

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA, :
DEPARTMENT OF ENVIRONMENTAL :
PROTECTION, :

Petitioner, :

v. :

No. 126 M.D. 2017

GRANT TOWNSHIP OF INDIANA COUNTY :
and THE GRANT TOWNSHIP SUPERVISORS, :

Respondents. :

RESPONDENTS’ SUPPLEMENTAL BRIEF IN OPPOSITION TO
PETITIONER’S PRELIMINARY OBJECTIONS TO
RESPONDENTS’ NEW MATTER AND COUNTERCLAIM

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FOR GRANT TOWNSHIP OF INDIANA
COUNTY AND THE GRANT TOWNSHIP
SUPERVISORS

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PROCEDURAL BACKGROUND

On March 27, 2017, the Petitioner Pennsylvania Department of Environmental Protection (“DEP”) filed a Petition for Review in the Nature of Complaint Seeking Declaratory and Injunctive Relief (“Petition”).

On May 8, 2017, Grant Township filed an Answer, New Matter, and Counterclaim.

On June 19, 2017, DEP filed Preliminary Objections to New Matter and Counterclaim of Respondents.

On September 1, 2017, DEP filed a brief in support of its preliminary objections.

On October 3, 2017, Grant Township filed Respondents’ Brief in Opposition to Petitioner’s Preliminary Objections to Respondents’ New Matter and Counterclaim.

On October 10, 2017, the Court held oral argument on DEP’s Preliminary Objections to New Matter and Counterclaim of Respondents.

On December 1, 2017, Respondents filed an Application for Leave to File Supplemental Brief in Opposition to Petitioner’s Preliminary Objections, to which DEP filed an Opposition that same date.

On December 15, 2017, the Court granted Respondents' Application for Leave to File Supplemental Brief in Opposition to Petitioner's Preliminary Objections.

On December 21, 2017, the Court granted Respondents' Unopposed Application for an Extension of Time to File Supplemental Brief, and gave Respondents until January 5, 2018 to file a supplemental brief.

ARGUMENT

The question before this Court is whether the people of Grant Township have the right to adopt a Charter that secures their right to clean air, water, and soil, and that exercises their right to outlaw activities that threaten their right to clean air, water, and soil, including the right to be free from the depositing of fracking waste, by declaring it "unlawful within Grant Township for any corporation or government to engage in the depositing of waste from oil and gas extraction." (Grant Township Home Rule Charter ("Charter") at Section 301.)¹ The answer is yes. The prohibitions contained in Section 301 of the Charter, and the related provisions in Sections 302, 303, and 306, are pursuant to the people's fundamental, unalienable, and constitutional rights under the Pennsylvania Constitution's

¹ The right to clean air, water, and soil is enumerated in Section 104 of the Charter. The prohibitions contained in Article III of the Charter also advance other rights enumerated in Article I of the Charter, such as the right to scenic, historic, and aesthetic values of the Township (Section 105); of natural communities and ecosystems within the Township to exist, flourish, and naturally evolve (Section 106); and to a sustainable energy future (Section 107).

Declaration of Rights, Article I, §2 (political rights), §25 (rights reserved to the people) and §27 (the “Environmental Rights Amendment” or “ERA”).

Sections 301, 302, 303, and 306 are also in accordance with Grant Township’s public trustee obligations to protect the people’s environmental rights under the Environmental Rights Amendment.

Under the Environmental Rights Amendment “[t]he people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic, and esthetic values of the environment” (collectively, “environmental rights”). In adopting the Charter, the people of Grant Township further expressed their environmental rights in Article I (Bill of Rights) as including the right to be free from activities which threaten clean air, water, soil, and scenic, historic, and aesthetic values, including the right to be free from the depositing of waste from oil and gas extraction.²

DEP’s claims (Counts I-V) go to the question of whether Sections 301, 302, 303, and 306 of the Charter are valid, as do Counts I, II, and III of Grant Township’s Counterclaim. Counterclaim IV goes to the related question of whether DEP is violating its public trustee duties under the ERA by failing to protect and advance the people’s rights secured by the ERA, and by attempting to prevent the

² The Charter’s Article I (Bill of Rights) enumerates rights parallel to, in furtherance of, and, in some instances, more specific than the Environmental Rights Amendment. Specific provisions within the Charter’s Bill of Rights are not at issue in this case.

people of Grant Township from doing so.³ Counterclaim V seeks the relief that flows from a finding in Grant Township's favor as to its other counterclaims since it is undisputed that DEP has issued a permit to Pennsylvania General Energy Company, LLC ("PGE") in violation of the Charter.

