

**IN THE COURT OF COMMON PLEAS OF LEHIGH COUNTY, PENNSYLVANIA
CIVIL DIVISION**

RICHARD D. FEGLEY, DIANE E. TETI,)	No. 2013-C-3436
EDWARD F. BECK and MARVIN M.)	
WHEELER,)	
Plaintiffs)	
)	
vs.)	CIVIL
)	
LEHIGH COUNTY BOARD OF)	
ELECTIONS, MATTHEW T. CROSLIS,)	
DORIS A. GLAESSMANN and JANE M.)	
GEORGE, In Their Official Capacity Only)	
Chief Clerk, Lehigh County Board of)	
Elections Timothy A. Benyo In His Official)	
Capacity Only,)	ASSIGNED TO:
Defendants)	The Honorable Michele A. Varricchio

Pa. R.A.P. 1925(a) STATEMENT

AND NOW, this 2nd day of October, 2013, the undersigned enters the following statement pursuant to Pennsylvania Rules of Appellate Procedure 1925(a):

On September 30, 2013, this Court entered an Order after argument held September 27, 2013 denying the Petition for Preemptory Writ of Mandamus filed by Plaintiffs. On September 30, 2013, Plaintiffs filed a Notice of Appeal to the Commonwealth Court of Pennsylvania at Docket Number 1751 CD 2013.

The reasons for the Court’s decisions are set forth in the attached opinion and we incorporate them herein.

BY THE COURT:



Michele A. Varricchio, J.

**THE COURT OF COMMON PLEAS OF LEHIGH COUNTY, PENNSYLVANIA
CIVIL DIVISION**

RICHARD D. FEGLEY, DIANE E. TETI,)	No. 2013-C-3436
EDWARD F. BECK and MARVIN M.)	
WHEELER,)	
Plaintiffs)	
)	
vs.)	CIVIL
)	
LEHIGH COUNTY BOARD OF)	
ELECTIONS, MATTHEW T. CROSLIS,)	
DORIS A. GLAESSMANN and JANE M.)	
GEORGE, In Their Official Capacity Only)	
Chief Clerk, Lehigh County Board of)	
Elections Timothy A. Benyo In His Official)	
Capacity Only,)	ASSIGNED TO:
Defendants)	The Honorable Michele A. Varricchio

Appearances:

Lawrence M. Otter, Esq.
Michael J. Ewall, Esq.
For Plaintiffs

John M. Ashcraft, III, Esq.
For Defendants

Robert B. McKinstry, Esq.
For Intervenor

OPINION

MICHELE A. VARRICCHIO, Judge

This Opinion is filed in support of our Order of September 30, 2013 denying Plaintiff's
Petition for Preemptory Writ of Mandamus.

This is a case in which a number of voters in the City of Allentown exercised their right to have a proposed ordinance placed onto the ballot for adoption or rejection in the November 2013 election. The Plaintiffs, Richard D. Fegley, Diane E. Teti, Edward F. Beck, and Marvin M. Wheeler, are all registered voters in the City of Allentown and members of a petitioners' committee formed on January 10, 2013 pursuant to Section 1003 of the City of Allentown Home Rule Charter. The petitioner's committee timely gathered over 2000 signatures in support of a proposed initiative ordinance. Their initiative petitions were certified sufficient by the City Clerk on April 22, 2013. Thereafter, pursuant to Section 1007(A) of the City of Allentown Home Rule Charter, the City Council of Allentown had sixty days to adopt the proposed ordinance. No action was taken by City Council. Accordingly, pursuant to Section 1007 (B), the proposed ordinance was submitted to the Board of Elections to be placed on the ballot to be adopted or rejected at the November 2013 election. The Lehigh County Board of Elections held a meeting and voted unanimously not to permit the City of Allentown Clean Air Ordinance to be submitted to the voters. A written explanation was provided by Timothy A. Benyo, Lehigh County Board of Elections Chief Clerk, on August 29, 2013 in his correspondence to the Allentown City Clerk.

On September 19, 2013 Plaintiffs filed an Emergency Petition for Review and Complaint in Mandamus together with a Motion for Preemptory Writ of Mandamus against the Defendants, the Lehigh County Board of Elections (Board) and its current members, Matthew T. Croslis, Doris A. Glaessmann, and Jane M. George, and Chief Clerk, Timothy A. Benyo. They asked the court to direct the Lehigh County Board of Elections to print the 2013 Municipal Election Ballot to include the City of Allentown Clean Air Ordinance for the decision of the voters. The action

was expedited due to the printing of the ballots on October 3, 2013.

