UNITED STATES DISTRICT COURT
THE WESTERN DISTRICT OF PENNSYLVANIA

PENNSYLVANIA GENERAL ENERGY COMPANY, L.L.C. Plaintiff, vs. GRANT TOWNSHIP, Defendant.	Case No. 1:14-cv-209 Magistrate Judge Susan Paradise Baxter

PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Plaintiff, Pennsylvania General Energy Company, L.L.C. ("PGE"), by its undersigned counsel, files this Brief in Opposition to Defendant Grant Township's Motion for Summary Judgment on its Counterclaim (Docket Nos. 157 and 158).

I. INTRODUCTION

It is Grant Township's position that as a local government, it has the right to violate the United States Constitution and state law. It does not possess that right, and this Court should deny Grant Township's Motion for Summary Judgment.

On October 14, 2015, this Court entered a Memorandum Opinion and Order in which it declared as invalid several key provisions of Grant Township's Community Bill of Rights Ordinance (the "Ordinance"), enjoined enforcement of the invalidated provisions and ordered the case to proceed to trial on the remaining claims and the issue of damages. (Docket Nos. 113 and 114.) This Court's Memorandum Opinion and Order also denied Grant Township's request for judgment on the pleadings as to Grant Township's Counterclaim. (*Id.*) In denying judgment on the Counterclaim, this Court found that Grant Township relied upon a "lengthy examination of

historical documents" and "historical events leading up to the American Revolution" to support its alleged right to local, community self-government. (Docket No. 113, at p. 7.) This Court also found that Grant Township provided "no precedential statute or constitutional provision authorizing its action" and held "[w]ithout a legal basis for its actions, as opposed to historical documents and events, this Court cannot provide the relief Grant Township seeks." (*Id.* at pp. 7, 9.)

Grant Township now moves for summary judgment on its Counterclaim and argues that it has provided legal support for its alleged right to a federally protected constitutional right to local, community self-government which permits it to take action that violates the United States Constitution and state law.[1] Grant Township has cited to no such authority, as it does not exist. Grant Township's legal theory is contrary to well-established law and, if accepted by our judicial system, would create anarchy and allow local governments to act in ways that violate the United States Constitution and state laws as the local governments see fit. This Court should promptly deny Grant Township's Motion for Summary Judgment.

The case law Grant Township cites to and relies upon in its Motion does not establish a federal constitutional right to local, community self-government, and certainly does not support Grant Township's assertion that local governmental rights trump the United States Constitution or state law. Whatever rights Grant Township possesses to operate its local affairs, those rights do not extend to violating the constitutional rights of persons, corporations or others. The notion that Grant Township has such a right to violate the Constitution or state law is baseless.

In addition, Grant Township has failed to state a valid claim under 42 U.S.C. § 1983. Grant Township has neither alleged a violation of a federal right nor any adverse action by a

[1] PGE has also filed a Motion for Summary Judgment in which it has requested that Grant Township's Counterclaim be dismissed. (*See* Docket No. 155, pp. 22-23.)

state actor. PGE instituted a private, civil action against Grant Township to challenge a patently unconstitutional and unlawful local ordinance. PGE has not violated any federal constitutional rights held by Grant Township. Further, PGE is a private company, not a state actor.

Accordingly, PGE respectfully requests that this Court deny Grant Township's Motion for Summary Judgment and grant PGE's Motion for Summary Judgment on Grant Township's Counterclaim.

II. ARGUMENT

A. Legal Standard.

Federal Rule of Civil Procedure 56 provides that "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "When applying this standard, the court must examine the factual record and reasonable inferences therefrom in the light most favorable to the party opposing summary judgment." *Coleman v. Pa. State Police*, 2013 U.S. Dist. LEXIS 99609, *29-*30 (W.D. Pa. 2013) (citing *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)). "All reasonable 'inferences, doubts, and issues of credibility should be resolved against the moving party.'" *Id.* at *30 (citing *Meyer v. Riegel Prod. Corp.*, 720 F.2d 303, 307, n. 2 (3d Cir. 1983)).

B. Grant Township Has Not Established a Federal Constitutional or Statutory Right to Local, Community Self-Government.

In addition to repeating arguments previously made in its Motion for Judgment on the Pleadings, Grant Township argues that the Bill of Rights and the Fourteenth Amendment protect more than just the rights specifically enumerated in the United States Constitution. (Docket No. 158, at p. 5.) Grant Township further argues that "[n]ot only does the foundation and history of this country require a recognition of the inherent right of local, community self-government, the

Pennsylvania Supreme Court and many other courts have found that such a right exists." (Docket No. 158, at p. 8.) This foundational argument presented by Grant Township is deeply flawed.

