

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

126 MD 2017

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL PROTECTION, PETITIONER,

v.

GRANT TOWNSHIP OF INDIANA COUNTY and
THE GRANT TOWNSHIP SUPERVISORS, RESPONDENTS.

**COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL PROTECTION'S
MEMORANDUM IN SUPPORT OF APPLICATION FOR SUMMARY
RELIEF TO DISMISS GRANT TOWNSHIP'S CONSTITUTIONAL
CLAIMS BECAUSE STATUTORY RELIEF IS AVAILABLE**

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STANDARD OF REVIEW

This Application for Summary Relief was filed pursuant to Rules 123 and 1532(b) of the Pennsylvania Rules of Appellate Procedure. Rule 1532(b) provides that, “[a]t any time after the filing of a petition for review in an appellate or original jurisdiction matter the court may on application enter judgment if the right of the applicant thereto is clear.” Pa. R.A.P. 1532(b). Applications for summary relief before the Commonwealth Court are evaluated according to summary judgment standards, viewing the evidence in the light most favorable to the non-moving party and entering judgment if there are no issues of material fact and the right to relief is clear. *Flagg v. Int’l Union, Sec., Police, Fire Professionals of Am., Local 506*, 146 A.3d 300, 305 (Pa. Cmwlth. 2016); *Myers v. Commonwealth*, 128 A.3d 846, 849 (Pa. Cmwlth. 2015).

INTRODUCTION

Pursuant to Pa. R.A.P. 123 and 1532(b) and this Court's order of December 12, 2018, Petitioner, Commonwealth of Pennsylvania, Department of Environmental Protection ("Department"), files this Memorandum in Support of Application for Summary Relief ("Application") seeking dismissal of the remaining claims of Grant Township of Indiana County and the Grant Township Supervisors (collectively, "Grant Township" or "Grant") as set forth herein.

Grant Township's remaining claims involve constitutional challenges to state statutes. Those challenges are based on a local law, specifically Grant Township's Home Rule Charter. The Home Rule Charter is itself unlawful because it regulates a land use, underground waste disposal, contrary to the Municipalities Planning Code. In addition, the Home Rule Charter is unconstitutional because it ignores limits on home rule governance established in Article IX, section 2 of the Pennsylvania Constitution. In light of this Court's well-established reluctance to decide constitutional issues unless it is absolutely necessary to do so, there is no reason to consider Grant Township's constitutional challenges, given that they are based on a local law that is itself unlawful and unconstitutional. Further, Grant Township has failed to exercise its statutory avenue under the Municipalities Planning Code to try to establish the land use

controls described in the Home Rule Charter. As a result, Grant's counterclaims based on its unlawful charter should be dismissed.

I. BACKGROUND

Grant Township is a home rule municipality in Indiana County, Pennsylvania. The Department is the agency that administers and enforces the Commonwealth's environmental statutes, including the Solid Waste Management Act and the Oil and Gas Act, as described below.

This matter was initiated by the *Department's Petition for Review in the Nature of a Complaint Seeking Declaratory and Injunctive Relief* filed on March 27, 2017 ("Petition"). The Petition, *inter alia*, seeks declaratory relief that Grant's Home Rule Charter's prohibition on oil and gas waste fluid injection wells is preempted by laws of statewide applicability that the Department enforces, *i.e.*, 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"). (Petition, pp. 11-13.)

Grant's *Answer to Petition for Review in the Nature of Complaint Seeking Declaratory and Injunctive Relief, New Matter and Counterclaim*, filed on May 8, 2017 ("Answer"), included five counterclaims. The Department objected to those counterclaims in its *Preliminary Objections to New Matter and Counterclaim of Respondents* filed on June 19, 2017 ("Preliminary Objections"). This Court

sustained some objections, but allowed Counterclaims 3 and 4 to proceed, as explained in the May 2, 2018 Opinion (“May 2, 2018 Opinion”).

This Memorandum and the Application seek the dismissal of the two remaining counterclaims in the Answer: Counterclaims 3 and 4.¹ In those Counterclaims, this Court is purportedly asked to pass on the constitutionality of the Solid Waste Management Act and the Oil and Gas Act. (May 2, 2018 Opinion, pp. 15-16.) The Department argues in the Application and below that those constitutional challenges should be dismissed.

