

USE WITH NO REVIEW:  
HOW SPECIAL USE PERMITS IN MUNICIPAL  
ZONING PERPETUATE ENVIRONMENTAL  
INJUSTICE IN FOSSIL FUEL  
INFRASTRUCTURE SITING

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## INTRODUCTION

On a November evening in 2017, community advocates from southwest and southside Virginia gathered in a boardroom in rural Chatham, Virginia to speak before the Pittsylvania County Planning Commission. At issue were two special use permit applications by a fracked gas<sup>1</sup> pipeline developer to build what they told the Commission would be a gravel parking lot and an interconnect with the nearby Transco Pipeline. Following a presentation from the well-dressed man representing Mountain Valley Pipeline, LLC, these advocates told the Planning Commission that they should not approve a special use permit for the Mountain Valley Pipeline to build these facilities, citing concerns that the surrounding areas are low-income and already burdened by facilities associated with the Transco Pipeline. They expressed their fears that, once the relevant local permits were obtained, Mountain Valley Pipeline would announce a compressor station that would emit more air pollution than the currently proposed interconnect, and the county had not assessed the impact this would have on the surrounding community. The developer's representative assured the Commission, and subsequently the Board of Zoning Appeals, that the advocates' concerns were unfounded—this is a simple interconnect site, not a compressor station. On April 11, 2018, the morning after obtaining final approval for two special use permits and rezoning from agricultural to heavy industry, Mountain Valley Pipeline, LLC announced MVP Southgate and a compressor station in Chatham, Virginia.

Despite the stakes of these zoning practices, we know little about the world of special use permits and their use in rural low-

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1. Fracking, or hydraulic fracturing, is a method of extracting fossil fuels from underground shale formations. *Fracking 101*, NAT. RES. DEF. COUNCIL, <https://www.nrdc.org/stories/fracking-101>[<https://perma.cc/RDP9-RSQN>]. Though more commonly called “natural gas,” this Note will use the term “fracked gas” to refer to gas extracted via this method in order to avoid assumptions that the resulting fossil fuel is a form of “clean energy.” See Jessica Tritsch, “*Natural Gas*” *Is Not Clean Energy – It’s Climate Endangering Methane Gas*, SIERRA CLUB N. STAR CHAPTER (Jan. 22, 2022), <https://www.sierraclub.org/minnesota/blog/2022/01/natural-gas-not-clean-energy-it-s-climate-endangering-methane-gas> [<https://perma.cc/AA6A-KLWR>] (“The fossil fuel industry really wants us to believe that ‘natural gas’ is clean. The truth is that ‘natural gas’ is primarily methane — a potent and dangerous greenhouse gas. It is more accurately called methane gas or fossil gas.”).

income communities and communities of color. While commentators have created rich literature about the history of environmental justice communities,<sup>2</sup> few have yet to ask how special permits work within these communities. Meanwhile, those that have inquired, have focused on permitting processes in urban settings, and generally celebrated them as a solution to environmental justice problems. As a result, we have yet to explore how these permits function as a mechanism for perpetuating environmental injustice and increased burdens on certain communities in rural areas, especially those long impacted by extractive and fossil fuel industries.

This Note offers a long overdue window into the actual permitting process in rural, low-income communities. By focusing on two case studies in rural Virginia impacted by the expansion of fracked gas infrastructure in Appalachia, it explores the question of how municipalities approve applications for special use permits and the consequences of these permits for questions of environmental justice. These case studies of Buckingham County and Pittsylvania County reveal that, contrary to what current scholarship suggests, municipalities are not necessarily employing a meaningful environmental justice analysis when approving or denying special use permits, even when such issues are raised in public fora. Instead, due to a multitude of factors such as a lack of financial and political power in these areas and a limited scope of judicial review of municipal land use decisions, insufficient permit analyses that neglect to address environmental justice implications are rarely challenged in court.

Based on these case studies, this Note offers a potential set of solutions. In particular, it argues that through a combination of legislative and constitutional reforms, states can require a level of environmental justice analysis in municipal special use permit decisions. Such solutions can be narrowed by industry or impact to ensure that the already-extreme burden the fossil fuel industry places on certain areas can be capped and reduced. By offering the first granular account of the process of special use permits in rural communities, this Note thus allows commentators, courts, and legislatures to meaningfully plan for a just transition away from fossil fuels in the face of the current climate crisis and amplify the grassroots voices of environmental justice communities in pushing back against unneeded and excessive fossil fuel infrastructure.

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2. See *infra* Part I.

Part I of this Note provides an overview of special use permits as a mechanism of local zoning law and current scholarship assessing the relationship between local land use law and environmental justice. Through this review, this Part argues that special use permits are a key tool in local zoning law that commentators have generally applauded as supporting environmental justice, but without interrogating how these processes actually work. Part II seeks to solve this gap in our current understanding of special use permits by investigating the permits associated with two proposed fracked gas compressor stations in environmental justice communities in rural Virginia. This Part shows that municipalities are not always meaningfully assessing the environmental justice implications of these land use decisions, even when such issues are raised by community members in the face of potentially biased or incomplete information from the developer. Part III then uses these case studies to offer a set of principles by which states and rural municipalities can incorporate environmental justice considerations into their municipal zoning processes, including special use permit approvals.

#### I. The Limited Assessment of Special Use Permits and Their Role in Environmental Justice

Part I of this Note analyzes how legislatures, courts, and local municipalities have defined and regulated special use permits, and how, in turn, commentators have sought to understand their place in the ecosystem of land use law. This analysis shows that municipalities have considerable discretion in zoning and issuing special use permits, though the mechanisms associated with such permits vary by jurisdiction. Further, commentators have only begun to explore the practice and consequence of special permits, particularly as related to environmental justice. Sections I.A and I.B outline the concept of environmental justice and literature surrounding the role of local land use law and zoning in either perpetuating or remedying environmental injustice. Section I.C defines a special use permit and provides a broad overview of the purposes and procedures for such uses-by-review, revealing the level of variation and state and local discretion in such decisions. Section I.D discusses the literature regarding special use permits and environmental justice. The literature review confirms that low-income communities and communities of color bear a higher burden of exposure to the environmental and health impacts of the fossil fuel and petrochemical industries, and local land use decisions such as

special use permits and other exceptions to the local zoning ordinance have predominantly been viewed as a solution for an environmental-justice-minded municipality rather than another mechanism of perpetuating environmental injustice. However, the literature also reveals the lack of robust scholarship considering how special use permits can, in practice, perpetuate environmental injustice. Section I.E provides a brief history of land use and environmental justice movements specifically in the unique cultural context of rural Appalachia. Section I.F will review case law relating to special use permits for the fossil fuel and petrochemical industries in central Appalachia—with a focus on the region in Virginia, West Virginia, Kentucky, Ohio, and Pennsylvania—to show that special use permits in these contexts rarely receive judicial review, let alone judicial review that assesses environmental justice implications of the permit in question.

#### A. A Brief Overview of Environmental Justice in the United States

Definitions of environmental justice as a concept vary—the Environmental Protection Agency’s definition of “the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income, with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies” is commonly used across government entities and educational institutions.<sup>3</sup> However, some advocacy organizations argue that this definition falls short in addressing concerns about historical inequity that are at the root of the environmental justice movement.<sup>4</sup> The First National People of Color Environmental Leadership Summit issued seventeen “Principles of Environmental Justice” in 1991, highlighting that environmental justice “mandates

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3. *Environmental Justice*, U.S. ENV’T PROT. AGENCY, <https://www.epa.gov/environmentaljustice> [<https://perma.cc/R9RM-836B>]; see also *Black America and COVID-19*, HARV. LIBR. (Nov. 21, 2021), <https://guides.library.harvard.edu/BlackCovid/EJ> [<https://perma.cc/3WLG-WACM>] (using the EPA definition of “environmental justice” in the context of the intersection of environmental justice issues and disparate impacts of COVID-19); Benjamin F. Wilson, *It’s Not “Just” Zoning: Environmental Justice and Land Use*, 49 URB. LAW. 717, 718 (2017) (describing EPA’s definition of environmental justice as “widely accepted”).

4. *Environmental Justice & Environmental Racism*, GREENACTION, <https://greenaction.org/what-is-environmental-justice/> [<https://perma.cc/3FWS-5XW5>].

the right to ethical, balanced and responsible uses of land and renewable resources in the interest of a sustainable planet for humans and other living things,” “demands the right to participate as equal partners at every level of decision-making, including needs assessment, planning, implementation, enforcement and evaluation,” and “considers governmental acts of environmental injustice a violation of international law, the Universal Declaration On Human Rights, and the United Nations Convention on Genocide.”<sup>5</sup> Offered as a response to and expansion upon “environmental racism,” environmental justice encompasses broad and meaningful inclusion of historically excluded and underrepresented populations within decision-making processes, including based on socioeconomic status and class, with a goal of preventing already-burdened low-income communities and communities of color from continuing to carry a “disproportionately high burden of exposure to environmental hazards or unwanted land uses.”<sup>6</sup> The catalyst for environmental justice as a social movement is broadly considered to be the sit-ins by predominantly Black community members in protest of a polychlorinated biphenyl (PCB) landfill in Warren County, North Carolina in 1962.<sup>7</sup>

Generally, an “environmental justice community” is one that is experiencing disproportionate environmental burdens, often but not always from multiple sources.<sup>8</sup> The EPA does not incorporate a formal definition of an “environmental justice community” in their definition of “environmental justice,” nor is it included in the agency’s Glossary of Environmental Justice terms.<sup>9</sup> However, in November

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5. FIRST NATIONAL PEOPLE OF COLOR ENVIRONMENTAL LEADERSHIP SUMMIT, THE PRINCIPLES OF ENVIRONMENTAL JUSTICE (EJ) (1991), <http://www.ejnet.org/ej/principles.pdf> [<https://perma.cc/84LG-EK92>].

6. Craig Anthony (Tony) Arnold, *Planning Milagros: Environmental Justice and Land Use Regulation*, 76 DENV. U.L. REV. 1, 7 (1998).

7. *Environmental Justice*, U.S. ENV’T PROT. AGENCY, <https://www.epa.gov/environmentaljustice> [<https://perma.cc/8LS4-EGBN>].

8. See, e.g., *Environmental Justice Definitions*, N.M. DEP’T HEALTH (1997), <https://www.nmhealth.org/publication/view/help/309/> [<https://perma.cc/J7P9-73CV>] (defining an “Environmental Justice Community of Concern” as “[a] neighborhood or community, composed predominantly of persons of color or a substantial proportion of persons below the poverty line, that is subjected to a disproportionate burden of environmental hazards and/or experiences a significantly reduced quality of life relative to surrounding or comparative communities”).

9. *Environmental Justice*, *supra* note 7; *EJ 2020 Glossary*, U.S. ENV’T PROT. AGENCY, <https://www.epa.gov/environmentaljustice/ej-2020-glossary>

2022 the Council on Environmental Quality released the Climate and Economic Justice Screening Tool, which highlights Census tracts as “disadvantaged” if they are “overburdened and underserved.”<sup>10</sup> Advocates in environmental justice movements tend to defer to communities themselves to decide whether they identify as an “environmental justice community” to promote community autonomy and self-determination.<sup>11</sup>

### B. Role of Land Use Planning in Environmental Justice

This Section discusses scholarship assessing the relationship between environmental justice and land use planning to show that special use permits are, to date, under-examined, particularly as a mechanism for perpetuating environmental injustice. Scholarship and analyses of the intersection of municipal zoning, land use regulations, and environmental justice in the last five decades broadly indicate that municipalities can and do tend to concentrate locally undesirable land uses and environmentally detrimental projects in lower-income communities and communities of color.<sup>12</sup> A 1998 analysis of thirty-one census tracts across seven cities nationwide showed that low-income communities and communities of color in populated areas in California, Pennsylvania, Texas, and Kansas contained a greater percentage of industrial and other heavy-

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[<https://perma.cc/B9DH-UD9M>]. The EPA does, however, offer a video on how to identify communities with environmental justice concerns. U.S. EPA, *Identifying Communities with Environmental Justice (EJ) Concerns*, YOUTUBE (June 24, 2021), <https://www.youtube.com/watch?v=rQ5qqbBvfxw> [<https://perma.cc/Y28W-JUE2>].

10. *Climate and Economic Justice Screening Tool*, COUNCIL ON ENV'T QUALITY, <https://screeningtool.geoplatform.gov/> (on file with the *Columbia Human Rights Law Review*).

11. See, e.g., CLIFFORD VILLA ET AL., ENVIRONMENTAL JUSTICE: LAW, POLICY & REGULATION 26 (3d ed. 2020) (excerpting the “Group of Ten” letter—a 1990 letter from environmental justice activists to ten major environmental nonprofits and a subsequent letter to then-president George W. Bush—and describing that “[t]hese writings reflect the view strongly held by many activists, a view that people living in heavily impacted communities can and do ‘speak for themselves.’”).

12. See Charles Lord & Keaton Norquist, *Cities as Emergent Systems: Race as a Rule in Organized Complexity*, 40 ENV'T L. 551, 557–8 (2010) (“Over the past five decades, dozens of researchers have documented inequitable distributions of locally unwanted land uses (LULUs) in residential areas throughout the nation . . . [which] overwhelmingly indicates that LULUs are distributed in patterns that strongly correlate to race.”).



use zones than nearby high-income, majority-white neighborhoods.<sup>13</sup> This correlation has since been affirmed by numerous studies, including a 2018 report from the U.S. Environmental Protection Agency that revealed people of color in the United States are more likely to live near polluting industries and be exposed to polluted air, and that people experiencing poverty are exposed to carcinogenic fine particulate matter at higher rates than people not experiencing poverty.<sup>14</sup> Looking directly to the fossil fuel industry, additional studies indicate that facilities associated with hydraulic fracturing and fracked gas are more likely to be cited in lower-income communities and communities of color.<sup>15</sup>

These studies and numerous others have been incorporated into reports and guidance documents designed to aid localities in comprehensive planning and zoning processes to show the ample evidence to date that undesirable and dangerous land uses such as heavy industry are disproportionately sited in low-income communities and communities of color.<sup>16</sup> Facilities associated with hydraulic fracturing and fracked gas especially utilize thousands of chemicals which are linked to health impacts such as “severe

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13. Arnold, *supra* note 10, at 9.

14. Van R. Newkirk II, *Trump’s EPA Concludes Environmental Racism is Real*, ATLANTIC (Feb. 28, 2018), <https://www.theatlantic.com/politics/archive/2018/02/the-trump-administration-finds-that-environmental-racism-is-real/554315> [<https://perma.cc/8BGP-BPY9>].

