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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 2295 CD 2015

DOLORES FREDERICK, *et al.*,

Appellants,

v.

ALLEGHENY TOWNSHIP ZONING HEARING BOARD, *et al.*,

Appellees.

BRIEF OF *AMICUS CURIAE* PENNSYLVANIA CHAMBER OF BUSINESS AND INDUSTRY

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The Pennsylvania Chamber of Business and Industry ("Chamber") submits this brief as *amicus curiae* and pursuant to Pa.R.A.P. 531(b)(1)(i).

I. THE INTERESTS OF *AMICUS CURIAE*

The Chamber is the largest, broad-based business association in Pennsylvania. It has thousands of members throughout Pennsylvania, who employ more than 50 percent of the Commonwealth's private workforce. The Chamber's mission is to improve Pennsylvania's business climate and increase the competitive advantage for its members while, at the same time, ensuring that the natural environment is protected.

In this case, Appellants (the "Citizens") challenge the Allegheny Township zoning ordinance (the "Ordinance") to the extent that it permits oil and gas wells to be located in all of the township's zoning districts (subject, however, to 10 pages of substantive and procedural requirements). The Citizens' argument is that, by allowing oil and gas wells to be sited in non-industrial zoning districts, the Ordinance violates Article I, Sections 1 and 27 of the Pennsylvania Constitution. The township's zoning hearing board rejected the Citizens' constitutional challenges and the trial court rejected them, too. The Citizens now appeal the trial court's decision to this Court.

By its January 3, 2018 order, this Court requested the filing of supplemental briefs regarding whether our Supreme Court's decision in *Pennsylvania*

Environmental Defense Foundation v. Commonwealth, 161 A.3d 911 (Pa. 2017) ("*PEDF*") has any impact on this appeal. Because members of the Chamber regularly apply for and obtain zoning permits from municipalities, they have a substantial interest in the Court's consideration of this issue and, ultimately, its disposition of this appeal.

The Citizens' argument, at bottom, is that Article I, Section 27 should be interpreted to strip the inherent and constitutionally-protected right of private property owners to use their property for any lawful purpose. This Court's decision, therefore, has the potential to materially affect the legal landscape and business climate for members of the Chamber, along with numerous other businesses that are required to obtain zoning permits from local municipal bodies. Most particularly, the decision will impact Chamber members and the decisions that they make with respect to capital investment in this Commonwealth, and for that reason it is of paramount concern to them.

II. SUMMARY OF ARGUMENT

The Supreme Court's limited holding in *PEDF* does not apply in this case. This case does not involve the "Commonwealth" or "public natural resources." The *PEDF* Court's statement in *dicta*, moreover, that the first sentence of Article I, Section 27 creates rights – and that "laws" may not "unreasonably impair" those rights – is not implicated. The Ordinance at issue does not unreasonably impair the

rights in question because, in the context of the challenge at hand, it does not implicate the Citizens' Article I rights at all.

The Ordinance does not deprive the Citizens of any rights under Article I of the Pennsylvania Constitution. It does not expressly authorize anyone to use private property in a way that deprives his neighbor of a property interest or shield anyone from liability for doing so. The Ordinance, instead, simply allows private property owners to use their private properties for lawful purposes, including oil and gas development. Article I protects citizens from the Commonwealth, not from each other, and an allegedly insufficiently restrictive ordinance does not, in and of itself, harm anyone.

Article I, Section 27 cannot be interpreted to create or reallocate private property rights. It cannot be read to take away a landowner's right to make an otherwise lawful use of his private property and transfer it to his neighbor so that the neighbor can realize some type of individual, environmentally-focused benefit. If Article I, Section 27 were interpreted that way, it would raise serious concerns that it had effectuated an uncompensated "taking" of private property, in violation of the Fifth Amendment to the United States Constitution.

III. ARGUMENT

A. The Pennsylvania Supreme Court's Decision In *PEDF* Does Not Apply To This Case.

In *PEDF*, the Supreme Court held that, under Article I, Section 27, the Commonwealth's oil and gas rights are "public natural resources" and the revenues that the Commonwealth derives from leasing them must, therefore, be held in trust and expended only to conserve and maintain "public natural resources." 161 A.3d at 938. This case, however, does not involve the "Commonwealth" or "public natural resources."

