

PENNSYLVANIA

CONSTITUTIONAL AND STATUTORY PROVISIONS

Home rule in Pennsylvania is primarily a municipal affair. While counties may also opt for “home rule,” as 7 of Pennsylvania’s 67 have, this primarily affects their form of government and not their powers.

Pennsylvania Constitution

- Art. IX, § 2. Home Rule.

Municipalities shall have the right and power to frame and adopt home rule charters. Adoption, amendment or repeal of a home rule charter shall be by referendum. . . . A municipality which has a home rule charter may exercise any power or perform any function not denied by this Constitution, by its home rule charter or by the General Assembly at any time.

Pennsylvania Statutes

- 53 PA. CONS. STAT. § 2961 (2017)

A municipality which has adopted a home rule charter may exercise any powers and perform any function not denied by the Constitution of Pennsylvania, by statute or by its home rule charter. All grants of municipal power to municipalities governed by a home rule charter under this subchapter, whether in the form of specific enumeration or general terms, shall be liberally construed in favor of the municipality.

MUNICIPAL HOME RULE STRUCTURE

The state constitution grants broad initiative authority to home-rule municipalities subject to state legislative override. While Article IX, § 2 might appear to be self-executing, the Pennsylvania General Assembly has nonetheless reiterated its grant of authority through statute while also expressly repudiating Dillon’s Rule. At the same time, the legislature has cordoned off certain powers that are denied to cities.¹ The legislature has also crafted distinctions among classes of municipalities, although all receive broad grants of power.² The various statutes delineate how a municipality’s classification determines the scope of its authority. As explained below, first class cities with a home rule charter—currently, only Philadelphia—have broader authority than home rule municipalities in part because some preemption statutes do not apply to them. Although cities may no longer adopt a charter under the Optional Third Class City Charter Law, eleven already-chartered cities continue to operate under the law, and may have authority as

¹ 53 PA. STAT. §13133 (2005).

² Compare PA. CONS. STAT. § 2973 (optional plan home rule cities), with Pa. Stat. § 13101 (first-class cities).

broad as Philadelphia.³

The essential principle underlying the enactment of home rule in Pennsylvania is the grant of authority to control certain municipal affairs from the state to the local level.⁴ Pennsylvania courts generally agree that 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.⁵ In cases alleging implied preemption, the Pennsylvania courts deem five factors helpful to determining the preemption issue:

- (1) Does the ordinance conflict with the state law, either because of conflicting policies or operational effect, that is, does the ordinance forbid what the legislature has permitted?
- (2) Was the state law intended expressly or impliedly to be exclusive in the field?
- (3) Does the subject matter reflect a need for uniformity?
- (4) Is the state scheme so pervasive or comprehensive that it precludes coexistence of municipal regulation?
- (5) Does the ordinance stand as an obstacle to the accomplishment and execution of the full purposes and objectives of the legislature?⁶

Pennsylvania courts are disinclined to find field preemption; the state supreme court has deemed local regulation completely preempted in only three fields: alcoholic beverages, anthracite strip mining, and banking.⁷

Pennsylvania courts have interpreted the home-rule enabling statutes to allow for ordinances enacted by home rule municipalities to be negated only when the General Assembly enacts a conflicting statute concerning substantive matters of statewide concern.⁸ Matters of statewide concern include matters involving the health, safety, security, and general welfare of all the inhabitants of the State, but do not include matters affecting merely the personnel and administration of the offices local to a municipality and which are of no concern to citizens elsewhere.⁹ Statute may also negate a home rule charter when the conflict involves a matter of statewide magnitude, such as the regulation of firearms.¹⁰

³ PENNSYLVANIA LEGISLATOR'S MUNICIPAL DESKBOOK (4th Ed. 2014); *see also* Greenberg v. City of Bradford, 248 A.2d 51, 53 (Pa. 1968).

⁴ Hartman v. City of Allentown, 880 A.2d 737, 742 (Pa. 2005).

⁵ *Id.* at n.11.

⁶ Duff v. Northampton Tp. 532 A.2d 500, 505 (Pa. Commw. Ct. 1987).

⁷ See Council of Middletown Township, 523 A.2d 311, 314 (Pa. 1987).

⁸ Devlin v. City of Philadelphia, 862 A.2d 1234, 1243 (Pa. 2004) (interpreting section 13133 of the First Class City Home Rule Act); *see also* Ortiz v. Commonwealth, 681 A.2d 152 (Pa. 1996) (applying a similar analysis to reject Pittsburgh's challenge to state preemption of local assault weapon ban).

⁹ Spahn v. Zoning Bd. of Adjustment, 602 Pa. 83 (2009) (“[O]rdinances of purely local concern are those that affect the personnel and administration of the local government”).

