IN THE LEHIGH COUNTY COURT OF COMMON PLEAS
ALLENTOWN, PENNSYLVANIA

Richard D. Fegley, Diane E. Teti,	**:**
Edward F. Beck, and Marvin M. Wheeler	**:**
v.	**:**
Lehigh County Board of Elections	**:**
Matthew T. Croslis, Doris A. Glaessmann, and	**: ELECTION MATTER**
Jane M. George	**:**
In their official capacity only	**: Docket No: 2013-C- 3436**
Chief Clerk, Lehigh County Board of Elections	**:**
Timothy A. Benyo	**:**
In his official capacity only	**:**

PLAINTIFF' BRIEF IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

A. ISSUES PRESENTED

1. **Whether any Challenge to the Petition filed on April 15, 2013 after April 22, 2013 is barred by the challengers failure to comply with the mandatory 7 day period for filing objections under the Pennsylvania Election Code, 25 P.S. § 2937?**

2. **Whether the Lehigh County Board of Elections has the authority to override the initiative process of the Allentown Home Rule Charter?**

3. **Whether Allentown's status as a home rule municipality, and the Environmental Rights Amendment (Article 1, Section 27 of the Pennsylvania Constitution) militate in favor of the City's power to adopt the Allentown Clean Air Ordinance and favor of the people's right to consider and adopt it?**

4. **Whether federal and state air pollution laws intended to allow Pennsylvania municipalities to adopt stricter air pollution laws?**

5. **Whether 35 P.S. 4012(a) or 35 P.S. 4012(b)-(f) applies to the City of Allentown?**

6. **Whether the requirement of DEP approval, which applies only to First and Second Class Counties, is due to the fact that these counties are empowered to replace DEP's air pollution regulatory role?**

7. **Whether the legislative intent behind 35 P.S. 4012 was to allow municipalities to provide additional and cumulative remedies above and beyond those of the PA Air Pollution Control Act?**

8. **Whether the Air Pollution Control Act contains express preemption of municipalities' rights to adopt air pollution laws stricter than state law?**

9. **Whether an implied preemption analysis is appropriate since the Air Pollution Control Act is not silent on the issue of preemption?**

10. **Whether the Air Pollution Control Act contains field preemption that prevents county and municipal rights to adopt air pollution laws stricter than state law?**

11. **Whether any specific provision of the Allentown Clean Air Ordinance conflicts with the Air Pollution Control Act?**

12. **Whether a conflict between one or more specific severable provisions of the Allentown Clean Air Ordinance and the Air Pollution Control Act authorizes the Lehigh County Board of Elections to keep the entire ordinance from consideration of the voters?**

B. LEGAL ARGUMENT

1. Any Challenge to the Petition filed on April 15, 2013 after April 22, 2013 is barred by the challengers failure to comply with the mandatory 7 day period for filing objections under the Pennsylvania Election Code, 25 P.S. § 2937.

The Allentown Clean Air Ordinance Initiative Petition, which contained approximately 3,500 signatures, was filed on April 15, 2013. It is

undisputed that there was never any objection or challenge filed by an Allentown citizen to the Air Pollution Initiative. The last day to challenge the Petitions was April 22, 2013, coincidently, Earth Day. 25 P.S. § 2937.

The seven days for filing and serving objections runs from the last day for filing such petitions. *In re Morrison Wesley*, 946 A.2d 789 (Pa. Cmwlth.) *aff'd per curiam*, 596 Pa. 457, 944 A.2d 78 (2008) (where because of heavy snow, Governor extended the date for filing petitions, the time for filing objections was similarly extended based on statutory language). This is true regardless of when such petitions were actually filed. *In re Petition of Werner*, 662 A.2d 35 (Pa. Cmwlth. 1995) (citing *In re: Referendum for Sunday Movie Picture Exhibitions in Borough of Waynesboro*, 383 Pa. 162, 117 A.2d 699 (1955) as mandating such analysis). The seventh day includes the entire day even if the gubernatorial extension of time to file the petitions is extended for only part of a day. *In re James,* 596 Pa. 442, 944 A.2d 69 (2008) (even though governor's extension of time to file petitions extended only until noon, objections could be filed until 5:00 p.m. on the last day). The objections must be filed in the appropriate court within the time period, but if filed in the wrong court, the objections may be transferred. *In re Keller*, 994 A.2d 1165 (Pa. Cmwlth. 2010). Postmarks are not likely to preserve a filing date. *See In re Nomination Petition of*

Acosta, 525 Pa. 135, 578 A.2d 407 (1990) **(stressing mandatory nature of statutory language and need for expeditious action by the courts)**. (Emphasis added). The Governor appears to have the authority to extend this deadline if a natural disaster occurs. *See In re James,* 596 Pa. 442, 944 A.2d 69 (2008) (Supreme Court reversed Commonwealth Court decision holding Governor's extension of time to file petitions did not permit extension of time to file objections; validity of extension apparently accepted without question).

Intervenor, Delta Thermo Energy A, LLC ("DTE"), tried to circumvent the mandatory seven (7) day provision of 25 P.S. § 2937 by showing up at the Board of Elections on August 27, 2013 to object to putting the question of the City of Allentown Clean Air Ordinance initiative on the November 2013 City of Allentown ballot. In essence, DTE is 127 days late with its concern over the petition as to the Board of Elections. DTE is barred from arguing against the Clean Air Ordinance initiative petition for failure to comply with 25 P.S. § 2937 and the board of elections lacked the authority to entertain a late challenge to the initiative.

There are two important concerns for this Court in dealing with an election code matter that involves the very basic right of the citizens of Allentown to petition their government for redress of grievances, First

Amendment of the United States Constitution, and the right to vote for a candidate or a referendum or initiative. *In re Motion Picture Exhibitions on Sunday in Borough of Hellertown*, 354 Pa. 255, 47 A.2d 273 (Supreme Court treats initiatives under the same election code rules as candidate's nomination petitions and papers).

Our Supreme Court in *In re Nomination Petition of Flaherty*, 564 Pa. 671, 770 A.2d 327 (2001), stressed that "the Election Code must also be liberally construed in order to protect a candidate's right to run for office and the voters' rights to elect the candidate of their choice. *In re Nomination Petition of Wesley*, 536 Pa. 609, 613, 640 A.2d 1247, 1249 (1994)." Further, "A party alleging the defects in a nominating petition has the burden of proving such. *In re Nomination Petition of Johnson*, 509 Pa. 347, 502 A.2d 142 (1985); *In re Nomination Petition of Wagner*, 102 Pa.Commw. 174, 516 A.2d 1276 (1986), aff'd, 510 Pa. 584, 511 A.2d 754 (1986)." *Flaherty*, *supra*.

Where the court is not convinced of the validity of the challenge, the candidate or in this case, the citizen's initiative, the challenge must be resolved in favor of the ballot by putting the initiative on the 2014 November Ballot in Allentown. *Flaherty*, *supra*.

2. The Lehigh County Board of Elections had neither the discretion nor the power to overrule the initiative procedures in the Allentown Home Rule Charter.

The Lehigh County Board of Elections performs a necessary and important function as a part of the democratic process in our form of government, but it has nothing to do with the substantive questions to be put to the voters on the 2013 Lehigh County Municipal Ballot. If the law prescribes that a question may be placed on the ballot, the county board must perform that duty.

The Allentown City Charter states quite clearly and succinctly:

SECTION 1002 INITIATIVE AND REFERENDUM

A. Initiative. The qualified voters of the City shall have the power to propose ordinances to the Council. **If Council fails to adopt *a proposed* ordinance, the initiative process *gives* the qualified voters of the City the opportunity to adopt or reject *the proposed* ordinance at a *primary, municipal or general* election. (11/6/01)** (emphasis added).

The source of the authority and structure of county boards of elections, including the Lehigh County Board of Elections, is the Pennsylvania Election Code, 25 P.S. § 2641 *et seq*. The Election Code mandates the existence of such boards in and for each county of the Commonwealth, with jurisdiction over the conduct and form of primary and general elections in each county. Section 302 of the Election Code delineates the powers and duties of county boards, seriatim, in paragraphs

(a) through (o). With the exception of paragraph (o), these deal with the mechanics of specific election procedures; paragraph (o) is a catch-all authorization to county boards to perform such other duties as may be prescribed by law. 25 P.S. § 2642(o). It is this latter provision, read in context with the provisions of § 1002(A) of the Allentown City Charter that provides the authorization to the Lehigh County Board of Elections to place the challenged referendum on the township ballot. "**The duties of the County Board of Elections are purely ministerial. They are prescribed by the Pennsylvania Election Code. They are given no discretion.**" (Emphasis added), *Shoyer v. Thomas*, 81 A.2d 435, 368 Pa. 70 (1951).

