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By Email

J. Everett Moore, Jr. Esq.

Moore & Rutt

122 W. Market Street

Georgetown, Delaware 19947

Re: Proposed Right to Work Ordinance and Sussex Home Rule Act

Dear Mr. Moore:

As you know, I am counsel for the Caesar Rodney Institute. I was asked to address whether the Sussex County Council (or the "County Council") has the right under the Sussex County Home Rule Act (9 Del. C. § 7001, et seq.) (the "Sussex Home Rule Act") to pass a proposed "Right to Work" ordinance. It is our opinion that it can.

During the County Council hearing on October 24, 2017, you expressed your view that the County Council was limited under Home Rule Act from passing the proposed Right to Work ordinance. Therefore, I was requested to share with you our reasoning in an effort to attempt to convince you regarding our position, or if not convince, to have you as County Attorney take a neutral position with respect to the proposed ordinance.

A. Background to the Sussex Home Rule Act.

The Sussex Home Rule Act was enacted by the General Assembly of the State of Delaware on July 23, 1970. See 57 Del. Laws ch. 762 (entitled "An Act To Amend Title 9, Delaware Code, By Providing For A New Chapter To Be Designated As Chapter 70, Relating To The Reorganization Of The Government Of Sussex County And Amending And Repealing Existing Laws Pertaining Thereto").[1] The Sussex Home Rule Act was codified at 9 Del. C. § 7001, et seq.

1[1] See http://delcode.delaware.gov/sessionlaws/ga125/chp762.shtml#TopOfPage (last visited Mar. 29, 2017).

The predecessor to the Sussex Home Rule Act was the "New Castle Home Rule Act" which had been previously enacted by the General Assembly on May 26, 1965. See 55 Del. Laws ch. 85 (entitled "An Act Providing For The Reorganization Of The Government Of New Castle County And Amending And Repealing Existing Laws Pertaining Thereto").[2] The New Castle Home Rule Act was codified at 9 Del. C. § 1101, et seq.

Debates on the floor of the Delaware House of Representatives during the passage of the New Castle Home Rule Act reflect some of the obvious concerns underlying the grant of power from the General Assembly to the County Government.[3] While certain legislators noted that the passage of home rule and the changes associated therewith were necessary to ease administrative frustrations as New Castle County became more urbanized, others opposing passage of home rule expressed their concern that the grant of home rule would lead to one political party controlling the County Government.[4] Despite the concerns, the New Castle Home Rule Act was overwhelmingly passed by the General Assembly and enacted on May 26, 1965.

Five years later, after a change in political control of the General Assembly (from Democrat to Republican), the Sussex Home Rule Act was enacted on July 23, 1970. The Sussex Home Rule originated as Senate Bill 702 and was introduced by Delaware State Senator David H. Elliott and co-signed by Delaware State Senators Frank R. Grier and Thomas E. Hickman, Jr. during the 125th General Assembly. As would be expected, Senators Elliott, Grier, and Hickman were all from Sussex County.

Both of the Home Rule Acts substantially changed the way the County Governments conducted their affairs by switching the form of County Government from the old "Levy Court" system (which is still in effect in Kent County) to a "County Council" system. Paramount in these changes was a substantial grant of power (or "home rule") from the Delaware General Assembly to the County Governments. Specifically, with respect to New Castle County, 9 Del. C. § 1101(a), provides, "The Government of New Castle County as established by this chapter shall assume and have all powers which, under the Constitution of this State, it would be competent for the General Assembly to grant by specific enumeration, and which are not denied by statute …." A similar broad grant of home rule was also granted to Sussex County. See 9 Del. C. §

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2 See http://delcode.delaware.gov/sessionlaws/ga123/chp085.shtml#TopOfPage (last visited Mar. 29, 2017). Together, the Sussex Home Rule Act and the New Castle Home Rule Act will be referred to herein as the "Home Rule Acts."

