

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 126 M.D. 2017

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL PROTECTION, PETITIONER,

v.

GRANT TOWNSHIP OF INDIANA COUNTY AND
THE GRANT TOWNSHIP BOARD OF SUPERVISORS,
RESPONDENTS.

**PETITIONER'S PRELIMINARY OBJECTIONS
TO NEW MATTER AND COUNTERCLAIM OF RESPONDENTS**

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Date: June 19, 2017

NOTICE TO PLEAD

To: Grant Township of Indiana County and
The Grant Township Board of Supervisors

By Counsels of Record:

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You are hereby notified to file a written response to the enclosed Preliminary Objections within twenty (20) days from service hereof or a judgment may be entered against you.

Respectfully submitted,

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FOR THE COMMONWEALTH OF
PENNSYLVANIA, DEPARTMENT OF
ENVIRONMENTAL PROTECTION

Date: June 19, 2017

PETITIONER’S PRELIMINARY OBJECTIONS
TO NEW MATTER AND COUNTERCLAIM OF RESPONDENTS

Pursuant to Pa.R.C.P. 1028, as incorporated by Pa.R.A.P. 1517, Petitioner, Commonwealth of Pennsylvania Department of Environmental Protection (“Petitioner” or “Department”), through the undersigned counsel, files these Preliminary Objections (“Preliminary Objections”) to *Respondents’ Answer to Petition for Review in the Nature of Complaint Seeking Declaratory and Injunctive Relief, New Matter, and Counterclaim* (“Answer”) filed on May 8, 2017, and for which a Notice to Plead was filed on May 19, 2017, in the above captioned matter, and requests dismissal of Respondents’ new matter and counterclaims, as set forth herein.

I. INTRODUCTION

1. On March 27, 2017, the Department issued a modification to the “Yanity” gas well permit (“Well Permit”) issued to Pennsylvania General Energy Company, LLC (“PGE”), authorizing the change-in-use of the existing well in Grant Township for brine disposal by injection.

2. The Department commenced this matter on March 27, 2017 when it filed its *Petition for Review in the Nature of a Complaint Seeking Declaratory and Injunctive Relief* (“Petition”).

3. Also on March 27, 2017, the Department filed its *Application for Expedited Special Relief in the Nature of a Preliminary Injunction* (“Application”) and its *Memorandum in Support*, seeking an injunction on the enforcement of Section 303 of Grant Township’s Home Rule Charter, which purports to fine the Department on a daily basis for the issuing well permits akin to the Well Permit.

4. On April 10, 2017, pursuant to a *Joint Application for Expedited Special Relief in the Nature of a Stipulated Order*, this Court issued an order stating the following:

The implementation and/or enforcement of Section 303 of the Home Rule Charter against the Commonwealth of Pennsylvania, its agencies, and its employees acting within the scope of their employment, is ENJOINED until such time as a final determination on the merits of the Petition for Review is rendered.

5. On April 25, 2017, PGE filed an appeal of the Well Permit with the Pennsylvania Environmental Hearing Board (“EHB”), Docket No. 2017-031-R.

6. On April 26, 2017, Judith Wanchisn, Stacy Long, and the “East Run Hellbenders Society” filed an appeal of the Well Permit with the EHB, Docket No. 2017-032-R.

7. The EHB consolidated the two appeals of the Well Permit on April 26, 2017, to Docket No. 2017-031-R.

8. Respondents Grant Township and the Grant Township Supervisors (“Respondents” or “Township”) have not appealed the Well Permit to the EHB.

9. On May 8, 2017, the Township filed its Answer to the Petition in this matter, which included new matter and counterclaims.

10. On May 19, 2017, the Township filed its Notice to Plead, resulting in a filing deadline of June 19, 2017 for the Department to respond to the Township’s Answer’s new matter and counterclaims.

11. Petitioner, the Department, may file preliminary objections if the Township, in its new matter or counterclaims, makes erroneous statements regarding jurisdiction, the law, or available remedies. Pa.R.C.P. 1028.

