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## NOT IN MY BACKYARD: UNCONVENTIONAL GAS DEVELOPMENT AND LOCAL LAND USE IN PENNSYLVANIA AND ALBERTA, CANADA

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The Commonwealth of Pennsylvania and the Province of Alberta, Canada, lie in different countries, with different legal systems and norms; but both areas have recently experienced prolific oil and gas development. Pennsylvania's and Alberta's recent experiences with exploding oil and gas development have much in common.<sup>1</sup> Both have deep ties to the oil and gas industry, and each has beheld massive growth in drilling activity in recent years.<sup>2</sup> The industry's resurgence has produced a windfall, and communities in Pennsylvania's and Alberta's energy-rich regions are prospering.<sup>3</sup>

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<sup>1</sup> Compare, e.g., Ross H. Pifer, *What a Short Strange Trip It's Been: Moving Forward After Five Years of Marcellus Shale Development*, 72 U. PITT. L. REV. 615, 622 (2011) (explaining the increase in drilling since 2003 in Pennsylvania), with AlbertaCanada, *About the Industry*, ALBERTACANADA.COM, <http://www.albertacanada.com/business/industries/og-about-the-industry.aspx> (last visited Nov. 29, 2012) (describing the dramatic expansion of Alberta's oil and gas industry).

<sup>2</sup> See generally Pifer, *supra* note 1, at 622; *About the Industry*, *supra* note 1.

<sup>3</sup> Compare, Pifer, *supra* note 1, at 625 (“[T]he natural gas industry has spurred economic activity in affected communities.”), with Tavia Grant & Ora Morison, *Hot Job Market Feeds Alberta's Record Population Boom*, GLOBE & MAIL, June 22, 2012, <http://www.theglobeandmail.com/news/national/hot-job-market-feeds-albertas-record-population-boom/article4362155/>.

With the good, however, comes the bad.<sup>4</sup> New wells and more people have caused friction between landowners; state, provincial, and local governments; and the oil and gas industry.<sup>5</sup> Pennsylvania's and Alberta's legislators and regulators are left playing catch-up.<sup>6</sup> After years of steady or slow development, each was caught off guard by such rapid growth.<sup>7</sup>

Forced to cope with increased oil and gas development, citizens in Pennsylvania and Alberta looked to their local governments to rein in drilling.<sup>8</sup> As a result, government representatives in both places became more active in the regulatory process.<sup>9</sup> In Pennsylvania, many localities used their authority over local land use to check otherwise unfettered resource extraction.<sup>10</sup>

<sup>4</sup> See, e.g., Pifer, *supra* note 1, at 625; see Kate Schneider, *Urban Drilling Policy Announced*, CALGARY SUN, June 24, 2012, 9:14 PM, <http://www.calgarysun.com/2012/06/24/urban-drilling-policy-announced> (discussing residents' worries about property values, air and water quality, traffic, and lack of an evacuation plan).

<sup>5</sup> See generally Pifer, *supra* note 4; see also Schneider, *supra* note 4.

<sup>6</sup> Compare, e.g., Schneider, *supra* note 4 (explaining Calgary's outdated urban drilling policy), with Ayesha Rascoe, *U.S. Shale Gas Regulators Struggle To Keep Up With Rapid Development, Government Finds*, HUFFINGTON POST, Oct. 9, 2012, 9:37 PM, [http://www.huffingtonpost.com/2012/10/10/us-shale-gas-regulators\\_n\\_%201953135.html](http://www.huffingtonpost.com/2012/10/10/us-shale-gas-regulators_n_%201953135.html) (explaining several GAO reports that recount the EPA's struggle to regulate drilling).

<sup>7</sup> See, e.g., Schneider, *supra* note 4; Rascoe, *supra* note 6.

<sup>8</sup> Compare Ross H. Pifer, *Drake Meets Marcellus: A Review of Pennsylvania Case Law Upon the Sesquicentennial of the United States Oil and Gas Industry*, 6 TEX. J. OIL GAS & ENERGY L. 47, 59 (2010-2011) (“[C]itizens often look to their municipalities as the primary regulator to remedy any real or perceived problems.”), with Nickie Vlavianos & Chidinma Thompson, *Alberta's Approach to Local Governance in Oil and Gas Development*, 48 ALBERTA L. REV. 55, 63 (2010) (“[M]unicipalities are also increasingly being asked to respond to their constituents' concerns about the environmental and public health risks of oil and gas development.”).

<sup>9</sup> See Pifer, *supra* note 8, at 59; Vlavianos & Thompson, *supra* note 8, at 63.

<sup>10</sup> See Sabrina Tavernise, *Pennsylvania: Gas Company Sues Over Zoning Rules*, N.Y. TIMES, Oct. 13, 2011, <http://www.nytimes.com/2011/10/14/us/pennsylvania-gas-company-sues-over-zoning-rules.html> (discussing Range Resources' lawsuits against three Pennsylvania towns).

Alberta's municipal governments enjoy comparatively less authority, but have also opposed<sup>11</sup>—and even managed to halt—unpopular oil and gas projects in some communities.<sup>12</sup>

Yet Pennsylvania's and Alberta's treatments of local land use in this context differ considerably. On a basic level, Alberta's municipalities are statutory creations,<sup>13</sup> while Pennsylvania's localities owe their existence to the state constitution.<sup>14</sup> Fundamental cultural differences also exist between Alberta and Pennsylvania regarding the role of local authority. Pennsylvania has “a long and rich tradition of local governance.”<sup>15</sup> Alberta, on the other hand, “scarcely mention[s] municipalities” as part of the Province's regulatory framework.<sup>16</sup>

As a result, oil and gas companies operating in Pennsylvania must navigate thousands of local zoning rules. Such a “[l]ack of [regulatory] uniformity has long been an Achilles' heel” for the

<sup>11</sup> See, e.g., Dave Mabell, *Council Opposes Oil & Gas Drilling in City*, LETHBRIDGE HERALD, Nov. 14, 2012 2:01 PM, <http://lethbridgeherald.com/front-page-news/council-opposes-oil-gas-drilling-in-city-111412.html>; see also Vincent McDermott, *Shell Project Could Burden Population: Municipality*, FORTMCMURRAY.COM, Nov. 14, 2012 5:56 PM, <http://www.fortmcmurraytoday.com/2012/11/14/shell-project-could-burden-population-municipality>.

<sup>12</sup> See, e.g., Sepac Canada's Oil and Gas Entrepreneurs, *Population Growth, Urbanization, and NIMBYism in Alberta Emerge as Potential Challenges for the Oil and Gas Industry*, EXPLORER, Fall 2012/Winter 2013 at 1-2, [http://explorersandproducers.ca/assets/files/SEPAC\\_Fall2012\\_Winter\\_2013.pdf](http://explorersandproducers.ca/assets/files/SEPAC_Fall2012_Winter_2013.pdf) (recounting Calgary citizens' opposition to a recent drilling project).

<sup>13</sup> Vlavianos & Thompson, *supra* note 8, at 56 n.1.

<sup>14</sup> See, PA. CONST. art. IX, § 2 (gives municipalities the right to adopt charters, but the constitution does not explicitly establish the municipality).

<sup>15</sup> *Forced Municipal Consolidation, House Bill 2431*, Pa. House Local Gov't Committee (Aug. 18, 2010) (statement of Betty Ann Moyer, 2d Vice-President, PA State Association of Township Supervisors), <http://webcache.googleusercontent.com/search?q=cache:bBwzraeZKT0J:www.pa.house.com/Freeman/documents/CommitteeTestimony/HB2431%2520—%2520Boroughs%2520Testimony.pdf+&cd=1&hl=en&ct=clnk&gl=us&client=safari>.

<sup>16</sup> Vlavianos & Thompson, *supra* note 8, at 56.

energy industry.<sup>17</sup> In fact, the state has twice tried to legislate away local zoning in the oil and gas context. The Oil and Gas Act of 1984 and Act 13 of 2012 each sought to preempt local land use ordinances affecting oil and gas development.<sup>18</sup> Both laws, however, fell prey to municipal challenges in state courts.<sup>19</sup>

Alberta, on the other hand, has largely avoided the “not in my backyard” (NIMBY) approach to oil and gas development, and “emphasiz[ed] the well-being of many, rather than the interests of a few.”<sup>20</sup> Though not immune to local political pressure, Alberta’s energy industry enjoys manageable land use rules compared to operators in Pennsylvania.<sup>21</sup>

Alberta’s approach to local land use should instruct Pennsylvania’s. As much as the oil and gas industry would like to do away with local roadblocks to drilling, Pennsylvania’s localities cannot, and will not, be browbeaten by the state legislature. “Individual citizens have more incentive to be involved” at the municipal level,<sup>22</sup> and local control over land use decisions is deeply ensconced in Pennsylvania law and custom. Put simply, people care

<sup>17</sup> Press Release, Marcellus Shale Coalition, MSC Statement on Pa. Commonwealth Court Ruling (July 26, 2012), <http://marcelluscoalition.org/2012/07/msc-statement-on-pennsylvania-commonwealth-court-ruling/>.

