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' AMENDED 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

Dated: November 1, 2017

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PRELIMINARY STATEMENT

This case is about the Pennsylvania Department of Environmental Protection's ("DEP") opposition to Grant Township's Home Rule Charter, which the people of Grant Township enacted by popular vote. On March 27, 2017, DEP issued a permit to Pennsylvania General Energy Company LLC ("PGE"), a corporation engaged in oil and gas activities, that purports to allow PGE to dispose of fracking waste within Grant Township. The permit issued by DEP violates the rights and prohibitions enumerated in the Charter.

DEP initiated this action to insulate itself from liability by obtaining a court order declaring the Charter invalid. Grant Township, on behalf of the people and natural communities and ecosystems of Grant Township, responded with an Answer, New Matter, and Counterclaim to defend and enforce the Charter.

Grant Township's New Matter and Counterclaim assert that the Charter is a valid law, enacted by the people of Grant Township pursuant to their fundamental and inalienable right of local, community self-government and Article I of the Pennsylvania Constitution, including the Environmental Rights Amendment. Because Grant Township's New Matter and Counterclaims properly assert legal bases for the Charter along with claims against DEP for its violation of the Charter, DEP's preliminary objections should be overruled.

STATEMENT OF JURISDICTION

The Court has jurisdiction over this matter, including Grant Township's Counterclaims and New Matter under Section 7532 of the Pennsylvania Declaratory Judgment Act, Act of April 28, 1978, P.L. 202, No. 53, as amended, 42 Pa. C.S. § 7532; Section 761(a) of the Judicial Code, 42 Pa.C.S. § 761(a); and 231 Pa. Code § 1602.

STANDARD OF REVIEW

Preliminary objections should be sustained only when it "appear[s] with certainty that the law will not permit recovery, and, where any doubt exists as to whether the preliminary objections should be sustained, the doubt must be resolved in favor of overruling the preliminary objections." *McCord v. Pennsylvanians for Union Reform*, 100 A.3d 755, 758 (Pa. Cmwlth. 2014) (citation and quotations omitted). "[This Court is] required to accept as true the well-pled averments set forth in the [petition for review], and all inferences reasonably deducible therefrom." *Id*. (citation and quotations omitted).

STATEMENT OF THE CASE

I. The Grant Township Home Rule Charter

On November 3, 2015, the people of Grant Township, by popular vote, voted to pass a Home Rule Charter. (Counterclaim ¶ 37.) Article I of the Charter sets forth an enforceable Bill of Rights and enumerates rights held by the people and natural communities and ecosystems of Grant Township. Article II sets forth the general powers of the Grant Township municipality. Article III of the Charter sets forth prohibitions enacted by the Charter and the means of enforcing the rights and prohibitions secured by the Charter. Article IV pertains to corporate powers and eliminates corporate personhood for corporations violating the rights and prohibitions secured by the Charter. Article V sets forth procedures for holding an emergency town meeting. Article VI pertains to Charter Amendments. Article VII calls for constitutional changes and Article VIII contains definitions.

The Home Rule Charter functions in terms of force, effect, and legal weight as a local constitution. The adoption of a home rule charter is a direct expression of the will of the sovereign people of the community, and a direct exercise of that will. (Counterclaim ¶¶ 39-41.)

The Charter is *not* an act of a municipality that can be constrained by the General Assembly through its enactment of state laws. Rather it is an enactment by the people that expands their civil, political and environmental rights. The Charter,

similar to the Pennsylvania or other any state constitution, may enumerate additional and more expansive rights than the United States Constitution. The Charter may also enumerate more expansive rights than the state Constitution and other law.

To this end, Sections 102 through 108 of the Charter enumerate rights belonging to all residents of Grant Township and the natural communities and ecosystems within Grant Township. Examples of such rights include:

- "the right of self-government of their local community, the right to a system of government that embodies that right, and the right to a system of government that protects and secures their human, civil, and collective rights" (Section 102);
- "the right to clean air, water, and soil, which shall include the right to be free from activities which may pose potential risks to clean air, water, and soil within the Township, including the depositing of waste from oil and gas extraction" (Section 104);
- "the right to scenic, historic, and aesthetic values of the Township" (Section 105);
- the right of "natural communities and ecosystems within Grant Township" to "exist, flourish, and naturally evolve" (Section 106);
- "the right to a sustainable energy future" (Section 107); and

- "the right to be fairly taxed" (Section 108).

Sections 109 and 110 of the Charter enumerate the rights to enforce the rights and prohibitions secured by the Charter.

II. Pennsylvania Department of Environmental Protection Issued a Permit to PGE Purporting to Allow it to Dispose of Fracking Waste in Grant Township in Violation of the Charter

On March 27, 2017, DEP issued a permit ("Permit") to PGE that purports to allow it to dispose of fracking waste in Grant Township. (Counterclaim ¶¶ 10, 33.) DEP should have, but chose not to, deny PGE's Permit Application because the requested permit violates the Charter. (Counterclaim ¶ 34.) DEP's decision to grant the Permit violates the Charter, and the people of Grant Township's right of local, community self-government, and the rights of the people of Grant Township and the duties of Grant Township as secured by the Pennsylvania Constitution's Environmental Rights Amendment. (Counterclaim ¶ 36.)

The particular provisions of the Charter at issue in this case are Sections 301, 302, 303, and 306. Section 301 of the Charter (Depositing of Waste from Oil and Gas Extraction) makes it "unlawful within Grant Township for any corporation or government to engage in the depositing of waste from oil and gas extraction." The "depositing of waste from oil and gas extraction" includes the issuance of permits that allow the depositing, disposal, storage or injection of brine, "produced water" and "frack water" (Charter, Art. VIII – Definitions). Section 302 of the

Charter declares that the permit issued by DEP to PGE is invalid. Section 303 of the Charter provides that DEP is guilty of an offense for issuing the permit to PGE in violation of the Charter. Section 306 provides that state laws and agency rules and regulations cannot violate the people's rights and prohibitions as enumerated in the Charter.

III. Petition for Review by the Pennsylvania Department of Environmental Protection

On March 27, 2017, the DEP filed a Petition for Review in the Nature of Complaint Seeking Declaratory and Injunctive Relief ("Petition"). The Petition seeks to permanently enjoin the implementation and enforcement of Sections 301, 302, 303, and 306 of the Charter as they pertain to the depositing, disposing, injecting, or introducing of liquids including, but not limited to, brine, produced water, frack water, flowback, and other waste or by-products of oil and gas extraction in the Township. (Petition at p. 17). DEP's Petition is based on the doctrine of preemption and the limited authority granted to municipalities under Pennsylvania's structure of government. The Petition asserts express and implied preemption (Counts I and II); Violation of the Home Rule Charter Act (Count III); and sovereign immunity (Count IV). Count V seeks injunctive relief.

IV. Grant Township's New Matter and Counterclaim

On May 8, 2017, Grant Township filed an Answer, New Matter, and Counterclaim. Grant Township's New Matter sets forth numerous defenses to the

claims alleged in DEP's Petition. The majority of assertions in the New Matter explain why the doctrine of preemption does not apply and, in particular, why the Charter is not constrained by state or constitutional law that limits the authority of municipalities. (*See e.g.*, New Matter, ¶ 63 ("DEP is not entitled to the relief requested, as it would violate the fundamental and unalienable rights of the citizens and residents of Grant Township."); ¶ 64 ("The Charter is a valid local law enacted pursuant to the right of local community self-government."); ¶ 65 ("The DEP's assertion of express and implied preemption violates the people of Grant Township's right of local, community self-government."); ¶ 66 ("The Charter is a valid local law enacted pursuant to Article I, § 27 of the Pennsylvania Constitution.").)

Grant Township's New Matter further explains how the DEP, in the legislative determination of the people of Grant in their Charter, 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.)[1] While the Charter is *not* a

[1] Recent investigations summarize DEP's failures. (*See* Troutman, Melissa, et al. *"Hidden Data Suggests Fracking Created Widespread, Systemic Impact in Pennsylvania",* Public Herald, dated Jan. 23, 2017*,* available at http://publicherald.org/hidden-data-suggests-fracking-created-widespread-systemic-impact-in-pennsylvania, visited May 7, 2017; Troutman, Melissa, et al., *"To Hell With Us", Records of Misconduct Found Inside Pa. Drinking Water Investigations*, Public Herald, dated Feb. 14 2017, available at http://publicherald.org/to-hell-with-us-records-of-misconduct-found-inside-pa-drinking-water-investigations, visited May 7, 2017).

zoning ordinance or akin to one[2], such allegations illustrate why the people of Grant have decided to abolish their form of government and enact a Home Rule Charter that increases protections for their health, safety, welfare, and civil, political, and environmental rights. Paragraphs 69 and 70, for instance, assert that the DEP has waived, or is estopped from making, any argument that the doctrine of preemption applies because of its failure to protect the health, safety, and welfare of the people of Grant Township, including by failing to prevent the disposal of fracking waste.

