

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. _____

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL PROTECTION, PETITIONER,

v.

GRANT TOWNSHIP OF INDIANA COUNTY AND
THE GRANT TOWNSHIP BOARD OF SUPERVISORS,
RESPONDENTS.

**PETITION FOR REVIEW IN THE NATURE OF COMPLAINT SEEKING
DECLARATORY AND INJUNCTIVE RELIEF**

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Date: March 27, 2017

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA, :
DEPARTMENT OF ENVIRONMENTAL :
PROTECTION, :
Petitioner, :
v. : Case No. _____
GRANT TOWNSHIP OF INDIANA COUNTY :
and THE GRANT TOWNSHIP SUPERVISORS, :
Respondents. :

NOTICE TO DEFEND

You have been sued in court. If you wish to defend against the claims set forth in the following pages, you must take action within 20 days after this complaint and notice are served, by entering a written appearance personally or by attorney and filing in writing with the court your answer, defenses and objections to the claims set forth against you. You are warned that if you fail to do so the case may proceed without you and a judgment may be entered against you by the court without further notice for any money claimed in the complaint or for any other claim or relief requested by the plaintiff. You may lose money or property or other rights important to you.

YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONCE. IF YOU DO NOT HAVE A LAWYER OR CANNOT AFFORD ONE, GO TO OR

TELEPHONE THE OFFICE SET FORTH BELOW TO FIND OUT WHERE YOU CAN GET LEGAL HELP. THIS OFFICE CAN PROVIDE YOU WITH INFORMATION ABOUT HIRING A LAWYER.

IF YOU CANNOT AFFORD TO HIRE A LAWYER, THIS OFFICE MAY BE ABLE TO PROVIDE YOU WITH INFORMATION ABOUT AGENCIES THAT MAY OFFER LEGAL SERVICES TO ELIGIBLE PERSONS AT A REDUCED FEE OR NO FEE.

The Commonwealth Court has designated the following organizations from which legal help can be obtained:

Central Pennsylvania Legal Services, Inc.
213 North Front Street
Harrisburg, PA 17101
717-232-0591

and

Public Services and Lawyers Referral Committee
Dauphin County Bar Association
213 North Front Street
Harrisburg, PA 17101
717-232-7536

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FOR THE COMMONWEALTH OF
PENNSYLVANIA, DEPARTMENT
OF ENVIRONMENTAL PROTECTION

Date: March 27, 2017

Supervisors invalidating and enjoining enforcement of certain provisions of the Grant Township Home Rule Charter regarding the depositing of waste from oil and gas extraction, and in support thereof states as follows:

I. PARTIES

1. The Department is the Commonwealth of Pennsylvania agency with the duty and authority to administer and enforce Pennsylvania statutes governing the development of oil and gas in the Commonwealth, including, but not limited to, the Oil and Gas Act, Act of February 14, 2012, P.L. 87, No. 13, 58 Pa.C.S. §§ 3201-3309 (“Oil and Gas Act”), the Solid Waste Management Act, Act of July 7, 1980, P.L. 380, *as amended*, 35 P.S. §§ 6018.101-6018.1003 (“Solid Waste Management Act”), Section 1917-A of the Administrative Code of 1929, Act of April 9, 1929, P.L. 177, *as amended*, 71 P.S. § 510-17, and the rules and regulations promulgated thereunder (“Regulations”), which in turn implement the Commonwealth’s duties under Article I, Section 27 of the Pennsylvania Constitution, Pa. Const. Art. I, § 27.

2. Respondent Grant Township (the “Township”) is a home rule municipality located in Indiana County, Pennsylvania with a business address of 100 East Run Road, Marion Center, PA 15759, and with a Solicitor of Christopher S. Welch, Esq., Budash & Welch, LLP Attorneys at Law, 120 South Seventh Street, Indiana, PA 14701.

