

Summary Relief to Dismiss Grant Township's Constitutional Claims Because Statutory Relief is Available ("Application").

DEP's Application asserts that "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."

(Application, p. 10). DEP's Application should be denied because the arguments set forth therein (1) have already been decided by this Court in its Memorandum Opinion, dated May 2, 2018; or alternatively, (2) should have been, but were not raised, in DEP's preliminary objections.

This Court has already rejected DEP's argument that Grant Township should have pursued other available remedies with regard to Counterclaims 3 and 4. (May 2, 2018 Opinion, pp. 12-13, 16). In its Opinion, the Court rejected DEP's argument that Grant Township could not proceed with its constitutional claims because of available statutory or administrative remedies. In overruling DEP's preliminary objections as to Counterclaims 3 and 4, the Court stated, in part:

If the Township at trial is able to prevail on its claims in Count 3 that provisions of the Oil and Gas Act and SWMA are unconstitutional, then necessarily those statutory provisions could not serve to preempt local ordinances, and DEP could be enjoined from enforcing them. Similarly, if it can prove its claim in Count 4 that these statutes are being unconstitutionally applied by DEP, an injunction could issue. ... Scientific and historical evidence concerning environmental issues, and evidence of DEP's actions may be necessary to fully adjudicate these Counterclaims as well as DEP's Complaint.

* * *

While some discovery may be necessary, the Township's remaining Counterclaims, Counts 3 and 4, are sufficiently specific as to allow DEP to prepare its defense. It is clear that the Township seeks a declaration that the Oil and Gas Act, the SWMA, and DEP's enforcement of these statutes, violate the Environmental Rights Amendment, and therefore that they are powerless to preempt the Township's Charter.

(May 2, 2018 Opinion, p. 16).

It is improper for DEP to file what amounts to a belated motion for reconsideration under the guise of a new application for relief.

Indeed, DEP's arguments make no sense. One of the issues in this case is the constitutionality of the very statutes which DEP incorrectly contends provide Grant Township "statutory remedies". Further, the overarching issue has nothing to do with what kind of laws DEP contends Grant Township should, or could, have enacted under the Municipal Planning Code. This case involves provisions of a Home Rule Charter, enacted by popular vote by the people of Grant Township. To frame the issue any other way ignores reality.

Consistent with the Court's May 2018 Opinion, Grant Township has served discovery upon DEP and is reviewing DEP's responses. The information requested and produced is relevant to Counterclaims 3 and 4. DEP cannot avoid further inquiry into the merits of Grant Township's claims by, in the midst of discovery, rehashing arguments previously rejected by this Court, and claiming, that Counterclaims 3 and 4 are suddenly unripe for review.

To the extent DEP's Application may be construed as presenting a new legal argument, not previously addressed by the Court's May 2018 Opinion, it must also be denied. DEP's Application asserts that Grant Township has failed to avail itself of available statutory remedies. Such an argument is an expressly listed preliminary objection in Pennsylvania Rule or Civil Procedure 1028(7) ("failure to exercise or exhaust a statutory remedy"). Rule 1028(b) provides, in part: "All preliminary objections shall be raised at one time." DEP filed its preliminary objections on June 19, 2017. As such, DEP was required to raise the argument it now makes in its Application in its preliminary objections. Therefore, DEP's Application must be denied as improper and untimely.

Grant Township respectfully requests that this Honorable Court deny DEP's Application, and allow Grant Township's Counterclaims 3 and 4 to proceed, for the reasons set forth above, along with Grant Township's specific responses to DEP's numbered paragraphs below. Grant Township otherwise welcomes the opportunity to more fully brief the issues according to the briefing schedule set forth in the Court's December 13, 2018 Order pursuant to which Petitioner's brief is due on or before February 19, 2019 and Respondents' opposition brief is due 30 days thereafter.

Grant Township responds to DEP's numbered paragraphs as follows:

1. Admitted.

2. Admitted that the Petition challenges the validity of portions of Grant Township's Home Rule Charter. By way of further response, Grant Township states that the Petition speaks for itself. It is denied that the Charter merely "purports to prohibit" the permitting and operation of oil and gas waste fluid injection wells in Grant Township. It is also denied that provisions of the Charter are preempted by state law.

3. Admitted.

4. Admitted.

5. Admitted.

6. Admitted.

7. Admitted.

8. Admitted.

9. Admitted that this Honorable Court issued a Memorandum Opinion on May 2, 2018. Grant Township refers to the Memorandum Opinion for its full and complete contents and denies anything inconsistent therewith.