Grant Township's Counterclaim sets forth counts that seek declaratory judgment as to the Charter's validity along with counts that allege that DEP has violated the Charter. Grant Township's counterclaims thus go to the heart of this case; that is, whether the Charter is a valid law enacted by the people of Grant Township pursuant to their inherent, inalienable, and fundamental right of local, community self-government and the Environmental Rights Amendment. If the Charter is valid, it is undisputed the DEP has violated it by issuing the frack waste disposal permit to PGE. Grant Township's Counterclaim asserts five counts:

- Count I asserts that the Charter is a valid law adopted pursuant to the people's right of local, community self-government.

[2] In considering whether an "exclusionary" zoning ordinance is constitutional, courts looks to whether it bears a substantial relationship to health, safety, and welfare. *See Township of Exeter v. Zoning Hearing Bd.*, 599 Pa. 568, 579-809 (Pa. 2009).

- Count II asserts that interpretation of the Oil and Gas Act and the Solid Waste Management Act to preempt the Charter would violate the people's right of local, community self-government.

- Count III asserts that the Charter is a valid law pursuant to Article I, § 27 of the Pennsylvania Constitution, commonly known as the Environmental Rights Amendment.

- Count IV asserts that DEP has violated Article I, § 27 of the Pennsylvania Constitution; and

- Count V asserts that DEP has violated Section 301 of the Charter.

V. DEP's Preliminary Objections

On June 19, 2017, DEP filed preliminary objections, seeking the following relief:

- Dismissal of paragraphs 68, 69, 70, and 83 of the New Matter for failure to exhaust statutory remedies (Preliminary Obj. at p. 9);

- Dismissal of Counts I, II, and III of the Counterclaim on the ground that the "Township's request for declaratory relief as to the Well Permit is legally insufficient" because the matter is within the exclusive jurisdiction of the Environmental Hearing Board (Preliminary Obj. at p. 10);

- Dismissal of Counts I – V for lack of jurisdiction due to failure to exhaust administrative remedies (Preliminary Obj. at p. 11);

- Dismissal of various paragraphs of New Matter and Counts I –V of Counterclaim to the extent they assert that the Charter is not preempted by the Oil and Gas Act or Solid Waste Management Act;

- Dismissal of various paragraphs of New Matter and Counts I –V of Counterclaim as exceeding the scope of the Township's authority;

- Dismissal of various paragraphs in New Matter and Counterclaim for lack of specificity; and

- Dismissal of Grant Township's request for jury trial.

On September 1, 2017, DEP filed a brief in support of its preliminary objections. Grant Township files this brief in opposition to DEP's objections.

SUMMARY OF THE ARGUMENT

This case is about the people's authority to enact a home rule charter pursuant to the people's fundamental and inalienable right of local, community self-government as secured by Article I, Sections 1 and 25, as well as, independently, pursuant to the Environmental Rights Amendment (Article 1, Section 27) of the Pennsylvania Constitution. DEP filed this action to obtain a court order invalidating certain provisions of the Charter as preempted and in excess of a municipality's home rule authority as recognized by the Pennsylvania Constitution, Article IX, Section 2 (titled "Home Rule") and the Home Rule Charter and Optional Plans Law, 53 Pa.C.S. § 2901, *et seq*. (hereinafter "Home Rule Law"). Grant Township responds by asserting a New Matter and Counterclaim that set forth the source of the people's, as distinct from the municipality's, right to enact a charter that secures and expands their civil, political, and environmental rights. Grant Township's New Matter and Counterclaim defend and enforce the Charter.

DEP's framing of the questions at issue in this case are overly simplistic and inaccurate. DEP asserts that the doctrine of preemption applies and that the Charter exceeds the scope of the Township's authority without even considering the legal basis for the counterclaims asserted by Grant Township. Rather than addressing the legal basis for Grant Township's counterclaims, DEP mischaracterizes them as

insufficiently pled. At the preliminary objection stage, the question before the court is whether Grant Township has stated defenses and counterclaims that are sufficient as a matter of law. Grant Township has done so.

Underlying all of Grant Township's assertions in defense and enforcement of the Charter is the premise that the Charter is a validly enacted law pursuant to the people's right of local, community self-government, and also pursuant to the Environmental Rights Amendment. Therefore, in order to grant DEP's preliminary objections for failure to state a claim, the Court would have to find that Grant Township's counterclaims based on the right of local, community self-government (Counts I, II) and on the rights and duties of the Environmental Rights Amendment (Count III) (along with the paragraphs of Grant Township's New Matter containing similar assertions), and Counts IV and V of Grant Township's Counterclaim which enforce those rights against DEP, fail as matter of law either because: (1) no such rights exist; or (2) Grant Township and the people of Grant Township, somehow did not properly exercise such rights in passing the Charter.

DEP's assertion that Grant Township has failed to exhaust administrative remedies and that this Court is without jurisdiction to hear the New Matter and Counterclaim is based on a similar mischaracterization of the issues at the heart of this case. Grant Township is not appealing the grounds upon which DEP issued the Permit. Grant Township does not, for instance, contend that DEP should have

imposed additional conditions or denied the Permit based on scientific evidence. Rather, Grant Township contends that DEP did not have the authority or jurisdiction to issue the Permit in the first place.

The issues before the Court in this case are: (1) whether the Charter is valid; and (2) if so, whether the DEP violated the Charter, and the Environmental Rights Amendment, in issuing the Permit. Grant Township contends, as alleged in Counts I – III of its Counterclaim, that the answer to the first question is "yes". The answer to the second question is also "yes". The fact that DEP issued the Permit in violation of the Charter's express language is not in dispute.

Somewhat hypocritically, DEP has recognized this Court's jurisdiction insofar as it may issue a declaratory judgment on the question of the Charter's validity. Yet, Counts I – III of Grant Township's Counterclaim ask the Court to do just that. Counts IV and V then, directly related to the issues in this case, seek judgment against the DEP for violating the Charter and the Environmental Rights Amendment. The Court has jurisdiction over Grant Township's New Matter and Counterclaim. To hold otherwise, would be to allow DEP to present its claims regarding the Charter's alleged invalidity without allowing Grant Township to assert corresponding claims for a declaratory judgment as to the Charter's validity, and directly related claims that apply the Charter and Pennsylvania Constitution to DEP's act of issuing the Permit.

ARGUMENT

I. Grant Township Has Sufficiently Alleged Claims and Defenses Based on the Violation of the People's Right of Local Community Self-Government

Counts I and II of Grant Township's Counterclaim are based on the people's right of local community self-government as are several of the paragraphs of Grant Township's New Matter, which similarly assert that the Charter is a valid law adopted pursuant to the people's right of local, community self-government (New Matter ¶¶ 63, 64), that DEP's assertion of express and implied preemption violates that right and preemption does not apply (New Matter ¶¶ 65, 74, 78-82), and that the Home Rule Law does not restrict the people's power and authority pursuant to the right of local, community self-government (New Matter ¶ 73.)

A. The People's Right of Local, Community Self-Government

The people enacted the Charter pursuant to their right of local community self-government to change their system of local government. The right of local, community self-government is an inherent, fundamental, and inalienable right held by each individual that resides within Grant Township, and is exercised collectively by the citizens of Grant Township. As alleged by Grant Township "[t]he right of local, community self-government is a fundamental and unalienable right secured by the American Declaration of Independence, the U.S. Constitution,

the Pennsylvania Constitution, the Home Rule Charter, in particular Sections 101, 102 and 103, and case law. (Counterclaim ¶ 48.)

1. The U.S. Constitution guarantees the right of local, community self-government to the people of Grant Township

The U.S. Constitution secures the right of local, community self-government in a number of places. The Preamble says:

> We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

U.S. CONST. at Preamble.

