

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL
PROTECTION,

Petitioner,

v.

No. 126 M.D. 2017

GRANT TOWNSHIP OF INDIANA COUNTY
and THE GRANT TOWNSHIP SUPERVISORS,

Respondents.

**GRANT TOWNSHIP’S ANSWER TO DEPARTMENT’S
APPLICATION TO STAY, OR IN THE ALTERNATIVE,
DISMISS GRANT TOWNSHIP’S COUNTERCLAIMS**

INTRODUCTION

On September 21, 2020, Respondents Grant Township of Indiana County and the Grant Township Supervisors filed an Application in the Nature of a Motion to Dismiss Petitioner’s Claims for Mootness, and an accompanying Memorandum of Law. The Township argues that the Department of Environmental Protection’s Petition should be dismissed as moot because, since the Department rescinded the fracking waste injection permit, there is no longer a live controversy, and the Court lacks jurisdiction under the Pennsylvania Declaratory Judgments Act.

On October 15, 2020, the Department filed its Answer to Grant Township’s Application, along with its own “Application to Stay Proceeding Due to

Intervening Event, or in the Alternative, Dismiss Grant Township's Counterclaims." The intervening event is the Department's rescission of the permit, and the ensuing appeal of the rescission before the Environmental Hearing Board by Pennsylvania General Energy Co., LLC ("PGE").

As a preliminary matter, Grant Township notes that the pleadings and Opinions of the Court referenced in the Department's Application speak for themselves. Once again, Grant Township denies the Department's characterization of a single paragraph of the Court's May 2, 2018 Opinion as the sole reason for declining to sustain the Department's preliminary objections to the Township's counterclaims.¹ In denying the Department's objections to Counts 3 and 4, this Court stated: "DEP takes background information regarding the permit to *misconstrue the Township's much broader general Counterclaims* regarding the validity of its Charter, ... [including] the duties under the Environmental Rights Amendment." May 2, 2018, Opinion at 12-13 (emphasis added).

As in its preliminary objections and its previous motion to dismiss, the Department is again attempting to misconstrue the Township's claims. The question at issue in this case is not solely whether certain provisions of the Oil and Gas Act and the Solid Waste Management Act ("SWMA") are unconstitutional.

¹ See Respondents' Answer to Petitioner's Application for Summary Relief to Dismiss Grant Township's Constitutional Claims Because Statutory Relief is Available at 5.

This Court has held that: “It is clear that the Township seeks a declaration the Oil and Gas Act, the SWMA, *and DEP’s enforcement of these statutes*, violate the Environmental Rights Amendment, and therefore that they are powerless to preempt the Township’s Charter.” *Id.* at 16 (emphasis added).

In response to the Department’s Application, first, Grant Township respectfully submits that the Commonwealth Court need not stay these proceedings pending the permit rescission appeal at the Environmental Hearing Board. This case has been pending before the Court for more than three years, with briefing and multiple arguments, and discovery conducted by both parties. The issues before the Court here that are also raised in PGE’s appeal should be resolved in this Court in the interest of judicial economy. Moreover, some issues before this Court are entirely unrelated to the appeal before the Board.

Second, Grant Township’s counterclaims are not moot. In its counterclaims, the Township asks the Court to find that the Charter provisions at issue are valid enforcements of constitutional rights that cannot be preempted by state statute, and moreover alleges that the Department has violated its constitutional public trustee duties to all Pennsylvanians, including Grant Township.

Finally, even if Grant’s counterclaims are found to be moot, they fall under a mootness exception, as they are capable of repetition yet evading review and involve matters of great public importance and interest.

ARGUMENT

I. The Case Should Not Be Stayed.

There is no need for a stay in this case pending PGE's appeal of the Department's permit rescission at the Environmental Hearing Board, filed April 16, 2020.² Significantly, issues before the Court here are also raised in the Board appeal.