In response to the Application, Grant Township filed its *Answer to Application for Summary Relief to Dismiss Grant Township’s Constitutional Claims Because Statutory Relief is Available* (“Answer to Application”), which asserts that the Department should have, among other things, advanced the argument in the Application earlier.

This Court set a briefing schedule regarding the Application, ordering this Memorandum to be filed on or before February 19, 2019.

¹ Grant Township describes its claims and counts using the singular term “Counterclaim,” and its specific requests for relief as “Counts.” (Answer, pp. 14, 28-34.) Consistent with the Application, this Memorandum refers to each of Grant Township Counts as a “Counterclaim.” For example, Count 3 is “Counterclaim 3” and Count 4 is “Counterclaim 4.”

A. There are no Disputed Facts.

The only material fact in the Application is whether Grant Township has not attempted to exclude oil and gas waste fluid disposal through a zoning ordinance. That fact is undisputed. Grant Township has stated to this Court that its only effort to achieve its land use goals of banning underground waste disposal has been through its Home Rule Charter, and it has not tried to exercise its zoning authority.² (*Grant Township’s Supplemental Brief in Opposition to Petitioner’s Preliminary Objections to Respondents’ New Matter and Counterclaim*, p. 7, n. 4.)

B. The Home Rule Charter

The Department challenges those portions of Grant Township’s Home Rule Charter, which purport to ban or exclude the disposal and deposition of oil and gas waste fluids as follows:

- Section 301 of the Home Rule Charter, entitled “Depositing of Waste from Oil and Gas Extraction,” states: “It shall be unlawful within Grant Township for any corporation or government to engage in the depositing of waste from oil and gas extraction.” (Exhibit A, Home Rule Charter.)
- Article VIII of the Home Rule Charter states that the phrase “‘Depositing of waste from oil and gas extraction’... includes, but is not limited to, the depositing, disposal, storage, beneficial use,

² This Court opined that Counterclaim 4 involves a claim that the Solid Waste Management Act and the Oil and Gas Act “are being unconstitutionally applied by DEP” (May 2, 2018 Opinion, p. 16.) The only Department permit or application for an oil and gas fluid waste injection well in Grant Township is the “General Energy permit.” (*Id.* at p. 10) But the validity of that permit is not at issue in this case. (May 2, 2018 Opinion, p. 10; this Court ruled that Grant cannot use this proceeding to collaterally attack the General Energy permit.) Thus, this “applied” constitutional claim is unsupported.

treatment, recycling, injection, or introduction of materials including, but not limited to, brine, ‘produced water,’ ‘frack water,’ tailings, flowback, or any other waste or by-product of oil and gas extraction, by any means. The phrase shall also include the issuance of, or application for, any permit that would purport to allow these activities. This phrase shall not include temporary storage of oil and gas waste materials in Grant Township at existing well sites.” *Id.*

(May 2, 2018 Opinion, pp. 1-3.)

The Department also challenges Sections 302, 303, and 306 of the Home Rule Charter in its Petition, based on the Department’s preemption argument, as explained by this Court. *Id.* at 11-17.

Among other purposes, the Home Rule Charter includes the following in its “Article I,” entitled “Bill of Rights”:

- “Section 104. All residents of Grant Township, along with natural communities and ecosystems within the Township, possess the right to clean air, water, and soil, which shall include the right to be free from activities which may pose potential risks to clean air, water, and soil within the Township, including the depositing of waste from oil and gas extraction.
- Section 105. All residents of Grant Township possess the right to the scenic, historic, and aesthetic values of the Township, including unspoiled vistas and a rural quality of life. That right shall include the right of the residents of the Township to be free from activities which threaten scenic, historic, and aesthetic values, including from the depositing of waste from oil and gas extraction.
- Section 106. Natural communities and ecosystems within Grant Township, including, but not limited to, rivers, streams, and aquifers, possess the right to exist, flourish, and naturally evolve.