Three of the four principles of self-government from the Declaration appear here, though more loosely. The words "justice, tranquility, defence, welfare, and blessings of liberty" express the Declaration's principle that people have certain natural rights by virtue of being human. The words "in Order to" and "do ordain and establish" express the Declaration's principle that people form governments to secure their civil and political rights. The words "We the People of the United States" express the Declaration's principle that governmental authority stems from the people of the community exercising the powers of government, and is to be exercised for their benefit only.[3]

[3] As one writer said, "The people, who are sovereigns of the state, possess a power to alter when and in what way they please. To say [otherwise] ... is to make the thing created, greater than the

The founders debated whether more explicitly to insert all four principles of the Declaration of Independence directly into the Constitution's preamble, or whether the people's right of self-government was so fundamental that it need not be expressly stated in the text of the Constitution itself.[4] Advocating for express inclusion, James Madison argued: "[i]f it be a truth, and so self-evident that it cannot be denied—if it be recognized, as is the fact in many of the State Constitutions. . . this solemn truth should be inserted in the Constitution."[5]

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power that created it." Fed. Gazette, 18 Mar. 1789 (reprinted in Matthew J. Herrington, *Popular Sovereignty in Pennsylvania 1776–1791*, 67 TEMP. L. REV. 575 (1994)).

[4] This debate was forced by the people of the states through their ratifying conventions. The conventions of many states chose to use the ratification process as another vehicle for securing their right of local, community self-government. They did so by offering amendments that incorporated the principles of the Declaration directly into the text of the Constitution. The people who voted to reject the Constitution outright (and the populations they represented), and the people who refused to ratify without the offering of those local self-government amendments (and the populations they represented) constituted a majority of the people living within the United States at the time of ratification. *See* The Avalon Project at Yale Law School at Ratification of the Constitution by the Various States (http://avalon.law.yale.edu/subject_menus/18th.asp) (accessed November 1, 2017).

[5]Madison proposed amending the Constitution's preamble to include the following language:

> "That all power is originally vested in, and consequently derived from the people.
>
> That government is instituted, and ought to be exercised for the benefit of the people, which consists in the enjoyment of life and liberty, with the right of acquiring and using property, and generally of pursuing and obtaining happiness and safety.
>
> That the people have an indubitable, unalienable, and indefeasible right to reform or change their government, whenever it be found adverse or inadequate to the purposes of its institution."

U.S. House of Representatives, June 8, 1789 (http://teachingamericanhistory.org/bor/madison_17890608/) (last accessed November 1, 2017).

The House rejected the addition, significantly because it deemed the language already incorporated within the Constitution's preamble. Roger Sherman explained that since:

> this right is indefeasible, and the people have recognized it in practice, the truth is better asserted than it can be by any words whatever. The words "We the people," in the original Constitution, are as copious and expressive as possible; any addition will only drag out the sentence without illuminating it. . . [6]

Fourteen years later, the U.S. Supreme Court, in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), validated Sherman's reasoning. Interpreting the Constitution's preamble as recognizing the people's inherent and fundamental right of self-government, the Court concluded:

> [t]hat the people have an original right to establish, for their future government, such principles as, in their own opinion, shall most conduce to their own happiness, is the basis on which the whole American fabric has been erected.

Marbury, 5 U.S. (1 Cranch) at 176. [7]

The right of local, community self-government, as a fundamental right, is also protected by the Ninth Amendment of the Bill of Rights. That Amendment

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[6] U.S. House of Representatives, August 14, 1789 (www.teachingamericanhistory.org/bor/select-committee-report/) (accessed November 1, 2017).

[7] Speaking at the Pennsylvania convention that ratified the federal Constitution, James Wilson said: "His [Mr. Findley's] position is, that the supreme power resides in the States, as governments; and mine is, that it resides in the people, as the fountain of government; that the people have not—that the people mean not—and that the people ought not, to part with it to any government whatsoever. They can delegate it in such proportions, to such bodies, on such terms, and under such limitations, as they think proper." James Wilson, Pennsylvania Ratifying Convention, 4 Dec. 1787 (reprinted in Philip B. Kurland, THE FOUNDERS' CONSTITUTION VOLUME ONE at 62).

says: "the enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage other rights retained by the people." As the concurrence in *Griswold*, 381 U.S. at 488, explained: "The language and history of the Ninth Amendment reveal that the Framers of the Constitution believed that there are additional fundamental rights, protected from governmental infringement, [in addition to] those fundamental rights specifically mentioned in the first eight constitutional amendments."[8]

Among the retained rights of the people is the fundamental right to alter or abolish their form of government whenever they see fit. *See* 2 Blackstone's COMMENTARIES: WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS OF THE FEDERAL GOVERNMENT OF THE UNITED STATES AND OF THE COMMONWEALTH OF VIRGINIA 162 (1803); *Deitz v City of Central*, 1 Colo. Rptr. 323 (Colo. Terr. 1871); *Henry Broderick, Inc. v. Riley*,157 P.2d 954, 966 (Wash. 1945) (the Ninth Amendment serves as a "sentinel against overcentralization of government, [and serves as a] monument to the wisdom of the constitutional framers who realized that for the stable preservation of our form of government, it is essential that local

[8] Historical evidence uncovered in the last twenty-five years reinforces that the public intent of this amendment was to elevate the natural rights of people - that pre-existed the Constitution - to the same status, whether or not the rights were explicitly enumerated in the Bill of Rights. Randy E. Barnett, *The Ninth Amendment: It Means What It Says*, 85 TEX. L. REV. 1, 28-29 (2006). These pre-existing natural rights include individual rights as well as collective rights. *Id.* at 21, 20, and 46.

governmental functions be locally performed."). As legal scholar Kurt Lash explains:

> The right to local self-government is a right retained by all people and can be exercised in whatever political direction the people please. What we have forgotten, what we have lost, is that the right to local self-government is more than an idea. It is a right enshrined in the Constitution itself.

Kurt Lash, THE LOST HISTORY OF THE NINTH AMENDMENT 360 (2009).

2. The Pennsylvania Constitution guarantees the right of local, community self-government to the people of Grant Township

Both current and earlier versions of the Pennsylvania Constitution recognized the right of local community self-government. Pennsylvania's Constitution of 1776 explicitly secured the people's inalienable right to *community* self-government in its formulation of the source and scope of - and manner of altering - governmental authority. It reaffirmed that the people are the source of all governmental power and that governments must exercise that power for the common benefit of people and their *communities*. To ensure that this is so, the *community* has "an indubitable, unalienable and indefeasible right to reform, alter or abolish government."[9]

[9] The Avalon Project at Yale Law School, Constitution of Pennsylvania at ¶5 (September 28, 1776) (http://avalon.law.yale.edu/18th_century/pa08.asp) (accessed August 8, 2014) (emphasis added). In his treatise on the Pennsylvania Constitution, Ken Gormley writes, "[m]any modern-day lawyers are surprised to learn that Pennsylvania's Constitution of 1776 was widely viewed as the most radically democratic of all the early state constitutions." Gormley, THE PENNSYLVANIA CONSTITUTION 3 (2004).

The history of local government in Pennsylvania at the time shows that the word "community" meant local communities. The members of Pennsylvania's Constitutional Convention of 1776 consisted largely of people who resisted both British rule and the centralization of political power in the City of Philadelphia.[10] Members of the constitutional convention wished to govern themselves locally and be free from both British rule and imperial-style control by the colonial power base in Philadelphia.

Mindful of a potentially oppressive state government, they ensured that Pennsylvania's first constitution emphasized that the right of self-government exists at the local, community level. Accordingly, Pennsylvania has historically recognized that it is the people who give the state the authority to govern and not the other way around. *See Commonwealth v. McElwee*, 327 Pa. 148, 193 A.628 (Pa. 1937) (citing *People v. Hurlbur*t, 24 Mich. 44 (1871)); *see also* Thomas M. Cooley, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 47 (5th Ed. 1883).