15. See, e.g., Jill E. Johnston et al., *Wastewater Disposal Wells, Fracking, and Environmental Injustice in Southern Texas*, 106 AM. J. PUB. HEALTH 550 (2016), <https://pubmed.ncbi.nlm.nih.gov/26794166/> [<https://perma.cc/6XJY-PMZZ>] (analyzing the racial composition of residents living within five kilometers of oil and gas disposal wells in the Eagle Ford area of southern Texas); FOOD & WATER WATCH, PERNICIOUS PLACEMENT OF PENNSYLVANIA POWER PLANTS 7 (2018), [https://foodandwaterwatch.org/wp-content/uploads/2021/03/rpt\\_1806\\_pagasplants\\_web3.pdf](https://foodandwaterwatch.org/wp-content/uploads/2021/03/rpt_1806_pagasplants_web3.pdf) [<https://perma.cc/FN7P-GHDF>] (“Lower-income communities are disproportionately affected by toxic pollutants irrespective of race and location. . . . [L]ower-income rural communities, especially in Appalachia, are prone to having toxic neighbors.”); Mark Hand, *Fracking Boom Takes Toll on Pennsylvania’s Communities of Color and Lower-Income Areas*, THINKPROGRESS (June 20, 2018), <https://archive.thinkprogress.org/fracking-boom-takes-toll-on-communities-of-color-and-lower-income-areas-of-pennsylvania-fc8c44bec74f/> [<https://perma.cc/4J9D-BL7X>] (summarizing the 2018 Food & Water Watch report on fracking-related environmental justice in Pennsylvania).

16. CRAIG ANTHONY ARNOLD, AM. PLAN. ASS’N, FAIR AND HEALTHY LAND USE 16–22, 147–57 (2007), [https://planning-org-uploaded-media.s3.amazonaws.com/publication/download\\_pdf/PAS-Report-549-550.pdf](https://planning-org-uploaded-media.s3.amazonaws.com/publication/download_pdf/PAS-Report-549-550.pdf) [<https://perma.cc/M76G-47LS>].

headaches, asthma symptoms, childhood leukemia, cardiac problems, and birth defects,” and some of which are “known to cause cancer.”<sup>17</sup> These health hazards are exacerbated as the industry expands, and many historically excluded and marginalized communities lack the resources and political power to oppose siting decisions and expansion.<sup>18</sup> Further, as the buildout of fracked gas pipelines continues, rural and low-income communities and communities of color are disproportionately impacted by the risk of pipeline explosions.<sup>19</sup> In the event of a fire or explosion, municipal fire and safety units are the first responders, and rural counties may not be equipped to prevent or contain the subsequent damage and fires.<sup>20</sup>

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17. *Reduce Fracking Health Hazards*, NAT. RES. DEF. COUNCIL, <https://www.nrdc.org/issues/reduce-fracking-health-hazards> [https://perma.cc/3FDG-5HAQ].

18. FOOD & WATER WATCH, *supra* note 15, at 4.

19. Newer pipelines—especially those built in mountainous regions like Appalachia—are also at a higher risk of explosion than older pipelines due to the speed of construction and increased danger of landslides. In 2018 and 2019, at least five fracked gas pipeline explosions occurred in Central Appalachia due to “landslide-related events.” Elizabeth Thompson, *America’s Natural Gas Pipeline Routes and Environmental Justice*, EOS (July 13, 2021), <https://eos.org/research-spotlights/americas-natural-gas-pipeline-routes-and-environmental-justice> [https://perma.cc/VQ2Z-GQG8]; Jacob Hileman & Kirk Bowers, *Mountain Valley Pipeline Is an Unnecessary Imposition*, ROANOKE TIMES (Aug. 11, 2021), [https://roanoke.com/opinion/columnists/hileman-and-bowers-mountain-valley-pipeline-is-an-unnecessary-imposition/article\\_7a7abf1a-ee46-11eb-a9d8-671ccb9e8d8.html](https://roanoke.com/opinion/columnists/hileman-and-bowers-mountain-valley-pipeline-is-an-unnecessary-imposition/article_7a7abf1a-ee46-11eb-a9d8-671ccb9e8d8.html) [https://perma.cc/C49V-3WHT]; *see also* Jacob Hileman, *Despite Rosy Projections, All Is Not Well with the Mountain Valley Pipeline*, VA. MERCURY (Sept. 2, 2020), <https://www.virginiamercury.com/2020/09/02/despite-rosy-projections-all-is-not-well-with-the-mountain-valley-pipeline> [https://perma.cc/6CMC-4A7G] (detailing the unique safety risks associated with the Mountain Valley Pipeline); Jacob Hileman, *Why the Mountain Valley Pipeline is Uniquely Risky*, VA. MERCURY (Aug. 22, 2019), <https://www.virginiamercury.com/2019/08/22/why-the-mountain-valley-pipeline-is-uniquely-risky/> [https://perma.cc/NAD3-UQX2] (same). These risks are not often adequately assessed during the Federal Energy Regulatory Commission’s Final Environmental Impact Statement process, which incorporate recycled language from projects with similar risk categories. *See generally* Jacob D. Hileman et al., *Recycled Text and Risk Communication in Natural Gas Pipeline Environmental Impact Assessments*, 156 ENERGY POL’Y 1 (Sept. 2019), <http://uu.diva-portal.org/smash/get/diva2:1610816/FULLTEXT01.pdf> [https://perma.cc/68KF-RTLA] (assessing the textual similarities in the Environmental Impact Assessments for “gas pipeline mega-projects” requiring FERC approval between 1997 and 2019).

20. Roanoke County first responders, for example, have not received specialized training to respond to possible leaks and explosions on the Mountain

### C. Special Use Permits as a Mechanism of Municipal Zoning

Special use permits and other uses-by-review are utilized in all states and most municipalities in the United States, but the administrative processes by which they are approved or denied vary widely.<sup>21</sup> A special use permit is a mechanism of use-by-review

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Valley Pipeline. *Public Safety Frequently Asked Questions, Mountain Valley Pipeline Information*, ROANOKE CNTY., <https://www.roanokecountyva.gov/1840/Frequently-Asked-Questions> [<https://perma.cc/H4HX-J6GL>]. Local emergency responders expressed concerns about pipe safety as early as 2016, and in the event of an extreme fire or explosion, the likely course of action would be little more than containment and evacuation. *See, e.g.*, Matt Saxon, *Assessing the Aftermath of Marshall County Pipeline Explosion*, INTELLIGENCER (June 11, 2018), <https://www.theintelligencer.net/news/top-headlines/2018/06/assessing-the-aftermath-of-marshall-county-pipeline-explosion/> [<https://perma.cc/5V7L-R8GJ>] (detailing the varying levels of county preparedness in West Virginia leading up to and during a pipeline explosion in Marshall County, and quoting one Wheeling-Ohio County emergency management official as saying, “[t]his is like a whole new type of response for us. With a gas fire, you don’t just put it out in a couple of hours and go home.”); Khiree Stewart, *Some Landowners Express Concerns About Pipeline Safety*, WDBJ7 (Nov. 2, 2016), <https://www.wdbj7.com/content/news/Some-landowners-express-concerns-about-pipeline-safety-399757361.html> [<https://perma.cc/A2CT-RM8C>] (“It’s just going to be basically a torch. So, we would just protect the area around it. If it’s in the mountains we’d keep it from [sic] spreading in the mountains. It would basically be a forest fire at that point.”); *see also* PIPELINE ASS’N FOR PUBLIC AWARENESS, PIPELINE EMERGENCY RESPONSE GUIDELINES 19–29 (2021) (outlining pipeline incident response steps, with a focus on containment and communication).

21. 12 MICHAEL ALLAN WOLF, POWELL ON REAL PROPERTY § 79C.14 [hereinafter 12 POWELL ON REAL PROPERTY]. Limits on the authority of a municipal zoning administrative body to approve or deny a special use permit are generally set forth in the locality’s zoning ordinance, and may be further limited by state law. *See, e.g.*, *Robwood Advertising Assocs., Inc. v. Nashua*, 153 A.2d 787 (1959) (upholding a Nashua County zoning ordinance that required applicants for a special use permit secure “written consent of the owners . . . of sixty (60) per cent of all real property situated within two hundred (200) feet of any of the boundaries of the lot for which the use variance is sought”); *Centro Bldg. Corp. v. Board of Zoning Appeals*, 197 N.Y.S.2d 869 (Nassau Cnty. Sup. Ct. 1960) (upholding the Village of East Hills requirement that applicants for a special use permit obtain “written consent of 80% in number of the owners and mortgagees of all property within two hundred (200) feet of any portion of the lot or plot on which the automobile service station is to be erected”); VA. CODE § 15.2-2288 (“A zoning ordinance shall not require that a special exception or special use permit be obtained for any production agriculture or silviculture activity in an area that is zoned as an agricultural district or classification.”); PITTSYLVANIA CNTY. CODE § 35-854, <https://www.pittsylvaniacountyva.gov/home/showpublisheddocument/>

through which a locality can authorize a landowner to pursue a particular use of a parcel in an area where the underlying zoning designation would not otherwise allow for that use.<sup>22</sup> For example, an individual could apply to operate a small business such as a daycare in an area generally deemed residential, a public utility could apply to construct an electrical substation in a residential area, or a corporation could apply to build an industrial facility in an area zoned for agricultural use.<sup>23</sup>

Generally, such uses are considered harmonious with as-of-right uses in the area—land uses that are considered the principal and primary use in a given zoning designation and therefore not requiring additional approvals from the municipality—but may negatively impact adjacent properties and thus may need to be limited in the area.<sup>24</sup> All states and most municipalities allow for uses-by-review under the state’s zoning enabling act, though terminology varies; what is called a special use permit in some localities may also be called a special exception, special permit, or a conditional use permit in others.<sup>25</sup> Some states also achieve a similar

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401/637940818774470000 [<https://perma.cc/E6SA-2URR>] (empowering a separate Planning Commission to conduct an initial review of special use permits and provide recommendations to the Board of Supervisors and Board of Zoning Appeals); CODE OF THE TOWN OF OYSTER BAY § 246-9.2 (2012), <https://ecode360.com/OY1221/laws/LF1580167.pdf> (on file with the *Columbia Human Rights Law Review*) (“The Town Board shall be the approving agency for all special permit uses, except where the Zoning Board of Appeals is the approving agency as noted in the Schedule of Use Regulations.”)

22. PACE UNI. SCH. OF L., LAND USE L. CTR., BEGINNER’S GUIDE TO LAND USE LAW 19–20 <https://law.pace.edu/sites/default/files/LULC/LandUsePrimer.pdf> [<https://perma.cc/MF9Z-HMPQ>] [hereinafter PACE LAW SCHOOL LAND USE PRIMER]; see also 12 POWELL ON REAL PROPERTY, *supra* note 21 § 79C.14 (quoting *Ford Leasing Dev. Co. v. City of Ellisville*, 718 S.W.2d 228, 232 (Mo. Ct. App. 1986) (“A Missouri appellate court pointed out that a special [use] permit is personal to the owner to whom it is granted, while a variance ‘runs with the land.’”))

23. PACE LAW SCHOOL LAND USE PRIMER, *supra* note 22, at 7; 8 PATRICK J. ROHAN & ERIC DAMIAN KELLY, ZONING AND LAND USE CONTROLS § 44.01 [hereinafter 8 ZONING AND LAND USE CONTROLS]. See *Friends of Buckingham v. State Air Pollution Control Bd.*, 947 F.3d 68, 76 (4th Cir. 2020) (discussing the underlying fact that developers of the Atlantic Coast Pipeline required a local special use permit to construct and operate a fracked gas pipeline compressor station in Buckingham County, Virginia).

24. PACE LAW SCHOOL LAND USE PRIMER, *supra* note 22, at 6–8.

25. 8 ZONING AND LAND USE CONTROLS, *supra* note 23, §§ 44.01–44.02. While the term “special exception” is used in the Standard State Zoning Enabling

goal of allowing a use in a particular area via a variance to the zoning ordinance or comprehensive plan.<sup>26</sup>

A locality's discretion in granting a special use permit or its equivalent is not complete; rather, several federal and state courts have articulated that the locality's discretion is "limited to a determination whether the exception sought meets the requirements of the [zoning] regulation" that sets express standards and criteria to ensure some level of compatibility with surrounding uses.<sup>27</sup> This is generally based on standards for permitting a use-by-review that are included within the ordinance allowing for such a permit.<sup>28</sup>

Further, the procedures for reviewing and either approving or denying a special use permit vary by state and locality—some are taken under review by a local zoning board or planning commission, others by the relevant board of supervisors or other general municipal governing body, and still others involve a two-step process where a permit may be initially reviewed by a zoning or planning board and their decision may require further approval of or could be appealed to the board of supervisors or other governing body.<sup>29</sup> A critical difference between a special use permit and other changes to a zoning ordinance or comprehensive plan—such as an action for rezoning of a parcel—is that the burden on the applicant to show that the use meets the requirements set forth by the broader zoning ordinance for the former is generally lower than the latter.<sup>30</sup> However, the burden

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Act, this Note will use "special use permit" throughout, unless discussing a specific locality that uses different language. 10 PATRICK J. ROHAN & ERIC DAMIAN KELLY, ZONING AND LAND USE CONTROLS § 53B.01; STANDARD STATE ZONING ENABLING ACT § 7 (ADVISORY COMM. ON ZONING 1926).

26. 8 ZONING AND LAND USE CONTROLS, *supra* note 23, ch. 44; *see also supra* note 22 (noting a Missouri court's description of the difference between a variance and special use permit).

27. 8 ZONING AND LAND USE CONTROLS, *supra* note 23, § 44.01; *Neighbors Against Foxhall Gridlock v. D.C. Bd. of Zoning Adjustment*, 792 A.2d 246, 252 (D.C. App. 2002); *see also Ogden Fire Co. No. 1 v. Upper Chichester Twp.*, 504 F.3d 370, 382 (3rd Cir. 2007) ("[I]t is presumed that the local legislature has already considered that such use satisfies local concerns for the general health, safety, and welfare and that such use comports with the intent of the zoning ordinance.").

28. 8 ZONING AND LAND USE CONTROLS, *supra* note 23, § 44.03.

29. *Id.* § 44.02; *see also supra* note 21 (providing varied examples of state and local requirements and processes for obtaining a special use permit).

