

## And the beat goes on: Municipal ordinances continue to face legal challenges

The oil and gas industry has enjoyed recent successes in two types of ordinance challenges in Pennsylvania. The first victory came in another in a growing line of zoning ordinance validity challenges, this one in Mount Pleasant Township, Washington County. The second victory came in a challenge to Grant Township, Indiana County's prohibition on underground injection wells.

### Mount Pleasant Township

As we reported last year for *The PIOGA Press*, five municipalities faced zoning ordinance validity challenges in 2015 and 2016. The cases were inspired largely by the Pennsylvania Supreme Court's plurality opinion in *Robinson Township v. Commonwealth*, and essentially argued that the ordinances did not regulate oil and gas development stringently enough, that zoning ordinances cannot permit oil and gas uses in agricultural or residential districts, and that municipalities must engage in extensive environmental assessments when enacting regulations.<sup>1</sup> The zoning hearing boards in Allegheny Township, Westmoreland County, Middlesex Township, Butler County, and Pulaski Township, Lawrence County, each rejected these arguments and upheld the ordinances. The remaining two challenges, in Robinson Township and New Sewickley Township, did not proceed to the merits.<sup>2</sup>

In May 2016, while the Allegheny and Middlesex cases were pending on appeal before the Commonwealth Court and the Pulaski case was pending before the Lawrence County Court of Common Pleas, Citizens for Pennsylvania's Future (PennFuture), with assistance from Fair Shake Environmental Legal Services (Fair Shake), challenged the Mount Pleasant Township, Washington County, zoning ordinance on similar *Robinson Township*-based grounds.

Range Resources-Appalachia, LLC, MarkWest Energy Partners, L.P., and owners of a proposed well site intervened in the case. The Mount Pleasant Township Zoning Hearing Board took testimony through nine nights of hearings and ultimately decided, as did the zoning hearing boards in the previous challenges, to uphold the targeted ordinance.

Critically, in the Mount Pleasant Township validity

challenge, PennFuture offered a variety of witnesses as experts on the alleged health, property value, and environmental impacts of oil and gas development. The board universally rejected this testimony:

- Ned Ketyer, M.D., a Washington County pediatrician, testified to his belief that oil and gas development can pose health risks for children. He also testified that he assumed gas development results in harmful exposures to air emissions based on what he had seen and smelled, but that he had not reviewed air emission data or monitoring studies. The board did not find his testimony to be "credible to the extent necessary to consider in this matter."

- Dr. Thomas Daniels, a professor of city and regional planning at the University of Pennsylvania, opined that oil and gas development is an "industrial" use that should not be placed in residential and commercial districts. However, the board noted that Dr. Daniels had never observed oil and gas development, was not familiar with Mount Pleasant Township and was unaware of well setbacks imposed by state law. The board rejected Dr. Daniels' characterization of unconventional natural gas development as an "industrial" use, his opinion that the challenged ordinance was inconsistent with the township's comprehensive plan and his opinion that the ordinance violates basic zoning principles.

- Dr. Christopher Timmins, an economist from Duke University, described his Pennsylvania-wide regression analysis study. That study concluded that a gas well can negatively impact the value of groundwater-dependent homes within a kilometer. However, Dr. Timmins also testified that his study did not take into account the timing of a well (i.e., whether it was in the development or production phase) at the time of a sale or whether mineral rights were conveyed with the property. The board rejected the conclusions of his study. Range presented several experts in defense of the ordinance:

- Anthony Gaudlip, Range's director of civil/environmental engineering and construction, testified about the mandatory state and local permitting procedures related to the development of an oil and gas well. The board found this testimony to be credible and directly relevant, concluding it demonstrated "that outside of the control of the Township, there are in place considerable protections of the residents of the Township relative to unconventional gas developments."

- Ross H. Pifer, director of the Center for Agricultural and Shale Law at Penn State Law, testified to the historic

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compatibility of oil and gas development and agriculture, and the reflection of that compatibility in various state laws. The board recognized Professor Pifer as an expert and accepted his findings and opinions.

- Dr. Christopher Long, an environmental and health consultant with Gradient, based his testimony on his review of materials including peer-reviewed published studies on air impact analysis in the Marcellus Shale region, various governmental reports and datasets, and commissioned studies in the Marcellus Shale region. He concluded that there exists a sizeable body of ambient air monitoring studies that can be used to assess the health risks associated with oil and gas development and that these studies do not support claims of widespread air exposures of public health concern. The board found that Dr. Long is “an expert with respect to toxicology, air exposures, and human risk assessment” and accepted his opinions and findings.

- Jerry Dent, managing director with Alvarez & Marsal, testified as an expert on the impact of environmental issues on property values. Based on his analysis of local market-based sales data and related information, he concluded there was no evidence that unconventional natural gas development caused a systematic diminution of residential property values in the township. The board found Mr. Dent to be an expert on the subject matter and concluded that his opinions and findings were credible.