<sup>18</sup> See generally Alex Chiaruttini, *Comparison of the Oil and Gas Act of 1984 and Act 13 of 2012*, STOCK & LEADER, [http://www.stockandleader.com/cms/uploads/articlesUploads/Pdf\\_101.pdf](http://www.stockandleader.com/cms/uploads/articlesUploads/Pdf_101.pdf) (last visited Oct. 25, 2012).

<sup>19</sup> See generally *Huntley & Huntley, Inc. v. Borough of Oakmont*, 600 Pa. 207 (2009); *Robinson Twp. v. Commonwealth*, 52 A.3d 463, 468 (Pa. Commw. Ct. 2012).

<sup>20</sup> Vlavianos & Thompson, *supra* note 8, at 56.

<sup>21</sup> Cf. Dan Packel, *Drillers Face Harder Times if Pa. Pro-Fracking Law Falls*, LAW360, Oct. 16, 2012 6:20 PM, <http://www.law360.com/articles/387105/drillers-face-harder-times-if-pa-pro-fracking-law-falls> (explaining how Act 13’s defeat will make it harder for drillers and landowners looking to capitalize on Pennsylvania’s gas boom).

<sup>22</sup> WENDELL COX CONSULTANCY, GROWTH, ECONOMIC DEVELOPMENT, AND LOCAL GOVERNMENT STRUCTURE IN PENNSYLVANIA 67 (2005), [http://66.241.215.190/local\\_gov\\_growth\\_report.pdf](http://66.241.215.190/local_gov_growth_report.pdf).

a lot about their neighborhoods. That is not to say, of course, that Albertans do not feel strongly about their local communities,<sup>23</sup> but Alberta's land use framework strikes a more delicate and nuanced balance between local and provincial interests, and allows for a more collaborative approach to land use decisions.<sup>24</sup>

This article recounts the recent history of oil and gas development in Pennsylvania and Alberta and explains the two jurisdictions' divergent approaches to land use regulation in the context of resource extraction. It will also describe the effects each jurisdiction's approach has had on oil and gas development, and how Pennsylvania's and Alberta's local governments have respectively adapted to increased drilling activity. Finally, it will suggest that Alberta's cooperative land use framework could be applied in Pennsylvania, which would help mitigate the touchy relationship between the state and local governments.

## I. PENNSYLVANIA'S OIL AND GAS COMEBACK

The modern oil and gas industry was born near Titusville, Pennsylvania, when Edwin Drake struck oil there in 1859.<sup>25</sup> Derided

<sup>23</sup> See, e.g., Nathan Vanderklippe, *Calgarians Near Urban Oil Well Say Not in my Backyard*, GLOBE MAIL, June 28 2012, 7:10 AM, <http://www.theglobeandmail.com/news/politics/calgarians-near-urban-oil-well-say-not-in-my-backyard/article4375710/> (describing community opposition to an oil well in Calgary).

<sup>24</sup> See, e.g., *South Saskatchewan Regional Advisory Council*, ALBERTA.CA, Nov. 29, 2012, <https://landuse.alberta.ca/RegionalPlans/SouthSaskatchewanRegion/SSRPRAC/Pages/default.aspx> (describing the South Saskatchewan Regional Advisory Council and the communities' involved in the planning process).

<sup>25</sup> Judah Ginsberg, *The Development of the Pennsylvania Oil Industry*, ACS, CHEMISTRY FOR LIFE, <https://communities.acs.org/docs/DOC-1706> (last visited Oct. 25, 2012).

by critics as “Drake’s Folly,”<sup>26</sup> the endeavor provided the world’s first commercially successful oil well.<sup>27</sup> The discovery ushered in a period of rapid mineral development, and by 1901 Pennsylvania produced half the world’s oil.<sup>28</sup>

Petroleum did not prove to be Pennsylvania’s only bountiful mineral resource. Natural gas was discovered in Murrysville, Pennsylvania in 1878.<sup>29</sup> Soon, Pennsylvania was the center of U.S. gas production, and remained so until the turn of the twentieth century.<sup>30</sup> The state experienced a decline in its share of national production in subsequent decades,<sup>31</sup> but a century later Pennsylvania reclaimed its place at the forefront of the gas industry thanks to Marcellus Shale and coalbed methane gas.<sup>32</sup>

The Marcellus Shale formation stretches 95,000 square miles, from upstate New York, through Pennsylvania, and into parts of Ohio, West Virginia, Maryland, and Virginia.<sup>33</sup> The Marcellus region is particularly attractive to energy companies for several reasons.<sup>34</sup> First, the formation is four times larger than the combined size of the other well-known shale gas formations in the western United States.<sup>35</sup> Second, Marcellus Shale has proved more productive than

<sup>26</sup> Samuel T. Pees, *Drake’s Well*, PETROLEUM HIST. INST., <http://www.petroleumhistory.org/OilHistory/pages/drake/drakewell.html> (last visited Oct. 25, 2012).

<sup>27</sup> Ginsberg, *supra* note 25.

<sup>28</sup> *Oil and Gas*, MCNEES WALLACE & NURICK LLC, <http://www.mwn.com/services/xprServiceDetailSym.aspx?xpST=ServiceDetail&service=42> (last visited Oct. 25, 2012).

<sup>29</sup> Pifer, *supra* note 1, at 618-19.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> Bill DesRosiers, *Northeast Pennsylvania Leads U.S. Natural Gas Production*, ENERGY IN DEPTH: MARCELLUS (Sept. 14, 2011), <http://energyindepth.org/marcellus/northeast-pennsylvania-leads-u-s-gas-production/>.

<sup>33</sup> John M. Smith, *The Prodigal Son Returns: Oil and Gas Drillers Return To Pennsylvania with a Vengeance: Are Municipalities Prepared?*, 49 DUQ. L. REV. 1, 4 (2011).

<sup>34</sup> Pifer, *supra* note 1, at 623.

<sup>35</sup> *Id.*

comparable shale formations by a large margin.<sup>36</sup> Finally, the Marcellus Region is closer to cold weather population centers in the northeastern United States than other shale gas formations, and thus enjoys lower transportation costs.<sup>37</sup>

Until recently, however, Marcellus Shale gas was considered commercially unviable, although the requisite extraction technology has existed for more than seventy-five years.<sup>38</sup> That was proved wrong in 2003 when Range Resources drilled the first successful well into the Marcellus formation in Washington County, south of Pittsburgh.<sup>39</sup> Pennsylvania quickly witnessed a dramatic increase in the number of shale gas wells drilled, both in western Pennsylvania and in previously unexploited areas in the northern tier of the state.<sup>40</sup> In fact, in the nine years since Range Resource's first well, nearly 12,000 well permits have been issued in Pennsylvania.<sup>41</sup>

Coalbed methane extraction has also exploded in Pennsylvania over the last several years.<sup>42</sup> Greater demand and higher gas prices have made previously unexploited coalbed gas profitable.<sup>43</sup> Progress has also been made in techniques to extract coalbed gas on a commercial scale, paving the way for increased production.<sup>44</sup> Today, for example, producers have the technology to

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> Pifer, *supra* note 1, at 623.

<sup>40</sup> *Id.*

<sup>41</sup> Russell Wright, *Shale Tech: Marcellus/Utica Liquids-Rich Gas Production Tempers Effects of Low Gas Prices*, WORLD OIL (Nov. 25, 2012), <http://www.worldoil.com/magazine/2012/june-2012/features/shale-tech-marcellusutica-liquids-rich-gas-production-tempers-effects-of-low-gas-prices>.

<sup>42</sup> Jason P. Webb, *Pennsylvania & Coalbed Methane: Reviving the Traditional Willingness to Protect Surface Owners*, 27 TEMP. J. SCI. TECH. & ENVTL. L. 35, 36 (2008).

<sup>43</sup> *Id.* at 35-36.