3[1] Undersigned counsel has obtained copies of the tape recordings of the debates underlying the bills leading to the passage of the Home Rule Acts from the Delaware State Archives.

4[1] The New Castle Home Rule Act originated as Delaware House Bill 171 and was introduced by the Speaker of the Delaware House of Representatives Harold T. Bockman of the 123rd General Assembly and all other Democrat New Castle County Representatives. An effort by State Representative T. Lee Bartleson to have the New Castle Home Rule Act put to a referendum were tabled by the House. House Bill 171 was overwhelmingly passed by the Democrat-controlled State House and State Senate.

7001(a) ("The government of Sussex County, as established by this chapter, shall assume and have all powers which, under the Constitution of the State, it would be competent for the General Assembly to grant by specific enumeration, and which are not denied by statute…."). The Delaware Code similarly notes that both grants of authority were to be "construed liberally in favor of the County" and that "specific mentions of particular powers" "shall not be construed as limiting in any way the general powers stated" in the various grants of authority. See 9 Del. C. § 1101(b) (pertaining to New Castle County)[5] and 9 Del. C. § 7001(b) (pertaining to Sussex County).[6]

While both of the Home Rule Acts contain broad grants of authority from the General Assembly to the county governments, both also contain the following provision:

> *This grant of power does not include the power to enact private or civil law concerning civil relationships, except as incident to the exercise of an expressly granted power, and does not include the power to define and provide for the punishment of felonies.*

See 9 Del. C. § 7001(a) and 9 Del. C. § 1101(a) (referred to herein as the "Grant Restriction"). The basic question that has been placed to us is what does this Grant Restriction mean with respect to the Sussex Home Rule Act?

Based on our research, it appears that the Grant Restrictions in the Home Rule Acts are not a Delaware-specific provision. Instead, similar provisions appear in several other home rule acts of other states throughout the United States. In a frequently cited law review article, The Limits of Municipal Power Under Home Rule: A Role for the Courts, Professor Terrance Sandalow stated:

> *The problem of private law making by home rule municipalities was explicitly considered for the first time in a legislative context in the Model Constitutional Provision for Home Rule drafted by Dean Fordham for the American Municipal Association. Section 6 thereof provides that the grant of initiative "does not include the power to enact private or civil law governing civil relationships[7] except as an incident to an exercise of an independent municipal power…." Virtually identical language has been adopted in the*

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5 9 Del. C. § 1101(b) ("Construction. — The powers of New Castle County shall be construed liberally in favor of the County, and specific mention of particular powers in this title shall not be construed as limiting in any way the general powers stated herein.").

6 9 Del. C. § 7001(b) ("Construction. — The powers of Sussex County under this reorganization law shall be construed liberally in favor of the County, and specific mention of particular powers in the reorganization law shall not be construed as limiting in any way the general powers stated in subsection (a) of this section.").

7 Prof. Sandalow defined this term "law governing civil relationships" stating, "The grant of home rule power has not generally been understood as authorizing municipalities to enact purely private law, i.e. law governing civil relationships." 48 MINN. L. REV. at 674.

> *sixth edition of the national Municipal League's Model State Constitution.*

48 MINN. L. REV. 643, 675 (1963) (emphasis added) (quoting AMERICAN MUNICIPAL ASS'N, MODEL CONSTITUTIONAL PROVISIONS FOR MUNICIPAL HOME RULE 19 (1963) and citing NATIONAL MUNICIPAL LEAGUE, MODEL STATE CONSTITUTION, § 8.02 (6th ed. 1963)). Prof. Sandalow concluded with respect to these provisions, "The meaning of these provisions is not altogether clear." Id.

