

North Braddock Residents For Our Future

Report and Recommendations

East Pittsburgh Oil and Gas Zoning Ordinance

“...a political subdivision has a substantial, direct, and immediate interest in protecting the environment and the quality of life within its borders, which interest confers upon the political subdivision standing in a legal action to enforce environmental standards.” **Pennsylvania Supreme Court, Robinson Twp. V. Pennsylvania (2013)**

August 20, 2019

Presented to the East Pittsburgh Borough Council
by XXX on behalf of North Braddock Residents For Our Future

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0.0.1. Table of Recommendations

Recommendation: A Partnership with the Public There needs to be a public engagement process so as to allow for community input and consideration. We all have constitutional obligations to protect the health, welfare, and safety of the community. Enacting appropriate and protective ordinances is in the best interests of the community. We appreciate the fact that there is a zoning ordinance, however, we view the current ordinance as a beginning, not an end.	Recommendation: Setbacks that Protect People Based upon peer reviewed studies, establishment of a minimum set back of 2,640 feet (½ mile) be established for a setback from protected structures. In addition, we recommend that a minimum distance of 1,000ft from Oil and Gas Well Site to a residential property also be established.
Recommendation: Explore Viable Options One clear option is for the borough to partner with other adjacent municipalities to determine if a multi-municipal comprehensive plan approach to this issue is possible. Conditional Use approvals should be postponed to ensure that ad hoc zoning decisions will not conflict with the Plan.	Recommendation: Adopt an Injection Well Ordinance We note the the pending ordinance does not address injection wells. The zoning code should address injection well land uses.
Recommendation: Seismic Survey Ordinance It is recommended that the borough adopt a non-zoning ordinance that would regulate seismic surveying/testing¹ within the borough.	Recommendation: Adopt a Two-Step Conditional Use Application The two-step process requires all oil and gas conditional use applications to be submitted in two stages. Before any conditional use application is officially “accepted” and the requirements of Conditional Use proceedings begin, the Township/Borough should consider adding a requirement for a application “completeness review.”
Recommendation: Adopt an Ordinance prohibiting the leasing of East Pittsburgh Public Lands. Given the fact that there was significant community opposition to the Merrion Oil and Gas Project, the Council should enact an ordinance that prohibits the leasing of the borough’s public land	Recommendation: Require Conditional Use Applicant to File a Ten Year Master Plan/ Full Life Cycle Plan We recommend that any conditional use exception include a requirement that a conditional use applicant file a ten-year master plan depicting all anticipated placement of well pads and, all other related infrastructure within the borough and, within a mile of its borders.
Recommendation: Require Disclosure of All Unconventional Drilling Hazards and Risks Require that all unconventional drilling conditional use applicants disclose all known hazards and risks, as are enumerated in the SEC Form 10-K that is associated with their operations. If the entity is privately held, then they shall also similarly disclose hazards and risks as do publicly traded corporations.	Recommendation: Excess Road Maintenance Agreement Costs to be Borne by Unconventional Drilling Conditional Use Applicants Franklin Park should require all drilling concerns to reimburse the the borough for all funds and time expended to cause an excess road maintenance agreement to come into effect, including but, not limited to, all engineering work to assess existing borough road conditions and, weight restriction postings.
Recommendation: Require Documentation of Lease-Holdings with Zoning Application. Add to Article 1200, that an Applicant for Conditional Use approval is required to submit information on all leases which it holds, or intends to acquire, as part of the	Recommendation: Consider Additional Setbacks near “Access Choke Points” Add a condition to Article 1200 requiring at least 1320 feet (1/4 mile) setback between the nearest edge of a proposed well pad and each of a list of “choke points” – e.g., “Braddock Ave. at E. Pittsburgh – McKeesport Blvd.”, “Center St./Bell Ave.

¹ Reflection seismology https://en.wikipedia.org/wiki/Reflection_seismology

proposed natural gas development. (An extract from an Allegheny County registry of leases could be accepted.)	Bridge", "Electric Ave. at Braddock Ave.", "any part of Prospect St."
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0.0.2. Executive Summary

The concerned citizens of East Pittsburgh Borough and grassroots community organization, North Braddock Residents For Our Future, have undertaken a review of the current oil and gas zoning ordinance. We provide herein our report and recommendations regarding Ordinance 908 East Pittsburgh Zoning Ordinance, and specifically, Article 1200 Natural Gas Regulations.

This report has been created to inform the citizens of East Pittsburgh, the Borough Council and Planning Board on a broad range of issues, including but not limited to the clear and specific constitutional duties imposed upon elected public policy makers in considering zoning matters. Our objective is to provide the reader with context, perspective and authoritative sources.

Because of the complexities associated with unconventional drilling, we have performed a substantial amount of due diligence in developing this report and recommendations. We attempted to address this issue as comprehensively as is possible. Considering the impact and scope associated with unconventional drilling and associated land uses, it is our recommendation that the Borough consider a suite of ordinances in order to appropriately address the many impacts associated with unconventional drilling in a comprehensive way.

Below is a list of recommendations for the East Pittsburgh Borough Council's consideration. Each recommendation is detailed within the report.

0.0.3. Introduction

*Insert introduction that discusses NBRFOF, what you have done as an organization in the past as well as what your mission is

We truly appreciate the Council's willingness to engage with us and consider the community's perspectives in the course of its decision-making process.

Like all civic groups, we promote the idea that citizens should constructively engage with their institutions of government. We support and promote transparency in public policy making. We support civil, informed discussion about issues concerning our communities for the betterment of the whole region. All voices count in the decision making process.

0.0.4. The Purpose of the Report & Recommendation

North Braddock Residents For Our Future has undertaken a review of the current zoning ordinance. We provide herein to the Council of East Pittsburgh our comments and recommendations with regard to the future of oil and gas development within its borders. We have made every attempt to have any assertions or technical matters properly backed with authoritative sources. We do not assert that this report is exhaustive. We reserve the right to bring additional issues to the table as we work with the Council on the matter of zoning for unconventional drilling and related operations.

We note that the Council's legislation addresses only certain aspects of land uses associated with unconventional drilling². Because of the complexities associated with unconventional drilling, we are of the opinion that we need to develop a suite of ordinances that appropriately address this impactful and, at times dangerous, land use in a comprehensive way.

Unconventional drilling is an industrial activity that has a variety of types of land uses associated with it. There is much more involved in this activity than just a well pad and/or a compressor station. The Council should consider all aspects of this land use in developing local ordinances in order to protect the health welfare, and safety of the greater community. Additional matters that require legislative responses are as follows:

- Injection Wells
- Seismic Survey/Testing
- Two-step Conditional Use Application Process
- Prohibition of leasing public lands for unconventional drilling
- East Pittsburgh Borough Multi-Municipal Comprehensive Plan

² "An unconventional gas well is a well that is drilled into an unconventional formation, which is defined as a geologic shale formation below the base of the Elk Sandstone or its geologic equivalent where natural gas generally cannot be produced except by horizontal or vertical well bores stimulated by hydraulic fracturing." *PA DEP*
http://files.dep.state.pa.us/OilGas/OilGasLandingPageFiles/Act13/Act_13_FAQ.pdf

0.0.5. Unconventional Gas Development and Following PA Court Decisions

In 2006, the first unconventional gas well in Pennsylvania was drilled in Washington County. Since that time about 90% of all wells drilled in Southwestern PA are unconventional wells.³

In 2012, the State Assembly amended the state's Oil & Gas Act (Act 13 of 2012)⁴. The revised PA Oil & Gas Act would finally begin to address the many new and, adverse impacts presented by six years of a "learn as we go" policy for unconventional drilling.

In 2013, the PA Commonwealth Court, in, *Robinson Twp. v. Commonwealth of Pennsylvania*⁵, held that Act 13's land-use regime was in violation of substantive due process because it "allow[ed] incompatible uses in zoning districts," failed to "protect the interests of neighboring property owners from harm, alter[ed] the character of the neighborhood and ma[de] irrational classifications."

Moreover, the legislature unconstitutionally delegated powers to the DEP when it authorized the agency to grant variances from the stream and wetland buffer requirements. Among them was a provision that allowed for industrial oil and gas operations as a "use by right in all zoning districts" in PA. The Commonwealth Court decision in *Robinson* was upheld on appeal to the PA Supreme Court.⁶ Had the "use by right" provision been left in place, Franklin Park would have no need for any local oil and gas zoning ordinance; unconventional drilling could take place in any zoning district in the state.

The PA Supreme Court's plurality opinion in *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 945 (Pa. 2013) (plurality opinion) not only dealt with the unconstitutional aspects of Act 13 of 2012, it finally gave meaning to the state's moribund constitutional amendment at Article I, Section 27, known as the Environmental Rights Amendment.⁷ The amendment, adopted in 1971, was never interpreted by the PA Supreme Court until 2013. It reads as follows:

The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.

