Received 9/19/2016 10:03:04 AM Supreme Court Middle District

Filed 9/19/2016 10:03:00 AM Supreme Court Middle District
67 MAP 2016

IN THE SUPREME COURT OF PENNSYLVANIA

No. 67 MAP 2016

Brian Gorsline, Dawn Gorsline, Paul Batkowski and Michele Batkowski
Appellants

v.

Board of Supervisors of Fairfield Township,

v.

Inflection Energy, LLC and Donald Shaheen and Eleanor Shaheen,

Appeal of: Brian Gorsline, Dawn Gorsline, Paul Batkowski and Michele Batkowski

REPLY BRIEF OF APPELLANTS BRIAN GORSLINE, DAWN GORSLINE, PAUL BATKOWSKI AND MICHELE BATKOWSKI

Appeal from Order of Commonwealth Court, 1735 C.D. 2014, dated September 14, 2015, reversing an Order of the Court of Common Pleas of Lycoming County, dated August 14, 2015, reversing a decision by the Board of Supervisors of Fairfield Township granting a conditional use approval to Inflection Energy, LLC

George Jugovic, Jr., Chief Counsel
Citizens for Pennsylvania's Future
200 First Avenue, Suite 200
Pittsburgh, PA 15222
Telephone: (412) 456-2785
PA ID 39586

Michael Helbing, Staff Attorney
Citizens for Pennsylvania's Future
8 West Market Street, Suite 901
Wilkes-Barre, PA 18701
Telephone: (570) 208-4007
PA ID 209177

Counsel for Appellants

TABLE OF CONTENTS

TABLE OF CITATIONS

CASES

CONSTITUTIONAL PROVISIONS

STATUTORY PROVISIONS

OTHER

ARGUMENT

1. Inflection Failed To Carry Its Initial Burden of Proof Under Section 12.18.1 of the Ordinance to Show That Its Proposed Shale Gas Development Was Similar To And Compatible With Other Permitted Uses In The R-A District.

a. The record contains no findings or substantial evidence that compares the proposed shale gas well pad to other permitted uses in the R-A District.

The first of the three threshold criteria under the "savings clause" of the Fairfield Township Zoning Ordinance ("Ordinance") requires an applicant for a conditional use approval to demonstrate that its proposed use "is similar to and compatible with the other uses permitted in the zone where the subject property is located." [1] Ordinance, § 12.18.1, R. 493a. Appellees, Inflection Energy, LLC and Donald and Eleanor Shaheen ("Inflection") claim that "[t]he Board of Supervisors specifically found that the proposed shale gas well pad was '*compatible with the other uses* permitted in the zone.'" (Inflection Brief, p. 42) (italics added by Inflection). Inflection fails to support the assertion with a citation to the record. That is because no such finding appears in the Board's Opinion and Order of December 18, 2013. Appellants' Opening Brief, App. A.

[1] As discussed in Appellants' Opening Brief, it was Inflection's burden to show, in the first instance before the Board of Supervisors, that its proposed use satisfied this criterion. Appellants' Opening Brief at 6; Ordinance § 12.18, R. 493a. Inflection failed to meet that burden. Appellants' Opening Brief at 24-29.

The Board's Opinion and Order also does not contain a single reference to "Essential Service," "Public or Quasi-Public Use," "Public Service Facility," or any other specific use permitted in Fairfield Township's ("Fairfield" or "Township") Residential-Agriculture ("R-A") District. It further contains no findings of fact or discussion comparing the proposed shale gas well pad to any other permitted uses in the R-A District. The rationale and comparisons relied on by Inflection, which continue to expand at each level of appeal, did not form the basis of the Board's decision, but instead have been supplied by Appellees and their *amici* in subsequent court proceedings.