Pennsylvania adopted a second constitution in 1790. The Pennsylvania Constitution of 1790 reaffirmed that people are the source of governmental power

[10] *See* John L. Gedid and Ken Gormley, *et al.*, THE PENNSYLVANIA CONSTITUTION, 37-41 (2004) (describing how disenfranchised communities in the western part of the state fought to exercise political power with communities around Philadelphia); Maier, AMERICAN SCRIPTURE, ch. 2 (1997) (describing how Pennsylvania's legislative assembly that resisted separation from Great Britain dissolved and a constitutional convention composed of members favoring self-governance formed); Bockelman, Wayne L., LOCAL GOVERNMENT IN COLONIAL PENNSYLVANIA 9-14 (1969).

and, as such, they have the unalienable and indefeasible right to alter, reform, or abolish their government. *See* PENNSYLVANIA CONSTITUTION OF 1790, Art. IX Declaration of Rights, §II (reprinted in Gormley, THE PENNSYLVANIA CONSTITUTION at 880).

The Pennsylvania Constitution made clear that the people's right of self-government could not be overridden by other levels of government:

> Exception from the general powers of government. Section XXVI. To guard against the transgression of the high powers which we have delegated, WE DECLARE, That everything in this article [on the Declaration of Rights] is excepted out of the general powers of government, and shall for ever remain inviolate.[11]

The exception clause recognizes the truism that the peoples' inherent, inalienable rights are forever superior to the state government established by the constitution, not subject to control by the state government.[12]

All Pennsylvania Constitutions since that of 1790, including the current Pennsylvania Constitution, have contained, in the Declaration of Rights, both the inalienable right of self-government, and the exception of the right from the

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[11] *See* PENNSYLVANIA CONSTITUTION OF 1790, Art. IX Declaration of Rights, sec. XXVI (reprinted in Gormley, THE PENNSYLVANIA CONSTITUTION at 883); Gormley, THE PENNSYLVANIA CONSTITUTION at 56 ("the bad experience with legislative incursions on individual rights under the 1776 Pennsylvania Constitution led to express exception from legislative power of rights contained in the Declaration of Rights of the Constitution of 1790.").

[12] According to John L. Gedid, "[t]he Whigs also believed that individuals inherently possessed natural rights, and that these rights did not have to be created by positive law or statute. This natural right theory meant that rights existed even if the legislature had not recognized them and that even the legislature could not take away these inherent natural rights." Gormley, THE PENNSYLVANIA CONSTITUTION at 40.

general powers of the state government. *See* PENNSYLVANIA CONSTITUTION OF 1838, Art. IX Declaration of Rights, §§II, XXVI (reprinted in Gormley, THE PENNSYLVANIA CONSTITUTION at 884, 887); PENNSYLVANIA CONSTITUTION OF 1874, Art. I Declaration of Rights, §§2, 26 (reprinted in Gormley, THE PENNSYLVANIA CONSTITUTION at 887, 891); PENNSYLVANIA CONSTITUTION OF 1968, Art. I Declaration of Rights, §2 ("Political Rights") §25 ("Reservation of Powers in People"), 25 (reprinted in Gormley, THE PENNSYLVANIA CONSTITUTION at 891, 895).

Pa. Const. art. I, § 2 provides for the people's political powers:

> All 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. I, § 25 reserves powers in the people:

> To 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.

3. The Pennsylvania Supreme Court recognizes the right of local community self-government

The Pennsylvania Supreme Court recognizes the fundamental rights reserved to the people in the Pennsylvania Constitution's Declaration of Rights (Article I), and that the inherent right of local, community self-government

exists.

The Pennsylvania Supreme Court's opinion in *Gondelman v. Com*., 520 Pa. 451, 467–69, 554 A.2d 896, 904–05 (1989) contains a lengthy discussion of the import of the Declaration of Rights explaining how the Pennsylvania Constitution establishes a government of general powers, restrained by the Declaration of Rights, and reiterating the well-established proposition that "those rights enumerated in the Declaration of Rights are deemed to be inviolate and may not be transgressed by government." *Id*. at 466-67 (citing *Spayd v. Ringing Rock Lodge No. 665, Brotherhood of Railroad Trainmen*, 270 Pa. 67, 113 A. 70 (1921). "Article I does not restrain the power of the people, it restrains the governmental structure that the people have created." *Id*. at 469.

The Court cited Article I, Section 25 and quoted from treatise authority to explain the import of the Declaration of Rights:

> The Constitution sets forth those rights and powers inherent in the people that are delegated to government and those powers which are reserved and retained by the people. In a sense, it is a power of attorney by the people to their designated officials acting as agents for the people and delineating the authority granted and the rights reserved.
>
> *Id*. at 467-68 (citation omitted).

After recognizing "that the rights articulated in Article I are to be recognized as being inherent in the right of a resident of this Commonwealth and insulated against the governmental power of this Commonwealth", *id*. at 466, the Court

recited the principle that other levels of government create a floor, not a ceiling, for the people's exercise of their inherent right of self-government. *Id*. at 468 ("Unless there is a federally protected right offended, the people, by way of amendment, are free to convey a power to their government if they choose to do so.") (citing *Stander v. Kelley*, 433 Pa. 406, 250 A.2d 474 (1969)). In applying these principles, the *Gondelman* Court upheld a mandatory retirement age for judges contained in Article V of the Constitution as a product of the people in structuring their government pursuant to Article I.

As *Gondelman* reminds, Article I, Section 2 recognizes the people's inherent power to alter, reform or abolish their form of government "in such manner as they think proper." In exercising this right, the manner thought proper by the people of Grant Township was to adopt a Charter. The Charter recognizes rights held by the people and natural communities, many of which are along the same lines as the rights secured by the Environmental Rights Amendment. The Charter is a local constitution that expands the people's rights. Laws which interfere with the exercise of those rights, such as the Oil and Gas Act and Solid Waste Management Act, are unconstitutional. The Home Rule Law, the enabling legislation for municipalities' Article IX "home rule" powers, also cannot be applied to violate the people's rights in Article I.

The Court in *Pennsylvania Envtl. Def. Found. v. Commonwealth*, 161 A.3d 911, 930–31 (Pa. 2017) recently emphasized the import of the inherent, indefeasible, and inviolate rights reserved to the people in Article I, this time in the context of the Environmental Rights Amendment, which is also contained in the Declaration of Rights, Article 1 at Section 27. The Court considered the power of the General Assembly derived from Article III in relation to Article I, finding that the General Assembly's powers to enact laws are "expressly limited by fundamental rights reserved to the people in Article I of our Constitution." *Id*. at 930. In considering the relationship between Section 27 and state law, then, the Court concluded that any state laws which impair the rights secured by Section 27 are unconstitutional. The General Assembly likewise cannot restrict other rights reserved to the people, including the right of local, community self-government as secured by Article I, Sections 2 and 25.

This recent case law builds off of a long history of the Pennsylvania Supreme Court's recognition of the right of local, community self-government. *See Commonwealth v. McElwee*, 327 Pa. 148, 193 A.628 (Pa. 1937) (applying Cooley's work in "Constitutional Limitations" to note "the American system is one of complete decentralization, the primary and vital idea of which is, that local affairs shall be managed by local authorities, and general affairs only by the central authority. . . The system is one which seems a part of the very nature of the

race to which we belong.").[13] The *McElwee* Court adopted Justice Cooley's reasoning in *People v. Hurlbut*, 24 Mich. 44 (1871): the case which established the "Cooley Doctrine" – the doctrine that people possess an inherent, constitutionally-protected right of local, community self-government that state action cannot infringe.[14]

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[13] *McElwee* is good law to this day. The Pennsylvania Supreme Court has not overruled any part of it, and has relied on it much, and recently, including for propositions pertinent to this case. *See, e.g., Robinson Twp. v. Commonwealth*, 83 A.3d 901, 948 (Pa. 2014); *Western Pennsylvania Socialist Workers 1982 Campaign v. Conn. Gen. Life Ins. Co.*, 515 A.2d 1331, 1335 (Pa. 1986) (citing *McElwee* for the proposition that the Declaration of Rights limits state governmental power); *Citizens Committee to Recall Rizzo v. Board of Elections of City and County of Philadelphia*, 367 A.2d 232, 294 (Pa. 1976) (Justice Roberts dissenting, citing *McElwee* for the propositions, "Written constitutions should be construed with reference to and in the light of well-recognized and fundamental principles lying back of all constitutions, and constituting the very warp and woof of these fabrics," and "the principle of 'home rule,' i.e., local self-government, which, like the tripartite separation of governmental powers, is a vital part of both the foundations and the general framework of our state and federal governments."); *Commonwealth v. Martin*, 232 A.2d 729, 738 (Pa. 1967) (citing *McElwee* for the proposition that "what is forbidden, either expressly or by necessary implication, in the Constitution cannot become law."); *In re Shelley*, 2 A.2d 809, 816 (Pa. 1938) (Justice Maxey concurring in part and dissenting in part, citing *McElwee* for the proposition, "[L]ocal self-government … is a vital part of both the foundations and general framework of our state and federal governments.").

