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COUNTER-STATEMENT OF THE CASE

Codified in the Home Rule Charter (“Charter”) enacted by the people of Grant Township (“Grant”) is a prohibition on the depositing of waste from oil and gas activities, an activity which the people of Grant determined violates the people’s inherent, indefeasible, and constitutionally secured environmental rights. Petitioner Commonwealth of Pennsylvania, Department of Environmental Protection (“DEP”) initiated the instant proceedings on March 27, 2017, by filing a Petition for Review in the Nature of Complaint Seeking Declaratory and Injunctive Relief. Respondent Grant Township filed an Answer on May 8, 2017, which included counterclaims as to how DEP’s position violates fundamental, unalienable, indefeasible and constitutionally secured rights. DEP objected to all of Grant’s counterclaims in its June 19, 2017 Preliminary Objections. DEP’s instant Application for Summary Relief to dismiss Counts 3 and 4 of Grant’s Counterclaim (“Application”) reasserts some of the very same objections that DEP asserted in its Preliminary Objections, and which the Court already rejected in its May 2, 2018 Memorandum Opinion (“Opinion”).

In its Opinion, this Honorable Court allowed Counts 3 and 4 of Grant’s counterclaims to proceed. Opinion at 15-16. In Count 3, Grant Township alleges that:

- The Charter is a constitutionally valid exercise of the people’s right to clean air, pure water, and to preservation of the natural, scenic, historic,

and esthetic values of the environment pursuant to Article I, § 27 of the Pennsylvania Constitution (“Environmental Rights Amendment” or “ERA”). (Respondents’ Answer to Petition for Review in Nature of Complaint Seeking Declaratory and Injunctive Relief, New Matter, and Counterclaim (hereinafter “Counterclaim”), ¶ 113);

- The Charter is also a valid exercise of Grant Township’s power, authority and duties as a public trustee under Article I, § 27 of the Pennsylvania Constitution. (Counterclaim, ¶ 114);
- As such, purported limitations of authority in the Home Rule Charter and Optional Plans Law, 53 Pa.C.S. § 2901, *et seq.*, do not apply, nor does sovereign immunity or the doctrine of preemption. (Counterclaim, ¶ 115);
- Further, while DEP also has public trustee duties under the Environmental Rights Amendment, those duties are not exclusive. Grant Township is free to enact stricter laws to advance and protect the rights secured by the Environmental Rights Amendment. (Counterclaim, ¶ 116).

As to Count 3, the Court’s Opinion rejected DEP’s preliminary objections and said: “If the Township at trial is able to prevail on its claim in Count 3 that provisions of the Oil and Gas Act [58 Pa.C.S. § 3201 *et seq.*] and SWMA [Solid Waste Management Act, 35 P.S. § 6018.101 *et seq.*] are unconstitutional, then

necessarily those statutory provisions could not serve to preempt local ordinances, and DEP could be enjoined from enforcing them.” (Opinion at 16).

In Count 4, Grant Township alleges that:

- The people enacted the Charter pursuant to Article I, § 27 of the Pennsylvania Constitution, commonly known as the Environmental Rights Amendment (Counterclaim, ¶ 118);
- DEP, as a public trustee, also has a duty to protect and advance the rights enumerated in the Environmental Rights Amendment. (Counterclaim, ¶ 119);
- DEP has failed, and continues to fail, to protect and advance these rights, and has therefore violated its public trustee duties to the people under Article I, § 27 of the Pennsylvania Constitution. (Counterclaim, ¶ 120);
- Further, Article I, § 27 of the Pennsylvania Constitution secures the people’s rights to clean air, pure water, and to preservation of the natural scenic, historic, and esthetic values of the environment. (Counterclaim, ¶ 121);
- 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. (Counterclaim, ¶ 122).

The Court rejected DEP's preliminary objections as to Count 4, holding, "similarly, if it can prove its claim in Count 4 that these statutes are being unconstitutionally applied by DEP, an injunctive could issue." Opinion at 16. The Court further opined that "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." *Id.*

More than seven months after the Court's Opinion, on December 3, 2018, DEP filed its "Application for Summary Relief to Dismiss Grant Township's Constitutional Claims Because Statutory Relief is Available." DEP's Application seeks to dismiss Counts 3 and 4 of Grant's counterclaims.

On January 7, 2019, Grant filed an Answer denying DEP's arguments and asserting that the arguments in DEP's Application (1) have already been decided by this Court in its Memorandum Opinion; or alternatively, (2) should have been, but were not raised, in DEP's preliminary objections.

On February 19, 2019, DEP filed a Memorandum in support of its Application. Grant now submits the instant Memorandum in opposition to DEP's Application.

