

December 2020 federal lawsuit against the Township, purportedly on partially the same state law grounds as the present case.

We conclude that neither DEP’s petition for review nor the Township’s remaining counterclaims are moot, that a stay of the proceedings is not warranted, and that the parties must proceed to trial of the instant case. Because we deny the Township’s application its praecipe to withdraw is moot. Accordingly, we direct the Office of Chief Legal Counsel to schedule a status conference to discuss the scheduling of a prompt trial of this matter.

The relevant background is as follows. In June 2014, the Township in its former capacity as a second-class township passed an ordinance defining the phrase “depositing of waste from oil and gas extraction” and prohibiting that activity. PGE challenged the validity of the ordinance in federal court. Subsequently, PGE sought a permit from DEP for a change-in-use well permit seeking to convert an existing natural gas well into an underground injection disposal well for the disposal of brine and other oil and gas waste, which would violate the ordinance. DEP suspended review of the well permit pending the outcome of the federal litigation. In October 2015, the federal court ruled, in relevant part, that the ordinance provisions violated the Second Class Township Code¹ and were unlawfully exclusionary. In November 2015, the Township voted to change to a Home Rule Charter form of government. The Charter included a definition of “depositing of waste from oil and gas extraction” and at least four sections effectively prohibiting such activity.

In March 2017, DEP granted PGE’s application for a change-in-use well permit and filed a petition for review challenging the Charter insofar as it prohibited oil and gas waste fluid injection wells and precluded application of state

¹ Act of May 1, 1933, P.L. 103, *as amended*, 53 P.S. §§ 65101-68701.

laws pertaining to depositing waste from oil and gas extraction when they conflict with the Charter. The petition for review seeking declaratory and injunctive relief against the Township included five counts: Count I - Declaratory Judgment (Express Preemption); Count II – Declaratory Judgment (Implied Preemption); Count III - Declaratory Judgment (Violation of Home Rule Charter and Optional Plans Law²); Count IV – Declaratory Judgment -Sovereign Immunity; and Count V - Injunctive Relief. In short, DEP sought declaratory relief that state laws such as the 2012 Oil and Gas Act³ (Oil and Gas Act) and the Solid Waste Management Act (SWMA)⁴ preempt the Charter’s prohibition on oil and gas waste fluid injection wells.

In addition to the petition for review, DEP filed an application for expedited special relief seeking to enjoin enforcement of Section 303 of the Charter providing that any corporation or government that violates the Charter shall be guilty of a summary offense. On April 10, 2017, this Court entered a Stipulated Order enjoining the implementation and enforcement of Section 303 against the Commonwealth, its agencies and its employees acting within the scope of their employment pending final disposition of the petition for review.⁵

The Township filed an answer, new matter, and five counterclaims. In its new matter, the Township noted PGE’s numerous past and current violations of environmental regulations and accused DEP of failing to protect the health, safety, and welfare of the citizenry, including their right to clean air, water, and soil. The

² 53 Pa.C.S. §§ 2901-2984.

³ Act of February 14, 2012, P.L. 87, 58 Pa.C.S. §§ 3201-3274.

⁴ Act of July 7, 1980, P.L. 380, *as amended*, 35 P.S. §§ 6018.101-6018.1003.

⁵ The doctrine of sovereign immunity has been waived only in the instances enumerated in what is known as the Sovereign Immunity Act, 42 Pa.C.S. § 8222. Pursuant to Section 2310 of the Pennsylvania Consolidated Statutes, the “Commonwealth, and its officials and employees acting within the scope of their duties, shall continue to enjoy sovereign immunity and official immunity and remain immune from suit except as the General Assembly shall specifically waive the immunity.” 1 Pa.C.S. § 2310.

Township alleged that DEP waived and/or should be estopped from asserting preemption based on those failures. Additionally, the Township alleged that DEP failed to exercise its independent judgment and permitted itself to be unduly influenced by corporate interests in both issuing the well permit to PGE and initiating legal action.

In its counterclaims, the Township sought the following declarations: (1) that the Charter is a valid law adopted pursuant to the people's right to self-government; (2) that interpreting the Oil and Gas Act and SWMA as preempting the Charter would violate the people's right; (3) that the Charter is a valid law pursuant to the Environmental Rights Amendment (ERA);⁶ (4) that DEP has violated the ERA by failing to protect and advance the rights protected by the amendment and by attempting to prevent the Township from exercising, advancing and protecting its rights under the same; and (5) that DEP violated the provisions of the Charter prohibiting the activity in question and is therefore subject to penalties. DEP filed preliminary objections to the new matter and all five counterclaims.