As an initial matter, PGE has never argued that Grant Township lacks any right to govern itself. However, those rights are limited. It is an unquestioned rule of law in Pennsylvania that municipal corporations are "creatures of the state" with no inherent power of their own. *Appeal of Gagliardi*, 163 A.2d 418, 419 (Pa. 1960). *See also Naylor v. Twp. of Hellam*, 773 A.2d 770, 773 (Pa. 2001) ("[I]t is fundamental that municipalities are creatures of the state and that the authority of the Legislature over their powers is supreme"). Consequently, municipal corporations "possess only such powers of government as are expressly granted to [them] and as are necessary to carry the same into effect." *Id*. *See also Naylor*, 773 A.2d at 773-774 ("Municipal corporations have no inherent powers and may do only those things that the Legislature has expressly or by necessary implication placed within their power to do").

Pennsylvania courts have maintained that municipalities ordinarily lack the "power to enact ordinances except as authorized by statute" and have consistently found any ordinance not in conformity with a municipality's enabling statute to be void. *City of Philadelphia v. Schweiker*, 858 A.2d 75, 84 (Pa. 2004). *See also Naylor*, 773 A.2d at 778; *Land Acquisition Servs. v. Clarion County Bd. of Comm'rs*, 605 A.2d 465, 471 (Pa. Commw. Ct. 1991); and *Trigona v. Lender*, 926 A.2d 1226, 1236 (Pa. Commw. Ct. 2007).

Indeed, the question before this Court is not whether Grant Township has any right to govern any activities within its boundaries. The critical question is how extensive are the rights of Grant Township to govern itself and whether Grant Township has the authority to take actions that violate the United States Constitution or state law. This has been a critical question since this

case was filed and remains so today. Yet, Grant Township, despite extensive briefing, has not and cannot point to any legal authority which allows it to take action that violates the United States Constitution or state law.

Further, contrary to Grant Township's arguments, none of the cases relied on by Grant Township stand for the proposition that there exists a *federal* constitutional right to "local, community self-government." Notably, Grant Township does not cite to a single case that interprets the United States Constitution to provide a right to local, community self-government. Likewise, none of the cases cited by Grant Township support Grant Township's contention that the right to local government somehow trumps the United States Constitution or state law.

As an initial matter, Grant Township had the opportunity to present case law in support of its Counterclaim when it attempted to obtain judgment through its Motion for Judgment on the Pleadings (Docket No. 52) and Brief in Support (Docket No. 53). At that time, Grant Township did not cite or rely on the cases relied on it in its Brief in Support of Motion for Summary Judgment (Docket No. 158) for the proposition that there is a federal constitutional right to local, community self-government or that such a alleged right allows Grant Township to take action which violates well-established United States Constitutional principles. In fact, in support of its argument that there exists a federal right to local, community self-government, Grant relied in its Brief in Support of Judgment on the Pleadings solely on the text of the Pennsylvania and U.S. Constitution and its interpretation of certain constitutional provisions based on a historical backdrop of the American Revolution. Grant Township's own Motion for Reconsideration (Docket No. 119) makes this point clear. On page 4 of its Motion for Reconsideration, Grant asserts:

> As the Court seemed to recognize on page 7 of its Memorandum Opinion, Grant Township does not rely solely on historical events or on the argument that corporations are not persons. To the contrary, Grant Township cites to particular provisions of the federal and state constitutions. In particular, Grant Township relies on Article I, Section 2 of the Pennsylvania Constitution, on the Preamble of the United States Constitution, and on the Ninth Amendment of the federal Bill of Rights. Then Grant Township supports invocation of these constitutional provisions by providing a thorough history of the right of local community self-government, as our constitutional jurisprudence makes clear that such history is pertinent to recognition and enforcement of fundamental constitutional rights.

(Docket No. 119, at p. 4.)

Grant Township only now relies on previously uncited case law after this Court pointed out that Grant Township provided no legal precedent to support its argument. In response, Grant Township scrambled to locate opinions in an effort to support its theory. Grant Township once again clearly was unable to locate any precedential case law, and instead cites to state law cases from the 1800's and early 1900's that have no precedential effect on this Court and that do not stand for the proposition that there is a federal right to local, community self-government or that such an alleged right trumps the United States Constitution and well-established constitutional law.

