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To: Toxic Free Philly
From: Amy Sinden, Professor of Law, Temple University Beasley School of Law, and Shalu Kodyattu, Research Assistant, Temple Law J.D. expected May 2021
RE: Proposed “Healthy Outdoor Public Spaces” (HOPS) Ordinance
Date: Oct. 2, 2020

You have requested a legal analysis as to the defensibility of a bill and ordinance to be enacted by the Philadelphia City Council (the proposed “Healthy Outdoor Public Spaces” or “HOPS” Ordinance) that would ban the use of toxic herbicides on lands owned, operated, or leased to or from the City and would further establish a reporting requirement for the usage of any kind of pesticide by City departments. Would such legislation be preempted by state law or is it within the home rule powers of the City to provide for the health, safety and welfare of its residents and visitors?

BRIEF ANSWERS

The City Council has the legal power to legislate on this matter, prohibiting the use of toxic herbicides on its own grounds and imposing a reporting requirement for all pesticides used notwithstanding language in the Pennsylvania Pesticide Control Act that appears to preempt local jurisdictions from regulating “the registration, sale, transportation, handling or use of pesticides . . . in conflict with [the Act].” 3 P.S. § 111.57(b).

The PA Pesticide Control Act does not preempt the HOPS Ordinance for two reasons:

1. The HOPS Ordinance is an exercise of the City’s *spending power* in connection with its own employees and properties rather than its *regulatory power* over the actions of private parties. As such, it does not implicate the preemption provision of the Pennsylvania Pesticide Control Act, which applies only to municipal exercises of *regulatory power*.
2. To the extent the Pennsylvania Pesticide Control Act is read to preempt the HOPS Ordinance, it is unconstitutional under the Environmental Rights Amendment of the Pennsylvania Constitution (Article I, Section 27), which prohibits the General Assembly from enacting legislation that “commands municipalities to ignore their obligations” under the Amendment to “‘conserve and maintain’ the public natural resources, including clean air and pure water ‘for the benefit of all the people.’” *Robinson Township v. Commonwealth*, 83 A.3d 901, 978 (Pa. 2013).
3. Indeed, if the City Council fails to enact the HOPS Ordinance, it may well run afoul of its constitutional obligations under the Environmental Rights Amendment, which imposes a

fiduciary duty on the City to “to act affirmatively via legislative action to protect the environment.” *Pennsylvania Environmental Defense Foundation. v. Commonwealth.*, 161 A.3d 911, 933 (Pa. 2017) (citing *Robinson Twp.*, 83 A.3d at 958).

DISCUSSION

I. THE HOPS ORDINANCE IS AN EXERCISE OF THE CITY’S SPENDING POWER, AND AS SUCH, DOES NOT TRIGGER THE PREEMPTION PROVISION OF THE PENNSYLVANIA PESTICIDE CONTROL ACT, WHICH REFERS INSTEAD TO “REGULATION.”

Under its Home Rule Charter, Philadelphia has broad police power authority to protect the health and safety of its citizens. Richie Feder & Lewis Rosman, *State Preemption of Local Government: The Philadelphia Story*, 49 ENVTL. L. REP. News & Analysis 10772, 10773 (2019). Indeed, the Charter states “the powers of the City . . . in the broadest and most comprehensive terms to assure the City the fullest possible benefits of home rule.” Phila. Home Rule Charter § 1-100 (“The City’s Powers Defined”) n.1. Thus, “the courts have recognized that [the City’s] police power authority is co-extensive with that of the Commonwealth.” Feder & Rosman, *supra* at 10773. And the Pennsylvania Supreme Court has said that “[i]n analyzing a home rule municipality’s exercise of power, . . . we begin with the view that it is valid absent a limitation found in the Constitution, the acts of the General Assembly, or the charter itself, and *we resolve ambiguities in favor of the municipality.*” *Delaware County v. Middletown Twp.*, 511 A.2d 811, 813 (Pa. 1986) (emphasis added). *See also Nutter v. Dougherty*, 938 A.2d 401, 411 (Pa. 2007) (same).

