health and safety of local residents from the heavy industrial processes associated with this development.

**Angela Novy, MD**, is an endocrinologist with Ashland Endocrinology in Ashland, OH. Dr. Novy obtained her medical degree from Ohio State University College of Medicine. Dr. Novy is concerned about the contamination of air, water, and soil by unconventional gas development and about the health implications of the known carcinogens, allergens, and endocrine disruptors that are used in this industrial process. Dr. Novy believes that individuals have the right to limit their exposure to such substances and supports the authority of localities to ensure the protection of these rights.

**Conleth Crotser, MD**, is a pediatrician with Kidz First Pediatrics of Oberlin, OH, who has been practicing medicine for over 30 years. Dr. Crotser obtained her medical degree from the University of Toledo College of Medicine. Dr. Crotser has an interest in local control over the location of oil and gas activities because she is concerned about the chemicals used in these activities and believes that the exposure of children and families to health and safety risks should be minimized.

**Bill Lonneman, MSN**, is a professor in the Department of Nursing at Mount St. Joseph College in Cincinnati, OH, where he teaches community and public health. His academic and clinical focus has been on community-based primary care in a variety of urban and rural settings. Mr. Lonneman has an interest in ensuring that heavy industrial operations with harmful public health impacts are not located next to vulnerable communities.

**Janalee Stock, RN**, is a school nurse with Athens City Schools. Ms. Stock has an interest in protecting children from exposure to pollution from oil and gas development and is concerned about the threats of unrestricted industrial development to air, water, and human health.

**Sue Papp, RN, BSN**, has been a nurse for 47 years and is a member of the Midwest Ohio Association of Occupational Health Nurses and the American Association of Occupational Health Nurses. Ms. Papp supports the power of localities to exclude gas extraction from areas with high densities of vulnerable members of the population, such as areas near schools, hospitals, and long-term care facilities.

**Rosemary Valedes Chaudry, PhD, MPH, MHA, BSN, RN, CPH**, is a nurse who has worked with the Alliance of Nurses for Healthy Environments and the Association of Ohio Health Commissioners to educate the public about health issues associated with oil and gas extraction activities. Dr. Chaudry supports informed public policy-making that errs on the side of caution where matters of health are involved. She has an interest in ensuring that localities protect their vulnerable populations and that these populations are not unduly burdened by harmful health impacts.

**Elaine McSweeney, OD**, is an optometrist who earned her Doctor of Optometry from Ohio State University. Dr. McSweeney believes that clean air and water are paramount social concerns. Dr. McSweeney supports the right of local governments to ensure that their residents are protected from health hazards associated with oil and gas extraction.

**Jonalea Neider, RN**, is a recently retired nurse with over 23 years of nursing experience, including at Lakewood Hospital and Lakewood Senior Health Campus in Lakewood, OH. Ms.

Neider supports the ability of local governments to determine where oil and gas extraction can occur because of the serious health issues that have been associated with these activities.

**Physicians, Scientists, and Engineers for Healthy Energy** (“PSE”) is an organization dedicated to providing unbiased and solid scientific information about unconventional gas development and to reducing public exposure to toxic chemicals during the development process. PSE’s Board and members are experts in various fields, from pediatrics and public health to engineering and ecology. PSE has an interest in this case because it recognizes that localities are best situated to regulate land use to protect the health of their residents from oil and gas operations.

#### STATEMENT OF FACTS

Amici adopt the Statement of Facts set forth in the Brief of Appellants and supplement it with the following information about the impacts of the oil and gas industry on public safety and health.

Oil and gas development requires the use of a variety of toxic chemicals, which are stored at the wellsite until they are needed, and the operations produce large volumes of toxic waste, which also is stored (and sometimes treated) onsite until it is buried or removed for reuse, treatment, or disposal.<sup>1</sup> The fuel used to operate drilling and stimulation equipment and the hydrocarbons that are extracted in the development process are flammable, as are some of the chemicals used and produced as waste, including chemicals that are emitted into the air during

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<sup>1</sup> See T. Hayes, *Sampling and Analysis of Water Streams Associated with the Development of Marcellus Shale Gas* (December 2009), available at <http://www.bucknell.edu/script/environmentalcenter/marcellus/default.aspx?articleid=14> (accessed Sep. 9, 2013); E.L. Rowan et al., *Radium Content of Oil- and Gas-Field Produced Waters in the Northern Appalachian Basin (USA): Summary and Discussion of Data* 31 (2011), available at <http://pubs.usgs.gov/sir/2011/5135/pdf/sir2011-5135.pdf>; see also Natural Resource Defense Council, *In Fracking’s Wake* 3 (2012), available at <http://www.nrdc.org/energy/files/fracking-wastewater-fullreport.pdf> (describing holding ponds as management option).

production or volatilize from wastewater storage in open pits. Escaping gas can travel hundreds of feet, and nearby structures can provide an ignition source.<sup>2</sup> When leaks, blowouts, or other accidents occur, local police, fire, and emergency medical personnel may be required to respond quickly to prevent serious injury to people and property nearby.

Incidents requiring the attention of first responders are not rare. Fire Chief P. Thomas Robinson documented 24 incidents requiring response by the Gates Mills Fire Department in a three-year period when drilling was at its height in that community.<sup>3</sup> Some of those incidents exposed both first responders and members of the public to great danger from leaks involving natural gas and other products.<sup>4</sup> The risk presented by oil and gas development – including the risk of explosions and fire – is greatly increased if industrial facilities are placed too close to non-industrial uses, especially occupied structures and busy recreational areas, or if first responders must battle pedestrian and vehicular traffic in congested streets to reach an accident site in a residential or commercial district.

The risk from oil and gas development is especially great in Ohio, because the Ohio Department of Natural Resources (“ODNR”) does not comply with the requirements of the federal Emergency Planning and Community Right-to-Know Act (“EPCRA”).<sup>5</sup> EPCRA requires that facilities storing hazardous chemicals over certain volume thresholds report to local fire

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<sup>2</sup> See P. Thomas Robinson, Testimony of Fire Chief before the Ohio Senate Environment and Natural Resources Committee (Nov. 4, 2009), available at <http://ohiogasdrilling.files.wordpress.com/2012/02/ohionov42009senatetestimony.pdf> [hereinafter “*Fire Chief Testimony*”] (testimony appears on pages 25-27).

<sup>3</sup> See P. Thomas Robinson, *A History of Gas Well Incidents in Gates Mills* (Nov. 22, 2010), available at <http://neogap.synthasite.com/oil--gas-wells-and-drilling.php> (click on 11-22-2010GasWellHx\_RecsByFireDeptGatesMillsOhio.doc).

<sup>4</sup> See *supra* note 2, *Fire Chief Testimony* at 26.

<sup>5</sup> See Letter from U.S. Environmental Protection Agency to Teresa B. Mills (Apr. 26, 2013), available at <http://ohiocitizen.org/wp-content/uploads/2013/06/US-EPA-EPCRA-response.pdf>.

departments detailed information on the composition, quantity, and risks from on-site chemicals. ODNR's failure to ensure that oil and gas well operators subject to the requirements of EPCRA file chemical inventory forms with local fire departments means that first responders may not have the information they need to protect themselves or nearby people and property when there are emergency incidents at wellsites in their communities. To reduce the risk to first responders and the public from exposure to unknown hazardous chemicals, it is essential that localities be able to adopt and enforce zoning ordinances that confine oil and gas operations to less populated areas.

The risks presented by oil and gas development are not limited to explosions and fires requiring emergency response. Everyday operations produce contaminated water, air pollution, foul odors, and high levels of noise and nighttime light that affect the physical and mental health of people living, working, or playing in the vicinity.<sup>6</sup> Common symptoms or complications among people living near oil and gas wellsites include dermatologic, gastrointestinal, neurologic, immunologic, sensory, vascular, bone marrow, endocrine, and urologic problems, as well as the risk of endocrine disruption and changes in quality of life and sense of well being.<sup>7</sup> Intense development is known to produce increased levels of ground-level ozone, which is associated

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<sup>6</sup> See Ruth McDermott-Levy, et al., *Fracking, the Environment, and Health*, 113 *Am. J. Nursing* 45 (2013), available at [http://journals.lww.com/ajnonline/Abstract/2013/06000/Fracking,\\_the\\_Environment,\\_and\\_Health.30.aspx](http://journals.lww.com/ajnonline/Abstract/2013/06000/Fracking,_the_Environment,_and_Health.30.aspx).

<sup>7</sup> See *id.* at 45; see also Katrina Smith Korfmacher et al., *Public Health and High Volume Hydraulic Fracturing*, 23 *New Solutions* 13 (2013), available at <http://www.ncbi.nlm.nih.gov/pubmed/23552646>.

with asthma and premature mortality.<sup>8</sup> As oil and gas operations expand in populated areas, health professionals are becoming increasingly concerned about industrial impacts and are recommending a precautionary approach.<sup>9</sup> Allowing municipalities to separate industrial uses from residential and commercial districts is essential to the ability of local governments to protect public health, especially that of children and other vulnerable populations.