On the issue of similarity, the Court of Common Pleas tersely explained that Fairfield's *post-hoc* rationale, that the proposed shale gas well pad is *similar* to a "Public Service Facility," was not supported by the record:

> Mr. Irwin testified that Inflection's proposed use was **not** classified as a public service facility under the ordinance. Transcript, 10/7/13, at 8 [R. 10a]. Apparently dissatisfied with that answer, Inflection's attorney then asked the following leading question, "It fits the definition as a public service facility under the Fairfield Township Zoning Ordinance, it that correct?" After this prompting, Mr. Irwin said, "Yes." [R. 10a] There was absolutely no explanation for Mr. Irwin's arguably inconsistent answers. The definition of a public service facility was not discussed or alluded to and no testimony was provided to show how Inflection's proposed use fits the definition. There was just a bald, conclusory statement that the use fit the definition of a public service facility.

(Appellants' Opening Brief, App. B, pp. 10-11).

Inflection similarly failed to provide substantial evidence that its proposed shale gas well pad was *compatible* with uses permitted in the R-A District. Again, the Court of Common Pleas highlighted the paucity of Inflection's evidence:

> The only testimony presented by Inflection on this issue was a statement by Mr. Irwin that he believes, given the location of the well, that it is compatible "with the surrounding properties." Transcript, 10/7 /13, at 20 [R. 23a]. This conclusory statement falls far short of establishing that the proposed use is compatible. Being compatible with "other properties" also does not prove compatibility with "other uses" in the zoning district.

Appellants' Opening Brief, App. B, p. 11.

The Marcellus Shale Coalition attempts to fill this gaping hole in the record by relying on evidence and findings of fact from three other zoning proceedings from western Pennsylvania. Brief of *Amicus Curiae* Marcellus Shale Coalition, pp. 18-23. This effort, to rely on records established in other proceedings in other townships involving other ordinances, merely confirms that Inflection failed to introduce substantial evidence in the instant case that the proposed shale gas well pad is similar to and compatible with permitted uses in the R-A District.

b. The record demonstrates that the proposed shale gas well pad is an industrial land use that is not similar to and compatible with surrounding land uses.

Inflection and Fairfield argue that both the plurality of this Court and Justice Baer got it wrong in *Robinson Township v. Commonwealth*, 83 A.3d 901 (Pa.

2013), when they characterized shale gas development as an industrial land use.[2] In part, they contend that the Court should have ignored, when characterizing the land use, all of the industrial activities that occur between movement of the first dozer load of dirt to reclamation of the well pad, including truck traffic, the use of large diesel engines, large multi-story drill rigs, the storage and use of explosives, the fracking operations that pump millions of gallons of fluid under extreme pressures into the formation, and the generation and storage of solid and liquid wastes on the property. Those activities, they argue, are merely part of the "construction" phase of the operation that is not reflective of the end use of the property. Inflection and Fairfield further argue that the Court should ignore the effects of these activities on neighboring property owners, and should ignore that the record shows the activities could occur again and again throughout the life of the well pad. The arguments should be rejected.

[2] *See Robinson*, 83 A.3d at 979 ("First, a new regulatory regime permitting *industrial* uses as a matter of right in every type of pre-existing zoning district is incapable of conserving or maintaining the constitutionally-protected aspects of the public environment and of a certain quality of life. . . . Act 13 permits *industrial oil and gas operations* as a use 'of right' in every zoning district throughout the Commonwealth, including in residential, commercial, and agricultural districts." (emphasis added) Castille, C.J., plurality), at 1005 ("As Challengers duly note, these *industrial-like operations* include blasting of rock and other material, noise from the running of diesel engines, sometimes nonstop for days, traffic from construction vehicles, tankers, and other heavy-duty machinery, the storage of hazardous materials, constant bright lighting at night, and the potential for life-and property-threatening explosions and gas well blowouts.") (emphasis added) (Baer, J., concurring).

i. The record demonstrates that development of the proposed shale gas well pad is an industrial land use.

Inflection attempts to characterize shale gas development as a benign land use similar to farming. That characterization is not supported by the record.

The proposed well pad at issue in this case would be located in a portion of the R-A District that has been the subject of *residential* development. While Inflection emphasizes that the subject parcel is currently being farmed, Inflection Brief at 6, it ignores the surrounding land uses, which include 128 single-family homes within 3,000 feet and more than 125 individual drinking water wells within that same distance. R. 25, R. 264a–269a. The record shows that there are no adjacent or nearby industrial or mineral extraction operations in the neighborhood of the proposed well pad. R. 264a-269a. Indeed, surface mining, the only mineral extraction activities expressly regulated by the Township's zoning ordinance, is only authorized as a Conditional Use in the Township's Industrial District. R. 366a.