SUMMARY OF ARGUMENT

At its heart, this case is about whether the people of Grant Township have the right to adopt a Charter that secures their right to clean air, water, and soil, and that exercises their right to outlaw activities that threaten their right to clean air, water, and soil, including the right to be free from the depositing of fracking waste, by declaring it “unlawful within Grant Township for any corporation or government to engage in the depositing of waste from oil and gas extraction.” (Grant Township Home Rule Charter at Section 301.)¹ DEP argues that Counts 3 and 4 of Grant’s counterclaim should be dismissed because Grant should have followed the procedures in the Municipalities Planning Code, 53 P.S. § 10101 *et seq.* (“MPC”). Yet, the Court in its May 2, 2018 Opinion already decided the issues raised by DEP’s Application in Grant Township’s favor in recognizing other legal and factual issues relevant to the disposition of Counts 3 and 4 of Grant’s counterclaim. In its May 2, 2018 Opinion, the Court considered the following issues:

1. Whether Grant Township “at trial [can] prevail on its claims in Count 3 that provisions of the Oil and Gas Act and SWMA are unconstitutional.” (Opinion at 16). If so, “then necessarily those statutory provisions could

¹ The right to clean air, water, and soil is enumerated in Section 104 of the Charter. The prohibitions contained in Article III of the Charter also advance other rights enumerated in Article I of the Charter, such as the right to scenic, historic, and aesthetic values of the Township (Section 105); of natural communities and ecosystems within the Township to exist, flourish, and naturally evolve (Section 106); and to a sustainable energy future (Section 107).

not serve to preempt local ordinances, and DEP could be enjoined from enforcing them.” *Id.*

2. Whether the Township “can prove its claim in Count 4 that these statutes are being unconstitutionally applied by DEP” *Id.* If so, “an injunction could issue.” *Id.*

DEP is now filing what amounts to a motion to reconsider the Court’s decision, which, in addition to being procedurally unsound, contains several spurious arguments already rejected by the Court.

DEP asks the Court to find that local lawmaking in Grant Township (or any municipality) that prohibits activities incompatible with the people’s environmental rights is limited to laws enacted pursuant to the MPC without considering the important constitutional issues raised by Grant in Counts 3 and 4 of its counterclaim.² It seems that DEP adopts this myopic focus on the MPC in order to avoid constitutional scrutiny of its statutory authority for permitting the disposal of fracking waste where a local law enacted by the people pursuant to their environmental rights prohibits such activity. This is not surprising given DEP’s regulatory failures, which have even led to an

² Grant Township’s Brief in Opposition to Petitioner’s Preliminary Objections to Respondents New Matter and Counterclaim, filed October 3, 2017, and its Supplemental Brief, filed January 5, 2018, set forth the important constitutional issues at stake in this matter.

investigation by the Pennsylvania Attorney General's office.³ The issues in this case have nothing to do with what kind of laws DEP contends Grant Township should, or could, have enacted under the Municipalities Planning Code. Instead, at issue in this case are provisions of a Home Rule Charter, enacted by popular vote by the people of Grant Township.

Further, the Court must reject the notion that DEP can continue to rely on statutory authority to regulate the disposal of fracking waste – in particular, the Oil and Gas Act and SWMA – in instances where those statutes, and DEP's actions in reliance on those statutes, violate the Environmental Rights Amendment.

DEP argues that it is entitled to summary disposition in its favor because the people of Grant enacted the Charter provisions at issue without using the allegedly proper procedures set forth in the MPC for enacting zoning laws. DEP Br. at 10. DEP's argument fails because: (1) DEP's Application is procedurally defective; (2) DEP has not shown a clear right to relief; (3) this Court must decide Grant Township's constitutional challenges based on the Home Rule Charter; (4) the ERA gives rise to rights and duties, independent of the MPC or any other law of

³ See Joshua B. Pribanic and Melissa A. Troutman, "State Officials Remain Unindicted As Fracking Industry Undergoes Criminal Investigation (Podcast)" (Public Herald, Feb. 15, 2019), available at <https://publicherald.org/state-officials-remain-unindicted-as-fracking-industry-undergoes-criminal-investigation-podcast/> (last accessed March 20, 2019).

the General Assembly; and (5) Sections 301, 302, 303, and 306 of the Charter are not *de facto* zoning.

Grant Township respectfully requests that this Honorable Court deny DEP's Application, and allow Counts 3 and 4 of Grant Township's Counterclaims to proceed.

ARGUMENT

I. DEP's Application is Procedurally Defective.

Contrary to DEP's assertions, its Application is procedurally defective and should be denied on that basis.

DEP's Application amounts to an untimely and improper motion to reconsider. The crux of DEP's Application is that Grant Township has failed to avail itself of available statutory remedies. In particular, DEP argues that Grant Township should have enacted a zoning law under the MPC.