30. 8 ZONING AND LAND USE CONTROLS, *supra* note 23, § 44.02.

of proof required of the applicant varies based on the facts of the permit application at hand.<sup>31</sup>

Localities and states are split on whether a special use permit is personal or may run with the land. Some courts have found that a special use permit may run with the land and future owners may operate under the permit and are subject to its conditions, while others have concluded that the permits do not run with the land and may not be passed to a new owner with the sale of a parcel.<sup>32</sup>

#### D. Lack of Scholarship Assessing Special Use Permits and Environmental Justice

Recent scholarship on land use and environmental justice<sup>33</sup> tends to promote special use permits as one of several means by which localities may prevent locally undesirable land uses from disproportionately impacting low-income communities and communities of color, and thereby promote environmental justice. Several analyses consider special use permits and variances to zoning ordinances to be “safety net[s]” that “cushion the otherwise confiscatory blows rendered by local planning and zoning decision-makers,” or alternatively as a method by which local authorities that wish to promote environmental justice can prevent locally undesirable land uses.<sup>34</sup>

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31. *Id.* § 44.03; 12 POWELL ON REAL PROPERTY, *supra* note 21 § 79C.14(1)(b) (describing the burdens of proof imposed by various states).

32. 8 ZONING AND LAND USE CONTROLS, *supra* note 23, § 44.01. *Compare* Ford Leasing Dev. Co. v. City of Ellisville, 718 S.W.2d 228, 232 (Mo. Ct. App. 1986) (citing Balodis v. Fallwood Park Homes, Inc., 283 N.Y.S.2d 497, 501 (1967)) (“The grant of a special permit is regarded as personal to the landowner to whom it is granted. Whereby a variance which ‘runs with the land’ is distinguished from a mere ‘permit’ which is personal to the guarantee.”), *with* Fromer v. Two Hundred Post Assocs., 631 A.2d 347, 349 (Conn. App. 1993) (“We hold . . . that the permit to conduct a regulated activity runs with the land and not with the applicant . . .”), *and* Shoosmith Bros. v. County of Chesterfield, 601 S.E.2d 641 (Va. 2004) (“[S]tate and local law required the owner to secure permits to conduct a landfill operation on its land. Those permits did not run with the land and were not transferable.”).

33. See discussion *infra* Section I.E.

34. Michael Allan Wolf, *Fruits of the “Impenetrable Jungle”: Navigating the Boundary Between Land-Use Planning and Environmental Law*, 50 WASH. U. J. URB. & CONTEMP. L. 5, 51 (1996); see also John R. Nolon, *In Praise of Parochialism: The Advent of Local Environmental Law*, 26 HARV. ENV’T. L. REV. 365, 380 (2002) (“[A] strong argument can be made that local environmental laws may be adopted as part of a community’s land use regime.”); Tessa Meyer

Environmental advocates have also pushed for reform of special use permit assessments to promote environmental justice in urban and other highly populated areas. In Austin, Texas, neighborhood advocates demanded the City Council create the East Austin Overlay Combining District, in which “[f]ourteen enumerated land uses and any land use for which a hazardous materials permit is required by the Austin Fire Department are defined as conditional uses” that require permits from the Planning Commission.<sup>35</sup> The updated ordinance also incorporates reporting and notification requirements for local landowners who may be impacted by the use being considered for a special use permit, above and beyond typical local requirements for a public notice in a readily-available publication.<sup>36</sup>

The proposal that states and localities should use special use permits to support environmental justice relies on the assumption that the local zoning board, relevant administrators, and elected officials are interested in promoting an environmental justice-minded agenda, which is not necessarily the case.<sup>37</sup> Further, the proposal fails to assess how special use permits may be utilized by localities to further environmental injustice and environmental racism in favor of profits for large companies and the hopes of increased tax revenue, thus placing an increased environmental burden on marginalized groups, particularly in rural settings. A comprehensive analysis of conditional use permits in Baltimore from 1930 to 2000 found that race was “the critical causal factor in the siting patterns” of unwanted land uses, particularly between 1940 and 1970.<sup>38</sup> Notably, in October

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Santiago, Note, *An Ounce of Prevention Is Worth a Pound of Cure: State Preemption of Local Siting Authority as a Means for Achieving Environmental Justice*, 21 VA. ENV'T. L.J. 71, 102 (2002) (proposing that local permitting board could use special or conditional use permits to impose environmental conditions on locally undesirable land uses).

35. Arnold, *supra* note 10, at 100.

36. *Id.*

37. See, e.g., Charles Miller, *A Case for Approving MVP Southgate Air Permit*, RICHMOND TIMES-DISPATCH (Nov. 18, 2021), [https://richmond.com/opinion/columnists/charles-miller-column-a-case-for-approving-mvp-southgate-air-permit/article\\_df97950a-264b-555a-9fdd-4a8b8229f860](https://richmond.com/opinion/columnists/charles-miller-column-a-case-for-approving-mvp-southgate-air-permit/article_df97950a-264b-555a-9fdd-4a8b8229f860) [https://perma.cc/XE3E-FP4R] (expressing support for the construction of the Lambert Compressor Station in Pittsylvania County, Virginia as a member of the Board of Supervisors despite environmental justice concerns raised by community members). For further discussion, see *infra* Section II.B.2 and note 127.

38. Charles Lord and Keaton Norquist, *Cities as Emergent Systems: Race as a Rule in Organized Complexity*, 40 ENV'T. L. 551, 554, 576 (2010). This

2020, the Maryland General Assembly proposed a bill that would require local governing bodies considering a special exception for a proposed landfill in a residential area to prepare an environmental justice analysis to inform the zoning decision.<sup>39</sup> The bill further calls for the Commission on Environmental Justice and Sustainable communities to make recommendations regarding state oversight of local zoning decisions that could implicate environmental justice concerns.<sup>40</sup> The Maryland Association of Counties formally opposed the bill, arguing that it would “unnecessarily infringe on local autonomy” in land use decisions.<sup>41</sup>

A question that recent literature leaves open is the extent to which environmental justice communities in rural spaces—such as central Appalachia—are impacted by municipal zoning and special use permit policies surrounding environmentally detrimental and locally undesirable land uses. The majority of recent analyses discussed here focus on the impact of municipal land use decisions on urban and highly-populated areas, for which the physical and political landscape of local zoning are quite distinct from rural areas that have historically been exploited by extractive industries.

#### E. Contextualizing Environmental Justice in the Appalachian Fracking Boom

This Section details the importance of investigating environmental justice issues stemming from the hydraulic fracturing boom in Appalachia. Assessing environmental justice in an Appalachian context requires an understanding of several points of Appalachian history, rooted in a longstanding relationship with and exploitation by extractive and fossil fuel industries in the region. First, many communities in central Appalachia originated from the expansion of coal mining and other extractive industries, resulting in one-industry “company towns” that were by design entirely economically reliant on the employer that was also polluting the

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analysis informed the methodology chosen for this Note, and further analyses of special use permits in rural municipalities and environmental justice could conduct a similar deep dive into permitting history as is illustrated in the analysis of Baltimore.

39. H.B. 51, 2021 Leg., 442nd Sess. (Md. 2021).

40. *Id.*

41. Letter from Alex Butler, Pol’y Assoc., Md. Ass’n of Cntys., to Env’t and Transp. Comm., Md. H.D. (Jan. 20, 2021), [http://www.ciclt.net/ul/mdcounties/HB0051ENV\\_MACo\\_OPP.pdf](http://www.ciclt.net/ul/mdcounties/HB0051ENV_MACo_OPP.pdf) [<https://perma.cc/B5DZ-LRVS>].



environment in which they lived.<sup>42</sup> In some instances, this leads to an internal struggle for grassroots environmental justice advocates, who now work to right the damage that was in some ways caused by their ancestors.<sup>43</sup> Second, large swaths of land in Appalachia are owned by extractive industries, and families who own the land beneath their homes often do not own the mineral rights underneath the surface.<sup>44</sup> This decreases the level of autonomy and control that landowners and communities have over surface operations, as those who own the mineral rights below generally have a right to access said minerals.<sup>45</sup> Combined with the reliance on extractive and exploitative employers, this creates an environment of “internal colonialism” and

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42. Alana Anton, *Commentary: Appalachia Can Prove Company Towns Don't 'Lift the Working Class'*, 100 DAYS IN APPALACHIA (Sept. 21, 2021), <https://www.100daysinappalachia.com/2021/09/commentary-appalachia-can-prove-company-towns-dont-lift-the-working-class/> [https://perma.cc/BKX7-8YGT].

43. See SHANNON ELIZABETH BELL, “*It's Just a Part of Who I Am*”: *Maria Lambert and the Movement for Clean Water in Prenter*, in OUR ROOTS RUN DEEP AS IRONWEED: APPALACHIAN WOMEN AND THE FIGHT FOR ENVIRONMENTAL JUSTICE 70, 76 (2013) (“Maria’s decision to lead the fight for clean water in Prenter was ignited in large part by her anger at being poisoned by the industry to which her husband, father, grandfather, and great-grandfather had given so much of themselves for so little compensation.”).

44. See Katherine Thomas & Emma Kelly, *Reckoning with Land Ownership as Central Appalachia Moves Away from Coal*, APPALACHIAN VOICE (Sept. 6, 2022), <https://appvoices.org/2022/09/06/reckoning-with-land-ownership-as-central-appalachia-moves-away-from-coal/> [https://perma.cc/M5GP-6TAT] (describing the problems of absentee and corporate ownership of land and mineral rights in Central Appalachia); see also 1 APPALACHIAN LAND OWNERSHIP TASK FORCE, LAND OWNERSHIP PATTERNS AND THEIR IMPACTS ON APPALACHIAN COMMUNITIES 210 (1981), <https://omeka.library.appstate.edu/items/show/43655> [https://perma.cc/E7B4-9L5H] (“The ownership of land and minerals in Appalachia is highly concentrated in the hands of a few owners . . . [and] . . . [l]arge corporations dominate the ownership picture in much of Appalachia.”); WEST VIRGINIA CENTER ON BUDGET AND POLICY & AM. FRIENDS SERVICE COMM., WHO OWNS WEST VIRGINIA? 6 (Dec. 2013) <https://wvpolicy.org/wp-content/uploads/2018/5/land-study-paper-final3.pdf> [https://perma.cc/6QYA-NLKA] (“The top 25 private owners [in West Virginia] own 17.6 percent of the state’s approximately 13 million private acres.”)

45. Jessica Lilly & Roxy Todd, *Appalachia's Deep Ties to Extractive Industries May be Keeping Region 'Poor, Sick & Stuck on Coal'*, 100 DAYS IN APPALACHIA (Apr. 9, 2018), <https://www.100daysinappalachia.com/2018/04/appalachias-deep-ties-to-extractive-industries-may-be-keeping-region-poor-sick-stuck-on-coal/> [https://perma.cc/NNE4-5DXP].

disempowerment of those living in the region, which fuels environmental justice concerns.<sup>46</sup>

With the development and expansion of hydraulic fracturing—also called fracking—in central Appalachia over the last decade and a half, the environmental justice concerns in Appalachia have spread to surrounding areas through related infrastructure buildout.<sup>47</sup> As such, communities impacted by projects such as fracked gas pipelines have come together in coalition to oppose the destruction of their communities.<sup>48</sup> The communities assessed within this Note are in a state that is historically quite friendly to coal, oil, gas, and other extractive industries closely associated with the region.<sup>49</sup> Specifically, the pipelines associated with the special use permits assessed in Part II of this Note originate from the fracked gas boom in the Marcellus shale play in West Virginia. Furthermore, the environmental justice movement surrounding the permits in question in these communities is the product of a collective regional effort including advocates and community members from Virginia, West Virginia, North Carolina, and Pennsylvania.<sup>50</sup> Finally, the region itself offers an interesting look at the convergence of the origins of the

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46. See Stephen J. Scanlan, *The Theoretical Roots and Sociology of Environmental Justice in Appalachia*, in MOUNTAINS OF INJUSTICE: SOCIAL AND ENVIRONMENTAL JUSTICE IN APPALACHIA 9–12 (Michele Morrone & Geoffrey L. Buckley eds., 2011) (outlining the roots and sociology of environmental justice in Appalachia).

47. *Fracked Gas in Appalachia*, APPALACHIAN VOICES, <https://appvoices.org/fracking/background/> [<https://perma.cc/BL6R-KDF6>].

48. For example, the POWHR Coalition is a grassroots coalition made up of county-based groups in Virginia and West Virginia opposing the Mountain Valley Pipeline, and coalition members have been active in opposing permits along both the Mountain Valley and Atlantic Coast Pipelines. *POWHR Coalition*, POWHR: PROTECT OUR WATER, HERITAGE, RIGHTS, <https://powhr.org/> [<https://perma.cc/AR8B-23FC>]; see also, e.g., *ABRA Members*, ALLEGHENY-BLUE RIDGE ALLIANCE, <https://www.abralliance.org/> [<https://perma.cc/B5DW-9UX9>] (listing members of the coalition formed in response to the Atlantic Coast Pipeline); *Stop the Pipelines*, DEL. RIVERKEEPER NETWORK (Feb. 5, 2020), <https://delawareriverkeeper.org/ongoing-issues/stop-pipelines> [<https://perma.cc/8P8J-VL47>] (discussing the advocacy of VOICES, a national coalition formed by grassroots advocates against fracked gas infrastructure that is spearheaded by the Delaware Riverkeeper Network).

49. See generally *Coal*, VA. DEP'T ENERGY, <https://energy.virginia.gov/geology/coal.shtml> [<https://perma.cc/US6F-L3FV>] (providing a brief history of coal mining in Virginia).

50. See *supra* note 48 (detailing several regional coalitions and their respective missions).

environmental justice movement in Warren County, North Carolina with the deep-seated cultural and socioeconomic implications associated with the long history of extraction in the mountains of Appalachia.

#### F. Overview of Courtroom Challenges to Fossil Fuel and Petrochemical Special Use Permits in Appalachia

A review of cases<sup>51</sup> pertaining to special and conditional use permits in central Appalachia heavily impacted by the fossil fuel and petrochemical industries—specifically in Virginia, West Virginia, Kentucky, Ohio, and Pennsylvania—reveal very few cases in which a fossil fuel or petrochemical company has obtained a special use permit for facilities that was subsequently challenged.<sup>52</sup> While there are a number of reasons why these permits may go unchallenged—such as lack of resources or political power for legal recourse from the community or a lack of standing by those who would bring such a challenge—the lack of meaningful judicial review of special use permits granted to the fossil fuel and petrochemical industries in the face of community opposition both prevents useful empirical investigation into how courts are considering special use permits in this context and allows potential systematic misuse of special use permits to go unnoticed by those who are not directly impacted.

*Freeman v. City-County Board of Adjustments*,<sup>53</sup> while related to oil and gas development in Warren County, Kentucky, does not concern fossil fuel development being facilitated by special use permits and was subsequently challenged by other entities. In *Freeman*, appellant held oil and gas rights on a portion of land that was purchased by Bluegrass Materials, which sought a conditional

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51. Based on a search of state and local case law in the states listed regarding “special use permit” and “conditional use permit” narrowed by those related to oil, gas, coal, petrochemical, mining, and manufacturing on prominent legal databases. Searches were conducted in both state courts and relevant federal circuits.

