

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, Appellee

v.

Inflection Energy, LLC and Donald Shaheen and Eleanor Shaheen, Appellees

**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

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TABLE OF CONTENTS

TABLE OF CITATIONS	ii
STATEMENT OF JURISDICTION.....	1
ORDER IN QUESTION.....	2
STATEMENT OF SCOPE AND STANDARD OR REVIEW	3
STATEMENT OF QUESTIONS INVOLVED	4
STATEMENT OF THE CASE	5
SUMMARY OF ARGUMENT	12
ARGUMENT	14
1. The Commonwealth Court’s decision, that an industrial shale gas development is similar to and compatible with uses expressly permitted in an R-A District, conflicts with this Court’s decision in <i>Robinson Township</i>	14
2. The Commonwealth Court committed an error of law in deciding that an industrial shale gas development is similar to and compatible with a “public service facility” in an R-A District where the Township made no factual finding or legal conclusion to that effect, the record contains no substantial evidence to support that determination, and the company’s own witness testified that shale gas development was <i>not</i> similar to a “public service facility” in an R-A District.	22
3. Did the Commonwealth Court improperly decide that <i>MarkWest Liberty Midstream</i> compels the conclusion that an industrial shale gas development is similar to and compatible with a “Public Service Facility” in an R-A District.	29

4. The Commonwealth Court committed an error of law to the extent it relied on prior conditional use approvals that the Township issued for uses not expressly permitted in the R-A District, in order to support its decision that an industrial shale gas development is similar to and compatible with uses expressly permitted in the R-A District. 34

CONCLUSION..... 39

APPENDICES

- A. Decision of the Fairfield Township Board of Supervisors**
- B. Opinion of the Lycoming County Court of Common Pleas**
- C. Opinion of the Commonwealth Court**

CERTIFICATE OF COMPLIANCE WITH WORD LIMITATION

CERTIFICATE OF SERVICE

TABLE OF CITATIONS

CASES

<i>Buckwalter v. Borough of Phoenixville</i> , 985 A.2d 728 (Pa. 2009).....	3
<i>Cellco Partnership v. North Annville Township Zoning Hearing Board</i> , 939 A.2d 430 (Pa. Cmwlth. 2007)	17, 27, 28
<i>City of Edmonds v. Oxford House, Inc.</i> , 514 U.S. 725, 732 (1995).....	16
<i>Delaware Riverkeeper Network v. Middlesex Township Zoning Hearing Board</i> , A.D. No. 15-10429 (Comm. Pls. Court Butler Co., Nov. 19, 2015).....	20
<i>Eichlin v. Zoning Hearing Bd. of New Hope Borough</i> , 671 A.2d 1173 (Pa. Cmwlth. 1996)	3, 22
<i>Euclid v. Ambler Realty Co.</i> 272 US 365 (1926).....	32
<i>Frederick v. Allegheny Township Zoning Hearing Board</i> , Civil Division No. 1898 of 2015 (Comm. Pls. Westmoreland Co., Oct. 21, 2015).....	20
<i>Gorsline v. Board of Supervisors of Fairfield Twp.</i> , 123 A.3d 1142 (Pa. Cmwlth. 2015)	11
<i>Heller v. Zoning Board of Adjustment</i> , 171 A.2d 44 (Pa. 1961)	34
<i>Hitz v. Zoning Hearing Board of South Annville Township</i> , 734 A.2d 60, 65 n. 9 (Pa. Cmwlth. 1999).....	3, 22
<i>JoJo Oil Co. v. Dingman Township Zoning Hearing Board</i> , 77 A.3d 679, 685 (Pa. Cmwlth. 2013)	17, 35
<i>Kretschmann Farm, LLC v. Township of New Sewickley</i> , 131 A.3d 1044 (Pa. Cmwlth. 2016)	19
<i>Mesivtah Eitz Chaim of Bobov, Inc. v. Pike Cnty. Bd. of Assessment Appeals</i> , 44 A.3d 3, 6 (Pa. 2012)	3

<i>MarkWest Liberty Midstream & Resources, LLC v. Cecil Township Zoning Hearing Board</i> , 102 A.3d 549 (Pa. Cmwlth. 2014), <i>allocatur denied</i> , 113 A.3d 281 (Pa. 2015)	11, 18, 29, 30, 31
<i>Omnivest v. Stewartstown Borough Zoning Hearing Board</i> , 641 A.2d 648, 652 (Pa. Cmwlth. 1994)	34
<i>Robinson Township v. Commonwealth</i> , 83 A.3d 901 (Pa. 2013)	11, <i>passim</i>
<i>Rushford v. Zoning Board of Adjustment of Pittsburgh</i> , 473 A.2d 719, 722 (Pa. Cmwlth. 1984).	3, 22
<i>Schubach v. Silver</i> , 336 Pa. 328, 333 (1975)	34
<i>Shaffer v. Smith</i> , 673 A.2d 872, 874 (Pa. 1996).....	37
<i>Society Created to Reduce Urban Blight v. Zoning Board of Adjustment</i> , 804 A.2d 116, 119 n.2 (Pa. Cmwlth. 2002)	3, 22
<i>Zoning Hearing Board of Northampton Township</i> , 969 A.2d 24, 29 (Pa. Cmwlth. 2009).....	3, 23

CONSTITUTIONAL PROVISIONS

Pa. Const. art. 1, Sec. 27	12, 13, 14, 19, 20
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OTHER

Fairfield Township Zoning Ordinance of 2007	5, <i>passim</i>
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STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to 42 Pa.C.S. § 724(a), which provides that the Supreme Court shall have jurisdiction to review a final order of the Commonwealth Court upon the grant of a petition filed by any party to the matter.

ORDER IN QUESTION

The final Order in question, issued by the Commonwealth Court, states:

ORDER

AND NOW, this 14th day of September, 2015, the order of the Court of Common Pleas of Lycoming County, dated August 29, 2014, is REVERSED.

MARY HANNAH LEAVITT, Judge

STATEMENT OF SCOPE AND STANDARD OF REVIEW

In an appeal from a court's review of a local land use decision, where no additional evidence is taken, an appellate court's review considers whether the local agency abused its discretion or committed an error of law. *Society Created to Reduce Urban Blight v. Zoning Board of Adjustment*, 804 A.2d 116, 119 n.2 (Pa. Cmwlth. 2002); *Rushford v. Zoning Board of Adjustment of Pittsburgh*, 473 A.2d 719, 722 (Pa. Cmwlth. 1984). The findings of the local agency must be supported by substantial evidence. *Hitz v. Zoning Hearing Board of South Annville Township*, 734 A.2d 60, 65 n. 9 (Pa. Cmwlth. 1999). Substantial evidence is that which a reasonable mind would accept as adequate to support the finding. *Eichlin v. Zoning Hearing Bd. of New Hope Borough*, 671 A.2d 1173, 1175 (Pa. Cmwlth. 1996). Where the agency findings are not supported by substantial evidence, the decision is properly reversed. *Zoning Hearing Board of Northampton Township*, 969 A.2d 24, 30 (Pa. Cmwlth. 2009).

Where the appeal presents questions of law, including constitutional issues, this Court's standard of review is *de novo* and its scope of review plenary. *Mesivtah Eitz Chaim of Bobov, Inc. v. Pike Cnty. Bd. of Assessment Appeals*, 44 A.3d 3, 6 (Pa. 2012); *Buckwalter v. Borough of Phoenixville*, 985 A.2d 728, 730 (Pa. 2009).

STATEMENT OF QUESTIONS INVOLVED

1. Does the Commonwealth Court's decision below, that an industrial shale gas development is similar to and compatible with uses expressly permitted in an R-A District, conflict with this Court's decision in *Robinson Township*?
2. Did the Commonwealth Court commit an error of law in deciding that an industrial shale gas development is similar to and compatible with a "public service facility" in an R-A District when the Township made no factual finding or legal conclusion to that effect, the record contains no substantial evidence to support that determination, and the company's own witness testified that shale gas development was *not* similar to a "public service facility" in an R-A District?
3. Did the Commonwealth Court improperly decide that *MarkWest Liberty Midstream*, wherein it held that a compressor station is similar to and compatible with a "public service facility" in a Light Industrial District, also compels the conclusion that an industrial shale gas development is similar to and compatible with a "public service facility" in an R-A District designed for quiet, residential development and not industrial land uses?
4. Did the Commonwealth Court commit an error of law by relying on prior conditional use approvals that the Township issued for uses not expressly permitted in the R-A District, in order to support its decision that an industrial shale gas development is similar to and compatible with uses expressly permitted in the R-A District?

STATEMENT OF THE CASE

On December 18, 2013, by a 2-1 vote, the Fairfield Township Board of Supervisors issued a Conditional Use approval to Inflection Energy, LLC (“Inflection”) for the construction and operation of an unconventional shale gas well pad in the middle of a residential development on property zoned Residential-Agriculture (“R-A”). R. 10a, 146a, 147a, 152a. The shale gas well pad is to be located on property currently used for farming, on which no one resides. R. 9a, 12a. There are 128 single-family homes and more than 125 individual drinking water wells located within 3,000 feet of the proposed well pad. R. 25, R. 264a–269a. There are no other industrial or mineral extraction operations near the proposed location of the well pad. R. 264a-269a.

The “Fairfield Township Zoning Ordinance of 2007” divides the Township into three zoned districts: Residential-Agricultural, Commercial, and Industrial. R. 408a. The purpose of the R-A District is to “foster a quiet, medium-density residential environment while encouraging the continuation of agricultural activities and the preservation of prime farmland.” Ordinance § 3.1, R. 408a. The R-A District expressly *discourages* industrial land uses. *Id.* The purpose of the Industrial District is to establish areas “for general industrial, manufacturing, and/or warehousing purposes.” Ordinance § 3.1, R. 408a. The Industrial district

contains specific standards to minimize harm typically caused by industrial operations: air pollution, noise, glare, heat, fire and safety hazards. Ordinance § 3.1, R. 409a.

Section 12.18 of the Ordinance (Uses Not Provided For) provides that whenever a use is neither specifically permitted nor denied, the Board of Supervisors may only permit the use, as a conditional use, if the application demonstrates compliance with three threshold criteria:

- 12.18.1 It is similar to and compatible with the other uses permitted in the zone where the subject property is located;
- 12.18.2 It is not permitted in any other zone under the terms of this Ordinance; and
- 12.18.3 It in no way is in conflict with the general purposes of this Ordinance.

The Ordinance places the burden of proof on the applicant to demonstrate compliance with these criteria. Ordinance § 12.18, R. 493a.

The Ordinance defines “Public Service Facility” as follows:

The erection, construction, alteration, operation or maintenance of buildings, power plants or substations, water treatment plants or pumping stations; sewage disposal or pumping plants and other similar public service structures by a utility, whether publicly or privately owned, or by a municipal or other governmental agency, including the furnishing of electrical, gas, communication, water supply and sewage disposal services

Ordinance § 2.2, R. 398a. The Ordinance permits Public Service Facilities as a Conditional Use across all three zoned districts. Ordinance - Schedule of Uses, R. 366a.

Inflection's conditional use application to the Township consisted of 170 pages. R. 111a-281a. The application did not contain a single reference to the criteria in Section 12.18. *Id.* The only evidence in the record concerning the proposal's compliance with Section 12.18 was testimony that was introduced at the public hearings on the application, held on October 7, 2013 and November 4, 2013.

At the hearings, Inflection offered the testimony of two employees, Senior Field Operations Manager Thomas Erwin, and Director of Regulatory Affairs and Environmental and Health and Safety Thomas Gillespie. R. 006a, 286a. Mr. Erwin's only testimony on the Section 12.18 criteria consisted of a one-word answer to a single leading question.

Q: And given the location of the well, do you believe it to be compatible with the surrounding properties?

A: Yes.

R. 23a.

Mr. Erwin was asked leading questions about whether the proposed use would conflict with or adversely affect adjacent property owners. R. 22a-23a. He stated, in conclusory fashion, that the proposed land use would have no adverse

effect on neighboring properties, but he offered no explanation or substantiation for this assertion. R. 22a-23a, 147a.

Mr. Erwin was asked whether the proposed use should be classified as a “Public Service Facility.” His first answer to the question was “no,” but he then changed his testimony when asked a second time. His entire testimony on the issue consisted of the following exchange with Inflection’s attorney:

Q: And what is the proposed use in that district? What do you plan on --

A: Oil and gas development.

Q: And is that proposed use classified as a public service facility under the ordinance?

A: No.

Q: It fits the definition as a public service facility under the Fairfield Township Zoning Ordinance, is that correct?

A: Yes.

R. 10a.

Mr. Gillespie, Inflection’s other witness, offered no testimony on whether the proposed use was similar to and compatible with other uses permitted in the R-A District, or, particularly, whether it was similar to a Public Service Facility. R. 286a-292a.

Residents elicited testimony from Inflection’s witnesses about impacts of drilling in a residential neighborhood, including noise impacts. Mr. Irwin

conceded that, despite efforts by the company, the noise would be loud and its impacts difficult to mitigate. R. 67a.

Based on personal experience, Fairfield Township residents testified to the traffic and odor impacts from other wells that had previously been permitted in the R-A District. R. 60a-61a, 327a. Residents testified based on personal experience to disturbances caused by high noise levels, and the way in which the sound from this particular well would impact their neighborhood because of its location in a topographic hollow. R. 327s-328a. One Township resident who worked on shale gas well pads testified that, for the people living around the site of the well pad, “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.

Appellants Brian and Dawn Gorsline live in the neighborhood where Inflection proposed locating its well. R. 60a., 325a. Mrs. Gorsline testified that she and her husband purchased their home because the neighborhood was zoned residential-agriculture, which led them to believe that they could raise a family in a quiet residential development. R. 60a-61a, 325a. She also testified that the

increasing number of unconventional shale gas wells and the heavy truck traffic associated with the industry was disrupting the tranquil character of the Township's R-A District. R. 314a, 323a, 326a.

After the hearings, on December 18, 2013, the Township's Board of Supervisors issued its decision to grant the conditional use application. Appendix A. The decision contained no findings of fact or conclusions of law on the threshold issue of whether the proposed use was similar to and compatible with other permitted uses in the R-A District. The decision made no mention of the proposed facility being similar to or compatible with a "Public Service Facility." On that issue, the Township's decision contained a single general conclusion of law stating that the application complied with the criteria in Section 12.18, *to wit*, that the site selected "is generally appropriate for the proposed uses" and that "no evidence was offered that there would be any adverse impacts." Appendix A, Conclusions of Law Paragraph 20.¹

On appeal, the Lycoming County Court of Common Pleas reversed. After conducting a thorough evaluation of the record, the Court stated that the Township's decision lacked specific findings on the threshold issue of similarity, and further, that essential findings were not supported by substantial evidence in the record. Appendix B, Slip Op. at 8, 26.

¹ The opinion issued by the Township, Appendix A, contains no page numbers.

The Township and Inflection appealed to the Commonwealth Court. The Commonwealth Court concluded that the proposed shale gas development was similar to and compatible with a “Public Service Facility” - a use permitted as a conditional use in all three of the township’s zoned districts. *Gorsline v. Board of Supervisors of Fairfield Twp.*, 123 A.3d 1142, 1154 (Pa. Cmwlth. 2015). Critical to the Court’s holding was its prior decision in *MarkWest Liberty Midstream & Resources, LLC v. Cecil Township Zoning Hearing Board*, 102 A.3d 549 (Pa. Cmwlth. 2014), *allocatur denied*, 113 A.3d 281 (Pa. 2015), in which it held that a natural gas compressor station had “the same general character” as an “essential service” in a Light Industrial zoning district. *Gorsline*, 123 A.3d at 1151-52. The Commonwealth Court described its decision in *MarkWest* as being “directly on point.” *Id.* at 1152. The Commonwealth Court summarily dismissed Appellants’ arguments that locating an industrial shale gas well pad in the R-A District violated their rights under the Pennsylvania Constitution and conflicted with this Court’s decision in *Robinson Township v. Commonwealth*, 83 A.3d 901 (Pa. 2013). *Gorsline*, 123 A.3d at 1155 n. 11.

SUMMARY OF THE ARGUMENT

In *Robinson Township v. Commonwealth*, 83 A.3d 901 (Pa. 2013), this Court recognized that shale gas development constitutes an industrial land use, and struck down a portion of a statute requiring municipalities to allow such operations in areas zoned to host incompatible land uses like residential developments. A plurality of the Court in that case based its decision on Article I, Section 27 of the Pennsylvania Constitution, also known as the Environmental Rights Amendment. Differing from the plurality “only in degree,” Justice Baer found that placing the proverbial “pig in the parlor” violated the substantive due process rights of landowners like the Appellants in this case.

Despite that ruling, the Commonwealth Court held in the instant case that it was permissible for a natural gas well pad, which is industrial in nature, to be constructed in a residential-agricultural district intended “to foster a quiet, medium-density residential environment while encouraging the continuation of agricultural activities and the preservation of prime farmland.” If allowed to stand, the Commonwealth Court’s holding would undermine – in municipalities across the state with ordinance provisions similar to those at issue in this case – *Robinson Township’s* insistence that incompatible land uses remain separate.

The Commonwealth Court’s decision should be overturned for several reasons. First, as discussed above, by effectively allowing industrial natural gas

drilling operations across all zoning districts in Fairfield Township, it contradicts this Court's decision in *Robinson Township*. *See, infra*, Argument Section 1. Further, the Commonwealth Court's conclusion that a well pad was similar to a "public service facility" is not supported by substantial evidence in the record or in proceedings below, *see, infra*, Argument Section 2, and is based upon an inapposite case that involved a Light Industrial zone rather than a Residential-Agricultural one. *See, infra*, Argument Section 3. Finally, to the extent that the Commonwealth Court gave precedential effect to previous conditional use authorizations for natural gas well pads in the Residential-Agricultural district, that reliance was misplaced. *See, infra*, Argument Section 4.

As a result of all of these infirmities, this Court should overturn the Commonwealth Court's decision and affirm the petitioners' rights secured by Article I, Section 27 of the Pennsylvania Constitution.