The most recent case relied on by Grant Township was decided in 1937. In *Commonwealth v. McElwee*, 193 A. 628 (Pa. 1937), the Pennsylvania Supreme Court ***did not*** recognize a federal constitutional right to local, community self-government. In fact, the Court in *McElwee* did not apply the United States Constitution or infer any non-enumerated fundamental constitutional rights. In *McElwee*, three members of the Board for the Assessment and Revision of Taxes for the County of Montgomery challenged the constitutionality of a new law that purported to remove them from their appointed office before their terms expired. *Id.* at

630. They argued that the legislature's "attempt to remove an appointive officer prior to the expiration of his term without abolishing his office offends Article VI, Section 4 of the [Pennsylvania Constitution] which reads, in part, as follows: 'Appointed officers . . . may be removed at the pleasure of the power by which they shall have been appointed.'" *Id.* The members of the Board also argued that the new law violated other sections of the Pennsylvania Constitution. *Id.*

The Pennsylvania Supreme Court discussed the principle of "home rule" in a portion of its opinion that is dicta because it had no bearing on the Court's ultimate holding. *McElwee*, 193 A. at 630. With respect to the principle of "home rule" or "local self-government" the Court opined as follows:

> In many states, notably New York, the principle of "home rule" as operative in the selection by the local electorate or by such electorate's chosen officials of public servants to administer matters of local concern, is expressly safeguarded by constitutional provisions[2]. In other states, notably Michigan, the principle of "home rule" is declared by the highest courts of these states to be implicit in the constitution.

Id. The Court ultimately sustained the constitutional challenge finding that the statute at issue "contravenes the prescriptions of section 4 of Article VI of the [Pennsylvania Constitution]…." *Id.* at 633. "The abolition of certain offices is a legislative function, but the abolition of officers is not." *Id.* Having decided that the new law contravened the mandates of Article VI, Section 4,

[2] The Pennsylvania Supreme Court in *McElwee* referred to New York as a state that recognizes the principle of "home rule" or local self-government. Notably, this right of local self-government was derived from the New York Constitution (not the United States Constitution), and the state constitution does not grant unfettered rights to local governments. For example, Article IX, Section 2(a) of the New York Constitution reads: "The legislature shall provide for the creation and organization of local governments in such a manner as shall secure to them the rights, powers, privileges and immunities granted to them by ***this*** constitution." N.Y. Const. art. IX, § 2(a) (emphasis added). Moreover, "every local government shall have power to adopt and amend local laws ***not inconsistent with*** the provisions of this constitution or any general law relating to its property, affairs or government." N.Y. Const. art. IX, § 2(c) (emphasis added). Clearly, New York law does not grant local government the unfettered powers that Grant Township seeks in its Motion for Summary Judgment. Moreover, it is equally clear that the rights and powers of local government in New York derive from the state constitution, not the United States Constitution.

the Court held "it is not necessary to discuss or to decide whether the act contravenes other constitutional provisions." *Id.*

The Pennsylvania Supreme Court in *McElwee* did not find a federal constitutional right to local, community self-government. Nor did the Pennsylvania Supreme Court hold that local government can trump or contravene federal law or the United States Constitution. Rather, the Pennsylvania Supreme Court addressed the right to manage local affairs pursuant to Article VI, Section 4 of the Pennsylvania Constitution, which confers to local governments the right to appoint local officials. PGE has never disputed that local governments maintain a right to govern themselves with respect to local concerns, such as appointing local officials to local offices. However, Grant Township is abusing those rights in direct violation of the United States Constitution and state law. Contrary to Grant Township's contentions, there is no support for the notion that local governments possess the power to govern themselves in a way that contravenes the United States Constitution or state law.

The other opinions cited and quoted at considerable length in Grant Township's Memorandum in Support are from state courts in other jurisdictions and therefore are not binding. Moreover, those opinions do not interpret or apply the United States Constitution to find an implied federal constitutional right to local, community self-government. Instead, similar to *McElwee*, the other decisions relied on by Grant Township all interpret and apply a state constitution and only stand for the general proposition that local governments have the right to manage local affairs based on rights conferred to local governments via their respective state constitutions. For example, in *People v. Draper*, 15 N.Y. 532 (1857), the Court of Appeals of New York interpreted and applied Article X, Section 2 of the New York Constitution to determine whether a state law providing for the election and appointment of all officers, local or

general, was unconstitutional. The Court ultimately held that the statute was constitutionally valid. *Id.* at 556. In discussing the "power of the people" to govern, the Court stated as follows:

> The constitution vests all legislative power in the senate and assembly, with certain restrictions and limitations imposed on that body by the constitution itself. Independent of those limitations, the legislative power is omnipotent within its proper sphere. The legislature, in this respect, is the direct representative of the people, and the delegate and depositary of their power. Hence, the limitations of the constitution are not so much limitations of the legislature as of the power of the people themselves, self-imposed by the constitutional compact.