Municipalities are not the "Commonwealth" for purposes of Article I, Section 27 and, consequently, do not have constitutionally-mandated "trustee" obligations under that provision, despite suggestions to the contrary in *dicta* in *PEDF*. *See* 161 A.3d at 931 n.23. In interpreting provisions of the Pennsylvania Constitution, "[o]ur ultimate touchstone is the actual language of the constitution itself." *Buckwalter v. Borough of Phoenixville*, 985 A.2d 728, 730 (Pa. 2009), *quoting Jubelirer v. Rendell*, 953 A.2d 514, 528 (Pa. 2008). Also, "because the Constitution is an integrated whole, effect must be given to all of its provisions whenever possible." *Cavanaugh v. Davis*, 440 A.2d 1380, 1382 (Pa. 1982).

The Pennsylvania Constitution, when viewed as a whole, clearly differentiates between the "Commonwealth" – *i.e.*, "The Legislature," "The Executive," and "The Judiciary" – and local municipalities. *See, e.g.*, Pa. Const.

art. I, § 26, art. II, § 1, art. III, § 31, art. IV, §1, art. V, §§ 1 & 2, art. VIII, § 2(b)(ii), art. VIII, § 4, art. VIII, § 9, art. VIII, § 16. In the Pennsylvania Constitution, in fact, there is an entire article, Article IX, that is devoted to "Local Government," *see* Pa. Const. art. IX, which is separate from Articles II, IV, and V, which are devoted to the Legislative, Executive, and Judicial Departments, respectively. As Article IX expressly provides, a "municipality," is a unit of government "*created by* the General Assembly." Pa. Const. art. IX, § 14 (emphasis added).

Not only is the "Commonwealth" uninvolved in this case, but the Ordinance does not concern "public natural resources." The Ordinance governs only the private use of *private property* and, consequently, does not implicate any trustee obligations under Article I, Section 27. The private property that the Ordinance regulates is not part of the "public natural resources," *i.e.*, the "corpus" of the trust. *See PEDF*, 161 A.3d at 931 & n.22 (Commonwealth's trustee obligations do not apply to purely private property rights); *Payne v. Kassab*, 361 A.2d 263, 272 (Pa. 1976) ("There is also no doubt that the property here involved is *public property*, a 'public Common', and that it is possessed of certain natural, scenic, historic and esthetic values.") (emphasis added).

"Public natural resources" are the property interests that the Commonwealth owns in natural resources. *See* Robert E. Woodside, Pennsylvania Constitutional

Law (1985) at 176 ("Article I, Section 27 expands [the] public trust doctrine beyond the navigable waters. The Commonwealth owns vast areas of forest land, parks, highways and other real estate, as well as rights in lakes and rivers, which are 'public natural resources' to be 'conserved and maintained' by the state as trustee for all the people. This is an interest in *property* and the proper subject of a trust.") (emphasis in original).

Indeed, using a possessive noun, Article I, Section 27 refers to "Pennsylvania***'s*** public natural resources[.]" (Emphasis added). The use of the possessive form signals that "public natural resources" are things that the Commonwealth ***owns***. Article I, Section 27 then states that the "public natural resources" are the "common ***property*** of all the people[.]" (Emphasis added). Synthesizing these points reveals that "public natural resources" are "property" interests that the Commonwealth owns in natural resources.

It follows that, while *PEDF* may provide this Court with general guidance and instruction – *i.e.*, that the decades-old "*Payne* test" is no longer viable – the Supreme Court's *holding* has no application here, and its *dicta* is not binding on this Court. *See Rendell v. Pa. State Ethics Comm'n*, 983 A.2d 708, 714 (Pa. 2009) (any statement in a court's opinion that is "ancillary and, ultimately, unnecessary to the resolution of the controversy" is not decisional and therefore merely non-binding *dicta*).

Even if the Supreme Court's *dicta* were binding, the only statement in the *PEDF* decision that could be relevant to this case is the suggestion that the first sentence of Article I, Section 27 creates rights and that "laws" may not "unreasonably impair" such rights. *PEDF*, 161 A.3d at 931. However, as explained below, in the context of the challenge at hand, the Ordinance does not unreasonably impair the rights in question because it does not implicate the Citizens' Article I rights at all.