Inflection seeks to distinguish the "construction phase" of the shale gas well pad, which it argues should include all of the disruptive activities that occur on the property from initial grading of the site through reclamation, from other less intrusive phases of the operation. This characterization, however, is at odds with the company's own conditional use Application, which describes the "Construction Stage" of the operation as limited to the "actual earth disturbance activities" at the

well pad, including construction of the entry road, well pad and storage impoundment. R. 153a, 157a, 163a. As such, Inflection's brief attempts to craft a legal argument that remains at odds with the underlying record in this matter.

Similarly, Inflection's brief states that the initial well construction period will occur over a period of ninety days. Inflection Brief at 6-7. This statement is again at odds with the record, as the company's land use Application states that drilling and fracking of multiple wells on the pad will occur over a period of "two to three years." R.153a. The Application refers to this "protracted" period as "Post-Construction" operations, and not "construction" activities. R. 153a, 165a. The record, then, does not support Inflection's effort to isolate from consideration the disruptive nature of shale gas development on neighboring property owners.

Indeed, Inflection attempts to minimize the harm that will be imposed on neighboring property owners by asserting that only two wells will be drilled on the pad. Inflection Brief at 6. That characterization is not consistent with the testimony of Inflection's witnesses, who stated that drilling and fracking of more wells would occur over a period of years should the initial wells prove productive, and that drilling those additional wells would result in "a more drawn out process." R. 28a, 153a, 156a. Inflection also would not commit that it only intended to use the proposed pad to develop gas from the Marcellus shale formation. If it decided

to access additional formations, that too would further extend operations at the site. R. 28a.

Inflection's Application contained a Pollution Prevention and Control Plan that planned for potential environmental and public safety issues that could arise throughout the entire life of the facility, and not just during well drilling operations. R. 198a – 235a. The Plan addressed the storage of hazardous and other pollutional materials at the well pad, including diesel fuel, antifreeze, motor oil, hydraulic fluid, drilling soap, waste oil, synthetic oils, emulsifiers, wetting agents and rig wash. R. 200a. Dry materials such as barite, calcium chloride, lime, oil absorbent and vicosifiers would also be stored on site. R. 200a. Wastewater and condensate, a flammable and explosive mix of hydrocarbons, would be stored at the site, and eventually transferred to trucks and removed from the site. R. 214a. While on the site, all of these materials pose a threat of harm to the public and area groundwater if improperly managed, or if an accident occurred.

Residents elicited testimony from Inflection's own witnesses that noise from the property would be "loud" and the impacts on adjacent properties would be difficult to mitigate. R. 23a, 41a.

Inflection presented testimony that during fracking operations its trucks would run twenty-two-and-a-half hours per day, nonstop. R. 46a. Inflection offered no assessment of the impact of truck traffic on the local community. Its

estimates of the number of trucks on the road varied from between 2,000–3,000 to the non-specific "very large number." R. 42, 44a–46a, 342a. When asked directly how having 2,000-3,000 large trucks on the road was not at least a commercial operation, Mr. Erwin testified "I don't have an answer for that." R. 48a.

Residents testified to traffic and odor impacts from the shale gas well pad based on their experiences with other existing wells in the Township. R. 60a-61a, 327a. They also testified that noise from the operation would impact use of their property. R. 327s-328a. One Township resident who had worked on shale gas well pads testified that for the people living around the Shaheen property "life is just going to absolutely suck for the next two years" because "that well pad is going to be down in that hole… you're going to hear people talking down in there, because that sound is going to echo up out. Not to mention the lights…. The lights, nobody is ever going to be able to feel like you're having a nice dark evening after they start drilling there because they're going to bring that rig in and it's just going to be a glow down in that hole." R. 327a-328a.

