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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Department of Environmental Protection, :
Petitioner :
v. : No. 126 MD 2017
Grant Township of Indiana County and :
The Grant Township Board of Supervisors, :
Respondents :

TRANSCRIPT OF PROCEEDINGS

Before: THE HONORABLE BONNIE BRIGANCE LEADBETTER,
Senior Judge
Date: October 10, 2017, 1:30 p.m.
Place: Commonwealth Court of Pennsylvania
Pennsylvania Judicial Center
601 Commonwealth Avenue, Courtroom No. 3001
Harrisburg, Pennsylvania

APPEARANCES:

Richard T. Watling, Esquire
Michael J. Heilman, Esquire
For - Petitioner

Elizabeth M. Dunne, Esquire
Natalie A. Long, Esquire
For - Respondents

1 THE COURT CRIER: All rise. Commonwealth Court is
2 now in session. The Honorable Bonnie Leadbetter presiding.

3 THE COURT: Please be seated.

4 Good afternoon. Well, we are here for argument on
5 preliminary objections to the new matter and counterclaim of
6 the respondents.

7 So we -- movant.

8 MR. WATLING: Should I approach?

9 THE COURT: Yes; please.

10 MR. WATLING: Good afternoon, Your Honor. I'm Rick
11 Watling, counsel for the Commonwealth in this matter. I'm
12 arguing in support of the department's preliminary objections
13 regarding Grant Township's new matter and counterclaims in it
14 that were filed with its answer in this matter.

15 The department's petition itself is not an attack
16 on the entire home rule charter of Grant Township. Instead
17 it selects to challenge certain provisions that apply to the
18 statutory duties of the government, including the Department
19 of Environmental Protection.

20 The department set forth its arguments in its
21 preliminary objections as well as --

22 THE COURT: Right.

23 MR. WATLING: -- its brief. And I -- if it's -- if
24 it pleases the Court, I'll attempt to address some of the
25 constitutional issues raised in Grant Township respondent's

1 brief that was filed with the Court last week.

2 THE COURT: All right.

3 MR. WATLING: So in order to discuss the
4 constitution -- constitutional issues, I'd like to backtrack
5 and go over a few basics of constitutional law in
6 Pennsylvania, if it pleases the Court.

7 One of those is that the state government has
8 plenary powers and it's unlike the federal constitution which
9 has limited rights. The state constitution addresses all of
10 the powers within the state itself. This is important
11 because Grant distinguishes itself from the state in some of
12 its arguments whereas it is a part of the state.

13 Another important concept is that the Pennsylvania
14 Constitution is read pursuant to basic rules of construction.
15 What that means, according to our -- according to the courts,
16 is read the Constitution in a way that do not render -- does
17 not render the sections meaningless; prefer specific over
18 general language; and if two sections could touch on the same
19 thing, read them to give them both meaning.

20 This is important because Grant has relied on the
21 more general Article I section of the Constitution regarding
22 rights and avoided the more specific provisions that the
23 department cites: Article IX.

24 The third concept is the word people. The
25 Constitution uses the word people on purpose, and so do the

1 courts when they address alleged conflicts in the
2 Constitution itself. The people is a reference to the people
3 of Pennsylvania, not one or two people, not a township by
4 itself and apart from the people of Pennsylvania.

5 So when we have provisions that state that certain
6 enumerated rights cannot be affected by the government,
7 that's a different concept than when the people get together
8 and make an amendment to the Constitution or ratify something
9 in the Constitution that affects the state itself.

10 So with those in mind, I -- I want to also clarify
11 what Grant Township is. It is a municipality. It has
12 admitted the same in its answer, paragraph 2, and --

13 THE COURT: Well, it's a home rule municipality.

14 MR. WATLING: It's a home rule municipality.

15 THE COURT: And their argument is that because
16 they're home rule, they're completely independent of the
17 state.

18 MR. WATLING: And we would just point out that
19 where they argue that they are beyond a home rule
20 municipality and something different, we argue that's not
21 true. The Pennsylvania Constitution clearly, Article IX,
22 Section, I believe, 14, defines a municipality to include a
23 township. So they are within the Constitution and its
24 framework and the Pennsylvania framework of laws.

25 So municipalities are subject to the local law

1 section of Article IX, which I mentioned earlier. And
2 Article IX, Section 2 gives municipalities like Grant the
3 power to adopt a home rule charter pursuant to procedures set
4 forth by the General Assembly in the Home Rule Charter and
5 Optional Plans Law.

6 Article IX, Section 2 of the Constitution
7 specifically limits a municipality. It may only exercise
8 powers or functions not denied by the Constitution, the home
9 rule charter, or the General Assembly.

10 In the Home Rule Charter and Optional Plans Law
11 which is the statute affecting Article IX, Section 2, the
12 General Assembly limited the home rule charter's -- a home
13 rule charter's power to not enlarge statutes applicable to a
14 similar town and that its regulations regarding laws of
15 statewide applicability are superseded.

