

Memo

To: Jonathan J. Reiss, Esquire
From: Stephen J. Kramer, Esquire
Date: 3/5/18
Re: Fireworks/Act 43 – Tobyhanna Township

You requested a review of Act 43 (formerly House Bill 542) which was signed into law by Governor Wolf on October 30, 2017. Among other things, the Act provides amendments legalizing the use, sale and possession of consumer fireworks, as well as regulations regarding the locations and conditions of such locations for the sale of consumer fireworks. The Act also provides new regulations on the display of display fireworks. You requested a memorandum detailing the new amendments contained in the Act regarding both consumer and display fireworks. In addition, you also requested a review of the Township's current code regulations on fireworks to determine the Township's compliance with Act 43 and make comments and suggestions where appropriate. Please allow the following memo to address these inquiries.

1. Act 43 Amendments:

A. Consumer Fireworks.

Section 2404 of the Act 43 ("Act") legalizes the sale, use and possession of consumer fireworks defined under Section 2401 as:

any combustible or explosive composition or any substance or combination of substances which is intended to produce visible or audible effects by combustion, is suitable for use by the public, complies with the construction, performance, composition and labeling requirements promulgated by the Consumer Products Safety Commission in 16 CFR (relating to commercial practices) or any successor regulation and complies with the provisions for "consumer fireworks" as defined in APA 87-1 or any successor standard, the sale, possession and use of which shall be permitted throughout the Commonwealth.

According to the definition, the term does not include ground and hand-held sparkling devices, novelties or toy caps. Act 43 provides certain conditions on who can use consumer fireworks and where such fireworks may be used. For example, Section 2404(A) of the Act states that an individual has to be at least 18 years of age to purchase, possess and use consumer fireworks. Moreover, Section 2404(B) prohibits a person from intentionally igniting or discharging:

- (1) Consumer fireworks on public or private property without the express permission of the owner.
- (2) Consumer fireworks or sparkling devices within, or throw consumer fireworks or sparkling devices from, a motor vehicle or building.
- (3) Consumer fireworks or sparkling devices into or at a motor vehicle or building or at another person.
- (4) Consumer fireworks or sparkling devices while the person is under the influence of alcohol, a controlled substance or another drug.
- (5) Consumer fireworks within 150 feet of an occupied structure.

B. Display Fireworks.

The Act defines display fireworks as “large fireworks to be used solely by professional pyrotechnicians and designed primarily to produce visible or audible effects by combustion, deflagration or detonation.” Display fireworks under the Act includes: (1) salutes that contain more than two grains or 130 milligrams of explosive materials; (2) aerial shells containing more than 60 grams of pyrotechnic compositions; and (3) other display pieces that exceed the limits of explosive materials for classification as consumer fireworks. Section 2402 provides that display fireworks may be possessed and used by a person holding a permit from a municipality at the display covered by the permit or when used as authorized by a permit for any of the following:

- (1) For agricultural purposes in connection with the raising of crops and the protection of crops from bird and animal damage.¹
- (2) By railroads or other transportation agencies for signal purposes or illumination.
- (3) In quarrying or for blasting or other industrial use.
- (4) In the sale or use of blank cartridges for a show or theater.
- (5) For signal or ceremonial purposes in athletics or sports.
- (6) By military organizations or organizations composed of veterans of the armed forces of the United States.

Section 2404.1 of the Act provides that no display fireworks shall be ignited within 300 feet of a facility that meets the requirements of Section 2407 (sales locations) and Section 2410 (temporary structures). Section 2402(B) requires that a display fireworks permit shall not be issued to a person under 21 years of age. The Act also requires under Section 2402(C) that the governing body of a municipality require a bond deemed adequate by it from the permittee in a sum of not less than \$50,000 conditioned for the payment of all damages which may be caused to a person or property by reason of the display and arising from an act of the permittee or an agent,

¹ Section 2405(B) provides that a permit issued by a municipality under this section shall remain in effect for the calendar year in which it was issued. After a permit is granted, sales, possession, and use of fireworks of that type and for that purpose shall be lawful only for that purpose.

an employee or a subcontractor of the permittee. If, because of unfavorable weather, the display for which a permit was granted does not occur at the time authorized by the permit, the person to whom the permit was issued may within 24 hours apply for a request for extension to the municipality which granted the permit. Section 2403(A).

According to Section 2403(B), such request for an extension must state under oath that the display was not made, provide the reason that the display was not made and request a continuance of the permit for a date designated within the request, which shall be not later than one week after the date originally designated in the permit. Upon receiving the request for extension, a municipality, if it believes that the facts stated within the request are true, shall extend the provision of the permit to the date designated within the request, which shall be not later than one week after the date originally designated in the permit. Section 2403(D) provides that the extension of time shall be granted without the payment of an additional fee and without requiring a bond other than the bond given for the originally permit, the provisions of which shall extend to and cover all damages which may be caused by reason of the display occurring at the extended date and in the same manner and to the same extent as if the display had occurred at the date originally designated in the permit.