A status conference/argument was held on September 25, 2013 with counsel for the Plaintiffs and Defendants. Delta Thermo Energy A., LLC (DTE) filed a Petition to Intervene on September 24, 2013 and it was granted by the court on September 26, 2013. Argument was held on the matter on September 27, 2013 and attended by the Plaintiffs and their legal counsel, Lawrence M. Otter, Esquire and Michael J. Ewall, Esquire, as well as a number of supporters; Matthew T. Croslis, and Timothy A. Benyo, and John M. Ashcraft, III, Esquire, legal counsel for the Defendants,. Also in attendance was Attorney Robert B. McKinstry, Esquire, legal counsel for DTE, the Intervenor. The court took the case under advisement on September 30, 2013 and issued an order denying the Plaintiffs' request for a writ of mandamus.

The writ of mandamus exists to compel official performance of a ministerial act or mandatory duty. *Seeton v. Adams*, 50 A.3d 268 (Pa.Cmwlt. 2012). A court may issue a writ of mandamus where petitioners have a clear legal right, the responding public official has a corresponding duty, and no other adequate and appropriate remedy at law exists. *Fagan v. Smith*, 41 A.3d 816 (Pa. 2012). The Pennsylvania Supreme Court has held that mandamus will lie to compel action by an official where his refusal to act in the requested way stems from his erroneous interpretation of the law. *Id.* at 817. Plaintiffs contend that the Board erred in refusing to place the proposed ordinance on the ballot. Defendant and Intervenor contend that the writ must be denied because the Board cannot be made to do an illegal act, i.e., placing a proposed invalid ordinance on the ballot. Although a multitude of issues were addressed at argument, ultimately it was agreed by all of the parties that the issue before the court was whether the proposed ordinance was valid.

After much consideration and review of the case law, this court concludes that the writ must be denied because the board cannot be compelled to take action that violates the law. The proposed ordinance is valid to the degree that it is an exercise of the authority reserved by state statute to local municipality. Nevertheless, it is invalid in that it oversteps the authority specifically reserved by state statute for the state department by statute and by rules and regulations. It is important to note that this court reached this conclusion as a matter of law without consideration of the politically charged issues raised by the parties such as the consequences to the City of Allentown, DTE, the contract, petitioners, or the environment. The issue before the court is narrow and simply, is the proposed ordinance valid.

The proposed ordinance is called the “City of Allentown Clean Air Ordinance” and provides that it is to take effect immediately. Its purpose and intent is set forth as: “to insure that accurate and complete information is available to the City and general public about pollutants released from new air polluting facilities within the City of Allentown, Lehigh County, Pennsylvania, and to exercise the authority granted to the City under the Pennsylvania Air Pollution Control Act (APCA). It asserts that “the City of Allentown finds that the Pennsylvania Department of Environmental Protection does not possess sufficient staff, funding, or resources to continuously verify compliance with applicable environmental requirements.” In its fifteen pages, the proposed ordinance is all inclusive in that it establishes standards more stringent than required by the state and the administration of an entire program of monitoring and controlling air pollution produced by new air polluting facilities. New air polluting facility is defined within the proposed ordinance as any facility, located in the City of Allentown, that commences operations after the effective date of this ordinance, which produces energy or disposes of waste

by combusting a Solid Fuel or Waste or gases produced from Solid Fuel or Waste, and which is capable of processing at least one ton per day. Pursuant to the proposed ordinance, these facilities would be required to install and operate continuous emissions monitoring systems.¹ Furthermore, the proposed ordinance establishes the monitoring requirements², data disclosure³, and emission limits.⁴ Finally, the proposed ordinance includes declaration of public nuisances; compliance orders; fees⁵; penalties⁶; abatement and injunctions; and citizen enforcement.

Contained within a 'whereas' clause, the proposed ordinance acknowledges that the Federal and Commonwealth Legislature have granted the power to local municipalities to adopt more stringent air pollution standards than those provided within the United States of America Clean Air Act, as amended, including Amendments of 1989, and the Pennsylvania Air Pollution Control Act (APCA) of January 9, 1960 (P.L. 2119), as amended, and as affirmed by the adoption of section 12 of Act 95 of 1992, 35 P.S. §4012. However, it is the Board's position that expansiveness of the proposed ordinance goes beyond that specifically authorized by 35 P.S. §4012.