- Section 107. All residents of Grant Township possess the right to a sustainable energy future, which includes, but is not limited to, the development, production, and use of energy from renewable and sustainable fuel sources, the right to establish local sustainable energy policies to further secure this right, and the right to be free from energy extraction, production, and use that may adversely impact the rights of human communities, natural communities, or ecosystems. The right to a sustainable energy future shall include the right to be free from activities related to fossil fuel extraction and production, including the depositing of waste from oil and gas extraction.”

(Ex. A, Home Rule Charter, Article I, §§ 104-107.)

C. The Home Rule Charter Conflicts with State Statutes.

The Home Rule Charter’s prohibition of the injection of waste from oil and gas activities conflicts with the Department’s permitting and regulation of oil and gas waste fluid injection wells under the Oil and Gas Act and the Solid Waste Management Act, raising issues of preemption. *See* 58 Pa. C.S. § 3211; 25 Pa. Code § 78.18 (regulation promulgated under the Solid Waste Management Act, oil and gas laws, and other laws). (May 2, 2018 Opinion, pp. 4-6, 14-15; other laws are cited in the Application and summarized in the May 2, 2018 Opinion.) This Court is allowing Grant Township to advance the following challenge to the constitutionality of the Oil and Gas Act and the Solid Waste Management Act, reasoning that if the conflicting state statutes are unconstitutional, then the unconstitutional provisions would not be preemptive. *Id.* at pp. 15-16.

D. Other Litigation

For reference, Grant Township has been in litigation with Pennsylvania General Energy Company, LLC (“General Energy”), in the case captioned *Pennsylvania General Energy Company, LLC v. Grant Township*, U.S. District Court for the Western District of Pennsylvania, C.A. No. 14-209ERIE. In addition, Grant Township residents Judith Wanchisn and Stacy Long, as well as “East Run Hellbenders Society,” filed an appeal with the Pennsylvania Environmental Hearing Board (“EHB”) of a permit issued to General Energy to operate an injection well in Grant Township (“General Energy Permit”), at EHB Docket number 2017-032 (“EHB Appeal”). Given that the Home Rule Charter bans the use permitted pursuant to the General Energy Permit, the parties requested and the EHB ordered the stay of the EHB Appeal for six months on September 12, 2018, pending the resolution of this matter. (EHB Docket No. 2017-032, Docket Items 15, 16, 17.)

SUMMARY OF ARGUMENT

The Department asks this Court to evaluate the lawfulness of Grant Township's Home Rule Charter as a first step before undertaking a constitutional evaluation of the state laws that preempt the Home Rule Charter. If the Home Rule Charter is unlawful, then examining the constitutionality of the preemptive state statutes is unwarranted. Because the Home Rule Charter is both unlawful and unconstitutional, it should not serve as a basis for Grant's constitutional challenges to state statutes. Given these flaws and this Court's reluctance to decide constitutional questions unless absolutely necessary to do so, Grant's remaining Counterclaims should be dismissed.

ARGUMENT

I. GRANT TOWNSHIP'S LOCAL BAN ON INJECTION WELLS IS UNLAWFUL AND UNCONSTITUTIONAL.

Grant Township, like other Pennsylvania municipalities, may regulate land use, but it must do so through properly adopted laws. Because Grant's Home Rule Charter's land use prohibitions were not adopted pursuant the requirements of the Municipalities Planning Code ("MPC"), which is the controlling state law, these land use restrictions are unlawful. Further, because the Pennsylvania Constitution requires home rule governments to abide by state statutes, the charter also is unconstitutional. For these reasons, Grant Township's counterclaims that rely upon the Home Rule Charter must be rejected.

A. Grant Township Can Exclude a Land Use Only Pursuant to the Municipalities Planning Code.

As a home rule municipality, Grant Township is subject to the MPC and may enact zoning only through the steps set forth in the MPC. Grant Township's Home Rule Charter contains *de facto* zoning, which was not adopted pursuant to the MPC. Therefore, these portions of the Home Rule Charter are unlawful and of no effect.

