

  
**Curtin & Heefner** LLP  
ATTORNEYS AT LAW

2005 S. EASTON ROAD • SUITE 100 • DOYLESTOWN, PA 18901

(267) 898.0570 • (800) 773.0680 • FAX (215) 340.3929

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JBY@curtinheefner.com

May 1, 2014

Mike Hnath, Esquire  
Solicitor, Middlesex Township  
128 W. Cunningham Street  
Butler, PA 16001

*Sent via regular mail and electronic mail: mhnath@dmkcg.com*

**Re: Middlesex Township  
Proposed Unconventional Gas Development on the Geyer Tract**

We are writing to address your stated position that Middlesex Township can allow unconventional gas development activity at the Geyer property in the Township's R-AG zoning district. Your position is untenable and exposes the Township to a significant risk of litigation.

Township officials – including the Chair of the Board of Supervisors – have made it clear that they are predisposed toward allowing gas development activity to proceed at the Geyer tract and throughout the Township, regardless of the facts. It has also become clear that the Township is seeking legal “cover” to do so. No such cover exists.

First, Township officials told residents that the Township does not have the ability to apply its zoning ordinance to unconventional gas development activity. We provided the Township an extensive memorandum debunking this assertion. Indeed, as we explained in that memorandum, the Pennsylvania Supreme Court has made it undeniably clear that municipalities have the authority to apply their zoning ordinances to the gas industry. Robinson Twp. v. Commonwealth of Pennsylvania, 83 A.3d 901 (Pa. 2013). The Court went further and reminded local elected officials that they have a constitutional duty to apply their zoning in a rational way and to protect the community's clean air, clean water and high quality soils for future generations.

With the Township's first legal position debunked, the Township is confronted with the reality that its zoning ordinance – which it has the authority and responsibility to enforce – does not allow gas development in the R-AG District, where the Geyer tract is located. In the face of this reality, the Township has shifted positions and is now advancing the erroneous position that unconventional gas development is permitted in the R-AG district (and all other agricultural districts) as an accessory use to farming. As this letter will explain, this most recent legal theory is not supported by the plain language of the Township's ordinance, case law, or the Municipalities Planning Code (“MPC”).

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As further explained below, the Township's current position directly conflicts with the Ordinance's definitions of "accessory use" and "agriculture;" is inconsistent with the Ordinance's statement of community development objectives, the comprehensive plan, and the purpose of the R-AG District; and ignores the fact that the Ordinance expressly permits gas development activity as a principal use in *other* districts, which precludes it from being an accessory use in the R-AG District.

I. Township's Assertion Is Inconsistent With The Zoning Ordinance and Established Law

The Township appears to be trying to rely on language in Section 175-244.A.(2)(k) of the Township's zoning ordinance. This section of the ordinance allows: "[o]ther accessory uses customarily incidental to and on the same lot with any permitted use, conditional use or use by special exception authorized in this district." The Township apparently claims that unconventional gas development is accessory to farming. The Township's current claim ignores the definition of "accessory use" in its ordinance, the definition of "agriculture," the community development objectives set forth in its ordinance, and the very purpose of the R-AG district.

A. Township's Argument Conflicts with the Ordinance's Basic Definition of "Accessory Use"

The definition of "accessory use" under the zoning ordinance is: "A use customarily incidental and *subordinate to* the principal use and located on the same lot as the principal use." Section 175-8 (emphasis added). The proposed shale gas development does not fit this definition for several substantial reasons.

1. Unconventional Shale Gas Wells Do Not Support Any Ongoing Agricultural Use

One of the requirements stated in the ordinance and considered by courts is whether the proposed accessory use is "subordinate" to the principal use – that is, whether it is secondary. Riskier v. Smith Tp. Zoning Hearing Bd., 886 A.2d 727 (Pa. Commw. Ct. 2005); Mitchell v. Zoning Hearing Bd. of the Borough of Mount Penn, 838 A.2d 819, 826-27 (Pa. Commw. Ct. 2003). The Township has effectively ignored this requirement. Unlike conventional wells, unconventional shale gas wells are, as a rule, unable to provide free gas to the property where they are located because the character of the gas makes directly providing free gas onsite prohibitively dangerous.<sup>1</sup> The well, therefore, is not accessory or subordinate to *any* use on the property – it is simply another use superimposed on agricultural land. As a result, the proposed unconventional gas development activity on the Geyer tract is not permitted.