## ARGUMENT

**PROPOSITION OF LAW ONE:** R.C. Chapter 1509 does not divest municipalities of their power to enact and enforce zoning laws.<sup>10</sup>

**I. This Court Should Not Read Chapter 1509 as an Implied Repeal of the Constitutionally Delegated and Statutorily Acknowledged Power of Localities to Adopt Zoning Laws.**

The Ohio Constitution's Home Rule Amendment gives municipalities "authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws." Ohio Const., Art. XVIII, § 3. This provision "is self-executing, and . . . the power of local self-government is inherent in all municipalities regardless of enabling legislation . . ." *Morris v. Roseman*, 162 Ohio St. 447, 449-50, 123 N.E.2d 419, 421 (1954). Nevertheless, the Ohio

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<sup>8</sup> See Eduardo P. Olaguer, *The Potential Near-Source Ozone Impacts of Upstream Oil and Gas Industry Emissions* 62 J. Air & Waste Mgmt. Ass'n 966 (2012), available at <http://www.ncbi.nlm.nih.gov/pubmed/22916444>; U.S. Evtl. Prot. Agency, *Regulatory Impact Analysis: Final New Source Performance Standards and Amendments to the National Emissions Standards for Hazardous Air Pollutants for the Oil and Natural Gas Industry* 4-26 (Apr. 2012), available at [http://www.epa.gov/ttnecas1/regdata/RIAs/oil\\_natural\\_gas\\_final\\_neshap\\_nsps\\_ria.pdf](http://www.epa.gov/ttnecas1/regdata/RIAs/oil_natural_gas_final_neshap_nsps_ria.pdf).

<sup>9</sup> See Am. Pub. Health Ass'n, *The Environmental and Occupational Health Impacts of High-Volume Hydraulic Fracturing of Unconventional Gas Reserves*, <http://www.apha.org/advocacy/policy/policysearch/default.htm?id=1439> (Oct. 30, 2012); Pediatric Evtl. Health Specialty Units, *PEHSU Information on Natural Gas Extraction and Hydraulic Fracturing for Health Professionals 2*, [http://aoec.org/pehsu/documents/hydraulic\\_fracturing\\_2011\\_parents\\_comm.pdf](http://aoec.org/pehsu/documents/hydraulic_fracturing_2011_parents_comm.pdf) (Aug. 2011).

<sup>10</sup> Amici address only the first legal proposition under consideration by this Court.

Legislature expressly has enabled municipalities to exercise their police powers through land use planning and regulation:

The planning commission of any municipal corporation may frame and adopt a plan for dividing the municipal corporation or any portion thereof into zones or districts, representing the recommendations of the commission, in the interest of the public health, safety, convenience, comfort, prosperity, or general welfare, for the limitations and regulation of the height, bulk, and location, including percentage of lot occupancy, set back building lines, and area and dimensions of yards, courts, and other open spaces, and the uses of buildings and other structures and of premises in such zones or districts.

R.C. § 713.06. As this Court has recognized: “It has been uniformly held that the enactment of a comprehensive zoning ordinance, which has a substantial relationship to the public health, safety, morals and the general welfare and which is not unreasonable or arbitrary, is a proper exercise of the police power.” *City of Akron v. Chapman*, 160 Ohio St. 382, 385, 116 N.E.2d 697, 699 (1953); *see State ex rel. Kearns v. Ohio Power Co.*, 163 Ohio St. 451, 460, 127 N.E.2d 394, 399 (1955) (recognizing that the police power “embraces the systematic and orderly development of a community with particular regard for streets, parks, industrial and commercial undertakings, [and] civic beauty”); *Smythe v. Butler Township*, 85 Ohio App. 3d 616, 622, 620 N.E.2d 901, 905 (2nd Dist. 1993) (finding that enforcement of zoning based on considerations of “traffic safety, aesthetics, neighborhood continuity, . . . and emergency vehicle access” advanced “the health, safety, welfare and morals of the community”).

The public interest protected by zoning is inherently local in nature, varying with the economy and character of each community. *See Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387, 47 S. Ct. 114, 118 (1926) (“A regulatory zoning ordinance, which could be clearly valid as applied to the great cities, might be clearly invalid as applied to rural communities.”). Local government officials, who are best placed to understand the concerns of their constituents and to balance competing economic interests, use zoning to encourage orderly

development of the community as a whole. See *Willott v. Village of Beachwood*, 175 Ohio St. 557, 560, 197 N.E.2d 201, 203 (1964) (noting that the local legislative body is charged with determining the wisdom of zoning rules, including “the control of traffic, . . . effect upon valuation of property, municipal revenue to be produced for the city, expense of the improvement, land use consistent with the general welfare and development of the community as a whole”); see also *Garcia v. Siffrin Residential Ass’n*, 63 Ohio St. 2d 259, 268, 407 N.E.2d 1369, 1376 (1980) (noting that the local zoning laws regulate land uses for “the planned orderly growth of the community”), *overruled on other grounds*, *Saunders v. Clark Cty. Zoning Dep’t*, 66 Ohio St. 2d 259, 421 N.E.2d 152 (1981). One of the most significant functions of a local government is fostering economically productive land use and protecting community character through zoning.

In accordance with this constitutionally delegated and statutorily acknowledged power, development in the City of Munroe Falls has been guided and fostered for nearly two decades by the Zoning Ordinance of Munroe Falls, Ohio (“Zoning Ordinance”). The legislative purposes of the Zoning Ordinance are described in part as follows:

to regulate the intensity of [land use]; . . . to prohibit uses, buildings or structures incompatible with the character of [particular] districts, to lessen congestion in the streets; to secure safety from fire, panic, and other dangers; to provide adequate light and air; to prevent the overcrowding of land; to conserve the taxable value of land and buildings throughout the Municipality; and to promote the public health, safety, and welfare.

Zoning Ordinance § 1101.03. Conserving property values, ensuring harmonious land uses, preserving the character of a neighborhood, protecting local citizens from fire, and promoting the public health, safety, and welfare are the quintessential objectives of local zoning that both animate and legitimate the City’s use of its police powers.

Familiar principles of statutory construction militate against concluding that Chapter 1509 divests municipalities of their power to enact and enforce zoning laws, such as the Zoning Ordinance. Such a conclusion would imply that Chapter 1509 partially repealed the prior Ohio statute establishing the right of municipalities to adopt land use plans and zoning measures. *See* R.C. § 713.06. As this Court has recognized, however: “It has been a long-standing rule that courts will not hold prior legislation to be impliedly repealed by . . . subsequent legislation unless the subsequent legislation clearly requires that holding.” *State v. Frost*, 57 Ohio St. 2d 121, 124, 387 N.E.2d 235, 237 (1979); *see State ex rel. Fleisher Eng’g & Constr. Co. v. State Office Bldg. Comm’n*, 123 Ohio St. 70, 74, 174 N.E. 8, 9 (1930) (“The rule is familiar and elementary that repeals by implication are not favored. . .”). A statute thus should not be deemed repealed by a later one, unless the two are in such irreconcilable conflict that both cannot be given effect. *See, e.g., State ex rel. Data Trace Information Servs., L.L.C. v. Cuyahoga Cty. Fiscal Officer*, 131 Ohio St. 3d 255, 265, 963 N.E.2d 1288, 1298 (2012) (“When two statutory provisions are alleged to be in conflict, R.C. 1.51 requires us to construe them, where possible, to *give effect to both*.”) (emphasis sic) (quoting *Gahanna-Jefferson Local School Dist. Bd. of Ed. v. Zaino*, 93 Ohio St. 3d 231, 234, 754 N.E.2d 789, 792 (2001)); *Schindler Elevator Corp. v. Tracy*, 84 Ohio St. 3d 496, 499, 705 N.E.2d 672, 674 (1999) (same); *United Tel. Co. of Ohio v. Limbach*, 71 Ohio St. 3d 369, 372, 643 N.E.2d 1129, 1131 (1994) (noting that courts interpreting “related and co-existing statutes must harmonize and give full application to all such statutes unless they are irreconcilable and in hopeless conflict.”). Because zoning laws, including the Zoning Ordinance, can operate harmoniously with Chapter 1509, there is no reason to find Chapter 1509 in hopeless conflict with the statute conferring municipal zoning power.

