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UPDATE: The Legacy of Robinson Township: Local Ordinances Create New Hurdles for Oil and Gas Operators

Since the 2013 Pennsylvania Supreme Court ruling in *Robinson Township v. Commonwealth*, 623 Pa. 564 (Pa. 2013), the oil and gas industry waited to see if local ordinances would put new hurdles in their path. Recent litigation throughout Pennsylvania indeed demonstrates that zoning and other ordinances present a costly and time-consuming impediment in oil and gas production.

One such example is *B. Gorsline, et al. v. Board of Supervisors of Fairfield Twp. v. Inflection Energy, LLC, et al.*, 1735 C.D. 2014 (Pa. Cmmw. September 14, 2015), where Inflection Energy, LLC (Inflection) proposed placing a well in an area zoned as a "Residential Agricultural District." The Fairfield Township Zoning Ordinances are silent as to natural gas wells but do contain a "savings clause" which states that "[w]henver, under this Ordinance, a use is neither specifically permitted or denied, and an application is made ... for such a use, the Zoning Officer shall refer the application to the Board of Supervisors (the Board) to hear and decide such request as a conditional use." § 12.18. The Board must determine if the applicant's intended use is "similar to and compatible with" the current uses in the zone, not authorized for use in another zone, and that it does not conflict with the Ordinance's general purpose. (See § 12.18.1-3).

The Board approved Inflection's permit, but the trial court reversed. On appeal to the Commonwealth Court, Inflection raised four issues, the crux of which was whether a well was a comparable use to current activities within the zone. The Court determined that the proposed well was "similar and comparable" to current permitted activities, including other wells operated by Inflection. Additionally, the Court held that Inflection had met its burden that Inflection's well would not "conflict with the general purpose" of the Ordinance, as Inflection pointed out that the Zoning Ordinance specifically authorizes the extraction of minerals. (§§ 12.18.1, 12.18.3; R.R. 493a). The Court then stated that the record did not reflect that the proposed well would be detrimental to the health, safety, and welfare of the neighborhood. Furthermore, the Court noted that the Board responded to any potential concerns by imposing various conditions on the approval of the permit. Accordingly, the Court reversed the lower court and upheld the Board's decision granting a use permit to Inflection.

Currently pending in the United States District Court for the Western District of Pennsylvania are two other ordinance-related cases. Pennsylvania General Energy Company, L.L.C., brought suit against Grant Township, Indiana County (Case No. 1:2014cv00209), and Seneca Resources Corporation brought suit against Highland Township, Elk County (Case No. 1:2015cv00060) for their restrictive ordinances. In both cases the townships passed ordinances that made it unlawful for deep injection well activities to occur within the township. Though no decision has been reached on the constitutionality of these ordinances, the uncertainty has resulted in interruptions in the permitting process.

The Pennsylvania Department of Environmental Protection ("DEP") recently informed both operators that it is delaying approval of their applications for deep injection well permits, pending the outcome of the litigation. The DEP has acknowledged that the Western District Court already ruled on a similar ordinance in *Penn Ridge Coal, LLC v. Blaine Twp.*, where the township passed an ordinance banning all mining activities within the township. 2009 U.S. Dist. LEXIS 84428 (W.D. Pa. 2009). The Court in *Penn Ridge Coal* held that the ordinance was an impermissible

exercise of legislative authority, which exceeded the power granted to the municipality by the Pennsylvania Legislature in an attempt to preempt existing state law. However, parties on both sides of the litigation point out that permitting determinations regarding conversion wells are within the DEP's authority, making it unnecessary for the DEP to push this responsibility onto the courts.

These recently decided or pending suits confirm that the legacy of the *Robinson Township* decision will be that operators are now forced to maneuver varying ordinances and the ensuing litigation in every location where they have operations. The only thing that is certain is that the lack of consistent regulation of the oil and gas industry throughout the state has left even the DEP puzzled and forced all parties to expend additional time and money only to have the courts determine the rules.

CASE UPDATE

10/16/2015:

On October 14, 2015, the United States District Court for the Western District of Pennsylvania enjoined Grant Township from enforcing provisions within its Community Bill of Rights ordinance against Pennsylvania General Energy Company, LLC (Plaintiff). *Pa. General Energy Company, LLC v. Grant Twp.*, 2015 U.S. Dist. LEXIS 139921 (W.D. Pa. 2015). The Plaintiff challenged several provisions contained within the ordinance including: §3(a) banning the depositing of waste from oil and gas extraction and §3(b) invalidating any permit issued by a government agency in violation of the ordinance. *Id.* at 17. The Court determined that these sections exceeded the township's municipal authority under Pennsylvania's Second Class Township Code, as the power to regulate oil and gas waste was not expressly granted to them by the state. *Id.* at 21–22. Additionally, the Court analyzed the sections under Pennsylvania law which requires a municipality to allow all legitimate business uses somewhere within its boundaries. *Id.* at 22. The Court held that the ordinance's outright ban of oil and gas waste disposal, a legitimate business activity, is de jure exclusionary and the township did not rebut the presumption of illegality. *Id.* at 23.

This case marks another victory for an oil and gas company facing ordinance barriers setup by local governments to impede their drilling operations. Unfortunately, the cost is over a year of litigation and delays. It has yet to be seen how quickly the DEP will respond in issuing a permit allowing Pennsylvania General Energy Company, LLC, to recommence its operations in Grant Township.



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