

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Department of Environmental
Protection,
Petitioner

v.

Grant Township of Indiana County and
The Grant Township Board of
Supervisors,
Respondents

No. 126 M.D. 2017
Heard: October 10, 2017

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
SENIOR JUDGE LEADBETTER

Filed: May 2, 2018

Before the Court at this time are the Department of Environmental Protection's (DEP) preliminary objections to the New Matter and Counterclaims of Grant Township of Indiana County and The Grant Township Board of Supervisors (collectively, Township). The Township filed its New Matter and Counterclaims in answer to DEP's original jurisdiction Petition for Review in the Nature of a Complaint Seeking Declaratory Judgment and Injunctive Relief (Complaint). For the reasons that follow, DEP's preliminary objections are sustained in part and overruled in part.

DEP's Complaint alleges as follows. On June 3, 2014, the Township, then a second class township, passed a local ordinance that prohibited the "depositing of waste from oil and gas extraction" within the Township.¹ Pennsylvania General

¹ The ordinance defined “depositing of waste from oil and gas extraction” to include:

Energy Company, LLC (General Energy) filed a 2014 action in the United States District Court for the Western District of Pennsylvania (federal court) challenging the validity of the ordinance.

In March 2015, General Energy filed with DEP an application for a change-in-use well permit. The permit would allow General Energy to convert an existing natural gas well located in the Township into an underground injection disposal well for the disposal of brine and other oil and gas wastes. DEP suspended review of General Energy's permit pending the outcome of the federal litigation.

The federal court thereafter issued an October 14, 2015 order granting in part and denying in part General Energy's motion for judgment on the pleadings. Specifically, the Complaint avers the federal court held that the ordinance violated the Second Class Township Code² and the Limited Liability Companies Law³ and that the ordinance was unlawfully exclusionary. Compl., ¶22.

Subsequent to the federal court's order, the Township citizens adopted a home rule charter (Charter) on November 3, 2015 that changed the form of the Township's government from a second class township to a home rule municipality. Several of the Township's Charter provisions are at issue here:

the depositing, disposal, storage, beneficial use, treatment, recycling, injection, or introduction of materials including, but not limited to, brine, 'produced water,' 'fract[sic] water,' tailings, flowback or any other waste or by-product of oil and gas extraction. The phrase shall also include the issuance of, or application for, any permit that would purport to allow these activities.

Compl., ¶19.

² Act of May 1, 1933, P.L. 103, *as amended*, 53 P.S. §§65101-68701.

³ 15 Pa. C.S. §§8811-8898.

- Section 301 of the Charter, “depositing of waste from oil and gas extraction”, provides that “[i]t shall be unlawful within [the Township] for any corporation or government to engage in the depositing of waste from oil and gas extraction.” Compl., ¶24.⁴ (Emphasis deleted.)
- Section 302 of the Charter, “state and federal authority,” provides that “[n]o permit, license, privilege, charter, or other authorization, issued to a corporation, by any State or federal entity, that would violate the prohibitions of this Charter or any rights secured by this Charter, shall be deemed valid within [the Township].” Compl., ¶26. (Emphasis deleted.)
- Section 303 of the Charter, “summary offense,” provides that “[a]ny corporation or government that violates any provisions of this Charter shall be guilty of an offense and, upon conviction thereof, shall be sentenced to pay the maximum fine allowable under State law for that violation. Each day or portion thereof, and each violation of a section of this Charter, shall count as a separate offense. Compl., ¶27. (Emphasis deleted.)
- Section 306 of the Charter, “enforcement of state law,” provides that “[a]ll laws adopted by the legislature of the State of Pennsylvania, and the rules adopted by any State agency, shall be the law of [the Township] only to the extent that they do not violate the rights or prohibitions recognized by this Charter.” Compl., ¶28.

⁴ Article VIII of the Charter defines “depositing of waste from oil and gas extraction” to include, but not limited to:

the depositing, disposal, storage, beneficial use, treatment, recycling, injection, or introduction of materials including but not limited to, brine, “produced water,” “frack water,” tailings, flowback, or any other waste or by-product of oil and gas extraction, by any means. The phrase shall also include the issuance of, or application for, any permit that would purport to allow these activities. This phrase shall not include temporary storage of oil and gas waste materials in the Township at existing well sites.