A. The HOPS Ordinance Invokes Only the City’s Spending Power, Not its Regulatory Power.

The HOPS Ordinance falls well within this broad grant of authority. It has only three substantive provisions: It 1) prohibits “the use or application of toxic herbicides on any Grounds owned, operated or leased to or from the City,” Healthy Outdoor Public Spaces Ordinance, Bill No. 200425, § 6-1303 (2020); 2) makes “Organic Pest Management practices” the “method of choice” for the understanding, prevention, and control of noxious weeds by City departments, *id. at* § 6-1304; and 3) requires City departments to report annually to City Council and through posting on the City’s website the “[u]sage of any kind of pesticide.” *Id. at* § 6-1305.

Thus, the HOPS ordinance relates only to the City’s spending power—that is, to internal decisions by the City regarding the goods and services on which it spends its own money in the operation of its own departments with respect to the care and maintenance of its own property. Nothing in the HOPS Ordinance purports to in any way regulate or restrict the activities of private parties. As such, it does not implicate the preemption clause of the Pennsylvania Pesticide Control Act, which applies specifically to municipal exercises of *regulatory* power, not *spending* power.

B. The Preemption Language in the Pennsylvania Pesticide Control Act Refers Only to “Regulation” by Municipalities and Does Not Apply to Municipalities’ Exercise of their Spending Power.

The Pennsylvania Pesticide Control Act [hereinafter “Pesticide Act”] creates a statewide scheme for the licensing of private businesses engaged in the application of pesticides and for the registration of pesticides sold in the Commonwealth. The statute’s definition of pesticide is broad, encompassing any substance “intended for preventing, destroying, repelling, or mitigating any pest . . . and any substance . . . intended for use as a plant regulator.” 3 P.S. § 111.24. This language appears to cover toxic herbicides of the sort targeted by the HOPS Ordinance’s spraying ban, as well as the pesticides subject to the Ordinance’s reporting requirements.

The preemption provision of the Pesticide Act, however, is specifically aimed at municipal exercises of regulatory rather than spending power. It states:

This act and its provisions are of Statewide concern and occupy the whole field of *regulation* regarding the registration, sale, transportation, distribution, notification of use, and use of pesticides to the exclusion of all local *regulations*. Except as otherwise specifically provided in this act, no ordinance or *regulation* of any political subdivision or home rule municipality may prohibit or in any way attempt to *regulate* any matter relating to the . . . handling or use of pesticides, if any of these ordinances, laws or regulations are in conflict with this act.

3 P.S. § 111.57 (emphasis added).

At least one court has noted that this language creates ambiguity. The first sentence appears to invoke field preemption, while the second sentence invokes conflict preemption. “Given this ambiguity and the reluctance of the Pennsylvania Supreme Court to find pre-emption of local legislation by state statutes, the more relaxed version of pre-emption permissive of complementary local legislation should be the test when measuring local legislation against the Pesticide Control Act.” *DeAngelo Bros. Inc. v. Carbon County*, 54 Pa. D. & C. 4th 364, 371 (Ct. Common Pleas, Carbon Cty., Nov. 28, 2001); *Cf. Borough of McAdoo v. Lawn Specialties*, 547 A.2d 1297, 1299 (Pa. Cmwlth Ct. 1988) (concluding without analysis that the Pesticide Act imposes field preemption). The Pennsylvania Commonwealth Court similarly endorsed a narrow reading of the Pesticide Act’s preemption provision when it held that the Pennsylvania Public Utility Commission’s jurisdiction to evaluate the reasonableness of herbicide use in a public utility’s right of way was not preempted by the Act. *West Penn Power Co. v. Pennsylvania Pub. Util. Com.*, No. 1548 C.D. 2018, 2019 Westlaw 4858352, at *7 (Pa. Cmwlth. Ct. Oct. 2, 2019).