As a Supplemental Brief, this brief further explains the legal basis for Sections 301, 302, 303, and 306 of the Charter and the framework applicable to laws that delineate and, in some cases, expand fundamental civil, political, and environmental rights at the local level. Grant Township does not waive any prior arguments by not reasserting them here.

³ As stated by counsel for Grant Township at oral argument, in Grant Township's view, based on the allegations in the present case, there is no issue of fact as to the validity of Sections 301, 302, 303, and 306 of the Charter. This is because Grant Township has alleged, and submits it cannot be disputed, that the people enacted the Charter provisions at issue pursuant to their fundamental right of local self-government as secured by Article I, §2 and §25 as well as pursuant to §27, the Environmental Rights Amendment. The prohibitions prevent the depositing of waste from oil and gas activity in accordance with the people's exercise of their fundamental rights. Under different circumstances, there could be an issue of fact as to whether a local law secures, expands or increases fundamental and inherent rights or rights secured by the federal and state constitutions. In which case, both parties would have the opportunity to present evidence and argument as to whether the provisions at issue are rights securing and/or expanding. Here, it cannot be disputed that the Charter, including its prohibitions, secure and advance the people's environmental rights. As to Counterclaim IV, Grant Township further submits that attempting to prevent it from enacting a law in accordance with the people's environmental rights and pursuant to Grant Township's public trustee duties is a violation of DEP's own public trustee duties. That said, DEP may somehow attempt to limit its public trustee duties and whether DEP has breached its public trustee duties could become a question of fact. In its New Matter (¶¶67), Grant Township further asserts other grounds upon which DEP is violating the ERA, and cites to investigations that support its allegations in this regard. Again, DEP has not raised a preliminary objection as to the substance (as opposed to alleged legal insufficiency and failure to exhaust) of Grant Township's claims based on the ERA, and therefore, the Court has not been presented with grounds to dismiss those claims. Nor does the DEP address Grant Township's assertions in its New Matter based on waiver and estoppel. (New Matter ¶¶ 69-71).

I. The Charter’s Prohibitions Against the Depositing of Waste from Oil and Gas Extraction Are Pursuant to the People’s Fundamental and Constitutionally Secured Rights and Grant Township’s Public Trustee Duties.

Sections 301, 302, 303, and 306 of the Charter are valid. These Charter provisions are not preempted by less-protective state law because of the (1) the people’s fundamental right of local community self-government; and, independently, (2) the Environmental Rights Amendment (§27). The import of the Environmental Rights Amendment is two-fold: (1) it secures the people’s inherent and infeasible environmental rights and limits the state’s power to act contrary to these rights; and (2) obligates both the Commonwealth and local governments, such as Grant Township, to conserve and maintain public natural resources. *See Pa. Env’tl. Def. Found. v. Com.*, 161 A.3d 911, 931-33 (Pa. 2017). Under the ERA, Grant Township “must act affirmatively via legislative action to protect the environment.” *Id.* at 933; *see Robinson Twp. v. Com.*, 623 Pa. 564, 647–48, 83 A.3d 901, 952 (2013) (plurality) (“the constitutional obligation [of the ERA] binds all government, state or local, concurrently.”) (citing *Franklin Twp. v. Com., Dept. of Env’tl. Res.*, 452 A.2d 718, 722 & n. 8 (citing Section 27, Court stated that protection and enhancement of citizens’ quality of life “is a constitutional charge which must be respected by all levels of government in the Commonwealth”); *see Hartford Acc. and Indem. Co. v. Ins. Comm’r of Com.*, 482 A.2d 542, 549 (Declaration of Rights provision “circumscribes the conduct of state and local

government entities and officials of all levels in their formulation, interpretation and enforcement of statutes, regulations, ordinances and other legislation as well as decisional law.”)).