On March 27, 2017, DEP granted General Energy's permit application pursuant to the 2012 Oil and Gas Act, 58 Pa. C.S. §§2301-3504, and the attendant regulations. Compl., ¶29.

In its five-count complaint, DEP explains that section 3202 of the Oil and Gas Act sets forth the Act's purpose. Namely, the Act is to allow for the optimal development of the Commonwealth's oil and gas reserves consistent with the protection of the health, safety, environment and property rights of Commonwealth citizens; to protect the safety of personnel and facilities employed in coal mining or exploration, development, storage, and production of gas or oil; to protect the safety and property rights of persons residing in areas where mining, exploration, development and storage or production occurs; and to protect the natural resources, environmental rights and values secured by the Pennsylvania Constitution. 58 Pa.C.S. §3202.

To those ends, section 3211 directs DEP to issue a permit within forty-five (45) days of submission of an application unless DEP denies the permit for reasons specified in subsection (e.1).⁵ 58 Pa.C.S. §3211(e). Section 3211 allows DEP to extend the time for issuance of a permit upon notification to the applicant of the reasons for the extension. *Id.* DEP may impose permit terms and conditions necessary to ensure compliance with the Oil and Gas Act or other laws that DEP administers. *Id.*

Of import here, section 3302 of the Oil and Gas Act provides at length:

⁵ Subsection 3211(e.1) provides that DEP may deny a permit where: (1) the well site is in violation of Chapter 32 of the Oil and Gas Act or the issuance of a permit would result in a violation of Chapter 32 or other applicable laws; (2) the permit application is incomplete; (3) there are unresolved objections to the well location; (4) bonding regulations have not been met; (5) DEP finds that an applicant, or parent or subsidiary corporation of the applicant, is in continuing violation of Chapter 32 or any other statute that DEP administers, any DEP regulation under Chapter 32 or any statute administered by DEP or any plan approval, permit or DEP order, unless the violation is being corrected to DEP's satisfaction; and, (6) the applicant failed to pay required fees or file a required report, unless an appeal is pending. 58 Pa. C.S. §3211(e.1).

Except with respect to local ordinances^[6] adopted pursuant to the [Municipalities Planning Code (MPC), Act of July 31, 1968, P.L. 805, *as amended*, 53 P.S. §§10101-11202] and the act of October 4, 1978 (P.L. 851, No. 166), known as the Flood Plain Management Act, all local ordinances purporting to regulate oil and gas operations regulated by Chapter 32 (relating to development) are hereby superseded. No local ordinance adopted pursuant to the MPC or the Flood Plain Management Act shall contain provisions which impose conditions, requirements or limitations on the same features of oil and gas operations regulated by Chapter 32 or that accomplish the same purposes as set forth in Chapter 32. ~~The Commonwealth, by this section, preempts and supersedes the regulation of oil and gas operations as provided in this chapter.~~

58 Pa.C.S. §3302 [*see Robinson Twp., Washington County v. Commonwealth*, 52 A.3d 463 (Pa. Cmwlth. 2012) (deleting the last sentence of Section 3302) *aff'd in part and rev'd in part*, 83 A.3d 901 (Pa. 2013)].

In addition, section 3273.1 of the Oil and Gas Act, 58 Pa.C.S. §3273.1, addresses an applicant's obligation to obtain a permit and to post a bond, and provides that these obligations will be considered met upon satisfaction with identified conditions. Section 3273.1 further provides that nothing in the section diminishes an owner's or operator's duties under the Solid Waste Management Act (SWMA), Act of July 7, 1980, P.L. 380, *as amended*, 35 P.S. §§6018.101-6018.1003, or the Resource Conservation and Recovery Act of 1976.⁷

Similarly, the Complaint alleges section 104(6) of the SWMA, 35 P.S. §6018.104(6), imposes a duty on DEP to regulate the storage, collection, transportation, processing, treatment and disposal of solid wastes in the Commonwealth. The SWMA defines "solid waste" to include "residual waste,"

⁶ Section 3301 of the Oil and Gas Act defines "local ordinance" as "[a]n ordinance or other enactment, including a provision of a home rule charter, adopted by a local government that regulates oil and gas operations." 58 Pa.C.S. §3301 (emphasis added).