Section 2406 of the Act authorizes municipalities to create reasonable rules and regulations for displays of display fireworks to be held within the municipality. The Act also provides that each display shall be handled by a competent operator and of a character and so located, discharged or fired as, in the opinion of the chief of the fire department or other appropriate officer as may be designated by the governing body of the municipality, after proper inspection, to not be hazardous to property or endanger any person. Further, the Act requires that if a municipality grants permission for a display, possession and use of display fireworks shall only be lawful for that purpose. Section 2406(B)(3) of the Act states that a permit shall be transferrable.

C. Consumer Fireworks Sale Locations/Licenses/Applications.

Section 2407 of the Act provides that consumer fireworks shall be sold only from facilities which are licensed by the Department of Agriculture and that meet the following criteria:

- (1) The facility shall comply with the provision of the Pennsylvania Construction Act.
- (2) The facility shall be a stand-alone permanent structure.
- (3) Storage areas shall be separated from wholesale or retail sales areas to which a purchaser may be admitted by appropriately rated fire separation.
- (4) The facility shall be located no closer than 250 feet from a facility selling or dispensing gasoline.
- (5) The facility shall be located at least 1,500 feet from another facility licensed to sell consumer fireworks.
- (6) The facility shall have a monitored burglar and fire alarm system.

- (7) Quarterly fire drills and preplanning meetings shall be conducted as required by the primary fire department.

According to Section 2410, consumer fireworks may also be sold at a temporary structure if the temporary structure meets the following requirements:

- (1) The temporary structure is located no closer than 250 feet from a facility storing, selling or dispensing gasoline, propane or other flammable products.
- (2) An evacuation plan is posted in a conspicuous location for a temporary structure in accordance with NFPA 1124.
- (3) The outdoor storage unit, if any, is separated from the wholesale or retail sales area to which a purchaser may be admitted by appropriately rated fire separation.
- (4) The temporary structure complies with NFPA 1124 as it relates to retail sales of consumer fireworks in temporary structures.
- (5) The temporary structure is located one of the following distances from a permanent facility licensed to sell consumer fireworks under the Fireworks Law of 1939, at the time of the effective date of this Act:
 - (a) Prior to January 1, 2023, at least five miles.
 - (b) Beginning January 1, 2023, at least two miles.
- (6) The temporary structure does not exceed 2,500 square feet.
- (7) The temporary structure is secured at all times during which consumer fireworks are displayed within the structure.
- (8) The temporary structure has a minimum of \$2,000,000 in public and product liability insurance.
- (9) The sales period is limited to June 15 through July 8 and December 21 through January 2 of each year.
- (10) Consumer fireworks not on display for retail sale are stored in an outdoor storage unit.

The Act also limits the sale of consumer fireworks from the temporary structure to helicopter, aerial spinners, roman candles, and mine and shell devices not exceeding 500 grams.

Section 2408 provides that to sell consumer fireworks, an application must be submitted to the Department of Agriculture on forms prescribed and provided by the Department with a nonrefundable application fee and license fee which vary depending on the size of the sale location and whether said location is temporary or permanent. According to Section 2408(C)(1), a facility that meets the requirements of Section 2407 shall be inspected by the Department of Agriculture within 30 days of receipt a complete application for a license. Further, the Department of Agriculture shall issue or deny a license within 14 days of completing the inspection. Under Section 2408(C)(2), the Act provides that the Department of Agriculture must

issue or deny a license for a facility meeting the requirements of Section 2410 (relating to temporary facilities) no later than 10 days prior to the first day of sale. The facility must be available for inspection by the Department of Agriculture for compliance with NFPA 1124 at all times during the licensed selling period.

With respect to the term of a license to sell consumer fireworks, Section 2408(D) of the Act states that a license shall be effective for one year from the date the license is issued. Licenses shall be renewed automatically upon payment of the appropriate annual license fee; however, each facility shall be subject to annual inspections by the Department of Agriculture and at other times as the Department may deem appropriate. Section 2408(F) prohibits the issuing of a license to sell consumer fireworks to a convicted felon or to an entity in which a convicted felon owns a percentage of the equity interest of a facility.

The Act also provides conditions for facilities selling consumer fireworks. Specifically, Section 2409 provides that a facility licensed by the Department shall be exclusively dedicated to the storage and sale of consumer fireworks and related items, and the facility shall operate in accordance with the following rules:

- (1) There shall be security personnel on the premises for the seven days and including July 4 and for the three days preceding and including January 2.
- (2) No smoking shall be permitted in the facility.
- (3) No cigarettes or tobacco products, matches, lighters or any other flame-producing devices shall be permitted to be taken into the facility.
- (4) No minors shall be permitted in the facility unless accompanied by an adult, and each minor shall stay with the adult in the facility.
- (5) All facilities shall carry at least \$2,000,000 in public and product liability insurance.
- (6) A licensee shall provide its employers with documented training in the area of operation safety of a facility. The licensees shall provide to the Department written documentation that each employee has received the training.
- (7) No display fireworks shall be stored or located at a facility.
- (8) No person who appears to be under the influence of intoxicating liquor or drugs shall be admitted to the facility, and no liquor, beer or wine shall be permitted in the facility.
- (9) Emergency evacuation plans shall be conspicuously posted in appropriate locations within the facility.