## II. The Zoning Ordinance Does Not Conflict with Chapter 1509.

Ohio courts apply a three-part test to determine whether a municipal ordinance is a legitimate exercise of home rule power or is instead preempted by state law. *See Ohioans for Concealed Carry, Inc. v. City of Clyde*, 120 Ohio St. 3d 96, 99, 896 N.E.2d 967, 971 (2008). “A state statute takes precedence over a local ordinance when (1) the ordinance is in conflict with the statute, (2) the ordinance is an exercise of the police power, rather than of local self-government, and (3) the statute is a general law.” *City of Canton v. State*, 95 Ohio St. 3d 149, 151, 766 N.E.2d 963, 966 (2002). In this brief, Amici focus solely on the question whether the Zoning Ordinance is in conflict with Chapter 1509.<sup>11</sup>

“The authority conferred by Section 3, Article XVII of the Ohio Constitution upon municipalities to adopt and enforce police regulations is limited only by general laws *in conflict therewith upon the same subject matter.*” *Fondessy Enterprises, Inc. v. City of Oregon*, 23 Ohio St. 3d 213, 215, 492 N.E.2d 797, 799 (1986) (emphasis added). Chapter 1509 does not preempt the Zoning Ordinance because the two laws regulate wholly *different* subjects: Chapter 1509 regulates the technical standards for oil and gas extraction in Ohio to ensure operational safety and to conserve resources, whereas the Zoning Ordinance regulates the use of land to protect the local community and the quiet enjoyment of property rights. *See infra* section I(A). Recognizing the different purposes of Chapter 1509 and the Zoning Ordinance is consistent with this Court’s prior rulings on the independent but complementary character of state regulation of industrial activities and local regulation of land use. *See infra* section I(B). Moreover, Chapter 1509 lacks the clearly preemptive language that this Court ordinarily demands before finding

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<sup>11</sup> Amici respectfully refer the Court to the Brief for Appellant for argument whether Chapter 1509 is a general law. The question whether the Zoning Ordinance is a lawful exercise of the City of Munroe Falls’ police power is not in dispute.

that a state law supersedes local zoning. *See infra* section I(C). For those reasons, and because local zoning coexists with state regulation in many oil- and gas-producing states, *see infra* section I(D), this Court should hold that Chapter 1509 does not divest municipalities of their power to enact and enforce zoning laws.

**A. The Zoning Ordinance and Chapter 1509 Regulate Different Subjects.**

There is a fundamental difference between the statewide “comprehensive plan with respect to all aspects of the locating, drilling, well stimulation, completing, and operating of oil and gas wells” implemented in Chapter 1509, *see* R.C. § 1509.02, and the local comprehensive plan implemented in the Zoning Ordinance. Chapter 1509 governs the technical methods and operational aspects of oil and gas extraction, but – unlike the Zoning Ordinance – the statute does not address traditional economic development and community character concerns, and it should not be interpreted to regulate land use. The language in Chapter 1509 conferring upon ODNR “sole and exclusive authority to regulate the permitting, location, and spacing of oil and gas wells and production operations within the state” should be construed to empower that agency to control the distance of a well from other structures or the placement of a well within a drilling unit, but that power is distinct from and compatible with the home rule authority of a municipality to differentiate among uses permitted within designated zoning districts. *Id.* By reading Chapter 1509 to regulate the location of oil and gas wells within districts zoned for such heavy industrial uses, the state statute and local zoning can operate concurrently, and the purposes of both laws can be fulfilled.

Chapter 1509 was enacted pursuant to Article II, Section 36, of the Ohio Constitution, entitled “Conservation of natural resources.” *See Dome Energicorp v. Zoning Bd. of Appeals*, No. 50554, 1986 WL 7716, \*2 (Ohio Ct. App., 8th Dist. July 10, 1986); *see also Redman v. Ohio*

*Dep't of Indus. Relations*, 75 Ohio St. 3d 399, 403, 662 N.E.2d 352, 356 (1996) (“Pursuant to [Section 36, Article II of the Ohio Constitution], and pursuant to the police power of the state to control and conserve the natural resources of Ohio, the General Assembly has enacted a number of statutes regulating the production of coal, oil and gas, including R.C. Chapter 1509.”) (internal citation omitted). This provision of the Ohio Constitution authorizes laws “to provide for the *regulation of methods* of mining, weighing, measuring and marketing coal, oil, gas and all other minerals.” Ohio Const., Art. II, § 36 (emphasis added). As one court observed in the context of coal mining, “this quoted language invests the legislature with power for the regulation of methods of mining, etc., rather than providing for regulations where coal might or might not be mined.” *East Fairfield Coal Co. v. Miller, Zoning Inspector*, 71 Ohio Law Abs. 490, 498 (C.P. 1955); *see also Dome Energicorp*, 1986 WL 7716, \*2 (contrasting Chapter 1509 with local zoning). ODNR thus may oversee the location of wells insofar as is necessary to ensure conservation of natural resources and to regulate methods of oil and gas mining, but the Ohio Constitution does not authorize the State to determine whether the placement of wells is consistent with nearby property uses or local community character.

Consistent with that constitutional constraint, Chapter 1509 regulates the location of specific wells, but only in the context of technical unitization, spacing, and setback requirements related to regulation of the *methods* of extraction. Specifically, Chapter 1509 establishes setback requirements for purposes of ensuring operational safety. *See* R.C. § 1509.021(A) (“The surface location of a new well or a tank battery of a well shall not be within one hundred fifty feet of an occupied dwelling that is located in an urbanized area . . . .”); R.C. § 1509.23(A) (authorizing ODNR to “specify practices to be followed in the drilling and treatment of wells, production of oil and gas, and plugging of wells,” including minimum setbacks for wells). Chapter 1509 also

authorizes ODNR to adopt rules regarding “minimum acreage requirements for drilling units and minimum distances from which a new well may be drilled . . . from boundaries of tracts, drilling units, and other wells *for the purpose of conserving oil and gas reserves.*” R.C. § 1509.24 (emphasis added); *see* Ohio Adm. Code 1501:9-1-04 (addressing the “[s]pacing of wells” and specifying acreage requirements for drilling tracts and units, based on the depth of the proposed well). Chapter 1509’s regulation of setbacks for safety purposes, R.C. § 1509.021, and spacing units to conserve resources, *id.* § 1509.24 – the aspects of well location legitimately controlled under the constitutional provision authorizing regulation of the methods of mining – avoids intruding upon the constitutionally delegated home rule power of localities to address the aspects of well location related to land use planning and zoning.

Indeed, in Chapter 1509’s lone reference to “zoning,” the statute expressly recognizes the significance of local zoning districts by authorizing ODNR to promulgate rules establishing:

Minimum distances that wells and other excavations, structures, and equipment shall be located from water wells, streets, roads, highways, rivers, lakes, streams, ponds, other bodies of water, railroad tracks, public or private recreational areas, *zoning districts*, and buildings or other structures.

R.C. § 1509.23(A)(2) (emphasis added). The plain language of the statute presupposes that zoning districts establish well-defined areas from which setbacks may be measured, just as they are from other pre-existing resources or occupied areas. Because Chapter 1509 regulates the methods of oil and gas extraction, while the Zoning Ordinance regulates land use, the state and local laws do not conflict but rather can co-exist harmoniously.

**B. The State’s Regulation of Oil and Gas Extraction Methods and the City’s Regulation of Land Use Can Exist Concurrently and Without Conflict.**

The proposition that Chapter 1509 and the Zoning Ordinance may co-exist harmoniously, because the two laws govern separate and distinct subjects, should come as no surprise to this

Court. The power of localities to exercise land use control in restricting extractive industries to certain zoning districts has a long history in this state. For example, half a century ago, this Court upheld an ordinance prohibiting strip-mining in lands zoned for residential uses. *Smith v. Juillerat*, 161 Ohio St. 424, 429, 119 N.E.2d 611, 614 (1954) (observing that the validity of such ordinances “ha[s] generally been recognized”); *see also Kane v. Kreiter*, 93 Ohio Law. Abs. 17, 195 N.E.2d 829, 831 (C.P. 1963) (same). In the context of sand and gravel mining, this Court reiterated the distinct and concurrent nature of local zoning and statutory regulation of resource extraction:

The purpose of adopting a comprehensive township zoning plan is to promote the public health, safety, and morals. R.C. 519.02. The purpose of R.C. Chapter 1514 is to ameliorate the effects of surface mining on the natural beauty and environment of Ohio, to the ultimate benefit of public health and safety. The legislative purposes are distinct, and the statutes together present dual conditions to the operation of a mineral quarry. R.C. Chapter 519 empowers a township to regulate surface mining, either by provision in the zoning ordinance, R.C. 519.02, or through the variance procedure, R.C. 519.14(B). R.C. 1514.02 provides that no operator may engage in surface mining without a permit issued by the Chief of the Division of Reclamation. The final and complete approval of the operation stems from the endorsement by both the state and local authorities.