ARGUMENT

1. **The Commonwealth Court’s decision, that an industrial shale gas development is similar to and compatible with uses expressly permitted in an R-A District, conflicts with this Court’s decision in *Robinson Township*.**

In *Robinson Township v. Commonwealth*, 83 A.3d 901 (Pa. 2013), this Court invalidated Sections 3215(b)(4), 3215(d), 3303 and 3304 of the Pennsylvania Oil and Gas Act (“Act 13”),² 58 Pa. C.S. §§ 3215(b)(4), 3215(d), 3303 and 3304. Section 3304 required that municipalities with zoning ordinances must authorize oil and gas production operations across all zoned districts either by right or as a conditional use, depending on the type of facility. *Robinson Township*, 83 A.3d at 971-72. In the Opinion announcing the Judgment of the Court authored by Chief Justice Castille, a plurality of the Court concluded that Section 3304 violated Article I, Section 27 of the Pennsylvania Constitution, often called “Pennsylvania’s Environmental Rights Amendment”. *Robinson Township*, 83 A.3d 901 (Castille, C.J.). In concurrence, Justice Baer found the constitutional infirmity in substantive due process, emphasizing the “reliance by property owners, citizens, and the like on [the] community planning” effected through the zoning process. *Id.* at 1001 (Baer, J., Concurring). Although relying on different constitutional theories, these two opinions, which formed the majority of the Court in favor of invalidating

² Act of February 14, 2012, P.L. 87, No. 13, 58 Pa. C.S. §§ 2310-3504.

Section 3304, were united by a common, fundamental premise: that shale gas development constitutes an industrial land use and it is impermissible to locate such operations with other land uses with which the industrial operations are not compatible.

Justice Baer accurately described unconventional shale gas production operations: “[T]hese 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.” *Robinson Township*, 83 A.3d at 1005 (Baer, J., Concurring). Justice Baer found Section 3304 particularly troubling because it approved the placement of well sites, compressor stations, and processing facilities in districts zoned residential and agricultural. *Id.* at 1005. Quoting the Commonwealth Court, Justice Baer found that Section 3304 was irrational because it required municipalities to allow “drilling operations and impoundments, gas compressor stations, storage and use of explosives” in all zoned districts, including residential and agricultural districts, where it “applie[d] industrial criteria to restrictions on height of structures, screening and fencing,

lighting and noise.”³ 83 A.3d at 1006 (quoting *Robinson Twp. v. Commonwealth*, 52 A.3d 463, 484-85 (Pa. Cmwlth. 2012) (*en banc*)). Section 3304 thus violated the “basic precept that ‘Land-use restrictions designate districts in which only compatible uses are allowed and incompatible uses are excluded.’” *Id.* (quoting *Robinson Twp.*, 52 A.3d at 484-85) (quoting *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 732 (1995)).

While articulating a different constitutional basis for striking down Section 3304, Chief Justice Castille’s plurality opinion in *Robinson Township* was grounded on the same basic premise: that gas drilling operations are industrial in nature and, thus, cannot be permitted across all zoned districts. The industrial nature of natural gas extraction was a centerpiece of the plurality’s analysis: “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.” *Robinson Township*, 83 A.3d at 979. *See id.* at 980 (“A second difficulty arising from Section 3304’s requirement that local government permit

³ The General Assembly, in enacting Act 13, also recognized the industrial nature of gas drilling operations. Section 3304, which this Court struck down in *Robinson Township*, would have prohibited municipalities from imposing conditions, requirements or limitations “on the construction of oil and gas operations that are more stringent than conditions, requirements or limitations imposed on construction activities for *other industrial uses* within the geographic boundaries of the local government.” *Robinson Township*, 83 A.3d at 970 (quoting 58 Pa. C.S. § 3304(3)) (emphasis added).

industrial uses in all zoning districts is that some properties and communities will carry much heavier environmental and habitability burdens than others.”).

Section 12.18 of Fairfield’s ordinance consists of a catch-all savings clause commonly used by municipalities to avoid claims of unlawful exclusionary zoning. *See JoJo Oil Co. v. Dingman Township Zoning Hearing Board*, 77 A.3d 679, 685-86 (Pa. Cmwlth. 2013); *Cellco Partnership v. North Annville Township Zoning Hearing Board*, 939 A.2d 430, 434 (Pa. Cmwlth. 2007) (“It is impossible for a legislative body to anticipate every conceivable use of land.”). It operates to allow “uses not provided for” to be approved as a conditional use in a zoned district so long as the use is “similar to and compatible with” other permitted uses in that district. Fairfield Township adopted its ordinance in 2007, before shale gas development arrived in north central Pennsylvania. As a result, the Ordinance does not specifically provide for shale gas well pads and their associated structures. R. 378a. Instead, as in the instant case, the Township processes land use applications for shale gas operations on a case by case basis under Section 12.18. As for all “uses not provided for,” the applicant bears the burden of demonstrating, as a threshold matter, that the proposed land use is appropriate for the zoned district in which it seeks to locate. Ordinance § 12.18, R. 493a.

Another common provision in zoning ordinances allows for the provision of basic public utilities and services necessary to promote the uses approved for that

zoned district. *See MarkWest*, 102 A.3d at 558-59. Section 2.2 of Fairfield

Township's ordinance defines "Public Service Facility" as follows:

The erection, construction, alteration, operation or maintenance of buildings, power plants or substations, water treatment plants or pumping stations; sewage disposal or pumping plants and other similar public service structures by a utility, whether publicly or privately owned, or by a municipal or other governmental agency, including the furnishing of electrical, gas, communication, water supply and sewage disposal services.

The Ordinance permits Public Service Facilities to be located in all three of the township's zoned districts. Ordinance Schedule of Uses, R. 366a. However, the ordinance states that the R-A District is intended to promote rural development in areas where public and sewer facilities are not likely to be available and may not become available in the near future. Ordinance a 3.1, R. 408a. As a result, the Ordinance requires minimum lot sizes to provide ample space for on-lot sewage and water facilities. *Id.* These provisions are consistent with the declared purpose of the R-A District "to foster a quiet, medium-density residential environment while encouraging the continuation of agricultural activities and the preservation of prime farmland." *Id.*

The Commonwealth Court, below, declared that a wholly private, industrial gas development, that is not designed to provide gas to local customers and not regulated as a public utility, is "similar to and compatible with" a "Public Service Facility" in Fairfield's R-A District. *Gorsline*, 123 A.3d at 1152. Because the Township's Ordinance determined that a "Public Service Facility" is presumed to

be appropriate in each of the three zoned districts, the effect of the Court’s decision is to allow industrial gas operations across all zoned districts in the municipality – in direct contravention of this Court’s holding in *Robinson Township*. As such, the Commonwealth Court’s decision below does nothing more than put a touch of lipstick on the proverbial pig, before allowing it into the parlor. *Cf. Robinson Township*, 83 A.3d at 1004 (Baer, J., Concurring).

When it comes to land use regulation, the “pig in the parlor” – an incompatible land use that subverts important, investment-backed expectations made in reliance on zoning classifications – is an unconstitutional result, whether under Article I, Section 27 (as the *Robinson Township* plurality would have held), or as a matter of substantive due process (as Justice Baer would have held). And whether that pig is forced into the parlor by the Commonwealth, as in *Robinson Township*, or allowed into the parlor by the municipality, as in this case, the result remains the same: permitting irrational land use patterns that disrupt basic, well-founded expectations about one’s family’s surroundings is unconstitutional, under either rationale.

The instant case is emblematic of a number of cases pending before municipalities and Pennsylvania courts, wherein litigants are contesting the meaning of this Court’s decision in *Robinson Township*. See, e.g., *Kretschmann Farm, LLC v. Township of New Sewickley*, 131 A.3d 1044 (Pa. Cmwlth. 2016);

Delaware Riverkeeper Network v. Middlesex Township Zoning Hearing Board, A.D. No. 15-10429 (Comm. Pls. Court Butler Co., November 19, 2015); *Frederick v. Allegheny Township Zoning Hearing Board*, Civil Division No. 1898 of 2015 (Comm. Pls. Westmoreland Co., October 21, 2015). As here, landowners who seek to protect their rights under Article I, Sections 1 and 27 of the Pennsylvania Constitution, object to local land use decisions that continue to permit industrial shale gas development to be located in districts zoned for residential and agricultural land uses. *See id.* Their opponents argue that *Robinson Township* imposes no substantive limits on the location of industrial shale gas operations, so long as the decision is made locally and not by the state. *See id.* The opponents' seemingly read out of both the plurality and concurring opinions in *Robinson Township*, any substantive determination that shale gas development is an industrial land use and that must be compatible with the uses in the zoning districts where it will be located. *See id.*

In this case, the Commonwealth Court accepted Inflection's argument that an industrial shale gas production facility is "similar to and compatible with" a "Public Service Facility," which the Township legislatively determined to be similar to and compatible with all land uses in the Township, *a fortiori*, industrial shale gas production facilities are compatible with all land uses in the Township. There is, however, a world of difference between the activities that occur at water

or sewage treatment plant and the lines that provide those services to the public, and the activities at an industrial, unconventional shale gas operation that provides no services to local land users, and under *Robinson Township*, that difference is of constitutional significance.

No matter the precise contours of Robinson Township, the plurality and concurring opinions stand for this proposition: that land use regulation be rational and well considered. It is not rational to authorize intrusive industrial shale gas production facilities in an R-A District by a factually unsupported, post-hoc, inapt analogy to the kinds of public service facilities that would promote the “quiet, medium density residential” land use and “continuation of agricultural activities” that define that R-A District. Ordinance § 3.1, R. 408a. That approach fails to protect the environmental rights of residents and fulfill the government’s obligations as trustee of the public’s natural resources, *Robinson Township* plurality, *see id.*, 83 A.3d at 946-84, and it fails to protect the reliance interests and substantive due process rights of landowners such as the Gorslines and Batkowskis, on which Justice Baer’s concurrence in *Robinson Township* was founded, *see id.*, 83 A.3d at 1000-08. Under both theories, the conditional use approval at issue fails to pass constitutional muster.

2. **The Commonwealth Court committed an error of law in deciding that an industrial shale gas development is similar to and compatible with a “Public Service Facility” in an R-A District where the Township made no factual finding or legal conclusion to that effect, the record contains no substantial evidence to support that determination, and the company’s own witness testified that shale gas development was *not* similar to a “Public Service Facility” in an R-A District.**

The Township’s decision, to issue a conditional use approval allowing Inflection to locate its industrial gas operation in an R-A District, was not based on a finding that the facility is similar to and compatible with a “Public Service Facility,” and the record contains no substantial evidence to support such a determination by Commonwealth Court.

Where a trial court takes no additional evidence, the appellate court reviews the local agency action for an abuse of discretion or error of law. *Society Created to Reduce Urban Blight v. Zoning Board of Adjustment*, 804 A.2d 116, 119 n.2 (Pa. Cmwlth. 2002); *Rushford v. Zoning Board of Adjustment of Pittsburgh*, 473 A.2d 719, 722 (Pa. Cmwlth. 1984). The findings of the local agency must be supported by substantial evidence. *Hitz v. Zoning Hearing Board of South Annville Township*, 734 A.2d 60, 65 n. 9 (Pa. Cmwlth. 1999). Substantial evidence is that which a reasonable mind would accept as adequate to support the finding. *Eichlin v. Zoning Hearing Bd. of New Hope Borough*, 671 A.2d 1173, 1175 (Pa. Cmwlth. 1996).

Where the agency findings are not supported by substantial evidence, the decision

is properly reversed. *Zoning Hearing Board of Northampton Township*, 969 A.2d 24, 29 (Pa. Cmwlth. 2009).

Fairfield Township approved Inflection's proposal to put an industrial gas operation on the Shaheen property as a "use not provided for" under Section 12.18 of its Ordinance. Section 12.18 provides that whenever a use "is neither specifically permitted [n]or denied, and an application is made ... for such a use," the board shall decide the request as a conditional use under Section 14.2 of the Ordinance. Ordinance § 12.18, R. 493a. In addition to the criteria under Section 14.2, Section 12.18 provides that no permit may be issued unless the application shows that (1) the use is similar to and compatible with other uses permitted in the zone; (2) the use is not permitted in any other zone under the Ordinance; and (3) the use in no way is in conflict with the general purposes of the Ordinance. *Id.*

The Township's record of decision in this matter contained only one generalized finding that could be characterized as addressing the similarity and compatibility criteria of Section 12.18(1): "[T]he Board of Supervisors finds that the criteria for review set forth in the Section 12.18 ... have been sufficient (sic) satisfied that the application as submitted by the Applicant with the imposed conditions meets the requirements of the Ordinance[.]" *Appendix A, Conclusions of Law* Para. 20. There is no finding of fact or conclusion of law in the Township's record of decision that suggests the Township based its decision on the

notion that an industrial gas operation is similar to and compatible with a “Public Service Facility” under the Ordinance.

Section 2.2 of the Township’s Ordinance defines a “Public Service Facility” as follows:

The erection, construction, alteration, operation or maintenance of buildings, power plants or substations, water treatment plants or pumping stations; sewage disposal or pumping plants *and other similar public service structures* by a utility, whether publicly or privately owned, or by a municipal or other governmental agency, including the furnishing of electrical, gas, communication, water supply and sewage disposal services.

Ordinance § 2.2, R. 398a. The Ordinance allows public service facilities as a conditional use in all three zoned districts within the municipality – residential agriculture, general commercial and industrial. *See* Ordinance §§ 4.2.2.16, 5.2.2.9, 6.2.3.10.

The Commonwealth Court’s attempt to analogize a private, industrial shale gas production facility to a “Public Service Facility” not only violates this Court’s decision in *Robinson Township*, as argued *supra.*, it also is not supported by substantial evidence in the record and contradicts prior case law.

The record below consists of Inflection’s 170-page conditional use permit application and transcript from two days of public hearings before the Board. As to the application, it contains not a single paragraph that attempts to demonstrate

that the proposed development project is similar to and compatible with a “Public Service Facility.” R. 111a-281a.

At the public hearings, Inflection offered the testimony of two employees. The testimony of Inflection’s first witness, Mr. Thomas Erwin, a Senior Field Operations Manager, on whether the proposed use was similar to and compatible with other permitted uses permitted in the R-A District, consisted of a single-word answer in response to a single leading question.

Q: And given the location of the well, do you believe it to be compatible with the surrounding properties?

A: Yes.

R. 23a.

Mr. Erwin provided no testimony that attempted to explain how a private industrial gas well development was *similar* to a public service facility intended to further the purposes of the R-A District, and his testimony on *compatibility* was, at best, conclusory.

Mr. Thomas Gillespie, Inflection’s other witness and its Director of Regulatory Affairs and Environmental and Health and Safety, offered no testimony on whether the proposed use was similar to and compatible with other permitted uses generally, or more specifically a “Public Service Facility.” R. 286a-292a.

Mr. Erwin was asked whether the proposed use should be classified as a “Public Service Facility,” but on that question his testimony was contradictory. He

first stated that the proposed shale gas development was *not* similar to a public service facility. R. 10a. Then, apparently dissatisfied with that answer, Inflection's attorney repeated the question in leading fashion to obtain the opposite result.

Q: And what is the proposed use in that district? What do you plan on --

A: Oil and gas development.

Q: And is that proposed use classified as a public service facility under the ordinance?

A: No.

Q: It fits the definition as a public service facility under the Fairfield Township Zoning Ordinance, is that correct?

A: Yes.

R. 10a. The witness was not asked any further questions about the issue, and he provided no explanation for his inconsistent answers.

"Substantial evidence" is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Eichlin, 671 A.2d at 1175.

What the Commonwealth Court relied on to arrive at its decision did not constitute substantial evidence. While the Court's opinion cites to testimony in the record offered by Inflection's witnesses, there is nothing in the record to which the Court could cite that constitutes "substantial evidence" that a private gas well development is similar to and compatible with a "Public Service Facility" intended to promote the purposes of the R-A District. Simply put, no such demonstration

was made either in the permit application or through testimony at the public hearings.

Further, the Commonwealth Court's determination that the proposed gas well development is similar to a "Public Service Facility" violates its own precedent. In *Cellco Partnership d/b/a Verizon Wireless v. North Annville Township Zoning Hearing Board*, 939 A.2d 430 (Cmwlth. Ct. 2007), a cellular phone company challenged a zoning hearing board decision denying the company's request to locate a cellular tower in a Rural-Residential District. The company argued that a proposed cell phone tower was similar to a municipal or public utility structure. *Id.* at 434. The Commonwealth Court held that when deciding whether a proposed use was similar to a public service-type facility, a determination needed to be made whether the facility principally served the public, rather than private, interest. *Id.* at 436. The Court explained that the "similar to" analysis must focus on the use or activity, and not simply the structure.

What takes place at a utility's sewage treatment plant or at a municipal fire station are activities that serve the public interest. As explained by the trial court, the "element of public benefit" is missing here. [citation omitted] Verizon's cellphone tower will advance Verizon's ability to compete in a marketplace, but these are commercial interests. There is a benefit conferred on the public by a cellphone tower because people desire cellphone coverage. However, there is an important difference between public and commercial benefits.

Id. Because the cell phone tower was primarily a commercial enterprise, the Court held that it was not "similar to" a public service-type facility. *Id.* at 437.

In the instant matter, there was no substantial evidence in the record supporting the Commonwealth Court's determination that Inflection's private gas well development was similar to and compatible with a "Public Service Facility." The only evidence in the record shows that the proposed development will serve the private commercial interests of the operator, Inflection Energy. As was the case in *Cellco Partnership*, the proposed development is a private enterprise that does not serve, as its primary purpose, a public interest such as facilities designed to supply power, fire protection, drinking water or sewage treatment.

Perhaps more fundamental, the Commonwealth Court failed to account for the type of activities that will take place at the proposed shale gas well pad when conducting its "similar to" analysis. As this Court stated in *Robinson Township*, shale gas development involves a myriad of industrial activities: the use of massive drill rigs, large diesel engines, bright lights, production and storage of toxic wastes, the use of explosives, and heavy traffic, to name a few. *See Robinson Township*, 83 A.3d at 979. As stated by the Commonwealth Court in *Cellco Partnership*, these are not the type of activities that take place at a sewage treatment plant or public water plant.

The Township, in this matter, did not find that the proposed use was similar to and compatible with a "Public Service Facility." That determination was made by the Commonwealth Court on appeal. The Commonwealth Court's

determination is not supported by substantial evidence in the record. There is nothing in the record that supports the position that a private, industrial gas well pad is similar to and compatible with a “Public Service Facility” that is intended to further the purposes of an R-A District. For these reasons, and because putting an industrial gas development in a district zoned for residential and agricultural uses violates this Court’s decision in *Robinson Township*, the Commonwealth Court’s decision must be reversed.

3. The Commonwealth Court improperly decided that *MarkWest Liberty Midstream* compels the conclusion that an industrial shale gas development is similar to and compatible with a “Public Service Facility” in an R-A District.

The Commonwealth Court concluded, improperly, that its decision in this matter was controlled by its earlier decision in *MarkWest Liberty Midstream v. Cecil Twp. Zoning Hearing Board*, 102 A.3d 549 (Pa. Cmwlth. 2014). *See Gorsline*, 123 A.3d at 1152 (decision in *MarkWest* is “directly on point”).