It is a question of law whether a proposed use, as factually described in an application or testimony, falls within a particular category or district described in a zoning ordinance, and that determination is therefore subject to *de novo* review. *Neill v. Bedminster Township Zoning Hearing Bd*., 592 A.2d 1385, 1387 (Pa.

Cmwlth. 1991); *In re Appeal of Ethken Corp*., 493 A.2d 787, 789 (Pa. Cmwlth. 1985); *Crary Home v. DeFrees*, 329 A.2d 874, 876 (Pa. Cmwlth. 1974).

Section 3.1 of Fairfield's Ordinance expressly states that "Industrial uses are discouraged in this [the R-A] district." R. 408a. Surface mining, the only mineral extraction activity principally regulated by the Ordinance, is not permitted, by right or as a conditional use, in the R-A District. R. 366a. Instead, the Ordinance isolates surface mining in the Industrial District of the township. *Id*. As the Supreme Court stated in *Euclid*, "whether a particular thing is a nuisance, is to be determined, not by an abstract consideration of the building or of the thing considered apart, but by considering it in connection with the circumstances and the locality. A nuisance may be merely a right thing in the wrong place." *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926). The record below, ignored by the Commonwealth Court, plainly demonstrates that the proposed shale gas well pad is an industrial land use that is not similar to and compatible with the land uses in the residential portion of the township's R-A District .

ii. The law does not support Inflection's argument that "construction activities" should not be considered a part of the proposed land use.

Inflection asserts that it is "well-established law" that the MPC does not regulate "construction" activities or the "particulars of development and construction." They then argue that both the plurality and Justice Baer in *Robinson*

erred in characterizing shale gas development as industrial in nature because these intensive uses of the land only occur during the "construction" phase of the operation." Inflection Brief at 22. The argument has several logical and legal flaws.

Inflection cites to just two cases for the "well-established" principle that "zoning only regulates the use of land and not the particulars of development and construction." *In re Thompson*, 896 A.3d 659, 671 (Pa. Cmwlth. 2006) (quoting *Schatz v. New Britain Township Zoning Hearing Board of Adjustment*, 596 A.2d 294, 298 (Pa. Cmwlth. 1991). To begin with the obvious, this Court is not bound by Commonwealth Court precedent. But more important, *Thompson* and *Schatz* do not stand for the broad proposition for which they are relied on by Inflection.

Thompson concerned a 39.5 acre parcel of land to be developed into a residential plan of single family houses. The developer had filed a comprehensive subdivision and land development plan under the township's Subdivision and Land Development Plan Ordinance ("SALDO"). Separately, the developer sought approval to disturb land within a Riparian Corridor Conservation District ("RCCD") encompassing 75 feet on either side of a stream to construct a road, utility crossing and stormwater retention basins. The Court of Common Pleas overturned the township's issuance of a conditional use approval. In reversing, the Commonwealth Court held that the township properly issued the approval because

the developer had demonstrated compliance with the express conditions of the ordinance.

Objectors argued that township should not have issued the approval until the applicant demonstrated compliance with the design standards in the SALDO. *Id*. at 669-670. The Court rejected this argument, stating that satisfying conditional use criteria for specific aspects of a development was typically just one step in a much longer process leading to approval of the overall development, and that the "particular details of the design of the proposed development" would be approved in those subsequent proceedings, including consideration of a land development plan under the SALDO. *Id*. at 670 (citing *Schatz v. New Britain Township Zoning Hearing Board of Adjustment*, 596 A.2d 294, 298 (Pa. Cmwlth. 1991). The Court reviewed cases that illustrated the principle and stated: "What we garner from these cases is that an applicant seeking conditional use approval must demonstrate compliance with the express standards and criteria of the ordinance that relate specifically to the conditional use." *Id*. at 671.

The *Schatz* case, quoted in *Thompson*, similarly concerned an argument that standards not found in the zoning ordinance should preclude issuance of a land use approval. There a developer sought a special exception from the zoning hearing board to put a drug and alcohol treatment facility in an Institutional zoned district. The applicant submitted plans showing that the facility complied with special

conditional use requirements for lot size and parking space. *Schatz*, 596 A.2d at 531. The board denied the application on several bases, including that that the facility could not, in its opinion, obtain an operating license. In support of its denial, the board made a number of findings concerning stormwater management, sewage capacity, and building code requirements.