DEP already made this argument at the October 10, 2017 hearing on DEP's preliminary objections and in its January 22, 2018 response to Respondents' Supplemental Brief.⁴ The Court properly rejected DEP's argument and allowed Claims 3 and 4 of Grant's counterclaim to proceed. (May 2, 2018 Opinion, pp. 12-13, 16). DEP's Application therefore amounts to an untimely motion to reconsider the Court's previous denial, in part, of its preliminary objections.

Moreover, failure to exercise or exhaust a statutory remedy is one of the expressly listed preliminary objections in Pa. R.C.P. 1028(7) ("failure to exercise

⁴ At the October 10, 2017 hearing on DEP's Preliminary Objections, DEP made the same argument that it makes in the present Application. DEP argued that Grant Township could not exceed the bounds of the Municipalities Planning Code. (*See* Oct. 10, 2017 Hearing Transcript at pp. 7-10). DEP reiterated this argument in its "Response to Respondents' Supplemental Brief in Opposition to Petitioner's Preliminary Objections to Respondents' New Matter", filed January 22, 2018, at p. 4: "Respondents do nothing to explain away the existence of other potential avenues to reach their goal of regulating local land uses, such as zoning. (Department's Brief in Support of Preliminary Objections, pp. 12-13.) Instead, the Supplemental Brief sidesteps the issue by asserting that Grant Township has chosen not to have zoning, purportedly because of Grant Township's population size. (Supplemental Brief, p. 7, footnote 4)."

or exhaust a statutory remedy”). Rule 1028(b) provides, in part: “All preliminary objections shall be raised at one time.” Parties may not defeat the “strong prohibition against a serial raising of objections” by mis-captioning a preliminary objection as something else. *Lexington Ins. Co. v. Commonwealth, Ins. Dep’t*, 541 A.2d 834, 836 (Pa. Cmwlth. 1988) (internal citation omitted). Consequently, even if the Court had not already ruled on this issue in Grant’s favor, the fact that DEP is raising this issue at this juncture is improper. DEP was required to raise arguments regarding the failure to exhaust statutory remedies in its preliminary objections.

Therefore, DEP’s Application is procedurally defective and should be denied as improper and untimely.

II. DEP Has Not Shown a Clear Right to Relief.

Pa. R.A.P. 1532(b) provides:

Summary relief. At 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) (emphasis added). The commentary explains that the rule “authorizes immediate disposition of a petition for review, similar to the type of relief envisioned by the Pennsylvania Rules of Civil Procedure regarding judgment on the pleadings and peremptory and summary judgment.” *Id.* (Official Note). “Any party may move for summary judgment in whole or in part as a matter of law whenever *there is no genuine issue of any material fact* as to a necessary element

of the cause of action or defense which could be established by additional discovery or expert report.” Pa.R.C.P. 1035.2(1) (emphasis added).

In determining whether to enter a summary judgment, a court must view the record in the light most favorable to the non-moving party. *Murphy v. Duquesne Univ.*, 777 A.2d 418, 429 (Pa. 2001). The moving party’s burden to prove that its right to a summary judgment is clear and free from doubt is a heavy one. *Miseo v. Ross Tp. Police Dept.*, 607 A.2d 806 (Pa. Cmwlth. 1992). Where there are disputed issues of material fact, an applicant’s right to relief is not clear. Pa.R.C.P. 1035.2(1).

DEP erroneously identifies the only material fact as “whether Grant Township has not attempted to exclude oil and gas waste fluid disposal through a zoning ordinance.” DEP Br. at 5. The fact that the people of Grant voted to enact Charter provisions, rather than Grant Township passing a zoning ordinance to exclude oil and gas waste fluid disposal is, indeed, undisputed, albeit immaterial. The Charter, including Section 301, is not a zoning law. This fact is not new to either the parties or this Court. It is a fact that was known to and considered by the Court prior to, and in, issuing its May Opinion.

Most importantly, the mere fact that Grant did not follow the Municipalities Planning Code is not dispositive of Counts 3 and 4. Counts 3 and 4 are based on the Environmental Rights Amendment contained in Article 1, § 27 of the Pennsylvania Constitution. The Court has identified the challenge as to the

constitutionality of the Oil and Gas Act and SWMA as central to Grant's claims in Counts 3 and 4. Yet, DEP's motion and brief do not present arguments regarding the constitutionality of the Oil and Gas Act and Solid Waste Management Act.⁵

DEP attempts to avoid consideration of the important constitutional questions raised in Grant's counterclaim, and identified by this Court in its May Opinion, by asking the Court to find that the only means by which Grant could have prohibited the disposal of fracking waste was to enact a zoning law under the MPC. DEP Br. at 18. DEP has thus shifted its argument. Nowhere does DEP's Petition for Relief allege that the Charter provisions at issue violate the MPC itself as a law of the General Assembly which allegedly restricts Grant's, and the people of Grant's, ability to pass local laws on certain topics. Rather, DEP relies on the Oil and Gas Act or SWMA as allegedly preempting the Charter provisions at issue. If DEP wanted to rely on the MPC as a basis for its Petition for Relief, it should have moved to amend its Petition. *See Pa.R.C.P. 1033.* It has failed to do so.