Section 2411 of the Act requires that any business entity which performs, provides or supervises fireworks displays or exhibitions for profit shall register annually with the Attorney General. Section 2411(B) requires the Attorney General to promulgate rules to implement the registration process.

D. Consumer Fireworks Tax.

In addition to any other tax imposed by law, Section 2412(A) requires that a 12% (of the purchase price per item sold) tax be imposed on each separate sale at retail of consumer fireworks, which shall be collected by the retailer from the purchaser at the time of sale and shall be paid over to the Commonwealth. The purchase price shall include state and local sales taxes. Under Section 2413(A) of the Act, it provides that one-sixth of the tax collected in a fiscal year, not to exceed \$2,000,000, shall be transferred annually for use as follows:

- (1) 75% for making grants under 35 Pa.C.S. Chapter 78, Subchapter C (relating to Emergency Medical Services Grant Program)
- (2) 25 % to be deposited into a special account in the state treasury designated as the online training educator and training reimbursement account for the purposes of developing, delivering and sustaining training programs for volunteer firefighters in the Commonwealth.

E. Penalties.

Under Section 2414(1), the Act provides that any person using consumer fireworks in violation of the provisions of the Act commits a summary offense and, upon conviction, shall be punished by a fine of not more than \$100. Any person selling consumer fireworks in violation of the Act commits a misdemeanor of the second degree according to Section 2414(2). Section 2414(3) states that any person selling display fireworks in violation of the Act commits a felony of the third degree. Section 2414(4) provides that any person selling federally illegal explosives such as devices as described in 49 CFR 173.54 (relating to forbidden explosives) or those devices that have not been tested, approved and labeled by the U.S. Department of Transportation, including, but not limited to, those devices commonly referred to as “M-80”, “Blockbuster”, “Cherry Bomb” or Quarter or Half Stick” explosive devices, in violation of the provisions of the Act commits a felony of the third degree. Moreover, Section 2415 states that the Pennsylvania State Police, a sheriff or police officer shall take, remove or cause to be removed at the expense of the owner all stocks of consumer fireworks or display fireworks or combustibles offered or exposed for sale, store or held in violation of the Act. Further, the owner shall also be responsible for the storage and, if deemed necessary, the destruction of these fireworks.

F. Transition.

Section 2416 of the Act provides that a person who, on the effective date of the Act, holds a license under the Fireworks Law of 1939, may continue the activity permitted by the license for a period of 90 days following the effective date of the Act or the date the license expires by the terms of the license, whichever is sooner. After the expiration of the 90-day period or the licensee, whichever is sooner, the person must obtain the license required by the Act to continue the permitted activity, if applicable.

2. Township Code:

a. Chapter 75 “Fireworks”.

I would recommend that Section 75-1’s definition of “Consumer Fireworks” be updated to reflect new language in the Act 43 definition as follows:

Any combustible or explosive composition or any substance or combination of substances, intended to produce visible and/or audible effects by combustion and which is suitable for use by the public that complies with the construction, performance, composition and labeling requirements promulgated by the Consumer Products Safety Commission in 16 CFR, as amended, or any successor regulation and which complies with the provisions for "consumer fireworks" as defined in the American Pyrotechnics Association (APA) Standard 87-1, as amended, or any successor standard, the sale, possession and use of which shall be permitted at all times throughout this Commonwealth.— The term does not include devices such as “ground and hand-held sparkling devices”, “novelties” and “toy caps” in APA Standard 87-1, as amended, the sale, possession and use of which shall be permitted at all times throughout this Commonwealth.

Section 75-1 also defines “Display Fireworks” as “defined as provided in 27 CFR 555.11, as amended.” This definition should be amended to match the language in the definition in Act 43 as follows:

DISPLAY FIREWORKS

Defined as provided in 27 CFR §555.11, as amended. Large fireworks to be used solely by professional pyrotechnicians and designed primarily to produce visible or audible effects by combustion, deflagration or detonation. The term includes, but is not limited to:

- (1) Salutes that contain more than two grains or 130 milligrams of explosive materials;*
- (2) Aerial shells containing more than 60 grams of pyrotechnic compositions;*
and
- (3) Other display pieces that exceed the limits of explosive materials for classification as consumer fireworks and are classified as fireworks UN0333, UN0334 or UN0335 hazardous materials table.*