II. PRELIMINARY OBJECTION- FAILURE TO EXHAUST A STATUTORY REMEDY (DEP’S WELL PERMIT)

12. Paragraphs 1-11, above, are incorporated by reference.

13. This Court does not have original jurisdiction over a claim where the Legislature has provided an adequate statutory remedy. *Ezy Parks v. Larson*, 454 A.2d 928, 935-936 (Pa. 1982); *Capital City Lodge No.12 v. City of Harrisburg*, 588 A.2d 584, 588 (Pa. Cmwlth. 1991). The procedure prescribed by statute must be strictly pursued to the exclusion of other methods of redress. 1 Pa.C.S. § 1504 (“In all cases where a remedy is provided or a duty is enjoined or anything is directed to

be done by any statute, the directions of the statute shall be strictly pursued, and no penalty shall be inflicted, or anything done agreeably to the common law, in such cases, further than shall be necessary for carrying such statute into effect.”). This is particularly true of special statutory appeals from the action of administrative bodies. *Blank v. Board of Adjustment*, 136 A. 2d 695, 696-697 (Pa. 1957).

14. “[W]here the legislature has provided an administrative procedure to challenge and obtain relief from an agency's action, failure to exhaust that remedy bars [the Commonwealth Court] from hearing claims for declaratory or injunctive relief with respect to that agency action.” *Feudale v. Aqua Pennsylvania, Inc.*, 122 A.3d 462, 466 (Pa. Cmwlth. 2015), *aff'd*, 135 A.3d 580 (Pa. 2016), *citing Funk v. DEP*, 71 A.3d 1097, 1101 (Pa. Cmwlth. 2013).

15. The Legislature, by statute, provided an administrative procedure to challenge permits issued by the Department: appeals are filed with and heard by the EHB. Section 4 of the Environmental Hearing Board Act, Act of July 13, 1988, P.L. 530, 35 P.S. § 7514(c) (“[N]o action of the [D]epartment adversely affecting a person shall be final as to that person until the person has had the opportunity to appeal the action in accordance with the regulations of the board.”). *See also* 35 P.S. § 7514(a), (g) (jurisdiction and procedure of the Board); 25 Pa. Code § 1021.2(a) (an

“action” of the Department is “[a]n order, decree, decision, determination or ruling by the Department affecting personal or property rights, privileges, immunities, duties, liabilities or obligations of a person including, but not limited to, a permit, license, approval or certification.”).

16. Thus, litigants are barred from seeking relief or otherwise challenging a permit issued by the Department if, as here, the litigants did not exhaust their administrative remedy of appealing a Department permit to the EHB. *Feudale*, 122 A.3d at 466.

17. Township’s Paragraphs 68, 69, 70, and 83 of the new matter in the Answer include these challenges to the Well Permit:

Paragraph 68: In light of PGE’s past and current violations of environmental regulations, DEP’s decision to grant PGE a permit to dispose of fracking waste in Grant 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; (Answer, p. 12.)

Paragraph 69: Even if preemption could be applied to the Charter, which it cannot, the DEP has waived any right to assert the doctrine of preemption by failing to protect the health, safety, and welfare of the people of Grant Township, including by failing to prevent the disposal of fracking waste; (*Id.*)

Paragraph 70: Even if preemption could be applied to the Charter, which it cannot, the DEP is estopped from asserting the doctrine of preemption because it has failed to protect the health, safety, and welfare of the people of Grant Township, including by failing to prevent the disposal of fracking waste; (*Id.*)

Paragraph 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. (*Id.* at p. 13.)

18. Paragraphs 68, 69, 70, and 83 of the Answer's New Matter challenge the Well Permit by asserting the following:

- a) the Well Permit fails to protect the environment; (Answer, p. 12, ¶ 68.)
- b) the Well Permit fails to protect the health, safety, and welfare of Grant Township's citizens; (*Id.* at p. 12, ¶¶ 68, 69, 70.)
- c) the Department's consideration of the application for the Well Permit was compromised because its judgment was influenced by corporate interests. (*Id.* at p. 13, ¶ 83.)