DEP's desire to avoid constitutional inquiry is further illustrated by the fact that, despite knowing that the ERA is central to Counts 3 and 4, DEP's brief makes

⁵ DEP's brief does not contain any legal or factual arguments of substance regarding the Oil and Gas Act or SWMA. Rather, DEP merely submits that Grant cannot meet its burden of showing that these statutes, if construed to expressly or impliedly preempt the Charter provisions at issue, are unconstitutional. In a footnote, DEP's brief references the portion of Section 3302 of the Oil and Gas Act that restricts local lawmaking regarding the regulation of oil and gas operations regulated by Chapter 32 to local ordinances adopted pursuant to the MPC as "another limit of the General Assembly on a municipality's power," but makes clear that its motion is based on the MPC itself, and not Section 3302 of the Oil and Gas Act. DEP Br. at 18 and at n. 3.

no mention of the ERA or how it applies in this instance. Indeed, DEP attempts to circumvent court review of these important questions by arguing that the Court should not reach the constitutional issues at all. DEP Br. at 19-21.

As the Court already pointed out in its May Opinion, Grant has stated claims under the ERA, and Counts 3 and 4 raise factual issues – factual issues which DEP has not acknowledged in its briefing, much less shown to be undisputed:

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 at 16 (emphasis added).

Consistent with the Court's Opinion, Grant Township has served discovery in the form of interrogatories and requests for production of documents upon DEP. DEP has provided written responses and produced more than 8,000 pages of documents. Grant is reviewing this information as it is

relevant to Counts 3 and 4. In reviewing the discovery provided by DEP in response to Grant Township's requests, it is apparent that the Court must have the opportunity to review this relevant information whether presented to the Court at trial or in a motion for summary disposition based on all relevant facts.⁶

The primary question relevant to Count 3 is whether Section 301 of the Charter advances the people's environmental rights consistent with the ERA. Grant submits that the answer is "yes." Under the ERA, the people have the right to clean air and water and to preserve and natural and scenic values of the environment. Grant Township has a corresponding public trustee duty to conserve and maintain these public resources. The Charter's prohibition against the disposal of fracking waste secures and advances these rights by preventing an activity that threatens these rights, and is in furtherance of Grant's public trustee duties. *See* attached Declaration of Jon Perry, Chairman of the Grant Township Board of Supervisors ("Perry Decl.") at ¶¶ 14-18. Grant can also show that the provisions of the Oil and Gas Act and SWMA, to the extent they are construed to expressly or implicitly

⁶ Moreover, the facts of this case present this Court with what Grant believes to be novel questions of law. While, in certain instances, Pennsylvania courts have addressed the validity of local zoning laws under the Environmental Rights Amendment, Grant is not aware of an instance in which the Pennsylvania courts have addressed whether a Charter provision, enacted by popular vote, is valid in accordance with the ERA based on the arguments made by Grant in this case. A federal district judge has found provisions of a similar Charter in Highland Township to be invalid (*see Pa. Gen. Energy Co., LLC v. Grant Twp.*, 2018 WL 306679 (W.D. Pa. 2018)), but, as argued by Grant at the October 10, 2017 hearing, the court in that case did not consider the ERA, and Highland Township, unlike Grant, did not even attempt to defend the Charter provisions at issue.

preempt the Charter’s prohibition against the disposal of fracking waste, unreasonable impair Grant Township residents’ environmental rights. *See Pa. Env’tl. Defense Found. v. Com.*, 161 A.3d 911, 931 (Pa. 2017) (“*PEDF*”) (the prohibitory clause declaring the right of citizens to clean air and pure water, and to preservation of natural, scenic, historic and esthetic values of the environment “places a limitation on the state’s power to act contrary to this right, and while the subject of this right may be amendable to regulation, any laws that unreasonably impair the right are unconstitutional.”). It is unconstitutional and unreasonable to prevent the people of a township from saying no to activities that threaten their environmental rights, or to limit their voice to remedies available under the Oil and Gas Act or SWMA, or to zoning laws enacted pursuant to the MPC. DEP may attempt to dispute such facts, although it has not done so in the present Application.