Section 75-2 provides that “it shall be unlawful for any person, persons, firms or corporations, amusement parks, fair associations or other organizations or groups of individuals to *have or to hold public displays of consumer fireworks* or display fireworks within the limits of the Township of Tobyhanna, unless a permit therefor is granted by Tobyhanna Township, as hereinafter provided.” While Act 43 permits municipalities to enact reasonable regulations for the display of display fireworks under Section 2406(A), it does not expressly provide the municipality the right to regulate the use of consumer fireworks as mentioned above. In fact, the Act provides its own express conditions by which a person may use consumer fireworks. Since

Section 75-2 of the Township Code requires that individuals obtain a permit to have to hold public displays of consumer fireworks when Act 43 already permits such use subject to its own conditions, I would recommend the that the Township amend Section 75-2 as follows:

§75-2 Unlawful to hold a display of display fireworks without permit.

It shall be unlawful for any person, persons, firms or corporations, amusement parks, fair associations or other organizations or groups of individuals to have or to hold public displays of ~~consumer fireworks or~~ display fireworks within the limits of the Township of Tobyhanna, unless a permit therefor is granted by Tobyhanna Township, as hereinafter provided.

If the Township wants to regulate the use of consumer fireworks, it must be consistent with Section 2404(A)-(B) of Act 43. To stay consistent, the Township can amend Chapter 75 of its Code to require that only a person who is 18 years of age may purchase, possess, and use consumer fireworks. Further the Township could prohibit a person from intentionally igniting or discharging: (1) consumer fireworks on public or private property without express permission of the owner; (2) consumer fireworks or sparkling devices within, or throw consumer fireworks or sparkling devices from, a motor vehicle or building; (3) consumer fireworks or sparkling devices into or at a motor vehicle or building or at another person; (4) consumer fireworks or sparkling devices while the person is under the influence of alcohol, a controlled substance or another drug; and (5) consumer fireworks within 150 feet of an occupied structure.

Section 75-4 should be updated to reflect new language in Act 43 as follows:

Every such fireworks display within the limits of the Township shall be handled, arranged, managed and directly supervised by a competent operator. Every such fireworks display within the Township shall be of such a character and so located, discharged or fired as not to be hazardous to property or endanger any person or persons in the opinion of the Board of Supervisors, or their duly authorized representative after proper inspection. No display fireworks shall be ignited within 300 feet of a facility that meets the requirements of Section 2407 or 2410 (relating to permanent and temporary sales locations) of Pennsylvania Act 43 of 2017. The Township Fire Chief and Fire Code Official, or other such officer as may be designated by the Township, shall inspect the display site prior to the issuance of a permit in accordance with the International Fire Code and other applicable regulations and ensure that the site and proposed fireworks, display are compliant with said regulations and safe. No permit for the public display of display fireworks shall be issued until the Township Fire Chief, or other such officer as may be designated by the Township, determines that the requested permit may be granted after inspecting the location for the requested display.

Section 75-5.B and C. should be amended to read as follows:

- B.** *If and after such permit is granted by the Township Board of Supervisors or an authorized designee, the possession, use and display of display fireworks for the approved display shall be lawful for that purpose, date and time only. ~~No permit~~*

~~granted hereunder shall be transferrable.~~ A permit granted hereunder shall be transferable.

C. No permit for the use and display of display fireworks shall be issued to an individual under the age of 18.

b. Zoning Code.

With the enactment of Act 43, the Township may want to consider enacting certain zoning regulations regarding the facilities that sell consumer fireworks pursuant to the Act. When considering zoning regulations for such use, the Township must be mindful that it cannot enact any legislation that would conflict or be preempted by the regulations of Act 43.

There are three generally recognized types of preemption: (1) express or explicit preemption, where the statute includes a preemption clause, the language of which specifically bars local authorities from acting on a particular subject matter; (2) conflict preemption, where the local enactment irreconcilably conflicts with or stands as an obstacle to the execution of the full purposes of the statute; and (3) field preemption, where analysis of the entire statute reveals the General Assembly's implicit intent to occupy the field completely and to permit no local enactments. *Hoffman Mining Company v. Zoning Hearing Board of Adams Township*, 32 A.3d 587, 610 (Pa. 2011).

The issue of preemption over local zoning regulations has been addressed by the Pennsylvania Supreme Court. For instance, in *Hoffman Mining Company v. Zoning Hearing Board of Adams Township*, Adams Township ("Township") enacted a zoning ordinance permitting mining activities in its Conservancy District only by special exception. In addition, the zoning ordinance requires that all blasting activities in said district must maintain a setback of at least 1,000 feet from all residential structures. *Id.* 590. Hoffman Mining Company ("Hoffman") sought to engage in surface coal mining within the Conservancy District and requested a variance from the 1000-foot setback provision. *Id.* In the alternative, Hoffman argued that there was a conflict between the zoning ordinance's setback provision and the Surface Mining Act's setback clause under which no "surface mining operations are permitted within 300 feet of any occupied dwelling." *Id.* at 590 and 591. The Township's zoning hearing board granted the request for a special exception but denied Hoffman's request for a variance from the 1,000-foot setback provision. *Id.* Hoffman appealed the board's decision to the Court of Common Pleas, who affirmed, concluding, *inter alia*, that the zoning ordinance's 1,000-foot residential setback provision was a traditional land use regulation, not a surface mining regulation, and thus, pursuant to the plain language of the Surface Mining Act's preemption clause, was not preempted. *Id.* at 592. Hoffman appealed to the Commonwealth Court, which also affirmed, opining that the "challenged [residential setback] provision of the Zoning Ordinance is a quintessential land use control logically connected to land use planning and is, therefore, not preempted by the Surface Mining Act's preemption clause. *Id.*

