

Court Rulings Favorable To Industry

By Kevin J. Garber
and Blaine A. Lucas

PITTSBURGH—In less than two months, courts in three Pennsylvania jurisdictions rendered decisions addressing the appropriate scope and application of local government ordinances to the oil and gas industry. All three were decided in favor of the energy industry.

The first reversed a controversial lower court decision that had invalidated a local government's approval of an unconventional natural gas well pad development. The second declared invalid a "community bill of rights ordinance" that banned underground injection wells and in all likelihood any unconventional well development. The last case, conversely, rejected a substantive validity challenge to a local zoning ordinance that authorized oil and gas wells in all zoning districts.

Although the cases involved different procedural and substantive issues, they all addressed attempts by people opposed to the oil and gas industry to thwart development through local land-use controls. These cases, which Babst Calland argued on behalf of the affected oil and gas operators, are relevant in shale development regions in Pennsylvania and around the country as they serve to be either precedential or as guidance to courts deciding similar cases.

Compatible With Zoning

On Sept. 14, the Commonwealth Court of Pennsylvania issued a much-anticipated ruling in *Gorsline v. Board of Supervisors of Fairfield Township*, reversing a decision by the Lycoming County Common Pleas Court, which had ruled that developing an unconventional natural gas well pad in a residential/agricultural (RA) zoning district was not similar to and compatible with other uses in that zoning dis-

trict. The ruling is significant because a considerable amount of natural gas development in Pennsylvania takes place in similar zoning districts.

In 2013, Inflection Energy LLC applied for conditional use approval for its plan to construct a natural gas well site in Fairfield Township's RA district. The township's zoning ordinance does not address oil and natural gas development specifically, but does contain a "savings clause" that permits a property owner to apply for conditional use approval for a use that is similar to and compatible with other uses within the zoning district.

Neighboring landowners objected, expressing vague, unsubstantiated concerns regarding traffic, noise and water. Nevertheless, the Fairfield Board of Supervisors granted Inflection's conditional use application and the neighboring landowners appealed to the Lycoming County Common Pleas Court. The common pleas court reversed, ruling that Inflection failed to prove the use was similar to and compatible with other permitted uses in the RA district.

Inflection appealed that decision to the Pennsylvania Commonwealth Court. The Marcellus Shale Coalition filed an amicus brief in support of Inflection's position, highlighting Pennsylvania's long history of oil and natural gas development.

A panel of the Commonwealth Court unanimously overturned the common pleas court's decision, finding that the objectors did not meet their burden because they did not present any real facts regarding any potential harm, and their testimony with regard to alleged harms was pure speculation. The Commonwealth Court also found that the proposed well pad was consistent with permitted uses within the RA district.

Significantly, the Commonwealth Court

also concluded in a footnote that the objectors' claim that Inflection's proposed use violated their rights under the Environmental Rights Amendment to the Pennsylvania Constitution had no merit. The court noted that such a claim presumed Inflection's use was not compatible with the permitted uses in the RA district and would cause environmental harm.

The court found that such a presumption did not apply, as the hearing record supported Fairfield Township's conclusion that Inflection's use was compatible with permitted uses in the RA district, and the objectors failed to present any evidence to the contrary.

There is no automatic right to appeal the Gorsline decision, and any such appeal is heard at the discretion of the Pennsylvania Supreme Court. On Oct. 14, the objectors filed a petition for allowance of appeal with the Supreme Court, which had not decided whether it would hear the case as of mid-November.

Community Bill Of Rights

Pennsylvania General Energy Company (PGE) obtained a federal Underground Injection Control Program permit from the Environmental Protection Agency to inject produced fluids into one of its depleted gas wells in Grant Township, Indiana County, Pa. The township does not have a zoning ordinance, but it banned injection wells using a "community bill of rights" ordinance that declared corporations had no constitutional rights.

In *Pennsylvania General Energy v. Grant Township*, PGE challenged the constitutionality, validity and enforceability of the community bill of rights ordinance in the U.S. District Court for the Western District of Pennsylvania. On Oct. 14, the district court invalidated several provisions of the ordinance.

The U.S. district court found these ordinance provisions were invalid because:

- Grant Township was not authorized to adopt such an ordinance under its enabling legislation, the Pennsylvania Second Class Township Code.

- The ordinance impermissibly excluded a use from the township.

- The ordinance was pre-empted by the Pennsylvania Limited Liability Company Law, which expressly acknowledges that such entities have the same legal capacity as natural persons.