*Set Products, Inc. v. Bainbridge Twp. Bd. of Zoning Appeals*, 31 Ohio St. 3d 260, 265, 510 N.E.2d 373, 378 (1987); *see also Village of Sheffield v. Rowland*, 87 Ohio St. 3d 9, 12, 716 N.E.2d 1121, 1124 (1999) (finding ordinance that entirely prohibited facilities for construction and demolition debris preempted by statute governing the regulation of such facilities, but clarifying that “[n]othing in this decision should be construed to suggest that Sheffield cannot restrict state-authorized facilities to certain districts with appropriate zoning”) (emphasis added).

The fact that state regulation and local zoning can exist concurrently is recognized even when the state admittedly holds the sole and exclusive power to regulate and license an activity. It is well established, for instance, that localities may apply zoning restrictions to solid waste

facilities even though Ohio Environmental Protection Agency (“EPA”) exercises sole and exclusive jurisdiction over the regulation and licensing of these facilities. *See Families Against Reily/Morgan Sites v. Butler Cty. Bd. of Zoning Appeals*, 56 Ohio App. 3d 90, 564 N.E.2d 1113 (12th Dist. 1989). As the court stated in that case:

Clearly, the legislature intended for the state through the Ohio EPA to preempt and solely occupy the licensing and regulation of solid waste disposal and sanitary landfill facilities. However, local zoning does play a pivotal role in the installation and chartering of these facilities. *Once the Ohio EPA has granted approval, its permit is subject to those local zoning provisions which do not conflict with the environmental laws and regulations approved by the state.*

. . . Local zoning and state environmental regulations are complementary but wholly independent of one another. The Ohio EPA is solely concerned with environmental protection and the protection of human health from pollution and improper waste treatment and/or disposal. A local zoning board, on the other hand, is primarily interested in land usage implications affecting the development of the community.

*Id.* at 94, 96 (emphasis added). Similarly, in *Hulligan v. Columbia Township Board of Zoning Appeals*, the Court of Appeals upheld a locality’s denial of a zoning certificate for a proposed landfill, concluding:

The fact that there is authority under Chapter 3734 through the Environmental Protection Agency to regulate landfill operations or to issue permits . . . does not preempt the field so far as local zoning is concerned. . . . The intents of local zoning approval and EPA regulations are distinct but harmonious. The jurisdictional line between the two is drawn by the particular protection each desires to achieve. . . . [T]he final and complete approval of a sanitary landfill stems from the endorsement by both authorities.

59 Ohio App. 2d 105, 108 (9th Dist. 1978) (internal quotation marks and citation omitted); *see also Clarke v. Warren Cty. Bd. of Comm’rs*, No. CA2005-04-048, 2006 WL 689039, \*6 (Ohio Ct. App., 12th Dist. Mar. 20, 2006) (acknowledging that Chapter 3734 authorizes only Ohio EPA to license and regulate solid waste facilities, but nevertheless upholding a local ordinance restricting those facilities to certain zones); *City of Garfield Heights v. Williams*, Nos. 77AP-449 to -484, 1977 WL 200442, \*3 (Ohio Ct. App., 10th Dist. Sep. 29, 1977) (concluding that Ohio

EPA “does not have jurisdiction to change or affect local zoning by the issuance of a [landfill] permit”).

In the oil and gas context, courts also have recognized that the state’s authority over matters related to oil and gas drilling does not preempt local zoning authority. In *Dome Energicorp*, the court upheld a zoning ordinance that limited the drilling of oil and gas wells to areas in the township zoned “Limited Industrial” or “Commercial Service” and prohibited drilling altogether in residential areas. 1986 WL 7716, \*1. The court recognized the difference between regulating the method of oil and gas operations and regulating the use of land, concluding:

We feel compelled to reject appellee’s contentions that the state’s policy to encourage oil and gas production preempts the township’s authority under its police power to limit oil and gas well drilling within the township. The statement of general policy must be interpreted in conjunction with and subordinate to the basic zoning power possessed by the township. . . . [W]e are persuaded that while there is authority for the state division of oil and gas to issue a permit for drilling operations and to regulate their operation, Chapter 1509 *et seq.* does not preempt the field so far as local zoning is concerned.

1986 WL 7716, \*3-\*4. Similarly, in *City of Niles v. Gasearch, Inc.*, 1986 WL 14111 (Ohio Ct. App., 11th Dist. Dec. 12, 1986), the Court of Appeals upheld a municipal ordinance that restricted oil and gas wells to particular zoning districts and prohibited oil and gas wells in residential areas: “While the ordinance in question prevents the drilling of wells in residential areas, the City of Niles, as a municipal corporation, is authorized . . . to enact zoning regulations which are reasonable, valid, and in the interest of the public health, safety, convenience, comfort, and general welfare of its citizens.” *Id.* at \*6 (“Simply stated, R.C. 1509.40 does not limit the City’s power to regulate zoning . . .”). The reasoning of those cases applies equally now, after repeated amendments of Chapter 1509, because the different subjects addressed by the statute and the Zoning Ordinance ensure that they do not conflict. Moreover, as is explained below,

Chapter 1509 lacks the clear language that Ohio courts require before ruling that a statute preempts local zoning.

**C. Courts Demand Clearly Preemptive Statutory Language Before Finding That a State Law Conflicts with Local Zoning.**

The courts of Ohio will not find preemption of local zoning, unless a statute limits a municipality's constitutional police powers in clear terms. This judicial reluctance to find preemption has extended to the few cases that have interpreted the preemptive power of Chapter 1509 after the 2004 amendment to the statute. Courts rightfully demand plain language preempting local laws, because the Ohio General Assembly knows how to draft statutes that unambiguously supersede local zoning, when it wants to do so.

The precise legislative language needed for a judicial finding that local zoning is preempted is evident in *City of Avon v. Samanich*, 1995 WL 500141 (Ohio Ct. App., 9th Dist. Aug. 23 1995). In that case, the plaintiff argued that a zoning ordinance conflicted with and was therefore preempted by R.C. Chapter 5104's regulation of day-care homes. The plaintiff did not cite any specific statutory provision from which the court could "evaluate the statutory language used by the General Assembly and compare that language to the city's zoning ordinances" and instead claimed that R.C. Chapter 5104 "as a whole preempt[ed] the city's zoning ordinances." *Id.* at \*3. That statute both set forth a detailed licensing scheme for all day-care facilities and explicitly stated that "[a]ny type B family day-care home . . . shall be considered to be a residential use of property for purposes of municipal, county, and township zoning and shall be a permitted use in all zoning districts in which residential uses are permitted." *Id.* (quoting R.C. § 5105.054).

In response to the preemption claim, the court noted that the mere existence of a detailed licensing procedure in the statute did not preclude local regulation: "Because the state and a

municipality may exercise concurrent police power, . . . [t]he party must affirmatively demonstrate that the state regulatory scheme was intended to totally eclipse municipal regulation *within that subject area.*” *Id.* (emphasis added). The court acknowledged a legislative intent “to preempt some local zoning with regard to *Type B* day-care homes” but did “not discover[] a single statutory provision indicating that the regulatory scheme in R.C. Chapter 5104 was intended to preempt municipal zoning with regard to *Type A* homes.” *Id.* Accordingly, the court concluded:

[N]o conflict exists between R.C. Chapter 5104 and Avon Codified Ordinances 1268.02(b) and 1260.06(12). Instead, the state and municipal regulations present dual conditions to the operation of a *Type A* home in the City of Avon. In the absence of an express state legislative intent to preempt municipal zoning with regard to *Type A* homes, such dual conditions are permissible, and we must respect the concurrent police power of the City of Avon and uphold its local zoning ordinances.

*Id.* at \*4. The General Assembly knew how to mandate that specific uses be allowed in residential districts, as it did with *Type B* homes, and the court declined to read that mandate into the law in the absence of clear statutory language.

This Court engaged in a similarly exacting analysis of statutory language in *Newbury Township Board of Trustees v. Lomak Petroleum*, 62 Ohio St. 3d 387, 583 N.E.2d 302 (1992), which involved a claim that the state oil and gas law preempted all local setbacks for wells. The *Lomak* Court noted that, while one statutory provision “lists those rules the chief of [ODNR] may specify,” such as minimum distances between wells and buildings, a separate provision of the law, R.C. § 1509.39, “specifically lists those areas townships may not regulate.” *Id.* at 393. The latter provision provided that “no . . . township may adopt resolutions relative to the minimum acreage requirements for drilling units, and minimum distances from which a new well may be drilled from boundaries of tracts, drilling units, other wells, and from streets, roads,

highways, railroad tracks . . . .” *Id.* at 389 n.1 (quoting R.C. § 1509.39). Observing that “[n]o mention is made of minimum distances from wells to structures and buildings,” the Court held that “townships may adopt resolutions pertaining to distances from dwellings when it is done to further safety and health standards,” notwithstanding ODNR’s concurrent authority to regulate such setbacks.<sup>12</sup> *Id.* at 394. The absence of clearly preemptive language dictated an interpretation of the statute that gave effect to both the state and local laws.