In general, states are not precluded from adopting or enforcing more stringent air

¹ Continuous Emission Monitoring System (CEMS) is a pollution monitoring system capable of sampling, conditioning, analyzing, and providing a record of emissions at frequent intervals and meeting U.S. Environmental Protection Agency or Department of Environmental Protection data acquisition and availability requirements.

² Article III- Monitoring Requirements has five sections; Air Pollution Monitoring, Pollutants to be Continuously Monitored, Five Year Review for Commercial Availability, Hazardous Air Pollutant Monitoring Exemptions, and Unlawful Conduct.

³ Article IV-Data Disclosure has three sections: Website for Data Disclosure, Disclosure of Emissions Data, and Disclosure of Regulatory Documents.

⁴ Article V includes sections: Emission Limits, Adoption and Incorporation of Other Limits and Standards, and Best Available Technology.

⁵ Article VIII establishes: Initial Licensing and Fee, and Annual License Fee.

⁶ Article IX establishes: Criminal and Civil Penalties, and Determination of Penalties for CEMS Reporting and Emission Limit Violations.

pollution laws than provided by federal law. 42 U.S.C. §7416. Similarly, the APCA does not prevent cities from enacting more stringent air pollution ordinances than the provisions of APCA, the Clean Air Act or the rules or regulations promulgated under either. 35 P.S. §4012(a). Nevertheless, it is the responsibility and the duty of the Pennsylvania Department of Environmental Resources (Department) to implement the provisions of the Clean Air Act and to enforce the APCA. 35 P.S. §4004(1-27). For instance, it is the responsibility and the duty of the Department to require an owner of an air contamination source to keep records and make reports, 35 P.S. §4004(4); to install and maintain an air contaminant monitoring equipment, 35 P.S. §4004(5); to sample the emissions thereof at locations and at intervals as prescribed by the Department, 35 P.S. §4004(6); and to prepare and develop a general comprehensive plan for the control and abatement, control and prevention of any new air pollution and air contamination and to submit a comprehensive plan to the Environmental Quality Board, 35 P.S. §4004(18). The administration procedures related to the abatement, reduction, prevention and control of air pollution as set forth in the APCA remains within the authority of the Department. Only first and second class counties are permitted to implement air pollution control programs. 35 P.S. §4012(b).

Air pollution control programs must be approved by the Department and meet the requirements of APCA, the Clean Air Act, and the rules and regulation thereto. The criteria and procedure by which the Department may approve an air pollution control program is established by regulation, 25 Pa.Code §133.1-133.10. An agency intending to operate an air pollution control program within the confines of a political subdivision of Pennsylvania to which the procedures for abatement, reduction, prevention, and control of air pollution, as set forth in the

APCA do not apply, must make application to DEP for approval of the agency and its program. 25 Pa.Code § 133.3(a). The requirements for the application are set forth in 25 Pa.Code §133.3(b). The information set forth in the application must be of sufficient detail to enable DEP to evaluate the program of the agency in terms of the criteria relating to the factors in evaluating applications for approval. 25 Pa. Code §133.3(c).

Furthermore, 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). Similar to our facts, in *Pennsylvania Gaming Control Board*, the Court enjoined the Philadelphia County Board of Elections from printing on the ballot a question whether to amend the city's home rule charter because the ordinance authorizing that ballot question was contrary to the Pennsylvania Race Horse Development and Gaming Act, 593 Pa. 241, 246, 928 A.2d 1255, 1257-58. Similarly, the proposed Ordinance here is preempted by the Air Pollution Control Act, and is unlawful under the Home Rule Charter.

As such, this court agrees with the conclusion of the Board. Timothy A. Benyo, Chief Clerk of the Election Board provided an explanation of the Boards' August decision. He wrote that the Board found that the " City of Allentown Clean Air Ordinance, as proposed, does not properly recognize and account for the Department of Environmental Protection's mandated approval role." The proposed ordinance establishes an air pollution control program that is not

authorized pursuant to APCA, 35 P.S. 4012(b) in that the City of Allentown is not a first or second class county. Furthermore, the proposed ordinance does not provide for or acknowledge the required application and approval of the Department in that the proposed ordinance is effective immediately. Therefore, the decision of the Board is affirmed and the writ of mandamus is denied.

Date: October 2, 2013



Michele A. Varricchio, J.