DEP alleges that Sections 301, 302, 303, and 306 are beyond the scope of Grant Township’s authority by citing preemption, the Home Rule Charter and Optional Plans Law, and Sovereign Immunity. DEP ignores the import of the Pennsylvania Constitution’s Declaration of Rights, Article I, in particular the people’s political and environmental rights.

A construct in which DEP can regulate the disposal of fracking waste to the exclusion of the people and local government is incompatible with the people’s constitutional rights under Article I, §2, §25, and §27 as exercised in adopting the Charter and with the rights enumerated in the Charter itself. The doctrine of preemption does not and cannot be applied, where, as here, the Court is called upon to consider whether the state is acting contrary to fundamental and inherent rights as enumerated in Article I. (*See* Grant Township’s Brief at p. 30-32; *Williams v. City of Philadelphia*, 164 A.3d 576, 584-85 (Pa Commw. Ct. 2017) (noting that preemption is rooted in the relationship between the constitutional provisions involving the legislature (Article III) and those providing for local government (Article IX)).

Nor can state law be applied to prevent Grant Township from fulfilling its public trustee duties “to prevent and remedy the degradation, diminution, or depletion of our public natural resources.” *Pa. Env’tl. Def. Found.*, 161 A.3d at 932. Requiring Grant Township to allow the depositing of fracking waste from oil and gas activity within the Township unlawfully forces it to violate its constitutionally prescribed duties to the people under the Environmental Rights Amendment, as well as the constitutionally enacted Charter provisions.⁴ The Court should reject DEP’s attempt to force Grant Township to violate the people’s constitutional rights as secured by the ERA and the Charter by accepting the depositing of fracking waste.⁵

⁴ Contrary to DEP’s suggestion at oral argument, regulating the depositing of waste from oil and gas extraction through zoning would be wholly insufficient to protect the people’s environmental rights and is, in fact, unavailable. Given Grant Township’s small population of around 700 people, it does not have a planning commission or a zoning code.

⁵ The state’s exercise of its lawmaking power, through the Oil and Gas Act and Solid Waste Management Act, to interfere with, and impair, the people’s environmental rights by subjecting them to the depositing of fracking waste is unconstitutional. Not only have the people acted to secure their fundamental Article I rights by adopting a valid local law in the form of a Charter, but, even absent the Charter, any governmental intrusion into the people’s fundamental rights must be narrowly tailored to achieve a compelling state interest. *See William Penn Sch. Dist. v. Pennsylvania Dep’t of Educ.*, 170 A.3d 414, 458 (Pa. 2017) (strict scrutiny applies where fundamental rights are at issue). DEP’s attempt to invalidate Sections 301, 302, 303, and 306 of the Charter violates the people’s fundamental environmental rights. (*See* Counterclaim IV, ¶122). Further, as alleged in Counterclaim II, interpretation of the Oil and Gas Act and Solid Waste Management Act to preempt the Charter violates the people’s right of local community self-government because it restricts the people’s fundamental, inherent, and constitutionally derived right to expand their civil, political and environmental rights beyond the protections afforded by state and federal law. (Counterclaim ¶¶ 104-05.) DEP’s preliminary objections do not address the substance of Counterclaims II and IV.

At oral argument, DEP attempted to downplay the significance of Article I by claiming that it is subject to Article IX of the Pennsylvania Constitution, pertaining to local government, and Article III, pertaining to the powers of the General Assembly. DEP's position is contrary to the Pennsylvania Supreme Court's recent articulation of the import of Article I:

[T]he General Assembly derives its power from Article III of the Pennsylvania Constitution which grants broad and flexible police powers to enact laws for the purposes of promoting public health, safety, morals, and the general welfare. *Id.* at 946. These powers, however, are expressly limited by fundamental rights reserved to the people in Article I of our Constitution. *Id.* at 946. Specifically, Section 1 affirms, among other things, that all citizens 'have certain inherent and inalienable rights.' *Id.* at 948 (quoting Pa. Const. art. I, § 1). As forcefully pronounced in Section 25, the rights contained in Article I are 'excepted out of the general powers of government and shall forever remain inviolate.' *Id.* (quoting Pa. Const. art. I, § 25).

