

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF PENNSYLVANIA

GEOKINETICS USA, INC.

Plaintiff,

Civil Action No. 2:17-cv-01314-JFC

v.

MUNICIPALITY OF MONROEVILLE,

Defendant.

**PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF
MOTION FOR PRELIMINARY INJUNCTION**

I. BACKGROUND

Plaintiff Geokinetics USA, Inc. ("Geokinetics") provides seismic data and geological services to the oil and gas industry. Seismic testing is a method of exploring for oil and gas in which sound waves are used to map rock layers underground. Information that Geokinetics provides is vital to the efficient exploration for and safe development of oil and gas reserves. Geokinetics contracted with an oil and gas operator to perform a seismic survey of a project area covering parts of Allegheny and Westmoreland Counties ("Project"). A portion of the Municipality of Monroeville ("Monroeville") is located within the Project area.

In March 2017, prior to conducting any seismic operations in Monroeville, Geokinetics approached Monroeville in good faith to negotiate a reasonable seismic agreement. Geokinetics originally requested permission to conduct seismic testing only on Monroeville-owned land. On June 8, 2017, Geokinetics submitted a proposed permit to allow seismic testing on Monroeville-owned lands, along with an attached addendum addressing proposed terms for use of local roads and rights-of-way ("Proposed Permit"). Throughout the summer of 2017, Geokinetics made ongoing efforts to reach an agreement with Monroeville. Despite Geokinetics' good faith efforts,

on September 12, 2107, Council voted, without providing any reasoning, to deny Geokinetics' Proposed Permit to conduct seismic operations on Monroeville roads and rights-of-way. At the same meeting, Council then went on to present and pass Ordinance No. 2668 (the "Ordinance"), which is an unduly restrictive ordinance that regulates seismic testing in Monroeville. Ordinance No. 2668, *available at* <http://www2.monroeville.pa.us/ordinances/ORD2668.pdf>.

At issue in the present case is Monroeville's denial of Geokinetics' request to conduct seismic testing on Monroeville's roads and rights-of-way through use of vibroseis vehicles and the temporary placement of receivers. PennDOT, the Western District of Pennsylvania, and the Commonwealth Court of Pennsylvania have all determined that seismic testing is safe and a legitimate use of public roads. *See ION Geophysical Corp. v. Hempfield Twp.*, 2014 WL 1405397, at *10 (W.D. Pa. Apr. 10, 2014); *Seitel Data v. Hopewell Twp.*, 2013 Pa. Commw. Unpub. LEXIS 922, at *2 (Pa. Commw. Ct. Sept. 3, 2013); PennDOT Publication 282, Highway Occupancy Permit (HOP) Operations Manual, at 103-04 (July 2017), *available at* <http://www.dot.state.pa.us/public/PubsForms/Publications/PUB%20282/PUB%20282.pdf>.

Geokinetics seeks a preliminary injunction prohibiting Monroeville from interfering with its seismic testing operations. In the alternative, Geokinetics seeks to invalidate Monroeville's newly enacted Ordinance regulating seismic testing, namely Ordinance No. 2668.

II. ARGUMENT

The standard governing the issuance of a preliminary injunction is well established. Before ordering injunctive relief, the Court must find that: 1) Geokinetics is likely to succeed on the merits; (2) Geokinetics is likely to sustain irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in Geokinetics' favor; and (4) the injunction is in the public interest. *See Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *Chester ex rel.*

N.L.R.B. v. Grane Healthcare Co., 797 F. Supp. 2d 543, 550-51 (W.D. Pa. 2011); *ION*, 2014 WL 1405397, at *5. A court also must take into account, where relevant, the possibility of harm to other interested persons resulting from the grant or denial of injunctive relief. *See MarbleLife, Inc. v. Stone Res., Inc.*, 759 F. Supp. 2d 552, 557 (E.D. Pa. 2010).

A. Geokinetics Has a Reasonable Probability of Success on the Merits.

1. The Denial of the Proposed Permit Was Unlawful.¹

a. **Impermissible Exclusionary Zoning.** “Pennsylvania law requires that a municipality authorize all legitimate uses somewhere within its boundaries.” *Seneca Res. Corp. v. Highland Twp.*, 2017 WL 4354710, at *8 (W.D. Pa. Sep. 29, 2017) (citing *Beaver Gasoline Co. v. Zoning Hearing Bd. of Osborne Borough*, 285 A.2d 501, 503-04 (Pa. 1971) (“[T]he constitutionality of a zoning ordinance which totally prohibits legitimate uses or fails to provide for such uses anywhere within the municipality should be regarded with particular circumspection.”)). “In situations involving the total prohibition of otherwise legitimate land uses, which, by common experience, appear to be [] innocuous . . . , the applicant has met his burden of overcoming the presumption of constitutionality by showing the total ban. Thereafter, if the municipality is to sustain the validity of the ban, it must present evidence to establish the public purpose served by the regulation.” *Beaver*, 285 A.2d at 504-05. The