19. Presently, the Township has not exhausted its statutorily-defined remedies by appealing the Well Permit to the Environmental Hearing Board; by operation of law, then, the Township's challenges to the Well Permit are inopposite to the law. *Feudale, Funk, supra.*

WHEREFORE, pursuant to Pa.R.C.P. 1028(a)(7), due to the Township's failure to exhaust its statutory remedies concerning the Well Permit at issue, the Township's challenges in paragraphs 68, 69, 70, and 83 of the Answer's new matter must be dismissed as a matter of law, as well as the prayer for relief based on those paragraphs.

III. PRELIMINARY OBJECTION- LEGAL INSUFFICIENCY OF A PLEADING (DEMURRER TO COUNTS I, II and III OF COUNTERCLAIM - DECLARATORY JUDGMENT RELIEF)

20. Paragraphs 1-19, above, are incorporated by reference.

21. The Township seeks declaratory judgment in its favor based on the new matter in paragraphs 68, 69, 70, and 83 of the Answer. (Answer, p. 14, “WHEREFORE” paragraph.)

22. However, as a matter of law, declaratory relief is not available when a “[p]roceeding is within the exclusive jurisdiction of a tribunal other than a court.” 42 Pa.C.S. § 7541(c)(2).

23. As explained more fully above, challenges to Department actions such as the Well Permit are within the *exclusive* jurisdiction of the EHB. 35 P.S. § 7514.

WHEREFORE, pursuant to Pa.R.C.P. 1028(a)(4), the Township’s request for declaratory relief as to the Well Permit is legally insufficient, as it fails to seek a remedy available to it as a matter of law.

IV. PRELIMINARY OBJECTION- LACK OF JURISDICTION (COUNTS 1 THROUGH 5 OF COUNTERCLAIM)

24. Paragraphs 1-23, above, are incorporated by reference.

25. The Township attempts to provide this Court with jurisdiction over its Counterclaims by averring that the Township will suffer injury due to Department’s issuance of the Well Permit:

Counterclaim Paragraph 20: Grant Township, and the people of Grant Township, have suffered a direct, immediate, and substantial injury by DEP's issuance of a permit to PGE to deposit fracking waste in Grant Township in violation of the Charter.

(Answer, p. 17.)

26. But the Township's failure to exhaust its statutorily-defined remedies (that is, its failure to appeal the Well Permit to the Environmental Hearing Board) legally bars the Township from seeking relief from this Court based on alleged harm from the issuance of the Well Permit. *Feudale, Funk, supra*.

27. The Township's Counterclaims, Counts 1 through 5, make claims that are factually based upon the Department's grant of the Well Permit, and cannot be independently pursued separate and apart from this central factual core.

28. Accordingly, this Court is without jurisdiction to hear the Township's Well Permit challenges, or to otherwise hear or adjudicate any of the ancillary claims represented by Counts 1 through 5 in its Counterclaims, and the Township's jurisdictional averment in paragraph 20 of the counterclaims in the Answer is incorrect.

WHEREFORE, pursuant to Pa.R.C.P. 1028(a)(1), Counts 1 through 5 of the Township's Counterclaims must be dismissed as a matter of law, because this Court is without jurisdiction to hear or adjudicate these claims.

V. **PRELIMINARY OBJECTION- LEGAL INSUFFICIENCY OF A PLEADING (DEMURRER TO NEW MATTER AND COUNTERCLAIMS BASED UPON CLAIMS THAT HOME RULE CHARTER LAW PROVIDES SUPREMACY OVER CONSTITUTIONAL AND STATUTORY LAW)**

29. Paragraphs 1-28, above, are incorporated by reference.

30. In its new matter and counterclaims, the Township asserts that the Commonwealth's Oil and Gas Act, 58 Pa.C.S. §§ 3201, *et seq.*, ("Oil and Gas Act") and the Solid Waste Management Act, Act of July 7, 1980, P.L. 380, *as amended*, 35 P.S. §§ 6018.101, *et seq.* ("Solid Waste Management Act") violate the Charter. (Answer, p. 16, ¶ 14.)

