

REBUTTAL

Pre-emptive State Laws and Corporate ‘Rights’ Are Fraught with PERIL for Municipalities

BY CHAD NICHOLSON, PENNSYLVANIA ORGANIZER / COMMUNITY ENVIRONMENTAL LEGAL DEFENSE FUND

Editor’s Note: This article is in response to an article in the July issue of the *Township News* on community bill of rights ordinances written by attorney Kevin Moody, general counsel to the Pennsylvania Independent Oil and Gas Association (PIOGA). The Community Environmental Legal Defense Fund (CELDF) requested the opportunity to respond.

The July issue of the *Township News* featured an article titled, “Community Bill of Rights Ordinances Are Fraught with Peril for Municipalities.” That article contained what our organization, the Community Environmental Legal Defense Fund, believes to be inaccuracies and omissions about community bill of rights ordinances and CELDF itself, and we appreciate the opportunity to offer our opposing viewpoint. CELDF was not consulted before the July article was published.

It should be noted that the author, Kevin Moody, counsel to the Pennsylvania Independent Oil and Gas Association (PIOGA), has filed a motion to permit PIOGA to intervene in the current case against Grant Township* (referenced in his article and the sidebar on P. 61), although the July article did not disclose PIOGA’s ties to that case.

While PIOGA may have certain interests that it promotes, in the opinion of this author, and as stated in the first part of this article, they may not be in the best interest of Pennsylvania municipalities. The second part of this article notes in more detail the factual

issues CELDF has with the July article.

The real PERIL facing Pa. municipalities

CELDF is a nonprofit, public-interest law firm that has been helping Pennsylvania communities protect their health, safety, and welfare since 1995. Communities have asked us to assist them with stopping harmful corporate activities, such as factory farms, the spreading of municipal sewage sludge, fracking, intensive mining operations, and toxic waste injection.

These communities come to CELDF armed with long lists of health and safety concerns associated with each of these activities, including water and air pollution, incessant noise and truck traffic, and the depletion of property values.

These communities have found that

* **Note:** CELDF is serving as legal counsel for two townships of the second class — Grant Township, Indiana County, and Highland Township, Elk County — that have passed community bill of rights ordinances prohibiting frack waste injection wells.

The people of the community must act locally to **protect their rights** when state government or regulatory agencies **won’t do so.**

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environmental regulatory agencies, such as the state Department of Environmental Protection (DEP), do not work to protect the environment but actually work to issue permits to corporations that legalize an allowable level of harm to be inflicted upon communities, even when those communities don't want the corporate activity in the first place.

You can't stop the activity, these communities are told. They are told that they are "pre-empted" by state laws, which remove authority from municipalities to make decisions on these important issues.

They are also told that if they try to pass local laws that prohibit the harmful activity, they risk infringing on the corporation's "rights," which may cause those corporations to sue the municipality for attorney's fees and damages. (Mr. Moody acknowledges that municipalities may be liable if faced with adverse court decisions; he never mentions that PIOGA is one of those organizations attempting to influence these decisions against municipalities.)

So what are Pennsylvania municipalities supposed to do when faced with harmful activities that would violate the rights of the people living there? Are they supposed to shut up and go home because they might get sued?

This type of thinking leaves our communities in a tough situation: They either accept a harmful activity they don't want and try to regulate it or get the pants sued off of them in court by corporations that want to force their way in against their will.

Thankfully, many communities don't accept that logic and are unwilling to surrender their decision making authority. And that is the reason that communities adopt these ordinances in the first place: The people of the community must act locally to protect their rights when state government or regulatory agencies won't do so.

More than a hundred communities in Pennsylvania have now drawn a line in the sand and passed community bill of rights ordinances to assert and protect their rights. The real peril is

not the ordinances themselves, as Mr. Moody asserts, but rather the structure of law that currently says that communities are pre-empted from passing laws to protect their rights, at the risk of being sued by corporate outsiders.

It's also the reason why communities that have passed these ordinances are joining together under the Pennsylvania Community Rights Network to build a statewide movement to change the state Constitution to protect Pennsylvania municipalities from unjust state and corporate overreach.

Comments on the July article

This is not an exhaustive list but an overview of the factual problems in the July article:

- The article states that CELDF “promotes” the community bill of rights ordinances. Not true: Communities contact us first and then we assist them in drafting ordinances, collaboratively, and only at their request.

- The author of the July article confuses our work with work going on in Texas. CELDF is not currently working in Texas.

- The article discusses the East Brunswick case in Pennsylvania but does not distinguish between “community” and “municipal corporation” in his analysis, which, in CELDF’s view, is a critical distinction.

That case, and Mr. Moody’s overall analysis, also ignore more recent court decisions that relate to the broader discussion about these ordinances. The Act 13 decision, handed down by the Pennsylvania Supreme Court in 2013, notes that there is a constitutional obligation — binding on both state and local governments — to protect natural resources.

In another 2013 case, from Washington County, a judge declared that corporations are not “persons” under the Pennsylvania Constitution and therefore, corporations cannot elevate their “private rights” above the rights of people: “The framers of our Constitution could not have intended [corporations] to be ‘free and independent,’ because, as the creations of the law, they are always subservient to it.” (*Hallowich v. Range Resources Corporation, et al.*, No. 2010-3954, Wash. Co. 2013)



Federal court strikes down significant portions of ordinance aimed at preventing injection well

Editor’s note: PSATS is providing this summary of a court decision affecting the community bill of rights ordinance adopted by Grant Township, Indiana County, referenced in the articles by Chad Nicholson and Kevin Moody.

In mid-October, a Pennsylvania federal court judge stopped Grant Township, Indiana County, from enforcing numerous provisions in a community bill of rights ordinance that it adopted in an effort to prevent the placement of a wastewater injection well within its borders.

In *Pennsylvania General Energy Co., LLC v. Grant Tp.*, ___ F.Supp.3d ___, 2015 WL 6001882 (W.D.Pa. Oct. 14, 2015), the court rejected PGE’s argument that the ordinance was pre-empted by the Oil and Gas Act because the section it relied on, 58 Pa. C.S., Section 3302, was ruled unconstitutional in *Robinson Tp. v. Commonwealth*, 83 A.3d 901 (Pa. 2013). However, the court held that the township exceeded its authority when it attempted to regulate the deposit of fracking waste, could not completely ban a legitimate use (*injection wells*), could not divest corporations of their rights, and could not trump the application of the Second Class Township Code through its ordinance.

It is unclear at this time whether the parties will appeal the decision. In the meantime, on November 4, voters in Grant Township approved a referendum question adopting a home rule charter, which reinstated the ban and may lead to further legal proceedings.

- Although my organization, CELDF, was referenced multiple times, we were not contacted for comment on allegations made about our motivations, our past litigation history in Pennsylvania, or our current legal representation of two townships that are PSATS members.

Conclusion

The very presentation of the original article, “PERIL,” makes clear that it was actually an attempt to scare those reading it, rather than provide an explora-

tion of the various issues involved with community bills of rights.

We are glad for the opportunity to share CELDF’s side of the story, and we look forward to continuing to help communities that are standing up to assert and protect their rights.

Readers are invited to contact CELDF to discuss these difficult issues in more depth and learn more about how they can protect their municipality and join with others who are creating a new and more just system of law in Pennsylvania. ♦