⁷ (Public Law 94-580, 90 Stat. 2795, 42 U.S.C. §6901).

which includes any “discarded material or other waste including ... liquid ... from industrial operations” Section 103 of the SWMA, 35 P.S. §6018.103. Brine and other oil and gas wastes are solid wastes and residual waste. Compl., ¶15.

DEP avers that section 3273.1 of the Oil and Gas Act and section 104(6) of the SWMA grant DEP the authority to regulate waste fluids from oil and gas activities on and off well sites. Compl., ¶17.

According to DEP, the above-noted Charter provisions conflict with the legislatively granted powers of DEP to regulate oil and gas-related activities. Thus, DEP seeks a declaration that (1) section 3302 of the Oil and Gas Act preempts sections 301, 302, and 306 of the Township’s Charter; (2) the Oil and Gas Act, the SWMA, and DEP’s regulations impliedly preempt sections 301, 302, and 306 of the Charter; (3) sections 301, 302, and 306 of the Charter violate the Home Rule Charter and Optional Plans Law (Home Rule Act), 53 Pa.C.S. §§2901-2984, because they purport to exercise and limit powers that the Oil and Gas Act expressly reserves to DEP; and (4) sections 303 and 305⁸ of the Charter are void and unenforceable as against the Commonwealth, its agencies, and its employees acting within the scope of their employment.⁹ In Count V, DEP seeks a permanent injunction prohibiting

⁸ Section 305 of the Charter, “enforcement of natural community and ecosystem rights” provides:

Ecosystems and natural communities within [the Township] may enforce their rights, and this Charter’s prohibitions, through an action brought by [the Township] or residents of [the Township] in the name of the ecosystem or natural community as the real party in interest. Actions may be brought in any court possessing jurisdiction over activities occurring in [the Township]. Damages shall be measured by the cost of restoring the ecosystem or natural community to its state before the injury, and shall be paid to [the Township] to be used exclusively for the full and complete restoration of the ecosystem or natural community.

Compl., Ex. E.

⁹ A declaratory judgment action is “to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations” 42 Pa.C.S. §7541(a). The Declaratory Judgment Act, 42 Pa.C.S. §§7531-7541, is to be construed liberally. A party seeking a declaratory judgment, however, must allege an interest that is direct, substantial, and present,

the Township from implementing and enforcing sections 301, 302, 303 and 306 of the Township's Charter.

The Township filed an answer to DEP's Complaint and set forth New Matter and Counterclaims. DEP has filed preliminary objections to both the New Matter and Counterclaims, which are now ripe for disposition. When reviewing preliminary objections, we must accept as true all well-pled material facts. *Singleton v. Lavan*, 834 A.2d 672 (Pa. Cmwlth. 2003). The court should sustain preliminary objections only where it is clear and free from doubt that the law will not permit recovery. *Id.* Where doubt exists, the court should refuse to sustain preliminary objections. *Id.*

New Matter

In addition to numerous defenses, the Township's New Matter sets forth a number of allegations to which DEP objects. Specifically, DEP objects to the following New Matter allegations:

68. In light of [General Energy's] past and current violations of environmental regulations, DEP's decision to grant [General Energy] a permit to dispose of fracking waste in [the Township] is yet another failure by DEP to protect the people's health, safety and welfare, including their right to clean air, water, and soil, and of its duty to preserve the natural, scenic, historic and esthetic values of the environment.