¹ This is not a case of first impression for the Western District of Pennsylvania. The Western District previously issued an injunction in a nearly identical case. *See ION*, 2014 WL 1405397, at *10. *ION*, like Geokinetics, conducts seismic testing services for the oil and gas industry. *Id.* at *1. *ION* sought and received all necessary permits to conduct seismic testing in Westmoreland County, Pennsylvania pursuant to contracts with oil and gas operators. *Id.* at *6. *ION* then approached Hempfield Township to negotiate a seismic agreement to use the township’s roads as the township did not have an ordinance regulating seismic testing. *Id.* at *2-*6. Despite *ION*’s efforts to negotiate such an agreement and to provide the township with relevant information regarding its proposed activities, the township refused to enter into the agreement. *Id.* The Western District found that such conduct by the township constituted “an attempt to regulate seismic activity by omission” and was “unreasonable and arbitrary and deprives *ION* of any avenue to seek accommodation to review the Township’s ‘regulation by inaction.’” *Id.* at *6.

municipality must show that the ban on the activity “bears a substantial relationship to public health, safety and welfare” in order to survive a challenge. *Tri-Cty. Landfill, Inc. v. Pine Twp. Zoning Hearing Bd.*, 83 A.3d 488, 518 (Pa. Commw. Ct. 2014). Even if the municipality were to assert a public health and safety interest, the ban cannot be “unreasonable, unduly oppressive or patently beyond the necessities of the case, and the means which it employs must have a real and substantial relation to the objects sought to be attained.” *Simco Sales Serv. of Pa., Inc. v. Lower Merion Twp. Bd. of Comm’rs*, 394 A.2d 642, 644 (Pa. Commw. Ct. 1978) (citing *Gambone v. Commonwealth*, 101 A.2d 634, 636-37 (Pa. 1954)).

Seismic testing is a legitimate use that must be permitted in Monroeville. *Seneca*, 2017 WL 4354710, at *8 (“development of oil and gas . . . is a legitimate business activity and land use within Pennsylvania”); *see also* 58 Pa. Cons. Stat. § 3301 (the definition for “oil and gas operations” includes seismic operations); *ION*, 2014 WL 1405397, at *10 (“Pennsylvania has clearly legislated in favor of the oil and gas industry”); *Seitel*, 2013 Pa. Commw. Unpub. LEXIS 922, at *2 (“Information that petitioner provides is vital to the exploration for and safe development of oil and gas reserves.”). Monroeville prohibited Geokinetics from engaging in this legitimate use, prior to passage of the Ordinance, by denying the Proposed Permit. Such action is equivalent to an ordinance completely banning the legitimate use of seismic testing. *See ION*, 2014 WL 1405397, at *6 (“We agree with ION that the Township’s ban on seismic testing on its roads is an attempt to regulate seismic testing by omission, in the absence of any ordinance regulating seismic testing. By refusing to pass a relevant ordinance or otherwise engage with ION, the Township’s conduct is unreasonable and arbitrary and deprives ION of any avenue to seek accommodation or review of the Township’s ‘regulation by inaction.’”). An outright denial serves as a *de jure* exclusion on seismic testing, shifting the burden to Monroeville to show that

the denial of the Proposed Permit “bears a substantial relationship to the public health, safety and welfare.” *Tri-Cty.*, 83 A.3d at 518 (“A *de jure* exclusion exists where an ordinance, on its face, totally bans a legitimate use.”).

Monroeville cannot show that this ban “bears a substantial relationship to public health, safety and welfare” in order to survive the present challenge. *Id.* Monroeville neither provided any rationale or reasoning behind the denial nor did it conduct any study or rely on any science to determine potential harm. The denial was prompted by unfounded fears raised by citizens’ rights organizations and was simply a knee-jerk reaction by a Council facing November elections.² Further, the Western District of Pennsylvania has already recognized the safety and benefits of seismic testing. *See ION*, 2014 WL 1405397, at *10 (“The evidence here did establish that seismic testing not only provides valuable data for the economic benefit of those who extract oil and gas, but also it provides valuable data for use in subsequent extraction of oil and gas to prevent unsafe and dangerous circumstances from occurring.”). Likewise, the Commonwealth Court of Pennsylvania found that seismic testing “is vital to the exploration for and safe development of oil and gas reserves.” *Seitel*, 2013 Pa. Commw. Unpub. LEXIS 922, at *2. PennDOT also determined that the minor shock waves involved with seismic testing “virtually preclude[s] damage to the highway.” *See PennDOT Publication 282, supra.* Geokinetics also agreed to post a \$100,000 bond for the use of all municipal roads and provide Monroeville with a certificate of insurance naming Monroeville as an additional insured. Finally, Geokinetics is prepared to present its own evidence regarding the safety and benefits of seismic testing. Monroeville simply cannot provide evidence suggesting its ban on seismic testing in

² This is also true for the newly enacted Ordinance. Instead of conducting its own scientific study and research, Monroeville simply decided to cut and paste restrictive ordinances from other municipalities. The Ordinance was merely a political stunt to protect Council at Geokinetics’ expense.