In the wake of these holdings, courts interpreting Chapter 1509 after the 2004 amendment have narrowly interpreted its preemptive effect. Recent decisions recognize that Chapter 1509 regulates the location of oil and gas wells in the context of setbacks from pre-existing reference points and spacing requirements. *See, e.g., Natale v. Everflow E., Inc.*, 195 Ohio App. 3d 270, 959 N.E.2d 602 (11th Dist. 2011) (holding that a local ordinance establishing a minimum wellsite distance from existing residences that was different from the statute’s setback was preempted by Chapter 1509). But Chapter 1509 has been found not to preempt a locality from enforcing ordinances specifying setback restrictions for new structures from an existing oil or gas operation. *See Smith Family Trust v. Hudson Bd. of Zoning & Bldg. Appeals*, 2009 WL 1539065 (Ohio Ct. App., 9th Dist. June 3, 2009); *Glenmoore Builders, Inc. v. Smith Family Trust*, No. CV 2006 02 1001, 2006 WL 5105774 (Ohio C.P., Sep. 13, 2006). The courts in those cases found no conflict when state law regulated “the distance of new drills or location of tank batteries to existing structures,” while the local ordinance regulated “the distance that a new

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<sup>12</sup> The General Assembly repealed section 1509.39 in 2004, when it enacted the preemption language now in Chapter 1509. Currently, section 1509.02 confers upon the State the exclusive right to regulate well setbacks from the reference points listed in section 1509.23, including setbacks from zoning districts. Far from clearly preempting zoning, Chapter 1509 protects local land use classifications by allowing ODNR to limit how close wells may be drilled to districts incompatible with oil and gas drilling.

home may be constructed from an existing oil or gas well, or tank battery.” *Glenmoore Builders*, 2006 WL 5105774 (pagination unavailable); see *Smith Family Trust*, 2009 WL 1539065, \*2 (“[T]he state codes regulate the distance that a *new well or new tank battery* can be located in relation to *an existing inhabited structure*. There are no corresponding state provisions that regulate the distance a *new residence or inhabited structure* can be built in relation to an *existing well or tank battery*.”) (emphasis sic).<sup>13</sup> Likewise, in the absence of clear state provisions prohibiting municipalities from requiring zoning approvals, Chapter 1509 should not be read to preempt the Zoning Ordinance, and the two laws should be given full effect.

Other Ohio statutes do, by contrast, contain the plain language required to find preemption of zoning. For example, the state law governing hazardous waste facilities explicitly provides:

No political subdivision of this state shall require any additional zoning or other approval, consent, permit, certificate, or condition for the construction or operation of a hazardous waste facility authorized by a hazardous waste facility installation and operation permit issued pursuant to this chapter, nor shall any political subdivision adopt or enforce any law, ordinance, or regulation that in any way alters, impairs, or limits the authority granted in the permit issued by the board.

R.C. § 3734.05(E).<sup>14</sup> By contrast, Chapter 1509 is silent on the issue of local zoning, except to acknowledge that well setbacks may be needed from pre-existing district borders. This Court should give Chapter 1509 the narrow construction that Amici recommend because legislative

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<sup>13</sup> These holdings mirror the interpretation of Chapter 1509 before 2004. See *Northampton Bldg. Co. v. Bd. of Zoning Appeals of Sharon Twp.*, 109 Ohio App. 3d 193, 671 N.E.2d 1309 (9th Dist. 1996) (concluding that zoning prohibiting new buildings within 200 feet of an oil or gas well did not conflict with Chapter 1509). Both before and after the amendment, courts have insisted upon clear statutory language in conflict with local ordinances before finding preemption.

<sup>14</sup> Notwithstanding this plain language, this Court refused to find that a municipality’s record-keeping, reporting, and fee requirements conflicted with Chapter 3734 or prohibited anything that the state statute permitted, stating: “[D]oes Ordinance No. 12-1984 prohibit anything permitted by R.C. Chapter 3734? There is no proscriptive language in Ordinance No. 12-1984. Thus, it passes the latter half of the test on its face.” *Fondessy*, 23 Ohio St. at 217.

silence is not a sufficient basis for finding that a state statute divests localities of their constitutionally protected zoning power.

**D. Throughout the Nation, State Oil and Gas Laws Exist in Harmony with Local Zoning Laws that Govern the Use of Land for Oil and Gas Development.**

A regime whereby the state has jurisdiction over technical extraction methods and localities have power over land use is commonplace in oil- and gas-producing states. The high courts of two states – Colorado and Pennsylvania – expressly have recognized that state oil and gas statutes and local zoning ordinances address different subjects and therefore can operate without conflict, when oil and gas operations are limited to particular districts. Other state courts also have rejected preemption challenges against such land use laws, and some courts – including the high courts of Texas and Oklahoma – have upheld even more extensive local powers. Plainly, the industry is booming in many areas nationwide with a form of the shared regulatory authority urged by Amici in this case.

The Supreme Court of Colorado was the first to apply the distinction between the regulation of oil and gas extraction methods and the regulation of land use to a preemption claim. *See Bd. of Cty. Comm'rs, La Plata County v. Bowen/Edwards Assocs., Inc.*, 830 P.2d 1045 (Colo. 1992). As in Ohio, Colorado jurisprudence recognized that “[t]he purpose of the preemption doctrine is to establish a priority between potentially conflicting laws enacted by various levels of government.” *Id.* at 1055. Noting that the state’s interest in its regulation of gas extraction methods is centered on the efficient production and utilization of the natural resources in the state, while a municipality’s interest in land use control is centered on the orderly development and use of land in a manner consistent with local needs, the Colorado high court reasoned:

Given the rather distinct nature of these interests, we reasonably may expect that any legislative intent to prohibit a county from exercising its land-use authority over those areas of the county in which oil development or operations are taking place or are contemplated would be clearly and unequivocally stated . . . .

...  
A legislative intent to preempt local control over certain activities cannot be inferred merely from the enactment of a state statute addressing certain aspects of those activities.

*Id.* at 1057, 1058. Moreover, after explicitly recognizing the state’s need for uniform regulation of the “location and spacing of wells,” the court concluded:

The state’s interest in uniform regulation of these and similar matters, however, does not militate in favor of an implied legislative intent to preempt all aspects of a county’s statutory authority to regulate land use within its jurisdiction merely because the land is an actual or potential source of oil and gas development and operations. The state’s interest in oil and gas activities is not so patently dominant over a county’s interest in land-use control, nor are the respective interests of both the state and the county so irreconcilably in conflict, as to eliminate by necessary implication any prospect for a harmonious application of both regulatory schemes.

*Id.* at 1058. For those reasons, the Colorado Oil and Gas Conservation Act does not, expressly or impliedly, preempt all local land use regulation.<sup>15</sup>

In 2009, the Supreme Court of Pennsylvania reached a similar conclusion with respect to the law of that Commonwealth as it existed at that time. Before its amendment by Act 13 of 2012, Pa. Laws 87 (Feb. 14, 2012) (“Act 13”), Pennsylvania’s Oil and Gas Act included the following language preempting municipal ordinances that regulated the industry’s operations:

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<sup>15</sup> Finding no preemption of local land use law, generally, the Court nevertheless recognized that the particular regulations at issue in *Bowen/Edwards* might serve as operational restrictions that *would* be preempted if they conflicted with the state rules. *See* 830 P.2d at 1059. The Court therefore remanded the question whether any operational conflict existed between the two regulatory regimes to the trial court for resolution on a fully developed record. *See id.* at 1060. This Court also should acknowledge the general power of localities to regulate land use, including by limiting oil and gas operations to particular districts. Whether the particular provisions that the City of Munroe Falls wishes to enforce in this case are in conflict with state regulations governing extractive methods should be resolved in the first instance by the trial court on a complete evidentiary record.

Except with respect to ordinances adopted pursuant to . . . the Pennsylvania Municipalities Planning Code, . . . all local ordinances and enactments purporting to regulate oil and gas well operations regulated by this act are hereby superseded. No ordinances or enactments adopted pursuant to the aforementioned acts shall contain provisions which impose conditions, requirements or limitations on the same features of oil and gas well operations regulated by this act or that accomplish the same purposes as set forth in this act. The Commonwealth, by this enactment, hereby preempts and supersedes the regulation of oil and gas wells as herein defined.

58 Pa. Cons. Stat. § 601.602 (1984) (superseded).<sup>16</sup> When a preemption claim was raised under the Oil and Gas Act against a local effort to exclude gas drilling from a residential district, the Pennsylvania Department of Environmental Protection argued:

[Although] zoning ordinances . . . may not “contain provisions which impose conditions, requirements or limitations on the same features of oil and gas well operations” regulated by the Act or “accomplish the same purposes” as the Act, [the Legislature] simply intended to foreclose municipalities from legislating on the technical aspects of well operations or enacting ordinances that purport to establish permitting, bonding, or registration requirements for oil or gas wells. This, in the Department’s view, does not equate to an evisceration of a political subdivision’s “core municipal function” of designating different areas of the municipality for different uses.