The critical difference between *MarkWest* and the instant case is that *MarkWest* involved a decision to issue a special exception for industrial land use in a **Light Industrial District**, whereas the instant case concerns an industrial land use in a **Residential-Agriculture District**. For purposes of zoning, which allows only compatible uses in the same zoned district, the difference is as between night and day.

In *MarkWest*, the Commonwealth Court overturned Zoning Hearing Board and Common Pleas Court decisions denying the company a special exception to put a natural gas compressor station⁴ in a district zoned Light Industrial. The Township's development ordinance defined "natural gas compressor station" to include the type of facility being proposed by MarkWest, *id.* at 552 n. 3, but the ordinance did not authorize natural gas compressor stations to be located, either as a conditional use or permitted use, in the Light Industrial District. *Id.* at 554 n.9. Admitting that it was not a government entity or public utility and that the compressor station would not provide gas to local customers, *id.* at 556, 558 n.15, MarkWest applied for a special exception under a section of the ordinance that allowed land uses, that are not specifically listed if they are of the "same general character" as permitted uses in the zoning district. *Id.* at 554. The listed use to which MarkWest sought to compare its compressor station was "essential services,"⁵ which were permitted as of right in the Light Industrial District. *Id.* at 554.⁶

⁴ The proposed facility was to consist of up to eight large engines, surrounding sound structures, dehydration facilities, tanks, a vapor recovery unit, a flare and associated piping. *MarkWest*, 102 A.3d at 552.

⁵ The ordinance defined "essential services" to mean "The erection, construction, alteration, or maintenance, of gas, electrical, and communication facilities; steam, fuel, or water transmission or distribution systems; and collection, supply, or disposal systems. Such systems may include poles, wires, mains, drains, sewers, pipes, sewage treatment plants, conduits, cables, fire alarm and police call boxes, traffic signals, hydrants, and similar accessories. **This definition is not intended to include private commercial enterprises** such as cellular communications facilities,

The Zoning Hearing Board denied the special exception on the basis that the proposed use was not of the “same character” as an “essential service.” *Id.* at 556. The Board emphasized that MarkWest was a commercial enterprise and not a public utility, and that the facility did not provide a service essential to the public. On appeal, the Washington County Court of Common Pleas affirmed. *Id.* at 551-52.

On appeal, the Commonwealth Court reversed. The Commonwealth Court reasoned that being the “same general character” as an “essential service” did not mean that the proposed use had to meet the definition of “essential service,” and as a result, MarkWest's commercial nature did not “preclude it from providing an ‘essential service’ as that term is defined” in the ordinance.” *Id.* at 559. The Court further held that the Board had applied an overly stringent standard by requiring the compressor station to be of the “same character” as the listed essential services, rather than the “same *general* character.” *Id.* at 560. Based on this distinction and after assigning other errors of law to the Board’s decision, the Commonwealth Court substituted its discretion for that of the Board and determined that MarkWest was entitled to a special exception, in part, because its gas compressor station was of the “same general character” as “essential services” under the ordinance.

but only those public facilities necessary for the health, safety, and general welfare of the community. *Id.* at 554 n.9. (emphasis added).

⁶ The ordinance also required that the applicant demonstrate that the proposed use would have no greater impact than any of the permitted conditional uses. *Id.* at 554.

Whatever the validity of the Court's decision in *MarkWest*, it should not be interpreted as compelling the conclusion that industrial shale gas development is "similar to and compatible with" a "Public Service Facility" in an R-A zoned district. If it does, then industrial shale gas development will be allowed in all zoned districts when an ordinance, such as here, does not expressly provide for shale gas development as a permitted use in any district, but does provide for public service facilities in all districts. In short, the decision to equate industrial shale gas development to public service facilities in an R-A District will become the proverbial camel's nose under the tent, because it would permit industrial shale gas development in every district where there is a need for public services to support the land uses, thereby transforming every zoned district into an industrial district regardless of its designation under the ordinance. Such a holding would undermine the very purpose of zoning. *See Euclid v. Ambler Realty Co.*, 272 US 365, 386-87 (1926).

The instant case illustrates this effect perfectly. The purpose of Fairfield Township's R-A District is to "foster a quiet, medium-density residential environment while encouraging the continuation of agricultural activities and the preservation of prime farmland." Ordinance § 3.1, R. 408a. In contrast to the Light Industrial District involved in *MarkWest*, the Fairfield Township Ordinance expressly states that "[i]ndustrial uses are discouraged" in the R-A District.

Ordinance § 3.1, R. 408a. The Commonwealth Court’s decision to permit private industrial gas operations in the Township’s R-A District under the guise of a “Public Service Facility” runs directly counter to the purposes of the district to promote open space, agricultural development and “a quiet, medium-density residential environment.” The fact that public service facilities may be necessary or helpful in promoting residential and agricultural uses should not become the predicate for the intrusion of industrial, unconventional gas production facilities into the R-A District.

The Commonwealth Court’s decision should be reversed because it inappropriately concluded that the decision in *MarkWest* controlled its holding in this case. The *MarkWest* decision does not control the instant case because that case concerned permitting an industrial compressor station in a district zoned Light Industrial, whereas here, the question is whether an industrial gas operation should be permitted in a district zoned for residential and agricultural development. The Court’s holding would not only undermine this Court’s *Robinson Township* decision, it would open the door for industrial gas operations to be permitted across all zoned districts that also provide for public services to promote the overall purpose of the district.

4. **The Commonwealth Court committed an error of law to the extent it relied on prior conditional use approvals that the Township had issued for uses not expressly permitted in the R-A District, in order to support its decision that an industrial shale gas development was similar to and compatible with uses expressly permitted in the R-A District.**

Inflection argued below, before both the Common Pleas Court and Commonwealth Court, that the Board of Supervisors' prior approval of shale gas well pads in the R-A District shows that Inflection's proposed use is similar to and compatible with other uses permitted in the R-A District. *Gorsline*, 123 A.3d at 1150. The Commonwealth Court summarized and did not reject Inflection's argument. *Id.* at 1150, 1152. It is not clear from the opinion, however, the extent to which Inflection's argument informed the Court's decision. To the extent it did, Appellants demonstrate below that the Court's reliance on the argument was in error.

Pennsylvania courts are generally reluctant to consider prior zoning decisions as binding precedent for future cases. *Schubach v. Silver*, 336 A.2d 328, 333 (1975), *citing* Ryan, Pennsylvania Zoning Law and Practice, § 9.4.17 (1970); *Heller v. Zoning Board of Adjustment*, 171 A.2d 44, 46 (1961) (grant of one variance does not compel grant of another, even in the same vicinity); *Omnivest v. Stewartstown Borough Zoning Hearing Board*, 641 A.2d 648, 652 (Pa. Cmwlth. 1994) (prior grant of a variance that later expired is not binding when Board considers subsequent request for same property) .

In *JoJo Oil*, 77 A.3d 679 (2013), the Commonwealth Court considered whether a proposed bulk fuel transfer station on a 3.3 acre property in a Resort/Commercial (R/C) Zoning District was “similar to and compatible with” other permitted uses in the zoned district. The proposed facility was to contain two large underground storage tanks, a dispensing station and truck turnaround, and no other buildings or structures. *Id.* at 682. The R/C District was intended to provide for “more intensive commercial and resort activity,” and contained a variety of permitted and conditional uses, including Commercial Recreation, Convenience Stores, Gasoline Stations, Inns, Light Manufacturing, and Motor Vehicle Sales and Service, but not bulk fuel storage and transfer. *Id.* 77 A.3d at 682 n.3. JoJo Oil sought a special exception under the township’s “Uses Not Provided For” section of its ordinance, which required that the proposed use be similar to and compatible with other uses permitted in the R/C District. *Id.*

Judge McGinley, writing for the Court, explained that in the case of permitted uses, conditional uses and special exceptions, the township has legislatively determined that the uses are compatible with other uses in the zoned district. Therefore, for those listed uses, it is presumed that they are similar to and compatible with other permitted uses in the district. However, for a use not provided for, the applicant must make a threshold demonstration that the proposed

use is appropriate for the district by showing it is similar and compatible to other permitted uses:

The proposed use must be similar to and compatible with the other allowable uses in the zoning district to be entitled to treatment and consideration as a special exception. This makes perfect sense because there can be no presumption of the suitability of a Special Exception use in a particular zoning district if the use was never even acknowledged by the legislating body in the first instance.

Id. 77 A.3d at 686.

For this reason, it would be error for the Commonwealth Court to have relied upon the Township's prior conditional use approvals for industrial gas operations in the R-A District to support Inflection's "similar to and compatible with" demonstration. The Township's 2007 Ordinance, adopted before the initial wave of shale gas development in Pennsylvania, does not expressly authorize unconventional shale gas development and its associated structures in any of its three zoning districts. For that reason, Inflection's application was processed by the township under the "uses not provided for" portion of its ordinance. By definition, uses not provided for do not enjoy a presumption of being similar to and compatible with other uses in the district because they were not legislatively determined to be compatible. Consequently, the Board of Supervisors must compare proposed uses that are not provided to other uses that have been legislatively determined to be compatible in order to approve that particular use as being appropriate for the zoned district in which it will be located. Conversely, the

Board of Supervisors may not compare proposed uses not provided for to previously issued conditional use permits under Section 12.18, because doing so would improperly elevate prior, site-specific conditional use decisions to the level of zone-wide legislative determination. That is, it would give certain site-specific conditional use decisions the effect of an amendment to the Ordinance.

Furthermore, it would be inappropriate to rely on such prior approvals because doing so would effectively deprive citizens of their opportunity to meaningfully participate in government decisions that substantially affect enjoyment of their property. It would be akin to applying offensive collateral estoppel against a person who did not have an opportunity or incentive to litigate an earlier conditional use approval on another parcel of land. *Cf. Shaffer v. Smith*, 673 A.2d 872, 874 (Pa. 1996). Under Inflection's construction, an application for conditional use approvals would be able to bootstrap itself into a presumption of validity throughout the zoned district merely by obtaining a single approval in the district for a "use not provided for" on a parcel of land that does not adversely affect other property owners in the district. The prior well pad applications used to support Inflection's argument were for completely different parcels of land than the one at issue in this case. Even if they had standing to do so, Appellants should not be expected to challenge every "use not provided for" decision in order to ensure that the Township does not subsequently treat that same use as if it were

legislatively determined to be compatible with other uses in the zoned district.

This is particularly the case when it is an industrial use that is proposed to be located in the R-A District.

For the foregoing reasons, to the extent the Commonwealth Court relied on Inflection's argument that prior conditional use approvals demonstrated that the well pad at issue was similar to and compatible with permitted uses in the R-A District, it erred.

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

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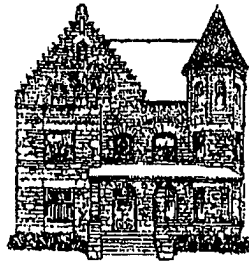
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APPENDIX A

Decision of the Fairfield Township Board of Supervisors

McCORMICK LAW FIRM

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J. DAVID SMITH
ROBERT A. ECKENRODE
JOANNE C. LUDWIKOWSKI
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150 Years of Service
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BUSINESS MANAGER

December 18, 2013

VIA FIRST CLASS MAIL

Donald G. Karpowich, Esq.
Donald G. Karpowich, Attorney-at-Law, P.C.
85 Drasher Road
Drums, PA 18222

Re: Inflection Energy, LLC – Shaheen Pad
Conditional Use Application – Opinion and Order

Dear Attorney Karpowich:

Pursuant to your instructions and in addition to the copy that has been transmitted electronically to you on December 18, 2013, in accordance with the provisions of 53 P.S. § 10908(10), enclosed please find a copy of the final decision by the Board of Supervisors of Fairfield Township in the above-referenced matter. The exhibits referenced in the final decision have not been reproduced but are available upon request. Any appeal rights to the Board of Supervisors' decision are set forth in the Opinion and Order.

By signing this letter, I hereby certify that a true and correct copy of the final decision in this matter was mailed by first class mail to you on December 18, 2013.

As always, please do not hesitate to contact me should you have any questions regarding the content of this letter or this matter in general.

Very truly yours,

MCCORMICK LAW FIRM


J. Michael Wiley

JMW/jw
Enclosure

PLEASE REPLY TO
835 WEST FOURTH STREET • P.O. BOX 577 • WILLIAMSPORT, PA 17703
570/326-5131 • 570/326-5529 FAX
www.mclaw.com

IN RE: APPLICATION OF INFLECTION	:	FAIRFIELD TOWNSHIP
ENERGY, LLC FOR CONDITIONAL USE	:	BOARD OF SUPERVISORS
APPROVAL FOR USE OF A PORTION OF	:	
TAX PARCEL NO. 12-332-152 LOCATED TO	:	
BE KNOWN AS SHAHEEN PAD ON LAND	:	
OWN BY DONALD AND ELEANOR	:	
SHAHEEN, HUSBAND AND WIFE FOR AN	:	
OIL AND GAS WELL PAD AND DRILLING	:	
OF WELLS	:	Conditional Use – Opinion and Order

OPINION AND ORDER

RECORD – TRANSCRIPTS OF OCTOBER 7, 2013 AND NOVEMBER 4, 2013 HEARINGS AND DECEMBER 2, 2013 PUBLIC ACTION ON APPLICATION¹

EXHIBITS

1. Application of Inflection Energy, LLC containing:
 - (a) Shaheen Deed;
 - (b) Shaheen Lease;
 - (c) Shaheen Lease Assignment;
 - (d) Shaheen Zoning/Development Permit Application;
 - (e) Project Narrative;
 - (f) Shaheen – ESCGP-2 Application
 - (g) Shaheen – ESCGP-2 Drawings
 - (h) Shaheen – ESCGP-2 DEP Approval Letter
 - (i) Preparedness Prevention and Contingency Plan (PPC)
 - (j) Shaheen Drilling Permit Application; and,
 - (k) Shaheen Map (Proposed Eck B Pad with 1,000 foot and 3,000 foot circles).
2. PaDEP Operator NOV Report for Inflection Energy, LLC

CONTROLLING ORDINANCE PROVISIONS

1. Conditional uses are governed by Section 14.2 of the Fairfield Township Zoning Ordinance of 2007 (hereinafter “Ordinance”).

¹ Ann Diggan, Court Reporter, was hired by Fairfield Township to transcribe the October 7, 2013 and November 4, 2013 public hearings as well as the December 2, 2013 public action by the Board of Supervisors on the Conditional Use Application. Fairfield Township has not ordered the transcripts of said hearings and public action but transcription of same could be arranged through Ms. Diggan. Naturally, said transcripts would form the record of proceedings in this matter. The testimony presented and the witnesses who presented testimony and/or comment at the hearings are identified in the aforementioned record.

2. The criteria for review and approval of a given conditional use are set forth in Section 14.2.5 of the Ordinance.

3. General Conditional Use Criteria are set forth in Section 12.1 of the Ordinance.

4. Section 14.2 of the Zoning Ordinance governs the Conditional Use application review process and specifically reads:

The Township Supervisors may grant Conditional Use approval for only those uses set forth in Articles 4 through 6 of this Ordinance, District Regulations, pursuant to the express standards and criteria for the specified uses outlined in the Ordinance. In addition, the Supervisors may attach such reasonable conditions and safeguards as they deem appropriate to protect the public welfare and implement the purpose of this Ordinance.

5. Section 14.2.1 establishes the Application Procedure; Section 14.2.2 requires a Written Statement describing the tract of land at issue and its intended use; Section 14.2.3 establishes the Site Plan requirements for a Conditional Use application; Section 14.2.4 establishes the Hearing Requirements for a request for Conditional Use; Section 14.2.5 sets forth the Criteria for Review and Approval of Conditional Use; Sections 14.2.6 and 14.2.7 set forth how the Board of Supervisors is required to render its decision; Section 14.2.8 establishes that the Conditional Use, if approved, expires within six (6) months if the necessary Building/Zoning Permits are not acquired; and Section 14.2.9 governs Appeals.

6. Pursuant to Section 14.2.5, the Board of Supervisors, in making decisions on each application for a Conditional Use, shall consider the following general criteria, in addition to the special criteria established elsewhere in the Zoning Ordinance:

14.2.5.1 the purpose of the zone in which the requested conditional use is to be located and the compatibility of the requested conditional use with existing and potential land uses on adjacent tracts of land

14.2.5.2 whether the specific site is an appropriate location for the use, structure or condition;

14.2.5.3 whether the use developed will adversely affect the neighborhood;

14.2.5.4 whether the use will create undue nuisance or serious hazard to vehicles or pedestrians;

14.2.5.5 whether adequate and appropriate facilities and services will be provided to ensure the proper operation of the proposed use;

14.2.5.6 the economic, noise, glare, or odor effects of the conditional use on adjoining properties and properties generally in the district; and

14.2.5.7 whether satisfactory provision and arrangement had been made concerning the following:

- ingress and egress to the property and structure thereon with particular reference to automotive and pedestrian safety and convenience, traffic flow, control and access in case of fire other emergency;
- off-street parking and loading areas;
- waste collection, storage or disposal;
- utilities, with reference to location, availability and compatibility;
- screening and buffering with reference to type, dimensions and character;
- signs, if any, and proposed exterior lighting with reference to glare, traffic safety, economic effect and compatibility and harmony with properties in the district; and
- required yards and open spaces.

7. Pursuant to Section 12.1 of the Zoning Ordinance, the following general criteria shall apply to all conditional use applications:

12.1.1 Adequate, safe, and convenient facilities for pedestrian and motor vehicles including roadways, driveways, off-street parking and loading, sidewalks, malls, screening and landscaped areas to serve the project shall be provided. See Article 11 for supplemental regulations which may apply.

12.1.2 The proposed use shall maintain or enhance the character of the area in which it is proposed to locate.

12.1.3 A proposed use shall be located so as not to hinder the natural or presumed development of the area, or detract from the value of existing development.

12.1.4 A proposed use shall not constitute a safety or health hazard, a nuisance, or have a noxious effect on the surrounding area either due to appearance or operations.

12.1.5 It shall be demonstrated that the operating requirements of the proposed use shall necessitate the location of such use or building within the vicinity served by the proposed location.

12.1.6 Special Exception or Conditional uses proposed for Residential Agricultural are deemed most appropriate for prominent locations along collector streets, at corner locations and in area of existing mixed residential and non-residential uses. Such uses are not appropriate at locations in neighborhoods which are primarily residential in nature and where traffic impacts would be disruptive to the residential character.

12.1.7 The use or adaptation of a structure or lot for a Special Exception or Conditional use shall not involve the destruction of open spaces, lawns, landscaping and trees except for changes made to meet parking, screening or other requirements set forth by this Ordinance or approving board.