The zoning hearing board's decision was reversed by the Court of Common Pleas. *Id.* at 527-29. On appeal, the sole issue was whether the developer had demonstrated its right to the special exception. *Id*. at 529. Addressing the zoning hearing board's findings about stormwater, sewage capacity, and building code requirements, the Commonwealth Court said that "an application for special exception is not required to address such issues. Such issues are to be addressed further along in the permitting and approval process. Zoning only regulates the use of land and not the particulars of development and construction." *Id*. at 532.

Inflection invites this Court to misinterpret and misapply the holdings in *Schatz* and *Thompson*. Neither of those cases stand for the "well-established law" that "matters of construction lie outside of the municipality's jurisdiction when administering its zoning ordinance." Inflection Brief at 22. *Schatz* and *Thompson* stand solely for the unremarkable proposition that to obtain a conditional use approval or special exception, an applicant must demonstrate compliance with the express standards and criteria of the zoning ordinance. *Thompson*, 896 A.3d at 671.

Inflection's argument takes the language from these cases out of context and attempts to form a rule where one does not exist. In *Thompson*, the developer proposed construction of a subdivision in a Residential zoned district, and sought a conditional use approval for appurtenant facilities that were expressly permitted as conditional uses in the RCCD District. In *Schatz*, the developer sought to locate a treatment facility in an Institutional zoned district, wherein all parties agreed that the proposed use fit the definition of a licensed nursing home that was expressly allowed in the district. Neither of these cases has application to the instant matter, in which the Commonwealth Court decided that an industrial shale gas development was compatible with a residential neighborhood in an R-A District.

Finally, Inflection's contention that municipalities should not consider construction impacts of a land use when developing zoning ordinances is belied by the very section of the Municipalities Planning Code ("MPC") that they rely on for that proposition. Inflection Brief at 22-23 (citing Section 603(b) of the MPC, 53 P.S. § 10603(b)). Section 603(b) provides that, unless otherwise preempted by law, when enacting zoning ordinances municipalities "may permit, prohibit, regulate, restrict and determine," among other things "[s]ize, height, bulk, location, erection, *construction*, repair, maintenance, alteration, razing, removal and use of structures." 53 P.S. § 10603(b)(2) (emphasis added). This express statutory provision hardly comports with Inflection's claim that "matters of construction lie

outside of the municipality's jurisdiction when administering its zoning ordinance." Inflection Brief at 22. Although municipalities may be preempted from regulating certain aspects of oil and gas operations under the Oil and Gas Act, this Court has held that municipal decisions about "which uses are permitted in different areas of the locality" are not preempted. *Range Resources v. Salem Township*, 600 Pa. 231, 236 (2009); see also *Huntley & Huntley, Inc. v. Borough Council of the Borough of Oakmont*, 600 Pa. 207 (2009); *Penneco Oil Co. v. County of Fayette*, 4 A.3d 722 (Pa. Cmwlth. 2010). As such, municipal officials maintain the authority to consider impacts from the "erection, construction … [and] maintenance" of oil and gas wells when determining where such structures may be located within the municipality. In *Robinson*, this Court implicitly recognized this power when it found unconstitutional the provisions of Act 13 that provided for the placement of "industrial-like operations [that] include blasting of rock and other material, noise from the running of diesel engines, sometimes nonstop for days, traffic from construction vehicles, tankers, and other heavy-duty machinery, the storage of hazardous materials, constant bright lighting at night, and the potential for life and property-threatening explosions and gas well blowouts" across all zoned districts, including agricultural and residential zoned districts. *Robinson*, 83 A.3d at 1005 (Baer, J., Concurring).

In sum, the lower court case law relied on by Inflection does nothing to undermine this Court's determination in *Robinson* that shale gas development is an industrial land use. Moreover, Section 603(b) of the MPC expressly supports consideration of construction and maintenance activities when adopting a zoning ordinance that must, as a matter of constitutional law, group only compatible land uses in the same zoned district.