Monroeville is necessary for, or related to, the health and safety of its residents. Instead, Monroeville simply opposes seismic testing because it also opposes oil and gas operations.³ This “not-in-my-backyard” response to seismic testing constitutes impermissible exclusionary zoning.

b. Violation of Substantive Due Process. “[T]ypically, a legislative act will withstand substantive due process challenge if the government identifies the legitimate state interest that the legislature could rationally conclude was served by the statute.” *RHJ Med. Ctr., Inc. v. City of DuBois*, 754 F. Supp. 2d 723, 767-68 (W.D. Pa. 2010) (internal citations and quotations omitted). Under Pennsylvania law, original municipal action taken in the absence of any previously enacted ordinance or resolution is legislative in character. *Jones v. Schuylkill Light, Heat & Power Co.*, 51 A. 762, 762-63 (Pa. 1902); *Achenbach v. Bath*, 19 Pa. D. 831, 835 (Pa. Ct. Com. Pl. 1910); *Yates v. Connellsville*, 40 Pa. C. C. 33, 36 (Pa. Ct. Com. Pl. 1912). If the municipal action has a legislative purpose or intent, it is irrelevant whether the municipal action is called an ordinance, resolution, or motion. *Whale’s Tale, Inc. v. City of Pittsburgh Zoning Adm’r*, 27 Pa. D. & C.3d 327, 330 (Pa. Ct. Com. Pl. 1982), *aff’d sub nom. Whale’s Tale, Inc. v. City of Pittsburgh*, 467 A.2d 665 (Pa. Commw. Ct. 1983). Legislative acts include the granting of privileges to occupy streets. *Jones*, 51 A. at 762. Additionally, zoning and land use planning determinations are generally recognized as municipal legislative acts. *See, e.g., RHJ*, 754 F. Supp. 2d at 768. As Monroeville’s denial of the Proposed Permit was a legislative act, Geokinetics need not establish a “protected property interest to which the Fourteenth Amendment’s due process protection applies, as this standard only applies in a non-legislative substantive due process claim.” *Id.* at 768-69 (internal quotations omitted).

³ Monroeville is currently taking steps “to eliminate oil and gas wells as a Conditional Use from every zoning district in the Municipality except the M-2, Industrial Zoning District. *Municipality of Monroeville Regular Council Meeting October 10, 2017 Agenda*, (Oct. 16, 2017), <http://www.monroeville.pa.us/docs/agendas/council/cnc2017/Oct2017.pdf>.

“In order for a federal court to interfere with a municipality’s legislative action, ‘like invalidation of legislation for irrationality or arbitrariness,’ it must be shown that ‘*the governmental body could have had no legitimate reason for its decision.*’” *Cornell Cos., Inc. v. Borough of New Morgan*, 512 F. Supp. 2d 238, 259 (E.D. Pa. 2007) (emphasis in original) (quoting *Cnty. Concrete Corp. v. Twp. of Roxbury*, 442 F.3d 159, 169 (3d Cir. 2006)). A legislative act is not for a legitimate reason if its purpose is to harm a corporation or motivated by a “desire to prevent [the plaintiffs] from continuing to operate . . . [their] business.” *Id.* at 260.

Monroeville violated Geokinetics’ substantive due process rights through its arbitrary and capricious actions, including denying Geokinetics’ request to conduct seismic testing on municipal roadways without any rational basis to protecting public health, safety, or welfare. An “ordinance which totally excludes a particular business from an entire municipality must bear a more substantial relationship to the public health, safety, morals and general welfare than an ordinance which merely confines that business to a certain area in the municipality.” *Exton Quarries, Inc. v. Zoning Bd. of Adjustment of West Whiteland Twp.*, 228 A.2d 169, 179 (Pa. 1967).

Monroeville’s denial operates as a ban on seismic testing operations. It cannot establish that the ban is even remotely necessary for the health and safety of its residents.⁴ As stated above, PennDOT, the Western District and the Pennsylvania State Courts have all recognized the safety and benefit of seismic testing. *ION*, 2014 WL 1405397, at *10; *Seitel*, 2013 Pa. Commw.

⁴ In denying Geokinetics’ request to conduct seismic testing, Monroeville failed to provide any reasoning, explanation, or rationale for its denial. The true intent was to totally exclude seismic testing from Monroeville and to protect Council in the November elections. *See id.* at 181 (finding an ordinance that would eliminate the business in the municipality was not sufficiently related to the protection of public health and safety).