12.1.8 In the event sewer and water facilities are required for the proposed use, it shall be the applicant's responsibility to provide those facilities. DEP approved on-lot facilities may be acceptable for the following uses: Adult Entertainment; Agricultural Business; Animal Hospital/Kennel; Automotive Uses; Bed & Breakfast; Bulk Storage; Clubs & Lodges; Day Care Center; Dwelling – Single Family Detached; Group Care Facility; Hotel/Motel; Junkyard or Salvage Yard; Manufacturing, Warehousing, Laboratory; Outdoor Recreation Facilities; Parking Lot/Parking Garage; Professional Office; Public or Quasi-Public Use; Shopping Center; Surface Mining; or Waste Storage, Disposal or Processing Facility.

12.1.9 Stormwater maintenance facilities shall be provided which shall be designed to create no increase in the rate of runoff of stormwater by providing controlled release, infiltration and recharge area; evidence of maintenance and liability responsibilities shall be demonstrated; and facilities shall not conflict with pedestrian, motor vehicles, and adjacent property owners.

12.1.10 Compliance with the floodplain regulations of the Municipality and the Commonwealth, if applicable, shall be demonstrated prior to granting the zoning approval.

12.1.11 Permanent screening and landscaping shall be provided in accordance with Article 11 to shield adjacent residential districts, or uses from parking lots, illumination and headlights, noise, and other objectionable influences and to enhance the overall appearance of the community.

12.1.12 Lighting facilities shall be designed to insure that glare and direction illumination does not occur onto adjacent properties and roadways.

12.1.13 Sites shall be designed and constructed in accordance with the applicable Subdivision and Land Development Ordinance.

12.1.14 Information on the method of municipal waste collection and disposal shall be presented by the applicant.

12.1.15 Sites shall be designed as a unit for development in their entirety under single ownership and control; or satisfactory condominium arrangements shall be demonstrated.

12.1.16 All lots and buildings shall have access by way of an internal street system and shall have convenient emergency vehicle and equipment access.

8. The subject property is located in the RA-Residential Agriculture District and an oil and gas well pad and well drilling is not permitted in the RA-Residential Agriculture District as a permitted use, conditional use or special exception use. See, Section 4.2, at 4-1 to 4-2.

9. The matter was referred by the Zoning Officer pursuant to the provisions of Section 12.18 -- Uses Not Provided For:

Whenever, under this Ordinance, a use is neither specifically permitted or denied, and an application is made by an applicant to the Zoning Officer for such a use, the Zoning Officer shall refer the application to the Board of Supervisors to hear and decide such request as a conditional use. The Board of Supervisors shall have the authority to permit the use or deny the use in accordance with the standards governing conditional use applications set forth in Section 14.2 of this Ordinance. In addition, the use may only be permitted if:

12.18.1 It is similar to and compatible with other uses permitted in the zone where the subject property is located;

12.18.2 It is not permitted in any other zone under the terms of this Ordinance; and

12.18.3 It in no way is in conflict with the general purpose of this Ordinance.

The burden of proof shall be upon the applicant to demonstrate that the proposed use meets the foregoing criteria and would not be detrimental to the public health, safety and welfare of the neighborhood where it is to be located.

See, Section 12.18, at 12-22.

FINDINGS OF FACT

1. A public hearing was scheduled, noticed and held on October 7, 2013 at 8:00 p.m., at the Fairfield Township Building, 238 Fairfield Church Road, Montoursville, Fairfield Township, Lycoming County, Pennsylvania.

2. At the end of the time allotted on October 7, 2013 for the public hearing, the record was held open and the continued hearing date was publicly announced for the next regularly scheduled Board of Supervisors' meeting on November 4, 2013 at the Fairfield Township Building before the October 7, 2013 hearing was adjourned. In addition, the continued public hearing was also publicly advertised.

3. The public hearing continued as scheduled on November 4, 2013. After everyone was afforded an opportunity to present testimony and address the Board of Supervisors, the Board of Supervisors took action to close the public hearing following an appropriate motion, second and unanimous vote. Since the Board of Supervisors reserved a decision on the application following the conclusion of the public hearing on November 4, 2013, the Board of Supervisors took action on the application at its regularly scheduled monthly meeting on December 2, 2013, also at the Fairfield Township Building. The action to defer action on the conditional use application was publicly announced before the November 4, 2013 hearing was adjourned. The continuance of the matter for decision at the December 2, 2013 regularly scheduled monthly Board of Supervisors' meeting was also publicly advertised.

4. In addition to the required public notices being published in the Williamsport SunGazette, the Township Secretary used his best effort to provide direct mail notice of the hearings to each property owner immediately adjoining the Shaheen property based upon the records of ownership available to him. This method of direct mail notice is not a requirement of the Pennsylvania Municipalities Planning Code or the Ordinance but was done by the Township Secretary as an attempt to provide an additional level of notice to immediately adjoining property owners.

5. The Zoning Officer published and posted notice of the scheduled hearing with the assistance of the Township Secretary and posted the subject property as required by the Ordinance and the Pennsylvania Municipalities Planning Code. The public notices, mailed letter notice with list of recipients and the sign-in sheets for the October 7, 2013, November 4, 2013 and December 2, 2013 meeting dates are part of the record in this case.

6. The hearings in this matter as well as the public action by the Board of Supervisors were convened as scheduled at the appointed dates and times and the above-listed evidence was presented. All members of the Board of Supervisors were present and participated in the hearing.

7. Applicant is Inflection Energy, LLC and the owners of the property are Donald H. Shaheen and Eleanor R. Shaheen, husband and wife. Applicant's leasehold interest in the property is evidenced by the Oil and Gas Lease and Assignment of Leases documents made part of the record in this matter.

8. Applicant proposes to locate the oil and gas well pad on a portion of Tax Parcel No. 12-332-152 to located as depicted on the Shaheen Site Plans that accompanied Applicant's Application.

9. Applicant describes its proposed use in its Zoning/Development Permit Application as "Site will be used for the drilling, completion, production & operations of multiple gas wells."

10. The "Shaheen Pad" location is located on the Site Plan Map provided with the Application.

11. As noted above, this portion of the Township is located within the RA-Residential Agriculture District. From the mapping prepared by the Applicant, while there is only one residence that is located within the 1,000 foot radius of the proposed well pad location, there is a large multiple single family residential development and as well as many individual single family homes located within the 3,000 foot radius of the proposed well pad location.

12. According to the Application, the well pad is proposed to measure approximately 300 feet by 350 feet initially and will ultimately measure 150 feet by 150 feet once completed.

13. According to the Applicant, including the access road, there will be 17.43 acres of disturbance associated with the proposed Shaheen Pad and the associated development will consist of a stone drive entrance with a paved apron, level pad, well head and temporary sediment and erosion controls.

14. According to the Application, during construction and drilling, temporary construction facilities and a security guard will be present on site.

15. Once drilling operations are completed, the well pad will be reduced to 150 feet by 150 feet and the surrounding site will be restored to its original grade to the maximum extent possible.

16. Applicant testified that their initial site activity will involve the construction of the well pad itself and then the drilling and installation of two (2) horizontal wells on the proposed Shaheen Pad.

17. Applicant testified that it will take those precautions reasonable necessary to mitigate against noise and odor from the site and that there will be no lighting issues impacting adjoining neighbors.

18. Applicant through its testimony at the hearing identified the residences that could be seen from the well pad itself due to the location of the well pad on the site.

19. Applicant's site plan does provide distances from the well pad and adjoining properties and residences.

20. Applicant testified that no parking or staging of vehicles for the well pad construction or well drilling and related activities would occur within the Township right of ways.

21. Applicant testified that there would be a proposed 2,000,000 gallon impoundment area on site for fresh water only during the well fracking process.

22. Applicant testified that drill cuttings would be disposed of off-site.

23. Applicant testified that there would be appropriate signage for the well site.

24. Applicant testified that it would provide appropriate safety precautions for larger equipment being transported to the site as required by PennDOT.

25. Applicant testified that it would coordinate safety issues with the Township.

26. Applicant provided detailed testimony regarding how it will construct the onsite well pad and any wells on said pad.

27. Applicant testified that it will follow all regulatory requirements and obtain any and all necessary permits for the construction of the well pad and its well drilling and related well activities.

28. Applicant testified that the lighting at the proposed well pad site would not illuminate adjoining properties.

29. Applicant testified that it would access the site from Quaker State Road.

30. Applicant testified that there were approximately 125 drinking water wells within the 3,000 foot radius of the proposed Shaheen Pad and that Applicant would be taking samples from all drinking water wells within the 3,000 foot radius.

31. According to Applicant, total traffic is anticipated at 300 trucks during construction, 120 trucks during drilling and 225 during completion. Once each well has been developed and is operational, Applicant expected 1 vehicle per day at the site.

32. However, Applicant did also testify that if water trucks were required to provide water during the well fracking process, up to 1,600 truck trips per well could be required.

33. Applicant testified that it is attempting to provide water during the well fracking process by pipeline as opposed to by truck delivery but acknowledge those details were not yet finalized.

34. Applicant testified that the initial well pad construction and drilling process would take approximately three (3) months.

35. Applicant testified that any noise generated by Applicant's operations would be below the Lycoming County noise standards.

36. Applicant testified that all required permits would be obtained and that no wetlands were impacted by the proposed Shaheen Pad.

37. Considerable testimony was presented by the adjoining property owners and other residents of the Township regarding concerns with the proposed Shaheen Pad. Much of this testimony focused on the adjoining single family residential properties and concerns regarding the potential impacts of the Applicant's operations on property values, drinking water quality, general safety and well-being of the residents, concerns about potential for criminal activity, increase in truck traffic, and general concerns the impacts of the gas industry generally.

38. More specifically, issues were also raised with impacts on wetlands on and about the Shaheen property and the stream that runs through the Shaheen property.

39. The Township afforded all affected residents an opportunity to state their concerns and have their questions answered by Applicant over the course of two (2) hearing dates on October 7, 2013 and November 4, 2013. When no further testimony or questions were presented at the continued hearing on November 4, 2013, the Board of Supervisors, upon motion, duly seconded, closed the public hearing.

40. The Board of Supervisors, following the close of testimony, took the matter under advisement and review and deferred action on Applicant's application to the December 2, 2013 regularly scheduled Board of Supervisors' meeting.

41. The Board of Supervisors was sympathetic to the concerns raised by the affected residents and the conditions imposed upon the Applicant herein are designed to reasonably address the stated concerns and to address the factors the Board of Supervisors are required to consider under the Ordinance.

42. The Board of Supervisors was concerned about the proximity of the proposed Shaheen Pad to the affected single family residents as detailed above – of the proposed well pad sites proposed by Applicant to date within the Township, the proposed Shaheen Pad is the closest

in distance to a significant number of single family residential homes as is evident from the materials supplied by Applicant itself. As will be discussed below, the law governing conditional uses is well-established and the Board of Supervisors is obligated to properly balance the facts and apply the law.

43. At the December 2, 2013 regularly scheduled public meeting, the Board of Supervisors took action on Applicant's application and, upon motion, duly seconded, voted 2 to 1 to approve Applicant's application subject to the conditions set forth hereinbelow.

CONCLUSIONS OF LAW

1. The Applicant's application and proposed uses are properly within the jurisdiction of the Board of Supervisors of Fairfield Township as a conditional use requests.

2. Public hearing of the above-captioned conditional use request was duly noticed as required by the terms of the Ordinance and the Pennsylvania Municipalities Planning Code and due process was afforded all parties to these proceedings and the Board of Supervisors took action on the request during a public meeting as also required.

3. As Applicant's request is governed by Section 12.18 of the Ordinance, the Board of Supervisors must follow the procedure set forth in Section 14.2 of the Ordinance and consider the factors set forth in Section 12.1 of the Ordinance.

4. Section 14.2.6 of the Ordinance provides that the Board of Supervisors shall establish findings of fact and issue a written decision within forty-five (45) days after the last hearing before the Board.

5. Parties may stipulate to facts before the Board of Supervisors.

6. Parties may also submit argument to the Board of Supervisors, including a proposed disposition of any pending matter, and the Board of Supervisors may consider such argument in rendering its decision.

7. It is well-established under the laws of this Commonwealth that a conditional use is “a form of permitted use”. See, 1 Ryan, Pennsylvania Zoning Law and Practice, § 5.1.4 (1992, as amended through to 2010 Cumulative Supplement). The general governing standard regarding conditional uses has been stated as follows: “The existence of a conditional use provision indicates legislative acceptance of the proposition that the use is consistent with the zoning plan and should be denied only where the adverse impact on the public interest exceeds that which might be expected in normal circumstances.” *Id.*, at § 5.1.5, citing Appeal of the Estate of Achey, 484 A.2d 874 (Pa. Cmwlth. 1984), *aff’d at* 501 A.2d 249 (Pa. 1985).

8. As is set forth in the Applicant’s application, the proposed Shaheen Pad satisfies the requirements of the Zoning Ordinance applicable to the proposed use in the RA-Residential Agricultural District. No waivers or variances of any of the applicable zoning criteria are being sought as part of Applicant’s application.

9. The law in the Commonwealth of Pennsylvania regarding conditional uses is well-developed and presents a clear standard. In reviewing this Application, Fairfield Township must employ a shifting burden of persuasion. See, Sheetz, Inc. v. Phoenixville Borough Council, 804 A.2d 113 (Pa. Cmwlth. 2002). Initially, Applicant must demonstrate to Fairfield Township that its proposed use is a type permitted by conditional use and the proposed use complies with the requirements in the ordinance for such a conditional use. See, In re McGlynn, 974 A.2d 525 (Pa. Cmwlth. 2009). Once this burden is satisfied, a presumption arises that the proposed use is

consistent with the general welfare. *See, H.E. Rohrer, Inc. v. Zoning Hearing Board of Jackson Township*, 808 A.2d 1014 (Pa. Cmwlth. 2002).

10. The law is then clear that the burden then shifts to objectors, if any, to rebut the presumption by proving, to a high degree of probability, the proposed use will adversely affect the public welfare in a way not normally expected from the type of use. *Id.* Once Applicant demonstrates that the proposed project is consistent with the requirements of the Ordinance, the law presumes that the proposed project is consistent with the general welfare of the community and the burden shifts to anyone opposed to the project to demonstrate, to a high degree of probability, that the project will have impacts beyond what is expected from this type of use – in this instance, whether there are impacts that are present with the proposed Shaheen Pad that are beyond what is expected by a proposed well pad use generally. *See, e.g., Aldridge v. Jackson Township*, 983 A.2d 247, 253 (Pa. Cmwlth. 2009).

11. The law is clear that “mere speculation as to possible harm is insufficient”. *Sunnyside Up Corporation v. City of Lancaster Zoning Hearing Board*, 739 A.2d 644 (Pa. Cmwlth. 1999). Also, the Pennsylvania Supreme Court ruled that bald assertions, personal opinions and perceptions of the neighbors concerning the effect on the neighborhood and statements over the effect on property values were not sufficient to deny approval. *See, Bureau of Corrections v. Pittsburgh City Council*, 532 A.2d 12 (Pa. 1987).

12. With respect to traffic impacts, the law states that there must be a high probability that the proposed use will generate traffic patterns not normally generated by this type of use and that this abnormal traffic will pose a substantial threat to the health and safety of the community. *See, Appeal of Martin*, 529 A.2d 582, 584 (Pa. Cmwlth. 1987).

13. By way of additional guidance, the courts have also consistently held objectors do not meet their burden of proving an adverse impact by “merely introducing evidence to the effect that property values in the neighborhood may decrease”. *See, e.g., In re Appeal of Estate of Achey*, 484 A.2d 874, 878 (Pa. Cmlth. 1984). Similarly, as to concerns about the effect of a particular development on the tax base, the Pennsylvania courts have held that tax base concerns cannot be decisive in a zoning case. *See, e.g., Brentwood Borough v. Cooper*, 431 A.2d 1177, 1179 (Pa. Cmwlt. 1981). Finally, it is well-settled that aesthetic considerations cannot justify a zoning decision. *See, e.g., Clinton County Solid Waste Authority v. Wayne Township*, 643 A.2d 1162, 1172 (Pa. Cmwlt. 1994).

14. When the law governing review of conditional use applications generally is applied to the facts presented during the hearings in this matter, while the Board of Supervisors are sympathetic to the issues raised by the objectors to the proposed Shaheen Pad, sufficient evidence was not presented during the hearing to support a denial of Applicant’s application particularly given that the majority of the impacts are associated with the initial construction of the well pad and the drilling and fracking of the wells and, once this process is completed, the well pad and gas well structures associated with the well pad do not present the same type of impacts as during the initial phases of construction and drilling.

15. Furthermore, the Board of Supervisors are mindful that its authority in this matter focuses on zoning approval and not on regulation of the gas industry itself which is the purview of other regulatory bodies – the Board of Supervisors must defer the permitting of the gas wells to the appropriate agencies of the Commonwealth of Pennsylvania.

16. Accordingly, the Board of Supervisors developed the conditions below to address and balance the issues raised during the hearings in this matter and its grant of Applicant’s

application is specifically conditioned upon the conditions set forth herein. A failure by Applicant to adhere to all stated conditions would constitute a violation of the approval of granted hereunder with conditions.

17. The Board of Supervisors interprets the Zoning Ordinance to allow Applicant's request to be considered under the guidance of Section 12.18. This interpretation allows this matter to be reviewed through the conditional use process and allows the imposition of the reasonable conditions set forth below.

18. Given that nature of the proposed oil and gas well pad use as detailed in the Applicant's Application, provided Applicant full complies with the materials provided in its Application and constructs its well pad as detailed in the Application, the Board of Supervisors believe it appropriate to approve the Application subject to the following conditions as set forth in Paragraph 9 below.

19. In light of the factors that must be addressed by the Board of Supervisors, the following conditions are deemed appropriate and necessary to assure compliance with the general purposes of the Ordinance, the specific requirements of conditional use approval and the need to demonstrate compatibility with other uses permitted in the RA-Residential Agricultural District:

(a). The Conditional Use Approval is granted for the proposed oil and gas well pad use as detailed and contained in Applicant's Application and additional approvals may be required in the event that Applicant substantively changes or modifies its proposed use and/or the nature and extent of the Shaheen Pad Site Plans;

(b). Applicant is required to enter into an Excess Roadway Maintenance Agreement subject to the review and approval of the Township Solicitor and Township Engineer and form agreement containing the basic terms and requirements for such an Excess Maintenance Agreement has been provided to Applicant as said document has been drafted and approved by Fairfield Township with such provisions and requirements as are adequately protective of the infrastructure and roadways of Fairfield Township and is reasonably written to meet the review factors that Fairfield Township is required to balance in its review and approval of Applicant's Application including requirements pertaining to maintenance and repair standards and specifications as well as insurance requirements.