B. The Challenge To The Zoning Ordinance In This Case Does Not Implicate Any Of The Citizens' Rights Protected By Article I.

The Ordinance does not limit or interfere with the Citizens' use of their property. There is no claim, for example, that the Ordinance prohibits the Citizens from making otherwise lawful use of their property or authorizes their neighbors to encroach on their property interests. Likewise, the Ordinance does not infringe upon the Citizens' liberty by, for example, prohibiting the Citizens from engaging in otherwise lawful conduct.

Most importantly, the Ordinance, on its face, does not deprive the Citizens of clean air, pure water, or the enjoyment of the natural, scenic, historic, or esthetic values of the environment. The Ordinance does not contaminate water, pollute the air, damage historic features, or otherwise have any impact on the environment. Rather, it simply establishes where, and under what conditions, *private landowners* may make otherwise lawful use of their *private property*.

The Ordinance, in sum, does nothing more than create a legal framework under which a private party might seek permission to engage in activity on private property that, if undertaken, may or may not harm the Citizens.

As our Supreme Court expressly recognized in *Western Pennsylvania Socialist Workers 1982 Campaign v. Connecticut General Life Insurance Co.*, 515 A.2d 1331 (Pa. 1986), the provisions of Article I of the Pennsylvania Constitution protect the citizens of the Commonwealth from the State and ***not*** from each other. Moreover, the common-law maxim – *sic utere tuo ut alienum non laedas* (so use your own property as not to injure your neighbors) – is not a source of a mandatory constitutional duty on the part of the Commonwealth or its municipalities to exercise the police power in order to protect citizens from each other by, for example, restricting Citizen A's use of his property in order to protect Citizen B from a potential nuisance. This is precisely the point that Chief Justice Saylor highlighted in his dissenting opinion in *Robinson Township*:

> In his concurring opinion, Mr. Justice Baer appears to translate the common-law maxim of *sic utere tuo ut alienum non laedas* into a federal constitutional duty, on the part of local municipalities, to protect property owners from the use of neighboring properties in ways that are undesirable to them. The decisions referenced in the concurrence, however, generally concern the boundaries of the police power to establish zoning regulations restricting the ability of landowners to do as they wish with their own properties. None of these decisions suggests a specific obligation on the part of local governments to affirmatively exercise delegated police powers in any particular fashion or establishes local-government sovereignty over state-level government in such exercise.

Robinson Township v. Commonwealth, 83 A.3d 901, 1013 n.2 (Pa. 2013) (Saylor, J., dissenting) (internal citations omitted).

Consistent with Chief Justice Saylor's observations, the analysis *must* begin with the recognition of the inherent and constitutionally-protected right of private property owners to use their property for any lawful purpose. Zoning is an exercise of the police power that *restricts* that inherent and constitutionally-protected right. The argument, therefore, that a local zoning ordinance, or a decision that a local official makes under it, can be declared *unconstitutional* because it *permits* a private property owner to do something that he has an inherent right to do anyway is fundamentally flawed. To conclude otherwise is to contend that the Commonwealth and its political subdivisions have a constitutional obligation to exercise their police power to zone and adopt ever-more restrictive property-use regulations. That flawed argument is precisely the one that the Citizens are making in this case. This Court should reject it in full.

1. The proper analytical starting point is a landowner's inherent right to use his property for any lawful purpose.

A fundamental problem with the Citizens' constitutional analysis is that it does not start at the beginning and therefore leads to an incorrect conclusion. The analysis must begin with recognition of the inherent and constitutionally-protected right of private property owners to use their property for any lawful purpose. As

the Supreme Court explained in *Cleaver v. Board of Adjustment of Tredyffrin Township*:

> The Constitution of the United States in the Fifth Amendment and in the Fourteenth Amendment, and the Constitution of Pennsylvania in Article i, § 1, ordain and guarantee the right of private property. Article i, § 1, of the Constitution of Pennsylvania provides: "All men … have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property …."
>
> The historical origin and development of our Country, our Birthright and Heritage of Freedom and the (so-called) inalienable fundamental rights, privileges and immunities guaranteed by our Constitution are too often forgotten today.
>
> The right of private property, together with the right of freedom of speech, freedom of religion, and freedom of the press are the Hallmarks of western civilization. These Basic Freedoms constitute the fundamental differences which distinguish - and create the great unpassable gulf which divides - western civilization and free peoples, from Communists and from other peoples who are ruled by a despotic dictator.
>
> ***It is clear beyond the peradventure of a doubt that the ownership and possession of private property necessarily includes its lawful use - it would be of little or no value unless the owner can deal with and use it as he desires, so long as its use is lawful***.