*Huntley & Huntley, Inc. v. Borough Council of Oakmont*, 600 Pa. 207, 218-19, 964 A.2d 855, 861-62 (2009). Adopting the Department’s interpretation, *see id.* at 223, and finding that the purposes of the zoning ordinance at issue – “preserving the character of residential neighborhoods and encouraging beneficial and compatible land uses,” *id.* at 224 (internal citation omitted) – did not conflict with those of the Oil and Gas Act, the Pennsylvania Supreme Court

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<sup>16</sup> Act 13 adopted new preemption provisions, including one that expressly directed localities to amend their zoning laws to allow oil and gas wells in all districts, 58 Pa. Cons. Stat. § 3304 (2012). An appellate court struck down the state zoning mandate as unconstitutional and enjoined its enforcement, *see Robinson Twp. v. Pennsylvania*, 52 A.3d 463, 485 (Pa. Commw. Ct. 2012), *cert. granted* Nos. 63 & 64 MAP 2012, and the case now is sub judice before the Pennsylvania Supreme Court. The agency appellants in that case, but not the Attorney General, are seeking re-argument of the appeal, following the appointment of a new Justice.

upheld the challenged zoning.<sup>17</sup> *See id.* at 226; *see also Penneco Oil Co. v. Cty. of Fayette*, 4 A.3d 722 (Pa. Commw. Ct. 2010) (holding that a county zoning ordinance was not preempted by Pennsylvania’s Oil and Gas Act, where the ordinance did not attempt to regulate technical aspects of gas development operations).

In New York, an appellate court recently rejected a claim that the state’s Oil, Gas and Solution Mining Law (“OGSML”) expressly preempted a town zoning amendment clarifying that oil and gas activities were prohibited uses. *See Norse Energy Corp. USA v. Town of Dryden*, 108 A.D.3d 25, 964 N.Y.S.2d 714 (3d Dep’t 2013). Recognizing that the statute superseded all local provisions “relating to the regulation of the oil, gas and solution mining industries,” the *Dryden* court stated: “The zoning ordinance at issue, however, does not seek to regulate the details or procedure of the oil, gas and solution mining industries. Rather, it simply establishes permissible and prohibited uses of land within the Town for the purpose of regulating land generally.” *Id.* at 32 (citation omitted). Citing three New York high court cases embracing the distinction between regulation of extractive industries and regulation of land use (in the context of sand and gravel mining), *see In re Gernatt Asphalt Prods. v. Town of Sardinia*, 87 N.Y.2d 668, 664 N.E.2d 1226 (1996); *In re Hunt Bros. v. Glennon*, 81 N.Y.2d 906, 613 N.E.2d 549

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<sup>17</sup> In a companion case, *Range Resources–Appalachia, L.L.C. v. Salem Township*, the Pennsylvania Supreme Court reaffirmed *Huntley*’s conclusion that “the Act’s preemptive scope is not total in the sense that it does not prohibit municipalities from enacting traditional zoning regulations that identify which uses are permitted in different areas of the locality, even if such regulations preclude oil and gas drilling in certain zones.” 600 Pa. 231, 236, 964 A.2d 869, 872 (2009). The *Range Resources* court found that the Township ordinance at issue was preempted, however, because it attempted to establish a comprehensive regulatory scheme relative to oil and gas development, rather than simply regulating the zones in which well drilling was permitted. *See id.* at 234 (describing an ordinance that required a permit for any drilling-related activities, regulated the location, design, and construction of access roads, gas transmission lines, water treatment facilities, and well heads, established complaint procedures and requirements for site access and restoration, and provided for fines or imprisonment as penalties for violations).

(1993); *In re Frew Run Gravel Prods. v. Town of Carroll*, 71 N.Y.2d 126, 518 N.E.2d 920 (1987), the appellate court ruled: “While the Town’s exercise of its right to regulate land use through zoning will inevitably have an incidental effect upon the oil, gas and solution mining industries, we conclude that zoning ordinances are not the type of regulatory provision that the Legislature intended to be preempted by the OGSML.” *Norse Energy Corp. USA*, 108 A.D.3d at 32 (citations omitted).

The New York court also rejected an implied preemption claim based on an alleged conflict between the state and local regulatory regimes. Responding to the argument that state regulation of the location of wells conflicted with the local zoning, the court explained:

The provisions that petitioner points to, however, relate to the details and procedures of well spacing by drilling operators (see e.g. ECL 23–0101[20][c]; 23–0503[2]) and do not address traditional land use considerations, such as proximity to nonindustrial districts, compatibility with neighboring land uses, and noise and air pollution. As we noted, the well-spacing provisions of the OGSML concern technical, operational aspects of drilling and are separate and distinct from a municipality’s zoning authority, such that the two do not conflict, but rather, may harmoniously coexist; the zoning law will dictate in which, if any, districts drilling may occur, while the OGSML instructs operators as to the proper spacing of the units within those districts in order to prevent waste.

*Id.* at 37. The same reasoning applies to Chapter 1509 and local zoning in Ohio.

Appellate courts of Western and Southern states with a long history of oil and gas development have recognized that extensive local regulation – well beyond zoning of uses into separate districts – can co-exist with state regulation of the oil and gas industry. *See, e.g., Vinson v. Medley*, 737 P.2d 932, 936 (Okla. 1987) (“A city is empowered to enact zoning laws to regulate the drilling of oil-and-gas wells with a view to safeguarding public welfare.”); *Unger v. Texas*, 629 S.W.2d 811, 812 (Tex. App. 1982) (agreeing that, in Texas, a municipality “under its police power has full authority both to regulate and prohibit the drilling of oil wells within its city limits”); *City of Baton Rouge v. Hebert*, 378 So. 2d 144, 146 (La. Ct. App. 1979) (stating, in

the context of oil development: “[W]e do not believe the state’s preemption in this field extends to abridging a municipality’s control over land use within its corporate boundary . . . .”<sup>18</sup>

Consistent with those holdings, the City of Tulsa, Oklahoma prohibited drilling for more than a century until 2010, *see, e.g., Tulsa City Officials Urged to Put Possible Oil Drilling Info Online*, <http://www.mobilitytechzone.com/news/2009/05/20/4190333.htm> (May 20, 2009) (noting that Tulsa first prohibited drilling in 1906), and is now one of many localities that regulate the industry extensively.<sup>19</sup> In Texas, as in Ohio, municipalities enjoy home-rule status and may enact and enforce ordinances designed to protect health, life, and property of their citizens. *See* Tex. Const., Art. XI, § 5. Exercising that power of local self-government, municipalities in Texas have adopted zoning ordinances regulating the use of land for oil and gas development.<sup>20</sup>

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<sup>18</sup> Complete prohibitions also are permitted in California and Illinois. *See* Cal. Pub. Res. Code § 3690 (“This chapter shall not be deemed a preemption by the state of any existing right of cities and counties to enact and enforce laws and regulations regulating the conduct and location of oil production activities, including, but not limited to, zoning, fire prevention, public safety, nuisance, appearance, noise, fencing, hours of operation, abandonment, and inspection.”); Cal. Att’y Gen. Op. No. 76-32, at 16 (1976), available at <ftp://ftp.consrv.ca.gov/pub/oil/publications/prc03.pdf> (opining that the State of California’s approval of an oil or gas well “would . . . not nullify a valid prohibition of drilling or a permit requirement by a county or city in all or part of its territory”); *accord Tri-Power Resources, Inc. v. City of Carlyle*, 2012 Ill. App. 5th 110075, 25, 967 N.E.2d 811, 816 (Ill. App. Ct. 2012) (holding that non-home-rule units of government in Illinois have the same power as home-rule municipalities to prohibit oil and gas wells within their borders).

<sup>19</sup> *See* Tulsa, Okla. Code of Ordinances tit. 42-A, available at <http://library.municode.com/index.aspx?clientID=14783&stateID=36&statename=Oklahoma>; *see also* El Reno Code of Ordinances §§ 270-3–270-12 (Oklahoma), available at <http://ecode360.com/8103800>; Lawton City Code, 2005, § 18-5-1-502(A)(4) (Oklahoma), available at [http://library.municode.com/HTML/14726/level3/CH18PLZO\\_ART18-5SPDIRE\\_DIV18-5-1GEAGDI.html#CH18PLZO\\_ART18-5SPDIRE\\_DIV18-5-1GEAGDI\\_18-5-1-502USPE](http://library.municode.com/HTML/14726/level3/CH18PLZO_ART18-5SPDIRE_DIV18-5-1GEAGDI.html#CH18PLZO_ART18-5SPDIRE_DIV18-5-1GEAGDI_18-5-1-502USPE).