In *Department of Environmental Protection v. Grant Township of Indiana County and The Grant Township Board of Supervisors*, (Pa. Cmwlth., No. 126 M.D. 2017, filed May 2, 2018) ("*Grant Township I*"), this Court, in a single judge opinion by Senior Judge Leadbetter, sustained DEP's preliminary objections in part, with respect to counterclaims 1, 2, and 5, struck specific paragraphs of the Township's new matter, and directed DEP to file and serve its answer to the remaining counterclaims, counts 3 and 4, within thirty days. She noted that the Township in the remaining counts challenged the constitutionality of certain provisions of the Oil and Gas Act and SWMA and, if it was to prevail, those statutory provisions could not serve preempt a local ordinance or Charter. She reasoned:

⁶ PA. CONST. art. I, §27.

[Counterclaims] 3 and 4 . . . are based, in addition to the right of self government, on the [ERA] of our Pennsylvania Constitution. If the Township at trial is able to prevail on its claim in [Counterclaim] 3 that the 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 [Counterclaim] 4 that these statutes are being unconstitutionally applied by DEP, an injunction could issue. We cannot say at this time that the Counterclaims asserted in Counts 3 and 4 are so clearly without merit that they must be preliminarily dismissed. 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 [Petition for Review]. Accordingly, this demurrer must be overruled and the issue must await further proceedings.

Grant Township I, slip op. at 15-16.

In December 2018, DEP filed an application for summary relief seeking to dismiss the Township's remaining constitutional counterclaims because statutory relief for enacting land protection measures was available, namely via the Pennsylvania Municipalities Planning Code.⁷ The Township filed an answer seeking denial of the application based on the determination in *Grant Township I* that the counterclaims should move forward and alleging that DEP should have raised this argument in its preliminary objections such that it was improperly seeking reconsideration.

Following argument before a panel of three judges, the Court denied DEP's application in *Department of Environmental Protection v. Grant Township of Indiana County and The Grant Township Board of Supervisors*, (Pa. Cmwlth.,

⁷ Act of July 31, 1968, P.L. 805, *as amended*, 53 P.S. §§ 10101-11202.

No. 126 M.D. 2017, filed March 2, 2020) (“*Grant Township II*”), reasoning that the Court in *Grant Township I* already rejected DEP’s argument that the Township could not proceed with constitutional defenses to its preemption claims and that if the Township was able to prevail on Counterclaims 3 and 4 at trial, then the unconstitutional provisions of the Oil and Gas Act and SWMA could not serve to preempt local ordinances and DEP could be enjoined from enforcing them; and an injunction could issue due to DEP’s unconstitutional application of the statutes. *Grant Township II*, slip op. at 7-8. The Court noted: “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 [ERA], and therefore that they are powerless to preempt the Township’s Charter.” *Id.*, slip op. at 9 (quoting *Grant Township I*, slip op. at 16). Accordingly, the Court stated:

[T]he Township seeks to prove that hydrofracking and disposal of its waste is so dangerous to the environment as to be in violation of the [ERA], and thus that the statutes upon which DEP bases its preemption claims are constitutionally invalid. While the Township may or may not be able to prevail on its constitutional claims, this Court has already ruled that it may attempt to do so in defense of DEP’s lawsuit, and this application for summary relief is nothing more than a collateral attack on that decision.

Id.

In the Township’s September 2020 application to dismiss DEP’s petition for review as moot, the Township asserted that DEP’s rescission of PGE’s well permit represented an intervening change in the facts such that DEP no longer had a legally cognizable interest in the outcome and that the Court lacked jurisdiction

to render a decision pursuant to the Declaratory Judgments Act.⁸ The Township also noted prior precedent holding that courts should only address constitutional questions where necessary and should not deal with such questions abstractly. *E.g.*, *Integrated Biometric Tech., LLC v. Dep't of Gen. Servs.*, 22 A.3d 303, 308 n.9 (Pa. Cmwlth. 2011).

On October 15, 2020, DEP filed a combination application to stay or to dismiss the proceedings without prejudice *and* an answer to the Township's application. In its application, DEP cited the intervening event of the rescission and requested a stay of the current proceeding during the pendency of PGE's EHB appeal. Alternatively, DEP requested that we dismiss the Township's remaining counterclaims without prejudice based on the lack of a case or controversy. Should we dismiss the remaining counterclaims, DEP would not oppose the dismissal of its petition for review, also without prejudice. In its answer to the Township's application, however, DEP stated its opposition to dismissing only one party's claims. Instead, if the Court decides that the matter is moot, DEP asserts that the Court should dismiss both DEP's petition for review and the Township's counterclaims.

In response, the Township argues that a stay is not necessary. In support, it asserts that (1) this matter has been pending before the Court for more than three years, with briefing, multiple arguments, and discovery; (2) the interests of equity and judicial economy warrant this Court addressing any issues that are the same as those raised in the EHB appeal;⁹ and (3) some of the remaining issues are

⁸ 42 Pa.C.S. §§ 7531-7541.