(c). Applicant shall engage a PennDOT pre-qualified contractor to complete all excess maintenance and preventative maintenance repairs;

(d). Applicant shall provide emergency contact information (including names, telephone numbers, mobile telephone numbers, and email addresses) upon request.

(e). Whenever school is in session, Over-Posted-Weight-Vehicles shall be prohibited on all roadways identified by the Township in the Excess Roadway Maintenance Agreement as school bus routes on Monday through Friday during times school student are picked up or dropped off or at such other times as the identified roadways are utilized by school buses.

(f). Over-Posted-Weight-Vehicles shall strictly comply with speed limits on all roadways identified by the Township Excess Roadway Maintenance Agreement.

(g). Applicant shall provide Fairfield Township with a schedule of construction/mobilization/demobilization operations involving Over-Posted-Weight-Vehicles and shall provide such schedule at least seven (7) calendar days in advance of operations involving Over-Posted-Weight-Vehicles.

(h). Applicant shall provide Fairfield Township with a weekly schedule of operations involving Over-Posted-Weight-Vehicles. In the event that there are any "mid-week" changes to a weekly schedule, Applicant shall immediately notify Fairfield Township of such changes.

(i). Applicant shall prohibit the parking and or staging of any vehicles within or from Fairfield Township rights-of-way.

(j). Applicant shall provide, install, and maintain advanced warning signs along municipal roadways to provide advanced warning to motorists of driveways that will be used by Over-Posted-Weight-Vehicles and said signs (including the placement and installation of said signs) shall be in strict accordance with PennDOT requirements and specifications.

(k). Applicant shall coordinate with Fairfield Township to prohibit movement of Over-Posted-Weight-Vehicles on municipal roadways during winter snow removal and de-icing operations.

(l). The conditional use approval is contingent upon compliance with all design standards and specifications set forth in Application and/or as otherwise

testified to during hearing including but not limited to representations regarding light, noise and odor;

(m). Applicant use best efforts to reasonably visually screen the well pad and well pad construction, drilling and fracking operations from all adjoining properties and in particular the adjoining single family residential properties ; and,

(n). The conditional use approval is contingent upon Applicant obtaining all required federal, state and local permits and/or approvals.

20. Contingent upon the protections afforded by the conditions attached to the approval of Applicant's conditional use request, the Board of Supervisors finds that the criteria for review set forth in Sections 12.18, 14.2.5 and 12.1 have been sufficient satisfied in that the application as submitted by the Applicant with the imposed conditions meets the requirements of the Ordinance for conditional use approval, the site selected is generally appropriate for the proposed uses, and no evidence was offered that there would be any adverse impacts to the surrounding neighborhoods or negative impacts to adjoining properties that are not appropriately mitigated by the attached conditions.

21. At the December 2, 2013 regular meeting, the Board of Supervisors acted upon Applicant's request and granted same subject to the specific conditions set forth in Paragraph 9 hereinabove and as reflected in the Order hereinbelow. The Board of Supervisors finds that these conditions are necessary and appropriate and fall within its jurisdiction under the provisions of Section 12.18, 14.2.5, and 12.1 of the Ordinance.

22. Consistent with the Findings of Fact and Conclusions of Law set forth herein, the Board of Supervisors hereby enters the following order in support of its decision to grant conditional use approval to Applicant.

ORDER

WHEREFORE, upon a consideration of the foregoing, it is hereby ordered and directed that:

1. The Applicant's requests for conditional use permit is granted expressly conditioned upon and subject to the following conditions:

(a). The Conditional Use Approval is granted for the proposed oil and gas well pad use as detailed and contained in Applicant's Application and additional approvals may be required in the event that Applicant substantively changes or modifies its proposed use and/or the nature and extent of the Shaheen Pad Site Plans;

(b). Applicant is required to enter into an Excess Roadway Maintenance Agreement subject to the review and approval of the Township Solicitor and Township Engineer and form agreement containing the basic terms and requirements for such an Excess Maintenance Agreement has been provided to Applicant as said document has been drafted and approved by Fairfield Township with such provisions and requirements as are adequately protective of the infrastructure and roadways of Fairfield Township and is reasonably written to meet the review factors that Fairfield Township is required to balance in its review and approval of Applicant's Application including requirements pertaining to maintenance and repair standards and specifications as well as insurance requirements.

(c). Applicant shall engage a PennDOT pre-qualified contractor to complete all excess maintenance and preventative maintenance repairs;

(d). Applicant shall provide emergency contact information (including names, telephone numbers, mobile telephone numbers, and email addresses) upon request.

(e). Whenever school is in session, Over-Posted-Weight-Vehicles shall be prohibited on all roadways identified by the Township in the Excess Roadway Maintenance Agreement as school bus routes on Monday through Friday during times school student are picked up or dropped off or at such other times as the identified roadways are utilized by school buses.

(f). Over-Posted-Weight-Vehicles shall strictly comply with speed limits on all roadways identified by the Township Excess Roadway Maintenance Agreement.

(g). Applicant shall provide Fairfield Township with a schedule of construction/mobilization/demobilization operations involving Over-Posted-Weight-Vehicles and shall provide such schedule at least seven (7) calendar days in advance of operations involving Over-Posted-Weight-Vehicles.

(h). Applicant shall provide Fairfield Township with a weekly schedule of operations involving Over-Posted-Weight-Vehicles. In the event that there are any "mid-week" changes to a weekly schedule, Applicant shall immediately notify Fairfield Township of such changes.

(i). Applicant shall prohibit the parking and or staging of any vehicles within or from Fairfield Township rights-of-way.

(j). Applicant shall provide, install, and maintain advanced warning signs along municipal roadways to provide advanced warning to motorists of

driveways that will be used by Over-Posted-Weight-Vehicles and said signs (including the placement and installation of said signs) shall be in strict accordance with PennDOT requirements and specifications.

(k). Applicant shall coordinate with Fairfield Township to prohibit movement of Over-Posted-Weight-Vehicles on municipal roadways during winter snow removal and de-icing operations.

(l). The conditional use approval is contingent upon compliance with all design standards and specifications set forth in Application and/or as otherwise testified to during hearing including but not limited to representations regarding light, noise and odor;

(m). Applicant use best efforts to reasonably visually screen the well pad and well pad construction, drilling and fracking operations from all adjoining properties and in particular the adjoining single family residential properties ; and,

(n). The conditional use approval is contingent upon Applicant obtaining all required federal, state and local permits and/or approvals.

2. The approval of the conditional use with the attached conditions addressed herein are specific to the use as proposed by Applicant in its application and as testified to during the October 7, 2013 and November 4, 2013 public hearing, and any departure or material alteration from each respective use as detailed and set forth by Applicant may be grounds for the Township to revoke its approval and/or require the submission of a new application for review and approval.

3. This Order fully determines the pending conditional use requests and is subject to the provisions of Section 14.2.8 of the Ordinance requiring Applicant to obtain the necessary

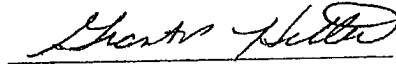
Building/Zoning Permits or comply with the conditions of this Order within six (6) months from the date of this Order.

4. Pursuant to the provisions of the Ordinance and the applicable provisions of the Municipalities Planning Act, 53 P.S. § 10002-A, any appeal of this decision must be filed with the Court of Common Pleas of Lycoming County, Pennsylvania, within thirty (30) days after the entry of the decision.

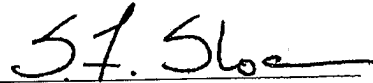
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FAIRFIELD TOWNSHIP, LYCOMING COUNTY

This 18th day of December, 2013

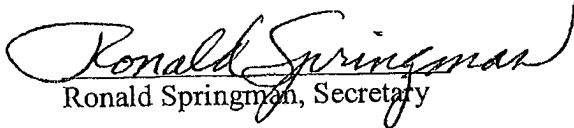


Grant P. Hetler, Chairman

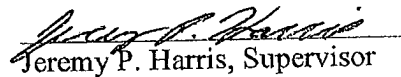


Scott F. Slocum, Vice-Chairman*

* Supervisor Slocum voted against
the proposed Shaheen Pad application



Ronald Springman, Secretary



Jeremy P. Harris, Supervisor

APPENDIX B

Opinion of the Lycoming County Court of Common Pleas

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

BRIAN GORSLINE,	:
DAWN GORSLINE,	:
PAUL BATKOWSKI and	:
MICHELE BATKOWSKI,	: CIVIL ACTION – LAW
Appellants	:
vs.	: NO. 14-000130
	:
BOARD OF SUPERVISORS OF	:
FAIRFIELD TOWNSHIP,	: ZONING/LAND USE APPEAL
Appellants	:
	:
vs.	:
	:
INFLECTION ENERGY, LLC, and	:
DONALD SHAHEEN and	:
ELEANOR SHAHEEN, his wife	:
Intervenors	

OPINION AND ORDER

Before the Court is the Appeal of Brian and Dawn Gorsline, and Paul and Michele Batkowski (Appellants) to the decision of the Board of Supervisors of Fairfield Township (Fairfield or the Board), which granted a conditional use approval to Inflection Energy, LLC (Inflection) for the construction and use of an oil and gas well pad on property owned by Donald and Eleanor Shaheen and located in Fairfield Township.

Inflection filed a Zoning and Development Permit Application (Application) to construct an oil and gas well site on the Shaheen property. As described in its Application, the proposed use of the property was as a site to “be used for the drilling, completion, production and

operations of multiple gas wells.” Public hearings on the Application were held before the Board on October 7, 2013 and November 4, 2013.

The well pad is proposed to measure approximately 300 feet by 350 feet initially and will ultimately measure 150 feet by 150 feet once completed. The well pad would be located on the Shaheen property which is located within a Residential Agricultural (RA) district. While there is only one residence that is located within a 1000 foot radius of the proposed well pad location, there is a large residential development, as well as many individual family homes located within a 3000 foot radius of the proposed well pad location.

On December 2, 2013, public action was taken by the Board of Supervisors on the Conditional Use Application. In accordance with the provisions of 53 P.S. § 10908 (10), the Board transmitted its final decision on December 18, 2013. On January 17, 2014, Appellants filed a land use appeal from the written decision of the Board. In their notice of appeal, Appellants lodged numerous objections to the decision.

Arguments on the appeal and the issues raised therein were subsequently held before the Court. The parties agreed that the Court could hear and decide the appeal on the record without any further facts being presented. As well, the parties submitted written legal briefs in support of their respective positions.

In opposition to the appeal, Fairfield, Inflection and the Shaheens first argue that Appellants have waived any right to raise the issues at this juncture because these issues were not raised before the Board.

During the oral argument on this matter, Fairfield, Inflection and the Shaheens submitted that the appeal is governed by the Local Agency Law and in particular 2 Pa. C.S.A. § 753. Appellants disagreed and argued that their appeal is governed by the applicable provisions of Pennsylvania's Municipal Planning Code (MPC).

Conditional uses in Fairfield Township are governed by § 14.2 of the Fairfield Township Zoning Ordinance of 2007 ("ordinance"). The criteria for review and approval of a given conditional use are set forth in § 14.2.5 of the ordinance. The ordinance also establishes procedures for the application and mandates criteria that the Board must consider in making a decision. In this matter and pursuant to § 14.2.6 of the ordinance, the Board established findings of fact and issued a written decision within the prescribed time period after the last hearing. The Board transmitted its written decision "in accordance with the provisions of 53 P.S. § 10908 (10)." Clearly, the Board conducted the hearing and issued its decision pursuant to the MPC.

The appeal by Appellants was styled as a "Land Use Notice of Appeal." Land use appeals are specifically addressed in the MPC. 53 P.S. § 11001-A.

The argument by Fairfield, Inflection and the Shaheens that the provisions of the Local Agency Law apply to the exclusion of the MPC lacks merit. The Board issued its decision pursuant to the MPC and Inflection and the Shaheens intervened in the appeal pursuant to the MPC. 53 P.S. § 11004 (A).

As Appellants correctly note, the hearing and argument on the land use appeal is governed by the MPC and in particular 53 P.S. § 11005-A. That provision specifically notes that

“[i]f the record below includes findings of fact made by the governing body, board or agency whose decision is brought up for review and the court does not take additional evidence, the findings of the governing body shall not be disturbed by the court if supported by substantial evidence.” 53 P.S. § 11005-A.

Pursuant to 53 P.S. § 11006-A, in a land use appeal, “the court shall have the power to declare any ordinance or map invalid and set aside or modify any action, decision or order of the governing body...brought up on appeal.”

There is no provision in the MPC that limits the Court from addressing issues raised by Appellants to only those issues that Appellants raised before the Board. Accordingly, the Court dismisses the waiver argument of Fairfield, Inflection and the Shaheens.

Alternatively, even if the position of Appellees and Intervenors is deemed to have merit, the Court agrees with Appellants that the issues asserted by them in their appeal should be addressed for due cause shown. When the ordinance was adopted, it is safe to assume that neither the drafters, the municipality or the citizens contemplated the issues involved in oil and gas exploration. Moreover, and in light of the Supreme Court’s decision in Robinson Township v. Commonwealth, 83 A.2d 901 (Pa. 2013), the issues raised by Appellants have significant constitutional import.

The first issue asserted by Appellants concerns whether Fairfield erred as a matter of law by reviewing the land use application as a “use provided for” under § 12.18 of the ordinance, rather than an application for “surface mining.”

Unfortunately, § 12.18 of the ordinance is inartfully drafted and confusing in part. The Court will endeavor to apply the ordinance and its required criteria consistent with its language and intent. The first criterion that the applicant must establish is that the proposed use is neither specifically permitted nor denied “under [the] ordinance.” Clearly, the burden falls on Inflection to establish that its proposed use complies with the requirements of the ordinance. Aldridge v. Jackson Township, 983 A.2d 247, 253 (Pa. Commw. 2009).

Appellants argue that an oil and gas well pad and well drilling fall within the definition of surface mining which is permitted as a conditional use in the industrial district. They assert that the plain language of the ordinance provides that surface mining activities are authorized as a conditional use in the industrial district of Fairfield. Specifically, they further assert that the ordinance defines “surface mining” to include industrial surface activities aimed at extracting minerals from the ground and that the ordinance defines “minerals” to include “oil and natural gas.” They contend that an interpretation of “surface mining” that does not include natural gas extraction within its meaning would render the term “minerals” and the phrase “oil and natural gas” meaningless and superfluous.

While the Court sees some merit in this argument, given the specific language of the ordinance and the legal precedents governing the interpretation of ordinances in general, the Court cannot agree with Appellant’s position. Under the specific terms of the ordinance, the use proposed on the property is only permitted if it is not permitted in any other zone under the terms of the ordinance. Ordinance, § 12.18.2. Article 6 of the ordinance entitled “Industrial District”

permits as a conditional use “surface mining.” Ordinance, § 6.2.3.12. Surface mining is defined in Article 2. It includes the extraction of minerals from the earth but specifically does not include those mining operations carried out beneath the surface by means of shafts, tunnels, or other underground mine openings. Minerals are defined under Article 2 as well. The definition of minerals includes “crude, oil and natural gas.”

The Court agrees with Fairfield and the Intervenors that the language of the ordinance does not provide for Inflection’s natural gas operations. It makes no mention of natural gas operations and said operations are not included in the definition of surface mining. As Fairfield and the Intervenors assert, in order to qualify as surface mining, it is not enough to simply involve certain minerals. Instead, the ordinance requires the removal of the minerals in a certain fashion and specifically excludes subsurface mining.

Moreover, even if the language can be considered ambiguous, this Court must give great weight and deference to the interpretation of it by Fairfield. In Re: Thompson, 896 A.2d 659, 669 (Pa. Commw. 2006); 1 Pa. C.S. § 1921 (c) (8). As Intervenors correctly note in their brief, “The basis for the judicial deference is the knowledge and expertise that a [municipality] possesses to interpret the ordinance that it is charged with administering.” In Re: Thompson, *supra*.

As well, and also as Fairfield and the Intervenors correctly note, this Court is required to interpret any ambiguous language in favor of the property owner and against any implied extension of the restriction. City of Hope v. Sadsbury Township Zoning Hearing Board,

890 A.2d 1137, 1143 (Pa. Commw. 2006). “In interpreting the language of zoning ordinances to determine the extent of the restriction upon the use of the property, the language shall be interpreted, where doubt exists as to the intended meaning of the language written and enacted by the governing body, in favor of the property owner and against any implied extension of the restriction.” 53 P.S. § 10603.1. Accordingly, the Court concludes that Fairfield did not commit an error of law in concluding that the proposed use was neither specifically permitted or denied in the zoning ordinance.

The second criteria the Board must consider in addressing a conditional use are set forth in § 14.2 of the ordinance. The burden of proof with respect to these factors depends on whether the factors are deemed to be specific or general. Bray v. Zoning Board of Adjustment, 410 A.2d 909, 911 (Pa. Commw. 1980); Appeal of Baker, 339 A.2d 131 (Pa. Commw. 1975). In light of the Court’s decision below with respect to the remaining § 12.18 factors, the Court need not address the § 14.2 factors.

As set forth in the December 18, 2013 Opinion and Order of Fairfield, it concluded that the proposed use “satisfies the requirements of the zoning ordinance applicable to the proposed use in the RA-Residential Agricultural District.” (Opinion and Order, Conclusions of Law, Paragraph 8). Fairfield further found that the criteria for review as set forth in § 12.18 have been “sufficient (sic) satisfied.” (Opinion and Order; Conclusions of Law, Paragraph 20). More specifically, Fairfield concluded that the site selected is generally appropriate for the proposed uses, and no evidence was offered that there would be any adverse impacts to the

surrounding neighborhoods or negative impacts to adjoining properties that are not appropriately mitigated by the Board's conditions to the conditional use approval. (Opinion and Order, Conclusions of Law, Paragraph 20). Curiously, other than a general finding by Fairfield that the criteria in § 12.8 have been satisfied, there are no specific findings regarding the required factors set forth in §§ 12.18.1, 12.18.2 or 12.18.3.

§ 12.18.1 establishes the third set of criteria. The use may only be permitted if the proposed use is similar to and compatible with other uses permitted in the zone where the subject property is located. The burden is on the applicant to prove such. Aldridge, 983 A.2d at 253.

This Court must specifically determine whether there is substantial evidence to support a finding that Inflection demonstrated that its proposed use is similar to the other uses permitted in the zone where the subject property is located. Stated otherwise, the Court must determine whether relevant evidence was presented to Fairfield such that a reasonable person might accept it "as adequate" to establish that the proposed use is similar to other uses "permitted in the zone."