16 The laws we've referenced in our brief are the
17 Solid Waste Management Act and the Oil and Gas Act. Those
18 laws apply statewide; they're of general application. And
19 the conflict means that the state statute is what we've
20 argued supersedes the local law. And this is the heart of
21 the argument here. The Pennsylvania Constitution restricts
22 what the home rule charter may regulate. And the people
23 adopted Article IX, Section 2 and specifically set forth a
24 framework of laws within which the home rule municipality may
25 do certain things and the state may do certain things.

1 The people did not provide a system with dueling
2 jurisdictions which is essentially the argument we're having
3 here: can a township have its own set of laws different and
4 apart and uncontrolled by state government? The people spoke
5 when they enacted Article IX, and they said, No, that's not
6 the case.

7 To further support that, the Act 13, the Oil and
8 Gas Act, addressed this very issue, addressing the different
9 roles of state government versus local government when it
10 explained that the operations of oil and gas under Chapter 32
11 are the state's concern and municipalities may adopt laws
12 regulating oil and gas only pursuant to the Municipalities
13 Planning Code, the Flood Plain Management Act.

14 An important point of clarification is in the
15 definitions in Act 13, it specifically calls out local
16 ordinances to include home rule charters. So that law is a
17 clear fit and applies to this case.

18 All of these arguments are not to undercut the
19 importance of anything in Article I. Article I is very
20 important, the Declaration of Rights, the Environmental
21 Rights Amendment. Those are to be read also with the rest of
22 the Constitution. The people adopted Article IX. The people
23 adopted Article I.

24 Grant points out that in -- mind if I get my
25 Constitution?

1 THE COURT: Go right ahead.

2 MR. WATLING: -- the reservation of powers and
3 people, Article I, Section 25 is strong in its favor. And
4 they claim that there are certain powers that government
5 can't step into, that are with the people.

6 And what's important is -- and I'm not going to
7 pretend to have memorized every case in my opponent's brief,
8 but they do cite one case: Gondelman. And it clearly
9 explains what should prevail when the specific of the
10 Constitution and the general in the Constitution are
11 advocated by either side of the v.

12 And it was addressing specific provisions in the
13 Constitution regarding judicial age limits, I believe. And
14 it stated that the Declaration of Rights is important but it
15 is a control on government; it is not a control on the
16 people. And when the people speak and the Constitution and
17 it's more specific, that's the section of the Constitution
18 that prevails.

19 Grant is not helpless here. There's guidance in
20 3302, the Oil and Gas Act as to what laws Grant may use to
21 achieve its objectives. And we filed an opinion from a
22 federal court, a magistrate judge, that also addressed some
23 of the Pennsylvania law issues applicable to how
24 municipalities may control what's within their boundaries.
25 They just haven't done it within the legal framework of

1 Pennsylvania here.

2 THE COURT: Well, are you suggesting that they can
3 -- I'm not sure exactly what you mean by saying that they can
4 do it if they do it the right way.

5 MR. WATLING: Well, thirty- --

6 THE COURT: That seemed to be what you were saying.

7 MR. WATLING: Okay.

8 THE COURT: But it seems to me that what they are
9 try- -- or what the township is trying to do is completely
10 exclude a certain activity --

11 MR. WATLING: That's correct.

12 THE COURT: -- which is lawful under state law.

13 MR. WATLING: That's correct.

14 THE COURT: And is there procedurally -- are you
15 suggesting that procedurally there is some way they can do
16 that?

17 MR. WATLING: I don't know every square foot of
18 Grant Township. If their goal is to promulgate -- promulgate
19 a zoning law that completely bans it in every part of the
20 township -- and I'm not a municipal lawyer in this context; I
21 represent the agency -- my understanding is they can make
22 efforts in that regard through the Municipalities Planning
23 Code but it would be subject to a burden shifting and a
24 higher standard with which they'd have to meet regarding
25 public health and safety to support such de jure exclusionary

1 zoning.

2 They can't under the home rule charter system of
3 laws exceed the bounds of the Municipalities Planning Code
4 vis-a-vis municipalities of their class, but they can operate
5 within that --

6 THE COURT: Hasn't the state already made a
7 legislative determination that this is -- this activity is
8 not antithetical to health, safety, and welfare?

9 MR. WATLING: The state reviews oil and gas well
10 permits based on the guidance it has in the Oil and Gas Act
11 as well as its obligations under other laws such as the Clean
12 Streams Law, 1917-A regarding nuisances, and -- as well as
13 the Environmental Rights Amendment.

14 It reviews well permits individually, and it
15 evaluates whether or not they are appropriate for the
16 setting. They do that based on geological analysis as well
17 as, and the most recent regarding some regulations that are
18 being challenged by industry right now, what's in and around
19 the oil and gas well site. So it does evaluate public
20 concerns, public health and safety, natural resources on a
21 case-by-case basis.