Pa. Envtl. Def. Found., 161 A.3d at 930–31.⁶

While *Pennsylvania Environmental Defense Foundation* specifically addressed the General Assembly's powers under Article III, similar logic applies to

⁶ Similarly, the Court in *Robinson Twp. v. Com.*, 623 Pa. 564, 639, 83 A.3d 901, 947 (2013) said:

Specifically, ours is a government in which the people have delegated general powers to the General Assembly, but with the express exception of certain fundamental rights reserved to the people in Article I of our Constitution. See Pa. Const. art. I, § 25 (reservation of powers in people); *see also Nat'l Wood Preservers, Inc. v. Com.*, 489 Pa. 221, 414 A.2d 37, 44 (1980) (citing Pa. Const. art. I, § 27) ("maintenance of the environment is a fundamental objective of state power"). Section 25 of Article I articulates this concept in no uncertain terms: "[t]o guard against transgressions of the high powers which we have delegated, we declare that everything in this article is excepted out of the general powers of government and shall forever remain inviolate."

the authority of home rule municipalities under Article IX, §2. Article IX cannot limit the exercise of the fundamental rights reserved to the people in Article I. Indeed, nowhere in its plain language does Article IX purport to do so.

A. The Right to Local Community Self-Government is a Source of Authority for Sections 301, 302, 303, and 306 of the Charter.

As set forth on pages 18-28 of Grant Township’s brief, the people enacted Sections 301, 302, 303, and 306 of the Charter pursuant to their right of local community self-government. The concept of the right to local self-government originates from the founding principles of the United States as set forth in the Declaration of Independence -- that people have inherent and inalienable rights, that people are the source of governmental authority, that people wield that authority to secure and protect their rights, and that the people may alter or abolish any government that fails to satisfy these fundamental principles.

The Pennsylvania Constitution’s Declaration of Rights embraces the revolutionary era’s focus on the sovereignty of the people, by providing that “all power is inherent in the people” and that the people have an “inalienable and inalienable right to alter, reform, or abolish their government as they may think proper.” Pa Const. art I, §2. Article I, §2 must be read according to the fundamental rules of constitutional interpretation.

In interpreting constitutional language, ‘the fundamental rule of construction which guides [this Court] is that the Constitution’s language controls and must be interpreted in its popular sense, as understood by the people when

they voted on its adoption.’ *Ieropoli v. AC & S Corp.*, 577 Pa. 138, 842 A.2d 919, 925 (2004). As with our interpretation of statutes, if the language of a constitutional provision is unclear, we may be informed by ‘the occasion and necessity for the provision; the circumstances under which the amendment was ratified; the mischief to be remedied; the object to be attained; and the contemporaneous legislative history.’ *Robinson Twp.*, 83 A.3d at 945 (citing 1 Pa.C.S. §§ 1921, 1922).

Pa. Env’tl. Def. Found., 161 A.3d at 929–30.

Because the language of Article I, §2 is clear, under principles of constitutional interpretation, it controls. By the clear language of Article I, §2, the ability to alter, reform, or abolish government in such a manner as the people may think proper is unqualified so long as it is to advance peace, safety, and happiness. When adopted, the political powers clause was understood to express political rights and powers retained by the people. *See* Ken Gormley, *THE PENNSYLVANIA CONSTITUTION* (2004) at 96. As expressed in Article I, §1, these rights are inherent and inalienable.

At oral argument, DEP suggested that the political powers retained by the people in Article I, §2 are somehow limited to being exercised at the state level or more particularly, by state constitutional amendment. DEP submitted that “people” as used in the Pennsylvania Constitution does not mean one or two people, or a township by itself apart from the people of the state of Pennsylvania. DEP has not

cited any authority to support this proposition.⁷ Indeed, this view is inconsistent with the import of the Declaration of Rights which is to reserve fundamental rights to the people, that are excepted out of the general powers of government and shall forever remain inviolate. *See Pa. Env'tl. Def. Found.*, 161 A.3d at 930-31.