Municipalities that propose to exclude a land use entirely must do so pursuant to the requirements of the MPC by enacting zoning ordinances. The

importance of that state law and its procedures were recently explained by the Pennsylvania Supreme Court as follows:

As Citizens and their amici have argued, the ordinance review procedures provided by the [MPC] are, by their nature, fact-intensive processes in which the zoning hearing board or local governing body, when confronted with a substantive challenge to a local land use decision, takes evidence and considers, factually, how an ordinance or ordinances which govern a proposed land use affects the aggrieved party's right to use and enjoyment of his or her property. As part of this process, these local governmental entities must, necessarily, consider evidence relating to whether the proposed use of property is consistent with both the terms of the ordinance and its locally tailored policy goals, which take into account "the character of the municipality, the needs of the citizens and the suitabilities and special nature of particular parts of the municipality." 53 P.S. § 10603; *see also id.* § 10916.1 (enumerating procedures for challenge to ordinances before zoning hearing board and governing body).

If an ordinance excludes a proposed use entirely, such as oil and gas well drilling, then the zoning hearing board or governing body may be asked to consider whether remedial action such as a variance, conditional use exception, or curative amendment is warranted to allow for the excluded use. In making this determination, the zoning hearing board or governing body again considers evidence relating to uniquely local factors, such as the physical characteristics of the land, the character of the neighborhood, the use and development of neighboring property, as well as the overall purpose of the MPC and the ordinance itself. *See generally* 53 P.S. §§ 10910.2, 10912.1, 10913.2 (enumerating specific factors which zoning hearing board or governing body is required to consider in making determination as to whether granting of a variance, special exception or conditional use is warranted).

The zoning hearing board or governing body, thus, function in the capacity of triers of fact with respect to the weighing and balancing of these considerations. For instance, the zoning hearing board conducts hearings at which evidence is presented by the witnesses of the respective parties who are the municipality, all persons affected by the

application, and any civic and community organizations which have been granted permission to appear by the board, and the board is required to make findings of fact. *See id.* § 10908. The governing body, or its designee, likewise conducts similar hearings on conditional use applications, and is also specifically charged with making findings of fact. *See id.* § 10913.2. Consequently, both entities develop an extensive factual record in support of their decisions which is then utilized by the courts of common pleas in which the municipality is located to conduct judicial review. *See id.* § 11003-A. The trial court is prohibited from disturbing the factual findings made by the local agencies if they are supported by substantial evidence; however, it too may receive additional factual evidence from witnesses relating to the above-enumerated factors, if necessary, to augment the previously developed record. *See id.* § 11005-A.

Robinson Township v. Commonwealth, 147 A.3d 536, 564–65 (Pa. 2016).

The MPC defines “municipality” to include a “home rule municipality.” 53 P.S. § 10107. A “municipality” may enact zoning in accordance with the MPC. 53 P.S. § 10601. A municipal law that has the purpose and effect of a zoning law but is not promulgated pursuant to the MPC and enacted without following the statutory procedural safeguards required by the MPC is unlawful. *See IA Const. Corp. v. Twp. of Bradford*, 598 A.2d 1347, 1349 (Pa. Cmwlth. 1991). That type of unlawful zoning is referred to as *de facto* zoning. *See id.*

Zoning laws include local regulations that “permit, prohibit, regulate, restrict and determine: (1) Uses of land, watercourses and other bodies of water. . . . (5) Protection and preservation of natural and historic resources and prime agricultural land and activities.” 53 P.S. § 10603(b). Those aspects of zoning, such as regulating uses of land, water, natural resources, and existing land uses, such as

agricultural activities, have been described by courts as the “elements” of zoning. *See IA Const. Corp.*, 598 A.2d at 1349; *Borough of Edgeworth v. MacLeod*, 456 A.2d 682, 684 (Pa. Cmwlth. 1983); *Bd. of Sup’rs of Franklin Twp. v. Meals*, 426 A.2d 1200, 1202 (Pa. Cmwlth. 1981). No single zoning element is dispositive when evaluating whether a local law is *de facto* zoning. *See IA Const. Corp.*, 598 A.2d at 1349. However, if enough zoning elements are in a local law not adopted pursuant to the MPC, then a court would determine that the law is unlawful *de facto* zoning. *Id.*

Courts also consider the purposes of a local law when evaluating whether a local law is *de facto* zoning. Zoning purposes set forth in the MPC include preserving a “present use” or to “promote, protect and facilitate any or all of the following: the public health, safety, morals, and the general welfare . . . ; as well as preservation of the natural, scenic and historic values in the environment and preservation of forests, wetlands, aquifers . . .” 53 P.S. § 10604; *see also IA Const. Corp.*, 598 A.2d at 1350.