³ "In 2012, 57 percent of all wells drilled in Pennsylvania and 90 percent of all wells drilled in Southwestern Pennsylvania were unconventional, though they still cumulatively represented only five percent of the total producing wells in the Commonwealth." *Status Of Unconventional Oil & Gas Development In Pennsylvania*, University of Pittsburgh, Institute of Politics, Shale Gas Roundtable https://www.iop.pitt.edu/sites/default/files/Reports/Other/Shale_Gas/Status%20of%20Unconventional%20Oil%20and%20Gas%20Development%20in%20PA.pdf

⁴ *Oil And Gas (58 Pa.C.S.) - Omnibus Amendments*, Act of Feb. 14, 2012, P.L. 87, No. 13, Session of 2012, *Oil and Gas Act*, 58 Pa. Cons. Stat. Ann. §§ 2301–3504 (West 2014). <https://www.legis.state.pa.us/CFDOCS/LEGIS/LI/uconsCheck.cfm?txtType=HTM&yr=2012&sessInd=0&smthLwInd=0&act=0013.&CFID=126352892&CFTOKEN=56814378>

⁵ *Robinson Twp. v. Commonwealth*, 52 A.3d 463, 494 (Pa. Commw. Ct. 2012), aff'd in part, rev'd in part, 83 A.3d 901 (Pa. 2013). http://www.pacourts.us/assets/opinions/Commonwealth/out/284md12amended_7-31-12.pdf

⁶ *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 945 (Pa. 2013) (plurality opinion)

⁷ Pa. Const. Art. I, § 27.

<https://www.legis.state.pa.us/cfdocs/legis/LI/consCheck.cfm?txtType=HTM&ttl=00&div=0&chpt=1&sctn=27&subsctn=0>

In developing an oil and gas zoning ordinance, we urge the Council to become familiar with the Supreme Court's decisions in *Robinson* and related decisions. This is no small matter as it directly involves the constitutional rights of citizens of East Pittsburgh and neighboring communities. **The PA Supreme Court imposes clear and specific duties on local elected officials with regard to upholding the environmental rights of citizens.**⁸ There is no statute or regulation that is capable of depriving a citizen of their constitutional rights. An excellent source for the Council to utilize is the annotated version of the PA Supreme Court's decision in *Robinson* (2013) *provided here*.

Robinson v. Commonwealth of PA (2013)

<https://www.documentcloud.org/documents/960821-act-13-local-zoning-majority-opinion.html#document/p134/a138000>

On June 10, 2017, in the *Environmental Defense Foundation v. Commonwealth of Pennsylvania* case, a majority of the PA Supreme Court affirmed the Court's 2013 plurality opinion which was written by Chief Justice Castile. The "Environmental Bill of Rights" is now indisputably the law of the land in Pennsylvania.⁹

We have serious concerns as to how the Council will approach the potential for unconventional drilling and assessing impacts in East Pittsburgh. We are mindful of the Supreme Court's finding in *Robinson* (2013):

By any responsible account, the exploitation of the Marcellus Shale Formation **will produce a detrimental effect on the environment**, on the **people**, their **children**, and **future generations**, and potentially on the public purse, perhaps rivaling the environmental effects of coal extraction.¹⁰

We hope that the Council fully appreciates that this is no ordinary zoning matter and, that takes it as seriously as did the PA Supreme Court. The legal landscape is still evolving. Additional cases for the Council to consider are:

- *Gorsline et. al. v. Board of Supervisors Of Fairfield Township v. Inflection Energy, Llc* , (June 2018)¹¹
- *Delaware Riverkeeper, et al. v. Middlesex Twp.* (summary disposition).¹² The Supreme Court remanded the Middlesex Twp. case back to the Commonwealth Court - with explicit instructions to apply its newly adopted constitutional standards.
- *Robinson Twp. v. Commonwealth of Pennsylvania* (2016). The Court also decided issues remaining from the 2013 decision.¹³

⁸ "...a political subdivision **has a substantial, direct, and immediate interest in protecting the environment and the quality of life within its borders**, which interest confers upon the political subdivision standing in a legal action to enforce environmental standards." *Robinson Twp. V. Pennsylvania* 83 A.3d 901, (PA 2013)

⁹ *Environmental Defense Foundation v. Commonwealth*, 161 A.3d 911 (Pa. 2017)

<https://widenerenvironment.files.wordpress.com/2017/10/pennsylvania-environmental-defense-foundation-v-commonwealth.pdf>

¹⁰ *Robinson Twp. v. Commonwealth of Pennsylvania* (2013) (page 118)

<https://www.documentcloud.org/documents/960821-act-13-local-zoning-majority-opinion.html#document/p134/a138000>

¹¹ *Gorsline et. al. v. Board of Supervisors Of Fairfield Township v. Inflection Energy, Llc* , (June 2018)

<https://caselaw.findlaw.com/pa-supreme-court/1897102.html>

¹² *Delaware Riverkeeper, et al. v. Middlesex Twp.* (summary disposition)

<https://law.justia.com/cases/pennsylvania/supreme-court/2018/270-wal-2017.html>

¹³ *Robinson Twp. v. Commonwealth of Pennsylvania* (2016) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2412657

We also recommend that you review *Robinson Township v. Commonwealth of Pennsylvania: Examination and Implications*, (Dernbach, May, & Kristl, Widener School of Law).¹⁴

With the Supreme Court decisions comes settled case law and crucial constitutional guidance on how best to proceed in the development of zoning ordinances for oil and gas land uses. To be clear, there are still unsettled matters before the courts. However, we have the benefit of the Court's decisions to consider, and to guide our planning and zoning process. It presents East Pittsburgh Council with an opportunity to craft a constitutionally sound zoning code, founded upon a comprehensive plan.

0.0.6. Unconventional Drilling In Allegheny County

With the demise of the steel industry in the 1970-80's, the region experienced a downturn in economic activity. During that period, the Mon-Valley held the primary responsibility for industrial development for the vast majority of Allegheny County, taking on more than it's fair share of heavy pollution for decades.

Now, we see unconventional drilling operations dominate the landscape in S.W. Pennsylvania. Unconventional drilling operations are complex, require large footprints drilling, mid-stream operations and produce enormous volumes of toxic waste, requiring thousands of truck trips to take them to disposal sites. Unconventional drilling displaces existing land uses in a dramatic way.

So far, Allegheny County has been spared the intensity of development we have seen in Washington and Greene counties. Allegheny County stands out like an island in a sea of gas wells.¹⁵ From a planning and land use perspective, unconventional drilling has become the most complex land use for municipal governments to plan for.

It is unreasonable to assume that drilling operations will continue to avoid Allegheny County. In 2006, there were only three unconventional wells in the county. As of May 2, 2018, the PA Department of Environmental Protection ("DEP") had issued permits for 258 wells, with 141 already drilled. About 18% of Allegheny County is known to be leased. Allegheny county's total area is 745 sq. miles.¹⁶

In 2016-17, Food & Water Watch, a national environmental advocacy non-profit conducted a review of 105 Allegheny county municipal zoning ordinances. Their findings noted that about 50 municipalities had no oil and gas zoning ordinance at all. Others are out of date, written long before the advent of unconventional drilling. Others still reflected the State Assembly's intent to have oil and gas operations be a "use by right" in all zoning districts and permit unconventional drilling in all zoning districts. Arguably, such an ordinance is illegal. Food & Water Watch's' disturbing findings were reported in the Pittsburgh Post Gazette in May of 2017.¹⁷ However,

¹⁴ Robinson Township v. Commonwealth of Pennsylvania: Examination and Implications
Rutgers U.L. Rev. Vol.67 (3/23/14; revised 8/20/2015) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2412657

¹⁵ FracTracker Alliance, Drilling Map <https://www.fracktracker.org/map/us/pennsylvania/>

¹⁶ FracTracker Alliance <https://www.fracktracker.org/map/us/pennsylvania/>

¹⁷ Many Allegheny County cities, municipalities unprepared for shale gas drilling rebound, (D. Hopey, 5/30/17)
<http://www.post-gazette.com/local/region/2017/05/30/Marcellus-Shale-drilling-Allegheny-County-zoning-ordinance-pa/stories/20170524-0023>

there are still many municipalities that, like East Pittsburgh, have deferred taking the matter up for a variety of reasons. We are very supportive of East Pittsburgh Council taking on this issue.

0.0.7. East Pittsburgh Current Oil & Gas Zoning Ordinance

Despite the dramatic expansion of unconventional drilling in SW PA, East Pittsburgh has not enacted a strong responsive zoning ordinance(s). We support the idea of enacting a constitutional, legally enforceable, protective ordinance in order to account for this impactful and industrial land use. The ordinance would significantly reduce the possibility of a substantive validity challenge. While the borough's current ordinance begins to regulate this land use, it has failed to provide adequate protections for the public health, safety and welfare. Many of our concerns are regarding provisions contained in the ordinance and the absence of other ordinances to account for all aspects of this industrial land use.

0.0.8. Need for Public Engagement Process

We note here that it was unfortunate that the community was not fully informed or otherwise consulted in any meaningful, systemic way in the development of this ordinance. Nor did Council inform or notify the community of the conditional use application submitted to the borough by Merrion Oil and Gas before taking a vote as Council was legally obligated to do. Our right to due process was stripped from us once, and we cannot allow that to happen again.