There is nothing within the political powers clause to indicate that it is limited to the people acting as a whole at the state level. State constitutional amendment is one, but not the only, way in which the people may exercise their political rights.⁸ The clear and plain language of Article I, §2 does not, in any way,

⁷ To the extent DEP suggests that the people have delegated their political powers to the state, such that the power to alter, abolish, or reform government can only be exercised at the state level, such a construct is inconsistent with the character of Article I rights as inherent and inalienable. Rights that are inherent and inalienable, by definition, cannot be destroyed or given away. The people may delegate lawmaking functions to state representatives, for instance, but this does not mean that the people lose their inherent and inalienable political rights. “As forcefully pronounced in Section 25, the rights contained in Article I are “excepted out of the general powers of government and shall forever remain inviolate.” *Pa. Env'tl. Def. Found.*, 161 A.3d at 931 (quoting Pa. Const. art. I, §25).

⁸ There are relatively few court decisions interpreting Article I, §2, some of which Grant Township discussed in its initial Brief in Opposition at pp. 25-26, 33-34. Grant Township noted the adverse language in *Com. Office of Atty. Gen. ex rel. Corbett v. E. Brunswick Twp.*, 956 A.2d 1100, 1108 (Pa. Commw. Ct. 2008) and explained why it does not apply here. It appears that earlier court decisions discussing Article I, §2 arose in the context of the constitutional amendment process. *See Wells v. Bain*, 75 Pa. 39 (1873); *Wood's Appeal*, 75 Pa. 59 (1874). In *English v. Com.*, 816 A.2d 382, 387 (Pa. Commw. Ct. 2003), the court rejected an argument that administrative code sections limiting the use of initiative and referendum violated the county charter and Article I, §2, finding that “there is no legal authority indicating that the provision has ever been interpreted to create an inherent right to exercise initiative and referendum as to every legislated measure.” Unlike here, where inherent environmental rights are at issue, in *English*, the court concluded that there was no fundamental right to the exercise of initiative and referendum. Grant Township is not aware of any Pennsylvania state court cases in which the Court has considered a local Charter provision that secures the people’s fundamental and inherent environmental rights, and, in particular, not since the Pennsylvania Supreme Court, in *Pennsylvania Environmental Defense Foundation*, rejected the *Payne I* test as the standard for examining Article I, §27 challenges.

preclude people from altering, abolishing, or reforming their government through local charters adopted by popular vote or otherwise.

Nor does Article IX, pertaining to local government, limit the means by which the people may exercise their political rights. Contrary to DEP's argument, Article IX is not a more specific provision pertaining to the exercise of political rights that takes precedence over Article I, §2.

The people have inherent and inalienable political rights that cannot be compromised by the powers granted to, or the restrictions imposed upon, home rule municipalities, whether contained in Article IX of the Pennsylvania Constitution or by statutes such as the Home Rule Charter and Optional Plans Law. While the legislature may pass laws that deny powers to home rule municipalities in their municipal character as subdivisions of the state, the political rights belonging to the people -- being fundamental, inherent, inviolate, and inalienable -- cannot be circumscribed. The myriad of cases discussing restrictions on *municipal* home rule authority have not considered the *people's* right of local community self-government or the import of the *people's* political and environmental rights under Article I. *See e.g., Mitchell's Bar & Rest., Inc. v. Allegheny Cty.*, 924 A.2d 730, 737–38 (Pa. Commw. Ct. 2007) (“Although the County is a home rule municipality and, therefore, has broader legislative power to

address such issues than a municipality without home rule, the General Assembly retains the ability to limit that authority.”).

Grant Township cites *Gondelman v. Com.*, 520 Pa. 451, 469 (1989) for the broad proposition that Article I rights are inherent and apply to restrain, not the people, but the governmental structure the people have created. Its holding otherwise has no bearing on this case. At oral argument, DEP suggested that *Gondelman* shows that the provision of the Pennsylvania Constitution pertaining to local government (Article IX), is a more specific provision that should prevail over what the DEP describes as the people’s more general exercise of Article I rights.