31. Specifically, the Township's New Matter and Counterclaims boldly contend that the Charter is superior to state statutory law, the Oil and Gas Act, and the Solid Waste Management Act¹:

New Matter Paragraph 61: The DEP does not possess any legal rights, privileges, powers, authority or protections that can interfere with, or otherwise trump, the rights and prohibitions enumerated in the Charter; (Answer, p. 10.)

New Matter Paragraph 62: DEP's claims are precluded by Section 306 of the Charter which provides that: "All laws adopted by the legislature of the State of Pennsylvania, and rules adopted by an State agency, shall be the law of Grant Township only to the extent that they do not violate the rights or prohibitions recognized by this Charter." (*Id.* at 11.)

¹ Paragraphs from Respondents' new matter and counterclaims are quoted here unless brackets are used, in which case they are summarized.

New Matter Paragraphs 69 & 70: [These paragraphs dispute that the doctrine of preemption applies to the Charter]; (*Id.* at 12.)

New Matter Paragraph 74: Preemption does not apply because the Charter has a status equal or greater to the status of the state laws that DEP contends preempt it; (*Id.* at 12.)

New Matter Paragraph 76: The doctrine of sovereign immunity does not apply to DEP's violation of the people of Grant Township's fundamental and constitutional right to local, community self-government; (*Id.* at 13.)

New Matter Paragraph 78: The Oil and Gas Act, and regulations thereunder, do not preempt the Charter; (*Id.*)

New Matter Paragraph 79: The Solid Waste Management Act, and regulations thereunder, do not preempt the Charter; (*Id.*)

New Matter Paragraph 80: The Oil and Gas Act, and regulations thereunder, violate the people of Grant Township's right of local, community self-government; (*Id.*)

New Matter Paragraph 81: The Solid Waste Management Act, and regulations thereunder, violate the people of Grant Township's right of local, community self-government; (*Id.*)

New Matter Paragraph 82: Any state or federal law which purports to preempt the Charter violates the people of Grant Township's right of local, community self-government; (*Id.*)

Counterclaim Paragraph 9: Section 301 of the Charter prohibits the depositing of fracking waste, which includes issuance of a permit by a government agency to allow for the depositing of fracking waste; (*Id.* at 15.)

Counterclaim Paragraph 10: DEP issued a permit to Pennsylvania General Energy, LLC ("PGE") that purports to allow for the depositing of fracking waste in Grant Township in violation of the Charter; (*Id.*)

Counterclaim Paragraph 12: DEP has violated, and continues to violate, the people of Grant Township's right of local, community self-government by seeking to invalidate and nullify the Charter and taking action, in the form of issuing a permit to PGE, in violation of the Charter; (*Id.*)

Counterclaim Paragraph 14: The Oil and Gas Act and the Solid Waste Management Act and regulations promulgated thereunder, and DEP's arguments under the preemption doctrine, violate the people's right of local, community self-government, including Sections 102 and 103 of the Charter; (*Id.* at 16.)

Counterclaim Paragraph 17: An actual controversy has arisen . . . and Grant Township maintains that the Charter is a valid law; (*Id.*)

Counterclaim Paragraph 18: The action is brought . . . because DEP has violated, and is violating, the Charter; (*Id.* at 17.)

Counterclaim Paragraph 20: Grant Township, and the people of Grant Township, have suffered a direct, immediate, and substantial injury by DEP's issuance of a permit to PGE to deposit fracking waste in Grant Township in violation of the Charter; (*Id.*)

Counterclaim Paragraph 36: DEP's decision to grant the Permit violates the Charter . . . ; (*Id.* at 19.)

Counterclaim Paragraph 45: Because a home rule charter has the force and status of an enactment of the legislature, and because it was enacted pursuant to the fundamental and inherent right of local, community self-government, the preemption doctrine does not apply to the Home Rule Charter; (*Id.* at 21.)

Counterclaim Paragraph 58: The people's authority to wield their right of local, community self-government is separate and distinct from the authority held by municipal corporations to enact local laws; (*Id.* at 23.)