Unpub. LEXIS 922, at *2; PennDOT Publication 282, *supra*.

c. **Violation of Equal Protection.** The Supreme Court of the United States “has explained that the purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State’s jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms or a statute or by its improper execution through duly constituted agents.” *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (per curiam) (internal citations and quotations omitted). Under the “class of one” doctrine, a plaintiff may obtain relief for equal protection violations where the plaintiff has been “intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment.” *Id.*; *Hill v. Borough of Kutztown*, 455 F.3d 225, 239 (3d Cir. 2006). The law “must not be applied in an arbitrary, unreasonable, or discriminatory fashion.” *Rabino v. Commonwealth, State Registration Bd. for Prof’l Eng’rs*, 450 A.2d 773, 775 (Pa. Commw. Ct. 1982).

When considering equal protection challenges to land use regulations, the court must first determine whether the complaining party is similarly situated to other entities that are “permitted as of right, or by special permit, in a certain zone.” *Cnty. Concrete*, 442 F.3d at 171. The municipality must then “justify its different treatment of the two by demonstrating that the ordinance is rationally related to a legitimate government purpose.” *Id.* (internal citations and quotations omitted).

Monroeville has discriminated against Geokinetics in violation of the Equal Protection Clause. Other industries, businesses, and government entities are permitted to access the municipal roads in Monroeville; therefore, by denying Geokinetics’ request, Monroeville has arbitrarily, irrationally, and unreasonably discriminated against Geokinetics by preventing it

from accessing the public roadways for a legitimate purpose. Ultimately, through the denial of Geokinetics' request to conduct seismic testing, Monroeville has effectively banned seismic operations on Monroeville roads and rights-of-way under the guise of public health and safety. Furthermore, Monroeville's true intention of protecting Council in the upcoming election is not rationally related to any legitimate government interest. Finally, denial of the Proposed Permit without conducting any study or analysis was arbitrary and capricious.

d. Impermissible Exercise of Police Power. Monroeville's ban on an otherwise lawful activity is a violation of its police powers. While municipalities may exercise their police powers to protect or preserve the public health, safety, morality, and welfare through substantially related measures, such power is limited. *See In re Realen Valley Forge Greenes Assocs.*, 838 A.2d 718, 727-28 (Pa. 2003). "A law which purports to be an exercise of the police power must not be unreasonable, unduly oppressive or patently beyond the necessities of the case, and the means which it employs must have a real and substantial relation to the objects sought to be attained." *Mahony v. Twp. of Hampton*, 651 A.2d 525, 527 (Pa. 1994); *see also Exton*, 228 A.2d at 178 ("the power to thus regulate does not extend to an arbitrary, unnecessary or unreasonable intermeddling with the private ownership of property.") (internal citations and quotations omitted). "An ordinance will be found unreasonable and not substantially related to a police power purpose if it is shown to be unduly restrictive or exclusionary." *Baker v. Upper Southampton Twp. Zoning Hearing Bd.*, 830 A.2d 600, 605 (Pa. Commw. Ct. 2003).

As stated above, Monroeville cannot establish that the banning of seismic testing in Monroeville is necessary for the health and safety of its residents. In addition to PennDOT's

clear statement of approval of vibroseis in its HOP Guidelines,⁵ Geokinetics can present documentary and testimonial evidence establishing that its seismic testing is safe. Monroeville's self-interested, arbitrary, and unreasonable denial of Geokinetics' request to conduct seismic testing is unduly restrictive and exclusionary in violation of Monroeville's police powers as such testing is safe, transitory, and no more disruptive than background noise of trucks, buses, and trains.

e. **Impermissible Exercise of Legislative Power.** As a home rule municipality, Monroeville's legislation cannot conflict with existing state and federal law. *See* 53 Pa. Cons. Stat. § 2961. Monroeville's "ability to exercise municipal functions is limited only by its home rule charter, the Pennsylvania Constitution, and the General Assembly." *Seneca*, 2017 WL 4354710, at *6 (citing *City of Phila. v. Schweiker*, 858 A.2d 75, 84 (Pa. 2004)).

Monroeville's denial of the Proposed Permit purports to regulate the location and uses within the municipality and is effectively a zoning regulation or ordinance. The substance, rather than the intent, of an ordinance will determine whether it is a zoning ordinance. *See Dean v. City of Harrisburg*, 563 A.2d 965, 969 (Pa. Commw. Ct. 1989) ("An examination of Section 1 indicates that Ordinance 13 was enacted to regulate land use, namely: '[t]o preserve the residential character of neighborhoods' This language reveals that Ordinance 13 was intended to do more than provide protection from criminal activities; it was intended to preserve the residential character of various neighborhoods in the City. The fact that Section 3(a) restricts bottle clubs in all zones located near a residence or church is of no consequence. As we stated in *MacLeod* nothing in the Planning Code requires a zoning ordinance to create districts.");

⁵ Again, the Western District of Pennsylvania and the Commonwealth Court of Pennsylvania have made similar recent findings regarding the safe nature of vibroseis and the benefits such testing provide. *See ION*, 2014 WL 1405397, at *10; *Seitel*, 2013 Pa. Commw. Unpub. LEXIS 922, at *2.