2. *Robinson* Decided Whether The Government Exercised Its Police Power In Violation Of Citizens' Inalienable Rights Under Article I, Sections 1 And 27 Of The Pennsylvania Constitution; The Court's Decision Was Not Limited To Deciding Which Level Of Government Had The Superior Right To Make Zoning Decisions.

Inflection argues that the Commonwealth Court's decision below does not conflict with this Court's decision in *Robinson,* 83 A.3d 901 (Pa. 2013), but they reach that result only by badly misinterpreting the holding in *Robinson*.

Inflection argues that *Robinson* held "that the General Assembly overstepped its authority in mandating a zoning scheme which removed from municipalities the ability to establish land use policy and to provide for the development of their communities consistent with the enabling authority given to them under the MPC." Inflection Brief at 26-27. In other words, Inflection and Fairfield argue that *Robinson* only determined who should make the decision on where industrial shale gas development may occur. According to Inflection and Fairfield, so long as local municipalities make the decision on where well pads,

compressor stations, wastewater impoundments and associated facilities will be located, the mandates of *Robinson* have been fulfilled. See Inflection Brief at 28 (*Robinson* "held that our General Assembly unconstitutionally interfered with a *municipality's right* to manage the arrangement of lawful uses within its border.") (emphasis added). Inflection's reading of *Robinson* is far too narrow.

The parties asserting, in *Robinson*, that Act 13 was unconstitutional did not argue that a municipality had an unfettered right to make its own zoning decisions; they argued that the state's decision to allow shale gas development across all zoned districts was irrational and did not comply with the constitutional constraints on the exercise of that power because it violated the constitutional rights of Pennsylvania residents. Chief Justice Castille recognized as much in his plurality opinion, where he wrote: "According to the Citizens, this dispute is not about municipal power, statutory or otherwise, to develop local policy, but it is instead about compliance with constitutional duties. Unless the Declaration of Rights is to have no meaning, the Citizens are correct." *Robinson*, 83 A.3d at 974.

Robinson was not, as asserted by Inflection, about protecting *a municipality's right* to exercise its zoning power; it was about protecting *citizens'*

rights under Article I, Sections 1 and 27 of the Pennsylvania Constitution when the government exercised its zoning power in an irrational manner. [3]

This Court was clearly troubled by the General Assembly's efforts, through Act 13, to broadly supersede municipal government input into where this new industry should develop throughout local communities. However, that concern alone could not provide a basis for striking down Act 13 as unconstitutional because municipalities are creatures of state government, and the state plainly has the power to preempt local government regulation. *See, e.g. Huntley & Huntley, Inc. v. Borough Council*, 964 A.2d 855 (Pa. 2009).

This Court found portions of Act 13 unconstitutional because it compelled municipalities to enact ordinances that violated the constitutional rights of its citizens. Those constitutional rights were not an entitlement to have local government make land use decisions instead of state government; they were the

[3] Despite amicus curiae American Petroleum Institute's (API's) attempt to frame this matter as a private dispute between landowners (Brief of Amicus Curiae API (API Brief), p. 5), this case involves at its heart a challenge to a municipal action – the granting of a conditional use approval – that violated Appellants' rights under Article I of the Pennsylvania Constitution. Although municipalities have no obligation to engage in zoning, once they choose to do so, they must act in accordance with the constitution, which demands, as this Court's decision in *Robinson* confirms, that Pennsylvania zones in districts, and those districts must consist of compatible land uses. Relying principally on dissenting opinions in *Robinson* (API Brief at 2, 20 n. 2, 21), API argues that neighboring residents have no constitutional rights at stake when a municipality makes a zoning decision authorizing a particular use of land. This notion is clearly is at odds with this Court's reasoning in *Robinson* that neighboring residents have environmental rights under Article I, Section 27 and substantive due process rights under Article I, Section 1 that are violated when the state compels or a municipality allows incompatible land uses in same zoned district. *See Robinsion*, 83 A.3d at 951-954 (Castille, C.J., plurality opinion); *id*. at 1005 (Baer, J., concurring) (The government intrusion, on the individual citizen level, is to the rights of the neighbor of the landowner who seeks to exploit his mineral rights).

investment-backed rights of neighboring property owners and the environmental and due process rights of all residents to continue living in areas with compatible land uses – to keep the "pig" out of their "parlor."