We, the people, *are* the government of East Pittsburgh. Our elected and appointed officials have the obligation to ensure that our institutions of government are open, engaged, and transparent to the fullest extent possible.

To that end, we look forward to working constructively with this and future Councils and appointed borough officials. It is, as citizens, our civic duty to do so. As our elected policy makers, it is Council's responsibility to provide the means that allow us to do so.

Recommendation: A Partnership with the Public

We request East Pittsburgh Council take the necessary steps to develop appropriate ordinances governing unconventional drilling. We all have constitutional obligations to protect the health, welfare, and safety of the community. Enacting appropriate and protective ordinances is in the best interests of the community. We appreciate the fact that there is a current zoning ordinance in place, however, we view this ordinance as a beginning, not an end.

In order to develop a comprehensive suite of ordinances to appropriately respond to unconventional drilling land uses, we recommend that the Council work with the community to develop a community engagement process in order to:

- Inform the community of the aspects and impacts of unconventional drilling. There has to be a basic understanding of the land use(s) involved in order to enact appropriate/responsive ordinances.

Convene meetings:

- To review other municipal oil and gas ordinances that have been enacted so as to provide a basis of comparison.
- To inform the community of its legal rights and responsibilities in the context of the zoning process.
- To inform the community of any hazards and risks associated with the unconventional drilling process.
- To develop a comprehensive set of ordinances that are responsive to all aspects of unconventional drilling as opposed to limiting it to a conditional use exception.

North Braddock Residents For Our Future pledges to work cooperatively with the Council to develop and convene informational/educational community meetings in order to promote a broader understanding of the impacts related to unconventional drilling as well as the laws which govern this process.

Given the importance and impact of the ordinance, as a community, East Pittsburgh needs to make fully informed decisions in developing good ordinances to address all aspects of unconventional drilling.

0.0.9. Review of Elements of the Current Ordinance

On October 1, 2014, East Pittsburgh Borough Council enacted legislation to amend the borough's zoning code in order to account for and update a variety of land uses, including oil and gas extraction operations. Now that more information is known as to the negative impacts on health, safety and welfare of residents, the community now has the responsibility to examine the content of the ordinance, and offer opinion as to its efficacy.

We respectfully offer the following commentary regarding the ordinance for Council's consideration.

0.0.10. Oil & Gas Allowable in Mixed Use Industrial Zone Only

While we do have concerns regarding the lack of protections within the ordinance, we do commend Council for choosing to agree with recent Supreme Court decisions that unconventional gas drilling is in fact an industrial use and have chosen to provide for it in an appropriate base zone.

However, given the size of East Pittsburgh Borough we recognize that the enactment of our recommended setbacks could leave the Borough vulnerable to challenge in which we recommend using the multi-municipal comprehensive plan that has already been initiated to provide for this land use.

Recommendation

Joint Planning & Zoning with Neighboring Municipalities

One option is for the borough to partner with other adjacent municipalities to determine if a joint approach to this issue is possible. This level of intergovernmental cooperation is not without precedent in the Quaker Valley. The Boroughs of Bell View, Avalon and Ben Avon have operated with a joint zoning code since 2009.¹⁸ Aleppo, Sewickley, and Glen Osborne (ASO) are currently updating their first joint Comprehensive Plan (2007).^{19 20}

Perhaps, in the past, there was never any real impetus for multi-municipal joint planning and zoning. With the

¹⁸ The zoning laws and regulations for the Borough of Bellevue are contained in the Avalon-Bellevue-Ben Avon Joint Zoning Ordinance, adopted 8-5-2009 by Ord. No. 09-07, as amended. <https://ecode360.com/15940686>

¹⁹ The Joint Comprehensive Plan provides a 10 to 15-year vision of what Aleppo, Sewickley and Osborne could be. In addition to identifying, analyzing and attempting to resolve the key issues facing the communities, the Joint Comprehensive Plan also suggest a method to leverage the communities' opportunities. <https://www.sewickleyborough.org/332/ASO-Joint-Comprehensive-Plan>

²⁰ *Aleppo Legislative Digest* – November 19, 2018, [Kimberly Koskey](#) | Nov 29, 2018

"The coordinator of the proposed update to the Aleppo, Sewickley, Osborne Joint Comprehensive Plan presented to us and told us where the process stands. We are expecting a draft of the plan in December, followed by a 45 Day public outreach period. ([Click here](#) to watch this portion of the meeting.) #ASO " <https://alepptownship.com/legislative-digest-november-19-2018/>

advent of industrial unconventional gas drilling the impetus to pursue intergovernmental joint planning and land use is now clearly present.

The Centre County Regional Planning Agency, in State College, PA, presents this matter this way in their booklet, *An Overview of Common Zoning Validity Challenges and Methods for Improving the Defensibility of Zoning Ordinances*²¹

Participating in a multi-municipal comprehensive plan provides numerous benefits to municipalities with regard to zoning validity challenges. Since 1968, the Pennsylvania Municipalities Planning Code²² (MPC) has permitted municipalities to coordinate land use planning efforts by creating multi-municipal comprehensive plans. Over the years, additional acts of the Pennsylvania Legislature have permitted increased opportunities for cooperation amongst neighboring municipalities. In 2000, the Pennsylvania Legislature passed **Acts 67 and 68 which amended the PaMPC, broadened the benefits of multi-municipal planning.**

One of the legal benefits of participating in a multi-municipal comprehensive plan is that **participating municipalities may address judicial mandates to provide for all reasonable land uses on a regional, not municipal, basis.** This allows municipalities to work cooperatively to provide for all land uses, both residential (of varying densities) and non-residential, in the most appropriate locations on a regional scale. **This allows municipalities to avoid exclusionary zoning challenges as well as “fair share” challenges, since any challenge would need to consider the entirety of the planning area rather than the municipal corporate boundary.** The ability to plan for uses at the regional level is stated in Section 1103 (a) (4) of the MPC, which states:

“County or multi-municipal comprehensive plans may] (sic) plan for the accommodation of all categories of uses within the area of the plan, provided, however that all uses need not be provided in every municipality but shall be provided for within a reasonable geographic area of the plan.”

We also recommend the Council look to the abovementioned municipalities for models as to how to develop a joint plan.

0.0.11. Setbacks - Determinant Factor: Safety

In the Conditions section we note that a 500' setback from a well pad from any residential property is present.

§1203-G. Conditions

(G)(1) Drilling rigs and equipment shall be located a minimum setback distance of one (1) foot for every foot of height of equipment from any property line, public or private street, or building not related to the drilling operations on either the same lot or an adjacent lot.

²¹ An Overview of Common Zoning Validity Challenges and Methods for Improving the Defensibility of Zoning Ordinances An Overview of Common Zoning Validity Challenges and Methods for Improving the Defensibility of Zoning Ordinances
http://www.crcog.net/vertical/sites/%7B6AD7E2DC-ECE4-41CD-B8E1-BAC6A6336348%7D/uploads/Zoning_Velocity_Challenges_Handbook.pdf

²² The Municipal Planning Code Act of 1968, P.L. 805, No. 247 as reenacted and amended. <https://dced.pa.gov/download/pennsylvania-municipalities-planning-code-act-247-of-1968/>

- (2) Natural gas compressor stations and natural gas processing plants shall comply with all general setback and buffer requirements of the zoning district in which the natural gas compressor station or natural gas processing plant is located.
- (3) Well pads shall be set back a minimum of 500 feet from any residential property.
- (4) Well heads shall be located 800 feet from any residential property
- (5) Recognizing that the specific location of equipment and facilities is an integral part of the oil and gas development, and as part of the planning process, operator shall strive to consider the location of its temporary and permanent operations, where prudent and possible, so as to minimize interference with East Pittsburgh residents' enjoyment of their property and future development activities as authorized by the Borough's applicable ordinances.

Setbacks are established for all manner of reasons. However, the primary purpose of a setback is to protect the public's health, welfare and safety. **In the context of industrial unconventional drilling, setbacks become incredibly important in protecting the health, welfare and, safety of the community, as well as citizens' constitutional right to clean air and clean water as discussed above.**

The PA Supreme Court, in *Huntley & Huntley v. Borough of Oakmont* (2009),²³ made two things very clear.

First, the PA Oil & Gas Act tells the industry how to drill for gas and, that jurisdiction is statewide.

Second, the Municipal Planning Code empowers local government to tell the industry where they can drill and, may impose certain conditions upon a drilling company.

The establishment of setbacks for this industrial land use becomes problematic. In a zoning context, setbacks are established to protect the health, welfare, safety and morals of the community – not to accommodate any particular land use that may ultimately have an adverse impact upon residents.

Obviously, the local elected official's primary duty is to abide by the PA & US Constitutions. A legislature cannot legislate or regulate away a constitutional right or obligation. On the matter of setbacks, we refer back to the Court's decisions in *Robinson Twp.*²⁴ for direction.