[14] The highest courts of thirteen states, including Pennsylvania, have followed Cooley's opinion from *Hurlbut*, finding as he did the existence of an inherent right of local self-government. Only one of those decisions (in Nebraska) has been overturned, the others presumably remaining good law: *People v. Lynch*, 51 Cal. 15, 27 (1875) (approving Judge Cooley's opinion that the right of local self-government is implied in our constitutions, and adding in this regard, "By the Tenth Amendment of the Constitution of the United States … The Government of the United States can exercise only such powers as are expressly granted to it, and such as are necessarily implied from those granted. It follows from this, that the people of the States respectively retain such powers as have neither been granted, expressly or by implication, to the Government of the United States, nor conferred on the State governments."); *State v. Moores*, 76 N.W. 175, 177-180 (Neb. 1898), *overruled*, *Redell v. Moores*, 88 N.W. 243 (Neb. 1901) ("It cannot be asserted that the only rights reserved to the people are those enumerated in said article of the constitution, since section 26 thereof declares, "This enumeration of rights shall not be construed to impair or deny others, retained by the people, and all powers not herein delegated, remain with the people…. On the contrary, it is very evident that the constitution was framed upon the theory of local self-government."); *State ex rel. Pearson v. Hayes*, 61 N.H. 264, 322 (1881) ("Local self-government

B. Dillon's Rule is Inapplicable and Unconstitutionally Infringes on the Right of the People of Grant Township to Local, Community Self-Government

In its preliminary objections, DEP contends that Grant Township exceeded its authority in adopting the Charter under Art. IX, Sect. 2 of the Pennsylvania Constitution and the Home Rule Law[15], thereby invoking the doctrine known as "Dillon's Rule." "Dillon's Rule" says that local governments serve at the whim of state legislatures, which have absolute authority to create them, define and limit

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(including much administration of law, and the extensive use of the law-making powers of taxation and police), introduced not only before the organization of both the state and province of New Hampshire, but also before the extension of Massachusetts jurisdiction to the Piscataqua, and continuing in uninterrupted operation more than two hundred years, has been constitutionally established by recognition and usage."); *Rathbone v. Wirth*, 45 N.E. 15, 17 (N.Y. 1896) (the right of local self-government "inheres in a republican government and with reference to which our Constitution was framed…. [A]s Judge Cooley has remarked with reference to the Constitutions of the states, 'if not expressly reserved, it is still to be understood that all these instruments are framed with its present existence and anticipated continuance in view.'"); *Helena Consol. Water Co. v. Steele*, 49 P. 382, 386 (Mont. 1897) ("We think the two provisos of the law under discussion are in violation of the clauses of the constitution quoted and referred to above, as well as the spirit of our governmental system, which recognizes 'that the people of every hamlet, town, and city of the state are entitled to the benefits of local self-government.'"); *State v. Standford*, 66 P. 1061, 1062 (Utah 1901) ("An examination into its early history will show the existence of a system of territorial subdivisions of the state into counties when the present constitution was adopted. At this early date the system of local self-government existed under the general laws of the territory, and there is no provision in the constitution which can be construed as impairing that right…. [T]he Constitution implies a right of local self-government to each county"); *Federal Gas & Fuel Co. v. City of Columbus*, 118 N.E. 103, 105 (Ohio 1917) ("If all political power is inherent in the people, as written in our Constitution, for the government of the state, it would seem at least of equal importance that all political power should be inherent in the people for the government of our cities and villages."); *State v. Essling*, 195 N.W. 539, 541 (Minn. 1923) ("The doctrine that local self-government is fundamental in American political institutions; that it existed before the states adopted their Constitutions, and that it is more than a mere privilege conceded by the Legislature in its discretion is ably discussed in *People v. Hurlbut*."); *Town of Holyoke v. Smith*, 226 P. 158, 158 (Colo. 1924) ("The central idea of government in this country was and is that in local matters municipalities should be self-governing.").

[15] The provisions of the Home Rule Law at issue are 53 Pa.C.S. § 2962 (c) and (e).

their powers, and even to eliminate them. *See* John Forrest Dillon, LL.D, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS, at 154-156 (5th Ed. 1911) ("Municipal corporations owe their origin to, and derive their powers and rights wholly from, the legislature.").

DEP's argument based on the limited home rule authority afforded municipalities is flawed. Dillon's Rule does not apply because: (1) it operates only against municipal corporations; (2) it violates the right of local, community self-government; and (3) it otherwise has become obsolete.

First, the people's authority to enact the Charter does not originate from the State's authorization of municipal corporate powers through Pennsylvania's Home Rule Law. The people's right of local, community self-government is not limited by the powers granted to municipal corporations. The people have the power to enact local bills of rights (*e.g.*, local constitutions), pursuant to the authority set forth above, including Article I, Sections 2 and 25, and that is exactly what the people of Grant Township did in this case. Dillon's Rule is inapplicable because the people of Grant Township adopted the Charter directly, by popular vote.

Second, if applied, Dillon's Rule would violate the right of local, community self-government by subjecting the exercise of the people's right to state law restrictions on the power of municipal corporations. As with any corporation, the powers of municipal corporations are defined by state law. The Home Rule Law

authorizes municipal corporations to take certain actions. The people are not "creatures of state law" and their fundamental, inalienable, and constitutional rights are not so constrained.

Third, Dillon's Rule should not be applied in this case because the doctrine has become obsolete. As the importance of local self-governance infiltrates various aspects of our society, the legal system must evolve to abandon doctrines that no longer reflect societal needs and values. In the past thirty years, courts have begun to recognize that Dillon's Rule runs contrary to the need for, and value of, local self-governance. In abandoning Dillon's Rule as it has previously applied to strict construction of municipal and county powers, the Utah Supreme Court in *State v. Hutchinson*, 624 P.2d 1116, explained that "[i]f there were once valid policy reasons supporting the rule, we think they have largely lost their force and that effective local self-government, as an important constituent part of our system of government, must have sufficient power to deal effectively with the problems with which it must deal." *Id.* at 1120.

C. The Doctrine of Preemption – When Applied to Set a Ceiling, Rather than a Floor, for Local, Rights-Based Lawmaking – Violates the Constitutionally Secured Right of the People to Local, Community Self-Government

DEP does not address the merits of Grant Township's allegations regarding the inapplicability of the doctrine of preemption to invalidate the Charter. DEP simply reiterates that the doctrine of preemption has historically been applied to

invalidate local laws. In doing so, DEP fails to address the substance of Grant Township's allegations: that preemption must give way to the people's expansion of their civil, political, and environmental rights via the right of local community self-government. When configured in that manner, state law may provide a floor for regulation – through which the people of the Township may not fall – but it cannot establish a ceiling that the people of the Township may not exceed.[16]

The doctrine of preemption is based on the concept that municipal corporations are creatures of the state and are subject to the plenary authority of the state legislature.[17] "The matter of preemption is a *judicially created principle*,

[16] The people may exercise their right of local, community self-government, as did the people of Grant Township, to protect the health, safety, and welfare of the people and the natural environment. That expansion of rights cannot be constrained by state and federally recognized constitutional rights because those rights may create a floor of rights-protections, but they cannot prevent an expansion of rights above that floor. *See Gondelman,* 520 Pa. at 468; *Kreimer v. Bureau of Police for Town of Morristown*, 958 F.2d 1242, 1269 (3d Cir. 1992) (declaring 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"); *Commonwealth v. Edmunds*, 586 A.2d 887, 894 (1991) (explaining that Pennsylvania's state charter supplies a substantive "floor" of protection that must always be at least as great as that established pursuant to similar provisions in the United States Constitution).