In its appeal, PGE argues that the Department unlawfully rescinded the permit because, *inter alia*, “[t]he Township’s remaining legal argument in the Commonwealth Court to justify the Home Rule Charter, *viz*, that Act 13 and the Solid Waste Management Act are unconstitutional, is untenable.”³

Another appeal of the Yanity Well permit pending at the Board, filed by the East Run Hellbenders Society,⁴ was also stayed pending the outcome of the instant case before this Court. The Hellbenders and the Department

informed the Board of the legal arguments pending in the Department’s action against Grant Township in the Commonwealth Court that bear on the validity of the Home Rule Charter as it relates to the Well Permit under appeal and asked the Board to stay proceedings and continue the appeal until the Commonwealth Court issued an opinion.⁵

² EHB Docket No. 2020-046-R (“PGE Rescission Appeal”).

³ PGE Rescission Appeal, Exhibit B to Notice of Appeal (Apr. 16, 2020) at 9. Grant Township would note that this is not the only remaining argument in its counterclaims, as described more fully in Section II, below.

⁴ EHB Docket No. 2017-032-R (consolidated with 2018-045-R) (“Hellbenders Permit Appeal”).

⁵ PGE Rescission Appeal, Exhibit B to Notice of Appeal (Apr. 16, 2020) at 7.

In that appeal, the parties jointly requested a stay before the Board for the following reasons:

Because there are legal arguments in the instant appeal before the Board which are pending in the Commonwealth Court in a closely related case, namely the validity of the Grant Township Home Rule Charter as a local ban on the permitted activity at issue in this Appeal, all Parties jointly request a stay of the Board proceedings for a period of six months to allow the Commonwealth Court to resolve these issues. ... [A] stay in this appeal for a period of six months will give the Commonwealth Court time to consider the relevant legal issues, serve the interests of judicial economy, and *avoid possibly conflicting opinions regarding an important legal issue concerning the Environmental Rights Amendment, the constitutionality of the Oil and Gas Act and the Solid Waste Management Act, and the lawfulness and constitutionality of the Home Rule Charter.*⁶

In the interest of judicial economy and given the balance of equities, it is preferable that this Court decide these issues. The instant proceeding has been going on for more than three years, during which time there has been briefing and argument, and both sides have served and received responses to discovery requests.

Notably, the Department served 51 pages of discovery requests on Grant Township on April 22, 2020 – *after rescinding the permit* – to which Grant has duly responded.

The Department itself states that the Environmental Hearing Board proceeding could result in the reinstatement of the permit, “which could be several

⁶ Hellbenders Permit Appeal, Joint Motion for Stay of Proceedings (Sep. 11, 2018) (emphasis added). The Hellbenders’ appeal is now stayed pending the PGE Rescission Appeal.

years from now.” Pet’r’s App. at 9. Currently, the parties are due to submit a status report by November 30, 2020; all discovery shall be completed by January 14, 2021; and all dispositive motions are to be filed by February 12, 2021.⁷

However, those deadlines have already been extended once, and may be extended in the future. PGE has stated that it is seeking a buyer for the Yanity well, and “the buyer will decide whether to step into PGE’s shoes to continue with this appeal.”⁸ PGE requested the extension “to allow discussions with potential buyers to continue to better determine the likely future of this appeal.”⁹

For the foregoing reasons, the Department’s request for a stay should be denied.

II. Grant Township’s Counterclaims Should Not Be Dismissed.

Grant Township respectfully submits that the Court should find that their claims are not moot because an “actual case or controversy” exists. However, if the Township’s claims are found to be moot, they still fall within recognized exceptions to the mootness doctrine: they are capable of repetition and likely to evade review, and they involve matters of great public importance.

⁷ PGE Rescission Appeal, Order, Sep. 16, 2020.

⁸ PGE Rescission Appeal, Joint Status Report and Motion to Extend Prehearing Deadlines, Sep. 16, 2020.

⁹ *Id.*

A. Grant Township’s Counterclaims are not moot because an ‘actual case or controversy’ still exists.

This Court has stated that an actual case or controversy is found where the following exist: (1) a legal controversy that is real and not hypothetical, (2) a legal controversy that affects an individual in a concrete manner so as to provide the factual predicate for a reasoned adjudication, and (3) a legal controversy with sufficiently adverse parties so as to sharpen the issues for judicial resolution. *Mistich v. Pa. Bd. of Prob. & Parole*, 863 A.2d 116, 119 (Pa. Cmwlth. 2004).