Even if the statute is read as creating field preemption, however, the field occupied by the Pesticide Act is the registration of pesticides and the licensing of private businesses engaged in applying them. Indeed, in those instances where the preemption provision of the Pesticide Act has been invoked, it has been to bar local ordinances that attempt to regulate private parties in a manner that specifically conflicts with the Act’s statewide licensing and registration schemes. *See DeAngelo Bros., Inc. v. Carbon County*, 54 Pa. D. & C. 4th 364, 374 (Ct. Common Pleas, Carbon Cty, 2001) (county ordinance prohibiting any entity from spraying chemicals within the county preempted by Pesticide Control Act); *Borough of McAdoo*, 547 A.2d at 1299 (borough ordinance requiring licensing of a professional lawn care company preempted by PA Pesticide Control Act). In contrast, the HOPS Act does not conflict with the licensing and registration schemes of the Pesticide Act or overlap with that field in any way. Indeed, it does not regulate, limit, or restrict

the activities of private parties at all. It simply reflects a choice by the City about how to spend its own funds and direct its own employees on the maintenance and care of the City's own property.

Banning the application of toxic herbicides on city property is merely an invocation of the City's right to spend public dollars for the goods and services it deems necessary to its operation as a municipal corporation. The purchase of toxic herbicides and other pesticides is an administrative function that is contained within the City's broad powers of municipal governance. And through the broad grant of power afforded by its Home Rule Charter, the City can choose the particular goods and services on which to spend its tax dollars. Phila. Home Rule Charter § 1-100 ("The City's Powers Defined") n.1 Phila. Home Rule Charter § 1-100, n.1 ("the powers of the City are stated in the broadest and most comprehensive terms to assure the City the fullest possible benefits of home rule."). Moreover, the Pennsylvania Supreme Court has made clear that "[i]n analyzing a home rule municipality's exercise of power, . . . we resolve ambiguities in favor of the municipality." *Delaware County v. Middletown Twp.*, 511 A.2d 811, 813 (Pa. 1986).

Finally, there is clear precedent for this kind of ordinance in Philadelphia. The City Council has previously passed ordinances under its spending power limiting how City dollars can be spent. The Philadelphia Code bans investments of the City's pension fund in tobacco companies, PHILADELPHIA, PA., CODE §22-1001(4) ("Investments; Assumptions, and Guarantee,") companies conducting business in Northern Ireland, *id.* at §22-1001(3), and predatory lenders, *id.* at §22-1001(5). It also prohibits city agencies from contracting with companies doing business in Sudan, *id.* at §17-104(4)(b) ("Procurement Contracts"), Iran, *id.*, or Northern Ireland, *id.* at §17-104(4)(a). The proposed HOPS Ordinance is similarly a simple exercise of the City's discretion to decide how to spend its money and with whom to conduct business.

II. THE PROPOSED ORDINANCE IS NOT PREEMPTED BY THE COMMONWEALTH'S PESTICIDE CONTROL ACT BECAUSE ANY SUCH PREEMPTIVE EFFECT WOULD VIOLATE ARTICLE I, SECTION 27 OF THE PENNSYLVANIA CONSTITUTION.

The HOPS Ordinance would not be preempted for a second, independent reason as well: The Pennsylvania Pesticide Act cannot be read to preempt the HOPS Ordinance without running afoul of Article I, Section 27 of the Pennsylvania Constitution, also known as the Environmental Rights Amendment. The Pennsylvania Supreme Court has made clear that a state statute cannot preempt a local government's power and authority to carry out its constitutional "duty [under the Environmental Rights Amendment] to 'conserve and maintain' the public natural resources, including clean air and pure water 'for the benefit of all the people.'" *Robinson Township v. Commonwealth.*, 83 A.3d 901, 978 (Pa. 2013) (plurality). In *Robinson Township*, a 3-justice plurality of the Pennsylvania Supreme Court relied on the Environmental Rights Amendment to strike down provisions of Act 13, a state statute that attempted to preempt municipal zoning authority with respect to natural gas development and to waive certain environmental safety and health measures. *Id.* at 978. Although *Robinson* was only a plurality decision, four years later, in a 4-2 majority opinion, the Pennsylvania Supreme Court broadly and decisively reaffirmed and ratified the *Robinson* plurality's reading of the Environmental Rights Amendment, with a fifth

justice concurring in many of that opinion’s basic principles. *Pennsylvania Environmental Defense Foundation. v. Commonwealth.*, 161 A.3d 911 (Pa. 2017) [hereinafter *PEDF*].