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<sup>1</sup> <http://pyllaw.com/oil-gas-leasing-dangers-problems/>;  
[http://wvso.org/resources/minerals\\_royalty/Gas\\_Lease\\_Addendum\\_Checklist.pdf](http://wvso.org/resources/minerals_royalty/Gas_Lease_Addendum_Checklist.pdf);  
<http://pubs.cas.psu.edu/FreePubs/pdfs/ua448.pdf>  
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2. Unconventional Shale Gas Development Does Not Naturally Exist as Incidental to Farming

The courts apply common sense in determining whether the alleged accessory use “would naturally exist ... as a use incidental to the principal use.” Benoff v. Zoning Bd. of Adjustment, 479 A.2d 68, 70 (Pa. Commw. Ct. 1984). In Benoff, the court found that parking an outboard personal, recreational motor boat on residential property, is incidental to the residential use, while the parking of commercial or industrial vehicles is not. Id. Similarly, in Appeal of Klein, 149 A.2d 114, 116 (Pa. 1959), the Supreme Court found that the sale of shrubs and flowers grown onsite is accessory to farming while the resale of plants purchased elsewhere would be commercial activity separate from the incidental sale of farm products.

Unlike the incidental sale of farm products or construction of a stable for raising horses, which may be natural outgrowths of agricultural activity on a property, unconventional shale gas wells do not naturally exist as incidental to farming. The very term “accessory” means something that complements, adds to, or aids.<sup>2</sup> Sales of farm products complement or add to a farm. The accessory use, in other words, does not diminish (or dwarf) the principal use. In contrast, an unconventional shale gas well site complex does not complement a farm. It eats up farmland and damages the principal use. Indeed, once agricultural soils are developed, they lose their value.<sup>3</sup> Thus, the Township’s argument ignores the “common usage” of the term “accessory”, and fails to interpret the language of the ordinance “in a sensible manner.” City of Hope, 890 A.2d at 1143-44.

3. Gas Revenue Would Exceed Farming Revenue

The proposed unconventional gas well site is also not subordinate to the property’s agricultural use because the revenue it would generate would likely far exceed current farming revenue from the property. In Bennett v. Zoning Bd. of Adjustment, 151 A.2d 439, 440-41 (Pa. 1959), a gas station claimed that its sale of trailers was accessory to the gas station. The court rejected this argument because the sale of trailers dwarfed the “principal” use in revenue. Here, the amount of income that the owners will derive from the shale gas development on the property will in all likelihood dwarf any income received from any ongoing farming activities, particular given that the proposed development will disrupt those activities. Thus, as in Bennett, the proposed unconventional gas development project is not subordinate to the principal agricultural use, and therefore is not an “accessory use” under the Township’s ordinance.

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<sup>2</sup> See <http://www.merriam-webster.com/dictionary/accessory?show=0&t=1398695947>

<sup>3</sup> See <http://landcover.usgs.gov/luhna/chap3.php>; <http://www.farmland.org/resources/fote/default.asp>  
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4. Unconventional Gas Development Would Substantially Change the Character of the Geyer Tract

An unconventional shale gas well site on the Geyer tract is not an accessory use because it would “dramatically change the character of the principal use of the property.” Riskier v. Smith Twp. Zoning Hearing Bd., 886 A.2d 727, 732 (Pa. Commw. Ct. 2005). In Riskier, a property owner wanted to build a 1900 foot long airplane landing strip to enable him to fly his antique airplane, and claimed that the landing strip was accessory to his residence. The Court agreed that the strip was not an accessory use to the single-family residence on the property noting that it would “dramatically change the character of the principal use of the property.” Just as an airplane landing strip would dramatically change the nature of a residential use, a heavy industrial use would substantially change the character of the Geyer farm. Shale gas well site development involves intense lighting, noise, odors, road and silica dust, and flaring, all of which dramatically change the character of the existing agricultural use.