22 That doesn't mean that a municipality can't also
23 evaluate sections of its community that -- and this is what
24 was evaluated by a plurality in the Robinson Township case:
25 does anyone have the power left to review where but not how

1 as to oil and gas activities? And the plurality said someone
2 should have that power.

3 And so townships at this point have zoning powers.
4 Again, I'm not a zoning expert, but that's my understanding.
5 They're not exploring that here. Instead they're exploring
6 something different which isn't allowed --

7 THE COURT: Yeah, I understand that.

8 MR. WATLING: Yeah. So the department doesn't
9 dispute the Article I rights are important, but it's arguing
10 that the rest of the Constitution is important too. It seeks
11 dismissal of the new matter and counterclaims because they
12 all hinge on the home rule charter which is the subject of
13 the challenge. And the issue -- the legal issues are clear,
14 and I believe this Court can rule with certainty in the
15 department's favor.

16 THE COURT: Thank you.

17 MR. WATLING: Thank you, Your Honor.

18 THE COURT: All right. Let's hear what the
19 township has to say.

20 MS. DUNNE: Good afternoon, Your Honor. Elizabeth
21 Dunne on behalf of the respondents, Grant Township and The
22 Grant Township Supervisors.

23 It is apparent from the argument you just heard
24 that we are stating fundamentally different views of the
25 Pennsylvania Constitution and what Article I means and the

1 import of the Declaration of Rights in relation to other
2 articles in the Constitution. So I've prepared an argument
3 based on our briefs submitted to the Court, and I can also
4 through that specifically address some of the issues raised
5 by DEP.

6 This case is about the people's fundamental,
7 inalienable, and constitutionally secured right to enact a
8 charter that expresses their rights to self-government and to
9 clean air, water, and soil and to enact prohibitions that
10 secure those rights. The people of Grant Township adopted
11 the charter by popular vote. It is the equivalent of a
12 constitution and on equal footing with state law.

13 Since 2012, the people of Grant Township have been
14 faced with the threat of the disposal of fracking waste in
15 their community, directly next to their homes, and in the
16 Little Mahoning Watershed, a designated high-quality
17 watershed and the sole source of the community's water.

18 In the charter, the people have declared their
19 right to be free from the depositing of waste from oil and
20 gas extraction and has made it unlawful for any corporation
21 or government to engage in such activity within the township.
22 And that includes DEP's action of issuing the permit to
23 Pennsylvania General Energy.

24 Rather than respecting the people's rights as
25 enumerated in the charter, DEP issued a permit to PGE to

1 dispose of fracking waste in express violation of the charter
2 and then filed this action to invalidate the charter. So
3 much to the community's dismay, the very agency that it
4 believed was supposed to be protecting it is suing.

5 In response to DEP's action, Grant Township has
6 pled a five-count counterclaim and a new matter. DEP's
7 preliminary objections which are based primarily on
8 preemption, the limitations of municipal home rule authority,
9 as we just heard, and the failure to exhaust administrative
10 remedies must be overruled.

11 So I'll first address how Grant Township -- Grant
12 Township has stated a claim for relief pursuant to the right
13 of local self-government and then under the Environmental
14 Rights Amendment and explain why the provisions of the
15 charter at issue are not preempted and then explain how DEP
16 is incorrect that Grant Township has failed to exhaust its
17 administrative remedies and finally address the remaining
18 objections by DEP.

19 So first looking at the right to local
20 self-government. As alleged in counterclaim 1, the people of
21 Grant Township assert that one source of the authority for
22 the charter is the right to self-government and that right
23 advances a system of law that responds to the people's needs
24 to increase their civil, political, and environmental rights
25 at the local level. That right addresses a fundamental

1 problem, and that is a system of government where state and
2 federal laws are inadequate and people are constrained by the
3 limitations on municipal authority.

4 As recognized by Justice Nigro in his dissenting
5 opinion in Ortiz versus Commonwealth, I quote, It is
6 fundamentally essential that the local government enact
7 legislation to protect its citizens whenever the state
8 legislature is unable or unwilling to do so, end quote.

9 Courts have long recognized that the United States
10 Constitution provides a minimum level of protection for the
11 people's rights and that a state constitution may provide
12 greater protection for those rights. It's logical then that
13 like a state constitution, the charter, which is the
14 equivalent of a constitution, may also provide greater
15 protections for people's rights.

16 THE COURT: Well, except that is directly contrary
17 to Ortiz. And I may agree with what Justice Nigro said, but
18 that was a dissent. So --

19 MS. DUNNE: Yes, Your Honor.

20 THE COURT: -- you know, I think that's --

21 MS. DUNNE: I do recognize that.

22 THE COURT: I mean, obviously it dealt with a
23 different issue, gun laws versus environmental laws. But
24 they both have -- have their roots in public safety and are
25 important public safety issues. And perhaps more with gun

1 rights than with the environment, but to some extent both of
2 them can vary greatly; the needs can vary greatly from
3 community to community.