To allow the unelected Board of Elections to usurp the power to defeat the clear right of citizens to this process clearly outlined in the Allentown City Charter is unprecedented. The Board has no discretion in this matter, *Shoyer v. Thomas*, 81 A.2d 435, 368 Pa. 70 (1951), but to abide by the terms of Allentown City Charter. Anything less makes a sham of Article 9, Section 2 Home Rule of the Pennsylvania Constitution.

No case law has overturned the Pennsylvania Supreme Court precedent in *Shoyer*, and surely has not granted the sort of sweeping authority that the Board of Elections claims to have to judge an ordinance's legality. In fact, none of the law cited by this court, the County Board of

Elections or the intervening party has shown otherwise.

As this court pointed out in the October 2, 2013 opinion in this matter:

> "the Pennsylvania Supreme Court has already enjoined presentation of ballot questions to the electorate where an ordinance would be ineffective, beyond the power of the jurisdiction, or illegal. See *Pennsylvania Gaming Control Board v. Philadelphia*, 593 Pa. 241, 928 A.2d 1255 (2007); *Deer Creek Drainage Basin Auth. v. County Board of Elections of the County of Allegheny*, 475 Pa. 491, 381 A.2d 103 (1977); *Citizens Committee to Recall Rizzo v. Board of Elections*, 470 Pa. 1, 367 A.2d 232 (1976)."

This makes our point. It was not the Boards of Elections that made these judicial decisions. It was the Pennsylvania Supreme Court.

The cases also make clear that Boards of Elections roles are primarily ministerial. "When certification occurs, under 53 P.S. § 13109, the Philadelphia County **Board of Elections is obligated** to cause a question to be printed on the ballot." (Emphasis added). *Pennsylvania Gaming Control Board* at 252. "Therefore, once the Board of Elections had determined that the proposed referendum met the procedural requirements of Section C-1192 [of the Home Rule Charter of West Deer] – a finding not challenged here – it became the **duty of the Board** to place the referendum question before the voters of West Deer." (Emphasis added). *Deer Creek Drainage Basin Auth.* at 505.

Citizens Committee to Recall Rizzo was a political anomaly, arguing that the Board of Elections' duties are both ministerial and deliberative, but then explaining the deliberative functions in fairly ministerial terms, where the deliberation is merely a matter of determining validity of signatures, notarizations and affidavits, not complex preemption analysis:

> "The language of that section imports a duty which is partially ministerial and partially deliberative. As to the ministerial aspect of the Board's duty, there appears to be little doubt that the Board is obliged to 'complete its examination of the petition within fifteen days and shall thereupon file the petition if valid or reject it if invalid.' This duty is purely ministerial in the sense that the Board is required to act on the validity of the petition within the prescribed time frame. *See, e. g., State v. Scott*, 52 Nev. 216, 285 P. 511 (1930). …in reaching the decision of whether to accept the petition, the Board is accorded the ultimate discretion as to the validity of the petition. In exercising that discretion the Board was bound to do so in good faith and in a legally sound manner. The discretion, in other words, was not unrestrained. *Tanenbaum v. D'Ascenzo*, 356 Pa. 260, 51 A.2d 757 (1947). …the Board could not base its determination on arbitrary and capricious grounds or an erroneous interpretation of law." *Citizens Committee to Recall Rizzo* at 11-12, 15.

The Lehigh County Board of Elections misrepresents these cases to the court. In their response filed with this court on September 24, 2013, they state: "The facial legality of a proposed ordinance is a proper issue for review by an Election Board in considering whether a proposed ballot question is properly put on the ballot by an Election Board. *Pa. Gaming Control Board vs. City Council of Philadelphia*, 593 Pa. 241,250, 928 A.2d

1255, 1260 (2007)." There is nothing on the pages cited, or in the case at large, that supports their statement. This is one of the cases where it was the Supreme Court that did the considering and the Election Board that was ordered to follow the result of that consideration.

The Lehigh County Board of Elections goes on to state:

> "In fact an Election Board has a duty to ensure that a referendum question that is invalid and would have no legal effect is not presented on the ballot so as to avoid unnecessary voter confusion and the unjustified expenditure of public resources on an inoperative election, as well as protecting the interests of all parties. *Deer Creek Drainage Basin Authority vs. County Board of Elections of Allegheny County*, 475 Pa. 491, 381 A.2d 103 (1977)." Board of Elections response #31, Sept. 24, 2013.

Again, they misrepresent the cases they cite. *Deer Creek* mentions duties only three times. The first, quoted above, shows that an Elections Board has a duty to place the referendum question before the voters once it determines that the proposed referendum met the procedural requirements in the home rule charter. The other references to duties state that "[i]f the law prescribes that a question may be placed on the ballot, the county board must perform that duty," *Deer Creek* at 503-04, and "[a]s above stated, the Board of Elections made no such determination; it was merely preparing, as was its duty, to place the question on the ballot pursuant to instructions from the Township acting under its home rule charter." *Deer Creek* at 505, n.6.

Nothing in this supports the assertion that a Board of Elections has a duty or discretion to judge the legality of ordinances.

The Board of Elections and intervenor both raise the cases of *Hempfield School Dist. v. Election Bd. of Lancaster Cnty.,* 57 4 A.2d 1190 (Pa. Commw. Ct. 1990) and *Blythe v. Bd. of Elections of Schuylkill,* 143 Pa.Cmwlth. 341,600 A.2d 231 (1991). These are both Commonwealth Court cases and are trumped by Supreme Court precedent, which overwhelmingly has held that a Board of Elections' job is ministerial. Nevertheless, these cases do not prove anything to the contrary. They are cases showing just that non-binding referenda are not permitted on the ballot in Pennsylvania, and that election boards are not empowered to put such measures on ballots. *Hempfield* states:

> "Nowhere is it provided in the Election Code that county election boards have the discretion to authorize non-binding referenda questions on the ballot. The phrase as hereinafter provided in Section 2645 makes clear that the **election boards only have discretion to place questions on the ballot when the Election Code specifically grants them that discretionary power**. Analysis of the succeeding provisions of the Election Code fails to demonstrate any instances in which the Election Board is conferred discretion to place a question on the ballot." (emphasis added) *Hempfield* at 89.

Blythe held the same. Neither case is relevant, as the Allentown Clean Air Ordinance is not a non-binding referendum, but a lawful proposed ordinance.

The Board of Elections also cites, in their appeal brief to the Commonwealth Court on Sept. 30, 2013, page 1266 from *Bell vs. Lehigh County Board of Elections*, 729 A.2d 1259, 1266 (Pa.Cmwlth. 1999) to support their statement that "proposed ordinances may not contravene constitutional principles nor other superseding statutes." Interestingly, there is no page 1266 in that short decision, where the Commonwealth Court chose not to rule on the merits. This is hardly a rival to Supreme Court precedent.

Finally, the Board of Elections argues in point #30 of its Sept. 24, 2013 response to our initial filing in this court that "[a] county Board of Elections has quasi-judicial functions such that it is more than a mere ministerial body." To back this up, they cite two cases, both predating *Shoyer*: *In Re: Nomination Papers of American Labor Party*, 352 Pa. 576, 579, 44 A.2d 48, 50 (1945) and *Boord vs. Maurer*, 343 Pa. 309, 312-13,22 A.2d 902,904 (1941).

In Re: Nomination Papers of American Labor Party states that "[t]he Election Code makes the County Board of Election more than a mere ministerial body. It clothes it with quasi-judicial functions," citing *Boord v. Maurer*, 343 Pa. 309, 312, which states the same and elaborates that "[e]ach County Board of Election may make regulations, not inconsistent with this

act or the laws of this Commonwealth to govern its public sessions, and may issue subpoenas, summon witnesses, compel production of books, papers, records and other evidence, and fix the time and place for hearing any matters relating to the administration and conduct of primaries and elections in the county under the provisions of this act." Both cases expound on how a Board of Elections is empowered to receive and determine the sufficiency of nomination petitions, certificates and papers of candidates, and the like. Nowhere does it even imply that a Board of Elections may judge the legality of an ordinance for an initiative. Such a duty falls squarely with the courts and outside of the duties of election boards.