69. Even if preemption could be applied to the Charter, which it cannot, [] DEP has waived any right to assert the doctrine of preemption by failing to protect the health, safety, and welfare of the people of [the Township], including by failing to prevent the disposal of fracking waste.

and must demonstrate the existence of an actual controversy related to the invasion, or threatened invasion, of his legal rights. *Waslow v. Dep't of Educ.*, 984 A.2d 575 (Pa. Cmwlth. 2009). A litigant may not use a declaratory judgment action to determine rights in anticipation of events that may never occur or as a medium for rendition of an advisory opinion that may prove to be purely academic. *Id.* Only where there is a real controversy may a party obtain a declaratory judgment. *Gulnac by Gulnac v. S. Butler County Sch. Dist.*, 587 A.2d 699 (Pa. 1991).

70. Even if preemption could be applied to the Charter, which it cannot, [] DEP is estopped from asserting the doctrine of preemption because it failed to protect the health, safety, and welfare of the people of [the Township], including by failing to prevent the disposal of fracking waste.

...

83. DEP failed to exercise its independent judgment and was unduly influenced by corporate interests in issuing the Permit and in initiating this legal action.

Township's New Matter, ¶¶68-70, 83 (pp. 12, 13).

DEP objects to these New Matter averments on the basis that the Township failed to appeal DEP's issuance of the General Energy permit to the Environmental Hearing Board.¹⁰ In support, DEP avers that two appeals were filed with the Environmental Hearing Board challenging DEP's issuance of the permit, but that the Township did not file either of them. DEP's Prel. Objections, ¶¶6-8. Where the legislature has provided for a mandatory and exclusive remedy, a court is without power to act under the doctrine of exhaustion of administrative remedies unless a party has availed itself of those remedies. *Village Charter Sch. v. Chester Upland Sch. Dist.*, 813 A.2d 20 (Pa. Cmwlth. 2002). An exception exists, however, for cases in which a litigant makes a purely legal argument challenging the agency's jurisdiction, [*Se. Pa. Transp. Auth. v. City of Phila.*, 101 A.3d 79 (Pa. 2014)], or where the administrative remedy is otherwise inadequate. This exception allows a litigant to seek declaratory and injunctive relief in a court without first exhausting administrative remedies. *Id.*

The Township responds that its pleading does not implicate the exhaustion of administrative remedies doctrine because it is challenging DEP's jurisdiction to issue the permit. The Township's argument appears to be as follows.

¹⁰ See Section 4(c) of the Environmental Hearing Board Act, Act of July 13, 1988, P.L. 530, *as amended*, 35 P.S. §7514(c).

The Township residents adopted the Charter pursuant to their right to local community self-government, the principle of government legitimacy, and the Home Rule Act. In particular, Article 1, section 2 of the Pennsylvania Constitution states that “[a]ll political power is inherent in the people, and all free governments are founded on their authority and instituted for their peace, safety and happiness. For the advancement of these ends they have at all times an inalienable and indefeasible right to alter, reform or abolish their government in such manner as they may think proper.” Pa. Const., art. 1, §2. Further Article 1, section 25 declares that “[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.” Pa. Const., art. 1, §25. Finally, Article 1, section 27, also known as the Environmental Rights Amendment, ensures the people’s right to clean air and pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pa. Const., art. 1, §27. The Township adopted Charter pursuant to the Environmental Rights Amendment. Township’s Counterclaims, ¶¶40, 73.

In addition, Article 9, section 2 of the Pennsylvania Constitution grants municipalities the right and power to frame and adopt home rule charters. Pa. Const., art. 9, §2. Section 2 further grants a home rule municipality the right to exercise any power or perform any function not denied by the Constitution, by its home rule charter, or by the General Assembly at any time. *Id.*

The Township further alleges that the Declaration of Independence and the U.S. Constitution secure the right to local, community self-government. *See* U.S. Const., amend. X (“powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people). *See also* 53 Pa.C.S. §2691 (general powers and limitations of home rule charter municipalities).

The Township avers that a home rule charter has the force and effect of a legislative enactment and, because the Charter was adopted pursuant to the

fundamental and inherent right to local, community self-government, the Home Rule Act and the preemption doctrine cannot limit its Charter.