The Court concludes that with respect to the similarity issue Fairfield abused its discretion in concluding that Inflection complied with its burden. Fairfield's decision is not supported by such relevant evidence that a reasonable mind might accept as adequate to support a conclusion.

First, and perhaps determinatively, the evidence presented as to the actual proposed use is not at all clear. The actual proposed use is fraught with significant uncertainties.

Inflection presented the testimony of both Thomas Irwin, a Senior Field Operations Manager for Inflection and Thomas Gillespie, the Director of Regulatory Affairs and Environmental Health and Safety at Inflection. While numerous specifics were set forth in connection with the proposed use, many determinative questions were left unanswered.

Inflection was unable to state with any certainty whatsoever, how many wells would be drilled. Transcript, 10/713, at 13 (“We will probably drill two wells off the pad initially, and it depends upon the results.”). Inflection was unable to state with certainty how much water would be needed. Id. (“we like to start with a couple million gallons before we start the fracking operation.”). Inflection was unable to state with certainty the type of energy it would be utilizing. Id. at 15 (“If we decide to use electricity---. We will probably use solar, that is what we have been using on all our other sites. There is electricity to the location though if we need it.”). Inflection was unable to state how long the site would be used for construction or otherwise. Id. at 26 (“We may come back...and so that makes it longer, a more drawn out process.”). Inflection also could not say if after they drilled through the Marcellus shale, they would be drilling other layers, thus being on the property much longer. Id.

With respect to adjoining property owners, Inflection could not state if the wells would be going under their property or “whose property it goes under.” Id. at 35. With respect to a water source, Inflection could not confirm whether it would be supplied by pipeline or trucked in. Id. at 42-43.

No one testified that the proposed use is similar to other uses specifically

permitted in the residential agriculture district. The permitted uses in a RA district are: Accessory Uses/Structures; Agriculture; Dwelling – Single Family Detached; Essential Services; Family Based Group Home; Family Day Care Home; Forestry Activities; Home Occupation; Hunting Camp or Seasonal Dwelling; and No Impact Home Based Business. Zoning Ordinance §4.2.1.

Fairfield argues in its brief that a natural gas pad is similar to the public service facilities that are permitted by conditional uses in the RA District. Such facilities include: power plants or substations; water treatment plants or pumping stations; sewage disposal or pumping plants and other similar public services, whether publicly or privately owned.

Appellants contend, and rightfully so, that Inflection's testimony was conclusory and not supported by any factual evidence whatsoever. Further, they persuasively argue that the uses permitted in the RA District do not involve the use of industrial machinery and chemicals, do not entail thousands of roundtrips of heavy truck traffic, do not cause loud noises at all hours of the day, do not impose threats to human health and safety and do not have negative impacts on the environment.

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. 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, is that correct?" After this prompting, Mr. Irwin said, "Yes." 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.

Inflection also testified that it "received approval" for four other wells in the same zoning district. The Court cannot conclude that this statement, in and of itself, constitutes such relevant evidence as a reasonable mind might accept as adequate to support the similarity conclusion. Inflection did not present any evidence whatsoever describing the specifics with respect to those other "four" wells. A resident, however, noted that the wells that have gone in seem to be much further from residential areas. Transcript, 11/4/2013, at 67. Furthermore, the criteria relates to similarity to explicit permitted uses, not other gas wells which are a use that is neither specifically permitted nor denied in the zoning ordinance. Moreover, Inflection is not constructing these gas wells to furnish natural gas to the residents of the Pines Development, or even Fairfield Township.

There was also insufficient evidence to support the finding that Inflection met its burden of proving that the proposed use was compatible. 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. 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.

As well, numerous residents of Fairfield Township as well as other concerned

individuals provided contrary proof. Their testimony raised specific issues regarding the compatibility of the subject property, the general purposes of the RA district and how the proposed use conflicted with those purposes and other uses permitted in the zone. Their concerns went beyond mere speculation, bald assertions, personal opinions or perceptions. Their concerns were factually based and supported by cogent arguments and evidence.

By way of example, numerous questions were raised regarding what, in fact, the limits were with respect to the proposed use. If the limits could not be explained by Inflection, the proposed use could not be deemed to be compatible with other uses. As well, the record is replete with testimony of individuals verifying the uses presently in existence in the zoning district and describing in detail how the proposed uses by Inflection would not be compatible.

The next factor to be considered is the general purposes factor set forth in 12.18.3. The proposed use may only be permitted if it “in no way is in conflict with the general purposes of [the] ordinance.”

Appellants argue that the purpose of the RA district is to encourage development of a quiet, medium density, residential environment. See ordinance § 3.1. They argue further that unlike the uses permitted in the RA district, the Shaheen pad activities are clearly industrial related activities and uses.

Appellants note that the general purposes of the ordinance are to promote public health, safety and welfare; encourage the most appropriate use of land; conserve and stabilize the value of property; provide adequate open spaces for light and air; prevent undue concentration of

population; and lessen congestion on streets and highways.

They argue that the testimony at the hearing established that the Shaheen pad poses the risk of spills, fires, accidents and other activities that threaten the public health, safety and welfare. Moreover, they argue that no testimony was offered to show that the Shaheen pad activities will conserve and stabilize the value of the residential properties or that traffic congestion would remain the same or lessen. Since traffic congestion, public health, safety and welfare, and property values are all general purposes of the ordinance, Appellants argue that Fairfield could not properly conclude that the proposed use is in accordance with the ordinance purposes.

According to the clear language of Article 3 of the ordinance, the RA district is generally intended for application to rural development areas. The purpose of the regulations for this district is to foster a quiet, medium density residential environment while encouraging the continuation of agricultural activities and the preservation of prime farmland. Industrial uses are discouraged in this district. Compatible public and semipublic uses such as schools, churches and recreational facilities are provided for. As well, a higher density residential development may be permitted under certain circumstances. Ordinance, § 3.1.

As set forth in Article 4 of the ordinance, the purpose of the RA district is to encourage the continued use of areas of the Township for rural living including open space, agricultural and residential uses. Such uses typically do not require public utilities or community services. Uses which specify the provision of community or public utilities may be feasible in

certain locations in the Township provided that the developer is able to furnish the necessary utility infrastructure. Ordinance, § 4.1.

The only evidence presented by Inflection, in support of meeting its burden in connection with the general purposes factor was the testimony of Mr. Irwin. Mr. Irwin stated that he was familiar with the purpose of the RA zone and “believed” that the proposed use furthered that purpose as set forth in § 4.1 of the ordinance. Yet he failed to support his conclusion with any facts whatsoever. He failed as well to reference, let alone provide any facts, as to the purposes of the RA district as set forth in § 3.1 of the ordinance.

However, and in addition to the uncertainties relating to the actual use and activities, many facts were developed at the hearing supporting the position that the proposed use is actually in conflict with the aforesaid general purposes.

During construction and drilling there would be an extreme amount of truck traffic. Mr. Irwin testified that “there will be a lot of trucks...I am guessing 1400, 1800 trucks just to get the gravel on location to meet the DEP permit we have applied for.” Transcript, 10/7/13, at 18. There will be about 206 truck trips to bring the three drilling rigs onto and off of the property – three loads in and three loads out for the conductor rig, 40 loads in and 40 loads out for the top all rig, and 60 loads in and 60 loads out for the horizontal rig. *Id.* at 18-19. These figures did not include any trucks to get 2,000,000 gallons of water to the property. *Id.* at 13, 42-43. Inflection did not know how it was going to get the water to the property. It would take an additional 100 trucks to install a pipeline and if a pipeline did not go through it could be a very

large number of trucks. Id. at 43. Mr. Irwin initially estimated the number of trucks to be 3000, but then he changed that number to 500 per well and stated that initially there would probably be two wells. Id. at 43-44. At the second hearing, however, Mr. Irwin stated that it would be 1430 trucks each with a trip in and out per well. Transcript, 11/4/13, at 61-62. The truck traffic would run 24 hours a day, nonstop except for two 45-minute shutdown periods. Transcript 10/7/13 at 44. Contrary to this clear evidence, the Board found that (excluding water trucks) “total traffic is anticipated at 300 trucks during construction, 120 trucks during drilling and 225 during completion.” Board Opinion and Order, Finding of Fact 31.

With respect to burning off excess gas, or what is known as a flare or a controlled kick, Mr. Irwin could only state that Inflection did not “anticipate” doing it. Id. at 38. However, Inflection did not anticipate doing that with another well either. When they did, there were numerous noise complaints and Inflection shut down over the holidays. Id. at 50-51.

With respect to noise, Mr. Irwin’s testimony was inconsistent. At one point he stated that “there might be a little noise” and “there is not very much, but if there is, [Inflection] tries to help the residents out.” Id. at 21, 39. But if there is a lot, they put some hay bales around. Id. When a resident asked what the fracking was like compared to the seismic testing that shook her house and rattled her dishes, Mr. Irwin stated, “It’s loud, and like I have said, we will try and take care of the neighbors.” Id. at 65. When the resident indicated that her house was way up high, Mr. Irwin said, “I understand that. It is going to be hard to do that. But we will try and we have tried with all of our neighbors so far.” Notably, however, when one of the residents asked

how she or any of her neighbors would be compensated for the noise, trucks and everything else that goes on, Mr. Irwin replied “There is no compensation, I am sorry. There is just no compensation. We will try to work with you, and if there is noise we will try to keep the noise down.” *Id.* at 48-49. Despite this testimony and there being no reference in the transcripts to any Lycoming County noise standards, the Board found in Finding of Fact 35 that “Applicant testified that any noise generated by Applicant’s operations would be below the Lycoming County noise standards.”

With regard to how long this whole ordeal was going to last, the Application submitted by Inflection stated the drilling and completion stages would be for a period of 2-3 years. Intervenor’s Exhibit 6, at 2, 10. In response to questions from the residents, Mr. Irwin testified that that it would take at least 9 months, maybe longer. Transcript, 10/7/13, at 26, 32. Mr. Gillespie testified that the aggregate number of days with truck traffic would be 90 days, but the whole process takes about 4 months or so – three to four weeks of construction, a month to six weeks where there would be no trucks on the road, two to three weeks of actual well drilling, weeks later the fracking string comes in and they don’t leave for another three weeks.¹ Transcript, 11/4/13, at 58-60. This, however, does not include any time for any post construction activities such as reduction of the well pad from 350’ by 300’ to 150’ by 150’. See, Transcript, 10/7/13, at 12.

¹ Inflection’s attorney, Mr. Karpowich, suggested that the whole process would take 90 days. Transcript, 11/4/13 at 38. It is well settled, however, that arguments and statements of attorneys are not evidence. Commonwealth v. LaCava, 542 Pa. 160, 182, 666 A.2d 221, 231 (1995); Pa.SSJI (Civ.) 1.190.

Curiously, when Mr. Minium, a resident who worked on a well pad in Susquehanna County, was commenting that life is going to “suck” for the next two years for anybody who lives around that pad and how it was going to be 24 hours a day, seven days a week and 365 days a year (Transcript, 11/4/13, at 45-48), the Chairman of the Board interrupted him and said that the “inconvenience” would be gone in 90 days. Transcript, 11/4/13/ at 48. Not surprisingly given the Chairman’s comments, but contrary to the clear evidence of record, the Board found that “Applicant testified that the initial well pad construction and drilling process would take approximately three (3) months.” See The Board’s Opinion and Order, Finding of Fact 34.

Of great concern to the Court is the use of the term “no way” in the ordinance. Section 12.8.3 of the zoning ordinance states that the use may only be permitted if it “in no way is in conflict with the general purposes of this Ordinance.” The Court defines “no way” as when there is a zero percent chance that something will or will not occur. There was insufficient evidence to conclude to a 100% certainty that the proposed use would not conflict with the general purposes of the Ordinance.

The construction of anywhere from one or more well pads with potentially one to four wells on each well pad is clearly in conflict with the general purposes of the ordinance as set forth in the aforesaid sections. It is not an open space, agricultural or residential use, and it does not foster a quiet, medium density residential environment while encouraging the continuation of

agricultural activities and the preservation of prime farm land.

The final factor addressed in 12.18 concerns detriment to public health, safety and welfare of the neighborhood where the well pad and wells are to be located. Ordinance, § 12.18.3. Regarding the applicable burden of proof with respect to this factor, Appellants argue that pursuant to the express terms of the ordinance, the Applicant, Inflection, bears the burden of proof.

A reading of the ordinance supports Appellants' position. The ordinance reads as follows:

"The burden of proof shall be upon the Applicant to demonstrate that the proposed use meets the foregoing criteria and would not be detrimental to the public health, safety and welfare of the neighborhood where it is to be located."

Appellants logically argue that the provision means what it says.

Appellee and Intervenor argue on the contrary that despite said express language, case law retains the burden of production on the Objectors. Remarkably, they are correct. While the ordinance places the "burden of proof" on the Applicant as to the matter of detriment to health, safety and general welfare, "such a provision... merely places the persuasion burden on the Applicant. The Objectors still retain the initial presentation burden with respect to the general matter of detriment to health, safety and general welfare." Manor Healthcare Corp. v. Lower Moreland Twp. Zoning Hearing Bd., 590 A.2d 65, 70 (Pa. Commw. 1991). The objectors must "raise specific issues concerning the proposal's general detrimental effect on the community

before the applicant is required to persuade the factfinder that the intended use would not violate the health, safety and welfare of the community.” Id. at 71, citing Appeal of R.C. Maxwell Co., Id. at 1303.

As with the other factors, Appellants and the other objectors present at the hearing raised numerous and specific issues concerning the proposal’s general detrimental effect on the community.

The Court has already discussed the truck traffic, noise, and lighting. Such certainly is not consistent with the serene, pastoral setting of a RA district. It also will have a detrimental effect on the community. This area has rolling hills, a couple of streams and some wetlands. Transcript, 10/4/13, at 11-12. The proposed location of the well pad is below several of the resident’s homes. By Mr. Irwin’s own admission, this topography makes it more difficult to shield the residents from the noise and lights. Mr. Minium, who worked at a well pad in another county, testified that given the location of the well pad “down in that hole”, the noise would echo up out away from the pad, and the lights would bring a glow so that nobody would be able to have a nice dark evening after Inflection starts drilling. Transcript, 11/4/13, at 45-47. Mr. Pentz also testified that with the trucks constantly running up and down Quaker State Road, the people wouldn’t be able to sleep and the road would be all chewed up until Inflection was done. Id. at 45.

This is not the typical construction situation. It is common knowledge that when an individual hires contractors to build a house or a farm, the work typically is performed during

daylight hours in the normal business week. In comparison, the construction and drilling for the proposed use involves constant or near constant truck traffic, illumination and noise from trying to get through thousands of feet (likely about a mile) of rock formations at all hours of the day and night, seven days a week until the well is completed. This would be less of a concern, and perhaps not a concern at all, in a commercial or industrial area where people aren't trying to sleep. In a commercial area, the businesses likely would be closed at night. In an industrial area, if there is a second or third shift operating, those industrial uses will have their own noise and light and won't notice or won't be bothered by the noise and light involved in the construction of a well pad. Here, however, there are in excess of 125 homes whose residents likely will be adversely affected by Inflection's activities, especially the activities that occur during nighttime.

The residents also had concerns about the individuals who would be working near their homes. Mr. Irwin did not know if the numerous contractors working on the site required criminal background checks for its employees. Transcript, 10/7/13, at 78. Of the 400 people who would be working on the pad over the course of the project, 98 or 99% would not be Inflection employees. Id. Inflection's attorney stated, "We are hiring local, insured, licensed, respectable contractors." Transcript, 11/4/13, at 3. Later in the hearing a resident asked, "But do they have background checks?" Id. at 38. The attorney replied, "We don't know that." Id. When the resident indicated that she still had concerns, the attorney said "they do sign agreements that they're going to be law abiding and they're not going to commit any crimes." Id. at 39. Mr. Gillespie read a portion of an Inflection company policy into the record. The policy did state that

there was a conduct policy that all Inflection's employees, contractors and other persons engaged in company business are obligated to follow, which prohibited, among other things, engaging in criminal conduct or any action that is detrimental to Inflection's efforts to operate properly and lawfully. The policy, however, did not state that contractors or their employees who had prior criminal records would not be hired. Instead, it merely stated that the company "inquires into the background of all of its employees, including contractors." Id. at 56. Unlike the standard of conduct policy relating to future activities, the inquiries into backgrounds did not explicitly cover "other persons engaged in company business" or describe what type of inquiry is made. In other words, Inflection could hire Company X to engage in construction activities such as hauling water, stone or concrete to the site and investigate Company X, but not investigate the individuals actually driving the trucks onto the site or even know who those individuals are. The language quoted by Mr. Gillespie regarding background inquiries also could mean that Inflection just inquires about licensing, insurance and/or bonding (and not criminal background checks) as suggested by the statements of Inflection's attorney earlier in the hearing.

The residents raised concerns about radiation at both hearings. Inflection's testimony on this issue was again somewhat inconsistent. Mr. Gillespie testified that the radiation levels are checked because they are going down into a deep formation, a different formation than exists in the upper mile of the earth, and bringing drill cuttings of that deep formation up to the surface. Transcript, 11/4/13 at 22. "Because we are opening a hole up to something a mile down below the ground, everybody just wants to be sure you're not bringing

something up or opening up a pathway for additional radiation to come out with natural rocks.”

Id. at 22-23. Mr. Gillespie downplayed the residents’ concerns by stating they have never detected anything in this region that is out of the ordinary background levels we see and radiation is in just about all the water in the region, including the residents’ drinking water. Id. at 31.

When asked if he was saying the residents’ drinking water had just as high level of radium 226 (a radioactive element) as a mile down, however, Mr. Gillespie said, “I wouldn’t say that, but there is no correlation between the depths of water you are looking at and the amount of any element within it.” Id. When a resident said he thought there would be more radiation further down, Mr. Gillespie contradicted his earlier testimony and said, “The rock formations that are down there are related to and of the same system rock formations as the ones that are directly under your feet.” Id.

The resident also cited a Duke University study which concluded that the waterways in Pennsylvania are now exceeding levels of appropriate radioactivity because of hydrofracking. Inflection, through both its attorney and Mr. Gillespie suggested that questions about the Duke University study challenged the process which is already permitted by DEP and went beyond what Mr. Gillespie was there to testify about. Inflection, however, did not refute the Duke study. Instead, Mr. Gillespie was “not ready to weigh in and say that the Duke people are right or wrong. It’s not settled yet.” Transcript, 11/4/13, at 36.