Id. at 549. The Court held that a state statute authorizing the governor and the senate to appoint all officers, general or local, did not violate the New York Constitution because the constitution did not expressly limit the power of appointment to the local authority. *Id.* at 554-556.

As another example, in *People v. Hurlbut*, 24 Mich. 44 (Mich. 1871), the Supreme Court of Michigan interpreted and applied several sections of the Michigan Constitution to determine whether the appointment of local officials by legislative enactment usurped any powers of local government. The Court held that the challenged statute was not void because the legislature had the power under the Michigan Constitution to create offices and fill them. *Id.* at 78-79. Again, this case recognizes a principle of local self-government, but the rights and limitations of local government are derived from the respective state constitution. The *Hurlbut* case does not stand for the proposition that local government can contravene federal constitutional law.

Critically, none of the cases cited by Grant Township (which were decided from 1857-1937) provide for a broad, omnipotent right to local government. Rather, the cases pertain to matters of purely local concern, not matters that are controlled by the federal and state government. And certainly none of the cases relied on by Grant Township hold or even suggest that local governments have the right to violate the United States Constitution or state law. Instead, the legal authority relied on by Grant Township merely hold that local governments

have the right to manage local affairs, such as the selection of local officers, based on rights conferred in the respective state constitutions. *See, e.g., McElwee*, 193 A. at 629-630 (the appointment of local officials to serve on the Board for the Assessment and Revision of Taxes); *Draper*, 15 N.Y. at 535 (the appointment of county police commissioners); *Hurlbut*, 24 Mich. at 52-53 (the appointment of members of the board of water commissioners); *State v. Denny*, 21 N.E. 274 (Ind. 1889) (the appointment of members to the fire and police boards); *State v. Barker*, 89 N.W. 204 (Iowa 1902) (the appointment of trustees for the board of waterworks); *Ex Parte Lewis*, 73 S.W. 811 (Tex. Ct. Crim. App. 1903) (the filling of local offices by the residents of the locality).

Accordingly, Grant Township has not established a federal right to local self-government that can be applied to trump the United States Constitutional or state law.

C. Grant Township's Right to Local Government Is Not Infringed by the Enforcement of Corporate Constitutional Rights.

Grant Township argues that PGE's undeniable corporate constitutional rights "infringe" upon Grant Township's alleged federal constitutional right to local, community self-government. Not only is there no legal support for this proposition, but Grant Township misses the point of the protections afforded by the United States Constitution to PGE. Contrary to Grant Township's contentions, PGE has not asked this Court to find a fundamental corporate right to inject oil and gas wastes into an injection well. Rather, PGE filed the instant action to challenge the Ordinance because it patently violates fundamental protections afforded by the United States Constitution. Specifically, PGE has alleged that the Ordinance violates its rights under the Supremacy Clause, the Contract Clause and the First and Fourteenth Amendments to the United States Constitution. These are not simply "corporate constitutional rights," but rather they are fundamental constitutional rights that belong to *all* persons, including corporations. The

recognition that corporations have the protection of the United States Constitution does not impinge on Grant Township's ability to govern itself. Grant Township maintains the ability to adopt local ordinances and to regulate matters of local concern as permitted by the Pennsylvania Legislature. What Grant Township cannot do, however, is govern in a way that directly contravenes the protections afforded by the United States Constitution or state law. Grant Township cannot govern in a way that infringes these constitutional rights, regardless of whether a person or a corporation is on the receiving end of the infringement. Grant Township seeks the right to violate the United States Constitution and state law. This power sought by Grant Township should be rejected.

The absurdity of the result sought by Grant Township is obvious when taken to its rightful extension. Grant Township's theory is that rights of "local, community self-government" can be used to allow the local government to take action that violates the United States Constitution. So, Grant Township desires the right not only to eliminate well-established rights that also apply to corporations, but also would allow a local government the right to, for example, prevent the right of individuals to own guns (United States Constitution, 2nd Amendment), permit slavery (United States Constitution, 13th Amendment), prohibit women the right to vote (United States Constitution, 19th Amendment), shut down a newspaper because it includes opinion articles opposing the decisions of the local government (United States Constitution, 1st Amendment), etc. These examples seem beyond the pale of reasonableness, but they are no more absurd than the right being sought by Grant Township in this action to blatantly violate PGE's constitutional rights.

D. Grant Township Cannot Enforce Its Alleged Right of Local, Community Self-Government against PGE because the Counterclaim Fails to Meet the Essential Elements of a Claim under 42 U.S.C. § 1983.