¹⁰ In re District Attorney, 756 A.2d 711 (Pa. 2000); *see also* Ortiz, 681 A.2d at 156 (firearms regulation matter of substantive statewide concern).

MUNICIPAL IMMUNITY FROM STATE PREEMPTION

Matters of local personnel and administration are immune to preemption under the constitutional and statutory scheme for home rule.¹¹ In one particularly broad holding, the Pennsylvania Supreme Court held that a Philadelphia ordinance requiring all employers in the city not subject to ERISA to provide benefits to “life partners” of employees fell within the city’s protected sphere of local personnel regulation.¹² This case is remarkable insofar as it implies that “personnel” includes non-city, privately employed personnel.

RECENT LEGAL DEVELOPMENTS

Two key areas—business regulation and the regulation of hydraulic fracturing (“fracking”) have seen key battles over preemption.

- **BUSINESS REGULATION.** Section 2629 of the Home Rule Act and Optional Plans Law prohibits cities other than Philadelphia from determining businesses’ “duties responsibilities or requirements.”¹³ Courts have interpreted this limitation as applying only to the imposition of an affirmative duty.¹⁴ Although this provision applies to second-class, home-rule cities, it is unclear whether optional third-class charter cities are subject to the same constraint.¹⁵

Section 2629’s limitation on business regulation is not absolute. Pittsburgh passed a living wage ordinance in 2010 that applies to companies that contract with or receive subsidies from the city.¹⁶ The ordinance has gone unchallenged, perhaps because rather than impose an affirmative duty, businesses are only subject to the ordinance’s standards if they receive subsidies from or contract with the city.

By contrast, a trial court recently held that Pittsburgh’s paid sick leave ordinance was invalid because the ordinance placed an affirmative duty on businesses in violation of section 2629.¹⁷ On appeal, attorneys for the city are arguing that the affirmative duty limitation does not apply when the city is using its police power to protect the health of its citizens.¹⁸

- **FRACKING.** A 2013 Pennsylvania Supreme Court plurality decision declared

¹¹ *Devlin*, 862 A.2d at 1242.

¹² *Devlin*, 862 A.2d at 1246.

¹³ 53 PA. CONST. STAT. § 2962 (2017).

¹⁴ *Bldg. Owners and Managers Ass’n of Pittsburgh v. City of Pittsburgh*, 985 A.2d 711, 715 (Pa. 2009) (citing *Hartman*, 880 A.2d 737 (Pa. Commw Ct. 2005)).

¹⁵ *See Greenberg v. City of Bradford*, 432 Pa. 611, 616 (1968) (characterizing third-class city powers as similar to those of first class (Philadelphia)).

¹⁶ Pittsburgh Code of Ordinances § 161.38 (2017).

¹⁷ *Pennsylvania Restaurant & Lodging Ass’n, v. City of Pittsburgh*, No. GD 15-016442 (Allegheny Ct. Com. Pl., Dec. 21, 2015), *citing Bldg. Owners & Managers Ass’n*, 603 Pa. at 511.

¹⁸ Appellant Brief, *Pa. Restaurant & Lodging Ass’n*, No. 79 CD 2016 (Pa. Commw. Ct.).

unconstitutional portions of Act 13, a piece of state legislation attempting to prevent local control of natural gas drilling.¹⁹ Three of the seven justices ruled that the act violated Article I Section 27 of the state constitution, known as the Environmental Rights Amendment, which enshrines a public right to clean air and water.²⁰ The crucial fourth justice (of seven) voted to invalidate the state law because, “as a matter of substantive due process, [it] usurped local municipalities’ duty to impose and enforce community planning, and the concomitant reliance by property owners, citizens, and the like on that community planning.”²¹

After *Robinson Township*, a federal court applying state law struck down a complete local ban on fracking, finding that the defendant second-class township had no authority to “completely ban a legitimate [land] use.”²² Separately, a pending Pennsylvania Supreme Court case will likely clarify whether the Environmental Rights Amendment offers an absolute right, and thus gives localities greater authority with respect to state laws that implicate the provision, or a relative right, which requires the state legislature to weigh a law’s environmental consequences against other benefits.²³

¹⁹ *Robinson Tp. v. Commonwealth of Pa.*, 83 A.3d 901 (Pa. 2013).

²⁰ *Id.* at 1000.

²¹ *Id.* (Baer, J., concurring) (concluding that state law deprived municipalities of their “duty to impose and enforce community planning”).

²² *Pa. General Energy Co. v. Grant Tp.*, 139 F. Supp. 3d 706, 718 (W.D. Pa. 2015).

²³ *Pa. Env. Defense Foundation v. Commonwealth of Pa.*, No. 10-MAP 2015 (Pa. Sup. Ct.); Matt Fair, *Constitution Limits State Gas Leases, Pa. Justices Told*, LAW360 (March 9, 2016).