Cleaver, 200 A.2d 408, 411 (Pa. 1964) (emphasis added). *See also Driscoll v. Corbett*, 69 A.3d 197, 208-209 (Pa. 2013) ("The right to acquire and own property, and to deal with it and use it as the owner chooses, so long as the use harms nobody, is a natural right. It does not owe its origin to constitutions. It existed before them. It is a part of the citizen's natural liberty — an expression of his

freedom — guaranteed as inviolate by every American Bill of Rights") (quoting *Appeal of White*, 134 A. 409, 412 (Pa. 1926)).

It follows that, for the constitutional analysis at hand, the proper analytical starting point, which the Citizens overlook, is that landowners have an inherent, constitutionally-protected right to ***use*** their land for any lawful purpose. *See Cleaver, Driscoll, supra*. *See also In re Realen Valley Forge Greenes Associates*, 838 A.2d 718, 727-728 (Pa. 2003); *Hopewell Township Board of Supervisors v. Golla*, 452 A.2d 1337, 1342 (Pa. 1982).

2. Zoning is a restriction on a landowner's inherent right to use his property.

Zoning, in turn, is a restriction on and, in fact, a deprivation of a landowner's inherent and constitutionally-protected right to use his property. As our Supreme Court explained in *Hopewell Township*, Article I, Section 1 of the Pennsylvania Constitution circumscribes the government's ability to interfere with a citizen's right to the enjoyment of private property. *See Hopewell Township*, 452 A.2d at 1342 (Pa. 1982). "We must start with the basic proposition that absent more, an individual should be able to utilize his own land as he sees fit." *Id*. at 1342 (quoting *Appeal of Girsh*, 263 A.2d 395, 397 n.3 (Pa. 1970)). Thus:

> the function of judicial review, when the validity of a zoning ordinance is challenged, is to engage in a meaningful inquiry into the ***reasonableness of the restriction on land use in light of the deprivation of landowner's freedom thereby incurred***. A conclusion that an ordinance is valid necessitates a determination that the public

> purpose served thereby adequately outweighs the landowner's right to do as he sees fit with his property, so as to satisfy the requirements of due process.

Id. at 1342 (emphasis added). The Supreme Court further explained that, while zoning may have a worthwhile objective, "since it is a ***restriction on and a deprivation of*** a property owner's Constitutionally ordained rights of property, it can be sustained only if it is *clearly necessary* to protect the health or safety or morals or general welfare of the people." *Id*. (emphasis added in part; emphasis in original in part). "The limit beyond which the power to zone in the public interest may not transcend is the protected property rights of individual landowners." *Realen*, 838 A.2d at 728. Moreover:

> The natural or zealous desire of many zoning boards to protect, improve and develop their community, to plan a city or a township or a community that is both practical and beautiful, and to conserve the property values as well as the 'tone' of that community is commendable. But they must remember that property owners have certain rights which are ordained, protected and preserved in our Constitution and which neither zeal nor worthwhile objectives can impinge upon or abolish.

Id., quoting *Cleaver*, 200 A.2d a 413 n.4.

Thus, when a zoning ordinance *limits* the use to which property may be put, it must be clear that the limitations have a substantial relation to the public good. If they do not meet this standard, the ordinance will be deemed to be an unlawful interference with the property rights of landowners. *See Hopewell*, *Realen*, *supra*. It necessarily follows that zoning, or the exercise of police power to *limit* an

otherwise constitutionally-protected right, might be unconstitutional if it goes too far by overly restricting the right, but it is not, and cannot be, unconstitutional by not going far enough.

3. A zoning ordinance's failure to restrict otherwise lawful use of property cannot deprive a citizen of Article I rights.