The Environmental Rights Amendment (“ERA”), Article I, Section 27 of the Pennsylvania Constitution, secures the right of Pennsylvanians to clean air and water, and enshrines a duty to protect those resources as a public trustee. Grant Township still has that duty, as does the Department. Grant Township’s counterclaims are not moot despite the permit rescission, since the permit could be re-issued, or another permit for another fracking waste injection well could be issued. Moreover, the Department continues to fail in its duty.

“A defendant’s voluntary cessation of allegedly unlawful conduct ordinarily does not suffice to moot a case.” *Friends of the Earth, Inc. v. Laidlaw Env’tl. Servs. (TOC), Inc.*, 528 U.S. 167, 174 (2000). In other words, “a defendant cannot automatically moot a case simply by ending its unlawful conduct once sued.” *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013). “Otherwise, a defendant

could engage in unlawful conduct, stop when sued to have the case declared moot, then pick up where he left off, repeating this cycle until he achieves all his unlawful ends.” *Nike*, 568 U.S. at 91. Doing so would “leave [t]he defendant free to return to his old ways.” *City of Mesquite v. Aladdin’s Castle, Inc.*, 455 U.S. 283, 289 n.10 (quotation marks omitted, alteration in original). Thus, it is well settled that a defendant’s voluntary cessation of a challenged practice does not deprive a court of its power to determine the legality of the practice. *Friends of the Earth, Inc.*, 528 U.S. at 189; *see City of Mesquite*, 455 U.S. at 289.

“Given this concern, our cases have explained that ‘a defendant claiming that its voluntary compliance moots a case bears the formidable burden of showing [*13] that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur.’” *Nike*, 568 U.S. at 91 (quoting *Friends of the Earth, Inc.*, 528 U.S. at 190).

Here, the Department claims that its rescission of the permit has mooted Grant Township’s counterclaims about the constitutionality of the Oil and Gas Act and the SWMA, as well as the Department’s violation of its duties. But the Department has failed to clearly show that its issuance of a permit in violation of Grant Township’s Charter could not reasonably be expected to recur.

Indeed, the Department asks for a stay because the permit rescission could either be upheld by the Board (“and, if any appeals thereof, by the courts”); or it

could be overturned by the Board, and the permit would be back in effect “at that time, which could be several years from now.” Department’s Application to Stay or Dismiss at 9.

Even without the permit in effect, Grant Township still has a case or controversy with the Department, which, as a Pennsylvania grand jury found earlier this year, is not adequately protecting the Township or other Pennsylvanians from environmental harm. The grand jury found the Department “did not take sufficient action in response to the fracking boom.”¹⁰ Pennsylvania Attorney General Josh Shapiro stated regarding the report: “It’s the government’s job to set and enforce the ground rules that protect the public interest. Through multiple administrations, they failed.”¹¹

This Court already found that “scientific and historical evidence regarding environmental issues, and evidence of DEP’s actions, may be necessary to fully adjudicate these counterclaims....” May 2, 2018, Opinion at 16. Remaining factual issues include the following:

- The materials in the fracking disposal waste at issue are not known even to the Department. The Material Safety Data Sheet identifies

¹⁰ Reid Frazier and Susan Phillips, “Pa. grand jury report on fracking: DEP failed to protect public health” (StateImpact Pennsylvania, June 25, 2020).

¹¹ *Id.*

them only by generic descriptions, and instead of giving a CAS number, they are listed as “Trade secret.”¹²

- The Department has never denied an application for a permit that would allow, in whole or in part, the injection of fracking waste in a well.¹³
- The Department 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.¹⁴

This failure was vividly illustrated just last month when, in a conventional oil and gas well operated by PGE in Grant Township, less than a quarter mile from the Yanity well, a spill occurred that contaminated a large quantity of land.¹⁵ The Township received no alert of the spill from either PGE or the Department. The Department is continuing to fail to protect the people of Grant Township.

¹² See Respondents’ Memorandum in Opposition to Petitioner’s Application for Summary Relief to Dismiss Grant Township’s Constitutional Claims Because Statutory Relief is Available, 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).