Even viewing the above well-pled allegations in favor of the Township as we must, we agree with DEP that the allegations amount to a collateral attack on DEP's issuance of the General Energy permit on the ground that DEP failed to fulfill its constitutional and statutory duties to protect the environment. This is simply another way of claiming that the permit should not have been granted because of environmental hazards. Accordingly, we sustain DEP's preliminary objections to paragraphs 68, 69, 70, and 83 of the Township's New Matter for the Township's failure to exhaust its administrative remedy.

Counterclaims

Based upon the allegations described above, the Township sets forth several Counterclaims to which DEP objects. The Township seeks a declaration that the Charter is a valid law adopted pursuant to the people's right to local, community self-government; that to interpret the Oil and Gas Act and the SWMA as preempting the Charter would violate the people's right to local, self-community government; that the Charter is a valid law pursuant to the Environmental Rights Amendment; that DEP has violated the Environmental Rights Amendment by failing to protect and advance the rights protected by the Environmental Rights Amendment and by attempting to prevent the Township from exercising, advancing and protecting its rights under the Environmental Rights Amendment; and that DEP violated sections 301 and 302 of the Charter and is therefore subject to penalties.

Specifically, Count 1 of the Township's Counterclaims alleges that the Township's residents have an inherent, fundamental and constitutional right to local, community self-government and that right includes the ability to change its form of government. Adoption of the Charter is a recognition of the people's right to increase protections of the rights identified therein and a recognition that the Second Class Township Code failed to protect those rights. The Counterclaim avers that any violation of the Charter is a violation of the fundamental and inalienable right to

local, community self-government and that sovereign immunity and preemption do not apply to this right. Count 1 of the Counterclaim seeks a declaration that the Charter is a valid law adopted pursuant to the people's right to local, community self-government and an order enjoining DEP from violating the Charter and awarding damages and costs and attorney's fees pursuant to 42 U.S.C. §§1983, 1988 (relating to violations of civil rights).

Count 2 of the Counterclaims avers that the doctrine of preemption, when exercised to constrict or impede the right of local, community self-government, violates that right and the Charter. Similarly, interpretations of the Oil and Gas Act and the SWMA and their regulations as preempting the Charter (in particular sections 301, 302, 303, and 306) violate the people's right to local, community self-government as such interpretations restrict the fundamental, inherent, and constitutional right to expand civic, political, and environmental rights beyond those protections afforded by state and federal law. Count 2 of the Counterclaims seeks an order enforcing section 306 of the Charter, declaring that an interpretation of the Oil and Gas Act, the SWMA, and their regulations to preempt the Charter violates the people's right to local, community self-government, and enjoining DEP from violating the Charter. Count 2, like Count 1, seeks an award of damages and costs and attorney's fees pursuant to 42 U.S.C. §§1983, 1988.

Counts 3 and 4 of the Township's Counterclaims allege that the Township residents adopted the Charter pursuant to the Environmental Rights Amendment and that the rights enumerated in the Environmental Rights Amendment are parallel to the rights set forth in sections 104, 105, 106, and 107 of the Charter. These Counterclaims further allege that the Charter is a constitutionally valid exercise of the people's right to clean air and pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment and a valid exercise of the Township's duty as a public trustee under the Environmental Rights Amendment. Accordingly, any limitations of the Home Rule Act do not apply. Further, the Township is free to pass stricter laws to advance and protect the rights secured by the Environmental Rights Amendment. It claims that DEP has failed in its duty as

a public trustee under the Environmental Rights Amendment. The Township seeks an order declaring that its Charter is a valid law adopted pursuant to the Environmental Rights Amendment and enjoining DEP from violating the Charter, as well as a declaration that DEP is violating the Environmental Rights Amendment and an order enjoining it from doing so.

Count 5 alleges that in issuing the General Energy permit, DEP violated the Charter and seeks a declaration that the permit is invalid and that DEP is guilty of an offense and subject to penalties provided for in the Charter.

In its second preliminary objection, DEP first argues that Counts 1, 2, and 3 of the Counterclaims are based on New Matter paragraphs 68, 69, 70, and 83, above. According to DEP, declaratory relief is not available because the Township failed to appeal DEP's approval of General Energy's well permit application before the Environmental Hearing Board.