3. Respondent Grant Township Board of Supervisors (“Supervisors,” collectively with the Township, the “Respondents”) is the governing body of the Township. This action does not name any Grant Township supervisors in their individual capacity.

II. JURISDICTION

4. This Court has jurisdiction over this matter under Section 7532 of the Pennsylvania Declaratory Judgment Act, Act of April 28, 1978, P.L. 202, No. 53, *as amended*, 42 Pa.C.S. § 7532; Section 761(a) of the Judicial Code, 42 Pa.C.S. § 761(a); and Pa.R.A.P. 3761.

5. This action is brought pursuant to the Pennsylvania Declaratory Judgments Act, 42 Pa. Cons. Stat. § 7531 *et seq.*, to determine the legal rights and obligations of the parties, and involves an actual controversy that is ripe for consideration, as appears more fully hereinafter.

III. BACKGROUND

6. Section 3202 of the Oil & Gas Act, 58 Pa.C.S. § 3202, declares the purpose of the act to be:

- (1) Permit the optimal development of oil and gas resources of this Commonwealth consistent with protection of the health, safety, environment and property of Pennsylvania citizens.
- (2) Protect the safety of personnel and facilities employed in coal mining or exploration, development, storage, and production of natural gas or oil.

- (3) Protect the safety and property rights of persons residing in areas where mining, exploration, development and storage or production occurs.
- (4) Protect the natural resources, environmental rights and values secured by the Constitution of Pennsylvania.

7. Section 3211 of the Oil & Gas Act, 58 Pa.C.S. § 3211, requires a person to obtain a well permit from the Department for the drilling or alteration of any “well.” 58 Pa.C.S. § 3211.

8. Section 3203 of the Oil and Gas Act, 58 Pa.C.S. § 3203, defines “well” in pertinent part as: “a bore hole drilled or being drilled for the purpose of, or to be used for, producing, extracting or injecting gas, petroleum or another liquid related to oil or gas production or storage, including brine disposal . . .”

9. The Regulations specifically regulate the drilling and alteration of wells utilized for disposal. *See* 25 Pa. Code § 78.18.

10. Subsection (e) of Section 3211 of the Oil and Gas Act, 58 Pa.C.S. § 3211(e), states:

The Department shall issue a permit within 45 days of submission of a permit application unless the Department denies the permit application for one or more of the reasons set forth in subsection (e.1), except that the Department shall have the right to extend the period for 15 days for cause shown upon notification of the applicant of the reasons for the extension. The Department may impose permit terms and conditions necessary to assure compliance with this chapter or other laws administered by the Department.

11. Section 3302 of the Oil & Gas Act, 58 Pa.C.S. § 3302, provides, in pertinent part:

Except with respect to local ordinances adopted pursuant to the [Municipalities Planning Code (“MPC”)] and the act of October 4, 1978 (P.L. 851, No. 166), known as the Flood Plain Management Act, all local ordinances purporting to regulate oil and gas operations regulated by Chapter 32 (relating to development) are hereby superseded. No local ordinance adopted pursuant to the MPC or the Flood Plain Management Act shall contain provisions which impose conditions, requirements or limitations on the same features of oil and gas operations regulated by Chapter 32 or that accomplish the same purposes as set forth in Chapter 32. The Commonwealth, by this section, preempts and supersedes the regulation of oil and gas operations provided in this chapter.

12. Although the last sentence of Section 3302 of the Oil and Gas Act has been stricken by this Court, Section 3302 still preempts local regulation of oil and gas operations, except to the extent that such local regulations are adopted pursuant to the Municipalities Planning Code or The Flood Plains Management Act, and such local regulations do not “impose conditions on the features of well operations which the remaining valid provisions of Act 13 regulate.”¹ *Robinson Township v. Commonwealth*, 147 A.3d 536, 566 (2016) (citing *Huntley & Huntley v. Borough Council of Oakmont*, 964 A.2d 855, 866 n. 11 (Pa. 2009)).