B. Delaware Case Law Applying/Interpreting the Grant Restriction.

Since the enactment of the Home Rule Acts in Delaware, Delaware Courts have considered the interplay between the General Assembly's grant of power and the Grant Restriction on only a few limited occasions. One of the leading cases in Delaware is Glassman v. Weldin Farms, Inc., 359 A.2d 669 (Del. Ch. 1976), decided by Vice Chancellor Brown. Glassman involved a residential property owner's efforts to enjoin a developer in New Castle County from draining surface water downstream to the plaintiff's (Dr. Glassman's) property. See id. at 670. One of the defenses ***raised by the developer*** *was that its alteration of the drainage and water flow patterns (which were subject to common law challenges) was permissible because the developers "detailed drainage plans" had been approved by the County. Id. at 677-78.*

Vice Chancellor Brown denied this defense relying in large part on the Grant Restriction in the New Castle Home Rule Act. See id. at 679 (quoting 9 Del. C. § 1101(a)). While noting that the Delaware Code provisions authorizes the County to regulate drainage in subdivisions, Vice Chancellor Brown ruled, "[I]t must be assumed that such regulation is to comport with the existing law of the State. Stated another way, the express grant is to regulate drainage in subdivisions. ***There is nothing to indicate that in so doing the County may alter civil relationships between landowners that would otherwise exist at law****." Id. (emphasis added). The Vice Chancellor concluded, "I find the defense premised on the governmental authority and discretion of the County to be unpersuasive." Id. at 680.*

The Court of Chancery's decision in Glassman was appealed to the Delaware Supreme Court. See Weldin Farms, Inc. v. Glassman, 414 A.2d 500 (Del. 1980). While the Supreme Court modified and remanded the overarching decision, with respect to the interpretation of the Grant Restriction, the Supreme Court upheld the Court of Chancery's reasoning, with Justice Quillen stating:

> *We agree with the Vice Chancellor's decision that insofar as the County regulation conflicts with the existing common law of the State it is ineffective and cannot provide a defense against an injunction based on those common law principles. The General Assembly's grant to the County in 9 Del. C. § 1101 of "all powers which . . . it would be competent for the General Assembly to grant by specific enumeration and which are not denied by statute . . . ." (Ingersoll v. Rollins Broadcasting of Delaware, Inc., Del.Supr., 269 A.2d 217, 219 (1970)) is expressly limited by the statutory provision that:*

> *"This grant of power does not include the power to enact private or civil law concerning civil relationships, except as incident to the exercise of an expressly granted power . . . ."*
>
> *9 Del. C. § 1101. The [9 Del. C.] § 3002 authorization to the County to regulate subdivision, including, by ordinance, drainage, is not such an express grant of power in these areas. Under the circumstances we must assume, as did the Vice Chancellor, that "such regulation is to comport with the existing law of the State." Glassman v. Weldin Farms, Inc., supra, 359 A.2d at 679. It could not have been reasonably intended by the General Assembly that the County, by exercising its authority on subdivision matters, could foreclose a private cause of action which exists under State law.*

Id. at 506. The Supreme Court ultimately concluded, "The current regulatory scheme cannot be read to oust the courts from their proper function in protecting individual property rights. The County's approval of Weldin Farms' drainage plan was not effective, therefore, to foreclose the injunction by the Court of Chancery." Id.

At first blush, certain statements in Glassman (i.e., "[t]here is nothing to indicate that in so doing the County may alter civil relationships between landowners that would otherwise exist at law") might raise some concerns. However, if the Courts' statements are literally read to hold that the General Assembly did not intend to give the County Government the authority to "alter" the "law," then such a limitation would eviscerate the entire grant of authority.[8]

Alternatively, in Hickman v. Workman, the Delaware Supreme Court took a much broader view of the grant of authority under the Sussex Home Rule Act. 450 A.2d 388 (Del. 1982) (per curiam decision). Here, the Delaware Supreme Court answered a certified question from the Court of Chancery whether the Sussex County Government could reapportion the councilmatic districts in response to a ruling of the United States District Court for the District of Delaware that the districts were "malapportioned in violation of the Equal Protection Clause of the Constitution of the United States." Id. at 389. Instead of reading the absence of a provision in the Sussex Home Rule Act as severely limiting the power of the Sussex County Government to act, the Court construed the act "liberally" in accordance with 9 Del. C. § 7001(b):

