

constitutional issues that should not be considered by this Court because Grant Township has failed to avail itself of available statutory remedies.

1. On May 29, 2017, the Department filed a Petition for Review in the Nature of a Complaint Seeking Declaratory and Injunctive Relief (“Petition”) and an Application for Expedited Special Relief in the Nature of a Preliminary Injunction (“Application for Preliminary Injunction”).

2. The Petition challenged the validity of portions of a Home Rule Charter (“Charter”) adopted by Grant Township that purports to prohibit, *inter alia*, the permitting and operation of oil and gas waste fluid injection wells in Grant Township, because the challenged provisions of the Charter are preempted by laws of statewide applicability that the Department enforces, including the 2012 Oil and Gas Act, 58 Pa. C.S. §§ 3201 – 3274 (“Oil and Gas Act”), and the Solid Waste Management Act, Act of July 7, 1980, P.L. 380, as *amended*, 35 P.S. §§ 6018.101 – 6018.1003 (“Solid Waste Management Act”).

3. The Application for Preliminary Injunction was resolved through this Court’s April 10, 2017 Order enjoining the enforcement of Section 303 of the Charter (the section that prohibited the permitting of injection well permits in Grant Township) pursuant to a Joint Application for Expedited Special Relief in the Nature of a Stipulated Order.

4. On May 8, 2017, Grant Township filed an Answer to the Petition, along with New Matter and five Counterclaims.

5. On June 19, 2017, the Department filed Preliminary Objections to New Matter and all five of the Counterclaims filed with Grant Township's Answer to the Department's Petition.

6. On July 18, 2017, Grant Township filed its "Reply" to the Department's Preliminary Objections.

7. The parties filed briefs in support of their positions.

8. On October 10, 2017, this Honorable Court heard oral argument on the Department's Preliminary Objections.

9. In a Memorandum Opinion dated May 2, 2018, this Honorable Court sustained the Department's Preliminary Objections to some of Respondent's New Matter and to Respondents' Counterclaims 1, 2, and 5.

10. The Court declined to sustain the Preliminary Objections to Counterclaims 3 and 4 solely for the following reason:

Counts 3 and 4, however, are based, in addition to the right of self-government, on the Environmental Rights Amendment of our Pennsylvania Constitution. If the Township at trial is able to prevail on its claim in Count 3 that provisions of the Oil and Gas Act and [Solid Waste Management Act] are unconstitutional, then necessarily those statutory provisions could not serve to preempt local ordinances, and DEP could be enjoined from enforcing them.

(May 2, 2018, Opinion, pp. 15-16.)

11. Thus, this Court left Counterclaims 3 and 4 intact solely because of a constitutional issue, specifically, whether certain “provisions” of the Oil and Gas Act and the Solid Waste Management Act are “unconstitutional.” (May 2, 2018, Opinion, pp. 15-16.)

12. The text of Count 3 of the Answer does not identify any provision of the Solid Waste Management Act or the Oil and Gas Act that Grant Township asserts is “unconstitutional.”

13. The text of Count 4 of the Answer does not identify any provision of the Solid Waste Management Act or the Oil and Gas Act that Grant Township asserts is “unconstitutional.”

14. Nevertheless, the Court concluded that in Counts 3 and 4, Grant Township raised a constitutional challenge (hereinafter, the “Constitutional Challenge”), specifically that:

the Oil and Gas Act, the [Solid Waste Management Act], and the [Department’s] enforcement of these statutes, violate the [Pennsylvania Constitution’s] *Environmental Rights Amendment* and that they are powerless to preempt the Township’s Charter.

(May 2, 2018, Opinion, p. 16 (emphasis added; “Environmental Rights Amendment” refers to Pa. Const. art. I, § 27).)

15. To address the Constitutional Challenge, the parties and this Court would need to scrutinize whether the text and implementation of two statewide environmental statutes (the Oil and Gas Act and the Solid Waste Management Act)

are constitutional to the extent that they preempt the enforcement of the Charter. The sections of those laws that survive such constitutional scrutiny would then be subjected to this Court's preemption analysis, as outlined in its Opinion. (May 2, 2018, Opinion, pp. 13-15.)

16. The Department files this Application because the Constitutional Challenge is not ripe and, therefore, should not be addressed by the Court.