Counterclaim Paragraph 59: The people's right of local, community self-government is not limited by the authority granted to Grant Township under the Home Rule Charter & Optional Plans Law, 53 Pa.C.S.A. § 2901 et seq.,

or by any other grant of authority (or lack of grant of authority) to Grant Township by the State, nor can it be preempted by state or federal law; (*Id.*)

Counterclaim Paragraph 61: To vindicate the right of local, community self-government, the new municipal system of governance (established through the adoption of the Charter) does not recognize certain legal doctrines, including: . . . certain types of state and federal preemption that would interfere with the Charter’s rights and prohibitions; and certain state authority that would otherwise constrict the exercise of the right of local, community self-government; (*Id.* at 24.)

Counterclaim Paragraph 62: The Charter, and the people of Grant Township through their adoption of the Charter, recognized that these doctrines, and the application of these doctrines to the Charter, are incompatible with the people’s right of local, community self-government; (*Id.*)

Counterclaim Paragraph 63: The doctrine of preemption, when exercised to constrict or impede the assertion of the right of local, community self-government to expand people’s rights, violates that right and provision of the Charter; (*Id.*)

Counterclaim Paragraph 64: Section 306 of the Charter (Enforcement of State Laws) remedies the interference of the doctrine of preemption with the expansion of rights by providing: “All laws adopted by the legislature of the State of Pennsylvania, and rules adopted by any State agency, shall be the law Grant Township only to the extent that they do not violate the rights or prohibitions recognized by this Charter.” (*Id.* at 24-25.)

Counterclaim Paragraph 65 (under the heading, “Rejection of State Authority that Constricts Local, Community Self-Government”): Requiring prior state legislative authorization before a community can enact local laws pursuant to the right of local, community self-government is unconstitutional, and violates that right the charter; (*Id.* at 25.)

Counterclaim Paragraph 68: Article III of the Charter, entitled Prohibitions and Enforcement, prohibits certain activities in furtherance of the rights articulated in Article I, entitled Bill of Rights; (*Id.*)

Counterclaim Paragraph 69: Section 301 of the Charter prohibits the depositing of waste from oil and gas extraction, which includes the issuance of a permit that purports to allow these activities; (*Id.*)

Counterclaim Paragraph 70: Section 302 of the Charter provides, in part, that permits issued in violation of the Charter are invalid; (*Id.* at 26.)

Counterclaim Paragraph 71: Under Section 303, because DEP issued PGE such a permit, it is “guilty of an offense and, upon conviction thereof, shall be sentenced to pay the maximum fine allowable under State law for that violation.” (*Id.*)

Counterclaim Paragraph 72: Under Section 306 of the Charter, to the extent the Oil and Gas Act, the Solid Waste Management Act, and regulations promulgated thereunder, are found to violate the people’s rights as secured by the Charter or to preempt the Charter’s prohibition against the depositing of fracking waste, they are not the law of Grant Township; (*Id.*)

Counterclaim Paragraph 76: Those rights are secured and enforced, in part, by Section 301 of the Charter, which prohibits the depositing of waste from oil and gas extraction, including DEP’s issuance of permits to allow such activities; (*Id.*)

Counterclaim Paragraphs 77 and 78: [These paragraphs generally aver that the Charter is constitutionally valid]; (*Id.*at 27.)

Counterclaim Paragraph 82: Grant Township is free to enact stricter laws to advance and protect the rights secured by the Environmental Rights Amendment; (*Id.*)

Counterclaim Paragraph 84: The Oil and Gas Act does not protect the people’s health, safety and welfare, or any of the rights secured by the Charter, including the people’s right to clean air, water, and soil and to a sustainable energy future. Nor does it preserve the natural, scenic, historic and esthetic values of the environment; (*Id.*)

Counterclaim Paragraph 85: Interpretation of the Oil and Gas Act to preempt the Charter would violate the people's right of local, community self-government; (*Id.*)

Counterclaim Paragraph 86: The Oil and Gas Act does not apply to home rule municipalities such as Grant Township; (*Id.* at 28.)