Other relevant facts that illustrate how the Oil and Gas Act and SWMA unreasonably impair residents’ environmental rights, and how DEP is breaching its public trustee duties as alleged in Count 4,⁷ include but are not limited to, the following:

⁷ Whether DEP has breached its public trustee duties requires examination of relevant facts to determine such issues as whether DEP is fulfilling its duties to prohibit environmental degradation. *See PEDF*, 161 A.3d at 932 (“First, the Commonwealth has a duty to prohibit the degradation, diminution, and depletion of our public natural resources, whether these harms might result from direct state action or from the actions of private parties. [citation omitted]. Second, the Commonwealth must act affirmatively via legislative action to protect the environment.”).

- The materials in the fracking disposal waste, including the content of the fracking waste to be disposed of in the Yanity Well, are not even known to DEP. The Material Safety Data Sheet (MSDS) identifies them only by generic descriptions, and instead of giving a CAS number,⁸ they are listed as “Trade secret.” *See, e.g.*, Declaration of Respondents’ Counsel Karen Hoffmann (hereinafter “Hoffmann Decl.”), Exh. A at 649 (DEP Produced Documents); *see also* Hoffmann Decl., Exh. B. at 43 (DEP Answer to Interrogatory No. 22).
- Scientific evidence and studies show groundwater contamination by frack waste disposal wells. *See, e.g.*, Abrahm Lustgarten, “Injection Wells: The Poison Beneath Us” (ProPublica, June 21, 2012), available at <https://www.propublica.org/article/injection-wells-the-poison-beneath-us> (last accessed March 21, 2019).
- The well water is Grant Township residents’ sole source of drinking water. *See* Perry Decl. ¶ 12.

⁸ CAS numbers are unique numerical identifiers assigned by the Chemical Abstracts Service to every chemical substance described in the open scientific literature. CAS, “CAS REGISTRY and CAS Registry Number FAQs,” available at <https://www.cas.org/support/documentation/chemical-substances/faqs#2> (last accessed March 12, 2019).

- DEP's violation of its public trustee duties are so egregious that the Attorney General is investigating its handling and permitting of oil and gas activities. *See* n. 3, *supra*.
- DEP issued the permit without taking groundwater, surface water, or soil samples from real property in Grant Township in relation to the planned injection of fracking waste in the Yanity Well. *See* Hoffmann Decl., Exh. B at 33 (DEP Answer to Interrogatory No. 13).
- In Grant Township, there are geological faults that would allow migration of fracking waste into the groundwater. *See* Hoffmann Decl., Exh. C (Expert Report of Daniel S. Fisher) (“[B]oth the location of the Yanity Well 1025 near vertical fractures and the unpredictable nature of the Huntersville Chert increase the risk of induced seismic activity and increase the risk to underground sources of drinking water (USDWs).”).
- DEP has never denied an application for a permit that would allow, in whole or in part, the injection of fracking waste in a well. *See* Hoffmann Decl., Exh. B at 32 (DEP Answer to Interrogatory No. 12).
- DEP recognizes that it does not have exclusive authority under the ERA. *See* Hoffmann Decl., Exh. B at 35 (DEP Answer to Interrogatory No. 15).

- DEP has failed to identify any program, policy, or process for notifying homeowners or residents who obtain their water supply, including from drinking, from private water sources, such as wells, of possible or actual water contamination from fracking waste. *See Hoffmann Decl., Exh. B at 39 (DEP Answer to Interrogatory No. 18).*

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 there are no disputed facts and that Counts 3 and 4 are suddenly unripe for review.

In sum, the right of DEP to its requested relief is far from clear. DEP's Application pertains only to its position regarding the applicability of the MPC and does not present legal or factual arguments regarding the basis for Counts 3 and 4. Genuine issues of material fact that could be established by testimony, additional discovery or expert reports remain. Therefore, DEP's Application should be denied so that the material facts can be presented to this Court and, if disputed, a trial may be held.

III. This Court Must Decide Grant Township's Constitutional Challenges Based on the Home Rule Charter.

The clear-cut issues as already defined by the Court in this case are constitutional in nature. Yet, DEP argues in its Application that "[i]t 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.” DEP Br. at 20-21.

Constitutional avoidance is a doctrine used by courts; it is not positive law. It applies only where there is an alternative ground for decision that would not be changed by reaching the constitutional question, not where a party’s very claim, as Grant Township’s here, turns on a constitutional issue. The Pennsylvania Supreme Court has explained the governing principle as follows:

The “canon of constitutional avoidance” provides that when a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter. *See Harris v. United States*, 536 U.S. 545, 555, 122 S.Ct. 2406, 153 L.Ed.2d 524 (2002). . . . Pennsylvania explicitly recognizes this canon by statute in instances where construction of a Pennsylvania statute is at issue. *See* 1 Pa.C.S. § 1922; *see also Commonwealth v. Bavusa*, 574 Pa. 620, 832 A.2d 1042, 1050-51 (Pa. 2003).