¹ The full quote of this text is from pages 565 and 566 of the Supreme Court’s opinion is as follows: “Given the absence of those statutory provisions, municipalities may again, as they did prior to the passage of Act 13, regulate the environmental impact, setback distances, and the siting of oil and gas wells in land use districts through local ordinances enacted in accordance with the provisions of the MPC or the Flood Plain Management Act, provided that such ordinances do not impose conditions on the features of well operations which the remaining valid provisions of Act 13 regulate.”

13. Section 6018.104(6) of the Solid Waste Management Act, 35 P.S. § 6018.104(6), imposes upon the Department the duty to “regulate the storage, collection, transportation, processing, treatment and disposal of solid wastes” in the Commonwealth of Pennsylvania

14. Section 103 of the Solid Waste Management Act defines “solid waste” to include “residual waste,” which that section defines to include any “discarded material or other waste including... liquid... from industrial operations...” 35 P.S. § 6018.103. Oil and gas operations are industrial operations.

15. Brine and other oil and gas wastes are solid waste and residual waste under the Solid Waste Management Act.

16. Section 3273.1 of the Oil and Gas Act explains the following regarding the Solid Waste Management Act:

(a) The obligation to obtain a permit and post a bond under Articles III and V of the act of July 7, 1980 (P.L. 380, No. 97), known as the Solid Waste Management Act, and to provide public notice under section 1905-A(b)(1)(v) of the act of April 9, 1929 (P.L. 177, No. 175), known as The Administrative Code of 1929, for any pit, impoundment, method or facility employed for the disposal, processing or storage of residual wastes generated by the drilling of an oil or gas well or from the production of wells which is located on the well site, shall be considered to have been satisfied if the owner or operator of the well meets the following conditions: (1) the well is permitted under the requirements of section 3211 (relating to well permits) or registered under section 3213 (relating to well registration and identification);(2) the owner or operator has satisfied the financial security requirements of section 3225 (relating to bonding) by obtaining a surety or collateral bond for the well and well site; and (3) the owner or operator maintains

compliance with this chapter and applicable regulations of the Environmental Quality Board. . . .

(c) Solid Waste Management Act.--This section does not diminish or otherwise affect duties or obligations of an owner or operator under the Solid Waste Management Act. This section does not apply to waste classified as hazardous waste under the Solid Waste Management Act

or the Resource Conservation and Recovery Act of 1976 (Public Law 94-580, 90 Stat. 2795, 42 U.S.C. § 6901 et seq.).

58 Pa.C.S. § 3273.1(a) and (c).

17. Pursuant to Section 6018.104(6) of the Solid Waste Management Act, 35 P.S. § 6018.104(6), and Section 3273.1 of the Oil and Gas Act, 58 Pa.C.S. § 3273.1(a) and (c), the Department regulates waste fluids from oil and gas activities on and off of well sites.

18. On March 30, 2015, Pennsylvania General Energy Company, LLC (“PGE”) applied to the Department for a change-in-use well permit to convert an existing natural gas well located in Grant Township, Indiana County, into an underground injection disposal well for the disposal of brine and other oil and gas wastes (“Permit Application”).

19. On June 3, 2014, the Township adopted a local ordinance that prohibited the “depositing of waste from oil and gas extraction” within the Township (“Grant Second Class Township Ordinance”) and defined “Depositing of waste from oil and gas extraction” to include:

the depositing, disposal, storage, beneficial use, treatment, recycling, injection, or introduction of materials including, but not limited to, brine, 'produced water,' 'fract [sic] water,' tailings, flowback or any other waste or by-product of oil and gas extraction. The phrase shall also include the issuance of, or application for, any permit that would purport to allow these activities.

A copy of the Grant Second Class Township Ordinance is Exhibit A.

20. On August 8, 2014, PGE filed a complaint in United States District Court, Western District of Pennsylvania, Docket Number 1:14-cv-00209-JFM, challenging the validity of the Grant Second Class Township Ordinance ("PGE Complaint"). A copy of the PGE Complaint is Exhibit B.