A zoning ordinance, by its very nature, limits the inherent right of a landowner to make otherwise lawful use of his property. This inherent right to make use of property does not stem from or arise out of any government action. The Ordinance does not create this right; rather, it limits this right. The act of a municipality, for example, in issuing a zoning permit to a landowner does not create in the landowner any right that he did not originally possess. It merely returns to the landowner the inherent right that he, and his predecessors, had *always* possessed.

In short, unless and until it is prohibited by a valid exercise of the police power, a private landowner has an unquestioned right to make otherwise lawful use of his private property. Citizen A, therefore, has no *constitutional* claim if a municipal zoning ordinance allows Citizen B to use his private property in a manner that is undesirable to him. Citizen A may dislike Citizen B's particular use of his property and may have standing to complain about, or challenge, that use under the Pennsylvania Municipalities Planning Code or another state law. Citizen A may also have a claim in nuisance or trespass, depending on the facts. But

Citizen A does not have a claim that he has been deprived of Article I constitutional rights because a zoning ordinance *fails to restrict* Citizen B's otherwise lawful use of his private property.

Our Supreme Court has recognized that Article I does not apply to private disputes like the one between our hypothetical Citizen A and Citizen B. In *Western*, a political committee requested a mandatory injunction that would have directed a private owner of a shopping mall to cease interfering with its political activities on the premises. Referring to the history of the Pennsylvania Constitution, the Supreme Court concluded that the Declaration of Rights in Article I is "a limitation on the power of state government." 515 A.2d at 1335. The Court explained that "the Pennsylvania Constitution did not create these rights." *Id*. Rather, these rights are "inherent in man's nature." *Id*. at 1335. Careful not to disturb this fundamental principle, the Court explained that the function of the Pennsylvania Constitution is to "prohibit[] the government from interfering with [man's inherent rights]." *Id*. Distinguishing between the fundamental nature of these rights and the more limited role of the Constitution, the Court concluded that, "the adjustment of these rights among private parties is not necessarily a matter of constitutional dimensions. If it were, significant governmental intrusion into private individuals' affairs and relations would be likely to routinely occur." *Id*. at 1335. "Constitutions, long-lasting and difficult to

change, primarily govern relationships between an individual and the state." *Id*. at 1336.

As this reasoning makes clear, the Declaration of Rights protects property owners *from* unwarranted interference with private property rights by *state actors*. Nothing in the Declaration of Rights requires the Commonwealth or its political subdivisions to protect the enumerated rights of its citizens against invasion by private actors. The Declaration of Rights is phrased as a limitation on the Commonwealth's power to act, not as a guarantee of certain minimal levels of safety and security. It forbids the *Commonwealth itself* from depriving individuals of rights, as set forth in its provisions, but its language cannot be extended to impose an affirmative obligation on the government to protect one citizen from another one. Its purpose is to protect the people from the Commonwealth, not to ensure that the Commonwealth protects people from each other. *See Western*, *supra*. *See also DeShaney v. Winnebago County Soc. Servs. Dep't*, 489 U.S. 189, 195 (1989) (Due Process Clause establishes a "limitation on the State's power to act, not [ ] a guarantee of certain minimal levels of safety and security").

In light of these factors, it is clear that a municipality's decision not to place a restraint upon the use of private property, or its refusal to do so in connection with a zoning ordinance or zoning approval, does not constitute an improper exercise of the police power. A municipality cannot be forced to impose

restrictions on the use of private property. If a municipality does not see fit to act with regard to a particular private property, no adjoining property owner can force it to act. A neighbor, in other words, has no right to require a municipality to restrict the use of adjacent private land in which he has no ownership. *See*, *e.g.*, *DeShaney*, 489 U.S. at 195; *Gagliardi v. Vill. of Pawling*, 18 F.3d 188, 192 (2d Cir. 1994) (refusing to find a property right in the enforcement of zoning laws against a neighbor's property).