17. It is settled law that a court should decline to decide a constitutional challenge "unless it is *absolutely required* to do so." *Shuman v. Bernie's Drug Concessions*, 187 A.2d 660, 663-664 (Pa. 1963) (emphasis added). See *Commonwealth v. Karetny*, 880 A.2d 505, 537 (Pa. 2005); *Mt. Lebanon v. Cty. Bd. of Elections of Allegheny Cty.*, 368 A.2d 648, 650 (Pa. 1977); *Integrated Biometric Tech., LLC v. Dep't of Gen. Servs.*, 22 A.3d 303, 308, footnote 9 (Pa. Cmwlth. 2011); *Atlantic-Inland, Inc. v. Board of Supervisors of W. Goshen Twp.*, 410 A.2d 380, 383 (Pa. Cmwlth. 1980).

18. This tenet of jurisprudence applies to constitutional challenges to statutes. As the Supreme Court explained, "It is a fundamental rule that a court will never pass on the constitutionality of a statute, unless it is absolutely necessary to do so in order to decide the cause before it." *Com. to Use of Dollar Sav. & Tr. Co. v. Picard*, 145 A. 794, 796 (Pa. 1929). See *Com. v. Janssen Pharmaceutica, Inc.*, 8 A.3d 267, 271 (Pa. 2010).

19. In this case, it is not necessary for the Court to evaluate the constitutionality of the Oil and Gas Act and the Solid Waste Management Act because Grant Township has a clear statutorily-authorized power (*infra*, the Municipalities Planning Code and the Oil and Gas Act) to enact its local laws regarding oil and gas fluid injection wells. To ignore those statutorily authorized powers would allow Grant Township to bypass two statutes that clearly empower it to adopt the land protections it seeks.

20. Constitutional challenges should not be heard when parties simply fail to avail themselves of adequate statutory remedies. *Beattie v. Allegheny Cty.*, 122, 907 A.2d 519, 525-531 (Pa. 2006); *Barsky v. Com., Depart of Public Welfare*, 464 A.2d 590, 593-594 (Pa. Cmwlth. 1983) (constitutional challenges are premature when an adequate relief or remedy is available through established statutorily-defined procedures).

21. The Constitutional Challenge is out of reach here because an available remedy is in the hands of Grant Township itself, as a municipality that can adopt local land use bans through the Municipalities Planning Code. Thus, with its destiny in its own hands, it need not seek relief from this Court regarding the Constitutional Challenge. Grant's ability to enact local land-use bans is explained below.

22. Generally, Grant Township may adopt local ordinances controlling or prohibiting uses of land, such as its ban of injection wells, only pursuant to the “Municipalities Planning Code” (“MPC”), 53 P.S. §§ 10107 (Municipalities Planning Code defines “municipality” to include a “home rule municipality”), 10601 (a “municipality” may enact zoning in accordance with the MPC), 10603(b) (“Zoning ordinances. . . may permit, prohibit, regulate, restrict and determine: (1) Uses of land, watercourses and other bodies of water. . .”), and 10604 (describes zoning purposes generally). *See City of Pittsburgh v. Fraternal Order of Police, Fort Pitt Lodge No. 1*, 161 A.3d 160, 171 (Pa. 2017) (“statutes of statewide application predominate over enactments of home rule municipalities.”); *Naylor v. Twp. of Hellam*, 773 A.2d 770, 773–74 (Pa. 2001); *Cleaver v. Board of Adjustment of Tredyffrin Township*, 200 A.2d 408, 412 (Pa. 1964).

23. Specifically, Grant Township’s local regulation of oil and gas operations, such as oil and gas waste fluid disposal or injection, is valid under Section 3302 of the Oil and Gas Act, 58 Pa. C.S. § 3302, only if enacted pursuant to the Municipalities Planning Code. (May 2, 2018, Opinion, pp. 4-5, explaining the portions of this law that remain in effect, citing *Robinson Twp. v. Commonwealth*, 52 A.3d 463 (Pa. Cmwlth. 2012) (deleting the last sentence of Section 3302) *aff’d in part and rev’d in part*, 83 A.3d 901 (Pa. 2013).)