<sup>44</sup> INT'L ENERGY AGENCY, *Golden Rules for a Golden Age of Gas World Energy Outlook Special Report on Unconventional Gas*, WORLD ENERGY OUTLOOK 29 (2012),



drill into coal seams both horizontally and vertically,<sup>45</sup> making the techniques for “fracking”<sup>46</sup> modern shale gas wells and coalbed wells substantially similar.<sup>47</sup>

Currently, there are over seventy oil and gas companies working in Pennsylvania, including many recognizable multinational corporations.<sup>48</sup>

## II. OIL AND GAS DEVELOPMENT AND THE CORRESPONDING POPULATION BOOM IN ALBERTA

Like Pennsylvania, Canada has a long history of oil and gas development.<sup>49</sup> Natural gas was first discovered in Ontario in the 1880s,<sup>50</sup> and has been extracted from Alberta for generations.<sup>51</sup> Alberta currently accounts for almost eighty percent of the natural

[http://www.worldenergyoutlook.org/media/weowebite/2012/goldenrules/WEO2012\\_GoldenRulesReport.pdf](http://www.worldenergyoutlook.org/media/weowebite/2012/goldenrules/WEO2012_GoldenRulesReport.pdf).

<sup>45</sup> U.S. Steel Corp. v. Hoge, 503 Pa. 140, 146 (1983).

<sup>46</sup> Mike Soraghan, *Baffled About Fracking? You're Not Alone*, N.Y. TIMES, May 13, 2011, <http://www.nytimes.com/gwire/2011/05/13/13greenwire-baffled-about-fracking-youre-not-alone-44383.html?pagewanted=all>.

<sup>47</sup> Laura C. Reeder, *Creating a Legal Framework for Regulation of Natural Gas Extraction from the Marcellus Shale Formation*, 34 WM. & MARY ENVTL. L. & POL'Y REV. 999, 1011 (2010).

<sup>48</sup> Pifer, *supra* note 1, at 622-624.

<sup>49</sup> See generally, Canadian Ass'n of Petroleum Producers, *The Facts on Natural Gas*, UPSTREAM DIALOGUE (Sept. 2011), <http://www.capp.ca/upstreamdialogue/naturalgas/Pages/default.aspx> (click on interactive publication).

<sup>50</sup> *Id.* at 5.

<sup>51</sup> THE APPLIED HISTORY RESEARCH GROUP, *The Oil and Gas Frontier: 1913-Present*, UNIV. OF CALGARY (1997), [http://www.ucalgary.ca/applied\\_history/tutor/calgary/oil.html](http://www.ucalgary.ca/applied_history/tutor/calgary/oil.html). (Gas was discovered in the early 1910s in Turner Valley, southwest of Calgary. In the early 1930s oil was discovered beneath the Valley's gas wells).

gas produced in Canada.<sup>52</sup> The province is also home to the third largest crude oil reserves in the world.<sup>53</sup>

Like Pennsylvania, mineral development in Alberta has expanded rapidly in recent years.<sup>54</sup> Revenues from Alberta's entire oil and gas sector increased by almost fifty percent from 2009 to 2010,<sup>55</sup> and the size of the province's energy industry more than doubled between 2000 and 2010.<sup>56</sup> Although exploration is ongoing, the province appears to contain large unconventional shale gas and coalbed methane reserves.<sup>57</sup> The provincial government anticipates shale and coalbed development will add substantially to Alberta's resource reserves in the future.<sup>58</sup> In just the last ten years, for instance, the number of coalbed wells in Alberta increased from 20 to over 18,000.<sup>59</sup>

At the same time, the Calgary-Edmonton Corridor, Alberta's most populated region, grew more than fifty percent from 1.7 to 2.7 million people.<sup>60</sup> This trend is not expected to slow down.<sup>61</sup> Boasting low unemployment and high wages, "Calgary and Edmonton are Canada's fastest-growing cities."<sup>62</sup> The provincial government expects Alberta will draw another million people in the

<sup>52</sup> *About the Industry*, *supra* note 1.

<sup>53</sup> *Id.*

<sup>54</sup> AlbertaCanada, *Natural Gas and Coalbed Methane*, ALBERTACANADA.COM, Oct. 25, 2012, <http://www.albertacanada.com/business/industries/og-natural-gas-and-coal-bed-methane.aspx>.

<sup>55</sup> *About the Industry*, *supra* note 1.

<sup>56</sup> *Id.*

<sup>57</sup> *Natural Gas and Coalbed Methane*, *supra* note 54.

<sup>58</sup> *Id.*

<sup>59</sup> AlbertaEnergy, *Coalbed Methane FAQs How many producing coalbed methane well connections are there in Alberta?*, ALBERTA.CA, Oct. 25, 2012, <http://www.energy.alberta.ca/naturalgas/750.asp>.

<sup>60</sup> *Population and NIMBYism in Alberta Emerge as Potential Challenges for the Oil and Gas Industry*, *supra* note 12, at 1.

<sup>61</sup> *See generally* Grant, *supra* note 3.

<sup>62</sup> *Id.*

next ten years.<sup>63</sup> The province has accommodated this growth through construction of “sprawling residential projects . . . as well as large-scale commercial and industrial projects surrounding Calgary and Edmonton.”<sup>64</sup> The cities’ growth has happened “mainly around the edges, suggesting that urban sprawl has become the norm in the growth of Canadian cities.”<sup>65</sup> As a result, new oil and gas wells, and suburban residential development, are converging for the first time.<sup>66</sup>

### III. LOCAL LAND USE AND MINERAL DEVELOPMENT IN PENNSYLVANIA

The drilling upsurge in Pennsylvania has had a significant effect on communities in the Marcellus Region.<sup>67</sup> The reinvigorated energy industry has stimulated economic activity in affected communities.<sup>68</sup> Landowners have received windfalls from mineral leases, and new jobs have been generated.<sup>69</sup> The real estate market has also been strengthened thanks to an increased demand for housing and commercial space.<sup>70</sup> On the other hand, affected communities have experienced “light, noise, dust, fumes, traffic, and drastic changes to the land.”<sup>71</sup> For some, this has meant a “decline in the overall quality of life as a result of continuous industrial operations.”<sup>72</sup>

<sup>63</sup> See, e.g., Vanderklippe, *supra* note 23.

<sup>64</sup> *Population and NIMBYism in Alberta Emerge as Potential Challenges for the Oil and Gas Industry*, *supra* note 12, at 2.

<sup>65</sup> Jordan Press, *Census: Edmonton, Calgary Fastest-Growing Cities*, VANCOUVER SUN, Feb. 8, 2012, <http://www.vancouversun.com/technology/Census+Edmonton+Calgary+fastest+growing+cities+Canada/6119830/story.html>.

<sup>66</sup> E.g., Schneider, *supra* note 4.

<sup>67</sup> See generally Pifer, *supra* note 1, at 625.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> Smith, *supra* note 33, at 9.

<sup>72</sup> Pifer, *supra* note 1, at 625.

In an effort to protect their citizens from the unseemly side of mineral development, municipal officials throughout Pennsylvania have sought to restrict development through zoning for years.<sup>73</sup> Local government “has a strong heritage in Pennsylvania”<sup>74</sup> and its citizens often turn to local officials to address daily problems.<sup>75</sup> With 2,632 governmental entities<sup>76</sup> that possess zoning authority,<sup>77</sup> oil and gas companies face obvious problems trying to navigate a complex and Balkanized legal framework.<sup>78</sup> Some in the energy industry have even complained that Pennsylvania’s municipalities use zoning as a back door way to ban drilling altogether.<sup>79</sup>

Pennsylvania’s unwieldy regulatory mix generated a legislative response in 1984 with the passage of the Oil and Gas Act.<sup>80</sup> The Act was intended to promote the development of the state’s oil and gas resources,<sup>81</sup> and, to that end, Section 602 of the Act preempted local

<sup>73</sup> See Smith, *supra* note 33, at 30 (“Restricting drilling activities by zoning districts seemingly employs a zoning method enjoyed by municipal officials for years.”).

<sup>74</sup> Pifer, *supra* note 8, at 59.

<sup>75</sup> *Id.*

<sup>76</sup> PA. GEN. ASSEMBLY LOCAL GOV’T COMM’N, LOCAL GOV’T ENTITIES IN PA. 11, 11 n. 1 (3d ed. 2006),

[http://webcache.googleusercontent.com/search?q=cache:MQA2qBthjQcJ:www.lg.c.state.pa.us/deskbook06/Basics01\\_Local\\_Government\\_Entities.pdf+&cd=1&hl=en&ct=clnk&gl=us&client=safari](http://webcache.googleusercontent.com/search?q=cache:MQA2qBthjQcJ:www.lg.c.state.pa.us/deskbook06/Basics01_Local_Government_Entities.pdf+&cd=1&hl=en&ct=clnk&gl=us&client=safari) (in January 2003, there were 67 counties, 56 cities, 961 boroughs, one incorporated town, 1,548 townships (91 first class and 1,457 second class), 501 school districts and 2,015 authorities).