²³*Huntley & Huntley, Inc. v. Borough Council of Oakmont*, 964 A.2d 855 (Pa. Feb. 19, 2009) (ruling that the ordinance's "overall restriction on oil and gas wells in R-1 districts" was not preempted by the Oil and Gas Act). "...[W]hile effective oil and gas regulation in service of the Act's goals may require the knowledge and expertise of the appropriate state agency, the **MPC's authorization of local zoning laws is provided in recognition of the unique expertise of municipal governing bodies to designate where different uses should be permitted in a manner that accounts for the community's development objectives, its character, and the "suitabilities and special nature of particular parts of the community."** 53 P.S. § 10603(a), quoted in Brief for Appellants at 22. Accordingly, and again, absent further legislative guidance, we conclude that the Ordinance serves different purposes from those enumerated in the Oil and Gas Act, and hence, that **its overall restriction on oil and gas wells in R-1 districts is not preempted by that enactment.**" <https://caselaw.findlaw.com/pa-supreme-court/1144542.html>

²⁴ PA Supreme Court's decision in *Robinson Twp. et al. v. Pennsylvania*(2013)(annotated).

This Court has held that **a political subdivision has a substantial, direct, and immediate interest in protecting the environment and the quality of life within its borders**, which interest confers upon the political subdivision standing in a legal action to enforce environmental standards. *Susquehanna County v. Commonwealth*, 458 A.2d 929, 931 (Pa. 1983) (p. 18).

The terms “clean air” and “pure water” leave no doubt as to the importance of these specific qualities of the environment for the proponents of the constitutional amendment and for the ratifying voters. Moreover, the constitutional provision directs the “preservation” of broadly defined values of the environment, a construct that necessarily emphasizes the importance of each value separately, but also **implicates a holistic analytical approach to ensure both the protection from harm or damage and to ensure the maintenance and perpetuation of an environment of quality for the benefit of future generations** (p.74).

[T]o achieve recognition of the environmental rights enumerated in the first clause of Section 27 as “inviolable” **necessarily implies that economic development cannot take place at the expense of an unreasonable degradation of the environment**. As respects the environment, the state’s plenary police power, which serves to promote said welfare, convenience, and prosperity, must be exercised in a manner that promotes sustainable property use and economic development (p. 79).

By any responsible account, the exploitation of the Marcellus Shale Formation will produce **a detrimental effect on the environment, on the people, their children, and future generations, and potentially on the public purse**, perhaps rivaling the environmental effects of coal extraction.(p. 118).

Appropriate Setbacks for Unconventional Drilling

We provide here citations to two scientific studies related to establishment of setbacks for HVHF land uses. The first is:

Adequacy of Current State Setbacks for Directional High-Volume Hydraulic Fracturing in the Marcellus, Barnett, and Niobrara Shale Plays (2016), published by the National Institute of Environmental Health Sciences of the United States National Institutes of Health. <https://ehp.niehs.nih.gov/15-10547/>

The objective of this study was to determine whether legal setback distances between well-pad sites and the public are adequate in three shale plays (Marcellus, Barnett, and Niobrara). The researchers report:

“The evidence suggests that presently utilized setbacks may leave the public vulnerable to explosions, radiant heat, toxic gas clouds, and air pollution from hydraulic fracturing activities.”

Conclusions: Our results suggest that setbacks may not be sufficient to reduce potential threats to human health in areas where hydraulic fracturing occurs. It is more likely that a combination of reasonable setbacks with controls for other sources of pollution associated with the process will be required.

The study further notes:

“In Pennsylvania, setback distances are determined by the state legislature and enforced primarily by the Pennsylvania Department of Environmental Protection (PA DEP) (PA DEP 2014b). According to Title 58, Section 3215 of the Pennsylvania Legislature, the **current setback distance to buildings is 500 feet.**” (page 11) [we note that is a *minimum* of 500’]

The **majority of setback distances** in the areas we studied **are not derived from peer-reviewed data, data-driven analysis, or historical events**(Fry 2013) –they are a compromise between governments, the regulated community, environmental and citizen interest groups, and landowners (COGCC 2013).”

Importantly, in part to address the issue of setbacks, the University of Maryland School of Public Health performed an in-depth analysis of the current data, and prepared a report for the Maryland Departments of the Environment and Health and Mental Hygiene. **The authors of that report recommended a minimum setback distance of 2,000 feet from well pads** (University of Maryland School of Public Health 2014). (Page 20)

Here, we provide the link to the University of Maryland’s study:

Maryland Institute for Applied Environmental Health, School of Public Health, University of Maryland. 2014. *Potential Public Health Impacts of Natural Gas Development and Production in the Marcellus Shale in Western Maryland*. College Park MD: University of Maryland.

See: http://www.marcellushealth.org/uploads/2/4/0/8/24086586/final_report_08.15.2014.pdf

See also: <http://www.marcellushealth.org>

<https://www.sciencedaily.com/releases/2016/02/160212164210.htm>

Recommendation: Setbacks that Protect People

- A setback should not be an arbitrary distance determined arbitrarily (e.g. “by a coin toss”) or to be bargained over among interested, and often uninformed, parties.
- Setbacks must be “derived from peer-reviewed data, data-driven analyses, or historical events.”
- Setbacks have a clear purpose: mitigate any potential harms to the health, welfare and, safety of citizens, to preserve the character of the community and, to protect the environment.

We recommend that a minimum distance of 2,640 feet (½ mile) from the well pad be established for a setback from protected structures and, even greater distances for places with more environmentally sensitive populations, such as schools and hospitals. In addition, we recommend that a minimum distance of 1,000ft from Oil and Gas Well Site to a residential property also be established.

Justification: Low Birth Weight Study

The 2,640’ (½ mile) setback takes is predicated upon the findings made by University of Chicago and Princeton University study. It was determined that infants born to mothers who live very close to natural gas fracking sites have a higher risk of low birth weight (peer-reviewed study published on December 13, 2017, in the esteemed journal, *Science Advances*).²⁵

²⁵ Journal Article: *Hydraulic Fracturing And Infant Health: New Evidence From Pennsylvania*

https://epic.uchicago.edu/research/publications/hydraulic-fracturing-and-infant-health-new-evidence-pennsylvania?mc_cid=ed2b6f2b05&mc_eid=%5bUNIQID%5d

0.0.12. Recommendation: Adopt an Injection Well Ordinance

We note the the current ordinance does not address injection wells^{26 27}. As noted above, the MPC requires that all land uses must be accomodated.

“Municipalities are required by the PA MPC to provide for all land uses within their corporate boundaries. This includes all housing, commercial, and industrial uses. Municipalities cannot exclude particular land uses from their community. All land uses must be accommodated somewhere in a municipality (e.g. industrial, landfills, cell phone towers, adult uses, and penal institutions). Not providing for a particular land use can result in a zoning validity challenge, such as a claim that the zoning ordinance is exclusionary.”²⁸

The absence of an injection well provision in the zoning code exposes East Pittsburgh to a substantive validity challenge. This is exactly the case with Plum Borough. While Plum is currently fighting the siting of an injection well in Commonwealth Court, it is unlikely they will prevail in their appeal. Plum did not address injection wells in their code at the time of application by Penneco, which opened them up to a substantive validity challenge. Penneco’s injection well permits have been approved by the Environmental Protection Agency and the PA Department of Environmental Protection.²⁹

Injection wells are not common in PA due to the fact that the subsurface geology is not conducive to injection wells.³⁰ Injection wells are directly linked to seismic activity (earthquakes).^{31 32 33}

Last year, Bell Acres adopted an injection well zoning ordinance to account for this land use and protect the borough from a substantive validity challenge. We encourage the Council to contact Bell Acres and review their ordinance and consider it for adoption.³⁴

²⁶ *Class II Oil and Gas Related Injection Wells*, U.S EPA <https://www.epa.gov/uic/class-ii-oil-and-gas-related-injection-wells>

²⁷ *Deep Injection Wells: How Drilling Waste Is Disposed Underground*, State Impact <https://stateimpact.npr.org/pennsylvania/tag/deep-injection-well/>

²⁸ *An Overview of Common Validity Challenges and Methods of Improving the Defensibility of Zoning Ordinances*.http://www.crcog.net/vertical/sites/%7B6AD7E2DC-ECE4-41CD-B8E1-BAC6A6336348%7D/uploads/Zoning_Validity_Challenges_Handbook.pdf

²⁹ Plum injection well project will get EPA permit, TribLive, (3/5/18) <https://archive.triblive.com/neighborhoods/plum/plum-injection-well-project-will-get-epa-permit/>

³⁰ “A lot of the geology in Pennsylvania isn’t all that suitable,” Dick said. While some areas of the western part of the state would work, the eastern part of the state has deeper formations. “There’s very little pore space in the rock where you can inject fluids.” <https://energynews.us/2014/07/18/midwest/fracking-wastewater-is-big-business-in-ohio/>

³¹ *Fracking Led to Ohio Earthquakes*, Live Science (1/5/2105) <https://www.livescience.com/49326-fracking-caused-ohio-earthquakes.html>

³² *Lessons learned from the Youngstown, Ohio induced earthquake sequence from January 2011 to January 2012* Science Direct (Oct. 2017) <https://www.sciencedirect.com/science/article/pii/S1674775516302578>

³³ *Oklahoma Earthquakes Lead to More Injection Well Shut Downs*, Insurance Journal (5/25/18) <https://www.insurancejournal.com/news/southcentral/2018/05/25/490403.htm>

³⁴ *Bell Acres Code at § 165-27 Oil & Gas Development, Definitions: Injection Well*

Any well into which fluids are injected underground in porous rock formations like limestone and sandstone, or below in the shallow soil layer. These waste fluids may include, but are not limited to, brine, heavy metals, chemicals, and radioactive materials.