If a law’s primary purpose is to regulate how an activity is to occur, that purpose may be considered by courts when evaluating whether the law is *de facto* zoning or a law under general police powers. *See Taylor v. Harmony Tp. Bd. of Com’rs*, 851 A.2d 1020, 1026 (Pa. Cmwlth. 2004); *Land Acquisition Services, Inc. v. Clarion Cty. Bd. of Comm’rs*, 605 A.2d 465, 469 (Pa. Cmwlth. 1992).

Alternatively, if a law has zoning purposes (as listed in the MPC), then those purposes may be considered by courts to evaluate whether the law is *de facto* zoning. *IA Const. Corp.*, 598 A.2d at 1350.

The evaluation of the zoning-like effects of a law and their correlation to zoning-like purposes of that law determine whether the law is *de facto* zoning. *See IA Const. Corp.*, *supra*. In other words, if a local law is intended to and does regulate where land use may or may not occur, it is zoning.

In *IA Construction Corporation*, a municipality adopted a local law regarding the deposition of waste. 598 A.2d at 1349. That law did not forbid the waste activity or create zones where the activity could and not occur. *Id.* Rather, the local law was limited in scope to waste activities and their distance to buildings and groundwater. *Id.* at 1349-51. Instead of regulating whether the activity could occur, the local law had the sole purpose and effect of regulating the activity itself. *Id.* at 1349-50. The court explained, “[b]ecause the overall purpose of [the law] is to regulate solid waste activity, and none of the sections of the ordinance go beyond the scope of that goal . . . [the law] is not a *de facto* zoning ordinance.” *Id.* at 1350. Based on its evaluation of the law’s purposes and effects, the court held that the law was not a *de facto* zoning ordinance. *See id.*

Citing *IA Construction Corporation*, the Commonwealth Court recently underscored the importance of identifying the purposes of a land use-related law in

determining whether that law is *de facto* zoning. *See Delchester Developers, L.P. v. Zoning Hearing Bd. of Twp. of London Grove*, 161 A.3d 1081, 1088-89 (Pa. Cmwlth. 2017). Thus, a thorough review of the purposes of a law, along with an analysis of the effect of the law, is necessary to determine whether it is *de facto* zoning.

The effect of the Home Rule Charter stands in stark contrast to the effect of the local law challenged in *IA Construction Corporation*. The provisions of the Home Rule Charter that are relevant to the instant matter do not merely regulate how an activity could occur in the municipality, but rather totally prohibit a specific activity anywhere in Grant Township. Section 301 of the Home Rule Charter prohibits the activity, deposition of waste fluids from oil and gas operations, as follows:

Section 301. Depositing of Waste from Oil and Gas Extraction. It shall be unlawful within Grant Township for any corporation or government to engage in the depositing of waste from oil and gas extraction.

(Ex. A, Home Rule Charter, Art. III, § 301.)

This provision does not regulate how an activity can or cannot occur, which could be lawful, but rather regulates where an activity cannot occur, by prohibiting the activity anywhere in Grant Township. This total exclusion exhibits an indisputable element of zoning, identifying an area *where* a land use can or cannot occur. *See IA Const. Corp.*, 598 A.2d at 1349-50.

Here, the zoning effect of the Home Rule Charter perfectly aligns with the stated purposes in the Home Rule Charter. Section 105 of the Home Rule Charter identifies its purpose as making Grant Township “free from activities which threaten scenic, historic, and aesthetic values, including from the depositing of waste from oil and gas extraction.” *Id.* at Art., I, § 105. Section 104 states a purpose of making Grant Township “free from activities” involving the “the depositing of waste from oil and gas extraction.” *Id.* at Art. I., § 104. These purposes are crystalized in Grant Township’s stated goal of shifting its energy economy to a “sustainable energy future,” which includes “the right to be free from activities relate to fossil fuel extraction and production, *including the depositing of waste from oil and gas extraction.*” *Id.* at Art. I, § 107 (emphasis added).