We disagree. Counts 1, 2, and 3 aver that there is a fundamental and inalienable right to self-government found in the state constitution and Declaration of Independence, that this right to self-rule effectuated in its Charter cannot be preempted by state law and that state law cannot preempt the rights protected by the Environmental Rights Amendment. Aside from reference to the permit in background allegations as an example of DEP's conduct, these claims do not reference the General Energy permit, but rather seek general declarations affirming the principles cited above and, therefore, issuance of an order enjoining DEP from violating its Charter. Therefore, we overrule the objection based on availability of an administrative remedy.

For the same reason, we must overrule DEP's third preliminary objection with respect to Counts 1, 2, 3 and 4 of the Township's Counterclaims. Again, according to DEP, the Township's failure to appeal the grant of the General Energy permit to the Environmental Hearing Board bars it from seeking relief. Similar to its prior objection, DEP takes background information regarding the permit to misconstrue

the Township's much broader general Counterclaims regarding the validity of its Charter, an attack on the doctrine of preemption based on the people's right to self-government and the duties under the Environmental Rights Amendment. However, with respect to Count 5, which seeks a declaration that the permit is invalid, we agree with DEP that the doctrine of exhaustion of administrative remedies applies, so this objection will be sustained with respect to Count 5.

DEP's fourth and fifth objections demur to the Township's claims that state law cannot preempt local ordinances because its Charter is a valid exercise of its citizens' right to self-government and fulfills its obligation to protect its citizens' rights under the Environmental Rights Amendment. In its preliminary objections, DEP asserts that these Counterclaims¹¹ have no basis in law but rather are statutorily limited by the Home Rule Act and argues that the Township's claims attempt to reject laws, which the General Assembly has the exclusive right to establish and the courts have the exclusive right to interpret. A home rule charter, according to DEP, cannot change established statutory authority by declaration, charter, or otherwise. With respect to Counts 1 and 2, we must agree.

Article 9, section 2 of the Pennsylvania Constitution permits a municipality to adopt a home rule charter and exercise any power and perform any function not denied by the Constitution, by its home rule charter or *by the Acts of the General Assembly*. Pa. Const., art. 9, §2. *See also* 53 Pa.C.S. §2961. "The Pennsylvania Constitution provides that home rule charters and amendments thereto are subservient to the limitations imposed by the General Assembly." *City of Pittsburgh v. Fraternal Order of Police, Fort Pitt Lodge No. 1*, 161 A.3d 160, 166-167 (Pa. 2017).

¹¹ DEP quotes the following Counterclaim paragraphs in support of its demurrer: 9, 10, 12, 14, 17-18, 20, 36, 45, 58, 59, 61-65, 68-72, 76, 77-78, 82, 84-86, 88, 90, 91-92, 97-100, 103-107, Wherefore Clause on page 31, 112, 115-16, Wherefore Clause on pages 32, and 122, 124-127 and Wherefore Clause on pages 33-34.

A home rule municipality's powers are restricted. Section 2962 of the Home Rule Act provides that home rule municipalities shall not "[e]xercise powers contrary to or in limitation or enlargement of powers granted which are applicable in every part of this Commonwealth." 53 Pa.C.S. §2962(c)(2). Moreover, "[s]tatutes that are uniform and applicable in every part of this Commonwealth shall remain in effect and shall not be changed or modified by this subpart. Statutes shall supersede any municipal ordinance or resolution on the same subject." 53 Pa.C.S. §2962(e). This is a legislatively imposed limitation. *City of Pittsburgh*.