Counterclaim Paragraph 88: The Charter is not a local ordinance, and therefore, Section 3302 does not apply; (*Id.*)

Counterclaim Paragraph 90: The Solid Waste Management Act does not protect the people's health, safety and welfare, or any of the rights secured by the Charter, including the people's right to clean air, water, and soil and to a sustainable energy future. Nor does it preserve the natural, scenic, historic and esthetic values of the environment; (*Id.*)

Counterclaim Paragraph 91: The Solid Waste Management Act does not apply to home rule municipalities such as Grant Township; (*Id.*)

Counterclaim Paragraph 92: Interpretation of the Solid Waste Management Act to preempt the Charter would violate the people's right of local, community self-government; (*Id.*)

Counterclaim Paragraph 97: Any limitations of the Home Rule Act do not apply to the Charter because it is enacted pursuant to the people's fundamental and inalienable right of local, community self-government; (*Id.* at 29.)

Counterclaim Paragraph 98: Any violation of the Charter is a violation of fundamental, inherent, or constitutional rights to which the doctrine of sovereign immunity does not apply; (*Id.*)

Counterclaim Paragraph 99: The doctrine of preemption does not apply to the Charter because to apply the doctrine of preemption to constrict or impede the assertion of the right of local, community self-government to expand people's rights violates that right and provisions of the Charter; (*Id.*)

Counterclaim Paragraph 100: By arguing that the Home Rule Act, sovereign immunity, and the doctrine of preemption apply to invalidate the Charter, DEP is violating the people’s right of local, community self-government. [In addition, the “Wherefore” paragraph following the aforementioned paragraphs similarly claims that statutory and constitutional law is inferior to the Charter.]; (*Id.*)

Counterclaim Paragraphs 103 – 107, and the “Wherefore” paragraph on page 31: [These paragraphs repeat claims that the preemption doctrine does not apply to the Charter, specifically stating that Section 306 of the Charter “remedies” the doctrine of preemption by negating state laws contrary to the Charter]; (*Id.* at 30-31.)

Counterclaim Paragraphs 112, 115, 116, and the “Wherefore” paragraph on page 32: [These paragraphs repeat assertions that the Charter conflicts with state law, i.e., the Oil and Gas Act and the Home Rule Act, and that the doctrines of sovereign immunity and preemption do not apply here, allowing Grant to adopt laws contrary to and “stricter” than state law]; (*Id.* at 32.)

Counterclaim Paragraph 122, 124, 125, 126, 127 and the “Wherefore” paragraphs on pages 33 and 34: [These paragraphs repeat assertions that the Charter is superior to state statutory law, claiming that DEP’s actions under state law violate the Charter]. (*Id.* at 33-34.)

32. The Township’s claims of authority find no basis in the law; but are, instead, plainly and specifically refuted in the statutory limitations delineated in the Home Rule Charter and Optional Plans Law:

(c) Prohibited powers. --A municipality shall not:

...

(2) Exercise powers contrary to or in limitation or enlargement of powers granted by statutes *which are applicable in every part of this Commonwealth.*

...

(e) Statutes of general application. — Statutes 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 (emphasis added).

33. This Court has also recognized the fallacy of claims that exceed home rule charter limitations. *See McKeesport v. Pa. Pub. Util. Com.*, 442 A.2d 30, 31 (Pa. Cmwlth. 1982) (“It is too clear for serious argument to the contrary that the Public Utility Law . . . is applicable in every part of the Commonwealth and that McKeesport in increasing its water rates to Versailles without PUC approval was attempting to exercise power not conferred on it by the Home Rule Charter and Optional Plans Law.”). *Also, see City of Pittsburgh v. Fraternal Order of Police, Fort Pitt Lodge No. 1*, ___ A.3d. ___ (Pa. 2017) (18 WAP 2016, 2017 WL 2229859) (the Pennsylvania Supreme Court ruled that a home rule charter amendment was subject to 53 Pa.C.S. § 2962, and the amendment’s language contrary to laws applicable statewide violate 53 Pa.C.S. § 2962).

