

Question/Answer with Attorney Thomas Linzey of the Community Environmental Legal Defense Fund on the Proposed Peters Township Charter Amendment

Thomas Linzey is the Executive Director of the Community Environmental Legal Defense Fund, a nonprofit public interest law firm which has served as an advisor to the Peters Township Marcellus Shale Awareness (PTMSA) organization. He served as co-counsel with Jules Lobel, the President of the Center for Constitutional Rights (CCR) in recent litigation defending the right of Peters' residents to qualify the proposed Peters Township charter amendment for the ballot.

Q. Given that no fracking corporations have applied for, or obtained, a permit from the State for drilling within Peters Township, what's the chance of Peters Township being sued over the proposed charter amendment, if it passes?

A: The gas corporations – and their energy trade associations – only sue municipalities when they absolutely must to gain access to gas reserves. If the gas corporations want to frack within Peters Township badly enough, they will attempt to sue the Township to overturn the charter amendment (which bans fracking within Peters). They will also attempt to overturn the zoning ordinance if the zoning ordinance impairs their ability to drill in the Township. A lawsuit will inevitably claim that the ordinance and amendment interfere with the corporation's "right" to drill for gas – an argument made more difficult if the gas corporation does not possess a state permit to drill. In addition, the City of Pittsburgh, as well as other municipalities, have had similar laws in place for over a year, and they have not been sued, even though threats of suits were lodged by the gas corporations prior to their passage.

Q. What happens if the Township is sued by a gas corporation?

A: If the Township is sued by a gas corporation, the Township first notifies its insurance carrier. Typically, the insurance carrier will either provide legal counsel to the Township or work with lawyers hired by the Township. The insurance carrier will attempt to settle the litigation with the least exposure to the Township. Unfortunately, many times that means that the insurance carrier will attempt to convince the Township to settle with the gas corporation by agreeing to not enforce the ordinance. Unless residents of the community intervene in that lawsuit, decisions about the future of fracking within the municipality will be left up to the two parties to the suit to decide. Insurance coverage afforded to the Township will be determined by the components of the policy that the Township holds.

Q. Are there other options to stop fracking other than the charter amendment?

A. Unfortunately, no. Although the Township has adopted a zoning ordinance that attempts to limit where surface drilling can occur; it's irrelevant how surface drilling is regulated because horizontal drilling by the gas corporations guarantees that the drilling can occur anywhere in the Township. That includes under residentially zoned areas of the municipality. So, although the surface drilling pads can be zoned within the municipality, that placement bears no relationship to where the drilling can actually occur within the Township, thus leaving the municipality without any conventional tools that can be used to protect residents from drilling done under their homes, churches, schools, etc.

Q. Couldn't the Township government simply refuse to enforce the Amendment if it passes?

Technically, no. Once the amendment becomes part of the home rule charter, it's the responsibility of the Township to enforce it. If the Township government refuses to enforce it, residents could bring suit forcing the Township to enforce the law. However, it is possible that the gas corporations would sue the municipality in an effort to overturn the amendment, and the Township government would elect not to defend the amendment, thus leaving it without an aggressive defense. Under that scenario, residents of the municipality with an interest in stopping the drilling from occurring would be forced to intervene in the case, which would eliminate the ability of the Township government to settle the case with the gas corporations without defending the amendment. Generally, intervention of that sort (by residents with an interest in stopping the drilling and enforcing the law) is allowed by the courts.

Q. If the gas corporations sue, what could that end up costing the Township in terms of hiring a lawyer and participating in the proceedings?

A: Generally, challenges brought to an ordinance or charter amendment, contending that the ordinance or amendment is preempted under state law, or runs afoul of corporate constitutional "rights", do not involve witnesses or trials. They generally consist of paper filings submitted by the parties, followed by a decision by the judge about whether the ordinance or amendment is unconstitutional or illegal. Thus, costs are much lower in those types of proceedings than in ones involving trials, witnesses, and discovery. Generally, municipalities maintain insurance coverage that will cover part, or all, of the costs of litigation, depending on the elements of the insurance policy maintained by the municipality.

Q. If the gas corporation sue, could they sue for damages, which would result in increased financial costs for the Township?

A: Depending on how badly the gas corporations want to access gas deposits in Peters Township, it is likely that the gas corporations will use every "tool in their toolbox" to try to force the overturning of the amendment if it passes. One of those tools – based entirely on the legal fiction that corporations are "persons"- allows the corporation to sue for "takings" of its property. Under the law, corporations claim that their property interest under the gas leases is property that is being "taken" by the amendment. Making that showing – especially when the corporation does not possess a state permit to begin the drilling – may be difficult to prove. However, under a worse case scenario, a gas corporation may be successful in making that claim, depending on the circumstances. It is the primary reason why the charter amendment doesn't just deal with "fracking" but that it seeks to contest the authority of the corporation to use those tools against the people of Peters Township. Again, insurance coverage carried by the municipality may provide coverage in the eventuality of damages, depending on the elements of that insurance coverage. Many policies also contain caps, which would only pay up to a certain amount on damage claims.

Q. Could a Peters Township resident sue the Township for interfering with their leasing of gas rights?

A: A Peters Township resident could attempt such a suit; however, being successful in such an action would require overcoming several hurdles. First, the landowners' interest is entirely contingent upon the terms of the contract signed with the drilling company, which may limit the remedies available to the landowner. In addition, contending that the amendment constitutes a "takings" is generally more difficult for an individual landowner than for a corporation holding a lease interest.

Q. If the proposed amendment passes and is then overturned in the courts, would the zoning ordinance still be in place?

A: Yes, under the terms of the proposed amendment, if the proposed amendment should be overturned, the zoning ordinance is still effective. However, if a gas corporation makes an effort to overturn the amendment in the courts, it is likely that it will attempt to overturn both the zoning ordinance and the amendment at the same time, as an efficient use of judicial resources and legal expenses.