52. Several cases were related to stone, gravel, and sand quarry operations but were not relevant to this Note, which is focused solely on fossil fuel and petrochemical industry operations. Cases concerning the aforementioned industries in which the underlying facts of the case occurred outside of central Appalachia were likewise deemed not relevant for purposes of this Note.

53. No. 2018-CA-001309-MR, 2019 Ky. App. Unpub. LEXIS 710 (Ky. Ct. App. Oct. 4, 2019).

use permit to expand its existing rock quarry operations onto the parcel. Freeman was concerned that such an action would interfere with his oil and gas rights, but the Court of Appeals affirmed the Warren Circuit Court decision to uphold the Board of Adjustment's issuance of a conditional use permit to Bluegrass Materials.<sup>54</sup>

Far more common than challenges by residents to special use permits granted to fossil fuel and petrochemical companies are challenges to denied permits by the companies seeking them. In *Huntley & Huntley, Inc. v. Borough Council*,<sup>55</sup> the appellant engineering company was denied a permit to drill for gas within the Borough of Oakmont in Allegheny County, Pennsylvania.<sup>56</sup> The Pennsylvania Supreme Court found that the state's Oil and Gas Act did not entirely preempt the relevant zoning ordinance from the Borough of Oakmont;<sup>57</sup> however, the court also found that the Borough should have granted the company a conditional use permit to operate a gas well in this instance under the Commonwealth Court's decision to define gas as a "mineral."<sup>58</sup> The court ultimately compelled the municipality to grant a conditional use permit for gas extraction to the developer. This case in particular provides an example of how municipal discretion can be limited, particularly in a state that is presently and historically sympathetic to extractive industries.

## II. Case Studies in Rural Virginia

Part I of this Note outlined the role of special use permits in rural and urban zoning processes, including the dearth of knowledge of their impact on rural communities facing petrochemical infrastructure projects. Part II of this Note assesses whether municipalities impacted by the fracking boom and infrastructure buildout in central Appalachia are adequately considering environmental justice impacts to surrounding communities when reviewing an application for a special use permit. It also weighs the merits of methods by which states and local municipalities can incorporate environmental justice into their permitting decisions. Finally, Part II assesses whether there is a mechanism by which

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54. *Id.* at \*3.

55. 600 Pa. 207 (2009).

56. *Id.* at 210–11.

57. *Id.* at 223, 225–26.

58. *Id.* at 227–28, 230.

states can require municipalities to conduct an environmental justice review before granting special use permits for particular types of uses, such as fossil fuel infrastructure or chemical plants.

Section II.A discusses the case of Union Hill, Virginia and the proposed Atlantic Coast Pipeline compressor station as an example of a community that would have been impacted by a fracked gas pipeline compressor station that required a special use permit. Section II.B then considers similar deployments of both rezoning and special use permits along the Mountain Valley Pipeline in Pittsylvania County, Virginia as an example of a community heavily burdened by fossil fuel and petrochemical industry in which special use permits are utilized in the zoning process for said industries. These communities were chosen for assessment in part based on the availability of public information and first-hand observations by the author regarding the special use permits at issue.

### A. Buckingham County and Special Use Permits for the Atlantic Coast Pipeline

#### 1. Environmental Justice in Buckingham County and Union Hill

Buckingham County is a rural county just south of the James River in central Virginia.<sup>59</sup> It is home to just under 17,000 people as of 2021 estimates.<sup>60</sup> Further, 2020 population estimates from the Census Bureau show that Buckingham County is 38.8 percent non-white (34.5 percent Black, 0.7 percent American Indian or Alaskan Native, 0.2 percent Asian, 2.4 percent Hispanic or Latino, and 1.5 percent identifying with two or more racial or ethnic groups listed by the census), with approximately 15.8 percent of persons in poverty in the county.<sup>61</sup> Union Hill is an unincorporated community in Buckingham County that sits on the eastern edge of the 23936 zip

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59. *About*, BUCKINGHAM CNTY., VA., <https://www.buckinghamcountyva.org/community/about.php> [<https://perma.cc/M5HZ-42Z4>].

60. *QuickFacts: Buckingham County, Virginia; United States*, U.S. CENSUS BUREAU (July 1, 2021), <https://www.census.gov/quickfacts/fact/table/buckinghamcountyvirginia/PST045221> (on file with the *Columbia Human Rights Law Review*).

61. *ACS*, U.S. CENSUS BUREAU, <https://data.census.gov/table?q=race+in+buckingham+county,+virginia+in+2020&tid=ACSST5Y2020.S0601> (on file with the *Columbia Human Rights Law Review*).

code area.<sup>62</sup> The community was established by freedmen and formerly enslaved people following the conclusion of the Civil War.<sup>63</sup> Union Hill is too small for the U.S. Census Bureau to offer data for the community, but the zip code area is home to just under 8,000 people, approximately 3,500 of whom identified to the Census Bureau as non-white.<sup>64</sup> The Council on Environmental Quality identifies the Census tract including Union Hill as “disadvantaged” for climate and economic justice purposes.<sup>65</sup>

The Williams Transcontinental Pipeline (Transco), with which the Atlantic Coast Pipeline was slated to intersect in Union Hill, runs northwest through the community.<sup>66</sup> Buckingham County is also crossed by two branches of the Colonial Pipeline, one of which runs through Union Hill.<sup>67</sup> In addition to fossil fuel pipelines, Buckingham County is dotted with brownfield sites from gold and base metal mining.<sup>68</sup> In September 2021, Canada-based mining company Aston Bay Holdings announced it would expand its gold

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62. *Virginia Zip Codes*, UNITEDSTATESZIPCODES.ORG, <https://www.unitedstateszipcodes.org/va/> [<https://perma.cc/ZL2E-S5JE>].

63. *See Friends of Buckingham*, 947 F.3d, at 85–86 (“Union Hill is a historic community with a high population of African-Americans whose ancestors established the community in the aftermath of the Civil War . . . . Of the 67 households for which a full set of responses exists, 42 (or 62.6%) are known descendants of formerly enslaved people from area plantations.”).

64. *2020 ACS Demographic and Housing Estimates for ZCTA5 23936*, U.S. CENSUS BUREAU, <https://data.census.gov/cedsci/table?g=860XX00US23936&tid=ACSDP5Y2020.DP05> (on file with the *Columbia Human Rights Law Review*). Demographic information for Union Hill as collected by Lakshmi Fjord is discussed *infra* Section II.A.2.

65. Tract Number 51029930201 in the *Climate and Economic Justice Screening Tool*, COUNCIL ON ENV’T QUALITY, <https://screeningtool.geoplatform.gov/en#9.43/37.476/-78.4017> (on file with the *Columbia Human Rights Law Review*).

66. *See Compressor Station Proposed for Buckingham County*, FRIENDS OF BUCKINGHAM, <https://www.friendsofbuckinghamva.org/friends/learning-center/compressor/> [<https://perma.cc/7QEN-37F9>] (“[T]he . . . existing Transcontinental pipeline . . . lies just north of Route 56, northwest of Union Hill Road, southeast of Shelton Store Road, and southwest of Ripley Creek.”); Daniel Shaffer, *Buckingham County Abandoned Metals Mines Map*, FRIENDS OF BUCKINGHAM (Sep. 13, 2021), [https://www.friendsofbuckinghamva.org/friends/wp-content/uploads/2022/06/5BuckCo\\_Abandoned-Metals-Mines\\_Map\\_2022-06-13.pdf](https://www.friendsofbuckinghamva.org/friends/wp-content/uploads/2022/06/5BuckCo_Abandoned-Metals-Mines_Map_2022-06-13.pdf) [<https://perma.cc/LY6E-ZB5L>] (illustrating the location of the Transco pipeline, as well as several mines in Buckingham County).

67. Shaffer, *supra* note 66.

68. *Id.*

mining exploration in Buckingham County.<sup>69</sup> Since then, Friends of Buckingham has been advocating against the expanded operation.<sup>70</sup> In February 2022, the Virginia House of Delegates rejected a bill that would establish a state working group to assess whether current state mining regulations for copper, zinc, and lead are sufficiently protective of air and water quality.<sup>71</sup> The bill would have prohibited mining of these metals as well as gold in areas larger than ten acres until at least July 1, 2024.<sup>72</sup> However, the National Academies of Sciences, Engineering and Medicine is conducting a parallel independent study of the potential impacts of gold mining in Virginia.<sup>73</sup> In a meeting of the Gold Mining Study Work Group on May 13, 2022, a mining consultant warned work group members about byproducts known as tailings, which can contain toxins and must be properly managed, and the risks associated with the amount of cyanide used in gold extraction.<sup>74</sup>

## 2. *Friends of Buckingham* and the Atlantic Coast Pipeline Union Hill Compressor Station

The case of *Friends of Buckingham v. State Air Pollution Control Board*<sup>75</sup> provides a fact pattern within which to assess special use permits as furthering environmental injustice rather than remedying it, as well as a rare instance of a legal challenge to a zoning special use permit. In the underlying facts of *Friends of Buckingham*, the Buckingham County Board of Supervisors issued a special use permit to operators of the Atlantic Coast Pipeline (ACP) to construct a compressor station for their fracked gas pipeline to operate within an area previously zoned as an A-1 Agricultural

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69. *Ban Gold Mining*, FRIENDS OF BUCKINGHAM, <https://www.friendsofbuckinghamva.org/friends/ban-gold-mining/> [https://perma.cc/S34F-KSW3]. See also *Virginia Overview*, ASTON BAY, <https://astonbayholdings.com/projects/virginia-usa/virginia-overview/> [https://perma.cc/P3VC-KNS5].

70. *Ban Gold Mining*, *supra* note 69.

71. Sarah Vogelsong, *House Panel Rejects Metals Mining Study*, VA. MERCURY (Feb. 7, 2022), <https://www.virginiamercury.com/blog-va/house-panel-rejects-metals-mining-study/> [https://perma.cc/2KYV-3QT7].

72. *Id.*

73. *Id.*

74. Joe Dashiell, *State Panel Studies Potential Impact of Gold Mining in Virginia*, WDBJ7 (May 16, 2022), <https://www.wdbj7.com/2022/05/16/state-panel-studies-potential-impact-gold-mining-virginia/> [https://perma.cc/T9FM-2L8R].

75. 947 F.3d 68 (4th Cir. 2020).

Zoning District.<sup>76</sup> Without the special use permit, the ACP compressor station could not be built in its planned location and could not receive necessary environmental permits from the Virginia Department of Environmental Quality.<sup>77</sup> The planned location of the compressor station was within the community of Union Hill in Buckingham County, Virginia, which is a community established by freedmen and formerly enslaved people.<sup>78</sup> While the primary developer of the pipeline, Dominion Energy, represented to the Federal Energy Regulatory Commission during Environmental Impact Statement development that the community surrounding the proposed compressor station was only 30.8% non-white, a door-to-door demographic study conducted by researchers from the University of Virginia found that over 83% of residents in the surrounding area are non-white.<sup>79</sup>

Although Virginia law stipulates that “[n]o application for a permit for a new or major modified stationary air pollution source shall be considered complete unless the applicant has provided [DEQ] with notification from the [county] governing body . . . that the location and operation of the source are consistent with all [local] ordinances,”<sup>80</sup> the hierarchy of local, state, and federal permitting does not always give a locality or state complete power to deny a permit and prevent an undesirable land use. Rather, members of state and local permitting decision-making bodies may feel that pressure and existing permits from the federal or state government may bar the smaller entity from making a meaningful determination on a permit application. For example, if a fracked gas pipeline has received a Certificate of Public Convenience and Necessity from the Federal Energy Regulatory Commission, a state agency assessing an

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76. *Id.* at 76; Jordan Miles, *Supervisors, ACP Face Suit Over Compressor Station*, FARMVILLE HERALD, <https://www.farmvilleherald.com/2017/02/supervisors-acp-face-suit-over-compressor-station/> [<https://perma.cc/22GG-5PWF>].

77. *Friends of Buckingham*, 947 F.3d, at 76.

78. *See id.* at 85–86 (“Union Hill is a historic community with a high population of African-Americans whose ancestors established the community in the aftermath of the Civil War . . . . Of the 67 households for which a full set of responses exists, 42 (or 62.6%) are known descendants of formerly enslaved people from area plantations.”).

79. *Id.* at 88; LAKSHMI FJORD, UNION HILL COMMUNITY HOUSEHOLD STUDY SITE AND METHODS REPORT 16 (2018), <https://www.friendsofbuckinghamva.org/friends/wp-content/uploads/2017/04/Fjord-Union-Hill-Community-Household-Study-12-17-18-Lakshmi-Fjord.pdf> [<https://perma.cc/8EF5-LC9W>].

80. VA. CODE § 10.1-1321.1(A) (2021).



application for a Clean Water Act Section 401 Permit may feel that they are not meaningfully given the opportunity to review the application on its merits and are expected to issue a permit for the project by any means necessary. This can be further impacted by external influences within governmental and political spheres—if a state governor is publicly and vocally in favor of a project, a state agency may feel increased pressure to find a means to approve a permit. Such a power imbalance is exacerbated when a federal project requires a permit from a municipality, as was the case with the ACP compressor station proposed for Union Hill.

The problem of state and federal pressure for a locality to issue a required permit for a large-scale project becomes more salient in the case of Union Hill when reviewing the Buckingham County zoning ordinance. According to the zoning ordinance, structures and uses permitted within an A-1 zoning district are limited to “rural land uses,” including but not limited to residential homes (both individual and group homes) and accessory buildings, churches, family cemeteries, hunting preserves, public schools, timber harvesting, and farm stands.<sup>81</sup> The zoning ordinance further limits the uses that can operate within an A-1 zoned district with a special use permit. This includes commercial garages, lumberyards, sewage treatment plants, public utility generating plants, and related facilities.<sup>82</sup> It is unclear from the definitions of permitted uses by special use permit whether the proposed compressor station qualified for such a permit from the county or would have required a full rezoning process; it is possible that because the primary owner and developer of the Atlantic Coast Pipeline was Dominion Energy, the compressor station qualified under the category of “[p]ublic utility generating plants, public utility booster or relay stations, transformer substations, meters and other facilities, including railroads and facilities, and water and sewage facilities.”<sup>83</sup> However, the classification of Dominion Energy as solely

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81. BUCKINGHAM CNTY., VA., ZONING ORDINANCE art. 2, dist. 1 (2018).