[17] As recently reiterated in *Williams v. City of Philadelphia*, 164 A.3d 576, 584–85 (Pa. Cmwlth. 2017), the concept of preemption involves the legislature and the "[t]he matter of preemption is rooted in the relationship between the constitutional provisions vesting the legislative power of the Commonwealth in the General Assembly, Article II, Section 1, and providing for local government, Article IX, Section 1. In providing for the general welfare of the Commonwealth's citizens, the General Assembly may choose to leave a subject open to control by local governmental bodies, it may enact laws of statewide application that simultaneously allow for local regulation, or local ordinances may be prohibited entirely." *Id*. (citing *City of Philadelphia v. Clement & Muller, Inc*., 552 Pa. 317, 715 A.2d 397, 398 (1998)). The right to local self-government is a fundamental right and the political power of the people is expressed in Article I, Section 2. The Declaration of Rights is in Article I to which the doctrine of preemption has no application.

based on the proposition that a municipality, as an agent of the state, cannot act contrary to the state. . .” *Burkholder v. Zoning Hearing Board*, 902 A.2d 1006, 1012 (Pa. Cmwlth 2006) (emphasis added).

In contrast, the people’s right of local, community self-government originates from the people themselves. Thus, the doctrine of preemption has no place in constraining the people of Grant Township’s natural, inalienable, and constitutionally secured right. Because preemption is a judicially created doctrine, the court can and must recognize it as inapplicable or modify it as necessary to account for the exercise of fundamental and constitutionally secured rights.

While not a case based on the people’s exercise of their inherent and inalienable rights as secured by Article, I, Justice Nigro’s dissent in *Ortiz v. Commonwealth*, 681 A.2d 152 (Pa. 1996) (preempting Pennsylvania municipalities from banning assault weapons pursuant to the Pennsylvania Uniform Firearms Act), expounds upon the policy reasons for recognizing rights increasing initiatives at the local level:

> In my opinion, whenever the state legislature fails to enact a statute to address a continuing problem of major concern to the citizens of the Commonwealth, a municipality should be *entitled* to enact its own local ordinance in order to provide for the public safety, health, and welfare of its citizens. . .Since Philadelphia County is besieged by a multitude of violent crimes which occur involving a variety of hand guns and automatic weapons it is *fundamentally* essential that the local government enact legislation to

protect its citizens whenever the state legislature is unable or unwilling to do so.

Id. at 157 (emphasis in original).

D. The Court Can and Should Recognize the Right of Local, Community Self-Government

DEP asserts that Grant Township's New Matter and Counterclaim are contrary to established law. (Preliminary Obj. VI at p. 21). This is incorrect. The Pennsylvania courts have not previously addressed whether the right of local, community self-government provides authority for the people to pass home rule charters.[18]

As noted by the Pennsylvania Supreme Court in *In re Addison*, where a home rule charter is "adopted by a constitutionally empowered electorate, it affords an example of pure democracy--the sovereign people legislating directly and not be representatives in respect of the organization and administration of their local government." *In re Addison*, 385 Pa. 48, 56-57, 122 A.2d 272, 275-76 (1956). The courts have continued to recognize that "[a] home rule charter is the equivalent of a constitution—it is the compact by which local citizens set forth the terms and conditions by which they consent to be governed. Importantly, provisions of a

[18] In *Seneca Resources Corporation v. Highland Township, et al*., C.A. No. 16-cv-289, the federal district court for the Western District of Pennsylvania recently found a similar Charter enacted by the people of Highland Township to be invalid. The federal decision is obviously not binding and provides no guidance to this Court, particularly because the Judge did not consider any of the claims raised by Grant Township here, specifically those based on the right of local community self-government and the Environmental Rights Amendment.

home rule charter have the force and status of an enactment of the legislature." *City of Pittsburgh v. Fraternal Order of Police, Fort Pitt Lodge No. 1*, 129 A.3d 1285, 1289 (Pa. Cmwlth.) (citing *Spencer v. City of Reading Charter Bd*., 97 A.3d 834, 840 (Pa. Cmwlth. 2014)), appeal granted, 635 Pa. 663, 139 A.3d 1257 (2016), and rev'd on other grounds, 161 A.3d 160 (Pa. 2017).

This recognition, however, has not translated into meaningful home rule authority by the people. Instead, the courts have continued to qualify the people's right to legislate by conflating it with the limitations on *municipal* authority to legislate. These are distinctly different concepts and the distinction makes all of the difference. The limitations of the Home Rule provision in Pennsylvania's Constitution, Art. XI, Section 2, along with its enabling legislation in the form of the Home Rule Law, expressly pertain to municipal authority. Because the right of local, community self-government is held by the people such limitations do not apply.

In *Com., Office of Atty. Gen. ex rel. Corbett v. E. Brunswick Twp.*, 956 A.2d 1100, 1108 (Pa. Cmwlth. 2008), this Court, recognized that "Section 2 guarantees *citizens* the right to amend the Pennsylvania Constitution" (emphasis added), while, at the same time, *in dicta*, wrongfully applied statutory limitations applicable to the authority of municipalities to the *people's* exercise of their rights

to alter, abolish, or reform their government as secured by Article 1, section 2.[19] *Id*. ("Article 1, Section 2 is silent on how local government is changed. Accordingly, it does not authorize citizens to amend their form of local government without following the statutory procedures therefor. *See, e.g*., the Act of April 21, 1949, P.L. 665, as amended, 53 P.S. §§ 13101–13157 (relating to the adoption and amendment of city charters); 53 Pa.C.S. §§ 2901–2983 (the Home Rule Charter and Optional Plans Law)").

Once the court recognizes that the people's authority is distinct from municipal authority, then it becomes clear that the home rule limitations in Article IX do not restrict the people's political rights in Article I, Section 2, that are inviolate, indefeasible, inherent and fundamental.

The Court cannot continue to simultaneously recognize that charters have the same force as constitutions, while, in the event of a conflict, find that state law prevails over the charter. The right of local, community self-government requires the Court to apply a different analysis. It is not about one level of government being superior to another. It is about the people exercising their right of local, community self-government to increase their rights at the local level. The question, then, is not whether there is a conflict between state and local law. Rather, the

[19] The decision in *East Brunswick Township* is, of course, not adverse precedent because the court in that case considered an ordinance, not a charter, and also did not decide whether the *people's* right of local self-government was a valid basis to uphold the ordinance.

question is whether the state law, by purporting to preempt Charter provisions that advance the people's right to clean air, water, and soil, violates the people's right of local, community self-government pursuant to which the people enacted the very Charter under attack.

The Court can and should recognize the right of local, community self-government. While fundamental and inalienable, and therefore, not a new right, it may be more fully articulated by the Court.[20] As set forth above, the courts play a crucial role in examining the Nation's history and constitution in recognizing and articulating fundamental rights. *See McDonald v. City of Chicago, Ill.,* 561 U.S. 742, 767 (2010). For law to evolve with a changing society, jurists must critically examine the wisdom of perpetuating unworkable legal doctrines, such as preemption when applied to set a ceiling rather than a floor. Courts are free to articulate the reasons for limiting application of established legal doctrines. *See U.S. v. Extreme Associates, Inc*., 431 F.3d 150, 155-56 (3d Cir. 2005).

The court in *Juliana, et al. v. U.S.*, 217 F.Supp.3d 1224, 1249–50 (D. Or. 2016), recently applied these principles to recognize that "the right to a climate system capable of sustaining human life is fundamental to a free and ordered society." *Id.* at 1249. The decision discussed other instances where courts have recognized fundamental and constitutional rights such as in *Obergefell v. Hodges,*

[20] As set forth above, the right of local self-governance is not a new right, but Grant Township recognizes that it has not been applied in the exact context that is before this Court.

135 S. Ct. 2584, 2598 (2015), recognizing a constitutional right to same-sex marriage, in which Justice Kennedy wrote:

> The nature of injustice is that we may not always see it in our own times. The generations that wrote and ratified the Bill of Rights ... did not presume to know the extent of freedom in all its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning. When new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed.

Obergefell, 135 S. Ct. at 2598. Thus, "[t]he identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution ... [that] has not been reduced to any formula." *Juliana, et al.*, 217 F.Supp.3d at 1250 (citation and quotation marks omitted). As Judge Aiken found "roots" of the right to privacy in the First Amendment, the Fourth Amendment, the Fifth Amendment, the penumbras of the Bill of Rights, and the Ninth Amendment, *id*., similarly, Grant Township asks the Court to consider the historical, legal, and policy considerations that support, and in fact, require recognition of the right of local, community self-government.

As such, the notion that the assertions in Grant Township's New Matter and Counterclaim violate judicial precedent, or are not well taken, is without merit. To the contrary, there is no precedent precluding the arguments made by Grant Township and it has articulated why the Court should recognize the right of local,

community self-government and apply that right to recognize the Charter's validity.