<sup>20</sup> *See, e.g.,* Southlake City Code, Subp. A, Chap. 9.5, Art. IV, §§ 9.5-221–9.5-299, available at [http://library.municode.com/HTML/12906/level3/SPAGEOR\\_CH9.5EN\\_ARTIVOIGAWEDRP.html#TOPTITLE](http://library.municode.com/HTML/12906/level3/SPAGEOR_CH9.5EN_ARTIVOIGAWEDRP.html#TOPTITLE); Code of the City of Fort Worth § 15-30–15-51, available at [http://www.amlegal.com/nxt/gateway.dll/Texas/fortworth\\_tx/36/chapter15-gas\\*?fn=altmain-nf.htm\\$f=templates\\$3.0](http://www.amlegal.com/nxt/gateway.dll/Texas/fortworth_tx/36/chapter15-gas*?fn=altmain-nf.htm$f=templates$3.0).

The states of Kansas, New Mexico, and Wyoming also leave land use regulation to localities, which have adopted zoning provisions governing the permissible locations of oil and gas activities.<sup>21</sup> Although they take a variety of forms, regimes of shared state and local power are the norm in the United States.<sup>22</sup>

In each of the gas-producing states where local land use control exists concurrently with state regulation of the gas industry, the state laws include provisions relating to the location and spacing of wells, including setback requirements. *See, e.g.*, Cal. Pub. Res. Code §§ 3600, 3602, 3606 (well setback and spacing unit requirements); Colo. Rev. Stat. Ann. § 34-60-116 (spacing unit requirements); Kan. Stat. Ann. §§ 55-211, 55-211a (well setback requirements); N.M. Stat. Ann. § 70-2-18 (spacing unit requirements); N.Y. Envtl. Conserv. L. §§ 23-0501 (spacing unit requirements), 23-0503 (well spacing); Okla. Stat. Ann. tit. 52, §§ 287.4, 305 (spacing unit and setback requirements); Tex. Nat. Res. Code Ann. § 102.011 (spacing unit requirements); Wyo. Stat. Ann. § 30-5-109 (spacing unit requirements). Moreover, those states include four of the top

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<sup>21</sup> *See, e.g.*, Chanute, Kansas Municipal Code §§ 16.44.010–16.44.120, available at [http://library.municode.com/HTML/16261/level2/TIT16BUCO\\_CH16.44OIGADRPR.html#TOPTITLE](http://library.municode.com/HTML/16261/level2/TIT16BUCO_CH16.44OIGADRPR.html#TOPTITLE); Wichita, Kansas Code of Ordinances §§ 25.04.010–24.04.240, available at [http://library.municode.com/HTML/14166/level3/COORWIKI\\_TIT25OIGAWI\\_CH25.04OIGAWI.html#TOPTITLE](http://library.municode.com/HTML/14166/level3/COORWIKI_TIT25OIGAWI_CH25.04OIGAWI.html#TOPTITLE); Code of Dona Ana County § 250-72 (New Mexico), available at [http://donaanacounty.org/sites/default/files/pages/CH\\_250\\_Zoning\\_Ord.pdf](http://donaanacounty.org/sites/default/files/pages/CH_250_Zoning_Ord.pdf); Carlsbad City Code § 56-267(16) (New Mexico), available at <http://library.municode.com/index.aspx?clientId=12431> (follow “Chapter 56” link in side menu, then “Article XI” link); Code of the City of Evanston §§ 16-1–16-48 (Wyoming), available at <http://ecode360.com/9851040>; Newcastle Town Code § 17-16 (Wyoming), available at [http://library.municode.com/HTML/16522/level2/PTIITHCO\\_CH17OFIS.html#PTIITHCO\\_CH17OFIS\\_S17-16OIGAWEREWHDROPETPR](http://library.municode.com/HTML/16522/level2/PTIITHCO_CH17OFIS.html#PTIITHCO_CH17OFIS_S17-16OIGAWEREWHDROPETPR).

<sup>22</sup> Amici recognize that not every state allows for local control of land use decisions relating to oil and gas development. *See Ne. Natural Energy, LLC v. City of Morgantown, W.V.*, No. 11-C-411, Slip Op. 8-9 (Cir. Ct., Monongalia Cty., Aug. 12, 2011). That West Virginia trial court decision was not appealed, and it appears to be the only court – other than the court below – to have adopted such a sweeping view of preemption.

gas-producing states in the nation.<sup>23</sup> Because the state and local laws can be interpreted to give both effect, and the industry can and does thrive under such a regime, there is no reason in law or practice to read Chapter 1509 to divest municipalities of their power to enact and enforce zoning laws.

### **III. Interpreting Chapter 1509 to Preempt Local Zoning Completely Would Render the Statute Unconstitutional.**

Appellee Beck Energy Corporation (“Beck”) seeks an exemption from the requirements of the Zoning Ordinance for development of oil and gas wells, without regard to the impacts on orderly economic development, on use and enjoyment of nearby private property, or on community health, safety, and welfare. Unlike other businesses in the City of Munroe Falls, Beck asserts a special entitlement to use land in any zoning district it chooses, including those otherwise restricted to family homes, elementary schools, churches, hospitals, and other sensitive uses.<sup>24</sup> Amici urge the Court to reject Beck’s claim and instead to construe Chapter 1509 narrowly to preserve the ability of municipalities to isolate oil and gas activity in zones that will protect the public health and will allow first responders to address industrial emergencies without undue risk to themselves, innocent bystanders, and adjacent residential, commercial, or park property.

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<sup>23</sup> See U.S. Energy Information Admin., *Top 5 Producing States’ Combined Marketed Natural Gas Output Rose in 2011*, <http://www.eia.gov/todayinenergy/detail.cfm?id=6030> (Apr. 27, 2012) (listing Texas, Colorado, Oklahoma, and Wyoming among the top five). During the period when Pennsylvania municipalities regulated the use of land for gas development, production reached an all-time high. See U.S. Energy Information Admin., *Natural Gas Gross Withdrawals and Production*, [http://www.eia.gov/dnav/ng/ng\\_prod\\_sum\\_dcu\\_spa\\_a.htm](http://www.eia.gov/dnav/ng/ng_prod_sum_dcu_spa_a.htm) (Jul. 31, 2013) (showing that gas production more than doubled from 2010 to 2011 and more than quintupled from 2008 to 2011).

<sup>24</sup> The asserted entitlement presupposes that Beck has leased mineral rights under the land and has received a state drilling permit.

If this Court reads Chapter 1509 to require localities to permit oil and gas operations in every district, the statute will operate as a law that carves unique exceptions from local zoning laws in favor of one industry. The statute would offer this preferential treatment notwithstanding the incompatibility of industrial operations with surrounding land uses, irrespective of adverse impacts on nearby property values, and without providing local officials or property owners any right to be heard. Interpreting Chapter 1509 to divest municipalities of their power to enact and enforce zoning laws thus would render the statute unconstitutional, as an arbitrary and unreasonable exercise of the state's police powers and a violation of due process. This Court should avoid such an interpretation, because "[w]here reasonably possible, a statute should be given a construction which will avoid rather than a construction which will raise serious questions as to its constitutionality." See *Coop. Legislative Comm. of Transp. Bhd. v. Pub. Util. Comm'n*, 177 Ohio St. 101, 103, 202 N.E.2d 699, 701 (1964); accord *Porter v. Investors' Syndicate*, 286 U.S. 461, 470, 52 S. Ct. 617, 620 (1932) (noting that the court is "bound if fairly possible to construe the law so as to avoid the conclusion of unconstitutionality").

"There can be no doubt that the bundle of venerable rights associated with property is strongly protected in the Ohio Constitution and must be trod upon lightly, no matter how great the weight of other forces." *Norwood v. Horney*, 110 Ohio St. 3d 353, 363, 853 N.E.2d 1115, 1129 (2006). Notwithstanding the strength of this protection, property rights are subject "to a reasonable, nonarbitrary exercise of the police power of the state or municipality, when exercised in the interest of public health, safety, morals, or welfare." *Wymyslo v. Bartec, Inc.*, 132 Ohio St. 3d 167, 181, 970 N.E.2d 898, 912 (2012) (citation omitted). Chapter 1509, if interpreted to carve holes in local zoning for the benefit of incompatible oil and gas uses, cannot be understood as a lawful exercise of the police power.