3. Allentown's status as a home rule municipality, and the Environmental Rights Amendment (Article 1, Section 27 of the Pennsylvania Constitution) militate in favor of the City's power to adopt the Allentown Clean Air Ordinance and favor of the people's right to consider and adopt it.

The City of Allentown is a home rule municipality. Under the concept of home rule, the ability of a locality to exercise municipal functions is limited only by its home rule charter, the **Pennsylvania Constitution**, and enactments of the General Assembly. *City of Philadelphia v. Schweiker, 579 Pa. 591, 605 (2004)*; 53 P.S. § 2961. In addition, grants of municipal power to a home rule municipality are to be "liberally construed in favor of the municipality." 53 P.S. § 2961. Thus, in

analyzing a home rule municipality's exercise of power, ambiguities are resolved in favor of the municipality. *Holt's Cigar Co., Inc. v. City of Philadelphia*, 608 Pa. 146, 153 (2011).

Constitutional obligations trump the General Assembly. We were recently reminded of this when preemption provisions in Pennsylvania's Act 13 of 2012 were overturned in *Robinson Twp. v. Commonwealth*, 83 A.3d 901 (2013) because they were found to be an unconstitutional violation of the Environmental Rights Amendment, Article 1, § 27 of the Pennsylvania Constitution. The unconstitutional parts of Act 13 "purport[] to preempt the regulatory field to the exclusion of all local environmental legislation that might be perceived as affecting oil and gas operations." *Robinson* at 978.

The Environmental Rights Amendment, cited as a source of authority in the Allentown Clean Air Ordinance states:

> 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.

The Pennsylvania Supreme Court reminds us that "the constitutional obligation binds all government, state or local, concurrently." *Robinson* at 952. The Court repeatedly points out that "all existing branches and levels

of government derive constitutional duties and obligations with respect to the people." *Id.* at 977; similar language at 963. More specifically, the Court explains:

> "This environmental public trust was created by the people of Pennsylvania, as the common owners of the Commonwealth's public natural resources; this concept is consistent with the ratification process of the constitutional amendment delineating the terms of the trust. **The Commonwealth is named trustee and, notably, duties and powers attendant to the trust are not vested exclusively in any single branch of Pennsylvania's government. The plain intent of the provision is to permit the checks and balances of government to operate in their usual fashion for the benefit of the people in order to accomplish the purposes of the trust. This includes local government.**" (Emphasis added) *Id.* at 956-57.

Historically, our courts have viewed municipalities as more subservient to the General Assembly, but any such restraints must be understood as secondary to constitutional obligations.

> "We recognize that, as the Commonwealth states, political subdivisions are 'creations of the state with no powers of their own.' *Fross v. County of Allegheny*, 20 A.3d 1193, 1202 (Pa. 2011). Municipalities have only those powers 'expressly granted to them by the Constitution of the Commonwealth or by the General Assembly, and other authority implicitly necessary to carry into effect those express powers.' Id. Within this construct, the General Assembly has the authority to alter or remove any powers granted and obligations imposed by statute upon municipalities. See, e.g., *Huntley*, 964 A.2d at 862 (even where state has granted powers to act in particular field, such powers do not exist if Commonwealth preempts field). By comparison, however, **constitutional commands regarding municipalities' obligations and duties to their**

> **citizens cannot be abrogated by statute.** See *Mesivtah*, 44 A.3d at 9**… Moreover, the General Assembly has no authority to remove a political subdivision's implicitly necessary authority to carry into effect its constitutional duties**. Cf. *Commonwealth ex rel. Carroll v. Tate*, 274 A.2d 193, 196-97 (Pa. 1971)." *Robinson* at 977.

Demonstrating the power and importance of the Environmental Rights Amendment versus other constitutional rights, the Court points out: "Generally, litigation efforts of private interests to limit the exercise of the General Assembly's police power to protect the environment by asserting competing constitutional rights have been unsuccessful, in recognition of the Section 27 imperative." *Id.* at 969.

As with any constitutional challenge, the **role of the judiciary** when a proper and meritorious challenge is brought to court includes the obligation to vindicate Section 27 rights. *Id.* at 968. The Environmental Rights Amendment "is more than statement of policy; it is intended to create [a] legally enforceable right to protect and enhance environmental quality." Pa. Legislative Journal-House at 2272, cited in *Robinson* at 952.

Says the highest court in our Commonwealth:

> "the citizens construe the Environmental Rights Amendment as protecting individual rights and devolving duties upon various actors within the political system; and they claim that breaches of those duties or encroachments upon those rights is, at a minimum, actionable. According to the citizens, this dispute is not about municipal power, statutory or otherwise, to develop local policy, but it is instead about compliance with

> constitutional duties. **Unless the Declaration of Rights is to have no meaning, the citizens are correct.**" (Emphasis added.) *Robinson* at 974.

The Environmental Rights Amendment received unanimous support in the Pennsylvania House and Senate, and with 4-to-1 approval at the polls, received more support at the ballot than any candidate seeking state-wide office or any of the other four proposed amendments in the referendum of May 18, 1971, the day it was adopted by the people. "To say the Environmental Rights Amendment was broadly supported by the people and their representatives would be an understatement." *Id.* at 962.

> Among the questions and answers distributed prior to the May 18, 1971 referendum and intended to aid voters in understanding the proposed constitutional amendment was the following:
>
> Q. Will the amendment make any real difference in the fight to save the environment?
> A. Yes, once [the amendment] is passed and the citizens have a legal right to a decent environment under the State Constitution, every governmental agency or private entity, which by its actions may have an adverse effect on the environment, must consider the people's rights before it acts. If the public's rights are not considered, the public could seek protection of its legal rights in the environment by an appropriate law suit . . . .
>
> Q. Will there be any "teeth" in the law, if passed?
> A. It will be up to the courts to apply the three broad principles [articulated in the amendment] to legal cases. However, having this law passed will strengthen substantially the legal weapons available to protect our environment from further destruction . . . . *Id.* at 952-53.

Despite these promises, there were no “teeth” until the *Robinson* case was recently decided, in which the Pennsylvania Supreme Court dusted off this dormant constitutional amendment and spelled out that these rights are self-executing, just as other constitutional rights are, and thus the courts may enforce these rights independently of any legislative action. *Id.* at 974-75.

No longer will the court assume that “mere compliance with the enabling statute and relevant regulations [is] sufficient to satisfy constitutional strictures.” *Id.* at 967, n.53.

Just as Delta Thermo Energy (DTE) argued in its appeal brief of this case to Commonwealth Court, the Commonwealth in *Robinson*, argued on behalf of the oil and gas industry against “a ‘balkanization’ of legal regimes with which the industry would have to comply.” *Id.* at 981. DTE argued that: “municipalities across Pennsylvania could create a patchwork of expansive, often inconsistent, comprehensive air pollution regulations… The result would be a tangled web of air pollution control programs establishing different requirements across Pennsylvania, frustrating the purpose of a state regulatory program.” This is a common refrain from industry, even when arguing for federal preemption to prevent states having varied standards – just as Pennsylvania has long had its own Air Pollution Control Act – and the end of the industrial world has not come.

The PA Supreme Court dismisses this alarmist argument, stating in *Robinson* that: "If economic and energy benefits were the only considerations at issue, this particular argument would carry more weight. But, the Constitution constrains this Court not to be swayed by counter-policy arguments where the constitutional command is clear." *Robinson* at 981.

By nearly every pollution measure, Pennsylvania is among the four most polluted states in the nation. Clearly, decades of local government authority to regulate air pollution has not resulted in a prohibitive environment for corporations with smokestacks to set up shop in our state.

The Court in *Robinson* notes that "the Commonwealth fails to respond in any meaningful way to the citizens' claims that Act 13 falls far short of providing adequate protection to existing environmental and habitability features of neighborhoods in which they have established homes, schools, businesses that produce or sell food and provide healthcare, and other ventures, which ensure a quality of human life." *Id.* at 981.