82. *Id.*

83. *Id.* While proponents of the Atlantic Coast Pipeline cited the need for fracked gas at utility-owned gas-fired power plants as justification for the pipeline itself, opponents of the pipeline were consistently skeptical of the actual need for additional fracked gas in the regions cited. *See Atlantic Coast Pipeline, LLC*, 161 F.E.R.C. ¶ 61,042, at 23 (2017) (“Atlantic states that it has entered into precedent agreements with end users for 96 percent of its capacity. . . . Atlantic states that these customers viewed the ACP Project as the best way to support their growing need for natural gas.”). *But see* RACHEL WILSON ET AL., ARE THE ATLANTIC COAST PIPELINE AND MOUNTAIN VALLEY PIPELINE NECESSARY? (2016) (assessing the

a “public utility” is nebulous given the corporation’s expansive role in fuel extraction and transmission, power generation, and employment across at least 15 states<sup>84</sup> and the extent to which it impacts political decision-making in those states.<sup>85</sup> Regardless, the outcome of *Friends of Buckingham*<sup>86</sup> and advocacy against the Union Hill Compressor Station provides an example of both the environmental justice implications of special use permits and the role state and federal courts can play in assessing special use permits that do not adequately take environmental justice into account.

### B. Pittsylvania County Rezoning and Special Use Permits for Mountain Valley Pipeline

The approval of special use permits for fossil fuel and petrochemical infrastructure may be most illuminated in instances such as the Union Hill Compressor Station, but special use permits are also implemented for seemingly less-impactful accessory facilities to larger-scale projects with little public fanfare. The rezoning and special use permits sought by developers of the Mountain Valley Pipeline in Pittsylvania County, Virginia offer a prime example. Grassroots community advocates have detailed the environmental justice implications of siting major fracked gas facilities in

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future demand of fracked gas and whether the proposed Atlantic Coast and Mountain Valley Pipelines are actually necessary to fulfill projected need); KATHY KUNKEL & LORNE STOCKMAN, INST. FOR ENERGY ECON. AND FIN. ANALYSIS, *THE VANISHING NEED FOR THE ATLANTIC COAST PIPELINE: GROWING RISK THAT THE PIPELINE WILL NOT BE ABLE TO RECOVER COSTS FROM RATEPAYERS 1* (2019) (questioning whether need can be reasonably shown by precedent agreements with “[s]ix companies, all of whom are regulated utility affiliates of the pipeline’s sponsors”); Thomas Hadwin, *The Atlantic Coast Pipeline Is Looking Like a Riskier Investment Every Day*, VA. MERCURY, <https://www.virginiamercury.com/2020/04/20/the-atlantic-coast-pipeline-is-looking-like-a-riskier-investment-every-day/> [<https://perma.cc/B9FL-MEJF>] (“[W]e no longer need as many new plants as first proposed. If built, they would require less than half of the capacity originally announced as the main reason to build the pipeline.”).

84. *Our Company*, DOMINION ENERGY, <https://www.dominionenergy.com/our-company> [<https://perma.cc/SX22-5SW9>].

85. *See, e.g.*, Patrick Wilson, *Inside the Utility Company Lobbying Blitz That Will Hike Electric Bills*, PROPUBLICA, <https://www.propublica.org/article/inside-the-utility-company-lobbying-blitz-that-will-hike-electric-bills> [<https://perma.cc/V3T3-ACC9>] (providing a window into the extent of Dominion influence in Virginia state politics).

86. *Friends of Buckingham v. State Air Pollution Control Bd.*, 947 F.3d 68, 68 (4th Cir. 2020).

Pittsylvania County, and the means by which the developer obtained permits via disingenuous<sup>87</sup>—or, at best, misleading—representations are illustrative of industry practices when interacting with rural communities and local government bodies.<sup>88</sup>

### 1. Environmental Justice in Chatham and Pittsylvania County

The town of Chatham, Virginia is the county seat of Pittsylvania County, which is on the southern edge of Virginia’s “south-central Piedmont plateau” region.<sup>89</sup> The town itself sits in the center of the county but it is considered part of the Danville, Virginia Metropolitan Statistical Area along with the rest of Pittsylvania County.<sup>90</sup> Until recently, whether Chatham—or Pittsylvania County

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87. See discussion *infra* Section II.B.2 regarding the Pittsylvania County Board of Supervisors approval of a special use permit for Mountain Valley Pipeline to construct an interconnect with the Transco Pipeline, community opposition to the application, and the pipeline developers’ next-day announcement of an intended expansion of the project and inclusion of a compressor station on the parcel, which was explicitly not disclosed during public meetings regarding the rezoning and special use permit applications; *see also* PITTSYLVANIA CNTY. PLAN. COMM’N, MINUTES OF REGULAR MEETING at 3 (Nov. 9, 2017), [https://perma.cc/2TEQ-CBFD] [hereinafter PITTSYLVANIA PLAN. COMM’N MINUTES, Nov. 9, 2017] (“[This] is not a compressor station . . . This site is an interconnecting site.”).

88. *Id.*

89. *Chatham Town History*, TOWN OF CHATHAM, <https://www.chatham-va.gov/visit-chatham/town-history> [https://perma.cc/9NNL-KQQU]; *The Piedmont Region of Virginia*, VA. PLACES, <http://www.virginiaplaces.org/regions/12piedmont.html> [https://perma.cc/PLH7-H78L]; *About the Community*, PITTSYLVANIA CNTY., <https://www.pittsylvaniacountyva.gov/327/About-the-Community> [https://perma.cc/S5K5-ZF6G]. Note that Virginia’s cultural boundaries do not always align with geological or geographic boundaries and are continually being reassessed and redefined by legislators and academics. *See, e.g., Regions of Virginia*, VA. PLACES, <http://www.virginiaplaces.org/regions/> [https://perma.cc/NA3S-3ZAY] (discussing changing regional boundaries as defined by the Virginia Department of Housing and Community Development and the University of Virginia Weldon Cooper Center for Public Service, which were reassessed as recently as 2018).

90. *Pittsylvania County*, GOOGLE MAPS, <https://www.google.com/maps/place/Pittsylvania+County,+VA/@36.8387777,-79.6837468,10z/data=!3m1!4b1!4m5!3m4!1s0x884d554eed7a0593:0xd932c742df27be99!8m2!3d36.7440186!4d-79.4703885> [https://perma.cc/8CYU-WAD3]; *Danville, VA Metropolitan Statistical Area*, U.S. CENSUS BUREAU (Jan. 1, 2007), <https://www2.census.gov/programs-surveys/economic-census/2007/reference-maps/va/metro/2007-us19260m-danville-va-metropolitan-statistical-area.pdf> [https://perma.cc/7M34-MTB4].

more broadly—were considered environmental justice communities was an open question.<sup>91</sup> Based on demographic data alone, 2020 population estimates from the Census Bureau show that Pittsylvania County is 23.6% non-white (21.2% Black, 0.3% American Indian or Alaskan Native, 0.6% Asian, 3.0% Hispanic or Latino, and 1.4% identifying with two or more racial or ethnic groups listed by the census), with approximately 14% of persons in poverty in the county.<sup>92</sup>

The town of Chatham within Pittsylvania County is the site of a compressor station for the Williams Transcontinental Pipeline (Transco), as well as the proposed site of the Lambert Compressor Station for the Mountain Valley Pipeline Southgate project. The population of Chatham is too small for the U.S. Census Bureau to show detailed demographic data for the town on its own<sup>93</sup> at approximately 1,400 people, but the town reports that approximately 72.3% of residents are white and households in the town have a median income estimate of \$51,505 in 2019.<sup>94</sup> The Council on Environmental Quality does not identify the primary Census tract including Chatham as “disadvantaged” for climate and economic justice purposes, but does identify the Census tract immediately east of the proposed location of the Lambert Compressor Station as “disadvantaged.”<sup>95</sup>

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91. Recently, the Virginia Air Pollution Control Board determined that Chatham is, in fact, an environmental justice community. See discussion *infra* Section II.B.2.

92. ACS, U.S. CENSUS BUREAU (July 1, 2021), <https://data.census.gov/table?q=race+in+pittsylvania+county,+virginia+in+2020&tid=ACSST5Y2020.S0601> (on file with the *Columbia Human Rights Law Review*).

93. The Census Bureau publicly offers detailed data “for cities and towns with a population of 5,000 or more.” *QuickFacts: Pittsylvania County, Virginia; United States*, U.S. CENSUS BUREAU (July 1, 2021), <https://www.census.gov/quickfacts/fact/table/pittsylvaniacountyvirginia,US/PST045221> [<https://perma.cc/EE3W-PG45>]. Some additional data for smaller communities and zip codes is collected and reported through the ongoing American Community Survey; *About the American Community Survey*, U.S. CENSUS BUREAU (Jan. 6, 2022), <https://www.census.gov/programs-surveys/acs/about.html> [<https://perma.cc/7YWE-WHFN>].

94. *Town Statistics*, TOWN OF CHATHAM, <https://www.chatham-va.gov/statistics> [<https://perma.cc/67TR-5GYR>]; see also *infra* note 114 (regarding the classification of the majority of Pittsylvania County as “low-income” by the Small Business Association).

95. Compare Tract Number 51143010500 in the *Climate and Economic Justice Screening Tool*, COUNCIL ON ENV'T QUALITY, <https://screeningtool>.

An analysis of public health impacts to the area surrounding the proposed Lambert Compressor Station commissioned by Mountain Valley Pipeline states in a footnote that:

Pittsylvania County is the largest county in Virginia, by area, covering about 982 square miles. Historically, the County had a large enslaved population, with an economy based on tobacco. The estimated 2019 population of the County is about 60,000 residents, of whom about 76% are White and about 22% are African-American. Within a one-mile radius of the proposed site, the population skews toward the elderly (with 25% being 65 years of age or older), 33% of the population are low income, and 22% are classified as minority.<sup>96</sup>

Aside from the proposed Lambert Compressor Station, “two other compressor stations currently operate in the immediate area” of

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geoplatform.gov/en#10.52/36.8313/-79.3886 (on file with the *Columbia Human Rights Law Review*) (identifying the tract including the town center of Chatham), with *The Facts on MVP Southgate’s Lambert Compressor Station*, MVP SOUTHGATE, <https://www.mvpsouthgate.com/the-facts-on-mvp-southgates-lambert-compressor-station/> [<https://perma.cc/WFB4-K4AT>] (identifying the proposed location of the Lambert Compressor Station as “987 Transco Road, on land owned by Mountain Valley and near an existing compressor station at Transco Village, approximately two miles east of the Chatham town limit in Virginia’s Pittsylvania County”), and Tract Number 51143010700 in the *Climate and Economic Justice Screening Tool*, COUNCIL ON ENV’T QUALITY, <https://screeningtool.geoplatform.gov/en#10.47/36.8184/-79.2352> (on file with the *Columbia Human Rights Law Review*) (identifying the tract immediately east of the Chatham town center). A search on Google Maps for the distance between 987 Transco Road and the intersection of Halifax Road and Sheva Road—which is included in the Census tract immediately east of the proposed Lambert Compressor Station site and labeled as “disadvantaged”—indicates the proposed compressor station is only 1.07 miles from the edge of the “disadvantaged” Census tract. Distance Between 987 Transco Road and Intersection of Halifax Road and Sheva Road, Chatham, Virginia, GOOGLE MAPS, <https://www.google.com/maps> (search “987 Transco Road, Chatham, VA,” right-click on the red pin and select “Measure distance,” right-click on the Halifax Road/Sheva Road intersection and select “Distance to here”).

96. LAURA C. GREEN & EDMUND A.C. CROUCH, PUBLIC HEALTH ASSESSMENT OF EXPECTED AIRBORNE EMISSIONS FROM THE PROPOSED LAMBERT COMPRESSOR STATION, PITTSYLVANIA COUNTY, VIRGINIA, at 1 n.1 (2021), <https://www.deq.virginia.gov/home/showpublisheddocument/5324/637499573598370000> [<https://perma.cc/NN77-PNLY>] (internal citations omitted). Unlike in Buckingham County, there has been no on-the-ground empirical study of the immediate area surrounding the proposed compressor station. *See id.* at 1.

Chatham.<sup>97</sup> Environmental justice advocates in the region argue that the existing compressor stations in the area have caused localized increases in asthma and respiratory illness,<sup>98</sup> which is supported by broader analyses of the health impacts of gas compressor stations.<sup>99</sup> State-level analyses of such impacts are missing from the Air Quality Analysis for the proposed facility.<sup>100</sup> The town has also faced division in the last four decades over the environmental impacts of a proposal for uranium mining—Virginia imposed a moratorium on uranium mining in the 1980s, and the decision was the subject of ongoing legal battles and public debate until the Supreme Court upheld the ban in *Virginia Uranium v. Warren*.<sup>101</sup> Additionally, in September 2021,

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97. *Id.*

98. Pittsylvania County NAACP Environmental Justice Committee, *Pittsylvania Community Circle of Protection for Environmental Justice: Sharing Our Stories*, YOUTUBE (Aug. 20, 2021), <https://www.youtube.com/watch?v=NDxkDEdLcJE> [<https://perma.cc/6XKZ-TJAP>] [hereinafter Pittsylvania NAACP Virtual Event].

99. *See generally* DELAWARE RIVERKEEPER NETWORK, COMPRESSOR STATIONS: HEALTH, ENVIRONMENTAL, & COMMUNITY IMPACTS, <https://www.delawareriverkeeper.org/sites/default/files/DRN%20Compressor%20station%20fact%20sheet.pdf> [<https://perma.cc/PWG8-D88G>] (outlining the public health risks of fracked gas compressor stations); TANJA SREBOTNJAK & MIRIAM ROTKIN-ELLMAN, FRACKING FUMES: AIR POLLUTION FROM HYDRAULIC FRACTURING THREATENS PUBLIC HEALTH AND COMMUNITIES, <https://www.nrdc.org/sites/default/files/fracking-air-pollution-IB.pdf> [<https://perma.cc/QM22-46ZB>] (describing the public health impacts of fracking and related facilities).

100. Memorandum from Blue Ridge Reg'l Off., Va. Dep't of Env't Quality, to Air Permit File, MVP Southgate Project – Lambert Compressor Station, Va. Dep't of Env't Quality (2020), <https://www.deq.virginia.gov/home/showpublisheddocument?id=2468>; *see also* William Limpert, *DEQ Ignores Health Threats*, ROANOKE TIMES (July 4, 2021), [https://roanoke.com/opinion/columnists/limpert-deq-ignores-health-threats/article\\_b27ce800-d84f-11eb-b5b4-c38f9a2beb81.html](https://roanoke.com/opinion/columnists/limpert-deq-ignores-health-threats/article_b27ce800-d84f-11eb-b5b4-c38f9a2beb81.html) (on file with the *Columbia Human Rights Law Review*) (“[T]here has been no public health assessment in the Chatham community, despite over 50 years of ongoing pollutant discharges from nearby Transco compressor stations.”).