II. Grant Township Has Sufficiently Alleged Claims and Defenses Based on The Environmental Rights Amendment

Count III seeks a declaration that the Environmental Rights Amendment ("ERA") is a source of authority for the Charter. Count IV asserts that DEP has violated the ERA. Grant Township's argument under the ERA is therefore twofold. The ERA is a basis for the people and Grant Township's authority to enact the Charter (Count III). And, DEP has violated the ERA by breaching its public trustee obligations (Count IV).

The ERA, Pennsylvania Constitution, at Article I, §27, establishes that

> The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic, and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.

PA CONST. Art. I, §27.

DEP's brief makes no mention of the ERA.[21] But because the ERA is an additional basis of authority for the Charter, and because Grant Township alleges

[21] DEP does not assert specific objections to Count IV of Grant Township's Counterclaim (Violation of Art. I, § 27). DEP argues only generally that the Oil and Gas Act and the Solid Waste Management Act preempt the Charter without considering Grant Township's allegation that DEP has violated its public trust duties under Art. I, § 27 (Counterclaim ¶ 120), and whether Art. I, § 27 is an additional source of the people's authority to enact the Charter that cannot be preempted by state law (Counterclaim ¶¶ 121, 122).

that DEP violates its public trustee duties under the ERA, Grant Township addresses its applicability.

In *Robinson Township et al. v. Commonwealth of Pennsylvania, et al*., 83 A.3d 901 (Pa. 2013), the Pennsylvania Supreme Court examined whether Act 13 of 2012 (which, among other provisions, prohibited local regulation of oil and gas operations and overrode certain locally adopted zoning provisions dealing with oil and gas extraction), violated the environmental guarantees of Article I, Section 27 of the Pennsylvania Constitution.[22] In examining the reach of Section 27, the Court explained that it contained two separate guarantees – the first establishing citizens' environmental rights, and the second establishing governments within the Commonwealth as trustees for the protection of natural resources. *Id*. at 950-952. The Court then recognized that the "constitutional obligation binds all government, state or local, concurrently." *Id*. at 952.

Pursuant to the ERA, local governments have not only the power, but also the duty, to secure the people's "right to clean air, pure water, and to [] preserv[e] natural, scenic, historic, and esthetic values of the environment." PA. CONST. Art I, §27; *see Robinson Township et al.*, 83 A.3d at 976.

Most recently the Court in *Pennsylvania Envtl. Def. Found. v. Commonwealth*, 161 A.3d 911, 931 (Pa. 2017) recognized that the ERA "grants

[22] The specific part of the decision resting on the provisions of Article I, §27 of the Pennsylvania Constitution was supported by a plurality of the Pennsylvania Supreme Court.

two separate rights to the people of this Commonwealth. The first right is contained in the first sentence, which is a prohibitory clause declaring the right of citizens to clean air and pure water, and to the preservation of natural, scenic, historic and esthetic values of the environment." *Id*. (citing *Robinson Twp*., 83 A.3d at 951). Significantly, the Court reaffirmed that "[t]his clause places a limitation on the state's power to act contrary to this right, and while the subject of this right may be amenable to regulation, any laws that unreasonably impair the right are unconstitutional." *Id*.

The second right reserved by Section 27, recognizes the common ownership by the people, including future generations, of Pennsylvania's public natural resources. *Id*. (citing *Robinson Twp*., 83 A.3d at 954). And, "[t]he third clause of Section 27 establishes a public trust, pursuant to which the natural resources are the corpus of the trust, the Commonwealth is the trustee, and the people are the named beneficiaries. *Id*. at 931-32 (citing *Robinson Twp*., 83 A.3d at 955–56).

Through the enactment of the Charter, and as alleged in Count III, the people of Grant Township exercised their environmental rights and Grant Township carried out its trustee obligations by banning the depositing of waste from oil and gas extraction. The state laws that DEP contend preempt the Charter are subordinate to the people's natural and inalienable rights secured by the Declaration of Rights, and to the rights and obligations recognized by the ERA

itself. *See Robinson Township*, 83 A.3d at 947 (recognizing that "[t]he express language of the [Environmental Rights] amendment merely recites the 'inherent and independent rights' of mankind relative to the environment which are 'recognized and unalterably established' by Article I, Section 1 of the Pennsylvania Constitution.") (*citing Commonwealth v. Nat'l Gettysburg Battlefield Tower, Inc*., 311 A.2d 588, 595 (1975) (Roberts, J., concurring, joined by Manderino, J.)).

Correspondingly, and as alleged in Count IV, Grant Township has stated a claim against DEP for violation of its public trust duties under the ERA. As Grant Township alleges, DEP has failed, and continues to fail, to protect the people's rights under the ERA. (Counterclaim ¶ 120.)

III. Even if the Preemption Doctrine Could be Applied to the Home Rule Charter – Which it Cannot – the Oil and Gas Act and Solid Waste Management Act Do Not Preempt It

Because the people enacted the Charter, limitations on home rule authority for municipalities, as set forth in Article IX and the Home Rule Law, do not apply. Nor, in light of the right of local, community self-government and the ERA, can the Oil and Gas Act, 58 Pa.C.S. §§ 3201, *et seq*. or the Solid Waste Management Act, 35 P.S. §§ 6018.101 *et seq*., (SWMA) be applied to preempt the Charter.

Even if the Court were to apply the limits on home rule authority and the preemption doctrine, state law does not preempt the Charter. DEP cites the *Duff*

test for preemption. (DEP Brief at p. 11). *Duff v. Northampton Twp*., 532 A.2d 500 (Pa. Cmwlth. 1987) is inapplicable because it discussed local ordinances, not charters, which, unlike ordinances, are the equivalent of a constitution and have the force and effect of state law.

Limitations on the exercise of municipal home rule authority come from the Home Rule Law, 53 Pa.C.S. § 2962, in particular subsections (c)(2) and (e). (*See* DEP Brief at p. 15). Section 2962(c)(2) provides that municipalities shall not "[e]xercise powers contrary to or in limitation or engagement of powers granted by statutes which are applicable in every part of this Commonwealth." Section 2962(e) similarly limits home rule municipalities from changing or modifying "statutes that are uniform and applicable in every part of the Commonwealth", and further provides that "statutes shall supersede any municipal ordinance or resolution on the same subject." The latter part of Section 2962(e) is inapplicable on its face because this case involves a Charter and not an ordinance or resolution.

Under a Home Rule Law analysis, the question is whether the Oil and Gas Act and the Solid Waste Management Act are uniform and applicable in every part of the Commonwealth. The answer is no.

The Oil and Gas Act and SWMA are not applicable in every part of the Commonwealth. As recent as September 13, 2017, the Delaware River Basin Commission passed a resolution prohibiting certain oil and gas activities within the

Delaware River Basin, which includes parts of Pennsylvania. ("Resolution for the Minutes," Delaware River Basin Commission (Sept. 13, 2017).)[23] In 2012, the General Assembly passed a law prohibiting DEP from issuing well permits in a certain portion of the state known as the South Newark Basin.[24] Also, the Oil and Gas Act's express preemption provision in 58 Pa.C.S. § 3302, purporting to supersede local ordinances, is inapplicable. The Charter is not a local ordinance and is not expressly preempted.

Likewise, the SWMA is not intended to preempt charters. Rather, one of the Act's purposes is to: "(1) establish and maintain a cooperative State and local program of planning and technical and financial assistance for comprehensive solid waste management". 35 Pa. Stat. Ann. § 6018.102. DEP has not pointed to any express provisions of the SWMA that preempt local laws, in particular charters, that pertain to the disposal of fracking waste or provisions that provide a uniform policy regarding such disposal.

At the very least, DEP's preliminary objections must be overruled because DEP has failed to show with certainty that the law will not permit Grant Township

[23] The Resolution is available at www.nj.gov/drbc/library/documents/ResforMinutes091317_natgas-initiate-rulemkg.pdf (visited on Oct. 3, 2017).

[24] Act of Jul. 2, 2012, P.L. 823, No. 87, § 1606-E (2012), available at www.legis.state.pa.us/cfdocs/legis/li/uconsCheck.cfm?yr=2012&sessInd=0&act=87 (visited on Oct. 3, 2017).

to prevail,[25] DEP has not moved for summary disposition on its claims, and whether the laws are applicable in every part of the Commonwealth is, at the very least, an issue of fact.