MCI WorldCom, Inc. v. Pa. Pub. Utility Comm’n, 844 A.2d 1239, 1249-50 (Pa. 2004).

Another Commonwealth agency, the Department of Human Services, attempted to argue constitutional avoidance in *J.P. v. Department of Human Services*, 170 A.3d 575, 584 (Pa. Cmwlth. 2017). However, the Court held: “Constitutional avoidance is inappropriate in this case because we simply must address the Department’s failure to provide a hearing. While we prefer to avoid constitutional questions when possible, here the due process question, the lack of any form of hearing, is the central issue and primary cause of Petitioner’s grievance.” *Id.*

Similarly, here, Counts 3 and 4 are based on a specific provision of the Pennsylvania Constitution. As it has already recognized, the Court cannot resolve the claims without reaching the constitutional issues presented. The Court has already found that Grant Township may show that to the extent the Oil and Gas Act or SWMA, or DEP's implementation of them, violate the ERA, "they are powerless to preempt the Township's Charter." May 2, 2018 Opinion at 16. In this analysis, constitutional questions are necessarily implicated. For these same reasons, contrary to DEP's assertion (DEP Br. at 21), Grant Township's constitutional challenges in Counts 3 and 4 are well-founded and ripe.

IV. The ERA Gives Rise to Rights and Duties, Independent of the MPC or Any Other Law of the General Assembly.

The ERA gives rise to rights and duties, independent of the MPC or any other law of the General Assembly. Counts 3 and 4 set forth the grounds pursuant to which the Charter's prohibition against the disposal of fracking waste, and related provisions, are valid and constitutional.⁹ Grant Township alleges that the prohibitions contained in Section 301 of the Charter, and the related provisions in Sections 302, 303, and 306, are pursuant to the people's fundamental, unalienable, and constitutional rights under the Pennsylvania Constitution's Declaration of

⁹ It is somewhat ironic that, in the same brief where DEP argues the Court does not need to reach constitutional questions, it also argues that Grant Township's Home Rule Charter is unconstitutional ("Because the Pennsylvania Constitution requires home rule governments to abide by state statutes, the charter also is unconstitutional." DEP Br. at 10.).

Rights, including the ERA.¹⁰ As alleged in Counts 3 and 4, Sections 301, 302, 303, and 306 are also in accordance with Grant Township’s public trustee obligations to protect the people’s environmental rights under the ERA.

The ERA allows the people of Grant to secure their environmental rights. The Charter provisions prohibiting the disposal of fracking waste are an expression of those rights. The ERA also imposes a public trustee duty upon Grant Township to maintain and conserve the natural environment. *See PEDF*, 161 A.3d at 932-33; *Robinson Twp. v. Com.*, 83 A.3d 901, 956-7 (Pa. 2013) (plurality) (“*Robinson II*”). Residents’ environmental rights and Grant’s public trustee duties cannot be reduced to the enactment of zoning laws under the MPC.

As stated by the Pennsylvania Supreme Court in *Robinson II*, “constitutional commands regarding municipalities’ obligations and duties to their citizens cannot be abrogated by statute.”¹¹ Yet, that is precisely the argument DEP makes in this

¹⁰ The Court dismissed Counts 1 and 2, but allowed Grant Township’s claims under the ERA (Counts 3 and 4) to proceed. May 2, 2018 Opinion at 15-16.

¹¹ *Robinson II* at 977. *But see Frederick v. Allegheny Twp. Zoning Hearing Bd.*, 196 A.3d 677, 697 (Pa. Cmwlth. 2018); *see also Delaware Riverkeeper Network v. Sunoco Pipeline L.P.*, 179 A.3d 670, 695 (Pa. Cmwlth. 2018), *appeal denied*, 192 A.3d 1106 (Pa. 2018) (“*DRN*”). Both *Frederick* and *DRN* are distinguishable from the instant case. *Frederick* involved a challenge to a zoning ordinance that permitted a gas well in an agricultural area. The *Frederick* Court appears to have adopted a much more limited interpretation of *Robinson II* in finding that it “did not give municipalities the power to act beyond the bounds of their enabling legislation.” Here, Grant respectfully submits that it is not acting beyond the bounds of its enabling legislation, and that such an interpretation is inconsistent with the import of the ERA and Article I rights as recognized by the Pennsylvania Supreme Court in the Robinson Township cases and *PEDF*. As the dissent in *Frederick* noted,

the recent hydrocarbon extraction boom, which is occurring throughout portions of this Commonwealth that overlay the Marcellus Shale Formation, stands ready to wreak havoc

case: that the MPC abrogates Grant's obligations and duties under the ERA, or, at the very least, severely limits the ability of people and townships, such as Grant, from realizing their rights and duties under the ERA.