The Pennsylvania Supreme Court also affirmed. In its holding, the court addressed the issue of preemption, acknowledging that even in areas over which municipalities have been granted power to act (like local zoning), the state may bar local governing bodies from legislating in a particular field. *Id.* at 593 citing *Huntley & Huntley, Inc. v. Borough Council of Oakmont*, 964 A.2d 855, 862 (Pa. 2009). However, the court notes that the mere fact that the

General Assembly has enacted legislation in a field does not lead to the presumption that the state has precluded all local enactments in that field; rather, the General Assembly must clearly evidence its intent to preempt. *Id.* Absent a clear statement to preempt, state legislation will not generally preempt local legislation on the same issue. *Id.* The court made it clear that conflict preemption may still result absent field preemption if the local enactment irreconcilably conflicts with or stands as an obstacle to the execution of the full purposes of the statute. *Id. at 594.* Moreover, the court opined that it is a long-established general rule that “in determining whether a conflict exists between a general and local law [] where the legislature has assumed to regulate a given course of conduct by prohibitory enactments, a municipal corporation with subordinate power to act in the matter may make such additional regulations in aid and furtherance of the purpose of the general law as may seem appropriate to the necessities of the particular locality and which are not themselves unreasonable.” *Id. at 595 citing Mars Emergency Medical Services, Inc. v. Township of Adams, 740 A.2d 193, 196 (Pa. 1999).* For example, the court provides that municipalities in the exercise of the police power may regulate certain occupations by imposing restrictions which are in addition to, and not in conflict with, statutory regulations. *Id. citing Western Pennsylvania Restaurant Association v. City of Pittsburgh, 77 A.2d 616, 620 (Pa. 1951).* According to the court, “we have also observed that this Court has ‘traditionally given local zoning power great play [, and has] been reluctant to strike down a local ordinance in cases where a state statute does not directly and inherently conflict with the zoning power.’” *Id. citing Council of Middletown Township v. Benham, 523 A.2d 311, 315 (Pa. 1987).*

In reviewing the facts, the court concluded that while the Surface Mining Act had a preemption clause, the Township’s zoning requirements were (setback provision and use permitted by special exception) were traditional zoning regulations and were not preempted by the preemption clause in the Act. *Id. at 602.* The court also roundly rejected Hoffman’s argument that the Township’s setback provision results in conflict preemption because the Surface Mining Act’s mandate that mining operations be no less than 300 feet from any occupied dwelling infers that land beyond the 300-foot residential setback is always available for mining. *Id. at 603.* Further the court stated that the text only provides that no surface mining operations shall be permitted within 300 feet of an occupied dwelling; the statutory text does not expressly provide that surface mining is permissible beyond 300 feet of an occupied dwelling in all cases, regardless of any reasonable local zoning ordinance responsive to local conditions. *Id.* Further the court stated that even still, any conflict between the two enactments is not irreconcilable because it is not impossible to comply with both of them, and an actor is not placed in the position of having to decide which enactment to follow. *Id.*

The issue of preemption and local zoning regulations also recently surfaced regarding the Oil and Gas Act in the court case *Robinson Township v. Commonwealth, 83 A.3d 901 (Pa. 2013).* In this case, the Oil and Gas Act (“Act 13”) required municipal zoning ordinances to allow oil and gas wells, pipelines, and impoundments in every zoning district with certain setback requirements. The Pennsylvania Supreme Court upheld the Commonwealth Court’s opinion that the foregoing zoning mandate violated substantive due process under the Pennsylvania and United States Constitutions through its requirement that local governments disrupt their existing zoning ordinances without regard for basic zoning principles which “allows incompatible uses in zoning districts and does not protect the interests of neighboring property owners from harm, alters the character of the neighborhood, and makes irrational classifications.” *Id. at 931 and 972; Robinson Township v. Commonwealth, 52 A.3d 463, 485 (Pa.*

Cmwlth. 2012). Moreover the court concluded that while Act 13 preempted the field of regulating the oil and gas industry, it did not preempt a local municipality's right to restrict such use in certain zoning districts.