Similarly, DEP has failed to provide adequate protection for the people's rights to clean air in the Lehigh Valley. This is evidenced, in part, by the fact that Allentown is described in a recent report as the nation's 11th

worst asthma capital[1] and that the Lehigh Valley is also the 14th worst in the nation for year-round fine particulate matter pollution and one of just a handful of regions where this pollution is getting worse.[2]

Clearly, Allentown's asthma and air quality would not be among the worst in the nation if the Department of Environmental Protection were adequately upholding the people's rights to clean air.

> "In relevant part, as we have explained previously, the Environmental Rights Amendment to the Pennsylvania Constitution delineates limitations on the Commonwealth's power to act as trustee of the public natural resources. It is worth reiterating that, insofar as the Amendment's prohibitory trustee language is concerned, the constitutional provision speaks on behalf of the people, to the people directly, rather than through the filter of the people's elected representatives to the General Assembly. See PA. CONST. art. I, §§ 25, 27." *Robinson* at 974.

The same can be said of the DEP. The people must have their rights to clean air protected, if not by DEP, then by their city… and if not by their city government, then by vote of the people who make up the city.

> "The right to 'clean air' and 'pure water' sets plain conditions by which government must abide. We recognize that, as a practical matter, air and water quality have relative rather than absolute attributes. Furthermore, state and federal laws and regulations both govern 'clean air' and 'pure water' standards and, as with any other technical standards, the courts generally

[1] "Asthma Capitals 2013," Asthma and Allergy Foundation of America. www.asthmacapitals.com ; www.aafa.org/pdfs/2013_AC_FinalPublicList1.pdf
[2] "The State of the Air 2013," American Lung Association, p.14. www.stateoftheair.org/2013/assets/ala-sota-2013.pdf

> defer to agency expertise in making a factual determination whether the benchmarks were met." *Id.* at 953.

This gets to the very purpose of the Allentown Clean Air Ordinance. DEP cannot make a "factual determination whether the benchmarks were met" – in the air pollution permit for Delta Thermo Energy or for any other company that may build an incinerator in the city – because the pollution monitoring itself is inadequate. Permit requirements, for DTE and other smokestack industries, only require state-of-the-art continuous emissions monitoring for a handful of pollutants, while others go unmonitored all but one day of each year (at best).

DTE's permit requires that only five pollutants that can harm health of local residents be monitored continuously, plus the darkness of the smoke and the global warming pollutant, carbon dioxide. It requires continuous monitoring for only ONE toxic chemical (hydrochloric acid). For mercury, dioxins, lead, arsenic and a myriad of other toxic pollutants, they'll have to test one time each year (while on their best behavior) or not at all. This is unacceptable. It's akin to having a speed limit where a speed trap is set just one day a year, there are signs warning "speed trap ahead" and the driver's brother runs the speed trap (the companies do their own testing). In reality, incinerators are "speeding" many other days of the year, with excessive emissions during startup, shutdown and malfunction times, when testing is

not done. For pollutants like dioxins, annual 6-hour tests cannot pick up the actual emissions (highest during startup/shutdown/malfunction times) that have been shown to be 30-50 times higher when tested using continuous monitoring equipment.[3]

The main feature of the Allentown Clean Air Ordinance is that it would require real-time monitoring and disclosure of air pollutants, using state-of-the-art technology to ensure compliance with emissions limits. Such modern equipment is needed to guarantee safer operations in light of the fact that trash, sewage sludge and other waste streams are known to be highly variable in their content of metals and other toxins.

DEP – the very agency that has allowed the area to become one of the most air-polluted in the nation – is not an agency that can be trusted to set and enforce benchmarks for how clean Allentown's air should be. The people have a right to do better.

When the Pennsylvania Supreme Court struck down the preemption clause in Act 13, they noted that the law's one-size-fits-all regulatory approach "in **every type of pre-existing zoning district** is **incapable** of conserving or maintaining the constitutionally-protected aspects of the public environment and of a certain quality of life." (emphasis added) *Id.* at

[3] Wevers M. and De Fré R., "Underestimation of dioxin emission inventories," Organohalogen Compounds, Vol. 36, pp. 19-20 (1998). http://www.ejnet.org/toxics/cems/1998_DeFre_OrgComp98_Underest_DIoxin_Em_Inv_Amesa.pdf

979. The Court repeatedly took note of the fact that communities across the state differ, and that local laws ought to vary because uniform approaches are not appropriate and cannot account for local differences. Allentown is an area suffering from excessive air pollution, and its people have a right to clean air that is not being attained. Without adequate monitoring, enforcement and pollution controls, DEP permits and weak enforcement are **incapable** of securing these rights.

There is no legal uncertainty about whether Pennsylvania law preempts this ordinance, as the following legal arguments outline, but if there were, the Pennsylvania Constitution militates in favor of the plaintiff's efforts to bring this clean air decision to the people.

The Environmental Rights Amendment mentions "the people" in all three clauses, as the Pennsylvania Supreme Court pointedly and repeatedly reminds us in *Robinson*. Even more relevant than the Act 13 case on the rights of municipalities to pass laws regulating the oil and gas industry, this case is literally about bringing the right to clean air to the people. The people of Allentown have spoken in meeting the requirements to secure their right to bring the ordinance to the voters. The City of Allentown – and all Pennsylvania municipalities – have the right to adopt such an ordinance. The people now must have their constitutional right to clean air brought

before them for a vote, as the city, county and state have fallen down in their constitutional obligations to protect these rights.

4. Federal and state air pollution laws allow Pennsylvania municipalities to adopt stricter air pollution laws.

The federal Clean Air Act, at **42 U.S.C. § 7416**, allows states <u>and municipalities</u> to have stricter air pollution laws than the federal floor. It states:

> **§ 7416. Retention of State authority**
>
> Except as otherwise provided in sections 119(c), (e), and (f) (as in effect before the date of the enactment of the Clean Air Act Amendments of 1977), 209, 211(c)(4), and 233 (preempting certain State regulation of moving sources) **nothing in this Act shall preclude or deny the right of any State <u>or political subdivision thereof</u> to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution**; except that if an emission standard or limitation is in effect under an applicable implementation plan or under section 111 or 112, **such State or political subdivision may not adopt or enforce any emission standard or limitation which is less stringent than the standard or limitation under such plan or section.** (emphasis added)

It is under such authority that Pennsylvania's Air Pollution Control Act exists. This Clean Air Act authority also grants Allentown the right to adopt local air pollution laws as strict or stricter than the Clean Air Act.

Pennsylvania's Air Pollution Control Act, at **35 P.S. § 4012(a)**,

contains a standard savings clause designed to allow stricter local air pollution laws, just as many other states do. It states:

> **35 P.S. § 4012. Powers reserved to political subdivisions**
>
> (a) **Nothing in this act shall prevent counties, cities, towns, townships or boroughs from enacting ordinances with respect to air pollution which will not be less stringent than the provisions of this act, the Clean Air Act or the rules and regulations promulgated under either this act or the Clean Air Act.** This act shall not be construed to repeal existing ordinances, resolutions or regulations of the aforementioned political subdivisions existing at the time of the effective date of this act, except as they may be less stringent than the provisions of this act, the Clean Air Act or the rules or regulations adopted under either this act or the Clean Air Act. **(emphasis added)**

5. 35 P.S. 4012(a) applies to the City of Allentown, not 35 P.S. 4012(b)-(f).

35 P.S. § 4012(a) speaks specifically to the authority of cities (and counties and other municipalities), broadly. **35 P.S. § 4012(b)** applies only to first and second class counties and thus does not apply to the City of Allentown.

Nothing in **35 P.S. § 4012(a)** requires Department of Environmental Protection (DEP) approval. In fact, numerous other municipalities in the Commonwealth have adopted their own similar local air pollution ordinances under this authority, without any involvement from the

Department of Environmental Protection. Department of Environmental Protection approval is only required under **35 P.S. § 4012(b)-(f)**, which pertains to county air pollution control programs/agencies of the sort that take the place of Department of Environmental Protection's air pollution regulatory role, and which are allowed only in first and second class counties (Philadelphia and Allegheny Counties, respectively).