<sup>77</sup> Pennsylvania Municipalities Planning Code, 53 P.S. 10601-10602 (the MPC grants zoning powers to municipalities and limited zoning power to counties).

<sup>78</sup> *Cf.* Press Release, *supra* note 17.

<sup>79</sup> Kevin Begos, *Pennsylvania Zoning Laws For Gas Drilling, Known As Act 13, Debated In State Supreme Court*, HUFFINGTON POST, Oct. 18, 2012 10:07 AM, [http://www.huffingtonpost.com/2012/10/18/pennsylvania-gas-drilling-laws\\_n\\_1979334.html](http://www.huffingtonpost.com/2012/10/18/pennsylvania-gas-drilling-laws_n_1979334.html).

<sup>80</sup> 1984 Oil and Gas Act, P.S. § 601.102, *repealed by* 2012 Pa. Legis. Serv. Act 2012-13 (H.B. 1950) (West).

<sup>81</sup> *Id.*

ordinances that imposed conditions, requirements, or limitations on those aspects of oil and gas operations regulated by the Act.<sup>82</sup>

To the chagrin of Pennsylvania's legislature, however, the state's Supreme Court reached conflicting decisions in two cases interpreting Section 602. The first, *Range Resources v. Salem Township*, illustrated a typical clash between state and local regulation.<sup>83</sup> In that case, Range Resources challenged a local ordinance that regulated certain surface development associated with oil and gas drilling operations.<sup>84</sup> The Supreme Court held the Township's ordinance was preempted because it "overlap[ped] substantially with the goals as set forth in the Oil and Gas Act."<sup>85</sup>

In *Huntley v. Borough of Oakmont*, on the other hand, the Court held that the Oil and Gas Act did not preempt a local zoning ordinance that governed well location, and not the "technical aspects of well functioning."<sup>86</sup> The Court found the ordinance did not overlap with the Act's stated purpose of protecting health, safety, the environment, and property.<sup>87</sup> Oakmont had instead sought to "preserv[e] the character of residential neighborhoods and encourag[e] beneficial and compatible land uses."<sup>88</sup>

By declining to extend 1984 Oil and Gas Act preemption to ordinances affecting well location, the *Huntley* Court "opened the door for some regulation of natural gas activities through municipal zoning powers."<sup>89</sup> The decision consequently frustrated the oil and gas industry's quest for uniform statewide land use rules, since the

<sup>82</sup> *Id.*

<sup>83</sup> Reeder, *supra* note 47, at 1000.

<sup>84</sup> See *Range Resources—Appalachia, LLC v. Salem*, 600 Pa. 231, 232 (2009).

<sup>85</sup> *Id.*

<sup>86</sup> *Huntley & Huntley, Inc. v. Borough of Oakmont*, 600 Pa. 207, 223 (2009).

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 224.

<sup>89</sup> Pifer, *supra* note 8, at 62 (2011).

ability to select well location is seen as a critical requirement for resource extraction.

Pennsylvania's legislature did not rest on its laurels.<sup>90</sup> Three years after the *Huntley* decision, in February 2012, the state repealed and replaced much of the Oil and Gas Act of 1984 with Act 13 of 2012.<sup>91</sup>

Act 13 made four significant changes to the 1984 law: (1) it allowed for new fees to be assessed on unconventional wells; (2) it created a formula for distribution of those fees; (3) it made changes to environmental requirements; and, most germane here, (4) Chapter 33 of the Act required local governments to allow oil and gas development in all zoning districts, drastically curtailing the authority of municipalities to prevent drilling through zoning.<sup>92</sup> The Act also created an "expedited review process" that empowered Pennsylvania's Public Utility Commission (PUC) to render quick decisions regarding local ordinances' compliance with the law.<sup>93</sup>

Act 13 thus addressed the local ordinance provision of the 1984 Oil and Gas Act that had provoked significant zoning litigation, including the *Range* and *Huntley* decisions. The Act attempted to close the loophole left open by the *Huntley* court's decision by stripping localities of the power to regulate well siting by zoning district.<sup>94</sup>

Act 13 was the result of negotiations between legislators, industry players, and environmentalists.<sup>95</sup> Yet despite support from

<sup>90</sup> *E.g.*, 2012 Pa. Legis. Serv. Act 2012-13 (H.B. 1950) (West).

<sup>91</sup> *Id.*

<sup>92</sup> *See generally PA's New Oil and Gas Law*, BABST CALLAND (Oct. 25, 2012), <http://www.babstcalland.com/legal-resources/pa-new-oil-gas-law.php>.

<sup>93</sup> *PA Commonwealth Court Prohibits All PUC Review of Local Ordinances under Act 13*, BUCHANAN INGERSOLL & ROONEY PC (Nov. 29, 2012), <http://www.bipc.com/pa-commonwealth-court-prohibits-all-puc-review-of-local-ordinances-under-act-13-11-05-2012/>.

<sup>94</sup> *See* Chiaruttini, *supra* note 18.

<sup>95</sup> *PA's New Oil and Gas Law*, *supra* note 93.

the oil and gas industry, citizen groups,<sup>96</sup> and Pennsylvania's local government associations,<sup>97</sup> the Act remained controversial.<sup>98</sup> In particular, the law angered seven communities affected by drilling in Marcellus shale. Two months after the Act's passage, those localities brought suit in the Commonwealth Court seeking to enjoin the law's enforcement and challenging its constitutionality.<sup>99</sup>

The localities won the day.<sup>100</sup> In July 2012, the Commonwealth Court found Chapter 33 of the Act, the part governing local zoning, unconstitutional.<sup>101</sup> The Court said the Act's restrictions on municipal ordinances violated landowners' substantive due process rights guaranteed by the Pennsylvania and United States constitutions.<sup>102</sup> Act 13's local zoning restrictions, the Court explained, failed to "protect the interests of neighboring property owners from harm, alter[ed] the character of neighborhoods, and ma[de] irrational classifications."<sup>103</sup>

The day after the ruling, Governor Thomas Corbett's administration filed an appeal with the state Supreme Court.<sup>104</sup> Arguments were heard in October 2012.<sup>105</sup>

<sup>96</sup> EUGENE E. DICE, PENNSYLVANIA'S NEW OIL AND GAS ACT 10 (2012), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2018416](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2018416).

<sup>97</sup> Scott Detrow, *Corbett Administration Files Act 13 Appeal with State Supreme Court*, STATE IMPACT, July 27, 2012 4:53 PM, <http://stateimpact.npr.org/pennsylvania/2012/07/27/corbett-administration-files-act-13-appeal-with-state-supreme-court/>.

<sup>98</sup> E.g., Pam Kasey, *PA Establishes Gas Impact Fee, Limits Local Regulation*, STATE JOURNAL, <http://www.statejournal.com/story/16906145/shale-gas-legislation-only-awaits-pa-govs-signature> (last updated Mar. 11, 2012 8:15 AM) ("Environmental groups decried both the inadequacy of the fee and the removal of local control, characterizing the local ordinance measure as a 'takeover' of municipalities.").

<sup>99</sup> *Robinson Twp.*, 52 A.3d 463.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 494.

<sup>102</sup> *Id.* at 484-85.

<sup>103</sup> *Id.* at 484.

<sup>104</sup> Detrow, *supra* note 98.

<sup>105</sup> Begos, *supra* note 79.

After the Commonwealth Court rendered its decision, the PUC suspended its accelerated review process for local ordinances pending decision on the lawsuit by the Supreme Court.<sup>106</sup> In September 2012, however, the Commission recommenced its evaluations.<sup>107</sup> It focused on ordinances it believed violated Act 13's still constitutional provisions and the Municipalities Planning Code.<sup>108</sup> In response, the Commonwealth Court issued a "terse" order that the PUC stop acting on requests for review of local ordinances pending a final resolution of the case.<sup>109</sup> The order relegated local land use ordinance challenges to the "cumbersome land use appeal process established in the Pennsylvania Municipalities Planning Code."<sup>110</sup> Rather than review by the PUC, the process requires a decision at the local level by either a zoning board or a municipality's governing body.<sup>111</sup> Appeals are then heard by county courts and ultimately by the Commonwealth Court—the "process can easily take a year or more."<sup>112</sup>

Before issuance of the order, however, the PUC made two decisions with broad implications. First, the PUC found that Pittsburgh's drilling ban—which earned the city council a standing ovation in 2010<sup>113</sup>—conflicted with state environmental law.<sup>114</sup> Second, the Commission declared a North Towanda Township

<sup>106</sup> Laura Olson, *Pa. Reviewing Legality of South Fayette Drilling Ordinance*, PITTSBURGH POST-GAZETTE, Aug. 22, 2012, <http://www.post-gazette.com/local/marcellusshale/2012/08/22/Pa-reviewing-legality-of-South-Fayette-drilling-ordinance/stories/201208220188>.