Gondelman does not stand for the proposition that allegedly more specific provisions of the Constitution prevail over provisions in the Declaration of Rights. The court in *Gondelman* considered the validity of the Pennsylvania Constitution’s Article V, providing for a mandatory retirement age for judges. The Court found that because the people, by constitutional amendment, and not the *government*, had adopted Article V, Article I did not apply to invalidate the mandatory retirement age as a violation of the people’s Article I right to equal protection.⁹

Both pre- and post-*Gondelman*, the Pennsylvania Supreme Court has questioned the distinction between the state and the people with regard to the

⁹ *Gondelman* arose in the context of a constitutional provision adopted by the people. Its reasoning does not apply to statutes, such as the Oil and Gas Act and Solid Waste Management Act, enacted by the legislative branch. See *Goodheart v. Casey*, 523 Pa. 188, 195, 565 A.2d 757, 760 (Pa. 1989).

violation of fundamental, inherent, and inalienable rights, indicating that other provisions of the Pennsylvania Constitution, despite being adopted by the people, cannot violate the inherent rights enumerated in Article I. *See Stander v. Kelley*, 433 Pa. 406, 413, 250 A.2d 474, 478 (1969) (“One’s right to life, liberty, and property * * * and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections. A citizen’s constitutional rights can hardly be infringed simply because a majority of the people choose that it be.”) (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638)); *Driscoll v. Corbett*, 620 Pa. 494, 511–12, 69 A.3d 197, 207–09 (2013) (speaking to, but determining it did not need to resolve, the question of whether a constitutional provision may be held infirm because it impinged upon Article I rights, and observing that “theoretically at least, there is some possibility that a constitutional amendment might impinge on inherent, inalienable rights otherwise recognized in the Constitution itself.”)¹⁰

¹⁰ In its discussion of inherent rights in *Driscoll*, the Pennsylvania Supreme Court noted that:

[T]he concept that certain rights are inherent to mankind, and thus are secured rather than bestowed by the Constitution, has a long pedigree in Pennsylvania that goes back at least to the founding of the Republic. *See generally W. Pa. Socialist Workers 1982 Campaign v. Conn. Gen. Life Ins. Co.*, 512 Pa. 23, 29, 515 A.2d 1331, 1334 (1986) (noting that the drafters of the Pennsylvania Constitution of 1776 adhered to the theories of Locke, Montesquieu, “and other natural law philosophers”). This idea also comports with the more widely-prevailing political philosophy at the time the nation was founded, as evidenced by natural law/inherent-rights passages contained in, for example, the Declaration of Independence, the Virginia Declaration of Rights of 1776, and the Massachusetts Declaration of Rights of 1780. *Driscoll*, 620 Pa. at 512 (citations omitted).

Gondelman's holding is limited and inapplicable to the facts of this case. The *Gondelman* court did not consider the right of local community self-government and, more particularly, the people's political rights in Article I, §2 or the people's environmental rights in Article I, §27 as a *source* of authority for lawmaking by the people at the local level.

Moreover, the Court, in this case, need not determine whether another constitutional provision may violate rights enumerated in the Declaration of Rights. The right to local community self-government is a separate and independent source of authority for the Charter's prohibitions, as is the Environmental Rights Amendment, discussed below. Article IX, §2's parameters pertaining to home rule authority do not apply to limit the people's Article I rights, in particular, their political and environmental rights.

If, however, the Court were to construe Article IX, §2, pertaining to municipal home rule authority, as a limitation on the people's Article I rights, then Grant Township submits that the Court's decision in *Stander*, 433 Pa. at 413, controls, and that Article IX cannot be applied to infringe fundamental, inalienable, and infeasible rights as secured by the Declaration of Rights.

B. The Environmental Rights Amendment is an Independent Source of Authority for Sections 301, 302, 303, and 306 of the Charter.

Neither DEP's Petition for Review nor its Preliminary Objections mention the Environmental Rights Amendment and the people's environmental rights and

the Township's and Commonwealth's public trustee duties thereunder. The DEP cannot invoke the Court's authority to prevent the people of Grant Township from protecting their environmental rights and the municipality of Grant Township from taking action that complies with its constitutional obligations.

The DEP's permit does not and cannot represent or guarantee that the depositing of fracking waste will not harm the people and natural ecosystems of the Township. Indeed, as alleged by Grant Township in its New Matter, “[t]he DEP has failed and is failing to protect the people’s health, safety, and welfare, including their right to clean air, water, and soil, and in its duty to preserve the natural, scenic, historic, and esthetic values of the environment.” (New Matter ¶67). Grant Township cites investigations summarizing DEP’s failures in regulating, or failing to regulate, the fracking industry. (*Id.*; *see* Counterclaims III and IV.)