101. *Virginia Uranium, Inc. v. Warren* 139 S. Ct. 1894 (2019); *see also* Errin Haines, *Uranium Mine Debate Pits Residents in Quaint Town of Chatham, Va.*, WASHINGTON POST, [https://www.washingtonpost.com/local/dc-politics/uranium-mine-debate-pits-residents-in-quiet-town-of-chatham-va/2012/12/27/8cd3dba6-5066-11e2-950a-7863a013264b\\_story.html](https://www.washingtonpost.com/local/dc-politics/uranium-mine-debate-pits-residents-in-quiet-town-of-chatham-va/2012/12/27/8cd3dba6-5066-11e2-950a-7863a013264b_story.html) [<https://perma.cc/L3VA-3PUR>]; Gregory S. Schneider & Robert Barnes, *Supreme Court to Consider Virginia Uranium Case That Divides a Rural County*, WASHINGTON POST, <https://www.washingtonpost.com/local/virginia-politics/supreme-court-to-consider-virginia-uranium-case-that-divides-a-rural-county/2018/11/03/2a4e06f8-dea6->

Canada-based mining company Aston Bay Holdings announced it would conduct exploratory drilling for zinc and copper mining in Pittsylvania County.<sup>102</sup>

Prior to state permitting decisions regarding the proposed Lambert Compressor Station,<sup>103</sup> the Pittsylvania County NAACP held a virtual event titled the “Pittsylvania Community Circle of Protection for Environmental Justice: Sharing Our Stories” to highlight the environmental justice concerns surrounding the proposed fracked gas facility.<sup>104</sup> The event featured stories from residents of Pittsylvania County as well as grassroots advocates against the Mountain Valley Pipeline in North Carolina, West Virginia, and other parts of Virginia.<sup>105</sup> Mary Finley-Brook, a University of Richmond Professor and member of the Virginia Environmental Justice Collaborative, discussed how the Lambert Compressor Station would have a disproportionate impact on environmental justice communities based on both race and income as well as the undue burden on the surrounding Banister District in

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11e8-85df-7a6b4d25cfbb\_story.html [https://perma.cc/8JCT-X77W]; Gregory S. Schneider, *U.S. High Court to Take up Issue of Whether Virginia Can Ban a Uranium Mine*, WASHINGTON POST, [https://www.washingtonpost.com/local/virginia-politics/us-high-court-to-take-up-issue-of-whether-virginia-can-ban-a-uranium-mine/2018/05/21/a972c328-5d06-11e8-a4a4-c070ef53f315\\_story.html](https://www.washingtonpost.com/local/virginia-politics/us-high-court-to-take-up-issue-of-whether-virginia-can-ban-a-uranium-mine/2018/05/21/a972c328-5d06-11e8-a4a4-c070ef53f315_story.html) [https://perma.cc/X5TQ-JNF2]; *Supreme Court Votes Against Virginia Uranium*, CHATHAM STAR-TRIBUNE, [https://www.chathamstartribune.com/article\\_2d73a4d4-444c-11ea-82fe-97094be66bec.html](https://www.chathamstartribune.com/article_2d73a4d4-444c-11ea-82fe-97094be66bec.html) [https://perma.cc/VUC8-XE5M] (chronicling the legal battles surrounding uranium mining in Pittsylvania County, Virginia).

102. *Ban Gold Mining*, *supra* note 69; *see also* ASTON BAY, *Virginia Overview*, <https://astonbayholdings.com/projects/virginia-usa/virginia-overview/> [https://perma.cc/SMU7-8T9S]; Sarah Vogelsong, *House Panel Rejects Metals Mining Study*, VA. MERCURY, <https://www.virginiamercury.com/blog-va/house-panel-rejects-metals-mining-study/> [https://perma.cc/2KYV-3QT7].

103. *See* discussion *infra* Section II.B.2 regarding the Virginia State Air Pollution Control Board permit, denied December 2021.

104. Pittsylvania NAACP Virtual Event, *supra* note 97; *Pittsylvania County NAACP Hosts Environmental Justice Webinar*, CHATHAM STAR-TRIBUNE, [https://www.chathamstartribune.com/news/article\\_5e395b96-0411-11ec-8eb8-bffd710fcabb.html](https://www.chathamstartribune.com/news/article_5e395b96-0411-11ec-8eb8-bffd710fcabb.html) [https://perma.cc/WTT4-BVUX]. For detailed information on the proposed Lambert Compressor Station, related permitting processes, and additional resources regarding the environmental justice impacts, *see Info Hub – MVP Lambert Compressor Station*, PROTECT OUR WATER, HERITAGE, RIGHTS, <https://powhr.org/info-hub-mvp-lambert-compressor-station/> [https://perma.cc/6E2H-BHQM].

105. Pittsylvania NAACP Virtual Event, *supra* note 97.

Pittsylvania County.<sup>106</sup> Further, Crystal Cavalier-Keck, a citizen of the Occaneechi Band of Saponi Nation—a tribe which has ancestral ties to the region in North Carolina and Virginia—detailed her connection to the nearby Banister River and the devastating impacts the pipeline would have for environmental quality in the town and county.<sup>107</sup> One advocate from Northampton County, North Carolina cited the importance of involvement in local government—especially planning boards—to prevent the “economic development” projects that disproportionately burden predominantly Black communities.<sup>108</sup>

## 2. An Analysis of the Pittsylvania County Planning Commission and Board of Supervisor Meetings Surrounding the Lambert Compressor Station

In Pittsylvania County, land use decisions such as requests for rezoning and special use permits are first heard by the County Planning Commission. The Planning Commission renders a decision as to whether they will recommend the request be approved or denied by the relevant county entity. Special use permits are then referred to the Board of Zoning Appeals, while rezoning requests are referred to the Board of Supervisors.<sup>109</sup> On October 3, 2017, the Pittsylvania County Planning Commission agenda included presentation and public comment on “Case 3: Mountain Valley Pipeline, LLC – Banister Election District, R-17-031,” a request by Mountain Valley Pipeline to rezone a parcel from A-1, Agricultural District to M-2, Industrial District, Heavy Industry and “Case S-3: James L.

106. *Id.*

107. *Id.* Cavalier-Keck noted that the tribe had made a settlement with the pipeline, but that did not necessarily indicate support for the project given the history of marginalization Indigenous tribes have faced in the United States. *Id.*; see also Mark Aramo, *North Carolina Tribes Fear Pipeline Will Damage Waterways, Burial Grounds*, GRIST, <https://grist.org/article/mountain-valley-pipeline-and-indigenous-land/> [<https://perma.cc/L2JV-8QG8>] (interviewing Cavalier-Keck and others about the impacts to Indigenous tribes of the Mountain Valley Pipeline).

108. Pittsylvania NAACP Virtual Event, *supra* note 97.

109. See generally PITTSYLVANIA CNTY. PLAN. COMM’N, REGULAR MEETING: THURSDAY, NOV. 9, 2017 MINUTES (2017) [hereinafter PITTSYLVANIA PLAN. COMM’N MINUTES, Nov. 9, 2017] (on file with the *Columbia Human Rights Law Review*) (indicating that the Planning Commission made recommendations to the Board of Supervisors regarding rezoning requests, and to the Board of Zoning Appeals regarding special use permit applications).



Gibson & Areta H. Gibson – Callands-Gretna Election District, S-17-015,” a request by landowners for a “Special Use Permit for a Temporary Construction Site for Mountain Valley Pipeline, LLC.”<sup>110</sup> At that time, Mountain Valley Pipeline withdrew both the rezoning and special use permit requests,<sup>111</sup> and both cases were instead heard during the November 9, 2017 Planning Commission meeting as Case 6 and Case S-2, respectively.<sup>112</sup>

The parcel for which landowners requested a special use permit during Case S-2 at the November 9, 2017 meeting, is located in the small community of Sandy Level,<sup>113</sup> along Route 40 in Pittsylvania County west of Gretna.<sup>114</sup> The community of Sandy Level has a population of approximately 500 in just under 200 households, per 2019 estimates.<sup>115</sup> Of those households, an estimated 20.3% receive SNAP benefits, and an estimated 139 individuals are within 150% of the federal poverty level.<sup>116</sup> The community is known colloquially by long-time residents of the area as a low-income community.<sup>117</sup> During the Planning Commission meeting, a

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110. PITTSYLVANIA CNTY. PLAN. COMM’N, REGULAR MEETING: OCTOBER 3, 2017 (2017) (agenda for meeting on file with the *Columbia Human Rights Law Review*).

111. PITTSYLVANIA CNTY. PLAN. COMM’N, REGULAR MEETING: OCTOBER 3, 2017 MINUTES 2, 5 (2017) (on file with the *Columbia Human Rights Law Review*).

112. PITTSYLVANIA PLAN. COMM’N MINUTES, Nov. 9, 2017, *supra* note 109. At the November 9 meeting of the Planning Commission, opponents of the project also argued that the withdrawal of the special use permit application from the October 3 meeting was improper, and thus the Commission’s consideration of the permit on November 9 was also improper. *Id.* at 4.

113. Distinct from the community of Sandy Level in neighboring Henry County, Virginia.

114. PITTSYLVANIA CNTY. PLAN. COMM’N, PACKET FOR NOVEMBER 9, 2017, at 11 (2017) [hereinafter PITTSYLVANIA NOV. 9 PLAN. COMM’N PACKET] (on file with the *Columbia Human Rights Law Review*).

115. *Poverty Status in the Past 12 Months for ZCTA5 24161*, U.S. CENSUS BUREAU, <https://data.census.gov/cedsci/table?q=ZCTA5%2024161&t=Official%20Poverty%20Measure%3APoverty&tid=ACSST5Y2019.S1701> (on file with the *Columbia Human Rights Law Review*).

116. *Id.*; *Food Stamps/Supplemental Nutrition Assistance Program (SNAP) for ZCTA5 24161*, U.S. CENSUS BUREAU, <https://data.census.gov/cedsci/table?q=ZCTA5%2024161&t=Official%20Poverty%20Measure%3APoverty&tid=ACSST5Y2019.S2201> (on file with the *Columbia Human Rights Law Review*).

117. This is supported by classifications of the zip code by the Small Business Association based on 2015–2019 census data. See *SBA Targeted EIDL Advance Low-Income Communities*, POLICYMAP, <https://sbaeidl.policymap.com/newmaps#/> (on file with the *Columbia Human Rights Law Review*) (search

representative for the pipeline developer indicated that the area would be used for temporary construction activity, not including pipe storage. Several community members spoke in opposition to the petition for a special use permit, citing concerns that the company still lacked numerous required federal and state permits.<sup>118</sup> A motion to grant the special use permit for a period of two years failed on a vote of 4-3, so no further action was taken on the case at the time. There is no evidence in the minutes for the November 9, 2017 meeting that the Planning Commission considered the demographic makeup of the surrounding community or any environmental justice implications, despite the issue being raised by concerned community members.<sup>119</sup> The Planning Commission had 60 days to make a final decision on the case, and ultimately granted the special use permit.<sup>120</sup>

The two parcels in question in Case 6 on November 9, 2017 are owned by Mountain Valley Pipeline, LLC. The developer sought to rezone the parcels in Chatham, Virginia from A-1 (agricultural) to

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location field “24161” and click within highlighted area to show data for census tract 51143010300; showing Sandy Level—zip code 24161, part of census tract 51143010300—as a “low-income community,” with an almost 14% poverty rate). Aside from a few tracts near Danville, Virginia, the majority of Pittsylvania County qualifies as a “low-income community” by the Small Business Association. *Id.*; see also Yang Jiang et al., *Basic Facts About Low-Income Children: Children Under 18 Years, 2014*, NAT’L CTR. FOR CHILD. IN POVERTY (Feb. 2016), <https://www.nccp.org/publication/basic-facts-about-low-income-children-children-under-18-years-2014/> [<https://perma.cc/7EHN-JV5S>] (defining “low income” as “family income less than 200 percent of the poverty threshold”); *Poverty Talk: Basic Terms You Need to Know Now*, ANNIE E. CASEY FOUND. (Oct. 18, 2019), <https://www.aecf.org/blog/poverty-talk-basic-terms-you-need-to-know-now> [<https://perma.cc/GRC5-XDB9>] (“To meet their most basic needs, families need to earn about twice as much as the federal poverty threshold . . .”).

118. PITTSYLVANIA PLAN. COMM’N MINUTES, Nov. 9, 2017, *supra* note 109, at 4. The Federal Energy Regulatory Commission granted a Certificate of Public Convenience and Necessity for the Mountain Valley Pipeline on October 13, 2017. *Mountain Valley Pipeline, LLC*, 161 F.E.R.C. ¶ 61,043 (2017). At the time of the Planning Commission meeting on November 9, 2017, no other federal or state permits required for the pipeline had been granted, and the company was not given a notice to proceed with construction from the Federal Energy Regulatory Commission. PITTSYLVANIA PLAN. COMM’N MINUTES, Nov. 9, 2017, *supra* note 109, at 3–4.

119. PITTSYLVANIA PLAN. COMM’N MINUTES, Nov. 9, 2017, *supra* note 109, at 4–5.

120. Telephone Call with Staff Member, Pittsylvania County Cnty. Dev. Off. (Feb. 17, 2022).

M-2 (heavy industry) for a “gas transmission facility.”<sup>121</sup> Properties surrounding the proposed facility were at the time zoned A-1, R-1 (residential suburban subdivision district) and M-1 (light industry).<sup>122</sup> At the time, the developer admitted that even if the Planning Commission and Board of Supervisors approved the rezoning of the parcels, the developer would still need to request a special use permit in order to operate the facility they sought to construct.<sup>123</sup> At the time of the November 9 meeting, a Senior Staff Attorney for the primary owner of Mountain Valley Pipeline, LLC told the Planning Commission and the public that despite concern from public commenters, the developer would *not* attempt to construct a compressor station on the property. The facility they sought to construct “is not a compressor station. [C]ompressor stations [for the Mountain Valley Pipeline] are located in West Virginia. This site is an interconnecting site” with the Transco Pipeline, the then-intended terminus of the Mountain Valley Pipeline project.<sup>124</sup>

While the Planning Commission vote on a motion to recommend the Board of Supervisors deny the rezoning request ended in a 4-4 tie and no action taken, the Board of Supervisors unanimously approved the rezoning request on February 20, 2018.<sup>125</sup> The pipeline developer subsequently applied for a special use permit to construct and operate a “gas transmission facility and related buildings,” which was granted by the Pittsylvania County Board of Zoning Appeals on April 10, 2018,<sup>126</sup> following a recommendation in favor of the special use permit by the Planning Commission on April

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121. PITTSYLVANIA NOV. 9 PLAN. COMM’N PACKET, *supra* note 114, at 118.

122. *Id.*

123. *Id.*

124. PITTSYLVANIA PLAN. COMM’N MINUTES, Nov. 9, 2017, *supra* note 109, at 3; PITTSYLVANIA NOV. 9 PLAN. COMM’N PACKET, *supra* note 114, at 138.