Borough of Edgeworth v. MacLeod, 456 A.2d 682, 685 (Pa. Commw. Ct. 1983) (“the preamble indicates that Ordinance No. 393 was enacted to regulate land use, which as previously noted is one of the primary purposes of zoning regulations.”); *Bd. of Sup’rs of Franklin Twp., Adams Cnty. v. Meals*, 426 A.2d 1200, 1202 (Pa. Commw. Ct. 1981) (“Is a de facto zoning ordinance, enacted after the promulgation of the MPC, which fails to provide those procedural safeguards required by the MPC, a valid exercise of the township’s power to zone? Clearly not. A zoning ordinance, no matter what its designation, must comport with the legislative imperatives of the MPC. The Code is comprehensive as to zoning matters The practical effect of the last sentence of s 303 (sic) is to leave the Code as the exclusive source of law for all matters which it covers.”) (internal citations and quotations omitted).

The Pennsylvania Municipalities Planning Code (“MPC”), 53 Pa. Stat. § 10101, *et seq.*, provides a comprehensive framework for municipal zoning and land use regulation. The Pennsylvania Home Rule Charter and Optional Plans Law specifically denies home rule charter municipalities from exercising power or authority contrary to, or in limitation or enlargement of, powers granted by applicable statutes, including the MPC. *See* 53 Pa. Cons. Stat. § 2962(a)(10).⁶

Monroeville’s denial of the Proposed Permit is in practice a ban on seismic testing which violates the limitations of the MPC. Consequently, Monroeville’s action constitutes an illegal exercise of legislative authority by Monroeville and is therefore invalid and unenforceable.

⁶ Geokinetics’ seismic tests are also considered “oil and gas operations” under Act 13. *See* 58 Pa. Cons. Stat. §3301 (““Oil and gas operations.’ The term includes the following: (1) well location assessment, including seismic operations[.]” Pursuant to 58 Pa. Cons. Stat. § 3302: “Except with respect to local ordinances adopted pursuant to the MPC . . . , all local ordinances purporting to regulate oil and gas operations regulated by Chapter 32 (relating to development) are hereby superseded.” Therefore, “[t]he plain terms of Act 13 indicate that a local ordinance purporting to regulate oil and gas operations must be adopted pursuant to the MPC and the Flood Plain Management Act.” *Seneca*, 2017 WL 4354710, at *6.

2. **Alternatively, the Ordinance is Invalid.**

a. **The Ordinance Cannot Be Retroactively Applied.** An ordinance will not apply retroactively when it was not in effect or pending at the time of the filing of an application for a permit. *Lhormer v. Bowen*, 188 A.2d 747, 748 (Pa. 1963) (“The ordinance could not apply retroactively”). As set forth in Paragraphs 19-37 of the Complaint, Geokinetics sought permission to use Monroeville’s roads for its seismic testing operations and submitted the Proposed Permit prior to Monroeville’s consideration and adoption of the Ordinance. Geokinetics did not intend to evade the proposed Ordinance. Therefore, there can be no retroactive application of the Ordinance to the denial of the Proposed Permit.

b. **Violation of Substantive Due Process.** The standard for considering a substantive due process challenge set forth previously in Section II.A.1.b applies equally to the Ordinance challenge. Attempts by municipalities to use zoning practices to prevent land uses it opposes suggest that the actions of the municipality are based on “improper animus that [is] unrelated to land use planning” and present an example of the “political principal of not-in-my-backyard.” *RHJ*, 754 F. Supp. 2d at 770-71 (recognizing claim for substantive due process violations when plaintiff alleged that municipality’s actions were based on opposition to methadone clinics and, therefore, were unrelated to land use planning).

Here, there is no indication that the ordinance was passed for any reason other than to ban seismic testing and to protect Council in upcoming elections. The Ordinance was passed in direct response to Geokinetics’ attempts to work with Monroeville and as a response to political animus asserted by the community against seismic testing specifically, and oil and gas operations in general. The Ordinance has no rational relation to land use planning, but is rather a “not-in-my-backyard” demonstration of Monroeville’s political opposition to seismic testing.

c. **Violation of Equal Protection.** The standard for considering an equal protection challenge set forth previously in Section II.A.1.c applies equally to the Ordinance challenge. Monroeville, through the Ordinance, treats seismic operators differently than other entities using the roads and rights-of-way.