Even if DEP had adequately considered its public trustee obligations under the ERA, the people of Grant Township have an independent right, and Grant Township has an independent duty, to determine whether the activity allowed by the permit violates the people’s rights as secured by both the ERA and the Charter. The ERA embodies the precautionary principle, and Grant Township need not prove that the activity at issue – in this case the depositing of fracking waste – will harm the people’s environmental rights. *See Robinson Twp.*, 83 A.3d at 953 (“The

benchmark for decision is the express purpose of the Environmental Rights Amendment to be a bulwark against actual or likely degradation of, inter alia, our air and water quality. *Accord Montana Env'l Info. Ctr. v. Dep't of Env'l Quality*, 296 Mont. 207, 988 P.2d 1236, 1249 (1999) (constitutional “inalienable ... right to a clean and healthful environment” did not protect merely against type of environmental degradation “conclusively linked” to ill health or physical endangerment and animal death, but could be invoked to provide anticipatory and preventative protection against unreasonable degradation of natural resources”).

As such, in addition to the right of local, community self-government, the Environmental Rights Amendment is another source of authority for the Charter provisions that advance the people’s environmental rights and comport with Grant Township’s public trustee duties.

II. The Charter’s Prohibitions Secure and Expand Fundamental and Constitutional Rights, and Are Thus Not Subject to Preemption by Less Protective State Laws.

After determining that there is a valid source of authority for the Charter’s prohibitions, the next consideration is whether these prohibitions are preempted by less-protected state law, and that consideration depends on whether the local law secures or expands fundamental or constitutional rights. The answer to that question is, in this case, straightforward. The Charter’s prohibitions advance rights

secured by the Charter's Bill of Rights (Article I) and by the Environmental Rights Amendment.

At oral argument, the Court inquired as to the limitations on lawmaking at the local level. Grant Township analogized to the well-established principle that states are free to extend more sweeping constitutional guarantees to their citizens than does federal law, as federal constitutional law constitutes the floor, not the ceiling, of constitutional protection. *See United Artists' Theater Circuit, Inc. v. City of Philadelphia*, 535 Pa. 370, 375, 635 A.2d 612, 615 (1993) (“This Court has recognized that our Constitution can provide greater rights and protection to the citizens of this Commonwealth than are provided under similar provisions of the federal Constitution. We have stated: ‘[T]he federal Constitution establishes certain minimum levels which are “equally applicable to the [analogous] state constitutional provision.’ However, each state has the power to provide broader standards and go beyond the minimum floor which is established by the federal Constitution.” (quoting *Com. v. Edmunds*, 526 Pa. 374, 388, 586 A.2d 887, 894 (1991)).

Similarly, the people of Grant Township are free to secure their environmental rights and to delineate and extend constitutional protections to themselves through the Charter. The right to be free from the depositing of waste from oil and gas extraction, and the corresponding prohibition to exercise that

right, advances the environmental rights secured by the Environmental Rights Amendment and the Charter.¹¹ Here, also, the Charter is the equivalent of a constitution. It follows that, like a state constitution, it can provide broader standards and go beyond the constitutional “floor.” Thus, preemption analysis does not even apply here.

III. Other Constraints on Lawmaking at the Local Level

Grant Township further explained that rights, and the prohibitions adopted in furtherance of those rights, are checked and limited by the existing frameworks that courts use to analyze whether fundamental or constitutional rights are being violated by local, state, or federal laws and to weigh competing constitutional rights between two or more parties. *See Norton v. Glenn*, 580 Pa. 212, 860 A.2d 48, 58 (2004) (referring to “seesawing balance between the constitutional rights of freedom of expression and of safeguarding one’s reputation: protection of one of those rights quite often leads to diminution of the other”).

It is possible that a permittee, such as PGE, may argue that it has competing rights that are somehow infringed by the Charter’s prohibition against the depositing of fracking waste. But that question is not presently before the Court. DEP does not, and cannot, argue that it, as an agency of the Commonwealth, has any “rights” that are being violated by the Charter’s prohibitions. Indeed, the

¹¹ It is conceivable that, in other cases, there might be a dispute as to whether the local law secures or advances fundamental or constitutional rights, but that is not the case here.