5. Unconventional Shale Gas Development Is Not Customarily Incidental To Agricultural Uses

For the Township’s argument to succeed, the proposed shale gas development must be “customarily incidental” to the principal use of agriculture under the Township’s ordinance. The Township’s argument fails on this point also. Even if there was and still is a common use of gas wells by farms for free gas from conventional wells, unconventional gas development is a use of a different nature and extent.

“[P]roof of customary incidence has entailed a showing that a significant percentage of like principal uses in the area have accessory uses of the *nature and extent* in question.” Champaigne v. Zoning Hearing Bd. of East Bradford Twp., 374 A.2d 752, 754 (Pa. Commw. Ct. 1977)(emphasis added).

The nature and extent of unconventional shale gas development is markedly different than the vertical (“conventional”) wells that have at times been found in parts of Pennsylvania. The shale gas development being proposed is a use entirely different than the alleged “historic use” that the Township is relying on. The proposed Geyer unconventional gas development site is simply not the same as the old gas well that someone’s grandfather had out on a corner of the farm.

In contrast to the relatively small footprint and simple process involved in conventional well drilling,<sup>4</sup> shale gas well development requires at least five (5) or more acres, multiple

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<sup>4</sup> Fracking: A Look Back, “Likewise, the hydraulic horsepower (hhp) needed to pump fracking material has risen from an average of about 75 hhp in the early days to an average of more than 1,500 hhp today, with big jobs  
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laterals, repeated high-volume hydraulic fracturing, staging areas, and all the equipment necessary to that development, including trucks, cranes, numerous compressors to supply the required horsepower for the fracking operations, chemicals, and explosives. There is significantly more waste and wastewater to handle because of the number of wellbores and the high-volume hydraulic fracturing process.

The hydraulic fracturing process on an unconventional shale gas well requires explosive charges to perforate the well casing, and a mixture of millions of gallons of water, fine sand (or another type of “proppant”) to hold open the fractures, and large quantities of different chemicals, including many carcinogenic, toxic and hazardous substances. One unconventional well may use several million gallons of water. The process also requires an extraordinarily large amount of hydraulic horsepower<sup>5</sup> in order to pump the fracturing mixture into the approximately mile-deep wellbore and out through the perforated casing at a pressure high enough to fracture the shale and to allow gas to flow.

An unconventional well can be fractured multiple times, and this process is then multiplied by the number of wells on a particular wellpad. For the proposed Geyer site, which currently would house six wells, there will be at least six (6) different fracking operations, with more needed if the gas does not flow as required. Further, an operator may decide to return several years later to drill a well deeper and engage in additional high-volume hydraulic fracturing to gather more gas from an already-drilled well, creating disruptions well into the future. As a result, a single unconventional gas site with multiple wellbores may require, over the entire development process, thousands of water trucks, hundreds of chemical storage trailers, numerous compressor engines, storage of explosives, sand-mixing trucks, monitoring equipment, and other vehicles and equipment in order to execute the fracturing process and fully develop all the wells on the wellpad. During that time, the site may also contain large impoundments of hazardous wastewater. A shale gas wellpad could take *at least* a year, if not two or more, to develop from start to finish. The well site remains indefinitely with various pipes, valves, and tanks that require servicing throughout the life of each well.

This difference in scale and intensity is significantly more disruptive than any traditional “conventional” vertical wells that the Township is basing its argument on. “Unconventional” gas wells were not historically placed on farms; unconventional gas wells did not even exist until recently.

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requiring more than 10,000 hhp.” <https://www.asme.org/engineering-topics/articles/fossil-power/fracking-a-look-back>; [https://www.museumoftheearth.org/files/marcellus/Marcellus\\_issue6.pdf](https://www.museumoftheearth.org/files/marcellus/Marcellus_issue6.pdf)

<sup>5</sup> Fracking: A Look Back, <https://www.asme.org/engineering-topics/articles/fossil-power/fracking-a-look-back>  
These greater horsepower requirements mean more emissions and noise per wellpad, given the compressor engines required for horsepower generation during the fracturing process.