Under Article II, Section 1 of the Ohio Constitution, and with the exception of the Home Rule Amendment, the State's police power is entrusted to the Ohio General Assembly. See *Holiday Homes Inc. v. Butler Cty. Bd. of Zoning Appeals*, 35 Ohio App. 3d 161, 165, 520 N.E.2d 605, 609 (12th Dist. 1987). The legislature's exercise of that power must, under due process principles, "bear a real and substantial relation to the object sought to be obtained, namely, the health, safety, morals or general welfare of the public," and must not be "arbitrary, discriminatory, capricious or unreasonable." *State v. Thompkins*, 75 Ohio St. 3d 558, 560, 664 N.E.2d 926, 928 (1996). To survive constitutional scrutiny, therefore, any state statute that operates as a zoning law must be grounded in a reasonable exercise of the police power. See *Cassell v. Lexington Twp. Bd. of Zoning Appeals*, 163 Ohio St. 340, 345, 127 N.E.2d 11, 14 (1955) ("All zoning laws and regulations find their justification in the police power and it is well settled that the power to enact zoning regulations can not be exercised in an arbitrary or unreasonable manner."); see also *Blust v. City of Blue Ash*, 177 Ohio App. 3d 146, 150, 894 N.E.2d 89, 92 (1st Dist. 2008) ("A zoning ordinance is unconstitutional if [it] is arbitrary and unreasonable and bears no substantial relationship to the health, safety, and welfare of the municipality.").

Although it would function as a zoning law, if it were interpreted broadly to preempt all local land use authority, Chapter 1509 does not preserve the integrity of existing local land uses or promote the welfare of local communities, as traditional and lawful zoning does. To the contrary, under that reading, Chapter 1509 would compel localities to accept oil and gas wells wherever a state permit allowed construction, without regard for locally adopted land use classifications or the quiet enjoyment of existing property uses. Wells could be located in congested locations that made emergency access difficult and dangerous, in districts where

people would be exposed to toxic emissions, and near private property used for purposes incompatible with heavy industry.<sup>25</sup>

The State's exercise of police power in this manner -- without consideration of the impacts on existing land uses incompatible with industrial oil and gas activity -- amounts to unconstitutional spot zoning. Spot zoning "refers to the singling out of a lot or a small area for discriminatory or different treatment from that accorded surrounding land which is similar in character." *Willott v. Village of Beachwood*, 175 Ohio St. at 559; *see also Pilla v. City of Willowick*, No. 8-243, 1982 WL 5727, \*4 (Ohio Ct. App., 11th Dist. Dec. 23, 1982) (describing spot zoning as "rezoning which singles out a small parcel of land for use or uses different from surrounding areas, seemingly on behalf of one owner"). Each well that ODNR permitted in a district that otherwise would not allow oil and gas operations would implement another spot zoning unconstitutionally mandated by Chapter 1509.

"[T]he typical spot-zoning fact pattern" presents a "conflict resulting from an attempt to put a more intense commercial use in a restrictive residential zone." *Phillips Supply Co. v. City of Cincinnati*, 985 N.E.2d 257, 270 (Ohio Ct. App., 1st Dist. 2012). Thus, a court upheld a city's refusal to rezone three properties in a residential zone as "commercial," concluding:

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<sup>25</sup> Moreover, there would be no state process to accommodate the interests traditionally protected by local zoning. Chapter 1509 thus stands in stark contrast with Chapter 3734, the hazardous waste facility siting law, which clearly preempts local zoning. Unlike Chapter 1509, Chapter 3734 creates a facility siting process that compels the state to take into consideration local interests otherwise protected by zoning. The applicant is required to publish notice of a public meeting on its permit application and to provide direct notice to the affected municipality of the application and the design and purpose of the facility, while ODNR must provide public notice of, opportunity for comment on, and a hearing regarding the application, if significant interest is shown. *See* R.C. § 3734.05(C)-(D)(1). In addition, the statute expressly preserves the common law right of municipalities to suppress nuisances created by any permitted facility. *See id.* § 3734.10. Because Chapter 3734 provides both procedural rights for local governments and their constituents and substantive rights to protect private property and public health, that statute does not raise the constitutional concerns presented by Chapter 1509.

We are of the opinion that the original zoning of the city of Belpre was comprehensive; that the three lots in question were zone 'residential' as part of an over all plan for the development of land use in that city; and that the attempt to rezone the three lots in question was 'spot zoning.'

*Walker v. City of Belpre*, 14 Ohio App. 2d 17, 19, 235 N.E.2d 729, 731 (4th Dist. 1967)

(observing that the effect of rezoning the properties as commercial "would be to increase the traffic in the neighborhood for the remaining lot owners"); *see also Pilla*, 1982 WL 5727, \*5 (upholding a determination that a proposed rezoning of property was spot zoning because "no rational reason had been presented for isolating [the] property and subjecting it to rezoning"). In *Renner v. Makarius*, the Court of Appeals found that the change in classification of a single lot from "residential" to "small office" was "unreasonable and arbitrary, and [did] not bear a real and substantial relation to the public health, safety, morals or general welfare," where the surrounding area was "clearly residential," notwithstanding nearby growth and increased traffic. No. CA 5993, 1979 WL 208364, \*5 (Ohio Ct. App., 2nd Dist. Aug. 3, 1979). The State's effective creation of a special district for oil and gas activity in the midst of residential and other non-industrial districts would be an even more egregious example of spot zoning. This Court therefore should avoid an interpretation of Chapter 1509 that would divest municipalities of their power to enact and enforce land use laws and create a system of unconstitutional spot zoning.

In Act 13, the legislature of Pennsylvania enacted a provision that expressly did what Chapter 1509 would do, if it were interpreted to divest municipalities altogether of their power to enact and enforce land use laws. *See* 58 Pa. Cons. Stat. § 3304. The provision mandates that "all local ordinances regulating oil and gas operations" in the Commonwealth authorize those operations in "all zoning districts." *Id.* § 3304(a), (b)(5)–(6). In adjudicating a due process challenge to that provision, *see Robinson Twp. v. Pennsylvania*, 52 A.3d 463, 481 (Pa. Commw. Ct. 2012), *cert. granted*, Nos. 63 & 64 MAP 2012, the Pennsylvania Commonwealth Court cited

*City of Edmonds v. Oxford House, Inc.*, in which the United States Supreme Court described the purpose of zoning as follows:

Land-use restrictions designate “districts in which only compatible uses are allowed and incompatible uses are excluded.” D. Mandelker, *Land Use Law* § 4.16, pp. 113–114 (3d ed.1993) (hereinafter Mandelker). These restrictions typically categorize uses as single-family residential, multiple-family residential, commercial, or industrial. *See, e.g.*, 1 E. Ziegler, Jr., Rathkopf’s *The Law of Zoning and Planning* § 8.01, pp. 8–2 to 8–3 (4th ed. 1995); Mandelker § 1.03, p. 4; 1 E. Yokley, *Zoning Law and Practice* § 7–2, p. 252 (4th ed. 1978).

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, 47 S.Ct. 114, 118, 71 L.Ed. 303 (1926).

514 U.S. 725, 732, 115 S. Ct. 1776, 1780-81 (1995). “So there is not a ‘pig in the parlor instead of the barnyard,’ zoning classifications contained in the zoning ordinance are based on a process of planning with public input and hearings that implement a rational plan of development.”

*Robinson Twp.*, 52 A.3d at 482. Section 3304 of Act 13 vitiated comprehensive planning processes throughout Pennsylvania and replaced them with a uniformly irrational and unconstitutional land use system.

The Pennsylvania court’s analysis of section 3304 is worth repeating:

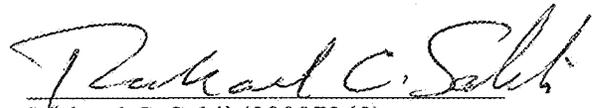
In this case, by requiring municipalities to violate their comprehensive plans for growth and development, 58 Pa. C.S § 3304 violates substantive due process because it does not protect the interests of neighboring property owners from harm, alters the character of neighborhoods and makes irrational classifications—irrational because it requires municipalities to allow . . . drilling operations and impoundments, gas compressor stations, storage and use of explosives in all zoning districts, and applies industrial criteria to restrictions on height of structures, screening and fencing, lighting and noise. Succinctly, 58 Pa .C.S. § 3304 is a requirement that zoning ordinances be amended in violation of the basic precept that “Land-use restrictions designate districts in which only compatible uses are allowed and incompatible uses are excluded.” *City of Edmonds*, 514 U.S. at 732, 115 S. Ct. 1776 (internal quotation omitted). If a municipality cannot constitutionally include allowing oil and gas operations, it is no more constitutional just because the Commonwealth requires that it be done.

*Id.* at 484-85 (footnotes omitted). Read to do implicitly what section 3304 did explicitly, Chapter 1509 also would violate substantive due process. This Court should avoid an interpretation of Chapter 1509 that renders it unconstitutional.

### CONCLUSION

For all the reasons set forth above, this Court should endorse Proposition of Law One, hold that Chapter 1509 does not divest municipalities of their power to enact and enforce zoning laws, and reverse the decision of the Court of Appeals.

Respectfully submitted this 6th day of September, 2013.



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Certificate of Service

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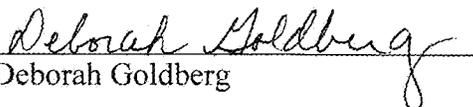
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