Most recently, on February 20, 2018, the Commonwealth Court held that the Commonwealth's field preemption of public utilities precludes the application of a municipality's zoning ordinance regarding the location of a pipeline determined to be a public utility. In *Sunoco*, plaintiffs sought to prevent Sunoco Pipeline L.P. ("Sunoco") from constructing a new set of pipelines (deemed to be a public utility) in West Goshen Township in a manner that violated the township's zoning ordinance, which restricted pipeline to certain districts as conditional uses and prohibited them in residential districts. *Sunoco Slip Op. Page 5*. The zoning ordinance also provided setback requirements for projects located in those certain districts. *Id.* The Plaintiff's argued, among other things, that Sunoco's non-compliance with the West Goshen's zoning ordinance violates the plaintiff's substantive due process rights and cites both the *Hoffman* and *Robinson* holdings. Specifically, the plaintiffs claimed that by finding that the zoning ordinance regulating the location of the pipelines in residential districts is preempted by the PUC's authority, the trial court did precisely what the Supreme Court prohibited in *Robinson*. *Id. at 23*. The court reasoned that such a parallel by Plaintiffs is flawed because *Robinson* did not involve a public utility (which case law clearly indicates the PUC preempts the entire field involving public utilities) and because the *Robinson* case involved a substantive validity challenge to a legislative enactment, whereas, the current case involved a challenge to a non-governmental action, which is a novel and illogical extension of a substantive due process challenge. *Id. at 48-49*.

After reviewing Act 43, I could not find any preemption clause with language specifically barring local legislation on the subject matter. In further reviewing the Act, I also found that under Section 2406, local municipalities are authorized to enact reasonable rules and regulations for displays of display fireworks to be held with the municipality. Specifically, Section 2406(A) provides that "permission shall be given by the governing body of a municipality under reasonable rules and regulations for displays of display fireworks to be held within the municipality." This provision indicates that it was not the intent of the General Assembly to occupy the entire field of fireworks completely and to permit no local legislation.

With respect to the sale locations of consumer fireworks (for permanent facilities), Section 2407 of the Act provides that consumer fireworks shall be sold only from facilities which are licensed by the Department of Agriculture and that meet certain criteria under that section of the Act. Section 2410 provides that notwithstanding Section 2407 or any other provision of law, a temporary structure may be licensed by the Department of Agriculture to sell consumer fireworks if the temporary structure meets certain criteria. There is nothing in the language of either of these sections expressly prohibiting a municipality from enacting traditional zoning regulations with respect to such permanent or temporary facilities. In fact, as mentioned above, courts have traditionally given local zoning power great play and have been reluctant to strike down a local ordinance in cases where a state statute does not directly and inherently conflict with the zoning power of a municipality. Similar to the Surface Mining Act in *Hoffman*, Act 43 provides minimum criteria for the sale locations of consumer fireworks from permanent and temporary facilities. Act 43 mandates that consumer fireworks shall be sold only from facilities which are licensed by the Department of Agriculture and meet certain criteria which

includes (among others) that a facility be located no closer than 250 feet from a facility storing, selling or dispensing gasoline, propane or other flammable products. Like in Hoffman, there is no statutory text expressly providing that consumer firework sale locations are always permissible beyond 250 feet from such facilities, regardless of any reasonable local zoning ordinance responsive to local conditions. Further, if the Township provided additional distance requirements for such facilities in its zoning ordinance (for example, firework facility must be at least 300 feet from a facility selling or storing gasoline or propane products) any conflict between those two enactments would not be irreconcilable because it would not be impossible to comply with both of them, and an actor would not be placed in the position of having to decide which enactment to follow. In the alternative, a municipal ordinance permitting the sale of consumer fireworks from temporary facilities not meeting the licensing criteria of Act 43, such as permitting such facilities to be within 150 feet of a facility selling or storing gas or propane would conflict with the Act 43 and would be preempted.

Based on the language of Section 2407 of the Act and the case law mentioned above, the Township could enact reasonable zoning regulations regarding the districts in which such temporary facilities could be sold so long as the zoning regulations are not conflicting with the established requirements of Act 43 for temporary facilities. For example, the Township could limit the sale of consumer fireworks in such facilities to certain compatible zoning districts and only by conditional use or special exception as such regulations would be traditional zoning provisions per *Hoffman* and *Robinson*. The Township could provide other traditional zoning provisions, such as additional setback distances from occupied dwellings. Further, the Township could require that such facilities shall not be located within a certain distance of local parks or schools. As mentioned previously, traditional zoning provisions with respect to such facilities would not be preempted by Act 43 so long as they do not stand as an obstacle to the Act's intent. Local zoning regulations are an obstacle when compliance with both the requirements in Act 43 and the Township's zoning code is impossible.

3. Conclusion:

It is my opinion that the Act requires that any individual or entity desiring to sell consumer fireworks must comply with its regulations and obtain a license from the Department of Agriculture. Since there is no express or field preemption within Act 43, it is my opinion that the Township could enact reasonable zoning regulations regarding the permanent and temporary facilities permitted under the Act, so long as they don't conflict with the Act's requirements and or stand as an obstacle to the Act's intent. In addition to this memo, I have attached a model ordinance from State Representative Farry's office which can serve as a useful model if the Township decides to enact zoning regulations regarding such facilities selling consumer fireworks.