<sup>107</sup> BUCHANAN INGERSOLL & ROONEY PC, *supra* note 93.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> BUCHANAN INGERSOLL & ROONEY PC, *supra* note 93.

<sup>113</sup> *Pennsylvania: Pittsburgh Forbids Gas*, N.Y. TIMES, Nov. 17, 2012, [http://www.nytimes.com/2010/11/17/us/17brfs-PITTSBURGHFO.BRF.html?\\_r=0](http://www.nytimes.com/2010/11/17/us/17brfs-PITTSBURGHFO.BRF.html?_r=0).

<sup>114</sup> Laura Olson & Joe Smydo, *Pennsylvania Says Its Drilling Law Trumps Pittsburgh's*, PITTSBURGH POST-GAZETTE, Sept. 12, 2012 12:00 AM, <http://www.post-gazette.com/stories/local/state/pennsylvania-says-its-drilling-law-trumps-pittsburghs-652872/>.



ordinance that governed well setback standards and water impoundment areas to be overly restrictive on oil and gas operations, and therefore in violation of state law.<sup>115</sup> The Commission was also studying ordinances from ten other municipalities, but the court order prevented the PUC from rendering final decisions on those ordinances.<sup>116</sup>

The Commonwealth Court's ruling frustrated the oil and gas industry.<sup>117</sup> Unconventional shale gas wells come with "high initial costs," which puts "an additional premium on predictability."<sup>118</sup> The imbroglio regarding Act 13 and PUC ordinance review jeopardized the industry's search for certainty.<sup>119</sup>

After waiting more than a year, the oil and gas industry was dealt another serious blow when the Supreme Court decided the fate of Act 13's local zoning provisions in December 2013. In its decision, the Court determined Act 13 violated the Environmental Rights Amendment of the Pennsylvania constitution that guarantees citizens' "right to "clean air, pure water, and to the preservation of

<sup>115</sup> *Advisory Opinion, Advisory Opinion re Compliance of North Towanda Township, Bradford County, Zoning Ordinance with Act 13 of 2012; Docket No. M-2012-2298565*, PA. PUBLIC UTILITY COMM'N (Sept. 5, 2012), <http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&ved=0CCQQFjAB&url=http%3A%2F%2Fwww.puc.state.pa.us%2Fpdocs%2F1190170.doc&ei=X60ZVOiUCtSfyATugIGYCg&usq=AFQjCNH2NvYwnQINtv3zj3UxQ92fnQFbIQ&sig2=23alq9qZBlADV6ryKDE2cg&bvm=bv.75558745,bs.1,d.aWw>.

<sup>116</sup> *The Pennsylvania Public Utility Commission on Act 13*, SAUL EWING LLP (2012), <http://www.saul.com/publications-alerts-934.html>.

<sup>117</sup> See Dan Packel, *Drillers Face Harder Times If Pa. Pro-Fracking Law Falls*, LAW360, Oct. 16, 2012 6:20 PM, <http://www.law360.com/articles/387105/drillers-face-harder-times-if-pa-pro-fracking-law-falls> ("zoning issues could significantly curtail development if [gas developers] have to go back through each municipality").

<sup>118</sup> *Id.*

<sup>119</sup> *See id.*

the natural, scenic, historic and esthetic values of the environment.”<sup>120</sup>

#### IV. LOCAL LAND USE AND RESOURCE EXTRACTION IN ALBERTA

The oil and gas industry enjoys a comparatively simpler set of local zoning rules in Alberta than in Pennsylvania. In fact, “little legal attention is typically paid to local governments or municipalities in Canada.”<sup>121</sup> This is particularly true with regards to oil and gas development.<sup>122</sup> The province’s top down approach promotes consistency, and has largely prevented the creation of a regulatory patchwork.<sup>123</sup> Alberta’s local governments are conciliatory toward oil and gas interests, as they recognize “the importance of recovering [a] valuable nonrenewable Provincial resource and to . . . [avoid] compromis[ing] [its] extraction.”<sup>124</sup>

This is increasingly in doubt, however.<sup>125</sup> Mineral development and the population grew precipitously in Alberta over

<sup>120</sup> Marie Cusick, *Pa. Supreme Court Will Not Reconsider Act 13 Decision*, STATE IMPACT, Feb. 21, 2014, <http://stateimpact.npr.org/pennsylvania/2014/02/21/pa-supreme-court-will-not-reconsider-act-13-decision/>.

<sup>121</sup> Vlavianos & Thompson, *supra* note 8, at 56.

<sup>122</sup> *Id.* at 91. (“There are no legal requirements to consult with, or even notify, municipalities when such decisions are made, thereby reducing the ability of local governments to influence decision-making and to plan and prepare for the impacts from ensuing development.”).

<sup>123</sup> *Id.* at 56.

<sup>124</sup> *Id.* at 57 n.6 (referring to the City of Calgary’s position regarding provincial mineral development).

<sup>125</sup> See Roger Gibbins & Barry Worbets, *Managing Prosperity: Developing a Land Use Framework for Alberta*, CANADAWEST FOUND. (last visited Jan. 9, 2013), [https://landuse.alberta.ca/Documents/LUF\\_Managing\\_Prosperty\\_%20Developing\\_a\\_Land\\_Use\\_Framework\\_for\\_Alberta\\_Report-2005-09.pdf](https://landuse.alberta.ca/Documents/LUF_Managing_Prosperty_%20Developing_a_Land_Use_Framework_for_Alberta_Report-2005-09.pdf) (“Although cracks in the status quo do not yet signal an acute crisis, they foreshadow serious challenges to come as pressures on the provincial land base rapidly increase. Population growth and urbanization will continue, fueled by economic prosperity and an enviable quality of life. The energy sector could expand dramatically in the

the last decade.<sup>126</sup> The changes beget conflict. Dramatic growth caused issues among “competing land users, including industrial, agricultural, residential, and recreational users; Aboriginal communities; and environmental groups.”<sup>127</sup> Alberta’s municipalities are thus “increasingly being asked to respond to their constituents’ concerns about the environmental and public health risks of oil and gas development.”<sup>128</sup> In the last several years, several of Alberta’s local governments have resisted conciliation, and taken a more active role in oil and gas development.<sup>129</sup>

Alberta’s localities do maintain primary jurisdiction over some land uses.<sup>130</sup> Municipal governments are authorized to enact land use bylaws that divide the municipality into zoning districts and govern what uses are permitted within those areas.<sup>131</sup> Many projects require a development permit or subdivision approval from a locality before land can be developed or subdivided.<sup>132</sup> Alberta’s Municipal Government Act,<sup>133</sup> however, specifically exempts oil and gas

next decade in response to strong markets and the huge opportunities provided by untapped conventional deposits, enhanced recovery, unconventional deposits like oil sands and coal bed methane, and increased value-added processing.”)

<sup>126</sup> See Vlavianos & Thompson, *supra* note 8, at 63 (“[R]esidential expansion of cities, towns or acreage subdivisions is occurring on the land above existing oil and gas fields, coal and gravel deposits, or other subsurface resources. In other places, previously undetected oil and gas fields are being identified beneath existing urban and residential sites or new energy projects are being developed within expected growth areas. Accessing these resources increases the potential for conflict between industry, landowners and the public.”).

<sup>127</sup> Alan Harvie & Trent Mercier, *The Alberta Land Stewardship Act and Its Impact on Alberta’s Oil and Gas Industry*, 48 ALBERTA L. REV. 295, 296 (2010).

<sup>128</sup> Vlavianos & Thompson, *supra* note 8, at 63.

<sup>129</sup> See, e.g., Vlavianos & Thompson, *supra* note 8, at 57; see also Mabell, *supra* note 11; Vincent McDermott, *Shell Project Could Burden Population: Municipality*, FORTMCMURRAY.COM, Nov. 14, 2012 5:56 PM, <http://www.fortmcmurraytoday.com/2012/11/14/shell-project-could-burden-population-municipality>.