Moreover, the argument that action by DEP obviates the obligation of a municipality to exercise its trustee duties was one of the very arguments rejected by the Supreme Court in *Robinson II*. The constitutional obligation binds all government, state or local, concurrently. *Franklin Twp. v. Com., Dep't of Env'tl. Res.*, 500 Pa. 1, 8, 452 A.2d 718, 722 & n.8 (1982) (citing Section 27, Court stated that protection and enhancement of citizens' quality of life "is a constitutional charge which must be respected by all levels of government in the Commonwealth"); see *Hartford Acc. and Indem. Co. v. Ins. Comm'r of Com.*, 482 A.2d 542, 549 (Pa. 1984) (Declaration of Rights provision "circumscribes the conduct of state and local government entities and officials of all levels in their

of similar class and character as those booms which stripped our forests bare, hunted our wildlife to near-or-actual extinction, and poisoned or scarred our air, land, and water. It is incumbent upon all levels of Commonwealth government, by virtue of the trustee responsibilities imposed by the Environmental Rights Amendment, to ensure that this potential does not become a reality.

Frederick, 196 A.3d at 714 (Ceisler, J., dissenting).

As for *DRN*, that case is easily distinguishable here, as the Court explicitly "decline[d] to embrace Plaintiffs' arguments based on the Township's constitutional duties to protect public natural resources, as embodied in the ERA and discussed recently by our Supreme Court in *Robinson Township II* and *PEDF*" primarily because those cases "do not deal with public utility services and facilities regulated by the PUC, and they are distinguishable for this important reason." *DRN*, 179 A.3d at 695-6.

formulation, interpretation and enforcement of statutes, regulations, ordinances and other legislation as well as decisional law.”).

V. Sections 301, 302, 303, and 306 of the Charter Are Not *De Facto* Zoning.

Flowing from the fact that the ERA gives rise to independent rights and duties is the fact that Sections 301, 302, 303, and 306 of the Charter are not *de facto* zoning constrained by the MPC. DEP claims that using the MPC to pass a zoning ordinance is Grant’s “only remedy” (DEP Br. at 23) – an unfounded interpretation of the statutory language as applied to zoning ordinances, given that the statute says “may,” not “must.” 53 P.S. § 10601; DEP Br. at 12. Grant is certainly not limited to the MPC in exercising its right to pass the Charter. Since the Charter is not a *de facto* zoning ordinance, Grant did not need to follow the MPC procedures.

The attached Declaration of Jon Perry, Chairman of the Grant Township Board of Supervisors, underscores the import of how and why the people enacted the Charter’s prohibitions, and Grant Township is defending these provisions. *See generally* Perry Decl. Chairman Perry further explains why due to its rural character, small population, and limited budget, Grant Township, like many small townships in rural Pennsylvania, has determined that zoning is unnecessary, impractical, and infeasible. Perry Decl. at ¶¶ 15-17.

The concept that a Township may enact zoning laws pursuant to its police powers is separate and apart from whether the people can enact laws by popular

vote to protect their environmental rights and whether townships have corresponding or complementary public trustee duties to defend and enact such laws. This is further illustrated by the fact that challenges to zoning laws often consider how the law relates to, or impacts, constitutionally protected property rights. *See In re Realen Valley Forge Greenes Assocs.*, 838 A.2d 718, 729 (Pa. 2003) (“Hence, the function of judicial review, when the validity of a zoning ordinance is challenged, is to engage in a meaningful inquiry into the reasonableness of the restriction on land use in light of the deprivation of landowner’s freedom thereby incurred.”).

The Charter provisions at issue here realize constitutional rights set forth in the ERA. That means that one of the primary tests developed by the courts for determining the validity of zoning laws would be inapplicable. That test weighs the zoning law against private property rights.¹² In weighing the validity of a zoning ordinance, courts consider such matters as whether it was enacted for a proper public purpose. That is entirely different than the question presented by this case – whether the Charter provisions advance people’s constitutionally protected environmental rights and the Township’s public trustee duties.¹³

¹² *See, e.g., Roddick v. Lower Macungie Zoning Bd.*, 39 Pa. D. & C.2d 529, 532 (Pa. Com. Pl. 1966) (“The power to thus regulate does not extend to an arbitrary, unnecessary or unreasonable intermeddling with the private ownership of property, even though such acts be labeled for the preservation of health, safety, and general welfare ...”).