⁹ According to the Township, the EHB granted a stay of PGE's EHB appeal for six months pending resolution of the instant matter. Additionally, the Township asserts that another EHB appeal, Hellbenders' Permit Appeal, has been stayed pending resolution of PGE's EHB appeal. (Township's Nov. 12, 2020 Answer at 4-5 ns.4 and 6.)

entirely unrelated to the EHB appeal. Additionally, it maintains that its counterclaims are not moot, despite DEP's rescission, because the permit could be reissued or another permit for a different fracking waste injection well could be issued. Assuming *arguendo* that the matter is moot, the Township argues that the exceptions to the mootness doctrine would apply despite DEP's decision to retreat from its initial position and to rescind PGE's well permit based on the Charter's prohibition because "[a] defendant's voluntary cessation of allegedly unlawful conduct ordinarily does not suffice to moot a case." (Township's Nov. 12, 2020 Answer at 7) [citing *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs. (TOC), Inc.*, 528 U.S. 167, 174 (2000)].

A court may dismiss a case for mootness at any time "because generally, an actual case or controversy must exist at all stages of the judicial or administrative process." *Pa. Liquor Control Bd. v. Dentici*, 542 A.2d 229, 230 (Pa. Cmwlth. 1988). An actual case or controversy exists when there is a real legal controversy that is not hypothetical; the legal controversy affects an individual in a concrete manner thereby providing the factual predicate for a reasoned adjudication; and the legal controversy has sufficiently adverse parties. *Mistich v. Pa. Bd. of Prob. & Parole*, 863 A.2d 116, 119 (Pa. Cmwlth. 2004). When an intervening change in the facts of a case or the applicable law deprives a litigant of a necessary stake in the outcome, a case can become moot even after a lawsuit has commenced. *In re Gross*, 382 A.2d 116, 119-20 (Pa. 1978). Mootness "stands on the predicate that a subsequent change in circumstances has eliminated the controversy so that the court lacks the ability to issue a meaningful order, that is, an order that can have any practical effect." *Burke ex rel. Burke v. Indep. Blue Cross*, 103 A.3d 1267, 1271 (Pa. 2014). Exceptions to the mootness doctrine include matters capable of repetition but likely to evade review, matters of great public importance, and matters

involving an issue that is important to the public interest or where a party will suffer some detriment without a court decision. *Pilchesky v. Lackawanna Cty.*, 88 A.3d 954, 964-65 (Pa. 2014).

We conclude that neither DEP's petition for review nor the Township's remaining counterclaims are moot because more than the single permit at issue in administrative process before the EHB remains in dispute here. DEP's case encompasses at least two larger issues. The first is whether two state statutes preempt the Charter such that the Township cannot use the Charter to preclude the application of state laws pertaining to depositing waste from oil and gas extraction when they conflict with the Charter. The second is whether sovereign immunity proscribes the Township from implementing and enforcing Section 303 of the Charter, imposing fines on any government violating the Charter.

As for the Township's remaining counterclaims, several issues also remain. The first pertains to the legality of the two state statutes upon which DEP bases its preemption claims. As DEP summarized:


To address the [Township's] Constitutional Challenge, the parties and this Court would need to scrutinize whether the text and implementation of two state environmental statutes (the Oil and Gas Act and [SWMA]) are constitutional to the extent that they preempt the enforcement of the Charter. The sections of those laws that survive constitutional scrutiny would then be subjected to this Court's preemption analysis, as outlined in [*Grant Township I*, slip op. at 13-15].

(DEP's Dec. 3, 2018 Application to Dismiss Grant Township's Constitutional Claims, ¶ 15 at 4-5.) Second, the Township seeks a declaration that the Charter is a valid law under the ERA and has asserted that DEP has violated the ERA by failing to protect and advance the rights protected by the ERA and by attempting to prevent

the Township from exercising, advancing, and protecting its rights under the same. To reiterate our previous holding: “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 [Petition for Review].” *Grant Township I*, slip op. at 15-16.

It is clear from the positions stated by the parties in the applications now before us that the controversy between the parties has not ended, but only been temporarily suspended. Indeed, DEP states that its complaint and the Township’s counterclaims should either be stayed or dismissed without prejudice “should a case or controversy [i.e., another well permit, or the one lately rescinded, should the EHB decide its appeal in favor of PGE] arise in the future.” (Application to Stay, p. 1) Consequently, an actual case or controversy remains, albeit temporarily latent, and the intervening events of the rescission of the well permit and the ensuing EHB appeal did not deprive either party of a necessary stake in the outcome of the instant case.

Accordingly, we deny the Township’s application to dismiss DEP’s petition for review for mootness and deny DEP’s application to stay proceedings due to an intervening event, or in the alternative, to dismiss the Township’s counterclaims. We direct the Office of Chief Legal Counsel to schedule a status conference to discuss scheduling of a prompt trial of this matter.



BONNIE BRIGANCE LEADBETTER,
Senior Judge