21. On August 12, 2015, the Department, by letter, suspended its review of the Permit Application pending the outcome of the litigation over the Grant Second Class Township Ordinance. A copy of the Department's letter of August 12, 2015 letter is Exhibit C.

22. On October 14, 2015, Federal Magistrate Judge Baxter issued a Memorandum Opinion in PGE's Federal action granting in part and denying in part PGE's motion for judgment, ruling that sections of the Grant Second Class Township Ordinance violated the Second Class Township Code and the Limited Liability Companies Law, and were also unlawfully exclusionary. A copy of the Memorandum Opinion is Exhibit D.

IV. THE HOME RULE CHARTER

23. On November 3, 2015, the citizens of the Township voted to adopt a home rule charter that changed the form of government in the Township from a Second Class Township to a Home Rule Municipality (“Home Rule Charter”). A copy of the Home Rule Charter is attached and incorporated as Exhibit E.

24. Section 301 of the Home Rule Charter, entitled “Depositing of Waste from Oil and Gas Extraction,” states: “It shall be unlawful within Grant Township for any corporation or *government* to engage in the depositing of waste from oil and gas extraction.” (Exhibit E, Home Rule Charter, emphasis added.)

25. Article VIII of the Home Rule Charter, entitled “Definitions,” defines “Depositing of waste from oil and gas extraction” as follows:

“Depositing of waste from oil and gas extraction” includes, but is not limited to, 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. *The phrase shall also include the issuance of, or application for, any permit that would purport to allow these activities.* This phrase shall not include temporary storage of oil and gas waste materials in the Township at existing well sites.

(Exhibit E, Home Rule Charter, emphasis added.)

26. Section 302 of the Home Rule Charter, entitled “State and Federal Authority,” states:

No permit, license, privilege, charter, or other authorization, issued to a corporation, by any State or federal entity, that would violate the

prohibitions of this Charter or any rights secured by this Charter, shall be deemed valid within Grant Township.

(Exhibit E, Home Rule Charter.)

27. Section 303 of the Home Rule Charter, entitled “Summary Offenses,” states:

Any corporation or *government* that violates any provisions of this Charter shall be guilty of an offense and, upon conviction thereof, shall be sentenced to pay the maximum fine allowable under State law for that violation. Each day or portion thereof, and each violation of a section of this Charter, shall count as a separate offense.

(Exhibit E, Home Rule Charter, emphasis added.)

28. Section 306 of the Home Rule Charter, entitled “Enforcement of State Laws,” states: “All laws adopted by the legislature of the State of Pennsylvania, and the rules adopted by any State agency, shall be the law of Grant Township only to the extent that they do not violate the rights or prohibitions recognized by this Charter.” (Exhibit E, Home Rule Charter.)

29. On March 27, 2017, the Department granted the Permit Application and issued a permit to PGE pursuant to Section 3211 of the Oil and Gas Act, 58 Pa.C.S. § 3211, and the Regulations authorizing the change-in-use of the existing well in Grant Township for brine disposal by injection (“Well Permit”). A copy of the Well Permit is attached as Exhibit F.

Count I – Declaratory Judgment – Express Preemption

30. Paragraphs 1-29 are incorporated herein by reference as if set forth in full.

31. Section 3211 of the Oil and Gas Act, 58 Pa. C.S. § 3211, directs the Department to issue permits for wells throughout the Commonwealth that will allow, among other things, depositing, disposing, injecting, or introducing liquids including, but not limited to, brine, produced water, frack water, flowback, and other waste or by-products of oil and gas extraction.

32. Section 301 and Article VIII of the Home Rule Charter purport to expressly prohibit the Department from issuing a permit that will allow the depositing, disposing, storage, treatment, recycling, beneficial use, injecting, or introducing liquids including, but not limited to, brine, produced water, frack water, flowback, and other waste or by-products of oil and gas extraction in the Township.