A. The Environmental Rights Amendment

The full language of the Environmental Rights Amendment (Article I, Section 27 of the Pennsylvania Constitution) 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. In both *Robinson* and *PEDF*, the Pennsylvania Supreme Court interpreted this language as creating two distinct rights. “The first right is contained in the first sentence, which is a prohibitory clause declaring the right of citizens to clean air and pure water, and to the preservation of natural, scenic, historic and esthetic values of the environment.” *PEDF*, 161 A.3d at 931 (quoting *Robinson Twp.*, 83 A.3d at 951). “This clause places a limitation on the state’s power to act contrary to this right, and . . . any laws that unreasonably impair the right are unconstitutional.” *Id.*

The second right, set forth in the second and third sentences of the Amendment, arises from the people of Pennsylvania’s common ownership of the Commonwealth’s public natural resources. *PEDF*, 161 A.3d at 931 (citing *Robinson Twp.*, 83 A.3d at 954). These two sentences incorporate the public trust doctrine into the Pennsylvania Constitution, designating the Commonwealth as trustee of these natural resources and Pennsylvania’s citizens, including future generations, as beneficiaries of the trust. *PEDF*, 161 A.3d at 932 (citing *Robinson Twp.*, 83 A.3d at 955-56). The fiduciary relationship thus created is governed by long-standing fundamental principles of Pennsylvania trust law and imposes on the Commonwealth the “duty to act toward the corpus of the trust—the public natural resources—with prudence, loyalty, and impartiality.” *PEDF*, 161 A.3d at 932 (quoting *Robinson Twp.*, 83 A.3d at 957).

In particular, the Commonwealth’s obligation to “‘conserve and maintain’ the corpus of the trust,” includes a “duty to prevent and remedy the degradation, diminution, or depletion of [the] public natural resources.” *PEDF*, 161 A.3d at 932 (quoting *Robinson Twp.*, 83 A.3d at 956-57). This duty is triggered whether these effects occur “through direct state action or indirectly, *e.g.*, because of the state’s failure to restrain the actions of private parties.” *Robinson Twp.*, 83 A.3d at 957. Notably, it also includes a duty “to act affirmatively to protect the environment, via legislative action.” *Id.* at 958.

Importantly, five justices of the Pennsylvania Supreme Court all agreed in *PEDF* that these “[t]rustee obligations are not vested exclusively in any single branch of Pennsylvania’s government” but that “instead all agencies and entities of the Commonwealth government, *both statewide and local*, have a fiduciary duty to act toward the corpus [of the trust] with prudence, loyalty, and impartiality.” *PEDF*, 161 A.3d at 931, n. 23 (emphasis added); *id.* at 940 (Baer, J. concurring specifically with note 23). It was on the basis of this principle that the supreme court

in *Robinson* struck down as unconstitutional the state statute at issue there, holding that it violated the Environmental Rights Amendment by preempting local zoning authority to restrict oil and gas development and thereby impermissibly “command[ed] municipalities to ignore their obligations under [the Environmental Rights Amendment].” *Robinson Twp.*, 83 A. 3d at 978.