Express preemption occurs when the statute includes a preemption clause and the language thereof specifically precludes local authorities from acting on a particular subject matter. *Hoffman Mining Co., Inc. v. Zoning Hearing Bd. of Adams Twp.*, 32 A.3d 587 (Pa. 2011). Express preemption clearly applies here. First, the Home Rule Act prohibits home rule municipalities from changing statutes of statewide application.¹² State statutes supersede any municipal ordinance or resolution on the same subject.¹³ 53 Pa.C.S. §2962(e); *see also* 53 Pa.C.S. §2962(c)(2). Second, as noted above, the Oil and Gas Act, enacted prior to adoption of the Township's Charter, specifically provides that all local ordinances purporting to regulate oil and gas operations are superseded. 58 Pa.C.S. §3302; *see also* 58 Pa.C.S. §3303. By including the word "supersede" in Section 3302, the General Assembly emphasized that this statute of statewide application prevails over the laws

¹² We have no hesitation in concluding that the Oil and Gas Act and the SWMA are statutes of statewide application. The purposes of the Oil and Gas Act are to "permit the optimal development of oil and gas resources of this Commonwealth consistent with the protection of the health, safety, environment and property of Pennsylvania citizens," to protect the safety and property rights of persons residing in areas where mining, exploration development and storage or production occurs, and to protect the natural resources, environmental rights and values secured by the Pennsylvania Constitution. 58 Pa. C.S. §3202. Similarly, the purpose of the SWMA is, in part, to "establish and maintain a cooperative State and local program of planning and technical and financial assistance for a comprehensive solid waste management." Section 102 of the SWMA, 35 P.S. §6018.102.

¹³ As noted above, the Oil and Gas Act's definition of "ordinance" includes home rule charters. 58 Pa.C.S. §3301.

of home rule municipalities. Thus, the Charter provisions as noted above conflict with the Oil and Gas Act.

Likewise, the SWMA grants DEP the authority to regulate the storage, collection, transportation, processing, treatment and disposal of solid waste. Sections 102 and 104 of the SWMA, 35 P.S. §§6018.102, 6018.104. While local municipalities may adopt ordinances pertaining to zoning, they may not regulate the disposal of solid waste. *Cf. Office of Attorney Gen. ex rel. Corbett v. East Brunswick Twp.*, 980 A.2d 720 (Pa. Cmwlth. 2009); *Liverpool Twp. v. Stephens*, 900 A.2d 1030, 1037 (Pa. Cmwlth. 2006) (“[A] municipality may be foreclosed from exercising power it would otherwise have if the state has sufficiently acted in a particular field. Obviously, local legislation cannot permit what a state statute or regulation forbids or *prohibit what state enactments allow.*”) [quoting *Duff v. Northampton Twp.* 532 A.2d 500, 504 (Pa. Cmwlth. 1987), *aff’d*, 550 A.2d 1319 (Pa. 1988) (emphasis in original)].

Nonetheless, the Township attempts to overcome this substantial body of authority based on general principles of fundamental rights enunciated in our state and federal Constitutions and the Declaration of Independence. While our foundational documents proclaim the right of the people to self-government, this means that our citizens have the right to vote for the representatives who will make the laws that govern them and the right to change the form of their government by lawful process. This does not mean, however, that local laws must prevail over state and federal laws, and the Township has cited no authority for any such proposition. Certainly, the Township has a right to enact its home rule charter, but to accept the basis of the Township’s claims in Counts 1 and 2, aside from being contrary to all relevant authority, would mean that the doctrine of preemption would never apply. The Township’s argument is simply without basis, and the demurrer to Counts 1 and 2 must be sustained.

Counts 3 and 4, however, are based, in addition to the right of self-government, on the Environmental Rights Amendment of our Pennsylvania

Constitution. If the Township at trial is able to prevail on its claim in Count 3 that provisions of the Oil and Gas Act and SWMA are unconstitutional, then necessarily those statutory provisions could not serve to preempt local ordinances, and DEP could be enjoined from enforcing them. Similarly, if it can prove its claim in Count 4 that these statutes are being unconstitutionally applied by DEP, an injunction could issue. We cannot say at this time that the Counterclaims asserted in Counts 3 and 4 are so clearly without merit that they must be preliminarily dismissed. Scientific and historical evidence concerning environmental issues, and evidence of DEP's actions may be necessary to fully adjudicate these Counterclaims as well as DEP's Complaint. Accordingly, this demurrer must be overruled, and the issue must await further proceedings.