The Home Rule Charter’s purposes also include the general protection of natural resources, such as streams, rivers, and aquifers, to protect its citizens’ right to “unspoiled vistas and a rural quality of life.” *Id.* at Art. I, §§ 105, 106. These purposes mirror zoning purposes set forth in the MPC, such as to “promote, protect and facilitate . . . the general welfare . . . ; as well as preservation of the natural, scenic and historic values in the environment and preservation of forests, wetlands, aquifers . . .” 53 P.S. § 10604. Thus, the Home Rule Charter’s purposes are typical of zoning purposes under the MPC.

This is not a case of attempting to regulate how an activity may be done within a community, as in *IA Construction Corporation*. Rather, this case involves a local law that specifically addresses where an activity could or could not occur. This land use control purports to further the express purposes of promoting a different type of land use (sustainable energy), protecting natural resources (air, soil, rivers, aquifers), and protecting “quality of life.” Favoring one land use over another to preserve existing living conditions and land uses heavily tips the scales towards a finding that the Home Rule Charter has so many hallmarks of zoning that it is a *de facto* zoning law.

In sum, the MPC is the sole authority for Pennsylvania’s municipalities, including home rule municipalities, to regulate or prohibit land uses within their borders. Grant Township is and was lawfully empowered to adopt any land use laws only pursuant to the MPC. However, Grant Township exceeded its authority. Its Home Rule Charter includes *de facto* zoning that was not adopted pursuant to the MPC. Therefore, the Home Rule Charter’s zoning is unlawful and of no effect.

B. The Pennsylvania Constitution Requires Home Rule Governments to Abide by the General Assembly’s Laws.

Grant Township’s authority is constitutionally limited, and it must abide by the MPC when it regulates land use in its boundaries.

Article IX, section 2 of the Pennsylvania Constitution specifically requires home rule municipalities to abide by limits imposed by the General Assembly.

City of Pittsburgh v. Fraternal Order of Police, Fort Pitt Lodge No. 1, 161 A.3d 160, 171 (Pa. 2017) (“[S]tatutes 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. Bd. of Adjustment of Tredyffrin Twp.*, 200 A.2d 408, 412 (Pa. 1964). As the foregoing demonstrates, the MPC³ is such a limit imposed by the General Assembly on home rule municipalities such as Grant Township.

This constitutional limit was explained by this Court in the instant case, as follows:

Article 9, section 2 of the Pennsylvania Constitution permits a municipality to adopt a home rule charter and exercise any power and perform any function not denied by the Constitution, by its home rule charter or *by the Acts of the General Assembly*. Pa. Const., art.9, §2. *See also* 53 Pa.C.S. §2961. “The Pennsylvania Constitution provides that home rule charters and amendments thereto are subservient to the limitations imposed by the General Assembly.” *City of Pittsburgh v. Fraternal Order of Police, Fort Pitt Lodge, No. 1*, 161 A.3d 160, 166-167 (Pa. 2017).

(May 2, 2018, Opinion, p. 13) (emphasis in original). Thus, if Grant wishes to control or prohibit uses of land, such as its ban of injection wells, it cannot do so in a manner that is denied by an act of the General Assembly. *Id.*

³ As this Court explained, Section 3302 of the Oil and Gas Act, 58 Pa. C.S. § 3302, is another limit of the General Assembly on a municipality’s power to locally regulate oil and gas operations, such as oil and gas waste fluid injection wells, and requires such local laws to be, *inter alia*, adopted pursuant to the MPC. (May 2, 2018 Opinion, pp. 4-5.)

Because the Home Rule Charter bans a land use in a manner contrary to limitations imposed by the General Assembly (*i.e.*, contrary to the requirements of the MPC), it is unconstitutional.