The scope of public natural resources protected by the Environmental Rights Amendment is broad. At a minimum, it includes “not only *state-owned lands*, waterways, and mineral reserves, but also resources that implicate the public interest, such as ambient air, surface and ground water, wild flora, and fauna (including fish) that are outside the scope of purely private property.” *Robinson Twp.*, 83 A.3d at 955 (emphasis added); *accord PEDF*, 161 A.3d at 931 (“The ‘public natural resources’ include . . . state forest and park lands.”). However, the Court also made special note that the concept of public natural resources was meant to be “flexible to capture the full array of resources implicating the public interest.” *Robinson Twp.*, 83 A. 3d at 955. Indeed, it “fairly implicates relatively broad aspects of the environment, and is amenable to change over time to conform, for example, with the development of related legal and societal concerns.” *Id.*; *see also PEDF*, 161 A.3d at 931 (noting that while there was initially an enumerated list of what public natural resources were included in the clause, the drafters removed it to “discourage courts from limiting the scope of natural resources covered”).

Finally, it is also important to note that these rights set forth in the Environmental Rights Amendment are, according to the Pennsylvania Supreme Court, “inherent and indefeasible” and will “forever remain inviolate” because they are among the “fundamental rights reserved to the people in Article I of [the] Constitution.” *PEDF*, 161 A.3d at 931. *See also Robinson Twp.* at 953 (“The right delineated in the first clause of Section 27 presumptively is on par with, and enforceable to the same extent as, any other right reserved to the people in Article I.”). Moreover, the “public trust provisions of [the Environmental Rights Amendment] are self-executing,” meaning that they “do not require legislative action in order to be enforced.” *PEDF*, 161 A.3d at 937.

B. Preemption of the Proposed HOPS Ordinance by the Pennsylvania Pesticide Control Act would be Unconstitutional.

Any effort to invoke the Pennsylvania Pesticide Control Act to preempt the proposed HOPS Ordinance would be unconstitutional under *Robinson* and *PEDF*. The proposed ordinance is directly aimed at conserving and maintaining a public natural resource by banning the use of toxic herbicides on all public grounds owned, leased or operated by the City. The outdoor public grounds to which the proposed ordinance would apply are clearly captured under the broad scope of “public natural resources” described in the third clause of the Environmental Rights Amendment. As the Pennsylvania Supreme Court has made clear, this is a comprehensive category that is meant to be expansive and flexible.

The proposed ordinance prohibits the “use . . . of toxic herbicides on any Grounds owned, operated, or leased to or from the City.” Healthy Outdoor Public Spaces Ordinance, Bill No. 200425, § 6-1303 (2020). It defines “Grounds” as “parks, open space, trails, lawns, playgrounds, sports fields, rights-of-way, land and real property,” not including “the interior spaces of buildings.” *Id.* at § 6-1302(1). Thus, the lands to which the ordinance would apply are public lands—mostly parks—owned or operated by the City. Most of these lands fall easily within the definition of public

natural resources under the Environmental Rights Amendment as “state-owned lands,” since the City of Philadelphia is an entity of the state. *Robinson Twp.*, 83 A.3d at 955. To the extent the herbicide ban would apply to lands not owned by the City, it would nonetheless clearly affect “resources that implicate the public interest, such as ambient air, surface and ground water, wild flora, and fauna (including fish).” *Id.* The spraying of herbicides can pollute the air, contaminate ground water, and cause myriad harms to wild flora and fauna. Indeed, scientific studies by highly respected entities like the World Health Organization, National Academy of Sciences, and the National Research Council have linked exposure to these toxic herbicides with asthma, cancer, birth defects, developmental disabilities, as well as a host of other detrimental health effects in humans. *Id.* at § 6-1301(5). These herbicides have also been shown to be harmful to pets, wildlife, plants, and ecosystems. *Id.* at § 6-1301(10).