The township was represented on a pro bono basis by the Community Environmental Legal Defense Fund, which has sought to convince communities across the country to enact similar community bills of rights, which are designed to stop oil and gas extraction, as well as managing wastes from those activities.

A similar ordinance has been overturned in Mora County, N.M., and a legal challenge to a community bill of rights ordinance adopted in Highland Township, Elk County, Pa., is pending in the U.S. District Court for the Western District of Pennsylvania.

Subsequent to this court decision, Grant Township voters on Nov. 3 adopted by referendum a home rule charter that removed the township from the purview of Pennsylvania's Second Class Township Code. The home rule charter also bans depositing waste from oil and gas extraction, and would effectively ban injection wells in the township. Further litigation is expected.

An Allowed Activity

In its well-publicized December 2013 decision in *Robinson Township v. Commonwealth of Pennsylvania*, the Pennsylvania Supreme Court invalidated portions of Act 13, the general assembly's comprehensive update of the commonwealth's Oil and Gas Act. Act 13 placed limits on local governments' authority to regulate oil and gas activities.

Since *Robinson*, objectors in several municipalities have challenged zoning ordinances that authorize oil and gas development, essentially arguing that those ordinances are invalid because they are not strict enough. In most of these cases, the objectors have asserted that the zoning ordinance violates the Pennsylvania Environmental Rights Amendment (as interpreted by *Robinson's* three-justice plurality) because it permits oil and gas development—a use the objectors characterize as “industrial”—in agricultural, residential and other nonindustrial districts.

To date, all those challenges have been rejected by local Pennsylvania zoning hearing boards, although several of those decisions have been appealed to county common pleas courts in the state.

On Oct. 21, in the first judicial decision addressing a *Robinson*-based ordinance challenge, the Westmoreland County Common Pleas Court issued a decision and order in *Frederick v. Allegheny Township Zoning Hearing Board* that upheld the validity of the township's zoning ordinance, which permits oil and gas well development in all zoning districts, including the R2 agricultural/residential district.

In *Frederick*, CNX Gas Company LLC received a zoning compliance permit to develop an unconventional gas well pad in the R2 district. Neighboring property owners appealed to the zoning hearing board, challenging both the permit and the validity of the township's zoning ordinance. The zoning hearing board ruled that the zoning ordinance was valid and upheld CNX's zoning compliance permit.

In affirming the zoning hearing board, the Frederick court first observed that *Robinson* was not binding precedent because it was only a plurality decision. The court also pointed out that *Robinson* did not address the constitutionality of a local ordinance, but instead involved a statute of statewide application (Act 13) that had been invalidated because it interfered with the right of municipalities to make local zoning determinations.

In any event, the court went on to conclude that the Allegheny Township zoning ordinance was consistent with the *Robinson* plurality. Significantly, citing the extensive record developed before the zoning hearing board, the common pleas court expressly rejected the objectors' contention that the zoning ordinance's authorization of oil and gas uses “is inconsistent with the agricultural and residential character of the township.”

That record established that:

- There was a long history of oil and gas development in the township, including a number of wells and a pipeline in close proximity of the objectors' properties.

- In the R2 district, 75 percent of the land mass is leased to oil and gas operators.

- Having the well pad on his property enabled the surface owner to continue farming his property instead of developing it for a residential subdivision.

- Permitting oil and gas operations in the R2 district enhances the township's ability to maintain its rural character.

The common pleas court also cited expert testimony that concluded oil and gas operations coexisted safely within rural communities throughout the commonwealth.

Although *Frederick* is binding precedent only in Westmoreland County, it is the first of its kind, and courts in other counties and states likely will see this decision as instructive.

On Nov. 13, the objectors appealed the

Frederick decision to the Pennsylvania Commonwealth Court. □

Editor's Note: Babst Calland attorneys involved in these cases representing Inflection Energy, Pennsylvania General Energy, and CNX Gas Company were Timothy Schoonover, Kevin Douglass, Robert Max Junker, Kevin Garber, James Corbelli, Alana Fortna, Blaine Lucas, Steven Silberman, and Lawrence Baumiller.



KEVIN J. GARBER

Kevin J. Garber is a shareholder of Babst Calland's environmental, energy and natural resources, public sector, and litigation groups. He represents oil and gas production, midstream, storage and transportation companies on a broad range of environmental issues, including permitting, water supply and treatment, and resource development, and on federal, state and local environmental regulations. He received his Ph.D. in ecology from the University of Pittsburgh, and J.D. from Duquesne University School of Law.