As President Judge Pellegrini of Commonwealth Court wrote in *Robinson*, Act 13 "violates substantive due process because it allows incompatible uses in zoning districts and does not protect the interests of neighboring property owners from harm, alters the character of the neighborhood, and makes irrational classifications." *Robinson Township v. Commonwealth*, 52 A.3d 463, 485 (Pa. Cmwlth. Ct. 2012). In affirming that decision, Chief Justice Castille, writing for the plurality, stated that "zoning laws protect landowners' enjoyment of their property by categorizing uses, designating compatible uses to the same district, and generally excluding incompatible uses from districts, with limited exceptions that do not affect the comprehensive land use scheme of the community." *Robinson*, 83 A.3d at 931 (plurality opinion). Justice Baer concurred, writing that Section 3304 of the Oil and Gas Act was unconstitutional because it required that zoning ordinances be amended in violation of the basic precept that "[l]and-use restrictions designate districts in which only compatible uses are allowed and incompatible uses are excluded." *Robinson*, 83 A.3d at 1006-07 (quoting the majority opinion below at 52 A.3d at 484-85).

In the instant case, this Court granted allocatur on the question of whether the decision that an industrial shale gas development was similar to and compatible with permitted uses in the R-A District violates the principles of *Robinson*.[4] The core holding in *Robinson* was that designating incompatible land uses in the same zoned district violates the constitutional underpinnings of the government's power to zone, whether that power is being exercised by the state or local government. The Commonwealth Court's decision, below, violates *Robinson* because, by equating an industrial shale gas development with a Public Service Facility in an R-A District, the Court authorized shale gas well pads to be located across all three of the township's zoned districts, including the district designed to promote residential developments. Fairfield's decision violates *Robinson* because it allows incompatible land uses to be located in the residential portion of its R-A District, within six-tenths of a mile of 128 single family residential homes and no other industrial-like development nearby, which is inconsistent with the purposes of the zoned district and fails to protect the interests of neighboring property owners from harm.

[4] Inflection makes the rather remarkable assertion that no "constitutional claim is mentioned in this Court's Order granting allocatur. Inflection Brief at 9, n7. Plainly, the first question presented – whether the decisions below allowing shale gas development in an R-A District violates this Court's decision in *Robinson* – squarely raises constitutional issues.

3. All Issues In This Appeal Were Appropriately Preserved, Are Non-waivable Because They Involve Constitutional Questions, Or Were Properly Addressed By The Court of Common Pleas For "Due Cause."

Inflection, briefly in the last page and one-half of its brief, argues that Appellants waived their constitutional claims because they were not "fully developed" before the Township.

First, Appellants properly preserved the constitutional issues raised in this appeal. Preservation of a question for appeal does not require that an appellant raise, before the agency, every *legal argument* concerning the issue being decided. *Transportation Services v. Underground Storage Tank Indemnification Bd*., 67 A.3d 142, 150-151 (Pa. Cmwlth. 2013).

Residents testified to numerous objections concerning the location of the proposed gas well pad – among them that the high levels of noise associated with the development would impact them, particularly because of where the well pad is sited in relation to the surrounding homes, that truck traffic and a blind hill near the entrance to the property would pose a hazard, and that the gas well would be visible from their homes and have aesthetic impacts, R. 023a, 041a, 044a-046a, 049a, 050a, 057a, 327a-328a, and 342a. The testimony on traffic and odor impacts was based on personal experiences with existing wells and truck traffic caused by those developments. R. 60a-61a, 327a. Residents testified that the increasing number of unconventional shale gas wells and the heavy truck traffic associated

with the industry was changing the character of the Residential-Agriculture zoned district. R. 314a, 323a, 326a. Residents also testified to decreased property values because the well operation would be located in a residential neighborhood and change its character. R. 52a, 314a, 323a, 326a. They further testified to the number of well casing failures that had been documented in the county and nearby townships which lead to methane contamination of private drinking water supplies, and expressed concern about the risk associated with wells being located so close to their residences and private drinking water wells. R. 53a-54a. The Residents repeatedly asked questions of Inflection's witnesses that directly put at issue the appropriateness of putting a gas well pad development in the middle of a residential neighborhood – the same issue at the heart of the constitutional claims before this Court.