[Added 11-12-2018 by Ord. No. 295]; **See also**, *Bell Acres Code at §165-24 Use Table*, <https://ecode360.com/13263445>

0.0.13. Recommendation: Seismic Survey Ordinance

It is recommended that the borough adopt a non-zoning ordinance that would regulate seismic surveying/testing³⁵ within the borough. A seismic survey is a process that utilizes induced sound waves to map the geology of a given area. It is akin to an MRI, used for mapping subsurface geological formations in order to determine where the best places to drill are located.

Sound waves can be generated by three methods:

- Weight drop– literally dropping a weight from a helicopter and the seismic waves produced by the weight drop are captured by sensors and produce images that reveal the prime areas for fracking shale.
- Thumper truck– several specialized vehicles working in tandem using steel plates to cause vibrations –sensors capture data, etc.
- Explosives– about 2.5 lbs. of explosives are placed in a 25’-30’ deep “shot hole.” The explosive charge is detonated causing seismic waves - sensors capture the returning sound waves that are utilized to produce a picture/map of subsurface geologic structure.

The communities of S. Fayette Twp.³⁶, Oakmont, Monroeville, Pitcairn, and other municipalities have enacted ordinances to regulate this activity.

Aside from the matter of regulating the use of the public rights of way in Franklin Park, it is important to note that seismic surveyors must also get permission from landowners who own their mineral rights or they be engaged in a “seismic trespass.”

Geokinetics, in their Securities & Exchange Commission (“SEC”) annual 10K filing, clearly state that they may be liable for seismic trespass if they do not secure a property owners permission to survey. A SEC 10-K filing discloses detailed information about a publicly traded corporation to its shareholders and/or potential investors.

³⁵ Reflection seismology https://en.wikipedia.org/wiki/Reflection_seismology

³⁶ S. Fayette Twp. Code: Article I Geophysical and Seismic Testing [Adopted 9-19-2012 by Ord. No. 2-2012] <https://ecode360.com/30646986?highlight=seismic%20testing#30646986>

0.0.14. GeoKinetics Form 10-K – Risk Factors Section

The information set forth below is derived directly from GeoKinetics' SEC Form 10-K. Risk Factors

"Our seismic data acquisition operations could be adversely affected by our inability to timely obtain access to both public and private land included within a seismic survey. **We cannot begin surveys on property without obtaining permits from certain governmental entities as well as the permission of the parties who have rights to the land being surveyed.** In recent years, it has become more difficult, costly and time-consuming to obtain access rights as drilling activities have expanded into more populated and protected areas. Additionally, while land owners generally are cooperative in granting access rights, some have become more resistant to seismic and drilling activities occurring on their property and stall or refuse to grant these rights for various reasons. In our multi-client services business, we acquire data sets pertaining to large areas of land. Consequently, **if we do not obtain land access rights from a specific land owner, we may not be able to provide a complete survey for that area. The failure to redact or remove the seismic information relating to mineral interests held by non-consenting third parties could result in claims against us for seismic trespass.** In addition, governmental entities do not always grant permits within the time periods expected. Delays associated with obtaining such permits and significant omissions from a survey as a result of the failure to obtain consents could have a material adverse effect on our financial condition and results of operations."³⁷

News Reports Related to Conduct/Tactics Employed by Geokinetics

Enter Landman: One Greene County man's encounter

<http://www.witf.org/news/2014/10/enter-landman-one-greene-county-mans-encounter.php>

Trespass by seismic crew leads to arrest and extradition (2010)

http://www.tiogapublishing.com/news/free_press-courier/trespass-by-seismic-crew-leads-to-arrest-and-extradition/article_39372eed-9d5b-5563-8af4-a0daed54c5ec.html

Seismic Testing Company Behaves Badly in Greene County, PA

<http://marcellusdrilling.com/2014/10/seismic-testing-company-behaves-badly-in-greene-county-pa/>

Trio of seismic surveyors cited for trespassing

http://www.endeavornews.com/news/2010-08-21/Potter_County_News/Trio_of_seismic_surveyors_cited_for_trespassing.html

Seismic surveying rattles Colorado homeowners (good graphic we might want to use in this story).

<http://www.denverpost.com/2013/03/15/seismic-surveying-rattles-colorado-homeowners-2/>

On shaky ground:

<http://npaper-wehaa.com/boulder-weekly/2013/03/28/?g=print#?article=1854416>

"I was sitting here doing homework when the whole house started shaking," Mieke Crumbley tells Boulder Weekly, describing the Dec. 14 incident when Geokinetics vibroseis trucks came down her road and she caught a member of its monitoring service, Urban Seismic, walking through her property despite three "No Trespassing" signs

Seismic tests before drilling cause Pa. disputes (2014)

Seismic testing before gas drilling divides some W. Pa. communities

<http://www.post-gazette.com/powersource/latest-oil-and-gas/2014/03/22/Seismic-tests-before-drilling-cause-Pa-disputes/stories/201403220161>

³⁷GeoKentic's, Securities & Exchange Commission 10K – Disclosure of risks

<https://www.last10k.com/sec-filings/314606#s673CD9989FFCEE796713D83C131B209D>

Recommendation: Adopt a Two- Step Conditional Use Application

The Environmental Integrity Project³⁸ has developed a citizens tool kit³⁹ in order to assist citizens in the effort to develop appropriate ordinances for oil and gas land uses.

The two-step process requires all oil and gas conditional use applications to be submitted in two stages. Here is what the Environmental Integrity Project states with regard to the use of a two-step process.⁴⁰ The Borough of Churchill has adopted this two-step process.⁴¹ It is noteworthy that Churchill, like Franklin Park, has no industrial zones.

The Environmental Integrity Project sets forth the 2-Step Conditional Use process as follows:

Before any application is “accepted” and the requirements of Conditional Use proceedings begin, the Township/Borough should consider adding a requirement for a “completeness review.”

This would be similar to the PA Department of Environmental Protection (PA DEP) requirement. Before proceeding to the technical (substantive) review stage, applications should be reviewed by Township/Borough officials to verify that all requirements of local zoning, land use and the MPC are fully addressed in the application materials.

Each community should develop a customized application checklist based on local ordinances, land use and bonding requirements and any other requirements outlined as part of the MPC. Items to consider in an “Application Completeness Checklist” include:

All requirements detailed in applicable local ordinances

Proof of required bonding – including bonding for specific projects not just company-wide policies (that may be insufficient because those are typically shared among other companies).

Information local communities should consider requiring – as part of any application process – to include the following:

- **Name of company**– corporate structure – including all names of all subsidiaries
- **Address of company**– corporate and local addresses
- **Company contact(s)**– including all local contacts addresses, phone numbers and emails
- **Signed lease agreements** with landowners’ signatures and contact information
- **Proof of applicable insurance bonds**– important to seek bonding that is specific to each project, not just company-wide bonds
- **Exact description of the location** of the proposed facility and all associated operations – including all latitude/longitude coordinates.

Must provide full disclosure of all proposed operations including:

- **Drilling** – how many well pads; how many well heads; how long to prepare, drilling and fracture each well.
- **Expected truck traffic** – how many trucks per day/month/year and over what period of time

³⁸ Environmental Integrity Project <http://www.environmentalintegrity.org>

³⁹ Pennsylvania Citizens’ Toolkit, Environmental Integrity Project
<http://www.environmentalintegrity.org/pennsylvania-citizens-toolkit/>

⁴⁰ Environmental Integrity Project, *Local Application Process: Complete and Fully Transparent Applications are a Must*,
<http://www.environmentalintegrity.org/wp-content/uploads/2017/02/Local-Application-Process.pdf>

⁴¹ Churchill Borough Code Chapter 304 Zoning, Conditional Uses, § 304-37 Oil and gas development
<https://www.ecode360.com/6753052>

- **Proposed truck route** –Written proof that applicant will abide by all road maintenance bonding and agreements.
- **Proof of insurance**– is this a company-wide insurance policy, or is it a site-specific certificate? Keep in mind, a company-wide insurance policy may not provide enough financial assurance in the event of major damage/emergency.

Because oil and gas operations are never individual, stand-alone operations, it is essential that local officials obtain full disclosure from each applicant on the entirety of the proposed operation – all pieces of the infrastructure.