125. PITTSYLVANIA CNTY. BD. SUPERVISORS, BUSINESS MEETING: FEBRUARY 20, 2018, at 9 (2018) (on file with the *Columbia Human Rights Law Review*); Ceillie Simkiss, *Rezoning Request Approved for Mountain Valley Pipeline Project in Pittsylvania County*, DANVILLE REGISTER & BEE (Feb. 20, 2018), [https://godanriver.com/news/pittsylvania\\_county/rezoning-request-approved-for-mountain-valley-pipeline-project-in-pittsylvania-county/article\\_ee28b3ec-16ac-11e8-9275-9385167225d5.html](https://godanriver.com/news/pittsylvania_county/rezoning-request-approved-for-mountain-valley-pipeline-project-in-pittsylvania-county/article_ee28b3ec-16ac-11e8-9275-9385167225d5.html) (on file with the *Columbia Human Rights Law Review*).

126. PITTSYLVANIA CNTY. BD. ZONING APPEALS, REGULAR MEETING: TUESDAY, APRIL 10, 2018 MINUTES 2–3 (2018) (on file with the *Columbia Human Rights Law Review*).

3, 2018.<sup>127</sup> Mountain Valley Pipeline, LLC announced their Southgate expansion—which includes the Lambert Compressor Station on the parcels at issue in Case 6—on April 11, 2018.<sup>128</sup>

Notably, the proposed Lambert Compressor Station is subject to the same state permits as the now-cancelled Union Hill Compressor Station in Buckingham County. The Virginia State Air Pollution Control Board denied a permit for the Lambert Compressor Station on December 3, 2021, finding that the impacted community was an environmental justice community and requirements under the *Friends of Buckingham*<sup>129</sup> decision, the Virginia Environmental Justice Act, and Virginia Code § 10.1-1307.E had not been met.<sup>130</sup>

The Virginia Environmental Justice Act, passed and signed by the Governor in 2020, states that “[i]t is the policy of the Commonwealth to promote environmental justice and ensure that it is carried out throughout the Commonwealth, with a focus on environmental justice communities and fenceline communities.”<sup>131</sup> As

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127. PITTSYLVANIA CNTY. PLAN. COMM’N, REGULAR MEETING: APRIL 3, 2018 MINUTES 3 (2018) (on file with the *Columbia Human Rights Law Review*).

128. *Mountain Valley Pipeline, LLC Announces MVP Southgate Project and Binding Open Season*, EQUITRANS MIDSTREAM (Apr. 11, 2018), <https://ir.equitransmidstream.com/news/news-details/2018/Mountain-Valley-Pipeline-LLC-Announces-MVP-Southgate-Project-and-Binding-Open-Season/default.aspx> [<https://perma.cc/7RZ5-RALG>]; see also *MVP Southgate Proposed Route*, MVP SOUTHGATE (Oct. 2019), [http://mvpsouthgate.wpengine.com/wp-content/uploads/2019/10/MVP-Southgate-Proposed-Route\\_Bing\\_Roads\\_October-2019.pdf](http://mvpsouthgate.wpengine.com/wp-content/uploads/2019/10/MVP-Southgate-Proposed-Route_Bing_Roads_October-2019.pdf) [<https://perma.cc/R78Q-RJZM>] (showing the location of the proposed Lambert Compressor Station).

129. 947 F.3d 68 (4th Cir. 2020).

130. Mountain Valley Pipeline, LLC Lambert Compressor Station (MVP), Registration No. 21652 (State Air Pollution Control Bd. Dec. 3, 2021); Sarah Vogel song, *Virginia Regulatory Board Denies Mountain Valley Pipeline Compressor Station Permit*, VA. MERCURY (Dec. 3, 2021, 2:48 PM), <https://www.virginiamercury.com/2021/12/03/virginia-regulatory-board-denies-mountain-valley-pipeline-compressor-station-permit/> [<https://perma.cc/K2FK-GDYN>]. Prior to the decision by the Air Board, one member of the Pittsylvania County Board of Supervisors wrote an op-ed for the Roanoke Times in support of the pipeline and the compressor station. Charles Miller, *A Case for Approving MVP Southgate Air Permit*, RICHMOND TIMES-DISPATCH (Nov. 18, 2021), [https://richmond.com/opinion/columnists/charles-miller-column-a-case-for-approving-mvp-southgate-air-permit/article\\_df97950a-264b-555a-9fdd-4a8b8229f860.html?utm\\_medium=social&utm\\_source=email&utm\\_campaign=use-r-share](https://richmond.com/opinion/columnists/charles-miller-column-a-case-for-approving-mvp-southgate-air-permit/article_df97950a-264b-555a-9fdd-4a8b8229f860.html?utm_medium=social&utm_source=email&utm_campaign=use-r-share) [<https://perma.cc/M9J9-Z6TK>].

131. Virginia Environmental Justice Act, VA. CODE § 2.2-234–2.2-235 (2020).

originally offered in Senate Bill 406, the Act would have required that all state agencies:

[E]xamine any new regulation or policy or amendment to an existing regulation or policy involving state action or funds in relation to its impact on environmental justice prior to adoption of the regulation or policy and shall have the authority to incorporate terms and provisions to reduce or eliminate elements contrary to environmental justice for environmental justice.<sup>132</sup>

House Bill 2074 would have additionally established an Interagency Environmental Justice Working Group to “[m]aximize state resources, research, and technical assistance to carry out the purposes of this article and to further environmental justice in the Commonwealth” and report annually to the Virginia Governor and General Assembly.<sup>133</sup> The Virginia Environmental Justice Act as codified includes no requirements for any state agencies, gubernatorial appointees, or interagency cooperative entities.<sup>134</sup> Virginia Code § 10.1-1307.E, which is part of the Air Pollution Control Board’s organic statute, requires the Board to consider “facts and circumstances relevant to the reasonableness of the activity” in question in a permit, including among other things “[t]he character and degree of injury to, or interference with, safety, health, or the reasonable use of property which is caused or threatened to be caused . . . [t]he suitability of the activity to the area in which it is located . . . .”<sup>135</sup> As such, though the Air Pollution Control Board cited the Virginia Environmental Justice Act as one of its reasons for denying the Lambert Compressor Station permit, it appears that the 2020 Act offers little more than a state-wide policy statement, and does not compel the Board to make any specific considerations or take any particular actions to assess or consider environmental justice when considering permits for fracked gas or other industrial facilities. It is therefore an outstanding question as to whether and to what extent

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132. S.B. 406, 2020 Gen. Assemb., Reg. Sess. (Va. 2020), <https://lis.virginia.gov/cgi-bin/legp604.exe?201+ful+SB406+pdf> [<https://perma.cc/TU25-W9PJ>].

133. H.B. 2074, 2021 Gen. Assemb., Spec. Sess. (Va. 2021), <https://lis.virginia.gov/cgi-bin/legp604.exe?212+ful+HB2074H2+pdf> [<https://perma.cc/YUP7-S8M5>].

134. Virginia Environmental Justice Act, VA. CODE §§ 2.2-234–2.2-235 (2020).

135. VA. CODE § 10.1-1307 (2021).

the Virginia Environmental Justice Act can or will be used to require or encourage environmental justice analyses in local land use decisions.

While a single smaller facility such as a temporary construction yard may not pose extreme environmental hazards to the community, taken in the aggregate in communities already heavily burdened by industry and infrastructure, the negative impacts of increased traffic and construction compound.<sup>136</sup> Further, collecting permits, reclassifications, private easements, and other local approvals for smaller facilities can be used by larger developers to demonstrate “local support” for a project in both courts of law and public opinion.<sup>137</sup> Finally, as the Lambert Compressor Station illustrates, developers may subdivide a project and local zoning processes in ways that call into question whether the approval boards have a meaningful opportunity to prevent unwanted and environmentally dangerous uses of land under their purview.

### III. Resolving the Lack of Environmental Justice Analysis in Special Use Permits

Part III of this Note explores three possible solutions to the lack of meaningful environmental justice analysis in the special use permit process, particularly in rural areas already heavily burdened by fossil fuel and petrochemical infrastructure and industry activity.

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136. See, e.g., Travis G. Grimler, *Pipe Meant for Line 3 Project Strewn in Ditch From Collision South of Pine River*, BRAINERD DISPATCH (June 6, 2021, 10:00 AM), <https://www.brainerddispatch.com/news/pipe-meant-for-line-3-project-strewn-in-ditch-from-collision-south-of-pine-river> [https://perma.cc/DXV6-SY4F]; *Worker Killed in Construction Accident on Enbridge Oil Pipeline*, DOAN L. FIRM (Dec. 21, 2020), <https://www.thedoanlawfirm.com/blog/2020/december/worker-killed-in-construction-accident-on-enbrid/> [https://perma.cc/6DER-P6D4]; Jonathan Sokolow, *Mountain Valley Pipeline Contractor Has a History of Killing its Own Workers*, MEDIUM (Aug. 1, 2019), <https://jonsokolow.medium.com/mountain-valley-pipeline-contractor-has-a-history-of-killing-its-own-workers-698a631a5954> [https://perma.cc/8YGU-Q6BQ].

137. This is a strategy employed by developers of large-scale projects with access to eminent domain power—company representatives will approach landowners and attempt to persuade them to sign an easement over to the developer with the argument that their neighbors had already signed easements and they are the last holdouts. Developers will use local permits, easements obtained, and discussions in Board of Supervisors’ meetings to show *local support* for a project when seeking other permits or attempting to gain broader public support for a project.

Section III.A advocates for further and more extensive study of how special use permits impact environmental justice communities in rural areas of the United States. Section III.B considers a legislative top-down approach by which a state can impose an affirmative requirement for increased environmental justice review. Section III.C outlines a more robust solution including fundamental environmental rights at a state level. While the Union Hill Compressor Station case provides an example of how judicial review can impose an environmental justice assessment requirement, the case itself required monumental efforts by the environmental community—from the local to national level—to pool resources and challenge the permits at issue.<sup>138</sup> Because environmental justice communities often lack the financial resources and political power to bring such challenges, a more proactive and preventative approach at the state level will better ensure a meaningful incorporation of environmental justice concerns when special use permits are first considered in municipal hearings.

#### A. Further Study of Special Use Permits and Environmental Justice

What this case study most importantly reveals is the lack of robust empirical scholarship investigating how special use permits

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138. See, e.g., Press Release, *Sierra Club, Over 150 Virginians Show up to Oppose Dirty, Dangerous Buckingham Compressor Station for Atlantic Coast Pipeline*, SIERRA CLUB (Sept. 12, 2018), <https://www.sierraclub.org/press-releases/2018/09/over-150-virginians-show-oppose-dirty-dangerous-buckingham-compressor-station> [https://perma.cc/UH7J-985H] (detailing advocacy against the compressor station during a State Air Pollution Control Board meeting, where “more than 150 people attended and over 60 Virginians spoke out against the dirty and dangerous Buckingham Compressor Station” and providing comments on the issue from several Sierra Club representatives); *Help Protect Virginia from Toxic Air Pollution*, NAT. RES. DEF. COUNCIL, <https://act.nrdc.org/letter/va-atlantic-coast-pipeline-180905> [https://perma.cc/WPJ6-3BUP] (providing an example of NRDC advocacy against the proposed Union Hill Compressor Station via a petition to the Virginia Department of Environmental Quality); *ACP Compressor Station at Union Hill VA Now Under Challenge by SELC*, FRACKCHECK WV (Feb. 15, 2019), <https://www.frackcheckwv.net/2019/02/15/acp-compressor-station-at-union-hill-va-now-under-challenge-by-selc/> [https://perma.cc/CD6C-2462] (noting the representation of Friends of Buckingham by the well-known environmental law firm Southern Environmental Law Center and the involvement of prominent figures such as Rev. Dr. William J. Barber, II and former Vice President Al Gore in advocacy against the proposed ACP compressor station in Union Hill).

are operating to perpetuate environmental injustice in rural communities across the United States. As discussed in Part I of this Note, the scholarship on special use permits and their relationship to environmental justice is extremely limited, and the most illuminating study available at this time looks specifically at historical land use in Baltimore, Maryland.<sup>139</sup> This study provides a useful framework for further investigation of the issue in non-urban areas and areas historically burdened by extractive industries.

The need for scholarship on this issue is further illustrated by the grassroots mobilization in Virginia to provide a detailed population survey showing the extent of the environmental injustice faced by these communities. Community resistance to the Mountain Valley and Atlantic Coast Pipelines has stayed in the national spotlight, particularly due to the early and zealous advocacy by community members supported by a variety of environmental organizations. Thanks to ongoing advocacy and support, community members have been able to create programs and conduct their own empirical analyses to refute inaccurate and inadequate information on environmental justice communities in the pipelines' pathways. These communities have been fortunate to have access to resources necessary to conduct such studies—not all rural communities do. Collecting more information on how special use permits impact environmental justice communities would help provide communities with the tools to better advocate on their own behalf, and is a critical first step to support the state-level solutions outlined in Sections III.B and III.C. Without a robust understanding of the problem, any solutions risk rendering environmental justice “merely a box to be checked.”<sup>140</sup>

#### B. State-Implemented Requirement for Environmental Justice Assessments in Zoning Decisions

A state-imposed requirement for environmental assessments at the local level could help lower the cumulative impacts on particular regions and municipalities caused by ongoing industry activity. Generally, land use regulation has been a responsibility left to local governments, but states have been known to adopt statewide

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139. See generally Charles Lord & Keaton Norquist, *Cities as Emergent Systems: Race as a Rule in Organized Complexity*, 40 ENV'T L. 551 (2010).

140. *Friends of Buckingham v. State Air Pollution Control Bd.*, 947 F.3d 68, 92 (4th Cir. 2020).



or regional management plans regarding land use in order to guide local decision-making.<sup>141</sup> In a regional example, North Carolina adopted a Land Policy Act in 1974, one express purpose of which is to “[e]stablish a State policy to give local governments guidance and assistance in the establishment and implementation of local land planning and management programs so as to effectively meet their responsibilities for economically and environmentally sound land-use management.”<sup>142</sup> The Act establishes a state-level Advisory Committee on Land Policy to recommend policies and practices that will guide the state and local governments in making land use decisions that best support a comprehensive plan and state-level policies promoting public welfare.<sup>143</sup> New York also has adopted state-wide guidelines for environmental consideration in land use decisions via its Environmental Conservation Law, including provisions for controls based on proposed land use and specific environmental concerns such as air pollution and pesticides.<sup>144</sup>

As part of a comprehensive regulation scheme, states impacted by the fracked gas infrastructure buildout could require environmental analyses for special use permit applications, tailoring the requirement to the fossil fuel and petrochemical industries so as not to overburden landowners interested in small changes to land use, like operating a bed and breakfast. Because it remains unclear whether the recent Virginia Environmental Justice Act requires any meaningful action by state agencies—let alone local governments—to account for possible environmental injustices in land use and other permitting decisions, the Act does not provide a sufficient model for such requirements.<sup>145</sup> Further, it is not clear whether or how the Virginia Environmental Justice Act could be used by community advocates and state courts to require any environmental justice analyses. Maryland’s 2020 proposal that would require local governing bodies considering a special use permit for a proposed landfill in a residential area to prepare an environmental justice

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141. 13 MICHAEL ALLAN WOLF & RICHARD E. NELSON, POWELL ON REAL PROPERTY § 79D.06 [hereinafter 13 POWELL ON REAL PROPERTY].