35 P.S. § 4012(b)-(f) states:

> (b) The administrative procedures for the abatement, reduction, prevention and control of air pollution set forth in this act shall not apply to any **county of the first or second class of the Commonwealth which has and implements an air pollution control program** that, at a minimum, meets the requirements of this act, the Clean Air Act and the rules and regulations promulgated under both this act and the Clean Air Act and **has been approved by the department**.
>
> (b.1) Provisions of this act pertaining to dust control measures shall not apply to portions of highways in townships of the second class where no businesses or residences are located.
>
> (c)(1) Whenever, either upon complaint made to or initiated by the department, the department finds that any person is in violation of air pollution control standards, or rules and regulations **promulgated pursuant to the grant of authority made in subsection (b)**, the department shall give notification of that fact to that person **and to the air pollution control agency of the county involved**.
>
> (2) If **such violation** continues to exist after **said notification** has been given, the department may take any abatement action provided for under the terms of this act.

> (d) Whenever the department finds that violations of this act or the rules and regulations promulgated under this act are so widespread that such violations appear to result from a failure of the **local county control agency** involved to enforce those requirements, the department may assume the authority to enforce this act **in that county**.
>
> (e) The department shall have the power to refuse approval, or to suspend or rescind approval, once given, to any **county air pollution control agency** if the department finds that **such county agency** is unable or unwilling to conduct an **air pollution control program** to abate or reduce air pollution problems within its jurisdiction in accordance with the requirements of this act, the Clean Air Act or the rules and regulations promulgated under both this act and the Clean Air Act.
>
> (f) Whenever the department takes action **under the provisions of subsections (d) or (e)** of this section, it shall give written notification to the **air pollution control agency of the county** involved and such notification shall be an appealable action.
>
> (emphasis added to show how subsections (c) through (f) are extensions of subsection (b) and all apply only to Philadelphia and Allegheny Counties so long as they continue to maintain county air pollution control agencies authorized under these subsections)

Simply put, **35 P.S. § 4012(b)-(f)** does not apply to the City of Allentown, since the City of Allentown is not a County of the first or second class, and since the proposed Allentown Clean Air Ordinance does not aim to replace the Department of Environmental Protection's air pollution regulatory role.

The authority for the Allentown Clean Air Ordinance is **35 P.S. § 4012(a)**, as stated in the ordinance itself.

35 P.S. § 4012(a) sets a floor, but not a ceiling. Pennsylvania's Air Pollution Control Act was adopted in 1960, and amended in 1966, 1972, 1992 and 1995. In the 1972 amendments, the General Assembly changed § 4012(a) from being a floor **and** a ceiling to just being a floor. The language used to state that cities and other political subdivisions could enact ordinances with respect to air pollution which will "not conflict with" the provisions of the Air Pollution Control Act. The 1972 amendments changed "not conflict with" to "not be less stringent than" – indicating an intent that political subdivisions be empowered to adopt local air pollution laws that are **as strict or stricter** than state and federal air pollution laws.

Many (primarily rural) Pennsylvania municipalities and some counties (outside of Philadelphia and Allegheny) have local air pollution ordinances under § 4012(a) authority, including open burning ordinances, ordinances regulating outdoor wood-fired boilers, ordinances regulating crematoria, and even some regulating hazardous or radioactive waste incinerators. These ordinances have many of the hallmarks of the Allentown Clean Air Ordinance, such as fees, emissions standards, pollution monitoring, inspections and enforcement, and civil and criminal penalties

for non-compliance. Some even go further, requiring permits. Some of these are even based on model ordinances for open burning and outdoor wood-fired boilers that DEP provides, containing these features.[4] One example is the City of Nanticoke's ordinance regulating outdoor furnaces that burn solid fuels.[5] The Allentown Clean Air Ordinance also seeks to regulate pollution from solid fuel burning facilities, but only new ones of a more industrial scale.

Far more comprehensive anti-pollution air ordinances have been held by this court to fall under § 4012(a). In 1976, and again in 1978, the case of *Commonwealth ex rel. Allegheny County Health Dept., Bureau of Air Pollution Control v. University of Pittsburgh* came before the Commonwealth Court.[6] In both cases, this Court referenced § 4012(a) as the source of authority for the county's 1972 anti-pollution ordinance, even though § 4012(b) existed at the time. The Allegheny County Health Department's Air Quality Program was not approved by DEP until 1998,[7] the same year that Philadelphia's Air Management Services program was

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[4] Model ordinances are available from the PA Department of Environmental Protection website titled "Open Burning Information."
http://www.dep.state.pa.us/dep/deputate/airwaste/aq/openburn/openburn.htm
[5] City of Nanticoke Ord. No. 7-2009, regulating outdoor boilers burning solid fuels.
http://ecode360.com/14393508
[6] 26 Pa. Commw. 375 (1976); 37 Pa. Commw. 117 (1978).
[7] "Approval of the Allegheny County Air Quality Program," 28 Pa.B. 5528.
http://www.pabulletin.com/secure/data/vol28/28-44/1798.html

approved. The Allegheny County Health Department's Air Pollution Control Rules and Regulations, adopted June 15, 1972, were quite the comprehensive program, regulating a wide range of industries, setting ambient air quality standards, providing for inspections and emissions standards, requiring testing and reporting, and establishing permits and fees as well as civil and criminal penalties.[8] The Allegheny County ordinance is far, far more exhaustive than the Allentown Clean Air Ordinance, yet the Commonwealth Court found it authorized under § 4012(a), not even referencing § 4012(b) in either case, even though that subsection existed at the time. If there were any ceiling under § 4012(a), surely the Allegheny County ordinance would have exceeded it.

6. The requirement of DEP approval, which applies only to First and Second Class Counties, is due to the fact that these counties are empowered to replace DEP's air pollution regulatory role.

There is no requirement for Department of Environmental Protection (DEP) approval of local ordinances adopted under § 4012(a). That requirement is only under § 4012(b), which applies only to county-wide air pollution programs in first and second class counties where the program takes the place of DEP's air pollution regulatory role.

The measure of whether DEP approval is required is not about how

[8] Allegheny County Health Department, Air Pollution Control Rules and Regulations, June 1972. http://www.scribd.com/doc/173230184/ACHD-1970s-Air-Ordinance-Article-XVIII

comprehensive an air pollution ordinance is, but whether a local law in Philadelphia or Allegheny County aims to replace DEP's air regulatory role by creating a comprehensive program.

The U.S. Environmental Protection Agency spelled this out in their 1972 Compendium of State Air Pollution Control Agencies,[9] stating in their description of Pennsylvania's program:

> "**Local governments whose air pollution control agencies and programs have been approved by the State are relieved from the application of State air pollution control procedures within their boundaries** except insofar as the effects of local air contaminant sources extend beyond those boundaries." (emphasis added)

This is a reference to **35 P.S. § 4012(b)**, the part of the Air Pollution Control Act that sets up this arrangement. Again, § 4012(b) states that "[t]he administrative procedures for the abatement, reduction, prevention and control of air pollution set forth in this act shall not apply to any county of the first or second class of the Commonwealth which has and implements an air pollution control program."

This is not the language of preemption. § 4012(b) is merely stating that the state's Air Pollution Control Act does not apply in these limited locations (in these two counties that now have approved programs) and,

[9] "1972 Compendium of State Air Pollution Control Agencies," U.S. Environmental Protection Agency, September 1, 1971, p.79 (p. 86 in the online document viewer). http://nepis.epa.gov/Exe/ZyPURL.cgi?Dockey=91004WDF.txt

conversely, that the Air Pollution Control Act (and DEP's authority to enforce it) still **does** apply everywhere else in the Commonwealth – even in places where political subdivisions choose to adopt additional and cumulative local air pollution laws under the § 4012(a) authority granted to them directly by the General Assembly.

25 Pa. Code § 133 spells out the criteria by which the Department of Environmental Protection (DEP) may approve a local air pollution control agency. The Allentown Clean Air Ordinance does not create an agency for which such approval is required. Even in cases where an ordinance adopted by a political subdivision other than Philadelphia or Allegheny County were to create an agency, that agency would not cause the political subdivision to be exempted from the DEP's concurrent enforcement of the Air Pollution Control Act since such exemption is only available to first and second class counties. **25 Pa. Code § 133.3(a)** states:

> "An agency intending to operate an air pollution control program within the confines of **a political subdivision of the Commonwealth to which the procedures for the abatement, reduction, prevention and control of air pollution as set forth in the act do not apply**, shall make application to the Department for approval of the agency and its program." **(emphasis added)**

This language refers back to language in **35 P.S. 4012(b)** that limits application to Philadelphia and Allegheny Counties, thus the requirement to

apply to the DEP applies only to these two counties, where administration of a county air pollution control program is permitted to take the place of the Department of Environmental Protection (DEP)'s air pollution regulatory role. The Allentown Clean Air Ordinance does not aim to take over the DEP's air pollution regulatory role. To the contrary, it aims to provide "additional and cumulative" efforts to reduce air pollution.