Permit DEP issued to PGE already states that it is subject to applicable law, which in this case is the Charter. (*See* Petition at Exh. F (DEP Well Permit to PGE issued 3/27/27).) Because Grant Township’s valid local law in the form of the Charter prohibits the activity allowed by the Permit, the Permit is invalid. The fact that the Permit is invalid does not violate any “rights” held by DEP. As discussed above, the people of Grant Township have rights infringed by the depositing of fracking waste within the Township and, under the Environmental Rights Amendment, Grant Township has the duty to defend a law that secures and advances those rights.

As in any case, a person may challenge the constitutionality of a law by claiming that it violates some right that the person has or claims to have. In this instance, after the Court has determined it to be a valid law, PGE may bring an action attempting to challenge the Charter as violating its alleged right to deposit fracking waste in the Township. PGE would need to articulate its case like any other party challenging a law. It would need to show that it has a right (the basis for that right) and that the Charter’s prohibition infringes that right. The standards applicable would be the same as applicable to any other challenge to law. If the challenger could show a fundamental right at stake, then Grant Township would need to show a compelling interest in the prohibition of the disposal of fracking waste. If there are no fundamental rights at stake, then Grant Township would need

only show that the Charter's prohibitions are rationally related to a legitimate government purpose. *See, e.g., Com. v. Martin*, 858 MDA 2014, 2015 WL 7575346, at *9 (Pa. Super. Ct. 2015) ("Any governmental intrusion into a fundamental right is required to be narrowly tailored to achieve a compelling state interest. [*Washington v. Glucksberg*, 521 U.S. 702, 719 (1997)]. When no fundamental right has been implicated, a law need only be rationally related to some legitimate state interest. *Romer v. Evans*, 517 U.S. 620, 631 (1996). Ordinarily, a law will be upheld if it advances a legitimate state interest even when "the law seems unwise or works to the disadvantage of a particular group, or if the rationale for it seems tenuous.").

The depositing of waste from oil and gas activities is an activity which the people and the Township have determined violates the people's inherent, infeasible, and constitutionally secured environmental rights. In this case, because fundamental, inherent, and constitutionally secured environmental rights are involved, PGE would also need to show that its alleged "right" (whatever that may be) is paramount over the people's rights infringed by its depositing of fracking waste in violation of the Charter. Grant Township submits that whereas the people have inherent, infeasible, and constitutionally secured rights to clean air and water, PGE does not have the right to deposit fracking waste within the

Township, or any other right that could justify the infringement of the people's rights secured and protected by the Charter's prohibitions.

These are the familiar frameworks that act as a check on local lawmaking (whether by the people through direct democracy or by municipalities acting through their governing bodies), just as they act as a check on lawmaking at the state and federal level. Again, however, the posture of the present case does not require the Court to engage in this analysis. DEP's Petition for Review challenges the validity of the Charter's prohibitions as beyond the scope of Grant Township's authority and preempted by state laws. Grant Township's Answer, New Matter, and Counterclaim shows why DEP's position is not well taken because it fails to recognize and, in fact, violates fundamental, unalienable, inalienable and constitutionally secured rights. Whether a permit holder, or any other party seeking to engage in the depositing of fracking waste within Grant Township may contend that the Charter's prohibitions are invalid as infringing competing fundamental, constitutional, or other rights is not presently before this Court.

CONCLUSION

For these reasons, and the reasons set forth in Grant Township's brief in opposition to DEP's preliminary objections, Grant Township respectfully requests that the Court overrule each of DEP's preliminary objections.

Respectfully submitted,

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FOR GRANT TOWNSHIP OF INDIANA
COUNTY AND THE GRANT TOWNSHIP
SUPERVISORS

Dated: January 5, 2018.

**CERTIFICATION OF COMPLIANCE WITH WORD COUNT FOR BRIEF
OF RESPONDENTS**

I, Karen Hoffmann, hereby certify that the foregoing Brief of Respondents contains fewer than 14,000 words as prescribed by Pa.R.A.P. 2135(a). Excluding the parts of the Brief that are exempted by Pa.R.A.P. 2135(b), there are 5,955 words in the Brief, as counted through the use of Microsoft Word.

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