Stating that the process is already permitted by DEP begs the question. Merely because hydrofracking is regulated by DEP, certainly does not mean the activity should occur in

this particular residential area. Inflection acknowledged that there are in excess of 125 wells that supply water to the residents within 3000 feet of Inflection's proposed well pad. Transcript 10/4/13, at 23-24. The residents were concerned that the increased levels of radioactivity in the waterways would also show up in their water supply and they were pointing to the Duke study to show that placing a natural gas well in this residential zoning district would be detrimental to their health, safety and welfare.

The residents were also concerned that the well casings would fail and affect their health, safety and welfare. Inflection could not say that no casings had ever failed in the fracking process. It admitted that it was "very possible" that well casings "weren't installed properly in Lycoming County." Transcript, 11/4/13, at 29, 30. Inflection tried to downplay that by stating, "That is an installation, that's not a failure." The resident aptly replied, "Well the point is though installation or failure, it still could render someone's water undrinkable." Id. at 30.

In addressing the detriment question, Inflection merely stated that it "did not believe" that the proposed use would adversely affect the neighborhood or create any nuisance or hazards to people or pedestrians. Transcript, 10/7/13, at 20. A resident, however, noted that there is a blind hill coming out of the Pines Development. Id. at 39. Excessive truck traffic and a blind hill coming out of the development certainly could create a nuisance if not an actual hazard to people in the development.

Inflection cursorily stated that the proposed use would not have an adverse impact on health, safety or welfare of the public. Id. at 21. On additional questioning, Inflection could

only respond “okay” when advised that there is no evidence to support its claim of no adverse impact. Id. at 32. Without any supporting evidence or “meat”, Inflection stated that it would control the effects on health, safety and environment “at the site.” Id. at 33.

Brian Gorsline testified about citations and violations. Particularly, Inflection was cited on July 18, 2013 by DEP for failure to properly control or dispose of industrial or residual waste to prevent pollution of the Commonwealth waters. Over a period of approximately five years, out of 180 wells inspected in Lycoming County, there were 660 violations. Transcript, 11/4/13 at 40, 41.

Given all of the aforesaid evidence, the Court finds that the Appellant objectors presented substantial evidence that there is a high degree of probability that the use will adversely affect the health, welfare and safety of the neighborhood. Therefore, they met their burden of production. The burden of persuasion, however, was not met by Appellees and Intervenor. In fact, there is no evidence to support the Board’s conclusion that said burden was met, let alone substantial evidence.

While the Court appreciates the deference that the Board presumably was paying to the intent and mandates of the legislature through Act 13 of 2012, the Pennsylvania Oil and Gas Act, such deference cannot be in abrogation to the criteria of the ordinance.

As the Pennsylvania Supreme Court recently noted, the technique used to recover the natural gas contained in Marcellus shale “inevitably” does “violence to the landscape.”

Robinson Township v. Commonwealth, 83 A.3d 901, 914 (Pa. 2014). One unconventional gas

well uses several million gallons of water. Id. at 915. “The Commonwealth’s experience of having the benefit of vast natural resources [with] unrestrained exploitation...[has] led to destructive and lasting consequences not only for the environment but also for the citizens’ quality of life.” Id. at 963. “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...perhaps rivaling the environmental effects of coal extraction.” Id. at 976.

Fairfield Township has a substantial and immediate interest in protecting the environment and the quality of life within its borders. Id. at 919-920. This quality of life is a constitutional charge that must be respected by all levels of government. Id. at 952 (citing Franklin Twp. v. Commonwealth, 499 Pa. 162, 452 A.2d 718, 722 & n.8 (1982)). “When government acts, the action must, on balance, reasonably account for the environmental features of the affected locale.” Id. at 953.

While the Court understands the constraints that the Board may have been operating under as a result of Act 13 and the litigation regarding its constitutionality, our Supreme Court has now ruled with respect to such, the citizens’ rights cannot be ignored and must be protected. Neither the Applicant nor the Board explained how unconventional natural gas operations are compatible with the permitted uses in this residential district. Furthermore, the Board’s findings were not supported by substantial evidence and, in some instances, were clearly in contravention of the evidence.

Appellant has raised several other issues in its appeal. In light of this Court’s

findings with respect to the factors set forth in § 12.18, the Court sees no need to address the other issues. In fact, the Court deems it improper to do so. The Court should not and cannot address, for example, constitutional issues if they need not be addressed.

In conclusion, taking into account the respective burdens as well as the standard for this Court's review, and acknowledging the appropriate deference that should be given to the Board in connection with its decision, the Court nonetheless concludes that the Board's findings with respect to the § 12.18 factors are not supported by substantial evidence. Accordingly, the appeal of Appellants shall be granted and the decision and Order of the Board shall be vacated and set aside.

ORDER

AND NOW, this 29th day of August 2014, for the reasons set forth herein, the Appeal of Appellants Gorsline and Batkowski is GRANTED. The decision of the Fairfield Township Board of Supervisors issuing a conditional use permit to Inflection Energy, LLC to construct and operate an unconventional natural gas well pad on the Shaheen property is VACATED, SET ASIDE and REVERSED.

By The Court,

Marc F. Lovecchio, Judge

cc: J. Michael Wiley, Esquire
Joshua J. Cochran, Esquire
Mark Szybist, Esquire

8 W Market St, Suite 901, Wilkes-Barre, PA 18701
George Jugovic, Esquire
Citizen's for Pennsylvania's Future
200 First Ave, Suite 200, Pittsburgh PA 15222
Kevin M. Walsh, Jr.
85 Drasher Rd, Drums PA 18222
Gary Weber (Lycoming Reporter)
Judge Lovecchio (Attn: Elizabeth Gula, Intern)
Work File

APPENDIX C

Opinion of the Commonwealth Court

Brian Gorsline, Dawn Gorsline,
Paul Batkowski and Michele
Batkowski

V.

Board of Supervisors of Fairfield Township

V.

Inflection Energy, LLC and
Donald Shaheen and
Eleanor Shaheen, his wife,
Appellants

:
 :
 :
 :
 :
 :
 : No. 1735 C.D. 2014
 : Argued: June 15, 2015

BEFORE: HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE ANNE E. COVEY, Judge

BY JUDGE LEAVITT

FILED: September 14, 2015

Inflection Energy, LLC and Donald and Eleanor Shaheen appeal an order of the Court of Common Pleas of Lycoming County (trial court) that denied Inflection's application to construct and operate a natural gas well on land it has leased from the Shaheens.¹ In so doing, the trial court set aside the order of the Board of Supervisors of Fairfield Township granting a conditional use permit for the well. We reverse the trial court.

¹ The Marcellus Shale Coalition has filed an *amicus curiae* brief on behalf of Inflection, one of its members.

Background

Inflection proposes to locate a natural gas well on land in Fairfield Township's Residential Agriculture (RA) District. The Township has three zoning districts: the RA District, the General Commercial District and the Industrial District. Most of the land in the Township has been assigned to the RA District. Because the Fairfield Township Zoning Ordinance (October 16, 2007), *as amended* (Zoning Ordinance), does not specifically authorize natural gas wells, Inflection applied for a conditional use permit under the "savings clause," which authorizes the Board of Supervisors to grant a conditional use where a proposed use is not specifically authorized anywhere in the Township. In that case, the applicant must show that the proposed use is consistent with the uses that are permitted in the zoning district and with the public health and safety. ZONING ORDINANCE, §12.18.² The Township's Board of Supervisors had previously granted conditional use approval for four other natural gas wells in the RA District.

The Board of Supervisors scheduled a public hearing on Inflection's application, which was opposed by Appellees Brian and Dawn Gorsline and Paul and Michele Batkowski and other neighbors (collectively, Neighboring Landowners). They expressed concern that the project would adversely affect their well water, as well as the stream located on the Shaheen property. They were also concerned about truck traffic, noise, light pollution from nighttime operations, the criminal record of employees that Inflection may hire to work at its well and how the well could affect their property values.³

² The text of Section 12.18 of the Zoning Ordinance is set forth *infra*. See also Reproduced Record at 493a (R.R. ____).

³ The Delaware Riverkeeper Network filed an *amicus curiae* brief in support of Neighboring Landowners.

At the first hearing, Thomas M. Erwin,⁴ Inflection's senior field operations manager, testified. Erwin, who holds a M.A. in Engineering and has 35 years of experience in the oil and gas industry, was accepted as an expert in the design, permitting, and development of gas wells.

Erwin began by noting that the Shaheen property consists of 59.88 acres, has no buildings and is currently used for farming. The only improvement is the farm access road. Inflection's well pad will measure 300 feet by 350 feet during construction and 150 feet by 150 feet after construction. The natural gas well operation will include a level pad, a well head, a water impoundment for 2,000,000 gallons of water, and sediment and erosion controls. The well pad will be located at the lowest visible point on the property. Erwin explained that Inflection will

probably drill two wells off the pad initially, and then it depends upon the results. You could drill more wells off of that pad.

Reproduced Record at 15a (R.R. ____). The farm access road will be improved to connect the well pad to Quaker State Road and will be constructed to meet applicable safety standards. The remainder of the Shaheen property will continue to be farmed.

During the 90-day construction period, an average of 35 trucks will visit the site per day. Many more will be required when the road is graveled. A total of 120 trucks will enter the property during the drilling phase and 225 during the completion phase. Once each well becomes operational, it is unmanned; one pick-up truck a day will visit the well. Inflection plans to provide water by

⁴ His name was spelled "Irwin" in the transcript, which was not correct. Inflection Brief at 7.

pipeline, but if that does not work, water will have to be brought in by truck. The amount of water needed depends on the number of “fracs” done. R.R. 46a.

Erwin estimated that the well, which will run for 24 hours a day, would be used for nine months. He acknowledged that Inflection had been at a well site in Eldred, Pennsylvania for over a year and continues to drill on the property.⁵

Erwin testified that there is one home within 1,000 feet of the well pad and a large residential development within 3,000 feet of the well pad. There are more than 125 water wells within a 3,000-foot radius of the proposed well pad; water samples will be taken from these wells before drilling begins. Erwin stated that the well operation would not create noise, nighttime lighting or odors. The drilling phase will produce noise, but it will be abated with bales of hay. Further, Erwin stated that Inflection will work with neighbors should they develop concerns about noise.

Neighboring Landowners questioned Erwin about the potential for contaminating water wells, the noise, the increase in truck traffic and the potential for employees at the well pad posing a risk to the safety of the community. The Board continued the proceeding so that Inflection could provide additional evidence regarding these concerns of Neighboring Landowners.

At the second hearing, Inflection produced its plan for Quaker State Road. It also provided its Master Service Agreement, which requires all employees to pass a criminal background check. Inflection also presented Thomas D. Gillespie, P.G., who is Inflection’s director of regulatory and environmental

⁵ Inflection’s erosion and sediment control plan states that Inflection will be drilling and completing numerous wells on a rotating basis and will be in the well drilling and well completion stage at the Shaheen well site for two to three years.

affairs and a licensed geologist for over 30 years. He testified in response to the health and safety concerns raised by Neighboring Landowners.

Gillespie testified about the stream and wetlands on the Shaheen property. He explained that Inflection's erosion and sediment control plan for the stream was approved by the Pennsylvania Department of Environmental Protection (DEP). The plan evaluated the entire site for storm water runoff, erosion, and sediment transport. It also accounts for the water to be used at the site for fracking and ensures that there will be no increase in erosion. Gillespie explained that the well pad will not involve that part of the Shaheen property that is a wetland. Further, the approved plan obligates Inflection not to flood the wetland or, alternatively, starve it of water.

Neighboring Landowners questioned Gillespie. He reiterated that the plan was designed to prevent any environmental insults. Nevertheless, in the unlikely event a neighbor's well or land was affected, Inflection would "set it right until you and every regulator involved is satisfied." R.R. 298a. Gillespie explained that a well is drilled close to a mile below the surface, which is far below the water that serves Neighboring Landowners' wells.

Gillespie was asked about the expected truck count per day, as opposed to the aggregate truck count for the project. He responded that in addition to the average of 35 trucks per day during the 90-day construction phase, there would be 150 trucks per day during the drilling phase, which lasts about a week for each well. Thereafter, truck traffic would be minimal.

Neighboring Landowners did not present any evidence in opposition to that presented by Inflection. They did, at the Board's invitation, make statements. One of them, Gorsline, used his statement to provide a report from DEP that listed citations that had been issued to Inflection at other gas drilling operations.

Board of Supervisors' Decision

The Board of Supervisors found, first, that Inflection's proposed use was neither permitted nor denied anywhere in the Township. It then concluded:

3. As Applicant's request is governed by Section 12.18 of the [Zoning] Ordinance, the [Board] must follow the procedure set forth in Section 14.2 of the [Zoning] Ordinance and consider the factors set forth in Section 12.1 of the [Zoning] Ordinance.

Board Decision, Conclusion of Law No. 3. The Board focused its 23-page decision to the question of whether Inflection satisfied the standards for a conditional use under Section 14.2.5 of the Zoning Ordinance.⁶ In general, Section 14.2.5 requires the conditional use not to: adversely affect the neighborhood; create an undue nuisance or serious hazard; adversely impact the area economically; or create excessive noise, glare or odor. Further, the conditional use must satisfy standards for traffic, parking, and waste disposal. The Board concluded that Inflection met its burden on each of these factors.

⁶ Section 14.2.5 states, in relevant part, as follows:

The Supervisors shall, in making decisions on each application for a Conditional Use, consider the following general criteria, in addition to the special criteria established elsewhere in this Ordinance.

14.2.5.1 the purpose .. and compatibility of the requested conditional use...;

14.2.5.2 whether the specific site is an appropriate location for the use...;

14.2.5.3 whether the use developed will adversely affect the neighborhood;

14.2.5.4 whether the use will create undue nuisance or serious hazard...;

14.2.5.5 whether [the use will be properly operated];

14.2.5.6 the economic, noise, glare, or odor effect of the conditional use...;

14.2.5.7 whether satisfactory provision [has been made regarding traffic flow, parking, waste management, utilities and open spaces].

ZONING ORDINANCE, §14.2.5; R.R. 514a.

This conclusion created a presumption that Inflection's proposed use was consistent with the general welfare and safety of the public. Accordingly, the burden shifted to Neighboring Landowners to rebut that presumption. The Board held that Neighboring Landowners did not meet their burden. Neighboring Landowners expressed concerns about their property values, their drinking water quality, increased truck traffic and noise, but their concerns were based on speculation. Neighboring Landowners did not present any evidence to substantiate their concerns.

The Board approved Inflection's conditional use application, subject to 14 conditions. The conditions placed restrictions on over-weight vehicles; required the posting of the weekly schedule of over-weight vehicles; prohibited Inflection from parking vehicles on the Township's right-of-ways; required Inflection to install and maintain warning signs along Township roads to warn motorists; required Inflection to comply with Township standards for light, noise and odor; required Inflection to screen the well operations from residential properties; and required Inflection to comply with all federal, state and local permits.

Trial Court Decision

Neighboring Landowners appealed to the trial court, which did not take additional evidence. The trial court agreed that the proposed use was neither permitted nor denied in any zoning district in the Township and therefore was governed by the "savings clause" set forth in Section 12.18 of the Zoning Ordinance. It states:

Whenever, under this Ordinance, a use is neither specifically permitted or denied, and an application is made by an applicant to the Zoning Officer for such a use, *the Zoning Officer shall refer the application to the Board of Supervisors to hear and decide such request as a conditional use. The Board of*

Supervisors shall have the authority to permit the use or deny the use in accordance with the standards governing conditional use applications set forth in Section 14.2 of the Ordinance. In addition, the use may only be permitted if:

12.18.1 It is similar to and compatible with other uses permitted in the zone where the subject property is located;

12.18.2 It is not permitted in any other zone under the terms of this Ordinance; and

12.18.3 It in no way is in conflict with the general purpose of this Ordinance.

The burden of proof shall be upon the applicant to demonstrate that the proposed use meets the foregoing criteria and would not be detrimental to the public health, safety and welfare of the neighborhood where it is to be located.

ZONING ORDINANCE, §12.18; R.R. 493a (emphasis added). Noting that it was Inflection's burden to satisfy each factor in Section 12.18, the trial court held that it did not do so. Accordingly, it reversed the Board's grant of the conditional use permit to Inflection.

In its reversal decision, the trial court first considered whether Inflection's proposed well was similar to other uses expressly permitted in the RA District. The trial court criticized Inflection's application as too imprecise to do this comparison. For example, Inflection was uncertain how many wells would be drilled; how much water would be used; how long it would be at the site; or whether the horizontal drilling would reach land adjacent to the Shaheens. The trial court rejected Erwin's testimony that Inflection's proposed well was similar to a public service facility. The trial court also found that Inflection's operation of four other well pads in the Township's RA District was irrelevant because Inflection did not present specific information about those other wells.

The trial court then considered whether Inflection's proposed well was compatible with other uses permitted in the RA District. Section 4.1 of the Zoning Ordinance states as follows:

The purpose of the Residential Agriculture District is to encourage the continued use of the areas of the Township for rural living including open space, agricultural, and residential uses. Such uses typically do not require public utilities or community services. Uses which specify the provision of community or public utilities may be feasible in certain locations in Fairfield Township provided that the developer is able to furnish the necessary utility infrastructure.

ZONING ORDINANCE, §4.1; R.R. 410a. In addition, Section 3.1 of the Zoning Ordinance describes the RA District as follows:

This District is generally intended for application to rural development areas where public and sewer facilities are not presently available and may not be available in the near or immediate future. *The purpose of the regulations for this district is to foster a quiet, medium-density residential environment while encouraging the continuation of agricultural activities and the preservation of prime farmland.* To this end, lot sizes are based upon the need to safeguard the health of the citizens by requiring ample space for the placement of on-lot sewage and water facilities, but yet providing for reduction of these minimum requirements where public sewer and/or water systems are developed. *Industrial uses are discouraged in this district; compatible public and semi-public uses such as schools, churches, and recreational facilities are provided for;* and higher density residential development may be permitted under certain conditions.

ZONING ORDINANCE, §3.1; R.R. 408a (emphasis added).

Noting that the RA District is intended for homes and farming, which are quiet uses, the trial court concluded that Inflection's proposed well was not a

compatible use. The trial court cited the number of truck deliveries that would be needed during the construction phase to deliver the gravel, the drilling rigs and installation of the water pipeline. If a pipeline was not authorized, thousands of truck deliveries would be needed to deliver water to the site. The truck traffic was expected to run 24 hours a day.

The trial court found Erwin's testimony regarding noise inconsistent. Although he stated that there would not be "much" noise, he also stated that Inflection would attempt to reduce noise. When asked whether fracking caused loud noises, Erwin stated, "It's loud, and like I have said, we will try and take care of the neighbors." R.R. 67a.