34. Here, the Township’s assertions are defective in that the Oil and Gas Act and the Solid Waste Management Act are laws applicable in every part of the Commonwealth. 58 Pa.C.S. §§ 3201, *et seq.*; 35 P.S. §§ 6018.101, *et seq.*

35. The Pennsylvania Supreme Court has plainly recognized that the surviving provisions of the Oil and Gas Act are applicable statewide. *Robinson Township v. Commonwealth*, 147 A.3d 536, 565-566 (Pa. 2016), citing *Huntley & Huntley v. Borough Council of Oakmont*, 964 A.2d 855, 866 n. 11 (Pa. 2009) (“Given the absence of those statutory provisions, municipalities may again, as they did prior to the passage of Act 13, regulate the environmental impact, setback distances, and the siting of oil and gas wells in land use districts through local ordinances enacted in accordance with the provisions of the MPC or the Flood Plain Management Act, provided that such ordinances do not impose conditions on the features of well operations *which the remaining valid provisions of Act 13 regulate.*”) (emphasis added).

36. Township’s claims also run counter to the limitations on home rule charter power expressly stated in the Pennsylvania Constitution: “[a] municipality which has a home rule charter may exercise any power or perform any function *not denied by this Constitution*, by its home rule charter *or by the General Assembly* at any time.” Pa. Const. Art. IX, § 2 (titled “Home Rule,” emphasis added).

37. It is beyond dispute, as set forth in the Pennsylvania Constitution and the Home Rule Charter and Optional Plans Law, above, that statewide statutes

adopted by the General Assembly are superior to local laws, including home rule laws.

38. Therefore, as a matter of law, the Township is bound by the provisions of the Oil and Gas Act and the Solid Waste Management Act, including the Department's regulations promulgated thereunder, and likewise subject to Departmental acts taken in the execution of such law.

WHEREFORE, pursuant to Pa.R.C.P. 1028(a)(4), the Township's new matter and counterclaim paragraphs set forth in Paragraph 31, above, and the Township's Counterclaim Counts 1-5, to the extent that they rely upon the same, must be dismissed as legally insufficient and contrary to the Constitution and statutory law.

VI. PRELIMINARY OBJECTION- LEGAL INSUFFICIENCY OF A PLEADING (DEMURRER TO NEW MATTER AND COUNTERCLAIMS BASED UPON ASSERTION BY TOWNSHIP OF IMMUNITY TO JUDICIARY'S CONSTITUTIONAL AUTHORITY TO ESTABLISH LAW)

39. Paragraphs 1 through 38, above, are incorporated by reference.

40. The Township asserts that the Charter is not limited by the "Home Rule Charter & Optional Plans Law, 53 Pa.C.S. § 2901, et seq., or by any other grant of authority (or lack of grant of authority) to Grant Township by the State, nor can it be preempted by state or federal law." (Answer, p. 23, ¶ 59.)

41. Counterclaim Paragraphs 17, 61-65, 94-100, 102-107, 115-116, and 122-127 purport to reject law established by the General Assembly and the Commonwealth's Constitution, and likewise refute being bound by precedent of the Commonwealth's courts. (Answer, pp. 24-25, ¶¶ 61-65; pp. 28-32, ¶¶ 94-100, 102-107, 115-116.)

42. It is beyond argument that that Pennsylvania's courts are vested with *exclusive* judicial power to interpret the Commonwealth's legal doctrines and laws, and that the General Assembly is vested with the Commonwealth's *exclusive* legislative power. Pa. Const. Art. II, § 1, and Art. V, § 1; *see, e.g., Marbury v. Madison*, 5 U.S. 137 (1803).

43. Home rule governments of any ilk cannot change established legal doctrines or the law by declaration, charter, or otherwise. *See* Pa. Const. Art. IX, § 2; 53 Pa.C.S. § 2962.

44. The Township has not, and cannot, cite legal authority supporting the contention that it, by home rule charter or otherwise, exerts extrajudicial unlimited authority, outside of Pennsylvania's laws and its Constitution.

45. In addition, the Township cites no authority empowering it to bring a lawsuit (here, New Matter and Counterclaims) against the Commonwealth for the purpose of *rejecting* established Pennsylvania constitutional and statutory law. *See*

Pa. Const. Art. I, § 11 (“Suits may be brought against the Commonwealth in such manner, in such courts and in such cases *as the Legislature may by law direct.*”) (emphasis added).