4 The -- obviously the need for gun control in the
5 city of Philadelphia is a lot different from a more rural
6 area where hunting prevails, et cetera. And certainly some
7 municipalities may be small enough that they have unique
8 environmental issues.

9 It seems to me that what counsel for the DEP was
10 saying is that to the extent that you have factors which are
11 unique in your township such that anywhere in your township
12 -- and I -- when you were talking about all of the water
13 coming from one source, it may be that you have a unique
14 situation in Grant Township that you could engage in what
15 would otherwise be exclusionary zoning under the
16 Municipalities Planning Code which would be an appropriate
17 avenue under -- in this situation and not preempted if you
18 could show a significant danger to health, safety, and
19 welfare throughout your township.

20 So that -- that avenue may exist, perhaps
21 precluding the necessity to make what I think is sort of a
22 steep, uphill argument that the Environmental Rights
23 Amendment and generally the -- the rights of the people of
24 your township to clean air and water supersede the remaining
25 constitutional provisions and statutory provisions regarding

1 preemption and supremacy.

2 But I've interrupted you. Go ahead.

3 MS. DUNNE: Thank you, Your Honor.

4 Well, I appreciate your thoughts. And I will point
5 out that the Ortiz decision I believe was decided in 1996.
6 And we recognize we're citing the dissenting opinion and
7 recognizing that these arguments -- well, the right to
8 self-government and the inherent rights that are secured by
9 Article I of the Constitution are -- are natural, inherent
10 rights, so they've obviously been existing for a long time --
11 that the particular arguments that we're making in this case
12 before the Court have not actually been made in this forum
13 for the Court to consider the relationship between the
14 Declaration of Rights in Article I and the other provisions
15 of the Constitution.

16 And so we submit that they can coexist and that
17 it's not a question of superiority but it's a question of
18 coexistence of those rights and that inalienable rights --
19 other provisions of the Constitution cannot violate those --
20 those rights. So that's the frame in which we are -- are
21 presenting this and recognizing that it is, I believe, a new
22 argument before -- before the Court.

23 So I'll just read from Article I, Section 2 of the
24 Pennsylvania Constitution. And that provides that all power
25 is inherent in the people and all free governments are

1 founded on their authority and instituted for their peace,
2 safety, and happiness. For the advancement of these ends,
3 they have at all times an inalienable and indefeasible right
4 to alter, reform, or abolish their government in such manner
5 as they may think proper.

6 And that phrase as they may think proper -- and we
7 were talking about -- or DEP's counsel was talking about
8 principles of constitutional construction. And that is a
9 clear phrase, as they may think proper. And that leaves it
10 up to the people to decide as they may think proper. And
11 here, the people of Grant Township felt that what was proper
12 was to adopt a charter by popular vote, by the people. And
13 it is a home rule municipality. It became a home rule
14 municipality. But the people's rights still exist in
15 coexistence with that status as a home rule municipality.

16 And that charter then increases the environmental
17 rights consistent with Article I, Section 2, Section 25, and
18 Section 27, the Environmental Rights Amendment, and includes
19 prohibitions on the depositing of fracking waste to further
20 those rights because having rights without having any
21 prohibition or any action to actually secure those rights is
22 basically a right without any remedy or any ability to
23 exercise it.

24 So talking about the Gondelman versus Commonwealth
25 case which we cited in our brief, that case we recognize is

1 not directly on point as it applies to home rule charters,
2 but it contains some important principles that have a common
3 thread throughout Pennsylvania case law and the history of
4 the Constitution which pertains to the strength of the
5 Declaration of Rights. And that case said Article I does not
6 restrain the power of the people; it restrains the
7 governmental structure that the people have created.

8 Now, the Pennsylvania Supreme Court recently in
9 Pennsylvania Environmental Defense Foundation versus the
10 Commonwealth emphasized the import of inherent and
11 indefeasible rights reserved to the people in Article I. And
12 this time it was in the context of the Environmental Rights
13 Amendment.

14 And the Court at pages nine -- 930 through 31 of
15 the opinion considered the power of the General Assembly
16 derived from Article I -- I mean -- I'm sorry; derived from
17 Article III in relation to Article I, the Declaration of
18 Rights, finding that the General Assembly's power to enact
19 laws are, quote, expressly limited by fundamental rights
20 reserved to the people in Article I of our Constitution, end
21 quote.

22 THE COURT: Well, where do you draw the line for
23 the power of the municipality to enact local ordinances that
24 conflict with state law?

25 MS. DUNNE: Well, Your Honor --

1 THE COURT: Does it have to be -- well, go ahead.
2 I'm going to -- I'll let you answer, and then I'll interrupt
3 you again. Go ahead.