In its sixth objection, DEP avers that the numerous averments in the Township's New Matter and Counterclaims lack specificity. In particular, the averments set forth maxims and principles without associating those concepts to specific laws or facts. Pennsylvania Rule of Civil Procedure No. 1019(a) requires that the "material facts on which a cause of action or defense is based shall be stated in a concise and summary form." Pa. R.C.P. No. 1019(a). The rule requires a party to plead all the facts that he must prove in order to prevail on the cause of action alleged. *Dep't of Transp. v. Shipley Humble Oil Co.*, 370 A.2d 438 (Pa. Cmwlth. 1977). The pleading must be sufficiently specific so that the defending party will know how to prepare its defense. *Id.*

While some discovery may be necessary, the Township's remaining Counterclaims, Counts 3 and 4, are sufficiently specific as to allow DEP to prepare its defense. It is clear that the Township seeks a declaration the Oil and Gas Act, the SWMA, and DEP's enforcement of these statutes, violate the Environmental Rights Amendment, and therefore that they are powerless to preempt the Township's Charter. Accordingly, we overrule DEP's preliminary objections raising lack of specificity as to these counts, and need not address the objection with respect to Counterclaims dismissed on other grounds.

Demand for Jury Trial

In its final objection, DEP seeks to strike the Township's demand for a jury trial. The right to a jury trial may be guaranteed by statute or by the Pennsylvania Constitution. To the extent the Township's Counterclaims invoke the Oil and Gas Act, the SWMA, and the Home Rule Act, we agree with DEP that these legislative acts do not provide the right to a jury trial. Our review of these laws finds no support for a demand for a jury trial.

The Pennsylvania Constitution may also guarantee the right to a jury trial. Article 1, section 6 of the Pennsylvania Constitution provides in pertinent part that, "[t]rial by jury shall be as heretofore, and the right thereof remain inviolate." Pa. Const., art. 1, §6. "Such guaranty is that the right shall remain as heretofore; that is, as it was when the Constitution was adopted." *Zauflik v. Pennsbury Sch. Dist.*, 72 A.3d 773, 788 (Pa. Cmwlth. 2013) [quoting *Cmwlth. ex rel. City of Pittsburgh v. Heiman*, 190 A. 479, 481 (Pa. Super. 1937)] (citations omitted). "Thus, the use of the word 'heretofore' in Section 6 of Article I of our Constitution preserves the right to trial by jury in cases where that right existed at common law." *Id.* [quoting *Blum by Blum v. Merrell Dow Pharmaceuticals, Inc.*, 626 A.2d 537, 542 (Pa. 1993)].

The Township has failed to demonstrate that the right to jury trial existed prior to adoption of the Pennsylvania Constitution for the causes of action set forth in its Counterclaims. Accordingly, we grant DEP's preliminary objection and strike the Township's demand for a jury trial.

Conclusion

Based upon the foregoing, DEP's preliminary objection to paragraphs 68, 69, 70 and 83 of the Township's New Matter, and to Counterclaim Counts 1, 2 and 5 are sustained. DEP's preliminary objection to Counts 3 and 4 of the Township's Counterclaims are overruled. DEP's preliminary objection in the nature of a motion to strike the Township's demand for a jury trial is sustained.



Bonnie Brigance Leadbetter, Senior Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Department of Environmental
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No. 126 M.D. 2017

ORDER

NOW, May 2, 2018 the Department of Environmental Protection's (DEP) preliminary objections to the New Matter and Counterclaims of Grant Township of Indiana County and The Grant Township Board of Supervisors (collectively, Township) are overruled in part and sustained in part in accordance with the foregoing opinion. In particular, DEP's preliminary objections to Counts 1, 2 and 5 of the Township's Counterclaims are sustained. DEP's preliminary objections to Counts 3 and 4 of the Township's Counterclaims are overruled.

Paragraphs 68 through 70 and 83 of the Township's New Matter are stricken.

DEP shall file and serve its answer to the Township's remaining Counterclaims within thirty (30) days of the date of this Order.

Boris B. Lezolbeth

Bonnie Brigance Leadbetter, Senior Judge

Certified from the Record

MAY - 2 2018

and Order Exit