46. Because the Township has no authority to legislate, rule, or overturn established law on par with, or to the exclusion of, the Commonwealth’s Judiciary or Legislature, the Township’s express “rejection” of the laws of the General Assembly, as interpreted by Pennsylvania’s Courts, is legally defective.

WHEREFORE, pursuant to Pa.R.C.P. 1028(a)(4), those identified provisions of the Township’s Answer with New Matter, and all Counts of its Counterclaims, because they rest upon such defective assertions, must be dismissed.

VII. PRELIMINARY OBJECTION- LACK OF SPECIFICITY (NEW MATTER AND COUNTERCLAIMS, COUNTS 1-5)

47. Paragraphs 1 through 46, above, are incorporated by reference.

48. The Township makes several statements in new matter and counterclaims that lack sufficient specificity, averring to maxims and principles, but without associating those concepts to specific laws or facts, for example:

New Matter Paragraph 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. (Answer, p. 11.)

49. Other Paragraphs in Township's Answer with New Matter and Counterclaims also lack the specificity necessary to respond to them, including New Matter Paragraphs 58-61, and 63-83, as well as Counterclaim Paragraphs 4-6, 11, 17, 19, 20, 36, 40, 45-63, 65, 80, 82, 86, 88-92, and 120. (Answer, pp. 10, 12, 15-17, 19, 21-25, 27-28, 33.)

50. The Township is required to, at a minimum, set out facts sufficient for the Commonwealth to defend or counter the Township's Counterclaims and New Matter. *See Podolak v. Tobyhanna Twp. Bd. of Supervisors*, 37 A.3d 1283, 1287-1288 (Pa. Cmwlth. 2012) ("Allegations will withstand challenge where they contain averments of all of the facts the plaintiff will eventually have to prove in order to prevail and they are sufficiently specific so as to enable defendant to prepare a defense."), *citing Department of Transportation v. Bethlehem Steel Corp.*, 380 A.2d 1308, 1313 (Pa. Cmwlth. 1977).

51. These New Matter and Counterclaim Paragraphs listed above refer only to broad topics, principles, and maxims, but do not recite facts with sufficient specificity for the Commonwealth to defend or counter these assertions.

WHEREFORE, pursuant to Pa.R.C.P. 1028(a)(3), those Township's New Matter and Counterclaim statements set forth in Paragraphs 48 and 49, above, should be dismissed because they lack sufficient specificity.

VIII. PRELIMINARY OBJECTION- LEGAL INSUFFICIENCY OF A PLEADING (DEMURRER TO DEMAND FOR A JURY TRIAL)

52. Paragraphs 1 through 51, above, are incorporated by reference.

53. In several places within its pleading, the Township demands a trial by jury. (Answer, pp. 14 and 35.)

54. A jury trial is not available because the claims made by the Township are based on provisions of the Pennsylvania Constitution and statutes that do not provide for jury trials (the Home Rule Charter & Optional Plans Law, the Oil and Gas Act, and the Solid Waste Management Act) or that did not exist in common law at the time of the adoption of the Pennsylvania Constitution. *Mishoe v. Erie Ins. Co.*, 824 A.2d 1153, 1155-1161 (Pa. 2003) (interpreting Pa. Const. Art. I, § 6, the Supreme Court concluded that a jury trial was not available because the cause of action post-dated the Pennsylvania Constitution and the statute in question did not provide a right to a jury trial).

55. Moreover, a trial by jury is not available under the Declaratory Judgments Act, 42 Pa.C.S. §§ 7531, *et seq.*, because there are no issues of fact for this Court to consider, but, rather, matters of law. *See* 42 Pa.C.S. § 7539(b).

WHEREFORE, pursuant to Pa.R.C.P. 1028(a)(4), the Township's demands for a jury trial must be dismissed as legally insufficient.

IX. CONCLUSION

For all of the reasons stated more fully above, the Department respectfully requests that this Court enter an order sustaining its preliminary objections and dismissing the Township's New Matter and Counts 1 through 5 of its Counterclaims, as set forth herein.

Respectfully submitted,

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FOR THE COMMONWEALTH OF
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ENVIRONMENTAL PROTECTION

Date: June 19, 2017