Grant Township's decision not to abide by the MPC, and thereby the Pennsylvania Constitution, makes the Home Rule Charter's ban on a waste disposal land use both unlawful and unconstitutional.

II. THIS COURT SHOULD NOT DECIDE GRANT TOWNSHIP'S CONSTITUTIONAL CHALLENGES BASED ON THE HOME RULE CHARTER.

Moreover, this Court should not consider Grant Township's constitutional challenges because it is not necessary to do so to resolve this case. Grant Township's claims may be dismissed because the Home Rule Charter is unlawful and unconstitutional, and because Grant Township has a statutory avenue to regulate land use under the MPC, which it has not tried to use.

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); *see also Gorsline v. Bd. of Supervisors of Fairfield Twp.*, 186 A.3d 375, 383 (Pa. 2018); *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, n. 9 (Pa. Cmwlth. 2011); *Atlantic-Inland*,

Inc. v. Bd. of Supervisors of W. Goshen Twp., 410 A.2d 380, 383 (Pa. Cmwlth. 1980). This tenet of jurisprudence applies to constitutional challenges to statutes. As the Pennsylvania Supreme Court explained, “[i]t 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.” *Commonwealth to Use of Dollar Sav. & Tr. Co. v. Picard*, 145 A. 794, 796 (Pa. 1929); *see also Commonwealth v. Janssen Pharmaceutica, Inc.*, 8 A.3d 267, 271 (Pa. 2010).

Grant Township’s constitutional challenges flow from its Home Rule Charter. The purpose of Grant Township’s constitutional challenges is to attack the state laws that statutorily preempt portions of the Home Rule Charter. (May 2, 2018 Opinion, pp. 14-16.) As the foregoing shows, the waste disposal provisions of the Home Rule Charter are themselves unlawful and unconstitutional (Argument Section I of this Memorandum, *supra*) and therefore void. Accordingly, there is nothing lawful remaining for the state laws to preempt. In the absence of valid local law to preempt, Grant’s constitutional challenges to preemptive state laws are not ripe, and it is not necessary to decide them.

In addition, it is not necessary to decide the constitutional challenges, because Grant Township has not tried to use its statutory authority under the MPC to regulate land use. It would be inappropriate and contrary to precedent to decide the constitutional challenges, when the moving party has sat on the statutory

authority that may allow it to achieve the same end. If, in the future, Grant Township adopts zoning pursuant to the MPC and excludes waste disposal, as it attempted to do in the Home Rule Charter, then these issues may come to the fore again (or they may not, if Grant Township regulates the “where” and not the “how”⁴ of such operations).

Thus, for these reasons, the Court should refrain from deciding the constitutional challenges because it not necessary to decide them to resolve this case.

III. GRANT TOWNSHIP’S VAGUE, AS-APPLIED CONSTITUTIONAL CHALLENGE IS UNFOUNDED OR, ALTERNATIVELY, NOT RIPE.

To the extent Grant Township is allowed to challenge the Solid Waste Management Act and the Oil and Gas Act as “applied” in Grant Township, that challenge is not ripe. The only application of those statutes in Grant Township has been the Department’s issuance of an injection well permit, which this Court already ruled cannot be challenged in this proceeding. (May 2, 2018 Opinion, p. 10.) With no further facts at issue regarding the application of these laws except for the Home Rule Charter’s ban, the “as applied” challenge is also not ripe and should not be considered either.

⁴ See *Frederick v. Allegheny Twp. Zoning Hearing Bd.*, 196 A.3d 677, 701 (Pa. Cmwlth. 2018) (“local governments regulate ‘where’ oil and gas operations will take place with zoning ordinances.”); *Huntley & Huntley v. Oakmont*, 964 A.2d 855 (Pa. Cmwlth. 2009); *Range Resources v. Salem Township*, 964 A.2d 869 (Pa. Cmwlth. 2009).

IV. THIS COURT SHOULD CONSTRUE THE STATE STATUTES AT ISSUE IN THIS CASE AS CONSTITUTIONAL.

Because it is possible to construe the Solid Waste Management Act and the Oil and Gas Act as constitutional in this case, if this Court were to take up the constitutional challenges, it should find each statute to be constitutional.