142. N.C. GEN. STAT. § 113A, art. 9 (2021).

143. 13 POWELL ON REAL PROPERTY, *supra* note 141 § 79D.06[g].

144. 13 POWELL ON REAL PROPERTY, *supra* note 141 § 79D.06[f].

145. Virginia Environmental Justice Act, VA. CODE §§ 2.2-234–2.2-235 (2020). See *infra* Section II.B.2 regarding the Air Pollution Control Board denial of a permit for the Lambert Compressor Station and the lack of meaningful requirements in the Virginia Environmental Justice Act as passed.

analysis to inform the zoning decision, while not going far enough on its own, could offer a model by which states may require environmental justice analyses for permits related to fossil fuel and petrochemical industry activities.<sup>146</sup>

One risk of a state-imposed requirement is the resource burden it may place on smaller municipalities or rural counties with less tax revenue and resources to conduct more thorough reviews of special use permit applications.<sup>147</sup> While a municipality could

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146. See *supra* Section I.D for an outline of Maryland H.B. 51, including opposition from local governments.

147. See, e.g., *Environmental Justice*, TRINITY CONSULTANTS, <https://www.trinityconsultants.com/consulting/ehs/ehs-management/environmental-justice> [<https://perma.cc/67BN-L7YW>] (stating that environmental justice analyses from Trinity Consultants have a starting cost of approximately \$2,000 “depending on the scope involved”). While the prices of environmental justice analyses vary depending on how thorough the analysis is required to be and the personnel conducting the analysis, the Virginia General Assembly proposed an annual budget for the Department of Environmental Quality of just under \$12 million for water protection permitting and approximately \$6 million for air protection permitting in fiscal years 2023 and 2024. H.B. 30 § 1-105 (378–79), 2022 Gen. Assemb., Reg. Sess. (Va. 2022). By comparison, the current operating budget for the Pittsylvania County government is approximately \$211 million, with approximately \$71.5 million allocated to “general government” operations. Letter from David M. Smitherman, Cnty. Adm’r, Pittsylvania Cnty., Va., to Robert W. Warren, Chairman, Bd. Supervisors, Pittsylvania Cnty., Va. (Mar. 16, 2021), <https://www.pittsylvaniacountyva.gov/DocumentCenter/View/4756/FY22BudgetMessageDRAFT031221FINAL?bidId=> [<https://perma.cc/PC97-EZJF>]. The current operating budget of Giles County, Virginia—an area also impacted by the Mountain Valley Pipeline and bordering West Virginia—is approximately \$54 million, with \$4.5 million allotted for “County Operations.” GILES CNTY. BD. SUPERVISORS, FY2021-2022 PROPOSED BUDGET (July 2021), <https://virginiasmtnplayground.com/wp-content/uploads/2021/07/Budget-FY21-FY22.pdf> [<https://perma.cc/C47T-LV2U>]. Following the *Friends of Buckingham* decision, air permitting in Virginia now includes an inquiry into environmental justice, and the record of any subsequent permitting decision must include evidence that the Board “considered . . . conflicting views presented” and “made a reasonable decision supported by substantial evidence.” *Friends of Buckingham v. State Air Pollution Control Bd.*, 947 F.3d 68, 90 (4th Cir. 2020) (internal citations omitted). See also *Mountain Valley Pipeline, LLC Lambert Compressor Station (MVP)*, Registration No. 21652 (State Air Pollution Control Bd. Dec. 3, 2021), <https://www.deq.virginia.gov/home/showpublisheddocument/12757/637743946190345980> [<https://perma.cc/89DB-YKNW>] (providing justification for denying an air quality permit for the Lambert Compressor Station). The Virginia Department of Environmental Quality also received third party recommendations to further incorporate environmental justice considerations into agency operations and “[p]artner with local government coordination organizations to provide education

mitigate this by requiring the applicant to submit a third-party assessment of the environmental implications of granting the special use permit, with an emphasis on environmental justice implications and cumulative impacts with existing and other proposed land uses in the area, the *Friends of Buckingham*<sup>148</sup> case reveals the risks of putting that responsibility in the hands of industry actors. The environmental justice reviews incorporated into the Final Environmental Impact Statement for the Atlantic Coast Pipeline—which relied on 2013 census data and information from EPA’s EJScreen that one DEQ staff member told the Air Pollution Control Board they “wouldn’t really rely on”—still vastly underestimated the non-white population of Union Hill surrounding the proposed compressor station when compared to the robust empirical analysis by concerned community members and academics.<sup>149</sup>

An alternative that would ease the burden on municipalities and counties lacking the resources to conduct analyses themselves

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to local governments on their roles and responsibilities related to environmental justice in . . . zoning and other land use regulations, local siting review and approval processes and how those roles and responsibilities relate to evaluation of environmental justice-related considerations . . .” SKEO SOLUTIONS, INC. & METROPOLITAN GROUP, ENVIRONMENTAL JUSTICE STUDY FOR THE VIRGINIA DEPARTMENT OF ENVIRONMENTAL QUALITY 21 (Oct. 2020), <https://www.deq.virginia.gov/home/showpublisheddocument/8624/637727534058630000> [<https://perma.cc/B44U-D3SY>]. Aside from creating an Office of Environmental Justice and convening an Interagency Environmental Justice Working Group in 2021, the Department of Environmental Quality has not indicated how or when it intends address the recommendations included in the September 2020 study. See generally *Environmental Justice*, VA. DEP’T OF ENV’T QUALITY, <https://www.deq.virginia.gov/home/showpublisheddocument/1813/> [<https://perma.cc/4P7C-B7UD>] (“The agency is committed to the process and will make every investment possible within our capacity to ensure success.”).

148. 947 F.3d 68 (4th Cir. 2020).

149. *Friends of Buckingham*, 947 F.3d at 88–89. See *supra* Section II.A.2 for discussion of the *Friends of Buckingham* case, the environmental justice analysis for ACP, and its flaws. The U.S. EPA’s EJScreen tool is a mapping tool that combines “environmental and demographic socioeconomic indicators” to give a preliminary assessment as to whether a particular area could potentially be considered an environmental justice community. *What is EJScreen?*, U.S. ENVIRONMENTAL PROTECTION AGENCY, (last updated Feb. 18, 2022), <https://www.epa.gov/ejscreen/what-ejscreen> [<https://perma.cc/Y4VA-Q3Z3>]. EPA states “there is substantial uncertainty in demographic and environmental data, particularly when looking at small geographic areas” and that the “EJScreen is not intended to provide a risk assessment.” *Id.*

could be a requirement by the state that a special use permit applicant obtain a permit or other certification from the state that the proposed land use does not perpetuate environmental injustice. This could also be narrowed by industry based on the particular environmental justice concerns within a state. To mitigate the problem of regionalized burden of the fossil fuel industry, for example, a state could require that any landowner seeking a special use permit for construction, operation, and maintenance of coal, oil, or gas infrastructure or processing gain a permit from the state environmental agency. Particularly for interstate and large-scale industrial projects, states and the federal government frequently already require environmental permits, and some even require an environmental justice analysis as part of said permits.<sup>150</sup> While only some of these permits presently require a meaningful environmental justice analysis, the Virginia Air Pollution Control Board's analysis of and actions on the proposed Lambert Compressor Station indicate that it is not unrealistic for state agencies to consider environmental justice impacts and deny permits on that basis.<sup>151</sup> Further, to reduce the burden on state agencies in conducting said analyses, a state could specifically require that a municipality review environmental justice implications of local land use decisions that already require other state or federal environmental permits, where an environmental justice analysis is more likely to be a preexisting requirement of those permits.<sup>152</sup> This may not be as broad as requiring analyses for all projects related to fossil fuel and petrochemical infrastructure, but would nonetheless offer a greater

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150. See, e.g., Clean Water Act §§ 401, 404, 33 U.S.C. §§ 1341, 1344 (requiring applicants for federal permits for projects involving discharges into certain waterways to obtain state and federal certifications that the discharges will comply with the provision of the Clean Water Act); N.Y. Comp. Codes R. & Regs. tit. 6, §§ 487.1–487.11 (creating a regulatory framework for assessing environmental justice issues for major electric generating facilities requiring a “certificate of environmental compatibility and public need pursuant to [New York] Public Service Law article 10”); see also *Atlantic Coast Pipeline, LLC*, 161 F.E.R.C. ¶ 61,042 (2017) (requiring the pipeline developers to obtain all relevant state and federal permits before proceeding with construction of their proposed projects); *Mountain Valley Pipeline, LLC*, 161 F.E.R.C. ¶ 61,043 (2017) (same).

151. See *supra* Section II.B.2, regarding the Virginia Air Pollution Control Board reading of Virginia State Code § 10.1-1307.E; *Friends of Buckingham*, 947 F.3d 68 (4th Cir. 2020); and the Virginia Environmental Justice Act.

152. See *supra* note 150 and accompanying text.

safety net for communities where there is currently no requirement for an environmental justice analysis in local land use decisions.

A state-level solution carries its own risks, especially in areas such as central Appalachia and Southern states that are quite friendly to fossil fuel and petrochemical industries. A state could write in an industry-specific requirement that a fracked gas corporation obtain an environmental permit—including an environmental justice analysis—from the state and could just as easily carve out an exception for that industry to a broader requirement for said assessment. Due to the risks carried by a state-level imposition by legislation, such an effort could be paired with a more robust requirement within the state constitution.

### C. State Environmental Rights and Green Amendments

To provide a more robust means of ensuring that rural environmental justice communities do not continue to be overburdened by fossil fuel and petrochemical infrastructure, a state could incorporate a constitutional environmental rights amendment affirmatively asserting a fundamental right to a healthy environment. The idea of an environmental rights or “green” amendment to a state constitution is not a new one—Pennsylvania passed such an amendment in 1971 that has been used by environmental advocates to challenge subsequent pro-fossil fuel laws.<sup>153</sup> The amendment provides that:

The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.<sup>154</sup>

While not new, the green amendment proposal has gained significantly more traction in recent years amid the climate crisis. As of August 2021, six states—Pennsylvania, Rhode Island, Montana, Hawaii, Illinois, and Massachusetts—had incorporated

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153. PA. CONST. art. 1, § 27; MAYA K. VAN ROSSUM, *THE GREEN AMENDMENT 9–10* (2017).

154. PA. CONST. art. 1, § 27.

environmental rights into their state constitutions.<sup>155</sup> The provisions remained largely dormant until the Pennsylvania Supreme Court overturned a state law preventing municipalities from banning hydraulic fracturing.<sup>156</sup> Additionally, in November 2021 New York voters approved a proposal for an environmental rights amendment to the state constitution affirming simply that “[e]ach person shall have a right to clean air and water, and to a healthful environment,”<sup>157</sup> and eleven other states are considering proposals for similar amendments.<sup>158</sup> Because this amendment in New York has only recently been added to the state constitution, it is unclear how courts will interpret the rights granted in a green amendment less detailed than that of Pennsylvania.

One drawback to relying on a state constitutional green amendment is that an amendment that would be effective in a myriad of contexts and stand the tests of time would likely be too broad to provide for proactive prevention of overburdening communities via special use permits. While a broad green amendment on its own may not be sufficient to proactively prevent increased burdens on environmental justice communities, it could increase the likelihood that communities have an avenue to bring legal challenges to decisions by municipalities that do not adequately assess the environmental or human impact of a proposed permit. However, relying on a reactive judicial solution presupposes that people in the area impacted by a particular permit will have the resources to challenge said permit. *Friends of Buckingham*<sup>159</sup> offers a glowing example of collective community effort against all components of a massive interstate infrastructure project, but a review of case law regarding special use permits in central Appalachia reveals that *Friends of Buckingham* is the exception, not

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155. Michael B. Gerrard, *Environmental Rights in State Constitutions*, COLUMBIA L. SCH. CLIMATE L. BLOG (Aug. 31, 2021), <http://blogs.law.columbia.edu/climatechange/2021/08/31/environmental-rights-in-state-constitutions/> [https://perma.cc/KF3B-K49V].

156. *Id.*; *Robinson Twp. v. Commonwealth*, 623 Pa. 564 (2013).

157. N.Y. CONST. art I, § 19; VAN ROSSUM, *supra* note 153, at 15.

158. Kirsten Williams, *Fundamental Environmental Rights: State Constitutions as a Vehicle of Change*, JURIST (Nov. 1, 2021, 3:19 PM), <https://www.jurist.org/commentary/2021/11/kirsten-williams-environmental-rights-amendments/> [https://perma.cc/7SGD-BF8D].

159. 947 F.3d 68 (4th Cir. 2020).

the rule.<sup>160</sup> This is particularly illustrated by the more recent Pennsylvania case law affirmatively requiring a municipality to grant a permit despite the state's long-standing green amendment.<sup>161</sup>

The limitations of a state-level green amendment on its own show that a multi-faceted approach to the problem of special use permits and environmental justice is necessary. By incorporating an affirmative environmental right in the state constitution while also implementing a legislative requirement for environmental justice analyses for certain special use permits, states heavily impacted by fossil fuel and petrochemical industries can both affirmatively prevent compounding environmental injustice and provide an avenue for relief to communities that find themselves already overburdened.

#### CONCLUSION

Special use permits in the municipal zoning process are currently operating in a gray area in regards to environmental justice. Some analysis has been done on special use permits and their role in fostering environmental injustice in urban spaces, but not enough is known at this stage about how special use permits are operating across Appalachia and rural America more broadly to understand the full extent of the problem detailed in this Note. The investigation of special use permits tied to proposed compressor stations in Buckingham County and Pittsylvania County revealed little to no meaningful analysis of the environmental justice impacts of the permits being analyzed, despite objections and concerns raised by community advocates and environmental organizations. However, with a combination of environmental rights amendments and targeted laws regarding environmental justice analyses for certain land uses and municipal land use changes, states can incentivize or require environmental justice analyses with little burden placed on the municipalities considering permits. As the United States and the global community move further away from fossil fuels in the face of climate change, local land use regulation and special use permits have the potential to play a key role in supporting or stonewalling meaningful solutions.

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160. See *supra* Section II.A.2 for a discussion of the *Friends of Buckingham* case.

161. *Huntley & Huntley, Inc. v. Borough Council*, 600 Pa. 207 (2009).