For example, Monroeville's noise ordinance provides that "Noise of construction and the operation of heavy equipment used for construction may exceed the limits of Table 301, Noise Level Limits, during the daytime work house of 7:00 AM to 7:00 PM[.]" Ordinance 2188, at § 302.4, *available at* <http://www2.monroeville.pa.us/ordinances/ORD2188.pdf>. Further, Monroeville recently passed a resolution, dated July 11, 2017, which states that "Monroeville agrees to permit milling paving and road reconstruction operations, to occur between 7:00 p.m. and 7:00 a.m. and waive all noise and light restrictions for the project duration." Resolution No. 17-32, *available at* <http://www2.monroeville.pa.us/resolutions/2017/RES%2017-32.pdf>. With the current Ordinance, however, seismic operators are limited to operations between 8:00 AM to 6:00 PM, Monday through Friday, excluding work on weekends and no holidays.

As another example, in Monroeville's ordinance governing municipal roadway occupancy,⁷ notice must only be given to property owners and/or tenants of property that abuts or adjoins the area of work "[i]f in the opinion of the Municipal Representative, the Work to be undertaken is such that it will affect any property which abuts or adjoins the area of the Work[.]" Ordinance No. 2193, at § 7.01, *available at* <http://www2.monroeville.pa.us/ordinances/ORD2193.pdf>. There is no 30-day mandatory notice requirement as required in the Ordinance. The application fee for "municipal highway

⁷ Municipal Roadway Occupancy is defined as: "The opening of the surface, the placing of facilities or structures in, on, or under; or opening an access within any Roadway of the Municipality." Ordinance No. 2193, at §1.0. Geokinetics' operations do not include any of these invasive activities.

occupancy” is only \$50.00, with a supplement fee of \$10 for each 6-month time extension or each change. The Ordinance requires an inordinate and unreasonable “non-refundable Permit fee of One thousand Dollars (\$1,000.00).” There are also no restrictions on workdays or times in the roadway occupancy ordinance, and in fact, Monroeville is authorized to extend the workday to 24 hours to “complete that part of the Work as soon as possible.” *Id.* at § 4.19. Furthermore, there are also no burdensome pre- and post-inspection requirements, and, with regards to underground facilities, permittees under Ordinance No. 2193 are only required to locate such facilities, and comply with the requirements of the “Underground Utility Line Protection Law Act 287 of 1974, as amended.” *Id.* at § 4.04. In juxtaposition, the Ordinance imposes inspection requirements that are burdensome and unnecessary, and which make seismic testing unfeasible.

The Ordinance treats seismic operators differently than other entities using Monroeville’s roads. There is no rational basis for the difference as the opening of roads, paving, and other construction work is more likely to cause property damage and disturbances to residents of Monroeville. Again, Monroeville’s “not-in-my-backyard” approach to seismic testing and oil and gas operations is the only basis for the difference in treatment. The Ordinance violates Geokinetics’ Equal Protection rights.

d. Preemption and MPC Requirements. As set forth above in Section II.A.1.e, Monroeville, as a home rule municipality, must act in accordance with the MPC when addressing zoning and land use matters, and the arguments set forth therein apply equally to the Ordinance challenge. Due to the Ordinance’s land use and zoning nature, Monroeville was required to follow the MPC.

Furthermore, Act 13 preempts the Ordinance as it was not passed pursuant to the MPC:

“[e]xcept with respect to local ordinances adopted pursuant to the MPC and the act of October 4, 1978 (P.L. 851, No. 166), known as the Flood Plain

Management Act, all local ordinances purporting to regulate oil and gas operations regulated by Chapter 32 (relating to development) are hereby superseded. No local ordinance adopted pursuant to the MPC or the Flood Plain Management Act shall contain provisions which impose conditions, requirements or limitations on the same features of oil and gas operations regulated by Chapter 32 or that accomplish the same purposes as set forth in Chapter 32.”

58 Pa. Cons. Stat. § 3302 (emphasis added); *see also Seneca*, 2017 WL 4354710, at *6 (“the plain terms of Act 13 indicate that a local ordinance purporting to regulate oil and gas operations must be adopted pursuant to the MPC and the Flood Plain Management Act.”). The definition for “oil and gas operations” includes seismic operations. 58 Pa. Cons. Stat. § 3301. Monroeville’s Ordinance is invalid pursuant to the MPC and preempted by Act 13. Monroeville is preempted from regulating oil and gas operations unless it does so pursuant to the MPC’s requirements. As Monroeville did not follow the MPC’s requirements, the Ordinance is preempted by Act 13.

e. De Facto Ban on Seismic Operations. As set forth above in Section II.A.1.a, “Pennsylvania law requires that a municipality authorize all legitimate uses somewhere within its boundaries.” *Seneca*, 2017 WL 4354710, at *8 (citing *Beaver*, 285 A.2d at 503-04). Monroeville does not authorize the legitimate use of seismic operations within its boundaries as the Ordinance operates as a *de facto* exclusion or ban on such activities. “In a *de facto* exclusion case, the challenger alleges that an ordinance appears to permit a use, but under such conditions that the use cannot in fact be accomplished.” *Twp. of Exeter v. Zoning Hearing Bd. of Exeter Twp.*, 962 A.2d 653, 659 (Pa. 2009).