PennFuture presented Dr. Seth Shonkoff, executive director of PSE (Physicians, Scientists and Engineers) - Healthy Energy, in rebuttal to Dr. Long’s testimony. Dr. Shonkoff did not find error in the basic information included in Dr. Long’s report, but did criticize various aspects of Dr. Long’s testimony. However, the board noted inconsistencies among some of the studies Dr. Shonkoff relied upon, that the epidemiological studies Dr. Shonkoff referenced were not based on actual air monitoring data, and that his criticism of Dr. Long’s testimony was inconsistent with the data and evidence presented. The board concluded that Dr. Shonkoff’s testimony was “equivocal, not properly founded, and not credible” and thus disregarded it.

PennFuture did not appeal the board’s decision.

In addition to filing the Mount Pleasant Township challenge while the Allegheny Township and Middlesex Township cases were pending before the Commonwealth Court, PennFuture pursued the case while the Pennsylvania Supreme Court was considering two relevant cases, namely *Pennsylvania Environmental Defense Foundation v. Commonwealth* (argued in March 2016) and *Gorsline v. Board of Supervisors of Fairfield Township* (argued in March 2017). Both cases include Robinson Township arguments like those raised in Mount Pleasant Township, and, once decided, may have direct bearing on the viability of this line of validity arguments.

Despite the pendency of these appeals, Fair Shake filed another challenge—this one to the Penn Township, Westmoreland County, zoning ordinance—in April. The zoning ordinance in Upper Burrell, Westmoreland County, was also challenged in February. These new cases are substantially similar to the challenges that have already been decided.

## Grant Township

Pennsylvania General Energy, L.L.C. (PGE) recently succeeded in its challenge to Grant Township, Indiana County’s underground injection well ban. In 2014, the township worked with the Community Environmental Legal Defense Fund, an antiindustry, anti-corporation Pennsylvania-based community rights organization, to enact a self-styled “Community Bill of Rights” ordinance. The ordinance specifically banned underground injection wells and purported to supersede any state or federal injection well permit. PGE, which obtained an EPA underground injection well permit in 2014 and had applied for a Pennsylvania Department of Environmental Protection (DEP) permit, filed a complaint in United States District Court for the Western District of Pennsylvania in October 2015 challenging the constitutionality, validity and enforceability of the ordinance.

The District Court initially invalidated six provisions of the ordinance on state law grounds in 2015<sup>3</sup>, and went on to grant three of PGE’s six motions for summary judgment on the remaining federal claims in March 2017. The court found that Grant Township’s ordinance violated the Equal Protection Clause of the Fourteenth Amendment because it discriminated against corporations, the Petition Clause of the First Amendment because it attempted to limit PGE’s access to the courts and the Due Process Clause of the Fourteenth Amendment because it demonstrated “irrational and arbitrary behavior, which acknowledges language contrary to existing law and takes the purpose outside of the original point of the Ordinance.” The court rejected Grant Township’s motion for summary judgment on its counterclaim, which claimed that PGE is violating the rights of Grant Township’s residents to “local community self-government.” PGE’s requests for damages, and injunctive and declaratory relief, remain viable after this ruling.

On the heels of the court decision invalidating Grant Township’s ordinance ban, DEP reissued<sup>4</sup> PGE’s underground injection well permit. DEP then filed actions against Grant Township and Highland Township, Elk County, asking the Commonwealth Court to invalidate and enjoin enforcement of similar provisions that both townships had added to a home rule charter. In April 2017, the Commonwealth Court issued orders in both cases, temporarily enjoining the townships from enforcing their charters, pending a final determination on the merits. ■

*The law firm of Babst Calland in Pittsburgh represented Range and PGE in these cases. For more about Grant Township and Highland Township, see April’s PIOGA Press, page 6. If you would like additional information about developments in this article, contact Krista-Ann Staley at 412-394-5406 or [kstaley@babstcalland.com](mailto:kstaley@babstcalland.com), or Blaine Lucas at 412-394-5657 or [blucas@babstcalland.com](mailto:blucas@babstcalland.com).*

<sup>1</sup> The *Robinson* case and its relationship to the validity challenges are summarized in our May 2016 *PIOGA Press* article entitled “*Robinson Township* arguments continue to reverberate.”

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<sup>2</sup> Objectors in New Sewickley Township, Beaver County, withdrew their case after presenting their witnesses and before ordinance proponents presented their cases. A validity challenge filed in Robinson Township, Washington County, is pending in the Court of Common Pleas, on appeal from the Robinson Township Zoning Hearing Board's dismissal of the case on standing and ripeness grounds.

<sup>3</sup> See the November 2015 article in *The PIOGA Press* entitled "Federal court invalidates portions of a local ordinance that banned the use of underground injection wells" by Babst Calland attorneys Kevin J. Garber, James V. Corbelli and Alana E. Fortna for additional case background.

<sup>4</sup> The DEP previously issued a permit for the projects, but suspended it while the PGE case was pending. PGE has appealed the permit conditions, and the East Run Hellbenders Society and two residents have challenged the issuance of the permit.