The "administrative procedures… shall not apply" language in § 4012(b) refers to exempting approved county air pollution programs from state air pollution regulation, which is further evidenced throughout the state code. See 25 Pa. Code § 122.2 (National Standards of Performance for New Stationary Sources), 25 Pa. Code § 124.2 (National Emission Standards for Hazardous Air Pollutants), 25 Pa. Code § 127.82 (Prevention of Significant Deterioration of Air Quality), and even the payment of emission fees to Philadelphia and Allegheny Counties instead of the state under 25 Pa. Code § 127.705 (applying to major air polluting facilities). 25 Pa. Code §§ 122.2 and 124.2 state:

> "The standards adopted in this chapter do not apply to sources located in areas under the jurisdiction of local air pollution control agencies approved under section 12 of the act (35 P. S. § 4012). The local agencies may or may not adopt such standards as they deem appropriate."

25 Pa. Code § 127.82 has nearly identical language:

> "The requirements adopted in this chapter do not apply to sources located in areas under the jurisdiction of local air pollution control agencies under section 12 of the act (35 P. S. § 4012). The local agencies may adopt such requirements as they deem appropriate."

The object of interpretation and construction of all statutes is to ascertain and effectuate the intent of the General Assembly. 1 P.S. § 1921(a). When the words of a statute are clear and free from all ambiguity, their plain language is generally the best indication of legislative intent. *Hoffman Mining Co. v. Zoning Hearing Bd.*, 612 Pa. 598, 608 (2011).

35 P.S. 4012(b) needs to be read for its plain language meaning. It states that the procedures of the Pennsylvania Air Pollution Control Act do not apply in first and second class counties if they have approved air pollution programs of their own. It does not have any preemptive language limiting what can be done in other political subdivisions. § 4012(b) merely exempts two counties from DEP's air regulatory authority under certain conditions, as is clear from EPA's 1972 summary of Pennsylvania's program as well as the four sections of the Pa. Code, cited above.

7. The legislative intent behind 35 P.S. 4012 was to allow municipalities to provide additional and cumulative remedies above and beyond those of the PA Air Pollution Control Act.

The General Assembly expressed their intent, in the same section of the state Air Pollution Control Act, that local governments provide

"additional and cumulative" efforts to reduce air pollution. 35 P.S. § 4012(g) states, in part:

> "It is hereby declared to be the purpose of this section to enunciate further that **the purpose of this act is to provide additional and cumulative remedies** to abate the pollution of the air of this Commonwealth." (emphasis added)

35 P.S. § 4012.1a., titled "Construction," reiterates this intent, stating, in part:

> "It is hereby declared to be the purpose of this act to provide additional and cumulative remedies to abate the pollution of the air of this Commonwealth…"

The plain language interpretation of § 4012 is that DEP approval is not required under § 4012(a), since it is required under § 4012(b) but not mentioned in § 4012(a). The legislature had five opportunities to say otherwise: when the law was adopted in 1960 and when it was amended four times since; at least three of those times involved amending § 4012. The General Assembly chose never to restrict § 4012(a) with a requirement of state approval as they had § 4012(b).

8. **The Air Pollution Control Act contains no express preemption of municipalities' rights to adopt air pollution laws stricter than state law.**

Preemption doctrine is organized as follows:

Savings clauses[10] – language that preserves the rights of lower levels of government to act

Preemption clauses:

- Express: language forbidding action by lower levels of government
- Implied: where there is no express savings or preemption clause and the court interprets the statute to be preemptive
  - Field preemption – court interpretation that the statute is so comprehensive that it "occupies the field"
  - Conflict preemption – court interpretation that a conflict exists such that a law at a higher level of government must trump the lower one because both are impossible to enforce simultaneously

Pennsylvania preemption law is well established and follows these same principles seen around the country. The landmark case, *W. Pa. Rest. Ass'n v. City of Pittsburgh*, 366 Pa. 374, 380-81 (1951) describes savings clauses, express preemption and possible field preemption:

> "There are statutes which expressly provide that nothing contained therein should be construed as prohibiting

[10] As the term "savings clause" seems to be new to some parties to this case, note its use in legal references and law journal articles on the topic, including: 32 A.L.R.3d 215 ("Although savings provisions of Federal Water Pollution Control Act Amendment of 1972…."); 67 A.L.R.4th 822 ("Although recognizing that it had been held that similar savings clauses in other federal environmental laws did not preserve the right to bring an action based on federal common law, the court indicated that actions based on state common law have been preserved." and "In addition to holding that a municipal ordinance was not pre-empted by federal hazardous waste legislation, where the federal law had a savings clause preserving common-law actions, the court... also held that the ordinance was not pre-empted by a state hazardous waste management act having a similar savings clause."); "Revitalizing the Presumption Against Preemption to Prevent Regulatory Gaps: Railroad Deregulation and Waste Transfer Stations," 34 Ecology L.Q. 1147 (2007) ("Congress considered the preemption clause to be so clear that a savings clause protecting state police powers was 'unnecessary.'"); "Comment: Federal and State Preemption of Environmental Law: A Critical Analysis," 24 Harv. Envtl. L. Rev. 237 (2000) ("At times these basic three types of preemption may be combined. The Toxic Substances Control Act ('TSCA') combines a non-discretionary standard with a savings clause that allows some degree of regulation by lower units of government.")

municipalities from adopting appropriate ordinances, not inconsistent with the provisions of the act of the rules and regulations adopted thereunder, as might be deemed necessary to promote the purpose of the legislation. On the other hand there are statutes which expressly provide that municipal legislation in regard to the subject covered by the state act is forbidden. Then there is a third class which, regulating some industry or occupation, are silent as to whether municipalities are or are not permitted to enact supplementary legislation or to impinge in any manner upon the field entered upon by the state; in such cases the question whether municipal action is permissible must be determined by an analysis of the provisions of the act itself in order to ascertain the probable intention of the legislature in that regard."

More recently, the Pennsylvania Supreme Court has outlined the three types of preemption in *Hoffman Mining Co. v. Zoning Hearing Bd.*, 612 Pa. 598 (2011):

> "There are three generally recognized types of preemption: (1) express or explicit preemption, where the statute includes a preemption clause, the language of which specifically bars local authorities from acting on a particular subject matter; (2) conflict preemption, where the local enactment irreconcilably conflicts with or stands as an obstacle to the execution of the full purposes of the statute; and (3) field preemption, where analysis of the entire statute reveals the General Assembly's implicit intent to occupy the field completely and to permit no local enactments. Both field and conflict preemption require an analysis of whether preemption is implied in or implicit from the text of the whole statute, which may or may not include an express preemption clause."

There is no express preemptive language anywhere in 35 P.S. § 4004

or § 4012 which "forbids" or "specifically bars" local authorities from acting on this subject matter. Thus, express preemption cannot and does not apply here.

Considering that only § 4012(a) can apply to the City of Allentown and the Allentown Clean Air Ordinance, and that there is no preemptive language in the text of § 4012(a), the doctrine of express preemption does not apply.

There is similarly no express preemptive language in § 4012(b). The language empowers two counties to replace the DEP's air pollution enforcement authority, but says nothing to restrict municipalities in any way. Any preemption to be found in 35 P.S. § 4012 must be implied because there is no express preemption language.

9. An implied preemption analysis is inappropriate since the Air Pollution Control Act is not silent on the issue of preemption.

Implied preemption is needed when a statute does not expressly state whether political subdivisions may or may not regulate the same subject matter. Implied preemption comes in two flavors: field preemption and conflict preemption.

In *Dep't of Licenses & Inspections, Bd. of License & Inspection Review v. Weber*, 394 Pa. 466, 147 A.2d 326 (1959), the Supreme Court of Pennsylvania set out one if its earlier pronouncements on state-to-local

preemption in the Commonwealth, stating:

> "Where the Act is silent as to monopolistic domination and a municipal ordinance provides for a localized procedure which furthers the salutary scope of the Act, the ordinance is welcomed as an ally, bringing reinforcements into the field of attainment of the statute's objectives."