PA MODEL FIREWORKS ORDINANCE

AN ORDINANCE OF THE _____, BUCKS COUNTY, PENNSYLVANIA, AMENDING CHAPTER ____ (ZONING) OF THE CODE OF ORDINANCES OF THE _____, BUCKS COUNTY, PENNSYLVANIA PROVIDING DEFINITIONS AND CONDITIONS FOR THE SALE AND STORAGE OF CONSUMER FIREWORKS AND PERMITTING SUCH USES IN THE I (INDUSTRIAL?) DISTRICT BY CONDITIONAL USE

WHEREAS, the _____, Bucks County, Pennsylvania (hereinafter "_____") is a _____ organized and existing under the laws of the Commonwealth of Pennsylvania; and

WHEREAS, _____ has enacted a zoning ordinance pursuant to its statutory authority, the Pennsylvania Municipalities Planning Code (MPC), Act 247 of 1968 as amended; and

WHEREAS, the Pennsylvania Construction Code Act requires the enactment of an appropriate Ordinance by municipalities electing to administer and enforce the building code provisions of the Act; and

WHEREAS, the _____ has opted to administer and enforce the provisions of the Pennsylvania Uniform Construction Code (UCC) including, but not limited to, the International Fire Code, and the International Building Code; and

WHEREAS, it is the intent of this ordinance to provide available locations for sale and storage of Consumer Fireworks, as defined herein, while simultaneously advancing the substantial government interest of public safety, health and protection; and

WHEREAS, the _____ has recognized the need to amend the zoning ordinance as reflected herein.

NOW, THEREFORE, BE IT AND IT IS HEREBY ORDAINED by the _____, Bucks County, Pennsylvania, and it is hereby ENACTED AND ORDAINED by authority of same as follows:

Section 1: The following definitions shall be added, alphabetically, to Section ____ of Chapter ____ of the Code of Ordinances of the _____:

CONSUMER FIREWORKS - Any combustible or explosive composition or any substance or combination of substances intended to produce visible and/or audible effects by combustion and which is suitable for use by the public that complies with the construction, performance, composition and labeling requirements promulgated by the Consumer Products Safety Commission in 16 CFR (relating to commercial practices) or any successor regulation and which complies with the provisions for "Consumer Fireworks" as defined in the American

Pyrotechnics Association (APA) Standard 87-1, including but not limited to Sections *3.1 and *3.5, or any successor standard. The term does not include devices such as "ground and handheld sparkling devices" as defined in APA Standard 87-1, Section *3.1.1, "novelties" as defined in APA Standard 87-1, Section *3.2, or "toy caps" as defined in APA Standard 87-1, Section *3.3.

DISPLAY FIREWORKS – Defined as more fully set forth in 27 CFR 555.11 (Meaning of terms), which is incorporated herein by reference which meet the types of display fireworks devices set forth in the APA Standard 87-1, Section *4.1 which comply with requirements for display fireworks set forth in APA Standard 87-1.

FIREWORKS - Any composition or device for the purpose of producing a visible or an audible effect for entertainment purposes by combustion, deflagration or detonation that meets the definition of 1.4 G fireworks or 1.3 G fireworks as set forth in the 2003 International Fire Code including, but not limited to, those compositions or devices defined in APA Standard 87-1.

NFPA 1124 – The National Fire Protection Association Standard 1124, *Code for the Manufacture, Transportation and Storage of Fireworks and Pyrotechnic Articles*, 2006 edition, or any subsequent edition.

NOVELTIES – Articles of trade having amusement value and whose appeal is often transitory, and which is limited to those items for sale described in American Pyrotechnics Association (APA) Standard 87-1, Section *3.2.

TEMPORARY STRUCTURE – A structure other than a permanent facility with fixed utility connections, which is in use or in place for a period of 20 consecutive calendar days or less and is dedicated to the storage and sale of Consumer Fireworks and related items, the term includes temporary retail sales stands, tents, canopies and membrane structures meeting the specifications of NFPA 1124. The term shall not include a facility that is not licensed to sell Consumer Fireworks under this Article.