IV. Grant Township's New Matter and Counterclaims Are Properly Before this Court

The Petitioner claims that the Court does not have jurisdiction over Grant Township's Counterclaim (Counts I – V) and that paragraphs 68, 69, 70, and 83 of the New Matter[26] should be dismissed for failure to exhaust statutory remedies. In doing so, Petitioner incorrectly characterizes Grant Township's claims as challenges to the Permit which should have been brought in an administrative proceeding before the Environmental Hearing Board ("EHB"). To the contrary, Grant Township's counterclaims directly respond to the claims set forth in DEP's petition by setting forth the legal grounds for the Charter's validity, alleging that DEP did not have the authority or jurisdiction to issue the Permit in the first place, and asserting the people's rights under the Charter and ERA.

Grant Township properly asserts defenses and counterclaims against DEP for declaratory relief and in its Counterclaim included all claims arising out of the

[25] In fact, Grant Township has shown the contrary.

[26] Contrary to DEP's argument, Grant Township's assertions in these paragraphs do not go to the question of whether DEP abused its discretion in issuing the Permit. Rather, they go to provide further context as to why the people of Grant Township elected to abolish their form of government and create a government which recognizes that the people may secure more expansive rights consistent with the protection of their health, safety, and welfare.

same "transaction or occurrence", that is, the Charter's validity and DEP's issuance of the Permit in violation of the Charter. *See Carringer v. Taylor*, 402 Pa. Super. 197, 206, 586 A.2d 928, 932 (Super. 1990) (discussing waiver for failure to assert counterclaims). Moreover, well-established case law shows that the doctrine of exhaustion of administrative or statutory remedies does not apply, and the issues raised by Grant Township are properly before this Court and not the EHB.

A. Grant Township Asserts that the DEP is Without Jurisdiction to Issue the Permit

Where, as here, a party challenges an agency's jurisdiction, there is no requirement to exhaust administrative remedies. *See Empire Sanitary Landfill, Inc. v. Com., Dept. of Environmental Resources*, 546 Pa. 315, 684 A.2d 1047 (1996) ("Three relevant exceptions to the exhaustion of administrative remedies are recognized for constitutional attacks. The first exception is where the jurisdiction of an agency is challenged"); *Nat'l Solid Wastes Management v. Casey*, 135 Pa.Cmwlth. 134, 141-42, 580 A.2d 893, 897 (Pa. Cmwlth. 1990) ("In particular, the exhaustion of administrative remedies is not required where the jurisdiction of an agency is challenged").

The crux of this case is whether DEP had jurisdiction to issue the Permit. The Charter says it does not. That is the very reason why DEP initiated this lawsuit in the first place. This Court, as DEP recognizes, and not the EHB, is the appropriate place to bring arguments about the validity and enforcement of the

Charter. An appeal before the EHB does not provide an adequate statutory remedy. *See Borough of Green Tree v. Bd. of Property Assessments*, 459 Pa. 268 (1974), f.n. 14. (An "inadequate statutory remedy" exists "where the administrative process has nothing to contribute to the decision of the issue and there are no special reasons for postponing its immediate decision").

B. The EHB Does Not Have the Authority to Provide the Relief Sought by Grant Township

Where the administrative process is not capable of providing the relief sought, or where legal and equitable remedies are unavailable or inadequate, there is no requirement to exhaust administrative remedies. *Bucks Co. Services, Inc. v. Phil. Parking Auth.*, 1 A.3d 379, 388–89 (Pa. Cmwlth. 2013); *Empire Sanitary Landfill, Inc.*, 684 A.2d at 1154-55 ("The Commonwealth Court did not err in concluding that an action for declaratory judgment with respect to the constitutionality of the Ordinance or the Act is appropriate in that court since the available statutory remedy is inadequate.").

The EHB does not have the power to grant declaratory judgment and injunctive relief pursuant to the Declaratory Judgment Act, 42 Pa.C.S. § 7531, *et seq*. *See Empire Sanitary Landfill, Inc.*, 684 A.2d at 1054-55. Here, both parties seek declaratory relief. The Court has jurisdiction over Counts I - III of Respondents' Counterclaim which seek declaratory relief, as well as the additional

Counts, which are directly related to the declaratory relief sought against DEP, and which Grant Township properly brings in this action.

DEP cites *Feudale v. Aqua Pennsylvania, Inc*., 122 A.3d 462, 466 (Pa. Cmwlth. 2015), aff'd, 635 Pa. 267, 135 A.3d 580 (2016), for the proposition that Grant Township should have appealed the Permit to the EHB. *Feudale,* citing *Funk v. Dep't Envtl. Prot*., 71 A.3d 1097, 1101 n. 4 (Pa. Cmwlth. 2013), reiterated that "[t]he purposes of this exhaustion requirement are to prevent premature judicial intervention in the administrative process and ensure that claims will be addressed by the body with expertise in the area." *Id*. at 465 (citing *Funk*, 71 A.3d at at 1101 (internal citations omitted)). *Feudale* is wholly distinguishable from the facts of this case. Unlike Grant Township's allegations here, *Feudale's* claim focused on whether DEP failed to properly consider certain factors in issuing the permit. And, the Court in *Feudale*, did, in fact, address the petitioner's claims under the ERA.

Grant Township asserts that DEP's exercise of its authority to issue permits to dispose of fracking waste violates the Charter and, in turn, the people's right of local, community self-government. The questions raised challenge the validity of the statutory scheme in its entirety insofar as it violates the people's rights as secured by Article I. That is not a question for the EHB or a question in which the doctrine of exhaustion of administrative remedies could, in any way, be logically applied.

For these reasons, the Court should deny Petitioner's Preliminary Objections based on lack of jurisdiction and failure to exhaust remedies.

V. Grant Township's New Matter and Counterclaim Do Not Lack Specificity

DEP's claim that Grant Township's New Matter and Counterclaim lack sufficient specificity is without merit. "Pennsylvania is a fact pleading rather than a notice pleading jurisdiction." *Griffin v. Rent-A-Ctr., Inc.*, 2004 PA Super 29, ¶ 4, 843 A.2d 393, 395 (2004). A plaintiff is "not required to specify the legal theory ... underlying the complaint." *Milton S. Hershey Medical Center v. Commonwealth Medical Professional Liability Catastrophe Loss Fund*, 763 A.2d 945, 952 (Pa.Cmwlth. 2000).

Grant Township's New Matter and Counterclaim go far beyond the pleading standard. Grant Township sets forth pages of facts to support its legal theories which are also set forth in great detail. DEP's claims of insufficiency are belied by the fact that it spends pages dedicated to arguing that the Charter is preempted and beyond the Township's authority. Just because DEP refuses to recognize the import of the right of local, community self-government and the ERA does not mean that these claims were insufficiently pled. DEP's objection for lack for specificity must be denied.

VI. Right to Jury Trial

Because this case involves the people's fundamental, inalienable, and constitutional right of local, community self-government and the constitutional rights of the people as secured by the ERA, Grant Township properly asserted the right to a jury trial. *See e.g., Bruckshaw v. Frankford Hosp. of City of Philadelphia*, 619 Pa. 135, 146–47, 58 A.3d 102, 108–09 (2012) ("We begin our analysis by recognizing that the right to a trial by an impartial jury is enshrined in the Pennsylvania Constitution, *see* Pa. Const. art. I, § 6, which guarantees that "trial by jury shall be as heretofore, and the right thereof remain inviolate." *See Commonwealth v. Eckhart*, 430 Pa. 311, 242 A.2d 271, 272–73 (1968) (construing "inviolate" as used in this section to mean "freedom from substantial impairment," and explaining that the "cardinal principle is that the [e]ssential features of trial by jury as known at the common law shall be preserved.")).

That said, Grant Township recognizes that if there is no factual dispute, then there is no need for a jury trial.

VII. Conclusion

For the reasons stated above, the Court should overrule each of Petitioner's preliminary objections.

Respectfully submitted,

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FOR GRANT TOWNSHIP OF INDIANA COUNTY AND THE GRANT TOWNSHIP SUPERVISORS

Dated: November 1, 2017

CERTIFICATION OF COMPLIANCE WITH WORD COUNT FOR BRIEF OF RESPONDENTS

I, Natalie A. Long, 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 12,298 words in the Brief, as counted through the use of Microsoft Word.

By: /s/ Natalie A. Long

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