This welcoming attitude toward municipal ordinances ought to be applied in this case, especially since the Air Pollution Control Act is not even silent on "monopolistic domination" – it specifically does the opposite. The title of 35 P.S. § 4012 is "Powers reserved to political subdivisions." It explicitly allows stricter local air pollution ordinances in any county or municipality, and permits two counties to replace DEP's air pollution regulatory role if they adopt programs comprehensive enough to warrant exemption from the Air Pollution Control Act.

An implied preemption analysis is only appropriate where the statute is "silent" on preemption. The Pennsylvania Supreme Court has made this point repeatedly. A heavily cited case on the topic, *United Tavern Owners v. School Dist.*, 441 Pa. 274 (1971), states:

> "**When a statute is silent** as to whether municipalities are or are not permitted to enact supplementary legislation or to impinge in any manner upon the field entered upon by the state, the question whether municipal action is permissible must be determined by an analysis of the provisions of the act itself in order to ascertain the probable intention of the legislature in that

> regard. It is, of course, self-evident that a municipal ordinance cannot be sustained to the extent that it is contradictory to, or inconsistent with, a state statute. If the general tenor of the statute indicates an intention on the part of the legislature that it should not be supplemented by municipal bodies, that intention must be given effect and the attempted local legislation held invalid.**”** (emphasis added)

Similarly, the aforementioned and most-cited *W. Pa. Rest. Ass’n v. City of Pittsburgh*, 366 Pa. 374, 380-81 (1951) case states that implied preemption is appropriate for that “third class” of statutes where they do not expressly allow or disallow municipal legislation, but are “silent as to whether municipalities are or are not permitted to enact supplementary legislation.”

More recently, the requirement that implied preemption takes place when a statute is “silent” is echoed in *Holt’s Cigar Co., Inc. v. City of Philadelphia*, 608 Pa. 146, 153-54 (2011), where it states: “[i]n field preemption, a ‘statute is silent on supersession, but proclaims a course of regulation and control which brooks no municipal intervention.’”

The Pennsylvania Air Pollution Control Act is not “silent” on preemption. It falls into the first category outlined in *W. Pa. Rest. Ass’n v. City of Pittsburgh*, 366 Pa. 374, 380-81 (1951) and described as:

> “statutes which expressly provide that nothing contained therein should be construed as prohibiting municipalities from adopting appropriate ordinances, not inconsistent with the provisions of

> the act of the rules and regulations adopted thereunder, as might be deemed necessary to promote the purpose of the legislation."

Since the Act is not silent on preemption, it does not fall into the class of statutes where an implied preemption analysis is applicable.

10. The Air Pollution Control Act contains no field preemption that prevents county and municipalities from adopting air pollution laws stricter than state law.

Field preemption is a type of implied preemption, analysis of which is not appropriate because the statute is not silent on the issue of preemption.

Field preemption is heavily disfavored in Pennsylvania. In *Council of Middletown Twp., Delaware Cnty. v. Benham*, 514 Pa. 176, 180-184 (1987), Pennsylvania's Supreme Court states:

> "The state is not presumed to have preempted a field merely by legislating in it. The General Assembly must clearly show its intent to preempt a field in which it has legislated. *** The test for preemption in this Commonwealth is well established. Either the statute must state on its face that local legislation is forbidden, or 'indicate[ ] an intention on the part of the legislature that it should not be supplemented by municipal bodies.' *** Total preemption is the exception and not the rule."

More recently, this court held, in *Hartman v. City of Allentown*, 880 A.2d 737 (2005):

> "It is the policy of the Pennsylvania courts to disfavor a finding of preemption 'unless the Commonwealth has explicitly claimed the authority itself, or unless there is such actual,

> material conflict between the state and local powers that only by striking down the local power can the power of the wider constituency be protected.' *** In fact, the General Assembly preempts a field only where the state has retained all regulatory and legislative power for itself and no local legislation is permitted."

The Pennsylvania Supreme Court reviewed the Commonwealth's preemption law extensively in the recent *Hoffman Mining Co. v. Zoning Hearing Bd.*, 612 Pa. 598, 609-10 (2011) decision, and states:

> "[T]he General Assembly must clearly evidence its intent to preempt. *** Such clarity is mandated because of the severity of the consequences of a determination of preemption. *** The General Assembly has evidenced a clear intent to totally preempt local regulation in only three areas: alcoholic beverages, anthracite strip mining, and banking."

Since Pennsylvania does not play the implied field preemption game, and since the statute is not silent on issues of preemption, the arguments of the Board of Elections and the intervening party should fail when they make field preemption arguments by pointing to the fact that 35 P.S. § 4004 requires DEP to regulate certain things, a few of which overlap with areas that would also be locally regulated by the ordinance.

Arguments have been made that the court should imply that there is field preemption under § 4012(b) if an ordinance that would otherwise fall under § 4012(a) goes too far and constitutes a "comprehensive air pollution program." This analysis is inappropriate and invalid, and even if explored,

does not hold up to scrutiny.

This logic makes no sense as there is no ceiling expressed in § 4012(a), and since there is no mechanism for pushing a county or municipality into consideration under § 4012(b) when that subsection only applies to first and second class counties, of which the City of Allentown is neither.

Preemption under 35 P.S. § 4012 could only apply if one implies from § 4012(b) that *only* first and second class counties may establish the sorts of comprehensive air pollution programs that require state approval because the state's role in enforcing the Air Pollution Control Act is being replaced. This is a reasonable interpretation because it only allows exemptions from state enforcement of the Air Pollution Control Act under these circumstances. There is no basis to extend this logic to mean that any municipality cannot set up an air pollution control program (no matter how comprehensive it may or may not be) *that operates concurrently* with state authority, or to mean that the ordinance in question comes anywhere close to being a "program."

The fact that the Allentown Clean Air Ordinance does not purport to exempt the City from state enforcement of the Air Pollution Control Act should be sufficient to conclude that any implied preemptive effect of §

4012(b) does not apply.

§ 4012(b) does not preempt municipalities other than first and second class counties from having air pollution control programs of their own. It merely limits the granting of exemption from DEP air pollution regulatory authority to those two counties.

That said, the Allentown Clean Air Ordinance would not establish an air pollution control program. The 14 criteria for a program are set out in 25 Pa. Code § 133.4. The ordinance comes nowhere close to meeting those 14 criteria. The ordinance does not control air pollution from open burning operations. § 133.4(b)(1). It does not control nuisances caused by emissions from air contamination sources not subject to emissions standards. § 133.4(b)(3). It does not set up a plan approval system for prevention of air pollution from new air contamination sources. § 133.4(b)(4). It does not establish criteria for ambient air quality. § 133.4(b)(5). It does not establish air stagnation air quality levels. § 133.4(b)(6). It does not establish a source emission inventory. § 133.4(b)(8). It does not give the city authority to require air stagnation alert emission control plans. § 133.4(b)(11).

Of the remaining criteria that are partially met, the application of those criteria is narrowly limited. There are 58 active air permit facilities in

the City of Allentown. The ordinance would apply to none of them, since they are existing facilities and the ordinance only covers new facilities. The ordinance does not touch mobile sources of pollution. It does not affect small, residential-scale burners. It only applies to new facilities that would burn more than one ton per day of a solid waste or fuel. This is essentially limited to coal, waste coal, biomass, municipal, residual and hazardous wastes. It is extremely rare that such facilities are proposed – especially in the state's third largest city. Nationally, the U.S. Environmental Protection Agency just adopted carbon dioxide (CO_2) standards for new coal power plants, which essentially bans new conventional coal power plants, as only facilities with extremely expensive carbon capture and sequestration systems can comply, of which only a few are proposed nationally, and in places near oil deposits where the CO_2 can be used in enhanced oil recovery operations. Such a facility could not be built in the Allentown area. Due to these new federal regulations, it would be unreasonable to expect that a coal or waste coal burning facility would ever be built in the City of Allentown. CO_2 regulations are pending on waste and biomass burning facilities as well. Once they are adopted, it is also unreasonable to expect new waste or biomass burning facilities to be proposed. It is already quite rare that new waste or biomass incinerators are built in the U.S. – in part because they are

so unpopular, but also because trash and biomass incinerators are the first and second most expensive energy facilities to operate and maintain, according to the latest available data from the Energy Information Administration. Trash incinerators are also the most expensive to build, of all sorts of electric generating plants. Aside from Delta Thermo Energy's proposed trash and sewage sludge incinerator, very few, if any, other facilities would ever be covered by the ordinance.