¹³ Indeed, provisions of the MPC not at issue here, such as those preventing unreasonable restrictions on forestry and mineral development, may very well be subject to challenge, or found

DEP quotes a significant portion of *Robinson Twp. v. Com.*, 147 A.3d 536 (Pa. 2016) (“*Robinson IV*”) for its point that “Municipalities that propose to exclude a land use entirely must do so pursuant to the requirements of the MPC by enacting zoning ordinances.” DEP Br. at 10-12. However, this does not apply to Grant’s Charter, for the following reasons:

“Zoning ordinance” and “land use ordinance” are used interchangeably by Pennsylvania courts. *See, e.g., Messina v. East Penn Twp.*, 995 A.2d 517, 520 n. 3 (Pa. Cmwlth. 2010). Local jurisdictions are required to comply with the MPC when enacting land use ordinances within their jurisdictions. Section 107 of the MPC defines “land use ordinance” as “any ordinance or map adopted pursuant to the authority granted in Articles IV, V, VI and VII.” 53 P.S. § 10107. Article IV of the MPC provides for the adoption of official maps, Article V provides for the adoption of subdivision and land development ordinances, Article VI provides for the adoption of zoning ordinances and maps, and Article VII provides for the adoption of ordinances regulating the development of Planned Residential Developments. 53 P.S. § § 10401-10408, 10501-10516, 10601-10621, 10701-10713. Grant Township’s Home Rule Charter is none of these. Therefore, DEP’s argument that *Robinson IV* stands for the proposition that Grant should have followed the MPC in enacting its Charter is without merit.

invalid, under the ERA. *See* 53 Pa. Stat. Ann. § 10603(f) (“Zoning ordinances may not unreasonably restrict forestry activities.”) and (i) (“Zoning ordinances shall provide for the reasonable development of minerals in each municipality”).

In fact, *Robinson IV* actually supports Grant’s actions of banning the deposition of fracking waste in the Township. In *Robinson IV*, the Court declined an invitation to revisit and “disavow” its reasoning in *Robinson II* that a number of Act 13 provisions violated the ERA. *Robinson IV*, 147 A.3d at 566-67. As set forth above, under the ERA, Grant Township must act affirmatively via legislative action to protect the environment. *See Robinson II* at 952 (“the constitutional obligation [of the ERA] binds all government, state or local, concurrently.”); *id.* at 953 (“The benchmark for decision is the express purpose of the Environmental Rights Amendment to be a bulwark against actual or likely degradation of, *inter alia*, our air and water quality.”).

Pointing out the statutory language that a “municipality” *may* (not must) enact zoning in accordance with the MPC,¹⁴ DEP argues that the Home Rule Charter is unlawful because it does not “merely regulate how an activity could occur in the municipality, but rather totally prohibit[s] a specific activity [deposition of waste fluids from oil and gas operations] anywhere in Grant Township.” DEP Br. at 15. For this proposition, DEP cites *IA Const. Corp. v. Twp. of Bradford*, 598 A.2d 1347 (Pa. Cmwlth. 1991). However, this case explicitly states: “The distinctive characteristic of zoning involves zones....” *IA Const Corp* at 307.

¹⁴ 53 P.S. § 10601; DEP Br. at 12.

DEP appears to be arguing that because the Charter prohibits frack waste disposal anywhere in Grant Township – and anywhere is a place – that therefore the Charter is really a *de facto* zoning law. The logical conclusion of this argument would be that any law that prohibits an activity anywhere in a town is a zoning law. This is plainly absurd.

DEP also argues that because the Charter’s purposes include protection of natural resources and this “mirror[s] 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...” that therefore “the Home Rule Charter’s purposes are typical of zoning purposes under the MPC.” DEP Br. at 16. This language is also mirrored in the Pennsylvania Constitution. Is every law that includes such language then a zoning law? Of course not.

Again, 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 at 12-13, 16.

For the foregoing reasons, the people properly enacted the Charter provisions independent of, and unconstrained by the MPC, and the Charter’s prohibition against the disposal of fracking waste, and related provisions, are not *de facto* zoning.

CONCLUSION

For the reasons set forth above, Grant Township respectfully requests that this Honorable Court deny DEP's Application and allow Grant Township's Counts 3 and 4 to proceed.

Dated: March 21, 2019

Respectfully submitted,

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FOR GRANT TOWNSHIP OF INDIANA
COUNTY AND THE GRANT TOWNSHIP
SUPERVISORS

CERTIFICATION OF COMPLIANCE WITH WORD COUNT

I, Karen Hoffmann, hereby certify that the foregoing Brief of Respondents contains fewer than 14,000 words as prescribed by Pa.R.A.P. 2135(a). Excluding the parts of the Brief that are exempted by Pa.R.A.P. 2135(b), there are 6,805 words in the Brief, as counted through the use of Microsoft Word.

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