10. This Honorable Court's Memorandum Opinion speaks for itself. Grant Township refers to the Memorandum Opinion for its full and complete contents and denies anything inconsistent therewith. By way of further answer, Grant Township denies DEP's characterization of a single paragraph of the opinion as the sole reason for declining to sustain the preliminary objections. In denying DEP's objections to

Counts 3 and 4, this Court stated: “DEP takes background information regarding the permit to *misconstrue the Township’s much broader general Counterclaims* regarding the validity of its Charter, ... [including] the duties under the Environmental Rights Amendment.” May 2, 2018, Opinion, pp. 12-13 (emphasis added). In its Application to Dismiss, DEP is once again attempting to misconstrue the Township’s claims.

11. This Honorable Court’s Memorandum Opinion speaks for itself. Grant Township refers to the Memorandum Opinion for its full and complete contents and denies anything inconsistent therewith. By way of further answer, it is denied that the question at issue is solely whether certain provisions of the Oil and Gas Act and the Solid Waste Management Act are unconstitutional. This is a disingenuous characterization of the Court’s words. The Court actually held that: “It is clear that the Township seeks a declaration the Oil and Gas Act, the SWMA, *and DEP’S enforcement of these statutes*, violate the Environmental Rights Amendment, and therefore that they are powerless to preempt the Township’s Charter.” *Id.* at 16 (emphasis added).

12. Denied. Grant Township’s Answer, New Matter, and Counterclaim speaks for itself and Grant Township refers to it for its full and complete contents and denies anything inconsistent therewith. By way of further answer, Count 3 of

Grant Township's Counterclaim incorporates by reference paragraphs 1-107, which include the following:

Article I, § 27 of the Pennsylvania Constitution, the Environmental Rights Amendment provides: "Natural resources and the public estate. 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." ...

The Oil and Gas Act does not protect the people's health, safety and welfare, or any of the rights secured by the Charter, including the people's right to clean air, water, and soil and to a sustainable energy future. Nor does it preserve the natural, scenic, historic and esthetic values of the environment.
...

The Solid Waste Management Act does not protect the people's health, safety and welfare, or any of the rights secured by the Charter, including the people's right to clean air, water, and soil and to a sustainable energy future. Nor does it preserve the natural, scenic, historic and esthetic values of the environment.

Paras 74, 84, 90. Moreover, in its Memorandum Opinion, this Court already held that "the Township's remaining Counterclaims, Counts 3 and 4, are sufficiently specific as to allow DEP to prepare its defense. It is clear that the Township seeks a declaration the Oil and Gas Act, the SWMA, and DEP's enforcement of these statutes, violate the Environmental Rights Amendment, and therefore that they are powerless to preempt the Township's Charter." (May 2, 2018, Opinion, p. 16).

13. Denied. Grant Township's Answer, New Matter, and Counterclaim speaks for itself and Grant Township refers to it for its full and complete contents and denies anything inconsistent therewith. By way of further answer, Count 4 of

Grant Township's Counterclaim incorporates by reference paragraphs 1 through 116. *See* Paragraph 12, above. Moreover, in its Memorandum Opinion, this Court already held that "the Township's remaining Counterclaims, Counts 3 and 4, are sufficiently specific as to allow DEP to prepare its defense. It is clear that the Township seeks a declaration the Oil and Gas Act, the SWMA, and DEP's enforcement of these statutes, violate the Environmental Rights Amendment, and therefore that they are powerless to preempt the Township's Charter." (May 2, 2018, Opinion, p. 16).

14. Denied as stated. This Honorable Court's Memorandum Opinion speaks for itself. Grant Township refers to the Memorandum Opinion for its full and complete contents and denies anything inconsistent therewith. By way of further answer, by choosing to use the word "nevertheless", DEP takes issue with the Court's holding and improperly seeks reconsideration of the Court's Memorandum Opinion. The Court held: "While some discovery may be necessary, the Township's remaining Counterclaims, Counts 3 and 4, are sufficiently specific as to allow DEP to prepare its defense. It is clear that the Township seeks a declaration the Oil and Gas Act, the SWMA, and DEP's enforcement of these statutes, violate the Environmental Rights Amendment, and therefore that they are powerless to preempt the Township's Charter." (May 2, 2018, Opinion, p. 16). DEP's Application is an improper attempt to seek reconsideration of the Court's Memorandum Opinion and

to make arguments that it already made, or could have made, in support or defense of its preliminary objections.