> *It is undisputed that the General Assembly had the right to establish and reapportion councilmatic election districts in Sussex County prior to the time it passed the [Sussex] Home Rule Act…. It is also undisputed that the General Assembly could validly delegate its reapportionment authority to the Council, since there*

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*8[l] Glassman is also cited in Albright v. Carey, 1978 WL 8396, at *3 (Del. Ch. July 19, 1978), and in NVF Co. v. Garrett Snuff Mills Inc., 2002 WL 130536, at *4 (Del. Super. Jan. 30, 2002). All of these cases (Glassman included) relate to claims by private citizens that certain common law rights were modified by the passage of certain County Government ordinances.* ***Critically****, none of these cases involved a claim by the County Government itself that it had some broader power.*

> *is nothing in the Delaware Constitution which precluded it from so doing. Further, the broad liberal construction provision of § 7001(b) of the [Sussex] Home Rule Act may be interpreted as in effect rebutting application of the "expressio unius" maxim[9] to the Act's terms.*

450 A.2d at 391. Rather than constraining the County's grant of power from the General Assembly, the Supreme Court here accepted that the County Government had the power to do what the General Assembly could do.

While these cases provide some insight into how the Court may ultimate seek to balance the grant of authority with the Grant Restriction, it is critical to note that neither of these cases directly relate to the proposed action by the County Council in question (i.e., the passage of a Right to Work ordinance). However, in light of the fact that the County's actions with respect to a Right to Work ordinance (1) is not the attempted alteration of a common law right, (2) is not an attempt by an individual to use a County ordinance as a defense in litigation, but (3) is rather an exercise of the County Government of authority in an area where the General Assembly has not acted, then Hickman rather than Glassman appears to be more on point.

C. Other Authority Interpreting the Grant Restriction.

Courts in other jurisdictions have analyzed the issue of what limits there are on home rule. As noted earlier, the Grant Restriction language appears to stem from certain model home rule provisions, and that the meaning of such restriction is "not altogether clear." See discussion, supra. As Prof. Sandalow noted with respect to provisions similar to the Grant Restriction:

> *Conceivably, they are intended only as a validation of the inevitable impact of public regulation on private rights, as, for example, a zoning ordinance affects the use which a landowner may make of his property. Such a construction would deny municipalities the power to define legal relationships between private individuals, although municipal legislation might continue to have indirect consequences for such relationships.*
>
> *At the other extreme, the provisions might be construed as permitting municipalities to regulate any purely private legal relationships which in some manner are related to an area of traditional municipal concern. Under this construction a municipality would not, for example, be permitted to declare void*

9 This is short-hand for the canon of statutory construction expressio unius est exclusio alterius, the "expression of one thing is the exclusion of another." See Brown v. State, 36 A.3d 321, 325 (Del. 2012); Leatherbury v. Greenspun, 939 A.2d 1284, 1290-92 (Del. 2007). Using this canon, the Court would infer the fact that the General Assembly listed certain reapportionment powers, but did not expressly provide for reapportionment by the Sussex County Government, meant that the General Assembly did not intend the County Council to have this power.

> *all contracts not under seal, but its traditional power to regulate the use of its streets would, presumably, permit enactment of any ordinance establishing comparative, rather than contributory negligence as a defense to all automobile accidents occurring on its streets.*

Sandalow, 48 MINN. L. REV. at 676.