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B. The Township's Position Is Inconsistent with the Zoning Ordinance's Definition of Agriculture

The Township's ordinance limits what can be considered as an accessory use to "agriculture." Under the Township's ordinance, "[a]ccessory uses permitted in conjunction with an agricultural use may include barns, stables, corn cribs, silos, greenhouses **and any other use or structure** that is **clearly related** to an agricultural operation." Zoning Ordinance Section 175-8 (emphasis added). An unconventional shale gas well site is not clearly related to an agricultural operation.

When reviewing ordinances, courts "rel[y] on the common usage of words and phrases and construe[] language in a sensible manner." City of Hope v. Sadsbury Twp. Zoning Hearing Bd., 890 A.2d 1137, 1143-44 (Pa. Commw. Ct. 2006). The Township's argument turns this rule of statutory construction on its head.

Rather than being clearly related to agriculture, the shale gas industry is an entirely different industry than agriculture.<sup>6</sup> Food Bag, Inc. v. Mahoning Twp. Zoning Bd. of Adjustment, 414 A.2d 421, 423-24 (Pa. Commw. Ct. 1980)(an activity cannot be approved as an accessory use if it is part of a different industry than the principal use).

In addition, it is a rule of statutory interpretation that when interpreting a list of items where general language follows a specific list, the general language is viewed as limited to the kind or class of the specific items that preceded it. 1 Pa. C.S. § 1903(b); Davis v. Sulcove, 205 A.2d 89 (1964); Warminster Fiberglass Co., Inc. v. Upper Southampton Twp., 939 A.2d 441 (Pa. Commw. Ct. 2007). Thus, "any other use or structure that is clearly related to an agricultural operation" must be of the same type or character as "barns, stables, corn cribs, silos, [and] greenhouses." Shale gas development sites are not of the same kind or class as barns, silos, or greenhouses in that wellpads, frac tanks, and thousands of water trucks have nothing to do with agriculture and do not aid in the activity at all, unlike barns, silos, and greenhouses, which all serve some function in agricultural production, including horticulture.

C. The Township's Argument Conflicts With the Ordinance's Community Development Objectives, and the Township's Joint Comprehensive Plan

When a municipality creates a zoning ordinance, the zoning ordinance must generally be consistent with the comprehensive plan. 53 P.S. § 10303(d). If the municipality includes a statement of community development objectives, the zoning ordinance should reflect those objectives. 53 P.S. § 10606.

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<sup>6</sup> [https://www.osha.gov/pls/imis/sic\\_manual.html](https://www.osha.gov/pls/imis/sic_manual.html); <https://www.census.gov/cgi-bin/sssd/naics/naicsrch?chart=20121266833.6/48438>

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The Township's interpretation of its ordinance directly conflicts with the statement of community development objectives, and with the Richland-Middlesex Joint Comprehensive Plan. The fact that the Township's argument directly conflicts with the plan and objectives strongly suggests that it is an unreasonable interpretation that undermines the rationality of the entire zoning scheme in the Township. See Robinson Twp. v. Com., 52 A.3d at 484-85 aff'd in part, rev'd in part by 83 A.3d 901 (Pa. 2013). Allowing a shale gas well into the R-AG district disrupts the general character of the district, further weighing against the wellpad being an accessory use. Id.

The Township's community development objectives include: 1) channeling development "into a logical sequence ***rather than permitted to occur in a haphazard arrangement*** across the Township;" 2) protecting and preserving "areas which are actively being farmed and which are particularly well-suited to farming because of soil types, size or location;" and 3) only encouraging industrial expansion "where the impact of such development ***will not deteriorate nearby residential or institutional growth.***" Zoning Ordinance Section 175-5.A., B., and J. (emphasis added).

The R-AG district has a stated purpose to:

provide for agricultural uses, low-density residential development and planned higher density development in areas where the general character is defined by rural areas which are in close proximity to major roads, infrastructure and areas near existing concentrated residential development ***and to provide for compatible*** public, semipublic and ***accessory uses*** as conditional uses or uses by special exception.

Zoning Ordinance, Section 175-243 (emphasis added).

Similarly, the Middlesex-Richland Joint Comprehensive Plan, in discussing development pressure along Route 228, notes the following:

[B]ecause the district contains areas of prime agricultural soils, the Township should encourage to the greatest extent possible that agricultural and low intensity/estate-scale residential development continue in the future in areas outside the Route 228 commercial zone.