<sup>130</sup> Vlavianos & Thompson, *supra* note 8, at 61.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> Municipal Government Act, R.S.A. 2000, c. M-26 (Can.).

operations from municipal land use planning and regulation.<sup>134</sup> The decision to exempt oil and gas operations from local bylaws was the province's affirmation that "as the lifeblood of Alberta's economy," mineral development "should not be subjected to local control that might vary from place to place."<sup>135</sup> Indeed, Alberta's Cabinet has the power to supersede local land use by enacting laws governing municipal matters in all areas of development.<sup>136</sup>

Alberta's Energy Resources Conservation Board (ERCB) handles oil and gas project permitting, as well as the overall management of energy resources in the province.<sup>137</sup> Again, the ERCB is not required to consult with municipalities in approving energy projects.<sup>138</sup> The Board does, however, require companies to consult with those affected during the permit application process, including local governments.<sup>139</sup> If unhappy, a municipality may attempt to challenge a permit before the ERCB. But only those whose rights may be "directly and adversely affected by a proposed project will be granted standing before the Board" to challenge a permit application.<sup>140</sup> "[O]ne would think that municipalities should almost always be able to meet the Board's test for standing," but the ERCB has denied local governments standing on several occasions.<sup>141</sup>

Despite their relative ineffectuality, Alberta municipalities have quashed several unpopular oil and gas projects. In 2006, for example, the ERCB's predecessor<sup>142</sup> refused to issue licenses for six

<sup>134</sup> Vlavianos & Thompson, *supra* note 8, at 79.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* at 66.

<sup>137</sup> See generally *About Us: What We Do*, ENERGY CONSERVATION BD., <http://www.aer.ca/about-aer/what-we-do> (last visited Nov. 28, 2012).

<sup>138</sup> Vlavianos & Thompson, *supra* note 8, at 65, 69.

<sup>139</sup> *Id.* at 72.

<sup>140</sup> *Id.* (internal citations omitted).

<sup>141</sup> See *id.* at 73.

<sup>142</sup> *Energy Resources Conservation Board (ERCB)*, ALBERTACANADA.CA, June 12, 2012 1:26 PM, <http://www.albertacanada.com/business/invest/energy-resources-and-conservation-board.aspx> ("On January 1, 2008, the Alberta Energy and Utilities Board was divided to create two agencies. The Energy Resources and

dangerous “sour gas”<sup>143</sup> wells along Calgary’s southeastern edge.<sup>144</sup> The decision hinged on the inadequacy of Compton Petroleum’s emergency plans, which were necessary to protect the public from a release of poisonous gas.<sup>145</sup> In the context of such a complex, dangerous project, the Board instructed that municipalities—Calgary in this instance—be allowed to evaluate the safety protocols and provide recommendations prior to project approval.<sup>146</sup> Instead, the gas company had remained unresponsive and acted unilaterally.<sup>147</sup> Calgary did not intend its reservations to be an “obstacle to business development,” but the municipality refused to “roll over when it [came] to public safety.”<sup>148</sup> At the time, the ERCB’s refusal to grant Compton the licenses was harkened as a “benchmark” for future permitting applications.<sup>149</sup>

Local governments across the province have since presented opposition to oil and gas development within their boundaries.<sup>150</sup> For example, Lethbridge, in Southern Alberta, adopted a policy

Conservation Board and the Alberta Utilities Commission focus on two distinct, expanding and complex segments of Alberta’s economy.”)

<sup>143</sup> *Sour gas: Why it Makes People Nervous*, CBC NEWS ONLINE, Aug. 10, 2005, [http://www.cbc.ca/news2/background/environment/sour\\_gas.html](http://www.cbc.ca/news2/background/environment/sour_gas.html).

<sup>144</sup> Jodie Hierlmeier, *EUB Gives Conditional Green Light on Sour Gas Wells Outside Calgary*, 20 ENV. L. CENTER 1, 1 (2005), [http://webcache.googleusercontent.com/search?q=cache:ihKox344vRMJ:www.elc.ab.ca/Content\\_Files/Files/NewsBriefs/EUBgiveconditionalgreenlight-Vol20-3.pdf+&cd=1&hl=en&ct=clnk&gl=us&client=safari](http://webcache.googleusercontent.com/search?q=cache:ihKox344vRMJ:www.elc.ab.ca/Content_Files/Files/NewsBriefs/EUBgiveconditionalgreenlight-Vol20-3.pdf+&cd=1&hl=en&ct=clnk&gl=us&client=safari).

<sup>145</sup> *Id.* at 1-2.

<sup>146</sup> *Id.* at 3.

<sup>147</sup> Alberta Energy and Utilities Board, *Compton Petroleum Corporation: Applications for Licenses to Drill Six Critical Sour Natural Gas Wells, Reduced Emergency Planning Zone, Special Well Spacing, and Production Facilities—Okotoks Field (Southeast Calgary Area)*, EUB DECISION 2005-060 (22 June 2005) [hereinafter *Compton: Okotoks*], <http://webcache.googleusercontent.com/search?q=cache:MQnrNcOqR1o:www.aer.ca/documents/decisions/2005/2005-060.pdf+&cd=1&hl=en&ct=clnk&gl=us>.

<sup>148</sup> *Plans Dropped for Sour Gas Well Project*, CALGARY HERALD, Jan. 5, 2006, [http://www.canada.com/story\\_print.html?id=82a0d40b-f818-4630-a20a-848c0526d3e7&sponsor](http://www.canada.com/story_print.html?id=82a0d40b-f818-4630-a20a-848c0526d3e7&sponsor).

<sup>149</sup> *Id.*

<sup>150</sup> Vlavianos & Thompson, *supra* note 8, at 57.

resolution in 2012 that fully opposed any drilling within city limits.<sup>151</sup> Although the city council acknowledged the region “had fairly limited exposure to oil and gas well drilling activity,” Lethbridge feared a repeat of cases where the provincial government awarded drilling rights within urban boundaries.<sup>152</sup> The city council intended the measure to get “the attention of the provincial Energy Resources Conservation Board.”<sup>153</sup>

In another case, reminiscent of Compton Petroleum’s defunct sour gas wells, Kaiser Exploration ran into political roadblocks in Calgary that halted development of an oil well within the city.<sup>154</sup> The planned well was expected to be over 500 meters from the nearest house or body of water, far more than the 100 meters provincial rules required,<sup>155</sup> and Kaiser obtained the necessary permits from the ERDC without trouble.<sup>156</sup> Before drilling, however, “not-in-my-backyard” community opposition<sup>157</sup> prompted the City of Calgary and a local provincial representative to intervene.<sup>158</sup> The provincial Energy Minister was also called.<sup>159</sup> The Minister launched a review of the province’s urban drilling policy<sup>160</sup> and requested the ERCB delay approval of Kaiser’s plans until the evaluation is complete.<sup>161</sup> In developing the new policy, Alberta plans to consider

<sup>151</sup> Mabell, *supra* note 11.

<sup>152</sup> *Id.*

<sup>153</sup> *City of Lethbridge: Council Adopts Position Opposing Oil & Gas Drilling Within Urban Boundaries*, 4-TRADERS.COM, Nov. 13, 2012 6:45 PM, <http://www.4-traders.com/news/City-of-Lethbridge-Council-Adopts-Position-Opposing-Oil-Gas-Drilling-Within-Urban-Boundaries%E2%80%9A9415507503/>.

<sup>154</sup> *Population Growth, Urbanization, and NIMBYism in Alberta Emerge as Potential Challenges for the Oil and Gas Industry*, *supra* note 12, at 1.

<sup>155</sup> Vanderklippe, *supra* note 23.

<sup>156</sup> *Population Growth, Urbanization, and NIMBYism in Alberta Emerge as Potential Challenges for the Oil and Gas Industry*, *supra* note 12, at 1.

<sup>157</sup> Vanderklippe, *supra* note 23.

<sup>158</sup> *Population Growth, Urbanization, and NIMBYism in Alberta Emerge as Potential Challenges for the Oil and Gas Industry*, *supra* note 12, at 1.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> Schneider, *supra* note 4.

issues such as well proximity to houses and what emergency response plans will be required of companies operating in urban areas.<sup>162</sup>

To address Alberta's increasing land-use conflicts and codify the provincial land policy, the province enacted the Alberta Land Stewardship Act (ALSA) in 2009.<sup>163</sup> The Act represented the statutory embodiment of the province's overarching land use strategy, and was designed to manage public and private lands and natural resources in the province.<sup>164</sup> The provincial government, with public comment, set Alberta's energy policy and established planning regions for the province.<sup>165</sup> To affect its goals, the provincial Cabinet was empowered to establish regional plans that are legally binding on local governments.<sup>166</sup> Municipalities are required to make future development and land use decisions in accordance with those plans,<sup>167</sup> and must "amend planning documents to adopt regional planning directions."<sup>168</sup>

Although the ALSA contained no requirement for local government representation in regional planning,<sup>169</sup> Alberta's provincial government intends to include municipal governments in the process, along with industry, nongovernmental, aboriginal groups, and "other relevant planning bodies."<sup>170</sup>

As a practical matter, municipalities have played a significant role in the development of Alberta's regional plans.<sup>171</sup> So far,

<sup>162</sup> Vanderklippe, *supra* note 23.