It is black letter law that the party asserting the unconstitutionality of a law has a “heavy burden” and “[t]here is a strong presumption [that] legislative enactments are constitutional.” *Commonwealth v. McMullen*, 961 A.2d 842, 846 (Pa. 2008); *see also* 1 Pa.C.S. § 1922(3) (statutory presumption that General Assembly did not intend to violate the United States Constitution or the Pennsylvania Constitution).

While the Department strongly asserts that no constitutional analysis of state statutes is warranted at this time, should this Court engage in any constitutional evaluation of state statutes in this case, Grant Township bears a “heavy burden” to overcome the presumed constitutionality of the state statutes. *McMullen*, 961 A.2d at 846. With only its Home Rule Charter and no application of laws at issue in this case, Grant Township is not able to advance evidence or arguments that would meet that burden.

V. THE DEPARTMENT’S APPLICATION IS PROCEDURALLY SOUND.

In its Response to the Application, Grant Township argues that the Application is not timely because these issues should have been raised with the Department’s Preliminary Objections, and not procedurally sound because the Department should have sought reconsideration of this Court’s May 2, 2018 Opinion. Both claims lack merit.

Grant Township first contends that the Department’s Application is really just an untimely preliminary objection regarding Grant Township’s “failure to exhaust” a statutory remedy that should have been raised as a preliminary objection pursuant to Pa. R.C.P. 1028(7). (*Answer to Application for Summary Relief to Dismiss Grant Township’s Constitutional Claims Because Statutory Relief is Available* (“*Answer to Application*”), p. 4, citing Pa. R.C.P. 1028(7)).

Grant Township’s assertion misstates the gravamen of the Department’s Application. The foregoing shows that the Department is not arguing that Grant Township “fail[ed] to exhaust” a statutory remedy here. Instead, Grant failed to avail itself of its only remedy: adopting land-use bans through zoning laws enacted under the MPC. Any other local effort to zone would be unlawful. *See* Argument, Sections I and II, *supra*.

The Department is not raising a procedural question of whether Grant has properly pursued a statutory remedy before seeking a constitutional remedy, as

contemplated by Pa. R.C.P. 1028(7). The issue is substantive. There is only one option available for a township to regulate land use: adopt zoning through the MPC. That is Grant's remedy, according to the Pennsylvania Constitution and the General Assembly. Without two or more remedies to choose from, there was nothing to exhaust, and, it must follow that, Pa. R.C.P. 1028(7) does not apply.

Grant Township's second procedural argument is that the Department should have sought reconsideration of this Court's Preliminary Objection decision if it was unsatisfied with this Court's opinion. (*Answer to Application*, pp. 15-16.) This is a made-up argument. There is no procedural requirement to seek reconsideration of interlocutory orders. Accordingly, this assertion must be rejected as meritless. *See* Pa. R.A.P. 341.

CONCLUSION

Grant Township's Home Rule Charter is unlawful and unconstitutional.

Therefore, any constitutional challenges based on that charter are not ripe and should not be considered by this Court. It is unlawful because it does not follow the MPC's prescriptions and limits on zoning laws. It is unconstitutional because Article IX, section 2 of the Pennsylvania Constitution specifically prohibits home rule municipalities from ignoring limits imposed by the General Assembly, such as the MPC.

Grant Township is not without a remedy. It may attempt to adopt zoning laws to achieve its ends. Grant Township may, at some point, have reason to challenge the constitutionality of state laws, but that time is not now. Grant Township's remaining counterclaims' constitutional challenges are not ripe, as set forth herein.

Grant Township should not be allowed to challenge environmental statutes of statewide applicability with an unlawful Home Rule Charter. Grant Township's constitutional challenges that are based on its unlawful and unconstitutional Home Rule Charter should be dismissed.

For these reasons, it is not necessary for this Court to evaluate Grant Township's Counterclaims 3 and 4 because they are based upon unlawful and unconstitutional provisions of the Home Rule Charter.

Respectfully submitted,

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FOR THE COMMONWEALTH OF
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