To that end, all applications should be required to provide full details on all planned operations/infrastructure including the following:

- **Well pads**– full details on each – location, number(s), sizes
- **All above and below ground impoundments or storage areas/tanks**– maps of exact locations should be required, as well as full narratives included all proposed sizes, designs, operations and length of operation.
- **Pipelines**– full details on each – location, number(s), sizes, expected final through put capacity and when anticipated to be added.
- **Gathering lines**– full details on each – location, number(s), sizes, expected final through put capacity and when anticipated to be added.
- **Compressor Stations**– full details on each – location, number(s), type of engines, numbers of flares, expected final through put capacity.
- **Pig Launchers and Receivers**– full details on each – location, number(s), expected final throughput capacity and when anticipated to be added.
- **Processing plants**– cryogenic/fractionation plants – full details on each location, expected final throughput capacity and when anticipated to be added.

Copies of required notification letters to landowners:

- Written proof that all landowners have been notified of the proposed project.
- Full documentation of all application and supporting information submitted to the Pennsylvania Department of Environmental Protection (PA DEP), the applicable County Conservation Districts, the United States Environmental Protection Agency (US EPA) and in applicable areas of the Commonwealth – the Allegheny County Health Department (ACHD) or Philadelphia Air Management Services (PAMS).
- Full documentation of all permits and supporting information associated with such permits as granted by the PA DEP, all applicable county authorities and/or US EPA
- Any other documentation required as part of local ordinances and/or the MPC
- All Planning, Preparedness and Contingency Plan PPC details – more specific details included below

Step two – technical review and conditional use procedures

Once all required submittals have been received, the Township/Borough should send a letter to the applicant notifying them that their application has been officially “accepted” and that the technical review stage has commenced, consistent with the Conditional Use proceedings as outlined by the MPC.

Using this process, the Township/Borough can ensure that all required submittals have been received so that all applicable Boards/Commissions/Councils can consider a complete application package and render their decision on all the facts and not just incomplete or partial submittals. All applicants should be subject to this two-step review process.

Full disclosure of ongoing communications with state, county and federal regulatory authorities

Because all oil and gas operations require multiple authorizations, it is essential that local Township/Borough officials be kept apprised of all communications with other reviewing/regulatory agencies.

For example, an applicant once requested a geographic change in location of a portion of its oil and gas operation after local governmental approval was obtained. This change, sought by the applicant via communications with the PA DEP, may have resulted in the need for a revised application to the local Township/Borough. However, it is unclear if such notification and subsequent approval was sought at the local level – even though the change in geographic location of the operation was relevant for the local decision-makers. Substantive changes to location of

operations is fundamental to review and approval by all agencies/boards/commissions/councils and, therefore, each has not only a right, but a responsibility to be kept informed of any changes.

To that end, Township/Borough officials should consider amending their protocols/ordinances to include a requirement that all emails, letters and meeting notes applicable to all discussions an applicant is having with PA DEP and any other regulatory agency regarding applications and/or approvals be submitted to the Township/Borough, at the same time those communications are submitted to the PA DEP and/or County officials. Additionally, all responses from the PA DEP, County officials and/or any other reviewing agencies should be shared with the Township, in real time. Elected boards must be kept in the loop with all developments, delays, extensions and modifications, including property boundaries and names of facilities.

Pennsylvania is experiencing an incredible influx of permit requests for highly industrial facilities – often in areas of communities where industrial activities have never occurred. The request for permit applications for consideration is happening in seemingly rapid succession and often involves multiple layers of new, expanded and modified operations. It is difficult for most to comprehend and at times, an overwhelming task to keep it all straight. In an effort to avoid rushed decision making and with an eye towards ensuring a thorough review of all pertinent facts, local government officials must update their protocols so that all permit requests are properly submitted and evaluated. Putting protocols in place to ensure the review process is sound is an important starting point for all community leaders.

0.0.15. Leasing East Pittsburgh Public Land for Oil & Gas Development

Recommendation: Adopt an Ordinance prohibiting the leasing of East Pittsburgh's Public Lands

We believe that a formal ordinance will give peace of mind to all who live in the borough knowing that public lands are not available for fracking.

The Borough of Emsworth⁴² serves as a model for such an ordinance. The Emsworth code reads as follows:

§161 Definitions

For the purposes of this chapter, the following terms shall be defined as follows:

BOROUGH PROPERTY

Real property, utilized for any purpose, of which the Borough of Emsworth is the owner of record. Property purchased subsequent to the adoption of this chapter shall also be deemed Borough Property subject to this chapter.

OIL & GAS

Crude oil, natural gas, methane gas, coal bed methane gas, propane, butane and/or any other constituents or similar substances that are produced by drilling a well of any depth into, through, and below the surface of the earth.

OIL AND GAS EXTRACTION

The well site preparation, well site construction, drilling, hydraulic fracturing, and/or site restoration associated with an oil and gas well of any depth; water and other fluid storage, impoundment and transportation used for such activities; and the installation and use of all associated equipment, including tanks, meters, and other equipment and structures whether permanent or temporary; and the site preparation, construction, installation, maintenance and repair of oil and gas pipelines and associated equipment and other equipment and activities associated with the exploration for, production and transportation of oil and gas, including natural gas compressor stations and natural gas processing plants and facilities performing the equivalent functions that operate as midstream facilities.

§161-2 Oil and gas extraction prohibited generally

⁴² Emsworth PA Code, Part II, General Legislation, Chapter 161 Oil and Gas Exploration and Extraction (§ 161-1 – § 161-2)
<https://ecode360.com/16002010>

A. Oil and gas extraction shall not be permitted upon Borough property, in any form or scope, as defined in the preceding section. **The Borough hereby prohibits the exploration for oil and gas deposits on Borough property in any manner.**

B. This chapter in no way shall affect or limit the use of natural gas or other public utilities in their normal course of operation or maintenance of Borough property.

0.0.16. East Pittsburgh's Comprehensive Plan

We recognize that East Pittsburgh has initiated the MPC mandated, community-centric, planning process that will identify and enumerate the planning goals and objectives of the community. In the course of that process, we encourage the Council to initiate a comprehensive review of our zoning code for completeness, ease of use, and its ability to facilitate the objectives of the community's comprehensive plan.^{43 44}

It is the legal obligation of a municipal government to convene the comprehensive planning process at least once every 10 years and, via that process, craft a Comprehensive Plan document.⁴⁵

The enfranchised citizens (persons of voting age) of East Pittsburgh are the ultimate authority in defining the *character* of their community. The institutions of the local government are obligated to facilitate the comprehensive planning process pursuant to the MPC.

Recommendation:

Explore Multi-Municipal Options to provide for Oil and Gas Development

Conditional Use approvals should be postponed to ensure that ad hoc zoning decisions will not conflict with the Plan.

To be clear, a Comprehensive Plan is not a legally enforceable document. The objectives and aspirations of the community, as set forth in the plan are, in large part, effectuated by the enactment of enforceable zoning ordinances.⁴⁶

⁴³ *MPC, Section 603. Ordinance Provisions.* (a) Zoning ordinances should reflect the policy goals of the statement of community development objectives required in section 606, and give consideration to the character of the municipality, the needs of the citizens and the suitabilities and special nature of particular parts of the municipality.

⁴⁴ *MPC, Section 606. Statement of Community Development Objectives.* Zoning ordinances enacted after the effective date of this act should reflect the policy goals of the municipality as listed in a statement of community development objectives, recognizing that circumstances can necessitate the adoption and timely pursuit of new goals and the enactment of new zoning ordinances which may neither require nor allow for the completion of a new comprehensive plan and approval of new community development objectives. This statement may be supplied by reference to the community comprehensive plan or such portions of the community comprehensive plan as may exist and be applicable or may be the statement of community development objectives provided in a statement of legislative findings of the governing body of the municipality with respect to land use; density of population; the need for housing, commerce and industry; the location and function of streets and other community facilities and utilities; the need for preserving agricultural land and protecting natural resources; and any other factors that the municipality believes relevant in describing the purposes and intent of the zoning ordinance.

⁴⁵ *MPC, Article III, Comprehensive Plan Section 301. Preparation of Comprehensive Plan.* "The municipal or multi-municipal comprehensive plan shall be reviewed at least every ten years."

⁴⁶ *Centre Regional Planning Agency* "It is important to remember that a comprehensive plan and a zoning ordinance are two separate tools that are used in conjunction with one another. A comprehensive plan acts in a guiding role and provides recommendations on how land should be utilized to meet the needs and desires of the community, whereas a zoning ordinance regulates land uses as recommended by the plan."

[https://www.crcog.net/vertical/Sites/%7B6AD7E2DC-ECE4-41CD-B8E1-BAC6A6336348%7D/uploads/Introduction to the Comprehensive Plan.pdf](https://www.crcog.net/vertical/Sites/%7B6AD7E2DC-ECE4-41CD-B8E1-BAC6A6336348%7D/uploads/Introduction%20to%20the%20Comprehensive%20Plan.pdf)

We recognize that there is a financial commitment to be made in initiating a community planning process. The process is usually managed by a consultant that is retained by the municipality. Public participation in the comprehensive plan development process is a high priority. If it is well managed, the community's collective knowledge of the zoning laws that govern their land use is enhanced. A comprehensive plan requires the perspectives of the entire community – in that way it becomes a better, more balanced and, implementable plan.