Thus, by enacting the proposed ordinance, City Council would be carrying out its constitutional obligation under the Environmental Rights Amendment to “conserve and maintain” the public natural resources, including “clean air and pure water,” “for the benefit of all the people.” PA. CONST. art. I, § 27. Accordingly, like the state statute purporting to preempt local zoning powers that the Pennsylvania Supreme Court struck down in *Robinson*, any attempt to read the Pesticide Act to preempt the proposed ordinance would run afoul of the Pennsylvania Constitution by “command[ing the city of Philadelphia] to ignore [its] obligations under [the Environmental Rights Amendment].” *Robinson Twp.*, 83 A.3d at 978. With respect to pesticides and herbicides, as with other areas impacting the environment, “the General Assembly[‘s] . . . police powers, . . . while broad and flexible, are nevertheless limited by constitutional commands, including the Environmental Rights Amendment.” *Robinson Twp.*, 83 A.3d at 978. In particular, a state statute cannot supersede the constitutional mandates the Amendment imposes directly on local governments. In short, any attempt to read the Pesticide Act to preempt the proposed ordinance would be unconstitutional.

III. IF THE CITY COUNCIL FAILS TO PASS THE PROPOSED HOPS ORDINANCE, IT RISKS RUNNING AFOUL OF ITS CONSTITUTIONAL OBLIGATION “TO ACT AFFIRMATIVELY VIA LEGISLATION TO PROTECT THE ENVIRONMENT.”

The Environmental Rights Amendment imposes a fiduciary duty on the Commonwealth to “to *act affirmatively via legislative action* to protect the environment.” *PEDF*, 161 A.3d at 933 (citing *Robinson Twp.*, 83 A.3d at 958) (emphasis added). And, as noted above, five of the seven current justices of the Pennsylvania Supreme Court have made clear their view that this fiduciary duty binds “all agencies and entities of the Commonwealth, both statewide and local.” *PEDF*, 161 A.3d at 931, n. 23 (emphasis added); *id.* at 940 (Baer, J. concurring specifically with note 23). Moreover, the scope of these duties is broad, encompassing “not only reactive but also anticipatory protection of the environment for the benefit of current and future generations.” *PEDF*, 161 A.3d at 919 (quoting *Robinson Twp.*, 83 A.3d at 963).

Notably, Pennsylvania has been viewed as a leader and model for other states in this regard. It is one of just three American states to protect the people’s environmental rights as an inviolable right of constitutional law. *PEDF*, 161 A.3d at 918. In fact, in *PEDF*, the Pennsylvania Supreme Court made special note of the fact that the “Pennsylvania Constitution now places citizens’

environmental rights on par with their political rights,” noting that “the decision to affirm the people’s environmental rights in a Declaration or Bill of Rights, alongside political rights, is relatively rare in American law.” *Id.* at 916-918. “That Pennsylvania deliberately chose a course different from virtually all of its sister states speaks to the Commonwealth’s experience of having the benefit of vast natural resources whose virtually unrestrained exploitation . . . led to destructive and lasting consequences not only for the environment but also for the citizens’ quality of life.” *Id.* at 918-19.

Thus, the Pennsylvania Constitution imposes a clear duty directly on the Philadelphia City Council to act affirmatively to “conserve and maintain” the environment, including the citizens’ constitutional “right to clean air and pure water.” PA. CONST. art. I, § 27. The HOPS Ordinance, by banning the spraying of toxic herbicides on City grounds, would go a long way toward fulfilling that duty to “conserve and maintain” clean air, clean water, and the health and safety of the City’s residents. Indeed, there is evidence linking such herbicides to a host of dangerous health effects, including asthma, cancer, developmental disabilities, and immune system damage. This is important now more than ever, at a time when COVID-19 is already wreaking havoc on our immune systems. As the largest metropolis in Pennsylvania with the highest number of COVID-19 cases, the City of Philadelphia has a unique responsibility to do all it can to protect its citizenry from these exacerbating health risks.

CONCLUSION

The proposed HOPS Ordinance is well within the City Council’s police powers to protect the health and safety of its citizens under its broad Home Rule Charter authority. The HOPS Ordinance will not be preempted by the Pennsylvania Pesticide Control Act, both because it is an exercise of the City’s spending power not its regulatory power and also because any attempted preemption would violate the Environmental Rights Amendment of the Pennsylvania Constitution. Indeed, that Amendment imposes on the City an affirmative constitutional obligation to protect its citizens rights to clean air and pure water through measures like the proposed HOPS Ordinance.