Comp. Plan at page 1-28.

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Allowing industrial development of the Geyer tract will violate the community development objectives of the zoning ordinance, the purposes of the R-AG zoning district, and the Comprehensive Plan. By allowing gas development in the R-AG district, the Township would be inserting an incompatible land use into the R-AG District and causing haphazard gas well development across the Township, rather than channeling it “into a logical sequence.” Section 175-5.A.

Further, the site of the proposed Geyer shale gas development has prime agricultural soils and agricultural soils of “statewide importance.”<sup>7</sup> Allowing a heavy industrial use onto this tract in this district would directly conflict with the Comprehensive Plan. See Main St. Dev. Grp., Inc. v. Tunicum Twp. Bd. of Supervisors, 19 A.3d 21, 28-29 (Pa. Commw. Ct. 2011).

Third, the impact of industrial expansion in this area will deteriorate residential and institutional growth, in conflict with Section 175-5.J of the Zoning Ordinance. The site is bordered by new residential development, including the Weatherburn development. The experiences of these individuals living near the proposed wellpad site will impact new residential development moving into the area.

By allowing shale gas development where it is not permitted and where it conflicts with the community development objectives and the comprehensive plan, the Township’s actions are arbitrary and unconstitutional, as they promote an irrational zoning framework. See Robinson Twp. v. Com., 52 A.3d at 484-85 aff’d in part, rev’d in part by 83 A.3d 901 (Pa. 2013). The area is increasingly residential with scattered farms, in keeping with the purpose of the district. The Township’s stated intent to allow industrial development in a rural residential and agricultural zone violates the very purpose and character of the district. A unconventional gas wellpad site is simply not “compatible” with the type of development envisioned for the R-AG district. See Robinson Twp. v. Com., 52 A.3d 463, 485 n. 23 (Pa. Commw. Ct. 2012) aff’d in part, rev’d in part by 83 A.3d 901 (Pa. 2013) (“What we have under Act 13 is a ‘spot use’ where oil and gas uses are singled out for different treatment that is incompatible with other surrounding permitted uses.”).<sup>8</sup>

The Township established particular expectations via the purpose statement of the district and the uses allowed. Its allowance of a use not listed and not compatible with the other uses in the district disrupts the expectations established by the zoning ordinance, and makes the ordinance irrational. See Robinson Twp. v. Com., 52 A.3d at 484-85 aff’d in part, rev’d in part by 83 A.3d 901 (Pa. 2013); compare Suhy v. Zoning Bd. of Adjustment of City of

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<sup>7</sup> Farmland Soils Classification, Soil Survey Staff, Natural Resources Conservation Service, United States Department of Agriculture. Web Soil Survey. Available online at <http://websoilsurvey.nrcs.usda.gov/>.

<sup>8</sup> In contrast, the Township allows “mineral removal” by special exception in the AG-B district, which is designed as a much lower-density area than the R-AG district. To allow the same type of use as an *accessory* use *by-right* in the R-AG district is inconsistent with the Township’s zoning ordinance and comprehensive plan.



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Philadelphia, 169 A.2d 62 (Pa. 1961) (finding gas station owner not entitled to sell cars, trucks, and trailers on property zoned commercial but bordered on three sides by residential uses due to potential disruption of character of the area).

D. Gas Development Is Not Permitted As An Accessory Use in the R-AG District Because It Is Explicitly Permitted As A Principal Use In Another District

If a particular use is expressly permitted in one district, it is not permitted as an accessory use in another district in which it is not identified. MAJ Entertainment, Inc. v. Zoning Bd. of Adjustment of the City of Phila., 947 A.2d 841, 844-848 (Pa. Commw. Ct. 2008) (the inclusion of an activity as a principal use indicates that the drafters of the ordinance did not intend it to be an accessory use); Appeal of Dillon Real Estate Co., Inc., 688 A.2d 1264, 1265 (Pa. Commw. Ct. 1997) (accessory use denied where ordinance explicitly permitted activity as principal use in another district).