Of the world of mobile and stationary air polluting sources, the scope of the ordinance is quite narrow and cannot be construed as a comprehensive air pollution program which, by definition, is one that covers a wide spectrum of sources, including ambient (background air) pollution levels, and including existing sources.

Due to the narrow scope of the ordinance and the fact that it does not establish a staffed agency of experts, or even meet most of the criteria for a program, there is no justification for defining it as a comprehensive air pollution program.

There is no ceiling in § 4012(a) which would push a local air ordinance into the realm of § 4012(b) if exceeded. This is clear from the plain language of § 4012(a) and in the fact that the ordinance falls far closer to the aforementioned City of Nanticoke ordinance regulating outdoor

furnaces that burn solid fuels, than it does to the comprehensive air pollution program that Allegheny County Health Department had in the 1970s, when this Court found that even that program fell under the authority of § 4012(a).

To establish a ceiling would be to draw a line in § 4012(a) that the General Assembly never created.

Rather than create a court-imposed arbitrary line that the General Assembly never envisioned, the court should abide by the plain language of the statute and find that the dividing line between § 4012(a) and § 4012(b) is not how far an ordinance goes, but whether the Department of Environmental Protection's air regulatory role is being replaced by exempting the jurisdiction from the procedures of the Air Pollution Control Act.

Even if it were appropriate for the court to do an implied preemption analysis of a statute that is not silent on preemption, field preemption is disfavored and cannot be found or justified for the statute in question.

11. No specific provision of the Allentown Clean Air Ordinance conflicts with the Air Pollution Control Act.

The only other option for finding preemption is conflict preemption – the second type of implied preemption, the analysis of which is inappropriate because the statute is not silent on the matter of preemption.

Pennsylvania courts have not been inclined to find conflict preemption lightly. *United Tavern Owners v. School Dist.*, 441 Pa. 274 (1971) explains:

> "In determining whether, by the enactment of the specific statute, the Commonwealth completely barred a municipality's enactment of an ordinance relating to the same field, courts will refrain from striking down the local ordinance unless the Commonwealth has explicitly claimed the authority itself, or unless there is such actual, material conflict between the state and local powers that only by striking down the local power can the power of the wider constituency be protected."

In *Hoffman Mining Co. v. Zoning Hearing Bd.*, 612 Pa. 598, 610-11 (2011), the Pennsylvania Supreme Court further explains:

> "Conflict preemption is a formalization of the self-evident principle that a municipal ordinance cannot be sustained to the extent that it is contradictory to, or inconsistent with, a state statute. *** **Conflict preemption is applicable when the conflict between a local ordinance and a state statute is irreconcilable, i.e., when simultaneous compliance with both the local ordinance and the state statute is impossible.** *** In addition, under the doctrine of conflict preemption, a local ordinance will be invalidated if it stands 'as an obstacle to the execution of the full purposes and objectives' of a statutory enactment of the General Assembly. *** With regard to conflict preemption, *** the proper standard for invalidation of local ordinances, and also as to the potential coexistence of local enactments that supplement the statutory scheme or goals [is:] '**[w]here an ordinance conflicts with a statute, the will of the municipality as expressed through an ordinance will be respected unless the conflict between the statute and the**

> **ordinance is irreconcilable.' [Pennsylvania Courts] will refrain from holding that a local ordinance is invalid based on conflict preemption 'unless there is such actual, material conflict between the state and local powers that only by striking down the local power can the power of the wider constituency be protected**.'" (emphasis added)

In *Moyer v. Gudknecht*, 67 A.3d 71, 76 (Pa. Commw. Ct. 2013), this court held that:

> "the fact that the Ordinance imposes an additional requirement does not constitute a conflict. Additional requirements beyond those in a state statute are not preempted unless they conflict with a *purpose* of the statutory provisions." (emphasis in original)

Furthermore, this court held, in *Hartman v. City of Allentown*, 880 A.2d 737 (2005):

> "Municipal regulations more restrictive than state regulations are not in conflict with the state provisions because any other result would severely restrict municipal autonomy with respect to police power."

In this court's opinion, issued October 2, 2013, no conflicts were specified. The opinion points to the general categories of DEP's duties, outlined at 35 P.S. § 4004(1-27), and points out a few particular subsections – § 4004 (4), (5), (6) and (18) without making any claim of conflicts with these sections. While the proposed Allentown Clean Air Ordinance has some additional requirements that fall within the realm of § 4004 (4), (5) and (6) – but not (18) – the ordinance does not conflict with the purpose of

the Air Pollution Control Act, nor does it create any irreconcilable conflict with these parts of the statute. Simultaneous compliance with both the local ordinance and the state statute is not impossible.

If this court finds that there is any specific conflict between a provision of the proposed Allentown Clean Air Ordinance and some section of the Air Pollution Control Act, we urge the court to provide specific guidance on what irreconcilable conflicts exist that make it impossible to simultaneously comply with both the local ordinance and the state statute. This guidance is needed so that there is clarity for petitioners and for all county and municipal governments that may want to use their authority under § 4012(a) without a vague legal cloud leaving them in fear of lawsuits if they cross an unspecified line.

12. A conflict between one or more specific severable provisions of the Allentown Clean Air Ordinance and the Air Pollution Control Act does not authorize the Lehigh County Board of Elections to keep the entire ordinance from consideration of the voters.

The source of the authority and structure of county boards of elections, including the Lehigh County Board of Elections, is the Pennsylvania Election Code, 25 P.S. 2641 *et seq.* 25 P.S. 2642 (j) allows the Board to receive and determine the sufficiency of a petition. This means that it can determine if the petition meets the minimum number of qualified voter signatures and addresses to be allowed on the ballot. In this instance,

the Allentown City Clerk performed that function. The Board of Elections has nothing to do with the substantive questions to be put to the Allentown voters on the 2014 Lehigh County General Election Ballot. If the law prescribes that a question may be placed on the ballot, the county board must perform that duty. **"The duties of the County Board of Elections are purely ministerial. They are prescribed by the Pennsylvania Election Code. They are given no discretion."** (Emphasis added), *Shoyer v. Thomas*, 81 A.2d 435, 368 Pa. 70 (1951).

Whether the ordinance is legal, or if there are severable parts of the ordinance that may be in conflict with state law, is a matter for the courts, not an unqualified Board of Elections that lacks the expertise to make such decisions. As argued in issue #2 above, in no case has an elections board been found to have more than ministerial powers and "discretionary" powers to review petitions for sufficient and valid signatures, affidavits, notarization and the like. Even in the cases cited to justify illegal questions being kept off of the ballot, it was the Pennsylvania Supreme Court judging the legality, and instructing election boards in whether the questions could go to the ballot. Board of Elections have not made these decisions and are not empowered to.

Even if this court were to hold that there is a conflict between part of

the Allentown Clean Air Ordinance and the Pennsylvania Air Pollution Control Act, it is the courts' job to decide the legality of the ordinance, not the Board of Elections, and such a conflict needs to be specified so as to not cast a vague cloud of uncertainty across the Commonwealth that would leave municipalities not knowing what they can or cannot legally adopt under § 4012(a) authority. This clarity is also needed to that the petitioners in this case can pursue their right to clean air in a valid way. Unless this court finds that an implied preemption inquiry is justified, that a conflict exists that is impossible to reconcile, and that such conflicts are not readily severable, we urge the court to carefully follow the law and allow the Allentown Clean Air Ordinance initiative to be presented to the voters for consideration in the next election.

C. CONCLUSION

The proper law that governs this case is 35 P.S. 4012(a), which does not preempt the City of Allentown Clean Air Ordinance initiative but, in fact, empowers the city, and its people, to lawfully adopt it.

Additionally, the Board and the intervenor skirted the clear mandate of the Election Code to bring a timely challenge to an Initiative petition. 25 P.S. § 2937. This is a clear error of law.

The City of Allentown Clean Air Ordinance initiative should be on the November 2014 ballot for the voters to decide.

Respectfully submitted,

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