We recommend the Council initiate discussions with our State Assembly Representative and Senator in order to determine the availability of any planning grants and/or other forms of support from the PA Department of Community & Economic Development (DCED)^{47 48}

Other sources of grant funds, e.g., private foundations, may also be explored. The Allegheny County Economic Development Authority's planning section should be consulted for technical support, as well as determining what, if any, resources might be offered by the PA State Association of Boroughs.⁴⁹

Fortunately, this is not uncharted territory. We have many examples to consider. Presently, three neighboring municipalities, Aleppo, Sewickley and Osborne (Glen Osborne) ("ASO") are jointly working on their community planning process.⁵⁰

We encourage the Council to initiate discussions with ASO officials involved with the comprehensive planning process in order to assess its methods, and financing.

We also encourage the Council to consult with all neighboring municipalities to determine if there is interest in working on a joint planning process. There are other examples of such intergovernmental cooperation to review.

⁴⁷ The Governor's Center for Local Government Services provides technical assistance on a variety of planning, land use, and development matters to planning commissions, zoning officers, zoning hearing boards, and other local government officials. Contact Denny Puko by phone at 412.770.1660 or by e-mail at dpuko@@pa.gov or, submit a Formal Request for Assistance. DCED provides funding to local governments for community planning through the Municipal Assistance Program (MAP). Funding supports multi-municipal, regional and county planning and implementation efforts, including TRID studies. Access the [Municipal Assistance Program \(MAP\) guidelines](#) for more information.

⁴⁸ *MPC Article III - Comprehensive Plan* Section 301.5 *Funding of Municipal Planning*. Priority for state grants to develop or revise comprehensive plans shall be given to those municipalities which agree to adopt comprehensive plans generally consistent with the county comprehensive plan and which agree to enact a new zoning ordinance or amendment which would fully implement the municipal comprehensive plan. No more than 25% of the total funds available for these grants shall be disbursed under priority status pursuant to this provision. Municipalities and counties shall comply with these agreements within three years. Failure to comply with the agreements shall be taken into consideration for future state funding.

⁴⁹ PA State Association of Boroughs <https://www.boroughs.org>

⁵⁰ *ASO Joint Comprehensive Plan* The Joint Comprehensive Plan for Aleppo, Sewickley and Osborne (ASO) is a compilation of the key components that make up the communities and define their identity: future land use, infrastructure, civic enhancements. The relationship and interaction of the components is critical to the Plan's overall composition as well as its significance to future growth and development. The ASO Joint Comprehensive Plan provides a 10 to 15-year vision of what Aleppo, Sewickley and Osborne could be. In addition to identifying, analyzing and attempting to resolve the key issues facing the communities, the Joint Comprehensive Plan also suggest a method to leverage the communities' opportunities. <https://www.sewickleyborough.org/332/ASO-Joint-Comprehensive-Plan>

For instance, since 2009, three Quaker Valley municipalities have successfully administered a joint zoning code.⁵¹ Such collaboration and cooperation is also promoted by the MPC.⁵² Doing so provides more options for land uses while protecting a larger area from adverse impacts from unconventional drilling.⁵³

Initiating a comprehensive planning process is no small matter. Either singularly, or in a multi-municipal format, it will require advice, forethought, planning and, funding to execute a mandated Comprehensive Plan. Nonetheless, it is required of us to do so. While there is work to be done, this is a significant opportunity to improve our zoning code, to control our destiny as a community and, to execute a great plan for the future of East Pittsburgh.

0.0.17. A Ten-Year Master Plan for Unconventional Drilling Applicants

As noted above, East Pittsburgh is required to develop a comprehensive plan at least every ten years. Due to the nature of the unconventional drilling process, any applicant for an unconventional gas conditional use should be required to file a ten year master plan for their operations in the borough.

Oil and gas extraction operations are not fixed to a single location and, as we see, the industry continues to grow its footprint in places where it has been established.

The filing of a ten-year master plan would illustrate what a complete build-out of all drilling related infrastructure would look like in a community over a ten-year period.

Recommendation: Require Conditional Use Applicant to File a Ten Year Master Plan

We recommend that any conditional use exception include a requirement that a conditional use applicant file a ten-year master plan depicting all anticipated placement of well pads and, all other related infrastructure within the borough and, within a mile of its borders.

The plan should be a part of the step-one requirement, in a two-step conditional use process. Such a plan should be provided to the community for comment, a public hearing and, approved by the Council, prior to moving on to the conditional use process. Reopening or amending the plan during its ten-year term should be prohibited. We point to the City of Pittsburgh's similar requirement for the large institutions that are resident to the city.^{54 55}

⁵¹ *Tri Boro Zoning* The zoning laws and regulations for the Borough of Bellevue are contained in the Avalon-Bellevue-Ben Avon Joint Zoning Ordinance, adopted 8-5-2009 by Ord. No. 09-07, as amended. <https://ecode360.com/15940686>

⁵² *MPC, Article VIII-A - Joint Municipal Zoning: Section 801-A. General Powers.*(a) For the purpose of permitting municipalities which cooperatively plan for their future to also regulate future growth and change in a cooperative manner, the governing body of each municipality, in accordance with the conditions and procedures set forth in this act, may cooperate with one or more municipalities to enact, amend and repeal joint municipal zoning ordinances in order to implement joint municipal comprehensive plans and to accomplish any of the purposes of this act. <http://mpc.landuselawinpa.com/MPCCode.pdf>

⁵³ *Centre Regional Planning Agency, Validity Challenges Handbook*, “**Municipalities are not required to provide for all land uses within their corporate boundaries if they participate in a multi-municipal plan.**” This exemption is provided in Section 1103 (4) of the PaMPC, which reads as follows: Plan for the accommodation of all categories of uses within the area of the plan, provided, however, that all uses need not be provided in every municipality, but shall be planned and provided for within a reasonable geographic area of the plan. Based upon this section of the MPC, municipalities that participate in a multi-municipal comprehensive plan, like the Centre Region Comprehensive Plan, can rely upon land uses being provided within other municipalities that also participate in the multi-municipal comprehensive plan.

http://www.crcog.net/vertical/sites/%7B6AD7E2DC-ECE4-41CD-B8E1-BAC6A6336348%7D/uploads/Zoning_Velocity_Challenges_Handbook.pdf

⁵⁴ City of Pittsburgh, Institutional Master Plan <http://pittsburghpa.gov/dcp/imp> Pittsburgh Code 905.03.

⁵⁵ Pittsburgh Zoning Code: EMI, Educational/Medical Institution District.

https://library.municode.com/pa/pittsburgh/codes/code_of_ordinances?nodeId=PIZO_CO_TITNINEZO_ARTIIBAZODI_CH905SPPU_DI_905.03EMEDMEINDI

0.0.18. Unconventional Drilling - Hazards and Risks

Publicly traded corporations, by law, must disclose all hazards and risks to potential investors and shareholders. Such notice is provided in their annual Security and Exchange Commission's ("SEC") Form 10-K filing.⁵⁶

However, when unconventional drilling concerns come to town to seek public approval, they are not required (and never do) to disclose the hazards and risks attendant to their operations. All we hear about are the so-called benefits.

A disclosure of risk made by drilling concerns in their SEC Form 10-K typically notes, "equipment failures or accidents; facility or equipment malfunctions; pipe or cement failures; environmental hazards, such as natural gas leaks; oil spills; fires; pipeline and tank ruptures; unexpected operational events and drilling conditions; and, unauthorized discharges of toxics."

It stands to reason that these hazards and risks that would be imposed upon a community, should also be disclosed.

Recommendation: Require Disclosure of All Unconventional Drilling Hazards and Risks

Require that all unconventional drilling conditional use applicants disclose all known hazards and risks, as are enumerated in the SEC Form 10-K that is associated with their operations. If the entity is privately held, then they shall also similarly disclose hazards and risks as do publicly traded corporations.

0.0.19 Municipal Road Maintenance

Unconventional drilling operations can generate thousands of truck trips from a single well pad.⁵⁷ Such levels of heavy truck traffic can cause severe damage to the borough's rights-of-way. **The bough has the option to enter into excess road maintenance agreements⁵⁸ with the well operator.**

Such agreements require the drilling concern to make repairs to roads that are damaged. However, the borough would have to expend funds for engineering work to set up posted weight limits and other things to cause an excess road maintenance agreement to be.