4 MS. DUNNE: A two-part question. Okay. So for the
5 -- for the first part, the line is drawn. We're really --
6 the concept is -- is already ingrained in law which is the
7 concept that the federal constitution is the floor and the
8 state constitution can go beyond that. And that -- we are
9 simply submitting that the local -- at the local level, the
10 people --

11 THE COURT: Well, that's -- that's federal law.

12 MS. DUNNE: -- have the authority.

13 THE COURT: And that's -- yes. And that's clear
14 federal law.

15 MS. DUNNE: Uh-huh.

16 THE COURT: But state law does not say the same
17 thing, that municipalities can do more. That might be a
18 salutary rule, but that doctrine doesn't exist the way it
19 does with respect to the federal government and states.

20 MS. DUNNE: Uh-huh. Well, I think what primarily
21 we're talking about here is the doctrine of preemption. And
22 so that's been applied in the context of when you're looking
23 at -- let's see -- the Williamson case -- Williams -- I'm
24 sorry; Williams versus City of Philadelphia, a recent --
25 another recent case from 2017. The Court looked at the

1 concept of preemption and described it as being about what
2 the General Assembly allows a local government to do.

3 But what we're talking about here -- and so that's
4 in this framework of what it's allowed the local government
5 to do such as under Article IX in the home rule powers. But
6 we're talking about authority in Article IX of the people and
7 the people's authority to self-government and the people's
8 right to a clean environment under the Environmental Rights
9 Amendment.

10 THE COURT: Well, okay. My question is, where do
11 you draw the line? Can -- because the people of Grant
12 Township feel that there's -- that -- that bicycles are
13 interfering with traffic, can they prohibit the right to ride
14 bicycles throughout the town? Can they, to -- to draw an
15 example that would be clearly in conflict with state law, say
16 that no matter what PennDOT posts, no one can drive anywhere
17 in the township at a greater speed than 25 miles per hour?
18 Could they enact other kinds of legislation under the guise
19 of self-rule that would be plainly in conflict with state
20 law? I assume that you would not say they can do any of that
21 anytime they want. So where do you draw the line? When --
22 when is it your position that they can essentially trump
23 state law?

24 MS. DUNNE: Well, the answer to that is that the --
25 the tools for the Court to decide when that is already exist.

1 And although it's the doctrine of the federal constitution
2 being the floor and the state constitution being able to
3 expand rights, here it's limited by an expansion of rights.
4 And so the answer to that would be whether it's an expansion
5 of the people's health, safety, and welfare rights to secure
6 their environmental rights so they're able to actually go
7 beyond what the state constitution is protecting. And so
8 there's limitations because you still aren't able to as a
9 local -- as local people, as a local home rule municipality
10 able to, say, discriminate in violation of the state or
11 federal constitution because that would then be exceeding the
12 floor established by those constitutions.

13 So that framework -- and these are things --

14 THE COURT: Could the township provide for harsher
15 criminal penalties for violations of state law than the state
16 provides?

17 MS. DUNNE: A -- so there's a lot of different
18 scenarios that we can -- we can address this in. And so if
19 there's a justification for harsher -- harsher criminal
20 penalties at the state -- or at the -- at the local level and
21 there was a system of -- you know, a judicial system that
22 would actually be implementing those penalties and that would
23 be furthering health, safety, and welfare of the people in
24 the community, then they're -- then that type of action could
25 be taken.

1 I mean, these are subject to the same tests that
2 the Court applies when -- when the Court deals with any, for
3 example, just conflicting rights, when there's a right to do
4 one thing and there's a right to do another and those rights
5 conflict. And so the Court has to weigh how do we resolve
6 when there are conflicting rights, like concerns about
7 privacy and -- and those kinds of things where the courts are
8 frequently weighing those. And so I would say --

9 THE COURT: Well, go ahead.

10 MS. DUNNE: Yeah. And so -- I mean, I was also
11 going to point out that, you know, at this stage, the
12 question is whether there is -- whether we stated a claim for
13 a right to local self-government as far as the nuances of how
14 that applies here in this case and how it applies to --

15 THE COURT: Well, let me ask you a question. Is
16 there anything in any of this that implicates fact-finding as
17 opposed to being pure questions of law?

18 MS. DUNNE: Well, the way the case has been
19 presented at this stage, we --

20 THE COURT: I'm talking about these --

21 MS. DUNNE: Oh, in the concept of --

22 THE COURT: -- the new matter which is the subject
23 of the preliminary objections.

24 MS. DUNNE: Uh-huh. The -- the new matter and the
25 counterclaims.

1 THE COURT: Yes.

2 MS. DUNNE: Is there anything that could get into
3 fact-finding? At this point, I don't see fact-finding
4 because we have an admission basically as a matter of law if
5 there's a claim stated under the right to local
6 self-government and the Environmental Rights Amendment and
7 there's a claim stated for violation of the charter in
8 violation of the Rights Amendment. So we have the claims
9 that are -- are counter to their -- the declaratory judgment
10 action, you know, based on that legal authority.