Monroeville’s Ordinance is arbitrary, capricious, overbroad, onerous and unreasonable and was adopted with the intent to completely prohibit seismic testing everywhere in the municipality. A detailed summary of the Ordinance’s arbitrary, capricious, overbroad, onerous and unreasonable conditions is set forth in the Complaint at Paragraphs 81-88. These restrictive conditions operate as a *de facto* ban on seismic testing in Monroeville. Geokinetics has met its

initial burden challenging the presumed constitutionality of the ordinance. The burden shifts to Monroeville “to establish the public purpose served by the regulation.” *Beaver*, 285 A.2d at 505.

Monroeville cannot meet this obligation as the Ordinance has no substantial relationship to promoting the public health, safety, or welfare. Seismic testing is safe and provides valuable data used to economically and safely develop oil and gas interests. *See ION*, 2014 WL 1405397, at *10; *Seitel*, 2013 Pa. Commw. Unpub. LEXIS 922, at *2. The Ordinance was adopted without any scientific analysis to determine potential harm. At bottom it is a knee-jerk reaction to unfounded fears raised by citizens’ rights organizations and a politically-motivated decision by the Monroeville Council facing November elections. The Ordinance is invalid because it arbitrarily and capriciously grants Monroeville with completely unrestricted discretionary power to prohibit seismic testing in Monroeville, and does not substantially relate to any legitimate purpose.

f. Improper Determination of Duties and Responsibilities of Business. Monroeville, as a home rule municipality, “shall not determine duties, responsibilities or requirements placed upon businesses . . . except as expressly provided by statutes which are applicable in every part of this Commonwealth or which are applicable to all municipalities or to a class or classes of municipalities.” 53 Pa. Cons. Stat. § 2962; *see also Smaller Mfrs. Council v. Council of City of Pittsburgh*, 485 A.2d 73, 74, 77 (Pa. Commw. Ct. 1984) (“The ordinance requires an employer, when a plant closes, relocates or reduces its operations so that there is a loss of employment of 15% of employees, to notify in writing a Bureau of Business Security created under the terms of the ordinance. . . . [I]t is clear that the trial court correctly concluded that the ordinance flies in the face of the express language of this section of the Home Rule and Optional Plans Law. Therefore, if the City wishes to act in this area it must be empowered to do so by the General

Assembly.”); *Bldg. Owners & Managers Ass’n of Pittsburgh v. City of Pittsburgh*, 985 A.2d 711, 714 (Pa. 2009) (same); *Hartman v. City of Allentown*, 880 A.2d 737, 746 (Pa. Commw. Ct. 2005) (“same”). As set forth more fully in Section II.A.2.e and the Complaint at Paragraphs 81-88, the Ordinance contains numerous duties, responsibilities and requirements on business.

B. Geokinetics Will Suffer Irreparable Harm.

In order to demonstrate irreparable harm, the moving party must demonstrate potential harm which cannot be redressed by a legal or an equitable remedy following a trial. *Inst. for Motivational Living v. Sylvan Learning Ctr., Inc.*, 2008 WL 379654, at *3 (W.D. Pa. Feb. 8, 2008); *Judy B. v. Borough of Tioga*, 889 F. Supp. 792, 798 (M.D. Pa. 1995) (“To prove irreparable harm, the petitioner must show that the harm threatened by the defendant’s conduct cannot be compensated by money damages.”). Significantly, the “[d]eprivation of a constitutional right alone constitutes irreparable harm as a matter of law.” *Beattie v. Line Mt. Sch. Dist.*, 992 F. Supp. 2d 384, 396 (M.D. Pa. 2014). Irreparable harm will also be found when a company is unable to comply with its contractual obligations. *ION*, 2014 WL 1405397, at *10. This is especially true in cases such as the present matter, where the data sought can only be obtained through the execution of such contracts. *Id.* (“We conclude that ION will suffer irreparable injury if we deny their requested injunctive relief since ION will not be able to comply with its contractual duties, and will be unable to obtain the data required under the contracts as such data only exists as attached to the mineral and surface owners’ properties from whom ION has obtained rights.”); *see also Seitel*, 2013 Pa. Commw. Unpub. LEXIS 922, at *15 (“The Court concludes, for purposes of equitable relief, petitioner’s inability to fulfill its contractual obligations constitutes irreparable harm that cannot be compensated for by money damages.”).

Here, but for the actions of Monroeville, Geokinetics can immediately commence seismic operations as it has invested considerable time and resources into completing the Project. Geokinetics has obtained the necessary permits and approvals from various Commonwealth entities and private landowners. However, due to the actions and inactions of Monroeville, it is impossible for Geokinetics to conduct seismic testing operations in the municipality in violation of its constitutional rights. Further, as set forth above, the Ordinance subjects Geokinetics to unnecessary, unreasonable, irrational, inconsistent, and prohibitively burdensome requirements that are preempted by state law.