BLAINE A. LUCAS

Blaine A. Lucas is a shareholder of Babst Calland's energy and natural resources, and public sector groups. He is responsible for coordinating the firm's representation of energy industry clients on land use and other local regulatory matters, including obtaining local government approvals for oil and gas exploration, drilling and production, and midstream operators. He has more than 30 years of experience practicing municipal law. He received his J.D. from the University of Virginia School of Law.



'Rights' Ordinances Wrong Way To Go

By Kevin Moody

WEXFORD, PA.—The Pennsylvania Independent Oil & Gas Association intervened in *Pennsylvania General Energy (PGE) v. Grant Township* to try to put a stop to the so-called community bill of rights ordinances championed by the Community Environmental Legal Defense Fund (CELDF). These tactics are intended to strip corporations of all rights granted to “persons” under state and federal constitutions, and prohibit corporations from challenging the validity of the ordinances, bestow personal “rights” on natural communities and ecosystems, and invalidate state and federal government permits and laws inconsistent with the ordinances.

Part of CELDF’s sales pitch to communities is offering free legal services if the ordinance is challenged. We think that is a risky pitch because CELDF’s ordinances have never survived a legal challenge. Also, if the community loses, it can have serious consequences when the plaintiff seeks damages and legal costs. That happened in Mora County, N.M.

PGE has asked the district court involved in the Grant Township case to award it damages and attorney fees, and a Nov. 13 *Pittsburgh Business Times* article quotes a CELDF spokesman saying: “Any damages awarded by the court against the township would have to be paid by the township.”

In the Elk County, Pa., community of Highland Township, where Seneca Resources is challenging one of CELDF’s ordinances, some residents and officials have expressed concern publically that a loss could bankrupt the township.

PIOGA is concerned with the unlawful disruption of the legitimate business operations of its members by these community bills of rights, and also with their proliferation across the country because that helps give CELDF and the ordinances publicity. CELDF appears to welcome this publicity to help advance its cause for constitutional change, which is what

is necessary to establish its asserted right to local self-government—as Section 8 of the Grant Township ordinance acknowledges.

CELDF’s continued efforts, and municipalities’ willingness to even consider or adopt these ordinances in the face of all adverse judicial decisions, shows that CELDF is not stopping. PIOGA is trying to get as many definitive judicial decisions in Pennsylvania as it can, even though the primary effect of the decisions so far seems to be even more notoriety for CELDF’s ineffective tactic, not deterrence.

More To Come

Despite this significant win, the case is not over. Grant Township has filed for reconsideration, asking the court for a decision on whether the people of the townships have the constitutional right to local self-government that the ordinance relies on, or alternatively, whether the Pennsylvania Constitution’s Environmental Rights Amendment provides the constitutional right to local self-government necessary to authorize the ordinance.

PIOGA’s intervention complaint asserts there is no such constitutional right to local self-government, and the federal judge denied Grant Township’s counterclaim because the township failed to establish that such a right existed.

For its part, PIOGA has filed a request for correction and amendment concerning the judge’s reason for not ruling on PGE’s Oil and Gas Act pre-emption claim. The motion asks the U.S. district court to correct the erroneous statement in its decision that the Oil and Gas Act pre-emption provision of Act 13 (Section 3302) was declared unconstitutional by the Pennsylvania Commonwealth Court as part of its decision on remand in *Robinson Township v. Commonwealth of Pennsylvania*.

Another twist came with the Nov. 3 general election, when Grant Township voters approved a home rule charter that includes the same ban on “the depositing,

disposal, storage, beneficial use, treatment, recycling, injection, or introduction of materials including, but not limited to, brine, ‘produced water,’ ‘frack water,’ tailings, flowback, or any other waste or by-product of oil and gas extraction, by any means,” as did the ordinance that was held to be unconstitutional. The township’s adoption of home rule could mean it takes a little longer to resolve the case, but the end result will be the same.

A home rule community can’t violate the U.S. or Pennsylvania constitutions, and the statute enabling home rule contains a host of state law prohibitions and limitations on what a home rule community can do.

The constitutional provisions that invalidate the community bill of rights ordinance also invalidate Grant Township’s home rule charter. CELDF needs constitutional change to establish the right to local self-government that its ordinances rely on, but misusing these local communities, ordinances and home rule charters is not a proper way to try to get it. □



KEVIN MOODY

Kevin Moody is general counsel for the Pennsylvania Independent Oil & Gas Association. He has both public and private sector experience, having worked at the Pennsylvania Department of Revenue and Public Utility Commission, as well as mid-major law firms based in Philadelphia and Pittsburgh.