Furthermore, Count 4 of Grant Township's Counterclaim included the following:

DEP has violated Article I, § 27 of the Pennsylvania Constitution by attempting to prevent the people of Grant Township from exercising, advancing, and protecting their rights thereunder, which they have done by adopting the Charter, in particular Sections 104, 105, 106, and 107 of the Charter, which parallel the rights enumerated in the Pennsylvania Constitution, and Article III of the Charter, which sets forth the prohibitions necessary to enforce those rights.

15. This is a legal conclusion to which no response is required. To the extent a response is required, this paragraph is denied. Grant Township further submits that DEP has misinterpreted the Court's analysis in its May 2, 2018 Opinion.

16. This is a legal conclusion to which no response is required. To the extent a response is required, this paragraph is denied. Moreover, DEP's Application is an improper attempt to seek reconsideration of the Court's Memorandum Opinion and to make arguments that it already made, or could have made, in support or defense of its preliminary objections. This Court has already held: "If the Township at trial is able to prevail on its claims in Count 3 that provisions of the Oil and Gas Act and SWMA are unconstitutional, then necessarily those statutory provisions could not serve to preempt local ordinances, and DEP could be enjoined from enforcing them. Similarly, if it can prove its claim in Count 4 that these statutes are

being unconstitutionally applied by DEP, an injunction could issue.” (May 2, 2018, Opinion, p. 16).

17. This is a legal conclusion to which no response is required. To the extent a response is required, this paragraph is denied. Moreover, DEP’s Application is an improper attempt to seek reconsideration of the Court’s Memorandum Opinion and to make arguments that it already made, or could have made, in support or defense of its preliminary objections. Grant Township further submits that the legal argument made by DEP in this paragraph is irrelevant to the issues in the present case. Grant Township also notes that the case cited by DEP, *Commonwealth v. Karetny*, 880 A.2d 505 (Pa. 2005), is cited at p. 537. There is no page 537 to reference, but on page 519, the Court merely restates the general principle: “this Court seeks to avoid constitutional issues if the claim may be resolved on alternative grounds.” *Id.* at 519. Again, this Court has already recognized that this case presents constitutional issues for decision by the Commonwealth Court.

18. This is a legal conclusion to which no response is required. To the extent a response is required, this paragraph is denied. Moreover, DEP’s Application is an improper attempt to seek reconsideration of the Court’s Memorandum Opinion and to make arguments that it already made, or could have made, in support or defense of its preliminary objections.

19. This is a legal conclusion to which no response is required. To the extent a response is required, this paragraph is denied. Moreover, DEP's Application is an improper attempt to seek reconsideration of the Court's Memorandum Opinion and to make arguments that it already made, or could have made, in support or defense of its preliminary objections. DEP improperly attempts to prevent the Court from considering the constitutionality of the Oil and Gas Act and SWMA, among other issues, when the Court has already found that Grant Township made sufficient allegations to bring those issues before it. Further, Grant Township denies that its law-making authority is so proscribed and restricted as alleged by DEP.

20. This is a legal conclusion to which no response is required. To the extent a response is required, this paragraph is denied. Moreover, DEP's Application is an improper attempt to seek reconsideration of the Court's Memorandum Opinion and to make arguments that it already made, or could have made, in support or defense of its preliminary objections. DEP improperly attempts to prevent the Court from considering the constitutionality of the Oil and Gas Act and SWMA, among other issues, when the Court has already found that Grant Township made sufficient allegations to bring those issues before it. By way of further answer, the cases cited by DEP only underscore the fact that DEP's Application is an improper attempt to seek reconsideration of the Court's Memorandum Opinion, or are otherwise

inapposite. In *Beattie v. Allegheny County*, the Supreme Court of Pennsylvania stated:

A central principle articulated by the plurality in Borough of Green Tree was that the Legislature retains the power to channel all issues, including constitutional ones, into a specified route of appeal, such as an administrative appeal before a state or local agency. ... Relying on prior cases, however, this Court recognized an exception for certain types of constitutional questions that the administrative process was ill-suited to resolve. In drawing the contours of this exception, the Borough of Green Tree plurality observed that bypassing the agency process within the framework of a direct attack on the enabling statute is inherently less likely to do violence to the agency's role as fact-finder and applier of specialized expertise than in the context of an "as-applied" challenge.