33. Section 302 of the Home Rule Charter purports to invalidate any permit issued by the Department under Section 3211 of the Oil and Gas Act, 58 Pa.C.S. § 3211, that will allow the depositing, disposing, injecting, or introducing liquids including, but not limited to, brine, produced water, frack water, flowback, and other waste or by-products of oil and gas extraction in the Township.

34. Section 306 of the Home Rule Charter purports to invalidate any provision of the Oil and Gas Act that would allow the depositing, disposing,

injecting, or introducing liquids including, but not limited to, brine, produced water, frack water, flowback, and other waste or by-products of oil and gas extraction in the Township.

35. Sections 301, 302, and 306 of the Home Rule Charter are not adopted pursuant to the Municipalities Planning Code or the act of October 4, 1978 (P.L. 851, No. 166), known as the Flood Plain Management Act.

36. Section 3302 of the Oil and Gas Act, 58 Pa. C.S. § 3302, expressly preempts Sections 301, 302, and 306 of the Home Rule Charter as these sections apply to the depositing, disposing, injecting, or introducing materials, including use of waste oil and gas fluids.

WHEREFORE, the Department respectfully requests this Court enter judgment in its favor and against Grant Township and declare that Sections 301, 302, and 306 of the Home Rule Charter are expressly preempted by Section 3302 of the Oil and Gas Act.

Count II – Declaratory Judgment – Implied Preemption

37. Paragraphs 1-36 are incorporated herein by reference as if set forth in full.

38. The permitting and operation of wells for the disposal of brine, produced water, frack water, flowback, and other waste or by-products of oil and gas extraction and other fluids is exclusively and comprehensively regulated within

the Commonwealth by the Department pursuant to the Oil & Gas Act, the Solid Waste Management Act, and their implementing Regulations, including, without limitation, 25 Pa. Code §§ 78.11 and 78.18.

39. The comprehensive and exclusive regulation of oil and gas activities established by the Oil and Gas Act and the Solid Waste Management Act preempts Sections 301, 302, and 306 of the Home Rule Charter.

WHEREFORE, the Department respectfully requests this Court enter judgment in its favor and against Grant Township and declare that Sections 301, 302, and 306 of the Home Rule Charter are preempted by the Oil and Gas Act, the Solid Waste Management Act, and the Regulations, and thus stricken as unlawful, void, and unenforceable.

Count III – Declaratory Judgment – Violation of Home Rule Charter Act

40. Paragraphs 1-39 are incorporated herein by reference as if set forth in full.

41. Section 2962(c) of the Home Rule Charter Act, 53 Pa. C.S. § 2962(c), prohibits a home rule municipality from exercising powers contrary to or in limitation or enlargement of powers granted by statutes that are applicable in every part of the Commonwealth.

42. Section 3211 of the Oil and Gas Act, 58 Pa. C.S. § 3211, grants the Department the power to permit wells for the depositing, disposing, injecting, or

introducing liquids including, but not limited to, brine, produced water, frack water, flowback, and other waste or by-products of oil and gas extraction in every part of the Commonwealth.

43. Sections 301, 302, and 306 of the Home Rule Charter attempt to exercise power that is contrary to and limits the powers expressly granted to the Department by the Oil and Gas Act, which are applicable in every part of the Commonwealth.

WHEREFORE, the Department respectfully requests this Court enter judgment in its favor and against Grant Township and declare that Sections 301, 302, and 306 of the Home Rule Charter violate Section 2962(c) of the Home Rule Charter Act and are thus stricken as unlawful, void, and unenforceable.

Count IV – Declaratory Judgment – Sovereign Immunity

44. Paragraphs 1-43 are incorporated herein by reference as if set forth in full.

45. Article I, Section 11 of the Pennsylvania Constitution provides that: “Suits may be brought against the Commonwealth in such manner, in such courts and in such cases as the Legislature may by law direct.” Pa. Const. Art. I, § 11.