Under Middlesex Township's ordinance, "mineral removal" is expressly permitted in the AG-B District by special exception, demonstrating that the intent was to place that use in a district where population density was lower, and to allow for a hearing to ensure that the use was on par with the expected impact. The Township's argument that it then could allow the same use *by-right* as an *accessory* use in another district with a *higher* population density defies logic.

Section 175-12.A of the Middlesex Township's zoning ordinance expressly permits gas development activity in the AG-B District as a principal use by special exception. Therefore, it cannot be a principal or accessory use in the R-AG District, which does not expressly permit gas development activities.

We understand that Township apparently claims that "mineral removal" in the AG-B District does *not* include removal of natural gas. The definition of "mineral" in the zoning ordinance, and in the Municipalities Planning Code, as well as clear directives from the Pennsylvania Supreme Court all make it clear that, under the Middlesex Zoning Ordinance, "mineral" includes natural gas.

The Township's ordinance defines "mineral removal" and "mineral" as follows:

Any extraction of any mineral for sale or other commercial purposes which involves removal of the surface of the earth or exposure of the mineral or subsurface of the earth to wind, rain, sun or other elements of nature. The term "mineral" includes, ***but is not limited to***, anthracite and bituminous coal, lignite, limestone and dolomite, sand, gravel, rock, stone, earth, slag, ore,

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vermiculite, clay and other mineral resources. Mining activities carried out beneath the surface of the earth by means of shafts, tunnels or other underground mine openings are not included in this definition.

Section 175-8 (emphasis added). The Township's definition of "mineral" does not *exclude* natural gas.

The MPC's definition of "mineral" expressly includes natural gas. 53 P.S. § 10107(a) ("The term includes, but is not limited to, limestone and dolomite, sand and gravel, rock and stone, earth, fill, slag, iron ore, zinc ore, vermiculite and clay, anthracite and bituminous coal, coal refuse, peat and crude oil *and natural gas.*") (emphasis added).

In Huntley & Huntley, Inc. v. Borough Council of Borough of Oakmont, 964 A.2d 855, 868 (Pa. 2009), the Pennsylvania Supreme Court found that, for zoning purposes, the term "mineral" includes natural gas. (emphasis added). The Court recognized that the MPC's definitions superseded *inconsistent* definitions set forth in a local ordinance. Id. at 867.

Despite the foregoing, we understand that the Township may be looking to Butler v. Charles Powers Estate ex rel. Warren, 65 A.3d 885, 897 (Pa. 2013), to support its position that "mineral" does not include "natural gas." The Butler decision is inapposite. In Butler, the Court discussed a "rebuttable presumption" regarding what the term "mineral" means in a private deed conveyance. The Court recognized that the parties to a transaction can choose to define the term "mineral" to include natural gas. 65 A.3d at 897. Butler has no applicability in the zoning context. Further, the Court expressly recognized that statutes *such as the MPC*, which apply in other contexts, may define "mineral" to include natural gas. 65 A.3d at 897. The MPC, together with the very definition of "mineral" under the Township's ordinance, demonstrates that in the zoning context, the term "mineral" includes natural gas. The Township cannot arbitrarily interpret its definition to be in conflict with the MPC.

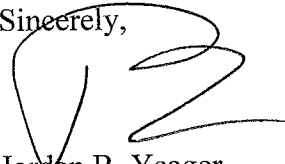
## II. Conclusion

As set forth above, the Township's assertion that unconventional shale gas development is an accessory use to farming in the R-AG District is directly inconsistent with the Zoning Ordinance, case law, the MPC, and the Pennsylvania Constitution. The Township is placing itself at substantial risk of challenge from citizens negatively impacted by the proposed Geyer well site development. Please share this correspondence with the Board of Supervisors and Township Manager so that they can be guided in carrying out their constitutional and statutory obligations.

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If we do not hear back from you by May 8, 2014, we will conclude that the Township is going to maintain its position that it will allow the Geyer unconventional gas development project to move forward, and we will proceed accordingly.

Sincerely,

A handwritten signature in black ink, appearing to be 'J. Yeager', written over the word 'Sincerely,'.

Jordan B. Yeager  
For CURTIN & HEEFNER LLP