Recommendation: Excess Road Maintenance Agreement Costs to be Borne by Unconventional Drilling Conditional Use Applicants

East Pittsburgh should require all drilling concerns to reimburse the the borough for all funds and time expended to cause an excess road maintenance agreement to come into effect, including but not

⁵⁶ Range Resources 2015 SEC Form 10-K, Item 1-A Risk Factors
https://www.last10k.com/sec-filings/rrc/0001564590-16-013402.htm#Risk_Factors

⁵⁷ How many tanker trucks does it take to supply water to, and remove waste from, a horizontally drilled and hydrofracked wellsite?
<http://www.bctwa.org/Frk-HowManyTankerTrucks.pdf>

⁵⁸ Penn DOT Excess Road Maintenance Agreements.
<http://www.penndot.gov/ProjectAndPrograms/PostedBondedRoadway/Pages/excessMaintenanceAgreement.aspx>

limited to, all engineering work to assess existing borough road conditions and, weight restriction postings.

In addition to the listed conditions in this section, the conditional use applicant should bear all costs incurred by the borough to establish any Excess Road Maintenance Agreements.

0.0.20. Recommendation: Require Documentation of Lease-Holdings with Zoning Application.

Finding #1: East Pittsburgh residents may not know whether their property has been leased.

Recently, we had an unexpected conversation with a local resident about a letter he had received from MPF Management Inc., concerning an existing gas lease on his property – which he hadn’t been aware of. [“MPF” is a land company who attended an East Pittsburgh Borough Council meeting in November 2017, accompanying Merrion Oil & Gas.] The resident had bought the property two years ago, and neither the seller’s disclosure form nor the lender’s title search had turned up information about a lease. Since that initial contact we have heard from others with similar stories.

Based on that first resident’s question, we searched the Allegheny County deed records for leases that were executed or owned by MPF. We found a single summary document where MPF listed over 600 parcels on which they hold leases. But, investigating a sample of those parcels, we could find an actual entry on the deed for less than 5% of the properties we checked. Often the necessary information just doesn’t exist where it supposed to be.

Finding #2: Public information on natural gas leases is not easily accessible.

Our search of County records (described above) wasn’t a simple matter of checking the Assessment site. We used custom-programmed computerized search routines to scan thousands of properties,

selecting those that matched the descriptions in the MPF document that started us looking. The average resident – or municipal official – doesn't have access to such technical firepower.

Finding #3: East Pittsburgh Borough lacks a comprehensive view of gas leases in the Borough.

And, after our computer-aided search, we manually compiled maps (like the ones included in this report) to get a high-level picture of the extent of leasing in East Pittsburgh. (Don't forget, though, we're only looking at MPF's leases. There is no public search mechanism in the County systems to answer queries like "Find all the gas leases in East Pittsburgh Borough.")

Discussion: Operators and land companies often prefer to keep this information to themselves, although it's relatively easy for competitors to learn about each other. And it unfortunately is a common practice for "landmen" to tell each homeowner, "Everyone else in your neighborhood has already signed," even if they would actually be the first. The public – and elected officials – are often the last to learn about the extent of leasing in their community.

It makes sense to require this information from an Applicant who is asking to come into East Pittsburgh:

Do they already have leases signed?

Are they going to be soliciting residents to sign up?

Will they be acquiring leases from some other company?

Recommendation:

Add to Article 1200, that an Applicant for Conditional Use approval is required to submit information on all leases which it holds, or intends to acquire, as part of the proposed natural gas development. (An extract from an Allegheny County registry of leases could be accepted.)

0.0.21. Additional Information: The Direct Financial Impact of Unconventional Drilling for East Pittsburgh Borough.

Zoning approvals should not be “for sale.” But public opinion, and even elected officials, can be swayed by predictions of windfall revenue for the community. Unfortunately, the promoters who talk about that revenue are rarely the same people who are responsible for paying it if the development goes forward. So it is worth being forearmed before castles-in-the-sky are being promised.

There are three direct paths by which East Pittsburgh (homeowners and municipal government) can receive revenue from natural gas development:

- (1) An initial payment (or “signing bonus”) for agreeing to lease: a negotiated amount, paid to the owner of the property, one time only;
- (2) Regular royalty payments: calculated as a fraction of the value of whatever amount of gas is extracted from the leased property, paid to the owner of the property, usually on a monthly or quarterly basis;
- (3) The Pennsylvania “Impact Fee”: calculated by the PUC as a share of the fee which the state collects on each well, paid to the municipal government on an annual basis.

As the following discussion will show, the amounts of money that East Pittsburgh might directly receive from drilling are small – probably less than 1% of some of the numbers that have been repeated by hearsay during the last Borough Council discussion on Conditional Use approvals.

Residential properties in East Pittsburgh are small, and will generate only small lease payments.

Most residential parcels in East Pittsburgh contain approximately 2500 square feet, or 0.06 acres. The terms of gas leases are usually kept confidential, but typical numbers might be \$3,000/acre for “signing bonus” so a typical homeowner might be offered \$180 as a one-time compensation for leasing his/her property.

Royalty payments are harder to estimate. First, realize that any particular landowner will receive royalties from only one Marcellus well, ever, no matter how many are drilled in and around their community, over whatever length of time the industrial activity persists. Only one well can go under any particular property and pay royalties to that landowner, and it’s up to the driller as to whether that specific well is drilled sooner or later or at all, during the life of the lease.

The amount of the royalty also requires some assumptions to be made, but one responsible estimate is a lifetime (until the well is exhausted) royalty of \$24,000 per acre. Most of this comes in the first couple of years, so an East Pittsburgh homeowner might possibly be paid a total of \$1,500 (in round numbers), of which perhaps \$500 is paid in the first year, \$500 more spread over the next three years, and another \$500 over the following 10 or more years. But, no matter how many wells are drilled in the Borough, any single homeowner – if and when a well goes under his/her property – might look forward to a lifetime total of about \$1500.

East Pittsburgh will receive only a tiny share of the Impact Fee from the proposed Merrion well.

Pennsylvania collects an “Impact Fee” on each well drilled in the state, and allocates that revenue according to a well-documented formula: some to the state itself, some to counties, and some to

municipalities. The share to each county and each municipality depends upon whether there are well heads “within” or “near” their boundaries.

In the case of East Pittsburgh, there are currently no frack wells either “within” or “near” the Borough, as those terms are defined. Because East Pittsburgh lies within Allegheny County, though, and the County does have well heads, the Borough does receive a secondary distribution of a part of the County’s share.

The proposed Merrion well is to be drilled in North Versailles, so it will generate Impact Fee revenue for East Pittsburgh, based on its being “near” the Borough. According to the most recent distribution⁵⁹, the Borough can expect less than \$300 (three hundred dollars) in the first year of the Merrion well, and lesser amounts in each of the following 14 years.

Impact Fee revenue from any future wells drilled within the Borough will be modest.

According to the same calculations from Pennsylvania reports, if some new Marcellus wells were drilled within East Pittsburgh, the Borough would receive roughly \$4,000 (four thousand dollars) for the first year of each well’s life, declining to about \$500 per year over the next 14 years.

0.0.22. Consider Additional Setbacks near “Access Choke Points”

East Pittsburgh neighborhoods are accessible from highways at a small number of “choke points.”

The significance of this topography was recently demonstrated by the impact of the 2018 landslide on US 30.

The potential for well pad accidents requiring evacuation of residents has been demonstrated repeatedly in the Marcellus Shale region.

Recommendation: Add a condition to Article 1200 requiring at least 1320 feet (1/4 mile) setback between the nearest edge of a proposed well pad and each of a list of “choke points” – e.g., “Braddock Ave. at E. Pittsburgh – McKeesport Blvd.”, “Center St./Bell Ave. Bridge”, “Electric Ave. at Braddock Ave.”, “any part of Prospect St.”

⁵⁹ My own analysis, done for North Braddock Borough Council in May, 2018, can be summarized as follows:

- Of the total collected, 40% is retained by the Commonwealth, leaving 60% to be split by Counties.
 - That 60% share is divided among those Counties with wells, and of the 60%...
 - o 36% (of 60%) goes to the County government [*pro rata* by the number of wells within the County]
 - o 37% goes to municipalities with wells within their boundaries [also *pro rata* by the number of wells]
 - o 27% goes to municipalities in the County which do not have wells within their boundaries, as follows:
 - Half (50% of 27% of 60%) split among ALL municipalities
 - The other half (50% of 27% of 60%) split among only those municipalities with “nearby” wells
- WHERE the split among municipalities is proportional by (a) half by population, (b) half by total miles of highway

0.0.23. Conclusion

As evidenced in this report and recommendations, planning and zoning for unconventional gas drilling is a complex task. Nonetheless, we are obligated to take up the matter - fracking isn't going to go away anytime soon. It is imperative that East Pittsburgh take action to address the matter in a comprehensive way.

We look forward to your responses to this report and recommendations that we have provided to you. We also look forward to working with our Borough Council in order to develop a comprehensive set of ordinances that fully addresses unconventional gas development.

We would also want to acknowledge and thank Food & Water Watch for their support in compiling this document and, providing research and technical assistance on any number of issues attached to this matter.



Figure 1. Tax parcels in East Pittsburgh (in white). Leases as discovered from MPF documents are highlighted in orange.



Figure 2. East Pittsburgh satellite view, with zoning districts per current Ordinance. The rough effect of a one-quarter-mile setback from Prospect Street is superimposed.