If a person uses his or her property in a way that unlawfully invades his neighbor's property, he may be liable to his neighbor under the common law. But there is no "state action" and, as a consequence, Article I, Section 27 is not implicated.[1] *See also Staino v. Commonwealth, Pennsylvania State Horse Racing*

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[1] A possible, narrow exception to this general rule comes into play if an ordinance or other legislative enactment, on its face, authorizes a person to use his private property in a way that deprives his neighbor of a property interest and shields him from liability for doing so. In that (rare) scenario, because the enactment expressly directs or sanctions the deprivation, the person's use of the property may amount to a "state action" and can therefore conceivably infringe on the neighbor's rights under Article I, including Article I, Section 27. *See also Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (where New York statute forced landlord to allow cable television company to install facilities on his private property, company's installation of the facilities amounted to state action for purposes of Fifth Amendment).

In this case, the Ordinance does not expressly authorize anyone to use private property in a way that deprives his neighbor of a property interest or shield anyone from liability for doing so. The Ordinance, instead, simply allows private property owners to use their private properties for lawful purposes, including oil and gas development.

Com., 512 A.2d 75, 77 (Pa. Cmwlth. 1983) (fact that corporation is licensed and pervasively regulated by state does not make its actions state action); *White Fence Farm, Inc.*, 99 Ill.App.3d at 243-44 (although plaintiff had right under state's constitution to "healthful environment," it did not enjoy right to be free from issuance of landfill permit, which did not itself deprive plaintiff of anything).

It is important to note, in this regard, that Article I, Section 27 cannot be interpreted to create or reallocate private property rights. It cannot be construed to take a landowner's private property rights and give them to his neighbor, in the name of securing the neighbor's right to clean air, pure water, or the enjoyment of the natural, scenic, historic, or esthetic values of the environment. It cannot, in other words, be read to take away the landowner's right to make an otherwise lawful (*i.e.*, non-trespassory and non-nuisance-creating) use of his private property and transfer it to his neighbor so that the neighbor can realize some type of individual, environmentally-focused benefit.

Indeed, if Article I, Section 27 were interpreted that way, it would raise serious concerns that it had effectuated an uncompensated "taking" of private property, in violation of the Fifth Amendment to the United States Constitution. *See, e.g.*, Pa. L. Journal, 154th General Assembly, No. 118, Reg. Sess., 2274 (1970) ("Broughton Analysis," cited in *PEDF*) ("Certainly the amendment was not intended to apply to purely private rights–among other things, it would have been

in violation of the 5th and 14th Amendments to the United States Constitution as a taking of property without just compensation, if so interpreted.").

An interpretation of that type should be avoided because, as our Supreme Court has stressed, although a state constitution may offer more protections for private property owners than the federal Constitution, it cannot provide fewer protections: "The federal Constitution provides a *minimum* of rights below which the states cannot go." *Commonwealth v. Matos*, 672 A.2d 769, 774 n.7 (Pa. 1996) (emphasis in original). *See also In re King Properties*, 635 A.2d 128, 131 n.6 (Pa. 1993) (same), *overruled on other grounds in Commonwealth v. Real Property and Improvements Commonly Known as 5444 Spruce Street*, 832 A.2d 396 (Pa. 2003).

It is therefore apparent that, contrary to what the Citizens contend, the Ordinance at issue here does not deprive them of any rights under Article I, Section 27. The Ordinance simply authorizes a private party to engage in activity (namely, oil and gas development) on private property that, in the future, may or may not harm the Citizens. As a matter of law, speculative – or even actual – harm that the Citizens may experience as a result of the actions that a private party takes under the Ordinance does not trigger the protections of Article I of the Pennsylvania Constitution.

4. A property owner has no vested right in the zoning of his neighbor's property.

Based on the principles that are discussed above, our Supreme Court has held that a property owner has no vested right in a municipality's maintenance of zoning restrictions on his neighbor's property. In *Hollearn v. Silverman*, 12 A.2d 292 (Pa. 1940), certain property owners brought an action against the owner of an adjoining property and the officers of a municipality, seeking to restrain them from amending a zoning ordinance to change the classification of the adjoining owner's property from residential to commercial. In sustaining a dismissal of the action, the Court explained that the plaintiffs had no right to insist that the classification be maintained as residential:

> Equity has jurisdiction to enjoin a nuisance but the record contains no evidence of nuisance. The prayer of the bill is to restrain enforcement of the ordinance of 1939 which neither prohibits plaintiffs from doing, nor requires them to do anything on their respective properties. They enjoy these as they did before. Their contention is that, if Silverman is permitted to conduct a store or stores on the Hortter Street front, even though the structures are limited in height to 15 feet above the street level (as required by the restriction in the deed) the fact that he may do so will result in depreciation of the value of their property. If it does, the result is *damnum absque injuria*. The original zoning ordinance which took in only the 134-foot front containing the drug store gave plaintiffs no vested right which would prevent the city from subsequently amending the ordinance by adding the remaining 100 feet on the same side of Hortter Street to the Class A Commercial zone. The power to amend the zoning ordinance was expressly conferred by the legislature. The ordinance of 1933 fixing the boundaries of the zones did not result in a contract with plaintiffs preventing the city from subsequently changing the boundaries if the city found it desirable to change them.

Hollearn, 12 A.2d at 293 (citing *Ayars v. Wyoming Valley Homeopathic Hospital*, 118 A. 426 (Pa. 1922)).

As it applies to zoning, or rezoning, the theory of vested rights relates only to a property owner's rights to prevent his *own* property from being rezoned so as to *prohibit* a particular use, after he has commenced the operation of that use on his *own* property, pursuant to a prior zoning ordinance. *See, e.g.*, *Gulf Oil Corp. v. Township Bd. of Supervisors*, 266 A.2d 84, 86 (Pa. 1970); *Shapiro v. Zoning Board of Adjustment*, 105 A.2d 299, 303 (Pa. 1954). This well-established principle of vested rights does not give a landowner a right to prevent the use by *other* owners of *their* property for such purposes as are legally permissible.

The exercise of the police power is not a contract. In enacting a zoning ordinance, a municipality is engaged in legislating, not contracting. *See Hollearn*, 12 A.2d at 293; *Ayars*, 118 A. 426. As a consequence, a zoning ordinance that fixes the boundaries of zones does not result in a contract between the relevant municipality and property owners that precludes the municipality from subsequently changing the boundaries if it deems the change to be desirable. *Id*. A zoning ordinance, moreover, does not vest in a property owner a right to prevent the restrictions that it imposes on his property, or the property of others, from remaining unaltered. *Id*.

That said, an affected landowner is not without a remedy. If a neighboring landowner "constructs a nuisance on his property, the zoning ordinance will not save him; an [affected property owner] will then have their remedy." *Hollearn*, 12 A.2d at 294. *See also Ayars*, 118 A. at 427 ("We cannot assume that defendant will make itself a nuisance sometime in the future, or continue the injunction to meet such a possibility.") (quoting lower court opinion).

The U.S. Supreme Court's decision in *Reichelderfer v. Quinn*, 287 U.S. 315 (1932) also helps to illustrate this point. In *Reichelderfer*, the owners of residential properties in the District of Columbia sought to enjoin the District Commissioners from constructing a fire house near their properties. The property owners contended that the federal statute that authorized the construction of the fire house at that location was inconsistent with regulations that had been adopted under the Zoning Act for the District of Columbia. They noted, in particular, that the fire house was to be constructed in an area that was previously designated as a park. It was conceded that the presence of the structure would diminish the attractiveness of adjoining residential properties and, therefore, decrease the value of those properties. The adjoining property owners contended they had a valuable right, appurtenant to their land, and in the nature of an easement, to have the adjoining land used for park purposes. They claimed that the Act of Congress, by directing its use for other purposes, constituted a taking of their properties without due

process of law and just compensation. The U.S. Supreme Court flatly rejected this contention. *Id*. at 319, 323. It pointed out that "zoning regulations are not contracts by the government and may be modified by Congress." *Id*.

The contentions that the complaining parties made in *Hollearn* and *Reichelderfer* are similar to the ones that the Citizens are making in this case. But the doctrine of vested rights may be invoked only if a property owner, in reliance on the applicable zoning ordinance, has commenced a use on his *own* property before the ordinance was changed. A property owner has no vested right in the maintenance of the zoning ordinance with regard to *other* peoples' property. *See Hollearn, Ayars, supra*. The Citizens, here, have no vested right in preventing the Ordinance from being changed so as to allow oil and gas wells to be located on other peoples' properties, where they may not have been allowed before.

C. The Court Should Not Impose A Bright-Line Rule That Excludes Oil And Gas Development Activities From Non-Industrial Zones.