907 A.2d 519, 525 (Pa. 2006) (internal citations omitted).

In its Memorandum Opinion, the Court already *rejected* DEP's argument that "the Township's failure to appeal the grant of the General Energy permit to the Environmental Hearing Board bars it from seeking relief." (Opinion at pp. 12-13). The Court recognized that: "Similar to its prior objection, DEP takes background information regarding the permit to misconstrue the Township's much broader general Counterclaims regarding the validity of its Charter, an attack on the doctrine of preemption based on the people's right to self-government and the duties under the Environmental Rights Amendment." *Id.* Further, DEP contorts and misapplies the doctrine of constitutional avoidance in an attempt to prevent the Court from addressing important constitutional questions, among which is the constitutionality of the very statutes upon which DEP relies to argue that the Court should not address

the important constitutional issues implicated by this case. Grant Township also denies that a municipality's ability to enact laws through the Municipal Planning Code is a "statutory remedy", much less an adequate one, or that the question of what a municipality can or cannot do under the Municipal Planning Code is relevant to the issues before this Court.

21. This is a legal conclusion to which no response is required. To the extent a response is required, this paragraph is denied. Moreover, DEP's Application is an improper attempt to seek reconsideration of the Court's Memorandum Opinion and to make arguments that it already made, or could have made, in support or defense of its preliminary objections. Admitted that Grant Township holds "its destiny in its own hands", but not in the way that DEP describes. Further denied to the extent that as previously stated, DEP is misconstruing the doctrines of constitutional avoidance and adequate statutory remedies to improperly prescribe to a Home Rule municipality the manner by which it should make laws.

22. This is a legal conclusion to which no response is required. To the extent a response is required, this paragraph is denied. Moreover, DEP's Application is an improper attempt to seek reconsideration of the Court's Memorandum Opinion and to make arguments that it already made, or could have made, in support or defense of its preliminary objections. Further denied to the extent that as previously stated, DEP is misconstruing the doctrines of constitutional avoidance and adequate

statutory remedies to improperly prescribe to a Home Rule municipality the manner by which it should make laws.

23. This is a legal conclusion to which no response is required. To the extent a response is required, this paragraph is denied. Moreover, DEP's Application is an improper attempt to seek reconsideration of the Court's Memorandum Opinion and to make arguments that it already made, or could have made, in support or defense of its preliminary objections. Further denied to the extent that as previously stated, DEP is misconstruing the doctrines of constitutional avoidance and adequate statutory remedies to improperly prescribe to a Home Rule municipality the manner by which it should make laws. By way of further answer, DEP's position is without merit because it is citing the Oil and Gas Act, the very constitutionality of which is at issue here, as authority for how Grant Township should be allowed to pass local laws.

24. This is a legal conclusion to which no response is required. To the extent a response is required, this paragraph is denied. Moreover, DEP's Application is an improper attempt to seek reconsideration of the Court's Memorandum Opinion and to make arguments that it already made, or could have made, in support or defense of its preliminary objections. Further denied to the extent that as previously stated, DEP is misconstruing the doctrines of constitutional avoidance and adequate

statutory remedies to improperly prescribe to a Home Rule municipality the manner by which it should make laws.

25. This is a legal conclusion to which no response is required. To the extent a response is required, this paragraph is denied. Moreover, DEP's Application is an improper attempt to seek reconsideration of the Court's Memorandum Opinion and to make arguments that it already made, or could have made, in support or defense of its preliminary objections. Further denied to the extent that as previously stated, DEP is misconstruing the doctrines of constitutional avoidance and adequate statutory remedies to improperly prescribe to a Home Rule municipality the manner by which it should make laws.

26. This is a legal conclusion to which no response is required. To the extent a response is required, this paragraph is denied. Moreover, DEP's Application is an improper attempt to seek reconsideration of the Court's Memorandum Opinion and to make arguments that it already made, or could have made, in support or defense of its preliminary objections. Further denied to the extent that as previously stated, DEP is misconstruing the doctrines of constitutional avoidance and adequate statutory remedies to improperly prescribe to a Home Rule municipality the manner by which it should make laws. By way of further answer, DEP is engaging in irrelevant speculation on what Grant Township could do, when what is at issue here

is what it has done. The Township did not pass a law under the MPC; rather, the people of Grant Township passed a Home Rule Charter.

27. Grant Township restates and incorporates its response to paragraph 26, above, and adds that DEP's speculation about whether this alternative lawmaking under the MPC would be acceptable is far outside the scope of this case. Again, one of the arguments Grant Township makes in this case is that the state laws at issue cannot preempt the charter provisions at issue, which are in furtherance of the exercise of constitutional rights secured by the Environmental Rights Amendment.