24. Grant Township may regulate oil and gas operations through zoning ordinances and not, for example, through local laws that regulate how oil and gas operations may be conducted in Grant Township. As explained in this Court’s October 2018 opinion in *Frederick v. Allegheny Township Zoning Hearing Board*, zoning is how municipalities regulate where oil and gas operations may take place:

it is the Commonwealth’s duty to regulate “how” gas drilling is conducted to protect Pennsylvania’s waters and air from degradation. *Huntley & Huntley, Inc. v. Borough Council of Borough of Oakmont*, 964 A.2d 855, 866 (Pa. 2009). By contrast, local governments regulate “where” oil and gas operations will take place with zoning ordinances.

Frederick v. Allegheny Twp. Zoning Hearing Bd., _____ A.3d _____ (No. 2295 C.D. 2015, 2018 WL 5303462, at *20) (Pa. Cmwlth. Oct. 26, 2018).

25. Such local ordinances allow Grant Township to do exactly what it seeks to do without need for the Constitutional Challenge: establish where or whether certain activities, such as oil and gas waste fluid injection wells, could occur in Grant Township based on compatibility with the other land uses.

26. Through local laws adopted under the Municipalities Planning Code, Grant Township could even entirely prohibit a use, such as oil and gas waste fluid injection wells. To do so, Grant Township would need to “present evidence to establish the public purpose served” by the local law, if the ordinance were challenged. *Beaver Gasoline Co. v. Zoning Hearing Bd. of Borough of Osborne*, 285 A.2d 501, 505 (Pa. 1971). For a township “to sustain the validity of [a] ban, it

must present evidence to establish the public purpose served by the regulation.”

Id. Thus, a township has the power to establish a local ban, but that power comes with the responsibility to support a ban with evidence. *Id.*

27. Because this statutory remedy is available to Grant Township under the Oil and Gas Act and the Municipalities Planning Code, it is clear that this Court is not “absolutely required” to decide Grant Township’s Constitutional Challenge to the Solid Waste Management Act and the Oil and Gas Act at this time. (May 2, 2018, Opinion, pp. 13-15; Department’s September 1, 2017, Brief in Support of Preliminary Objections, pp. 10-20.) Accordingly, under longstanding Pennsylvania jurisprudential precedent, this Court should refrain from doing so.

28. Grant Township has not contested the availability of this statutory remedy. To the contrary, Grant Township has candidly admitted to the Court that it has not even attempted to exercise its statutory authority to regulate injection wells under the Municipalities Planning Code. Grant Township’s only excuse for not using the lawful processes in the Municipalities Planning Code to locally legislate regarding oil and gas waste fluid injection wells is the following brief conclusory statement:

regulating the depositing of waste from oil and gas extraction through zoning would be wholly insufficient to protect the people’s environmental rights and is, in fact, unavailable. Given Grant Township’s small population of around 700 people, it does not have a planning commission or a zoning code.

(Grant Township’s Supplemental Brief in Opposition to Petitioner’s Preliminary Objections to Respondent’s New Matter and Counterclaim, p. 7, footnote 4, filed January 5, 2018.)

29. Because Grant Township has admitted that it has not adopted local zoning laws or ordinances pursuant to the Municipalities Planning Code, there are no facts at issue.

30. Because Grant Township has an adequate statutorily defined means to implement its desired ban on oil and gas fluid injection wells, this Court should follow well-established precedent and dismiss the Constitutional Challenge.

Shuman; Com. to Use of Dollar Sav. & Tr. Co., supra.

31. With no facts at issue and with the Department’s right to the relief clear, Counterclaim Nos. 3 and 4 should be dismissed. Pa.R.A.P. 1532(b).

WHEREFORE, Grant Township’s Counterclaims 3 and 4 are not ripe and should be dismissed because Grant Township has not pursued available statutory remedies prior to initiating constitutional challenges.

Respectfully submitted,

s/ Richard T. Watling

Richard T. Watling

Assistant Counsel

PA ID No. 204178

rwatling@pa.gov

s/ Michael J. Heilman

Michael J. Heilman

Assistant Counsel

PA ID No. 44223

mheilman@pa.gov

Office of Chief Counsel

400 Waterfront Drive

Pittsburgh, PA 15222-4745

FOR THE COMMONWEALTH OF
PENNSYLVANIA, DEPARTMENT OF
ENVIRONMENTAL PROTECTION

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