11 And so factually the department obviously pleads
12 that the -- it issued the permit in violation of the charter.
13 That's the purpose of the lawsuit, is to basically seek court
14 clarification on its action because --

15 THE COURT: Right.

16 MS. DUNNE: -- it expressly violated the charter.
17 So in this context, I don't see a factual dispute as to -- as
18 to that issue. I think that if the Court were -- if there
19 would be a need -- yes. So as to that particular issue, then
20 I don't see a dispute as to that.

21 As far as the claim -- and so that would be our
22 counterclaims for declaratory judgment which basically
23 correspond or respond to the counterclaims as to the validity
24 of the charter. And also as to our claim that the DEP has
25 violated the charter, I don't think there's any dispute

1 there.

2 As to the claim that the -- the DEP has violated
3 the Environmental Protection Act -- and I heard some issues
4 that might sound like that factual issue is there -- I think
5 as far as the Environmental Rights Amendment being authority
6 for the charter, there is no -- I mean, the Robinson case is
7 clear that a town, a local government can enact laws that
8 increase environmental protections. And that's exactly what
9 Grant Township did in this case. And so if that language is
10 to mean anything, then that's -- then that's the result, is
11 that the charter is valid under the Environmental Rights
12 Amendment that specifically addresses those -- those rights.

13 So I just wanted to remind the Court -- I think
14 there were some questions about the Court's authority or
15 recognition of the right to local self-government or
16 recognition of the application of the Environmental Rights
17 Amendment in this case, but the Court's jurisprudence is
18 actually ripe for this type of determination because the
19 pieces are all there. And they have been there, and there's
20 threads of it throughout the case law. And it's just a
21 matter of putting it together to actually recognize that the
22 community has a right to enact a charter to increase its
23 rights.

24 And what I'm referring to specifically is that the
25 Court has long recognized that charters are constitutions

1 that are on equal footing with state law. And I know Your
2 Honor is well aware of that -- of that proposition.

3 And I think what happens is that then that concept
4 exists but then it takes this turn and then we end up in this
5 preemption analysis that then takes away the status of a
6 charter being a constitution and being on equal footing
7 because if it's on equal footing, how is it preempted? And
8 so that is, I think, a hole in the case law that we're asking
9 the Court to make that connection here and recognize in this
10 context, that local communities do have that right.

11 And the case law advancing -- or the case law that
12 exists -- actually it's a long thread of case law under
13 Article I explaining how significant those rights are and
14 that those are rights retained by the people. And just
15 because they haven't been exercised in this fashion before
16 certainly doesn't mean that they don't exist and certainly
17 doesn't mean that the Court can't recognize them and
18 certainly doesn't mean that this Court can't recognize them
19 as opposed to a higher court. And we cited some authority
20 for that in our -- in our brief of examples of -- of how
21 that's possible.

22 And also the doctrine of preemption, it's a
23 judicially created doctrine here. And it can be modified to
24 fit the changing circumstances. We're looking at the Ortiz
25 opinion from 1996. And so now we're in a different situation

1 now. We're over a decade later. And we're looking at --
2 that -- there was a need recognized back in that time for
3 local governments to be able to increase rights and address
4 issues at the local level, as Your Honor recognized. And
5 that need exists today, and it's evermore increasing. And so
6 the people need that ability to do that. And the people have
7 that ability, and they have that right. They have that
8 inherent right to do that.

9 And just turning to the Environmental Rights
10 Amendment, we've talked about that a little bit. But I
11 wanted to point out that the -- so the DEP hasn't made any
12 specific objections as to the Environmental Rights Amendment
13 and -- and Grant's claims. In its brief, there was no
14 mention of the Environmental Rights Amendment actually. So I
15 take that to mean it's relying on kind of general allegations
16 of lack of specificity and perhaps on its exhaustion, failure
17 to exhaust argument.

18 But, again, I'm pointing out that the law here is
19 -- is very clear that the township has that authority; that
20 the people had a right; and the township also has an
21 authority -- has the -- has the duty in fulfilling its
22 obligations, its public trustee obligations. And we further
23 submit that the DEP has failed to fulfill its public trustee
24 obligations because it hasn't protected the people. And you
25 see examples of that all throughout the state.

1 So Grant Township submits it has stated a claim
2 against the Department of Environmental Protection for
3 violation of the Environmental Rights Amendment on those
4 grounds. And that's an independent claim obviously from the
5 idea that it's a source of authority, in our allegations that
6 the Environmental Rights Amendment is a source of authority
7 for the charter.