Inflection did nothing to explain the rationale for locating its well pad in an area zoned Residential-Agriculture. In fact, when asked directly why the well was being located so near a residential development, Inflection's witness could only say that it was the largest parcel of land in the area that the company could find. R. 49a, 50a.

Second, Pennsylvania Courts have held that a constitutional challenge need not be raised at the administrative agency level in order to be raised on appeal. *Marchionni v. SEPTA*, 715 A.2d 559, 561 (Pa. Cmwlth. 1998); *See also Newcomer*

v. Civil Service Commission of Fairchance Borough, 515 A.2d 108, 110 (Pa. Cmwlth. 1986), *alloc. denied*, 522 A.2d 51 (Pa. 1987). Therefore, it was proper for Appellants to raise in their land use appeal whether Fairfield's decision comported with this Court's decision in *Robinson*.

Third, the Court of Common Pleas, below, properly decided in the alternative that that the social and legal importance of the issues being raised under *Robinson* supplied ample "due cause" for considering the issues. 2 Pa. C. S. § 753(a); *See Boron v. Pulaski Twp. Bd. of Supervisors*, 960 A.2d 880, 885 (Pa. Cmwlth. 2008). As the plurality observed in *Robinson*, Pennsylvania has "a notable history of what appears retrospectively to have been a shortsighted exploitation of its bounteous environment," and the legal issues raised by shale gas development are "unprecedented," especially in relation to local land regulation. *Robinson*, 83 A.3d at 976. Fairfield will continue to feel the pressure of industry's desire to develop shale gas resources within its borders, and will need to balance that pressure with competing land uses. The development of the constitutional and statutory framework for regulating those activities is critical to the health, safety, and welfare of the citizens of the Township.

For these reasons, this Court has a proper basis for addressing all of the issues, including the constitutional concerns, raised by this appeal.

CONCLUSION

For the reasons set forth above, Brian and Dawn Gorsline, and Paul and Michelle Batkowski, respectfully request that this Honorable Court reverse the decision of the Commonwealth Court.

Respectfully submitted

FOR APPELLANTS

/s/ George Jugovic, Jr.
George Jugovic, Jr.
Michael Helbing
Citizens for Pennsylvania's Future
200 First Avenue, Suite 200
Pittsburgh, PA 15222
Telephone: (412) 456-2785
PA ID 39586

CERTIFICATE OF COMPLIANCE WITH LENGTH LIMITATION

In accordance with Pa. R.A. P. 2135(d), I, George Jugovic, Jr., hereby certify that this brief complies with length limitation in Pa. R.A.P. 2135(a) (1) in that it contains less than 7,000 words, excluding the supplementary matter exempted by Pa. R.A.P. 2135(b), as determined by the word counting function in the word processing system used to prepare the brief, Microsoft Word 2010.

/s/ George Jugovic, Jr.
George Jugovic, Jr.
Citizens for Pennsylvania's Future
200 First Avenue, Suite 200
Pittsburgh, PA 15222
Telephone: (412) 456-2785
PA ID No. 39586

DATED: September 19, 2016

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Brief of Appellants Brian and Dawn Gorsline, and Paul and Michelle Batkowski, was filed electronically using the PACFile system. Service will be made on the persons and in the manner set forth on the Proof of Service generated by the PACFile system, which service satisfies the requirements of Pa. R.A.P. 121. The Proof of Service generated by the PACFile system will follow this Certificate of Service in the paper copy of this brief filed with the Court.

/s/ George Jugovic, Jr.
George Jugovic, Jr.
Citizens for Pennsylvania's Future
200 First Avenue, Suite 200
Pittsburgh, PA 15222
Telephone: (412) 456-2785
PA ID 39586

DATED: September 19, 2016