In *Robinson Township*, what the plurality found to be unconstitutional under Article I, Section 27, and what Justice Baer found to be unconstitutional under Article I, Section 1, was a *state-wide* approach to zoning for oil and gas operations. That approach, according to the plurality and Justice Baer, failed to account for differing local conditions and considerations. *See Robinson Township*, 83 A.3d at 980, 1008-09 (Baer, J., concurring). Adoption of the Citizens' proposed bright-line rule – that oil and gas development activities cannot be located in non-

industrial zones – would usurp local legislative authority in the same manner that a majority of our Supreme Court found to be unconstitutional (for differing reasons) in *Robinson Township*.[2] The Court, as a result, should not adopt the proposed rule.

There are, moreover, literally hundreds of zoning ordinances across the Commonwealth that permit, for example, mining and other mineral extraction activities in non-industrial zones, such as agricultural zones, precisely *because* those zones are located away from population centers and contain larger tracts of land that are available for development. Oil and gas development activities have occurred safely, both historically and today, in numerous agricultural, residential, and other mixed use areas of the Commonwealth. This long history demonstrates that oil and gas development activity, which is subject to strict and comprehensive regulation, is not incompatible with agricultural, residential, and other uses.

The Commonwealth in fact recognizes, *by statute*, that developing oil and gas on agricultural lands is an acceptable and legitimate use of those lands. There are two Pennsylvania statutes that are specifically designed to provide special protections for, and preservation of, agricultural lands – the Farmland and Forest

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[2] Indeed, what the Citizens are actually proposing here is even less palatable. The provisions of Act 13 that the *Robinson Township* decision found unconstitutional were provisions that sought to require municipalities to codify and *restore* the inherent rights of a property owner to use his property as he wished (*i.e.*, for reasonable development of oil and gas). Here, by contrast, the Citizens are advocating for a bright-line rule that would require a municipality to permanently *strip* a property owner of those inherent rights.

Land Assessment Act (known as "Clean and Green"), 72 P.S. § 5490, and the Agricultural Area Security Law, 3 Pa.C.S. § 901. Both statutes expressly allow for oil and gas development and operations to occur on the agricultural lands that they protect. *See Del. Riverkeeper Network v. Middlesex Twp. Zoning Hearing Bd.*, 2017 Pa. Commw. Unpub. LEXIS 415 at *31, n.22 (Pa. Cmwlth. June 7, 2017) (noting that General Assembly has "recognized the compatibility between agricultural and oil and gas development uses"). The bright-line rule that the Citizens seek, aside from being the very one-size-fits-all approach that a majority of our Supreme Court rejected (for differing reasons) in *Robinson Township*, would ultimately force municipalities that desire to allow such development in their borders to rezone. They would be forced, in the Citizens' words, to "industrialize" their zoning ordinances. Moreover, the Citizens' argument opens the door to labelling as "industrial" any commercial use they disfavor, thus greatly limiting business opportunities within municipalities.

Under Pennsylvania law, moreover, there is no requirement for a zoning district to include *only* uses that are compatible with one another, without including any uses that might be considered incompatible. *See Robinson Township v. Commonwealth*, 52 A.3d 463, 496 (Pa. Cmwlth. 2012) (Brobson, J., dissenting) (rejecting majority's statement in *dicta* that it is a "basic precept" that a zoning ordinance is unconstitutional if it allows a particular use in a district that is

incompatible with other uses in that district). "Indeed, if accepted, such a rule of law would call into question, if not sound the death knell for, zoning practices that heretofore have recognized the validity of incompatible uses – *e.g.*, the allowance of a pre-existing nonconforming use and authority of municipalities to grant a use variance." *Id*. "Although the inclusion of one incompatible use within a zoning district of otherwise compatible uses might be bad planning, it does not itself render the ordinance, or law, constitutionally infirm." *Id*.

The Ordinance here, by allowing oil and gas wells to be sited in non-industrial zoning districts, does not violate Article I, Sections 1 and 27 of the Pennsylvania Constitution.

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CERTIFICATE OF COMPLIANCE

Pursuant to Pa.R.A.P. 531, I hereby certify that this *amicus curiae* brief contains less than 7,000 words as calculated by the word count feature on the word processing program that was used to prepare it.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

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