Thus, absent an injunction, Geokinetics will suffer immediate and irreparable harm that cannot be compensated for in money damages. As in *ION*, Geokinetics will not be able to comply with its contractual duties to the oil and gas operator and individual land and mineral owners. 2014 WL 1405397, at *10. The continued prohibition of seismic testing will also result in incomplete data and substantial lost value to Geokinetics and its client, as there is no other way for Geokinetics to obtain the information. *See Seitel*, 2013 Pa. Commw. Unpub. LEXIS 922, at *14-15. Finally, the inability to obtain sufficient data may render the whole project unusable and will affect the ability of Geokinetics to obtain contracts and future business. Therefore, Geokinetics can demonstrate irreparable harm for which an injunction should be issued.

C. The Balance of Equities Tips in Geokinetics' Favor.

If the Court denies the preliminary injunction, greater injury will result than is prevented. Beyond the irreparable injuries to Geokinetics without the injunction, granting injunctive relief will cause Monroeville no harm. Instead, denial would likely lead to greater injury to the general public. *See ION*, 2014 WL 1405397, at *10. The denial would also adversely affect the efficient production of future oil and gas operations resulting in greater impact to the community and

environment. Moreover, if Geokinetics is prevented from conducting its seismic testing, the mineral owners who have seismic contracts with Geokinetics will likewise be prevented from benefiting from oil and gas development. Accordingly, Geokinetics has shown that greater harm will result from refusing the preliminary injunction than from granting it.

D. The Injunction is in the Public Interest.

“As a practical matter, if a plaintiff demonstrates both a likelihood of success on the merits and irreparable injury, it almost always will be the case that the public interest will favor the plaintiff.” *Am. Tel. & Tel. Co. v. Winback & Conserve Program, Inc.*, 42 F.3d 1421, 1427 n. 8 (3d Cir. 1994); *see also Inst. for Motivational Living*, 2008 WL 379654, at *5; *Minard Run Oil Co. v. U.S. Forest Serv.*, 2009 WL 4937785, at *33 (W.D. Pa. Dec. 15, 2009). The granting of Geokinetics’ preliminary injunction coincides with the greater public interest. Denial would give Monroeville unbridled discretion to interfere with private valid contractual rights, as well as negatively impact the development of the oil and gas industry in both Monroeville and the surrounding communities. Geokinetics has already demonstrated a strong probability of success on the merits and irreparable harm.

Beyond the general public interest in preventing local municipalities from exceeding their given authority, the Commonwealth has also recognized the importance of oil and gas exploration, and has chosen a policy of “encouragement and accommodation of rapid exploitation of the Marcellus Shale Formation.” *ION*, 2014 WL 1405397, at *10 (internal citations and quotations omitted). As such, the public interest favors the injunction.

III. CONCLUSION

Geokinetics meets the standard for preliminary injunctive relief. First, Geokinetics is likely to succeed on the merits as Monroeville’s actions and inactions (1) constitute improper

exclusionary zoning, (2) violate the Substantive Due Process Clauses of the Fifth and Fourteenth Amendment of the United States Constitution, (3) violate the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, (4) constitute an impermissible exercise of police power, (5) constitute an impermissible exercise of legislative authority, and/or (6) are preempted and superseded by state law. Second, due to the nature of Geokinetics' planned seismic testing Project, Geokinetics will suffer immediate and irreparable harm unless injunctive relief is granted. It will be unable to complete the Project and its contractual obligations to its client, resulting in losses to Geokinetics. Geokinetics has no adequate remedy at law. Third, the balance of equities tips in Geokinetics' favor as Monroeville's actions were not motivated by any legitimate concerns for health and safety but rather by its Council's concerns about November elections. Finally, the injunction is in the public interest as the exercise of Geokinetics' lawful right to engage in seismic testing operations is necessary to facilitate safe and economic oil and gas development. Accordingly, Geokinetics requests this Honorable Court to grant its Motion for Preliminary Injunction and enjoin Monroeville from interfering with Geokinetics' proposed seismic operations in Monroeville.

Respectfully submitted,

STEPTOE & JOHNSON, PLLC

/s/Kevin Gormly

Kevin Gormly (PA I.D. No. 85280)

Adam S. Ennis (PA I.D. No. 71999)

11 Grandview Circle, Suite 200

Canonsburg, PA 15317

Tel: (724) 749-3140

kevin.gormly@steptoe-johnson.com

adam.ennis@steptoe-johnson.com

*Counsel for Plaintiff Geokinetics,
USA, Inc.*

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing was filed electronically through the Court's CM/ECF System this 18th day of October, 2017. Notice of this filing will be sent via email to all parties by operation of the Court's electronic filing system.

/s/Kevin Gormly
Kevin Gormly