8 So I also wanted to note there was the limitations.
9 So even if the Court were to apply the home rule limitations
10 in Article IX and the home rule law and the preemption
11 doctrine, the DEP's argument still fails on preemption. And
12 that's because -- so the DEP cited the Duff case as the
13 preemption standard in its brief. And that case doesn't
14 apply here because we're talking about a home rule
15 municipality. And, again, this is in the paradigm of
16 traditional preemption analysis obviously. So we submit that
17 those provisions of home rule law are unconstitutional.

18 Other provisions of the home rule law can be in
19 effect, but the provisions of the home rule law that actually
20 prevent true home rule and local communities from enacting
21 laws that increase their rights are unconstitutional because
22 they violate the right to local self-government. And when
23 they -- pertaining to increasing environmental rights, they
24 violate Section 27 of the Constitution.

25 So -- but even under the traditional analysis, the

1 Oil and Gas Act and Solid Waste Management Act are not laws
2 applicable in every part of the Commonwealth. And as cited
3 in our brief, in 2012, the General Assembly passed a law
4 prohibiting DEP from issuing well permits in certain portions
5 of the state known as the South Newark Basin. And just
6 recently another commission, the Delaware River Basin
7 Commission, passed a resolution prohibiting certain oil and
8 gas activities within the Delaware River Basin, and that
9 includes parts of Pennsylvania. So it's not a law of general
10 application. It doesn't apply everywhere in the state. And
11 so that policy doesn't apply; that need for preemption does
12 not exist here.

13 And what happens in that kind of context -- and
14 this is important to understanding the need for the right to
15 local self-government and the people of Grant Township
16 enacting here. Grant Township is a town of 700 people. It's
17 a small, rural township with -- with less economic means than
18 many areas of the state. And so what happens often is that
19 areas of the state with greater economic means end up
20 achieving moratoriums and bans on such activities and then
21 the other areas of the state don't. And so the law is not of
22 general application. There is no need that it be of general
23 application. And, therefore, even under traditional
24 preemption analysis, the charter -- the provisions of the
25 charter at issue in this case are not preempted.

1 And now turning to DEP's objections regarding
2 jurisdiction and the failure to exhaust remedies, those
3 objections also must be overruled. Given the import of the
4 constitutional questions at stake, it's -- it's apparent that
5 DEP's objections -- these objections are -- are without merit
6 here. We've briefed this in our -- briefed the case law in
7 this.

8 But I find it somewhat hypocritical that DEP has
9 recognized that the Court's jurisdiction -- that the Court
10 has jurisdiction over its claims for declaratory judgment but
11 does not have jurisdiction over the counterclaims and the
12 related claims -- related counterclaims brought by Grant
13 Township which are declaratory judgment actions.

14 The first three are declaratory judgment, seeking a
15 declaratory judgment that the charter provisions at issue are
16 in fact valid under the legal -- as stated in the claims. So
17 it's hard to see how there's no jurisdiction over Grant
18 Township's claims when the Court can hear DEP's claims.

19 Also the issues here are not about the conditions
20 of the permit that -- that DEP granted to PGE, and that type
21 of thing would be before the Environmental Hearing Board.
22 The case law says that you look at whether the -- it's an
23 area in which the Environmental Hearing Board has expertise.
24 This is not an area in which the Environmental Hearing Board
25 has expertise. We aren't arguing about the conditions of the

1 permit. We're arguing about the people's fundamental,
2 constitutional rights.

3 In addition, it's well established that here we're
4 challenging an agency's jurisdiction which the -- the
5 township is challenging Grant -- DEP's jurisdiction to issue
6 the permit under the charter, that the Environmental Hearing
7 Board does not have a role -- it does not have a role there.
8 It's a challenge to jurisdiction. And in fact the
9 Environmental Hearing Board doesn't have jurisdiction over
10 declaratory judgment action claims which are all the claims
11 brought by DEP and half the claims brought by Grant Township.
12 So on those grounds, we submit that the DEP's preliminary
13 objections should be denied.

14 As to the lack of specificity, I think that the
15 extent of the briefing on this and the -- the length of our
16 -- the new matter and the -- and the counterclaims and the
17 specificity there, I didn't -- I -- that should be dismissed.
18 Clearly we've gone far beyond what's required for pleading.
19 In the event that the Court is inclined to find that there's
20 a lack of specificity as to any of the claims, then we would
21 request leave to amend.

22 Finally, Grant has properly asserted the right to a
23 jury trial so long as there are factual issues in dispute.
24 And as the Court is aware, we included a request for a jury
25 trial in the -- the answer as -- as you need to do in order

1 not to waive that in the event that there are factual issues
2 that should be brought before a jury.