<sup>163</sup> Land Stewardship Act, S.A. 2009, c. A-26.8 (Can.).

<sup>164</sup> Harvie & Mercier, *supra* note 127, at 296.

<sup>165</sup> Vlavianos & Thompson, *supra* note 8, at 58, 78.

<sup>166</sup> *Id.* at 66.

<sup>167</sup> *Id.*

<sup>168</sup> *Alberta Land-Use Framework*, CITY OF EDMONTON (Dec. 2008), [http://www.edmonton.ca/city\\_government/documents/Alberta\\_Land\\_Use\\_Framework.pdf#search=alberta%20land-use%20framework](http://www.edmonton.ca/city_government/documents/Alberta_Land_Use_Framework.pdf#search=alberta%20land-use%20framework).

<sup>169</sup> Vlavianos & Thompson, *supra* note 8, at 67.

<sup>170</sup> *Alberta Land-Use Framework*, *supra* note 168.

<sup>171</sup> See generally Alberta Environment and Sustainable Resource Development, *Regional Plans*, ALBERTA.CA,

municipal authorities, including local mayors and members of town councils, provided input and served on the regional planning council.<sup>172</sup>

#### V. ALBERTA'S EXPERIENCE IS INSTRUCTIVE FOR PENNSYLVANIA

Pennsylvania and Alberta's experiences with municipal objections to oil and gas development show that localities will not be forced into compliance with state or provincial goals. This is unsurprising given Pennsylvanians' penchant for strong local government. Albertans' reluctance is uncharacteristic for the region, and therefore dramatically illustrates the inescapability of state and local political conflicts, even where municipal governments exercise comparatively little power.

In Pennsylvania, the disagreement will not subside under the state's current regulatory framework, especially since Act 13's key provision was invalidated by the state's Supreme Court.<sup>173</sup> Unless drilling activity decreases, there is no reason to think local governments will face fewer complaints from citizens in affected communities. State regulators and legislators will also face pressure from the oil and gas industry.<sup>174</sup> Act 13 represented a failed attempt at reconciling the interests of Pennsylvania's various stakeholders.<sup>175</sup>

<https://www.landuse.alberta.ca/RegionalPlans/Pages/default.aspx> (last visited Nov. 28, 2012).

<sup>172</sup> See *Lower Athabasca Regional Advisory Council*, ALBERTA.CA, <https://www.landuse.alberta.ca/LandUse%20Documents/Lower%20Athabasca%20Regional%20Advisory%20Council%20Members%20-%202009-06.pdf> (last visited Nov. 29, 2012); see also *South Saskatchewan Regional Advisory Council Members*, *supra* note 24.

<sup>173</sup> See Timothy Puko, *Ruling on Act 13 Won't End Fray*, TRIBLIVE, Dec. 10, 2012, 11:56 PM, <http://triblive.com/news/3110483-74/state-court-act#axzz2HLw8nPnr>.

<sup>174</sup> See *id.*

<sup>175</sup> See Detrow, *supra* note 97 (“[T]he provisions casually set aside by the court were the result of months of compromise and negotiation, with significant input and support from Pennsylvania's local government associations.”).



Rather than end the consistently prickly debate regarding municipal regulation of oil and gas drilling, the Act resulted in new litigation.<sup>176</sup> That the County Commissioners Association of Pennsylvania and the State Association of Township Supervisors supported Act 13 did not influence the seven municipalities who challenged the law.<sup>177</sup> The municipalities' success also emboldened other discontented localities and environmental groups, several of which filed amicus briefs with the Supreme Court opposing the Act.<sup>178</sup>

Pennsylvania's local communities argued that Act 13's one-size-fits-all approach to oil and gas regulation ignores individual localities' unique physical and political characteristics.<sup>179</sup> Statewide rules may "expedite unconventional gas drilling" and "encourage investment by giving companies regulatory and financial certainty,"<sup>180</sup> but Act 13 ignored fundamental differences between urban, suburban, and rural communities. Even oil and gas companies have recognized that drilling in large cities, for example, is impracticable.<sup>181</sup> According to one industry spokesman, "density and distance from any pipeline make drilling in Pittsburgh . . . a bad idea."<sup>182</sup>

<sup>176</sup> *Id.*

<sup>177</sup> See *Robinson Twp.*, 52 A.3d 463.

<sup>178</sup> *Cowardly "Me Too" Towns Support Act 13 Lawsuit in 11th Hour*, MARCELLUS DRILLING NEWS, <http://marcellusdrilling.com/2012/09/cowardly-me-too-towns-support-act-13-lawsuit-in-11th-hour/> (last visited Jan. 9, 2013).

<sup>179</sup> See *Special Treatment: How Did Two Counties Rate a Ban on Gas Drilling?*, PITTSBURGH POST-GAZETTE, July 15, 2012, 12:07 AM, <http://www.post-gazette.com/opinion/editorials/2012/07/15/Special-treatment-How-did-two-counties-rate-a-ban-on-gas-drilling/stories/201207150129>.

<sup>180</sup> John H. Quigley & Joel P. Epstein, *Go Beyond Act 13: Gas Companies Should Acknowledge Local Needs in Community Compacts*, PITTSBURGH POST-GAZETTE, Apr. 15, 2012, <http://www.post-gazette.com/stories/opinion/perspectives/go-beyond-act-13-gas-companies-should-acknowledge-local-needs-in-community-compacts-631389/>.

<sup>181</sup> Brian O'Neill, *City Drilling Ban Seems a Shallow Debate*, PITTSBURGH POST-GAZETTE (July 21, 2011 12:00 AM), <http://www.post-gazette.com/stories/opinion/brian-oneill/city-drilling-ban-seems-a-shallow-debate-307078/#ixzz2HUX5oSwA>.

<sup>182</sup> *Id.*

In Pennsylvania, rural Bradford County's experience unmistakably illustrates the rural-urban divide.<sup>183</sup> More wells have been drilled in Bradford than anywhere else in Pennsylvania.<sup>184</sup> Thanks to Act 13 the county collected more than \$8 million in impact fees in 2012, and was able to reduce property taxes as a result.<sup>185</sup> Bradford's struggling farmers have also been bolstered by lease payments from energy companies.<sup>186</sup> At the same time, though, locals struggled with increased traffic, polluted water wells, acid spills, and a gas well blowout.<sup>187</sup> Pittsburghers have experienced no such consequences of gas development.

Rural and urban Pennsylvania's differences are not only physical. Even before the Act 13 litigation began, two suburban Philadelphia counties managed to exempt themselves from the Act's one-size fits all approach.<sup>188</sup> The counties' state representatives tucked a localized drilling moratorium into the state's annual budget at the eleventh hour.<sup>189</sup> The move angered rural counties left to cope with unrestrained gas drilling.<sup>190</sup> The moratorium highlighted the dissimilar political clout enjoyed by suburban, urban, and rural Pennsylvanians on energy issues.

<sup>183</sup> *Pennsylvania's Busiest Drilling County: Bradford*, STATE IMPACT, <http://stateimpact.npr.org/pennsylvania/tag/bradford-county/> (last visited Jan. 9, 2013).

<sup>184</sup> *Id.*

<sup>185</sup> James Loewenstein, *Bradford County's \$8.4M Impact Fee Allotment Arrives*, DAILY REVIEW, Nov. 16, 2012, <http://thedailyreview.com/news/bradford-county-s-8-4m-impact-fee-allotment-arrives-1.1404090>.

<sup>186</sup> Eric Boehm, *Farmers Highlight Pennsylvania Gas Industry's Positive Impact*, PENNSYLVANIA INDEP., May 11, 2011, <http://paindependent.com/2011/05/farmers-highlight-pennsylvania-gas-industrys-positive-impact/>.

<sup>187</sup> *Pennsylvania's Busiest Drilling County: Bradford*, *supra* note 183.

<sup>188</sup> Michael Macagnone & Angela Coulombis, *Local Drilling Moratorium Rankles Rest of State*, PHILADELPHIA INQUIRER, July 11, 2012, [http://articles.philly.com/2012-07-11/news/32619938\\_1\\_south-newark-basin-drilling-for-natural-gas-charles-mcilhinney](http://articles.philly.com/2012-07-11/news/32619938_1_south-newark-basin-drilling-for-natural-gas-charles-mcilhinney).

<sup>189</sup> *Id.*

<sup>190</sup> *Id.* (as one rural legislator quipped, “[w]hat makes Bucks and Montgomery [counties] so special?”)