Finally, the trial court held that Inflection did not prove that its proposed use would not be detrimental to the public health, safety and welfare of the neighborhood. Neighboring Landowners flagged numerous concerns about the noise and lights generated by an operation that would run all night long and seven days a week. Gorsline's report from DEP showed that Inflection had been cited in 2013 for failing to properly control or dispose of industrial waste to prevent water pollution. Over a period of five years DEP found 600 violations at the 180 wells it inspected in Lycoming County.

The trial court granted Neighboring Landowners' appeal, nullifying the decision of the Board of Supervisors to grant Inflection a conditional use permit. Inflection appealed to this Court.

Appeal

On appeal,⁷ Inflection raises four issues. First it contends that the trial court erred in holding that Inflection did not prove that its well would be similar to and compatible with uses permitted in the RA District and in no way contrary to the general purpose of the Zoning Ordinance. Second, it contends that the trial court erred in holding that Inflection did not meet its burden of proving that its proposed use would not be detrimental to the health, safety and welfare of the neighborhood. Third, it contends that the trial court erred because it gave no consideration to the 14 conditions imposed by the Board. Fourth, the trial court erred by considering issues that Neighboring Landowners did not raise in the proceeding conducted by the Board.

Conditional Use

A conditional use involves the use of the land, as opposed to the particular design details of the development. *Joseph v. North Whitehall Township Board of Supervisors*, 16 A.3d 1209, 1215 (Pa. Cmwlth. 2011). An applicant is entitled to a conditional use as a matter of right, unless it is determined “that the use does not satisfy the specific, objective criteria in the zoning ordinance for that conditional use.” *In re Drumore Crossings, L.P.*, 984 A.2d 589, 595 (Pa. Cmwlth. 2009). The applicant bears the burden of establishing that the proposed conditional use satisfies the criteria in the zoning ordinance. *Id.* The zoning board is the fact-finder, with the responsibility for credibility determinations and the weight to assign the evidence. *Joseph*, 16 A.3d at 1218. Further, the zoning board’s

⁷ Where, as here, the trial court did not take additional evidence, our review is limited to determining whether the zoning board committed an error of law or abuse of discretion. *Weiser v. Latimore Township*, 960 A.2d 924, 929 n.9 (Pa. Cmwlth. 2008).

“interpretation of its own ordinance is entitled to great deference and weight.” *Id.* at 1215.

In some circumstances, the trial court may make its own findings of fact. Section 1005-A of the Municipalities Planning Code (MPC) states as follows:

If, upon motion, it is shown that proper consideration of the land use appeal requires the presentation of additional evidence, a judge of the court may hold a hearing to receive additional evidence, may remand the case to the body, agency or officer whose decision or order has been brought up for review, or may refer the case to a referee to receive additional evidence, provided that appeals brought before the court pursuant to section 916.1 shall not be remanded for further hearings before any body, agency or officer of the municipality. *If the record below includes findings of fact made by the governing body, board or agency whose decision or action is brought up for review and the court does not take additional evidence or appoint a referee to take additional evidence, the findings of the governing body, board or agency shall not be disturbed by the court if supported by substantial evidence. If the record does not include findings of fact or if additional evidence is taken by the court or by a referee, the court shall make its own findings of fact based on the record below as supplemented by the additional evidence, if any.*

53 P.S. §11005-A (emphasis added).⁸ In short, the trial court may make its own findings where it takes additional evidence or where the municipality or zoning hearing board did not make findings of fact. Where the record contains findings of fact, the trial court may reject those findings not supported by substantial evidence. 53 P.S. §11005-A.

⁸ Act of July 31, 1968, P.L. 805, added by the Act of December 21, 1988, P.L. 1329, 53 P.S. §11005-A.

Analysis

The gravamen of Inflection's appeal is that its proposed use is similar to and compatible with uses allowed in the RA District either as a matter of right or as a conditional use. These uses range from essential services and hunting camps to parking garages, offices, funeral homes, and public service facilities. ZONING ORDINANCE, §4.2.⁹ Inflection claims that its proposed well is similar to a "public service facility," which is defined as follows:

The erection, construction, alteration, operation or maintenance of buildings, power plants or substation, water treatment plants or pumping stations, sewage disposal or pumping plants and *other similar public service structures* by a utility, whether publicly or privately owned, or by a municipal or other governmental agency, *including the furnishing of* electrical, gas, communication, water supply and sewage disposal services.

ZONING ORDINANCE, §2.2; R.R. 398a (emphasis added). Inflection asserts that its well will serve the general public by producing natural gas for its use and consumption. Further, the Board has already permitted four other gas well pads within the RA District, which shows that Inflection's proposed use is compatible with other uses in the RA District.

⁹ Section 4.2.1 states that "Agriculture," "Dwelling-Single Family Detached," "Family Based Group Home," "Family Day Care Home," "Essential Service," "Forestry Activities," "Home Occupation," and "Hunting Camp or Seasonal Dwelling" are permitted uses. ZONING ORDINANCE, §4.2.1; R.R. 410a.

Section 4.2.2 permits "Agricultural Business," "Bed and Breakfast Inn," "Day Care Center," "Multiple Family Housing Development," "Funeral Home," "Group Care Facility," "Hospital, Hospital Administration & Support Uses," "Mobile Home Park," "Nursing or Retirement, Assisted Living Facility," "Parking Lot/Parking Garage," "Professional Office," "Public or Quasi-Public Use," "*Public Service Facility*," "Recreation, Commercial," and "Recreation, Public" as conditional uses. ZONING ORDINANCE, §4.2.2; R.R. 410a-411a (emphasis added).

Inflection also argues that the proposed use does not conflict with the “general purposes of this [Zoning] Ordinance.” ZONING ORDINANCE, §12.18.3; R.R. 493a. Indeed, Section 603(i) of the MPC requires a municipality’s regulation of land use to provide for “reasonable development of minerals.” 53 P.S. §10603(i). The Zoning Ordinance defines a “rural resource area” as “including ... mining, quarrying and other extractive industries....” ZONING ORDINANCE, §2.2; R.R. 400a.

Neighboring Landowners counter that it was Inflection’s burden to show that its natural gas development was similar to and compatible with other uses permitted in the RA District, and it did not do so. Simply establishing that other gas well pads were permitted in the RA District is not enough. Inflection had the duty to show that its gas well pad “in no way is in conflict with the general purposes of this [Zoning] Ordinance.” ZONING ORDINANCE, §12.18.3; R.R. 493a. Landowners contend that Inflection did not do so.

The Township adopts the arguments of Inflection. It explains that when it enacted the Zoning Ordinance, the “Marcellus Shale and oil and gas land use was not in play.” Township Brief at 17. Therefore, “the [Zoning] Ordinance is silent on oil and gas land uses.” *Id.* at 18. However, the savings clause in Section 12.18 authorizes uses not expressly identified where they are similar to and compatible with other uses expressly permitted in the zoning district chosen by the applicant. The Township contends the trial court improperly substituted its judgment for that of the Board of Supervisors, which is empowered to make the relevant factual findings and to apply the Zoning Ordinance standards to the evidence. If the trial court believed that the Board was not sufficiently detailed in its analysis, the appropriate remedy was to order a remand.

Section 1005-A of the MPC permits the trial court to make its own findings where (1) it takes additional evidence or (2) “the record does not include

findings of fact.” 53 P.S. §11005-A. In *Koutrakos v. Zoning Hearing Board of Newtown Township, Delaware County*, 685 A.2d 639 (Pa. Cmwlth. 1996), we considered what is meant by a record without findings of fact. We explained that it refers to instances where there is an order, but no decision, or where there has been a deemed approval, “which normally implies an absence of board findings.” *Id.* at 641-42. Otherwise, the trial court is “precluded from making its own findings.” *Id.* at 642.

In the case *sub judice*, the record contained detailed findings of fact. The trial court did not take additional evidence or confront a record absent of findings of fact. Indeed, the trial court itself claimed to be conducting appellate review. Consistent with that form of review, the trial court held that the record evidence did not support the Board’s conclusion that the proposed well was similar to and compatible with uses authorized in the RA District. However, this did not give the trial court authority to act as factfinder and substitute its credibility determinations for those of the Board. Nor do we agree with the trial court’s conclusion.

The principal problem with the trial court’s rejection of the Board’s legal conclusion is that it was based upon a narrow view of what uses are appropriate for the RA District. The Zoning Ordinance permits a wide range of conditional uses in the RA District, including forestry operations, hunting camps, hospitals, retirement homes, and commercial recreation. ZONING ORDINANCE, §4.2.2; R.R. 410a-411a. Inflection notes that in contrast to the size of a hospital, for example, a natural gas well will present a low physical profile and involve a small footprint on the land. More to the point, its proposed well is similar to a public service facility, which is expressly allowed in the RA District. Inflection notes that the Board’s interpretation of its Zoning Ordinance is entitled to deference.

In *MarkWest Liberty Midstream & Resources, LLC v. Cecil Township Zoning Hearing Board*, 102 A.3d 549 (Pa. Cmwlth. 2014), *petition for allowance of appeal denied*, 113 A.3d 281 (Pa. 2015), the zoning board denied MarkWest's application for a special exception to operate a natural gas compressor station in the township's light industrial zoning district. Its proposed facility involved up to eight engines, surrounding sound structures, dehydration facilities, tanks, a vapor recovery unit, a flare and associated piping. The closest residence was 1,000 feet from the proposed facility. The zoning board denied the application for the stated reason that MarkWest failed to establish that its facility would be similar to other uses permitted in the zoning district or that its impact would be equal to or less than that of other permitted uses. The trial court affirmed the board.

On appeal to this Court, MarkWest argued that its compressor station had the same general character as an "essential service," which was a use permitted in the light industrial district. The zoning ordinance defined "essential service" as follows:

The erection, construction, alteration, or maintenance, of gas, electrical, and communication facilities; steam, fuel, or water transmission or distribution systems; and collection, supply, or disposal systems. Such systems may include poles, wires, mains, drains, sewers, pipes, sewage treatment plants, conduits, cables, fire alarm and police call boxes, traffic signals, hydrants, and similar accessories. This definition is not intended to include private commercial enterprises such as cellular communications facilities, but only those public facilities necessary for the health, safety, and general welfare of the community.

MarkWest, 102 A.3d at 556 (emphasis added). The zoning board concluded that the MarkWest compressor was different from an "essential service" because it would not transmit natural gas to an "end user." *Id.* at 557. This Court rejected

that conclusion because the zoning ordinance did not contain such a requirement. Rather, an “essential service” was defined as “public facilities necessary for the health, safety, and general welfare of the community.” *Id.* at 557. Further, the zoning ordinance defined a “public service facility” as

[b]uildings, power plants or substations, water treatment plants or pumping stations, sewage disposal or pumping plants, and other similar public service structures used by a *public utility ... whether publicly or privately owned*, or by a municipal or other government agency, including the furnishing of ... gas ... services.

Id. at 558-59 (emphasis in original). We concluded that MarkWest’s compressor had the “same general character” as an “essential service.” It was not necessary that the proposed use be the “same” as a permitted use but only that it be “similar.”

MarkWest is directly on point. The Township’s Zoning Ordinance defines a “public service facility” as follows:

The erection, construction, alteration, operation or maintenance of buildings, power plants or substations, water treatment plants or pumping station; sewage disposal or pumping plants and other similar public service structures by a utility, whether publicly or privately owned, or by a municipal or other governmental agency, including the furnishing of electrical, gas, communication, water supply and sewage disposal services.

ZONING ORDINANCE, §2.2; R.R. 398a. Further, Section 4.2 of the Zoning Ordinance defines “essential services” as follows:

Public utility facilities that do not require enclosure in a building, including gas, electrical, steam, telephone, or water distribution systems; and including related equipment such as poles, towers, wires, mains, sewers, pipes, conduits, cables, fire alarm boxes, police call boxes, traffic signals, hydrants and other similar equipment.

ZONING ORDINANCE, §2.2; R.R. 387a.

Precisely as in *MarkWest*, Inflection’s proposed use satisfies the requirement set forth in 12.18.1 of the Zoning Ordinance that it “is similar to and compatible with other uses permitted in the zone where the subject property is located.” ZONING ORDINANCE, §12.18.1; R.R. 493a. The evidence about Inflection’s well was in no way rebutted, and the Board has already authorized Inflection’s other wells in the RA District.

Proving that its proposed use is similar to and compatible with uses expressly permitted in the RA District is not dispositive. Inflection also had the burden to show that its proposed use does not “conflict with the general purposes of this [Zoning] Ordinance.” ZONING ORDINANCE, §12.18.3; R.R. 493a. Again, its evidence was uncontradicted. Inflection argues that its well will not conflict with the general purpose of the Zoning Ordinance, which expressly authorizes the extraction of minerals.¹⁰ ZONING ORDINANCE, §§12.18.1, 12.18.3; R.R. 493a.

In holding otherwise, the trial court conflated the general purpose of the Zoning Ordinance with the requirement that the proposed use be similar to and compatible with other uses allowed in the RA District. The trial court also erred in focusing on the truck deliveries during the construction phase of the project because “[z]oning regulates the *use* of land and not the particulars of development and construction.” *In re Thompson*, 896 A.2d 659, 671 (Pa. Cmwlth. 2006).

We hold that Inflection’s proposed use met the threshold requirements set forth in Sections 12.18.1 and 12.18.3 of the Zoning Ordinance. It is similar to and compatible with the uses permitted in the RA District and does not conflict with the general purpose of the Zoning Ordinance.

¹⁰ See ZONING ORDINANCE, §2.2; R.R. 400a (defining a “rural resource area” as “including ... mining, quarrying and other extractive industries”).

In its second issue, Inflection argues that the trial court erred in concluding that it did not prove that its natural gas well would “not be detrimental to the public health, safety and welfare of the neighborhood where it is to be located.” ZONING ORDINANCE, §12.18; R.R. 493a. Inflection presented expert testimony on that issue, which the Board accepted. Neighboring Landowners presented no evidence to the contrary.

Neighboring Landowners claim that the Township did not do its job. They claim that the Township failed to obtain meaningful information from Inflection about the storage and transportation of chemicals and wastewater and the impact the well would have on the environment. They assert that “the record” contains evidence that Inflection’s activities will constitute a nuisance and have a noxious effect on the surrounding area due to noise, light, and traffic impacts. Neighboring Landowners’ Brief at 47. However, they do not cite where in the record this evidence is to be found.

Inflection’s oil and gas engineering expert, Thomas Erwin, testified that once the gas well is constructed and drilling completed, its operation will not create noise, light glare or odors noticeable to Township residents. Inflection’s director of regulatory and environmental affairs, Thomas Gillespie, testified that Inflection’s erosion and control plan had been approved by DEP. The plan addressed storm water runoff, erosion, sediment transport and the water to be used for fracking. He testified that the gas well would be drilled far below the subsurface water that serves Neighboring Landowners’ wells.

The Board accepted this testimony. The Board acknowledged that Neighboring Landowners expressed concerns but concluded that their “speculation of possible harms” was insufficient to show that the proposed natural gas well will be detrimental to the health, safety and welfare of the neighborhood. *Sunnyside Up Corporation v. City of Lancaster Zoning Hearing Board*, 739 A.2d 644, 650 (Pa.

Cmwlth. 1999). *See also Rural Area Concerned Citizens, Inc. v. Fayette County Zoning Hearing Board*, 646 A.2d 717, 723 (Pa. Cmwlth. 1994) (objectors' arguments that proposed quarry would have detrimental effect on community did not constitute substantial evidence that quarry use would affect health and safety of community).

Nevertheless, the Board responded to the concerns of Neighboring Landowners by imposing numerous conditions related to roadway maintenance, traffic and parking. It also required Inflection to provide emergency contact information upon request, visually screen the well from the neighborhood and comply with all federal state and local permits and approvals. Specifically, the Board stated:

Contingent upon the protections afforded by the conditions attached to the approval of [Inflection's] conditional use request, the [Board] finds that the criteria for review set forth in Sections 12.18, 14.2.5 and 12.1 have been sufficient[ly] satisfied in that the application as submitted by [Inflection] with the imposed conditions meets the requirements of the Ordinance for conditional use approval, the site selected is generally appropriate for the proposed uses, and no evidence was offered that there would be any adverse impacts to the surrounding neighborhoods or negative impacts to adjoining properties that are not appropriately mitigated by the attached conditions.

Board Decision, Conclusion of Law No. 20.

The questions asked by Neighboring Landowners did not constitute probative evidence that Inflection's natural gas well would be harmful to the health, welfare and safety of the neighborhood. No evidence rebutted the evidence presented by Inflection. Accordingly, the trial court erred in holding that

Inflection's proposed well would present a detriment to the health and safety of the neighborhood.

Conclusion

The trial court erred in holding that Inflection's proposed use was not *similar to* a public service facility, which is expressly permitted in the RA District and compatible with other uses permitted in the RA District. The trial court also erred in holding that Inflection's proposed use conflicted with the general purpose of the Zoning Ordinance, which specifically authorizes extraction of minerals. Finally, there was no probative evidence offered to show that Inflection's proposed well will present a detriment to the health and safety of the neighborhood. Inflection satisfied the requirements of Section 12.18 of the Zoning Ordinance.

For these reasons we reverse the order of the trial court.¹¹

MARY HANNAH LEAVITT, Judge

¹¹ Inflection asserted that the trial court erred by stating it could consider additional claims raised by Neighboring Landowners that were not raised before the Board. Those issues concerned whether a gas well was permitted in the commercial zoning district and whether the gas well pad impacted on Neighboring Landowners' constitutional rights. The trial court found in favor of Inflection on the first issue and reached no decision on the second. The constitutional claim was that the proposed use violated Neighboring Landowners' right of "enjoying and defending life and liberty, [and] of acquiring, possessing and protecting property," as expressed in Article I, Section 1 of the Pennsylvania Constitution, and their right to "clean air, pure water and ... the preservation of the ... environment," as guaranteed to all citizens in Article I, Section 27 of the Pennsylvania Constitution. PA. CONST. Art. I, §§1, 27. This claim presumed that the proposed use was not compatible with permitted uses in the RA District and would cause environmental harm. Because the record supports the Board's determination that Inflection's proposed use is compatible with the permitted uses in the RA District and no evidence of harm was presented, Neighboring Landowners' claims are unsupported by the accepted evidence of record.

No. 1735 C.D. 2014

ORDER

AND NOW, this 14th day of September, 2015, the order of the Court of Common Pleas of Lycoming County, dated August 29, 2014, is REVERSED.

MARY HANNAH LEAVITT, Judge

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 14,000 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.

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DATED: August 1, 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.

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