46. Pursuant to 1 Pa.C.S. § 2310, the Commonwealth of Pennsylvania enjoys sovereign immunity unless the General Assembly specifically waives such immunity.

47. 42 Pa.C.S. § 8522 provides a discrete list of limited situations in which the General Assembly has waived sovereign immunity for the Commonwealth of Pennsylvania.

48. Section 303 of the Home Rule Charter imposes fines on any government that violates the Home Rule Charter.

49. The General Assembly has not provided in 42 Pa.C.S. § 8522, or otherwise, for any exception to sovereign immunity in situations where the Commonwealth of Pennsylvania has violated a home rule charter.

50. Section 303 of the Home Rule Charter is proscribed by 1 Pa.C.S. § 2310 and Pa. Const. Art. I, § 11 to the extent that it applies to the Commonwealth of Pennsylvania and its agencies and their employees.

WHEREFORE, the Department respectfully requests this Court enter judgment in its favor and against Grant Township and declare Sections 303 and 305 of the Home Rule Charter to be void and unenforceable to the extent that it applies to the Commonwealth of Pennsylvania, its agencies, and its employees acting within the scope of their employment.

Count V – Injunctive Relief

51. Paragraphs 1-50 are incorporated herein by reference as if set forth in full.

52. The Respondents' adoption and implementation of Sections 301, 302, 303, and 306 of the Home Rule Charter as described in Counts I-IV, above, violate the Pennsylvania Constitution and the Home Rule Charter Act, and are pre-empted by the Solid Waste Management Act and the Oil and Gas Act.

53. Sections 301, 302, 303, and 306 of the Home Rule Charter purport to unlawfully prevent the Department from exercising its statutory duties under the Oil and Gas Act and the Solid Waste Management Act, and prevent the Department from meeting its obligations under Article 1, Section 27 of the Pennsylvania Constitution within the Township.

54. As set forth in Paragraph 29, above, the Department granted the Permit Application and issued the Well Permit to PGE and is thus now exposed to potential liability as set forth in Sections 303 of the Home Rule Charter.

55. Enjoining the implementation and enforcement of Sections 301, 302, 303, and 306 of the Home Rule Charter as requested herein will not otherwise affect the other unchallenged portions of the Home Rule Charter.

56. The Department's right to relief in Counts I through IV, above, is clear; the injury to the Department imposed by Sections 301, 302, 303, and 306 of the Home Rule Charter cannot be compensated by damages; greater injury results from not enjoining Sections 301, 302, 303, and 306 of the Home Rule Charter than

enjoining those Sections as requested herein; and the Department has no adequate remedy at law.

57. By separate filing of this same date, the Department is seeking temporary injunctive relief imposing a stay of Sections 301, 302, 303, and 306 of the Home Rule Charter until the matters set forth in this petition are determined.

WHEREFORE, the Department respectfully requests that this Court permanently enjoin the implementation and enforcement of Sections 301, 302, 303, and 306 of the Home Rule Charter as they pertain to the depositing, disposing, injecting, or introducing liquids including, but not limited to, brine, produced water, frack water, flowback, and other waste or by-products of oil and gas extraction in the Township.

Respectfully submitted,

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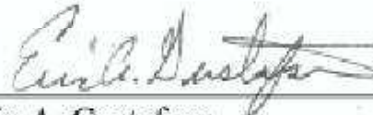
/s/ Michael J. Heilman

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Date: March 27, 2017

VERIFICATION

I, Eric Gustafson, hereby state that I am the Oil and Gas Program Manager for the Commonwealth of Pennsylvania, Department of Environmental Protection, and that the facts set forth in the foregoing Petition for Review In the Nature Of Complaint Seeking Declaratory And Injunctive Relief are true and correct to the best of my knowledge, information and belief. I understand that any false statements made herein are subject to the penalties of 18 Pa.C.S.A. § 4904 relating to unsworn falsification to authorities.



Eric A. Gustafson

Dated: MARCH 27, 2017