Pittsburgh, Philadelphia, and Bradford's disparate experiences with drilling and related legislation demonstrate that Act 13 was never meant to affect all of Pennsylvania's localities equally. The inequity bristled some.<sup>191</sup> After the suburban Philadelphia moratorium was passed, State Representative Jesse White, whose district encompasses parts of rural western Pennsylvania far from Philadelphia, criticized the exemption as unfair.<sup>192</sup> White argued that "[if] Act 13 isn't good enough for some of us [Pennsylvanians], then it isn't good enough for any of us."<sup>193</sup>

Alberta's approach to its land use framework is instructive for Pennsylvania in this regard. The Canadian province has struck a balance between provincial and local concerns, and with a close eye toward physical characteristics unique to each planning region. Alberta's land use strategy was given legal force in 2009 with the enactment of the ALSA,<sup>194</sup> but the planning processes began in 2005, and continued through 2008.<sup>195</sup> During that time, "landowners; municipal leaders and planners; agricultural, forestry, transportation and energy associations; conservation and environmental groups; recreational groups; and academics" were provided the opportunity to comment on the plan.<sup>196</sup>

During the course of this planning, Alberta's local leaders echoed Pennsylvania's municipalities' criticisms of Act 13. In fact, "the lack of land use decision making authority at the municipal level was a prevailing issue among . . . participants."<sup>197</sup> Also noteworthy

<sup>191</sup> Jesse White, *Op-Ed: Selective Drilling Ban Exposes Hypocrisy in PA Energy Policy*, BEAVERCOUNTIAN.COM, July 3, 2012, <https://beavercountian.com/content/op-ed/op-ed-selective-drilling-ban-exposes-hypocrisy-in-pa-energy-policy>.

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> Harvie & Mercier, *supra* note 127, at 296.

<sup>195</sup> See *Developing a Land-Use Framework*, ALBERTA.CA, <https://landuse.alberta.ca/PlanforAlberta/DevelopingFramework/Pages/default.aspx> (last visited Jan. 9, 2013).

<sup>196</sup> *Id.*

<sup>197</sup> THE PRAXIS GROUP, MUNICIPAL CONSULTATION ON THE PROVINCIAL LAND USE FRAMEWORK INITIATIVE SUMMARY REPORT 5 (2006),

“was a common recognition that many land use planning issues are regional in nature.”<sup>198</sup> As the report summarizing municipal comments on the provincial plan put it—“One size does not fit all!”<sup>199</sup>

Alberta’s solution to the municipalities’ concerns was to divide the province into seven land-use planning regions.<sup>200</sup> The seven plans are also being developed to “reflect the uniqueness and priorities of each region.”<sup>201</sup> Each regional plan sets “out regional land-use objectives and provides the context for land-use decision-making within the region.”<sup>202</sup> The “ERCB will now have to expand the scope of its considerations to . . . contemplate whether the proposed project conforms with the vision, goals, and objectives established in the regional plan.”<sup>203</sup>

Resource extraction emerged as a higher priority in some regions than in others. The Lower Athabasca Region, for example, contains much of Alberta’s oil sands, and the development of this resource is the region’s paramount objective.<sup>204</sup> The South Saskatchewan Region, on the other hand, is “home to 45 percent of Alberta’s population and contains the province’s largest city,

[http://webcache.googleusercontent.com/search?q=cache:KHLLqbcTDiEJ:https://landuse.alberta.ca/Documents/LUF\\_Municipal\\_Consultation\\_on\\_the\\_Provincial\\_Land\\_Use\\_Framework\\_Initiative\\_Report-2006-11.pdf+%&cd=1&hl=en&ct=clnk&gl=us](http://webcache.googleusercontent.com/search?q=cache:KHLLqbcTDiEJ:https://landuse.alberta.ca/Documents/LUF_Municipal_Consultation_on_the_Provincial_Land_Use_Framework_Initiative_Report-2006-11.pdf+%&cd=1&hl=en&ct=clnk&gl=us).

<sup>198</sup> *Id.* at 6.

<sup>199</sup> *Id.* at 32.

<sup>200</sup> ALBERTA.CA, LAND-USE FRAMEWORK 19 (2008), available at [https://www.landuse.alberta.ca/Documents/LUF\\_Land-use\\_Framework\\_Report-2008-12.pdf](https://www.landuse.alberta.ca/Documents/LUF_Land-use_Framework_Report-2008-12.pdf).

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

<sup>203</sup> Harvie & Mercier, *supra* note 127, at 327.

<sup>204</sup> *Lower Athabasca Regional Advisory Council Advice to the Government*, ALBERTA.CA (2010), <https://landuse.alberta.ca/RegionalPlans/LowerAthabascaRegion/LARPRAC/Pages/default.aspx> (last visited Jan. 9, 2013).

Calgary.”<sup>205</sup> As a result, water management is the region’s “top concern,” and “stands to be the limiting factor on future population and economic growth.”<sup>206</sup> Project permitting decisions will undoubtedly differ between regions focused on water conservation, as in South Saskatchewan, and energy, as in Lower Athabasca.

Once all regional plans are complete, the ALSA will leave oil and gas drillers with seven unique regulatory regimes to cope with. From an industry standpoint this may appear a less desirable situation than negotiating Alberta’s former province-wide land use rules regarding energy development, but, as discussed, recent unrest in Calgary regarding gas drilling has thrown the predictability of Alberta’s previous regulatory regime into question.<sup>207</sup> The ALSA will alleviate those “cracks in the status quo . . . that foreshadow serious challenges to come as pressures on the provincial land base rapidly increase.”<sup>208</sup>

A comparable approach to Pennsylvania’s search for workable uniformity and predictability would help alleviate the tension between the energy industry, the state, and local governments. Pennsylvania, like Alberta, is home to large swaths of rural land, as well as dense urban areas and suburban sprawl. A statewide land use regime applied to oil and gas must account for this reality. A regional approach, like Alberta’s, would strike a balance between those seeking recognition of local characteristics and the quest for uniformity and predictability. It would also give municipal

<sup>205</sup> SOUTH SASKATCHEWAN REGIONAL ADVISORY COUNCIL, ADVICE TO THE GOVERNMENT OF ALBERTA FOR THE SOUTH SASKATCHEWAN REGIONAL PLAN 5 (2011), <https://landuse.alberta.ca/LandUse%20Documents/South%20%20Saskatchewan%20Regional%20Advisory%20Council%20Advice%20to%20Government%20-%202011-03.pdf>.

<sup>206</sup> *Id.*

<sup>207</sup> Vanderklippe, *supra* note 23.

<sup>208</sup> ROBERT GIBBINS & BARRY WORBERTS, MANAGING PROSPERITY: DEVELOPING A LAND USE FRAMEWORK FOR ALBERTA, 3 (2005), <https://landuse.alberta.ca/LandUse%20Documents/Managing%20Prosperity%20Developing%20a%20Land%20Use%20Framework%20for%20Alberta%20-%202005-09.pdf>.

officials a meaningful place at the table when crafting rules for oil and gas drillers. Industry would also be placated, as negotiating even dozens of regions would be preferable to the thousands of individual municipal zoning codes currently in existence.

## CONCLUSION

Pennsylvania and Alberta's recent experiences with oil and gas development are much alike.<sup>209</sup> Steady or slow development suddenly gave way to frenzied growth, and regulators are only now catching up.<sup>210</sup> Here, however, is where the similarities end. Pennsylvania's and Alberta's treatment of local land use decision-making differ significantly. Alberta's local governments play a comparatively minor role to those in Pennsylvania, yet the province intends to include them in the land use planning process. Pennsylvania's localities enjoy more power, but have been bullied by the state government. Yet Pennsylvania's political and cultural framework requires informed reliance on local input for a successful land-use regime to work. Regional stakeholders must be consulted, and municipal leaders given a chance to contribute meaningfully. And as the Canadians put it: One size does not fit all.<sup>211</sup>

Alberta's approach to local land use as it relates to oil and gas development bears important lessons for Pennsylvania. Unlike the contentious and litigious relationship between Pennsylvania's state and local governments, Alberta's land use framework strikes a balance between local and provincial interests. Pennsylvania should take note.

<sup>209</sup> Pifer, *supra* note 1, at 622.

<sup>210</sup> Schneider, *supra* note 4; Ayesha Rascoe, *U.S. Shale Gas Regulators Struggle To Keep Up With Rapid Development, Government Finds*, HUFFINGTON POST, Oct. 9, 2012, 9:37 PM, [http://www.huffingtonpost.com/2012/10/10/us-shale-gas-regulators\\_n\\_1953135.html](http://www.huffingtonpost.com/2012/10/10/us-shale-gas-regulators_n_1953135.html).

<sup>211</sup> MUNICIPAL CONSULTATION ON THE PROVINCIAL LAND USE FRAMEWORK INITIATIVE SUMMARY REPORT, *supra* note 197.