3 The final thing I wanted to address is the order in
4 the federal case that was filed, the application filed with
5 the Court, Seneca versus Highland Township. That case
6 obviously is not binding on this Court, and it didn't come
7 out of a truly adversarial proceeding. I think that's an
8 important -- a very important point to make, is that Highland
9 Township agreed -- basically Seneca Resources filed the
10 complaint, claiming that the charter was invalid. And
11 Highland Township agreed that the charter -- admitted in its
12 answer that the charter was invalid. So the Court's analysis
13 was not informed by any of the arguments that Grant Township
14 is making here today nor any arguments under any analysis in
15 defense of its charter. So the Court didn't have the benefit
16 of the arguments that are before this Court.

17 THE COURT: Well, if the parties agreed, why was
18 there ever an adjudication in the first place?

19 MS. DUNNE: The reason that the -- it was decided
20 on a motion for judgment on the pleadings is because it's a
21 charter, so the township couldn't just -- because it's
22 democratically enacted by the people, by popular vote. And
23 under the law, the township cannot just agree and basically
24 give away the people's rights.

25 THE COURT: They can't -- they can't settle a

1 lawsuit?

2 MS. DUNNE: They cannot -- they cannot say that the
3 charter -- they can't repeal the charter. So the mechanism
4 that was determined there was to file a motion for judgment
5 on the pleadings. Basically the company and the township
6 agreed. So the Court didn't have the benefit of any of this
7 briefing. The Court did not consider any arguments under
8 Article I.

9 Obviously the arguments that we're making here are
10 -- are heavily based on state law, the Pennsylvania
11 Constitution, the Environmental Rights Amendment, and the
12 right to local self-government and this very strong line of
13 case law emphasizing the import -- and, again, most recently
14 with the 2017 case in the Pennsylvania Environmental Defense
15 Foundation, the importance of Article I and the Article I
16 powers.

17 THE COURT: Thank you.

18 MS. DUNNE: Thank you.

19 MR. WATLING: Your Honor, may I address two points?

20 THE COURT: You may. I recognize that you were
21 quite brief in your presentation, and I've allowed
22 considerable additional time for the township. So -- but try
23 to --

24 MR. WATLING: Thank you. I think --

25 THE COURT: Try to keep it to rebuttal --

1 MR. WATLING: We will. I think we addressed many
2 of those arguments, so I'll just try and focus on a couple
3 points we didn't address or I didn't address.

4 The Solid Waste Management Act and the Oil and Gas
5 Act are laws of statewide application. I went to the links
6 in Grant Township's brief, and I believe I have the correct
7 document. One is a Fiscal Code omnibus amendment that
8 addresses well permits and whether or not they would be
9 issued until January 1st, 2018, in an area called the South
10 Newark Basin. And Your Honor can get that online too. I'll
11 be glad to give you a copy.

12 And it essentially says the department was going to
13 hold off on issuing new well permits in a limited area of
14 Pennsylvania until January 1st, 2018, while a study was being
15 done. It did not carve out that part of Pennsylvania from
16 the Oil and Gas Act's jurisdiction.

17 THE COURT: Was there a statute that effected that?

18 MR. WATLING: It was a Fiscal Code amendment, and
19 then it referenced --

20 THE COURT: Oh, okay. You said that.

21 MR. WATLING: Yeah.

22 THE COURT: I'm sorry. Yes.

23 MR. WATLING: And then regarding the DRBC, they
24 have federal -- they're like a commission that's part
25 federal, part state, where several states that are invested

1 in the Delaware River Basin have a commission. And they have
2 an overlay of jurisdiction, if you will, but it doesn't mean
3 that the Oil and Gas Act doesn't apply in that part of
4 Pennsylvania. A lot like in this case there's federal
5 jurisdiction over the injection well; there's a federal
6 permit for it. But the department also has jurisdiction over
7 the well under its Oil and Gas Act.

8 And in addition, the -- the resolution itself says
9 the commission is requesting the drafting of provisions for
10 ensuring safe and protective storage, treatment, and disposal
11 and/or discharge of wastewater within the basin. It's not
12 talking about -- it's just saying, Create some provisions.
13 So that's a clarification.

14 Another point is we're not saying that all these
15 issues should be brought to the Environmental Hearing Board.
16 We're just saying that there were some challenges to the
17 decision itself among the various paragraphs in what comprise
18 the new matter and counterclaims and some of those appeared
19 to go to the merits of whether or not it was a good idea to
20 issue the permit. And the Environmental Hearing Board is in
21 a better position statutorily, code-wise, and from expertise
22 as well to address those concerns.

23 So with that, I'll thank you for your time.

24 THE COURT: Thank you.

25 We'll take it under advisement. Thank you all.

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Well argued on both sides.

THE COURT CRIER: Commonwealth Court is now
adjourned.

(Whereupon, the proceedings adjourned at 2:15 p.m.)

I hereby certify that the proceedings and evidence
are contained fully and accurately in the notes taken by me
on the proceedings of the above cause and that this copy is a
correct transcript of the same.

DATED: November 9, 2017



Rebecca Toner, RPR

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