Section 2: Section _____ of Chapter ____ (Zoning) of the Code of Ordinances of the _____ shall be amended to include "Sale of Consumer Fireworks" as an additional land use as follows;

Uses Permitted by Conditional Use:

1. Sales of Consumer Fireworks from either a permanent facility or Temporary Structure shall be permitted only by conditional use in the ____ District subject to compliance with all of the following specific regulations with respect to such use as well as the general provisions regarding the Conditional Use contained in paragraph __ of the Code.
 - a. Such use shall not be located within 1,500 feet of any premises selling alcoholic liquors, alcohol, malt or brewed beverages for consumption on or off premises.
 - b. Such use shall not be located within 1,500 feet of any local or state park, school

- or child daycare facility, recreational establishment, house of worship, dwelling, hospital, group home or nursing home.
- c. Any structure containing quantities of Consumer Fireworks as defined herein exceeding 50 pounds shall be no closer than 150 feet to any building, state highway, railway, local street or alley, waterway, or utility right of way including, but not limited to, natural gas line.
 - d. Such use should not be located within 1,500 feet of any premises selling firearms.
 - e. All land development plans for construction, use or renovation of an existing building for the purpose of selling fireworks shall be reviewed by the code enforcement officer for compliance with all required fire safety codes including, but not limited to, the International Fire Code, and his comments and/or report shall be copied to the official Borough-designated fire company.
 - f. Sale of fireworks shall be subject to compliance with all of the provisions of Pennsylvania Act 43 of 2017 pertaining to the sale thereof. Hours of operation shall be confined from 9:00 A.M. to 5:00 P.M. Security and site management shall be provided 24 hours per day.
 - g. All sales of Consumer Fireworks shall be conducted only within a facility approved by the Pennsylvania Department of Agriculture pursuant to the Pennsylvania Fireworks Law.
 - h. All sales of Consumer Fireworks as defined herein shall be conducted only from a facility exclusively dedicated to the storage and sale of fireworks.
 - i. If the facility in which the Sales of Consumer Fireworks are conducted is a Temporary Structure, it shall comply with the following regulations, in addition to the other regulations set forth in subparagraphs a-i above:
 1. The Temporary Structure is located no closer than 250 feet from a facility storing, selling or dispensing gasoline, propane or other flammable products.
 2. An evacuation plan is posted in a conspicuous location for a Temporary Structure in accordance with NFPA 1124.
 3. The outdoor storage unit, if any, is separated from the wholesale or retail sales area to which a purchaser may be admitted by appropriately rated fire separation.
 4. The Temporary Structure complies with NFPA 1124 as it relates to retail sales of Consumer Fireworks in Temporary Structures.
 5. The Temporary Structure is located one of the following distances from a permanent facility licensed to sell Consumer Fireworks under the Act of May 15, 1939 (P.L. 134, No. 65), referred to as the Fireworks Law, at the time of the Effective Date of this Article:
 - (i) Prior to January 1, 2023, at least five miles.
 - (ii) Beginning January 1, 2023, at least two miles.
 6. The Temporary Structure does not exceed 2,500 square feet.
 7. The Temporary Structure is secured at all times during which Consumer Fireworks are displayed within the structure.
 8. The Temporary Structure has a minimum of \$2,000,000 in public and

- product liability insurance.
9. The sales period is limited to June 15 through July 8 and December 21 through January 2 of each year.
 10. Consumer Fireworks not on display for retail sale are stored in an outdoor storage unit.
 11. Limitations – The sale of Consumer Fireworks from the Temporary Structure is limited to the following:
 - (i) Helicopter, aerial spinner (APA 87-1, 3.1.2.3).
 - (ii) Roman candle (APA 87-1, 3.1.2.4).
 - (iii) Mine and shell devices not exceeding 500 grams.
 12. Storage of Consumer Fireworks shall be permitted only as an accessory use to the sale of Consumer Fireworks on premises.
- j. The facility from which fireworks are sold whether permanent or temporary shall comply with the _____ lot dimensional, area, and parking regulations of the zoning district within such facility is located, including but not limited to, setbacks and buffers.

Section 3: The applicable provisions of the _____ Zoning District and Section _____ Table of Land Uses are amended to permit the Sale of Consumer Fireworks in the Zoning District as follows:

Land Use Category
Sales of Consumer Fireworks

Section 4: This Ordinance shall become effective immediately.

Section 5: The provisions of the Code of Ordinances of the _____, insofar as they are the same as those ordinances and regulations in force immediately prior to the adoption of this Ordinance, are intended as a continuation of such ordinances and regulation and not as a new enactment and shall remain in effect as heretofore enacted.

Section 6: It is hereby declared to be the intention of the _____ that the chapters, parts, sections, paragraphs, sentences, clauses and phrases of this Ordinance are severable. If any section, paragraph, sentence, clause or phrase of the Ordinance is declared unconstitutional, illegal or otherwise invalid by the judgment or decree of a court of competent jurisdiction, that invalidity shall not affect any of the remaining chapters, parts, sections, paragraphs, sentences, clauses or phrases of Chapter __ (Zoning).

Section 7: All ordinances or parts of ordinances, insofar as the same are inconsistent herewith, shall be and the same expressly are repealed.

ENACTED this _____ day of _____, 20__.

(TOWNSHIP OR BOROUGH OF _____)

By: _____

[SEAL]

Attest: _____
_____, Secretary

EXAMINED and APPROVED this _____ day of _____, 20__.

_____, Mayor