Other state courts, interpreting language in various home rule provisions similar to the Grant Restriction in the Home Rule Acts, have similarly struggled with determining what is the balance between a grant of home rule versus a retention of authority by the grantor. One leading case is Marshal House Inc. v. Rent Review & Grievance Bd., 260 N.E.2d 200 (Mass. 1970), a case from the Supreme Judicial Court of Massachusetts. In this case, the Massachusetts court reviewed whether a town had the authority to enact "rent control" laws as part of its grant of authority under the home rule provisions of the Amendments to the Constitution of the Commonwealth. The Amendments included a provision similar to the Grant Restriction. The Marshal House court noted:

> *The powers, which at first glance seem to be granted by § 6, are limited substantially by § 7 which reads: "Nothing in this article ... shall be deemd to grant to any ... town the power to ... (5) to enact private or civil law governing civil relationships except as an incident to an exercise of an independent municipal power ...."*

260 N.E.2d at 203. The court, quoting Prof. Jefferson B. Fordham—who appears to have been one of, if not the primary, drafters of the model home rule provisions—noted that the language in question sought to "strike a balance by enabling home rule units to enact private law only as an incident to the exercise of some independent municipal power." Id. at 204 (quoting J.E. Fordham, Home Rule-AMA Model, 44 NATL. MUNICIPAL REV. 137, 142 (Mar. 1955)). With the Marshal House court left to do the balancing, the court struck down the town's rent control ordinance, finding that the rent control law was not incidental to the exercise of municipal power. See 260 N.E.2d at 207.

In a more recent decision, however, courts have expressed a willingness to accept the idea that municipalities do have a role to play in promoting the general welfare of the communities in which they operate. In New Mexicans for Free Enterprise v. Santa Fe, a New Mexico state court analyzed whether a city ordinance could raise the minimum wage for people working within the city limits of Santa Fe. 126 P.3d 1149, 1155 (N.M. App. 2005). Challengers to the city ordinance argued that this was beyond the grant of authority under the home rule provisions in the Amendments to the New Mexico State Constitution. Id. Again, the home rule provisions in place granted broad power, but also denied municipalities from "'enact[ing] private or civil laws governing civil relationships except as incident to the exercise of an independent municipal power.'" Id. at 794 (quoting N.M. Const. art. X, § 6(D)).

Here, the New Mexico court came out on the opposite direction from the Marshal House court. Despite the fact that the State of New Mexico had a state minimum wage law in place, the court determined that nothing in this law evinced an intent on the part of the State to limit municipalities from enacting laws of this sort. Id. at 795. Next, turning to whether this was a

"private or civil law governing civil relationships" within the meaning of the home rule amendment, the court agree that it was. Id. at 796. Despite this finding, the court concluded that this law was "incident to the exercise of an independent municipal power," and that "setting a minimum wage is unquestionably a public purpose and that such legislation is within the police and general welfare power of a New Mexico municipality." Id. at 798. Finally, concluding that there was no serious risks of lack of uniformity and no denial of authority by the state legislature, the court found that Santa Fe ordinance survived scrutiny under the home rule amendment of the State of New Mexico's constitution. Id. at 799-801. The court concluded, "Minimum wage policymaking is within the scope of municipal power unless the legislature clearly intends to remove it or when there is a conflict between an ordinance and the general state law." Id. at 802.

D. <u>Conclusion.</u>

Despite the Grant Restriction in the Home Rule Acts, we believe that the more reasonable reading of the Home Rule Act is that unless the General Assembly determines to occupy the area, the County Government is free to act. Because a Right to Work ordinance is not a "common law right," even if the Court were to bring Glassman in its analysis, Glassman is not on point. Instead, Hickman is more on point in light of the fact that it pertains to the County Government acting, not a private citizen seeking to advance his or her own argument in litigation.

Moreover, given the similarity between the Home Rule Acts, it is important to remember that to the degree that an interpretation is made that the Sussex County Government does not have authority to pass an ordinance of this type, a similar limitation would need to be read into what the New Castle County Government can and cannot do.

Regardless of the positions that the Courts ultimately take with respect to the import of the Home Rule Acts, we maintain that nothing in the case law prohibits the County Council from taking the actions to implement the Right to Work ordinance. Until the General Assembly affirmatively occupies the space, the County Council may act.

I remain available should you have any further questions concerning this.

Very truly yours,
/s/ Theodore A. Kittila
Theodore A. Kittila, Attorney at Law
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