28. This is a legal conclusion to which no response is required. To the extent a response is required, this paragraph is denied. Moreover, DEP's Application is an improper attempt to seek reconsideration of the Court's Memorandum Opinion and to make arguments that it already made, or could have made, in support or defense of its preliminary objections. Indeed, DEP cites to prior briefing by Grant Township on this issue. Further denied to the extent that as previously stated, DEP is misconstruing the doctrines of constitutional avoidance and adequate statutory remedies to improperly prescribe to a Home Rule municipality the manner by which it should make laws. DEP is engaging in irrelevant speculation on what Grant Township could do, when what is at issue here is what it has done. The Township did not pass a law under the MPC; rather, the people of Grant Township passed a Home Rule Charter. Again, one of the arguments Grant Township makes in this case

is that the state laws at issue cannot preempt the charter provisions at issue, which are in furtherance of the exercise of constitutional rights secured by the Environmental Rights Amendment.

29. This is a legal conclusion to which no response is required. To the extent a response is required, this paragraph is denied. Moreover, DEP's Application is an improper attempt to seek reconsideration of the Court's Memorandum Opinion and to make arguments that it already made, or could have made, in support or defense of its preliminary objections. By way of further response, Grant Township states that there are certainly facts at issue. As this Court stated in its May 2, 2018 Memorandum Opinion:

If the Township at trial is able to prevail on its claims in Count 3 that provisions of the Oil and Gas Act and SWMA are unconstitutional, then necessarily those statutory provisions could not serve to preempt local ordinances, and DEP could be enjoined from enforcing them. Similarly, if it can prove its claim in Count 4 that these statutes are being unconstitutionally applied by DEP, an injunction could issue. ... Scientific and historical evidence concerning environmental issues, and evidence of DEP's actions may be necessary to fully adjudicate these Counterclaims as well as DEP's Complaint. ... Some discovery may be necessary.

(May 2, 2018 Opinion, at p. 16).

Grant Township has served discovery upon DEP and is reviewing its responses. The information requested and produced is relevant to Counts 3 and 4 of Grant Township's Counterclaims.

30. This is a legal conclusion to which no response is required. To the extent a response is required, this paragraph is denied. Moreover, DEP's Application is an improper attempt to seek reconsideration of the Court's Memorandum Opinion and to make arguments that it already made, or could have made, in support or defense of its preliminary objections. Further denied to the extent that as previously stated, DEP is misconstruing the doctrines of constitutional avoidance and adequate statutory remedies to improperly prescribe to a Home Rule municipality the manner by which it should make laws. Additionally, the primary case cited by DEP, *Shuman*, merely references "the familiar principle that a court will not decide a constitutional question unless it is absolutely required to do so" to refrain from considering the constitutional validity of a provision. *Shuman v. Bernie's Drug Concessions, Inc.*, 409 Pa. 539, 545 (1963). Once again, this is irrelevant to the case at bar, and DEP is misapplying the familiar doctrine of constitutional avoidance:

The canon of constitutional avoidance— also sometimes referred to as the doctrine of constitutional doubt— requires courts to construe statutes, "if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score." ... "[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems," courts will construe the statute to avoid such problems "unless such construction is plainly contrary to the intent [of the legislature.]" ... "The elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." ... "This approach not only reflects the prudential concern that constitutional issues not be needlessly confronted, but also recognizes that [legislatures,] like [the courts] are bound by and swear[] an oath to uphold the Constitution."

Franklin v. Sessions, 291 F.Supp.3d 705, 718 (W.D.Pa. 2017) (internal citations omitted).

31. This is a legal conclusion to which no response is required. To the extent a response is required, this paragraph is denied. Moreover, DEP's Application is an improper attempt to seek reconsideration of the Court's Memorandum Opinion and to make arguments that it already made, or could have made, in support or defense of its preliminary objections. There are plainly facts at issue here; see paragraph 29, *supra*. Moreover, the DEP's right to relief is far from clear, as evidenced by the Court's prior Opinion overruling, in part, DEP's preliminary objections to Grant Township's New Matter and Counterclaims.

Answering the "WHEREFORE" clause following paragraph 31, Respondents Grant Township and the Grant Township Board of Supervisors deny the allegations put forth by DEP, as well as deny that DEP is entitled to the requested relief.

Conclusion

WHEREFORE, this Honorable Court should deny DEP's Application for Summary Relief to Dismiss Grant Township's Constitutional Claims Because Statutory Relief is Available, and allow Grant Township's Counterclaims 3 and 4 to proceed based on the responses and arguments made by Grant Township in this Answer. Grant Township otherwise welcomes the opportunity to more fully brief

the issues according to the briefing schedule set forth in the Court's December 13, 2018 Order.

Respectfully submitted,

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FOR GRANT TOWNSHIP OF INDIANA
COUNTY AND THE GRANT TOWNSHIP
SUPERVISORS

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