Grant Township's Counterclaim seeks relief pursuant to 42 U.S.C. Sections 1983 and 1988. (Docket No. 10, at ¶¶ 34-63.) To prevail on a Section 1983 claim, a plaintiff must establish the deprivation of a federal constitutional right and that the alleged deprivation was committed by a person acting under color of state law. *Angelico v. Lehigh Valley Hosp., Inc.*, 184 F.3d 268, 277 (3d Cir. 1999). *See also, Abbott v. Latshaw*, 164 F.3d 141, 145 (3d. Cir. 1998) ("Section 1983 provides a cause of action for violations of federally secured statutory or constitutional rights 'under color of state law.'"). Action under color of state law "requires that one liable under § 1983 'have exercised power possessed by virtue of state law and made possible only because the wrongdoer is ***clothed with the authority of state law***.'" *Abbot*, 164 F.3d at 146 (emphasis added). If a plaintiff sues private individuals under Section 1983, he must point to some action that is "fairly attributable" to the state. *Angelico*, 184 F.3d at 277 (citing *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 930 (1982)). "A person may be found to be a state actor when (1) he is a state official; (2) 'he has acted together with or has obtained significant aid from state officials,' or (3) his conduct is, by its nature, chargeable to the state." *Id.* (citing *Lugar*, 457 U.S. at 937). Importantly, "'without a limit such as this, private parties could face constitutional litigation whenever they seek to rely on some state rule governing their interactions with the community surrounding them.'" *Id.*

Grant Township states in its Memorandum in Support that "business corporations are creations of the state" and that "the instant action is merely one of enforcement—PGE's enforcement of pre-existing rights and protections that have been created and recognized by both state and federal authority." (Docket No. 158, at pp. 21, 23-24.) However, the Supreme Court

has consistently held that "the mere fact that a business is subject to state regulation does not by itself convert its action into that of the State for purposes of the Fourteenth Amendment." *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 52 (1999) (citations omitted). Thus, a private entity is not a state actor "unless 'there is a sufficiently close nexus between the State and the challenged action of the regulated entity'…Whether such a 'close nexus' exists…depends on whether the State 'has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State.'" *Id.* (citations omitted.) Accordingly, "the under-color-of-state-law element of § 1983 excludes from its reach 'merely private conduct.'" *Id.* at 50 (citations omitted).

In the instant case, Grant Township filed a Counterclaim against PGE under Section 1983 alleging that PGE seeks to "violate the people of Grant Township's right of local, community self-government" by filing the instant action against Grant Township to challenge the Ordinance. (*See* Docket No. 10, p. 24.) Grant Township argues that PGE is acting "under color of state law" because it is invoking state law and "governmentally-bestowed corporate 'rights'" to nullify the Ordinance. (*Id.*, at p. 26.) However, Grant Township has not cited a single case that supports its argument. This is not surprising. Grant Township's position on "state action" effectively labels every corporation a "state actor" for purposes of Section 1983 by virtue of the fact that corporations are organized under and regulated by state law. Such an extreme and broad interpretation of acting "under color of state law" is without legal foundation and would open the door to Section 1983 actions against companies for all purely private conduct.

PGE is a private entity which filed a private, civil lawsuit. PGE is not acting in conjunction with the State or at the State's direction. The mere fact that PGE is subject to state regulation and is invoking state laws to file a private lawsuit does not transform PGE into a state

actor for purposes of Section 1983. The Supreme Court has expressly held that purely private conduct is excluded from the reach of Section 1983.

Moreover, as discussed above, Grant Township fails to allege the deprivation of a federal constitutional or statutory right. This Court correctly determined in its October 14, 2015 Memorandum Opinion that Grant Township's arguments in support of its Counterclaim failed because Grant Township cited no legal precedent that could support its interpretation of the constitutional provisions that allegedly support its claim of a right to local, community self-government. (Docket No. 119, p.4.) The additional case law that Grant Township has relied upon in support of its Motion for Summary Judgment likewise does not support its claims. Accordingly, this Court should deny summary judgment in favor of Grant Township on its Counterclaim.

III. CONCLUSION

For the foregoing reasons, PGE respectfully requests that this Honorable Court deny Grant Township's Motion for Summary Judgment.

Respectfully submitted,

Dated: February 29, 2016

By: /s/ James V. Corbelli

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed a true and correct copy of the foregoing **Brief in Opposition to Grant Township's Motion for Summary Judgment** this 29th day of February, 2016, using the Court's CM/ECF system, which will automatically serve a copy upon all counsel of record.

By: */s/ James V. Corbelli*