¹³ See Hoffmann Decl., Exh. B at 32 (DEP Answer to Interrogatory No. 12).

¹⁴ See *id.* at 39 (DEP Answer to Interrogatory No. 18).

¹⁵ The J. Elmer Lockhart well apparently had not been inspected since 1998. See https://www.ahs.dep.pa.gov/eFACTSWeb/searchResults_singleSite.aspx?SiteID=485798. Upon inspection on October 6, 2020, the Department noted violations including failure to follow the required hierarchy for corrective actions to mitigate excess pressure, and failure to equip the well with casing sufficient to prevent blowouts, explosions, and fires.

Because the Department could issue another permit for fracking waste injection in Grant Township, or the Yanity permit could be reissued, and moreover is continually failing to protect the environment in Grant Township, a controversy capable of producing harm to the Township still exists. Therefore, the Department's Application should be denied so that the material facts can be presented to this Court and, if disputed, a trial may be held. Grant Township's counterclaims should not be dismissed for mootness.

III. Respondents' Counterclaims Fit Within Recognized Exceptions to the Mootness Doctrine.

If Grant Township's counterclaims are found to be moot, they nevertheless fall within well recognized exceptions to the mootness doctrine:

(1) for matters of great public importance and (2) for matters capable of repetition, which are likely to elude review. *See Rendell v. State Ethics Com'n*, 983 A.2d 708, 719 (Pa. 2009). Moreover, we have found this exception applicable where a case involves an issue that is important to the public interest or where a party will suffer some detriment without a court decision. *Com., Dept. of Environmental Protection*, 32 A.3d at 651-652.

Pilchesky v. Lackawanna Cty., 88 A.3d 954, 954-965 (Pa. 2014).¹⁶

¹⁶ In its Answer to Grant Township's Application to Dismiss for Mootness, the Department does not argue that its Petition falls under a mootness exception.

A. The issues raised by Grant Township are capable of repetition yet likely to evade review.

The first element of this exception is that the duration of the challenged action is too short to be fully litigated prior to its cessation or expiration. *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975) (*per curiam*); *Com. v. Buehl*, 462 A.2d 1316, 1319 (Pa. Super. 1983). The second is that parties *or others similarly situated* are at risk of being subjected to the challenged action. *See, e.g., Dep't of Env'tl. Prot. v. Cromwell Twp., Huntingdon Cty.*, 32 A.3d 639, 651-652 (Pa. 2011); *Rivera v. Pa. Dep't of Corrections*, 837 A.2d 525, 528 (Pa. Super. 2003).

As described above, another permit could be issued in Grant Township, or the Yanity well permit could be reissued pursuant to a decision by the Board -- be it “several years from now,” or after a hearing at the conclusion of motions practice, as soon as next February. There is no definitive way of knowing how long the Board proceedings will take.

Moreover, Pennsylvania courts have repeatedly recognized that the “capable of repetition” exception applies not only to the parties in the initial action, but to others who may suffer similarly in the future. In a case involving township supervisors facing incarceration for contempt of court, the Pennsylvania Supreme Court held that even if the case were moot because none of the original supervisors were still in their posts, the case still fell within a mootness exception in part

because “it is possible that successor supervisors similarly face incarceration”
Cromwell Twp., Huntingdon Cty., 32 A.3d at 651-652.

Here, other municipalities who pass Home Rule Charters banning the disposal of fracking waste could be sued by the Department under SWMA and the Oil and Gas Act, whereupon the same issues would be in front of the Court.

For the foregoing reasons, Grant Township’s counterclaims fall within the scope of the “capable of repetition” exception.

B. The issues raised by Grant Township are important to the public interest.

Pennsylvania courts have recognized an exception to the mootness doctrine for issues of public importance, *Pilchesky*, 88 A.3d at 964-965, and have applied this exception across a variety of issues. *See, e.g., Mifflin Cty. Sch. Dist. v. Stewart by Stewart*, 503 A.2d 1012 (Pa. Cmwlth. 1986) (although the matter of the treatment of a student who had graduated was moot, the issue was of public importance due to its potential impact on other students across the Commonwealth); *see also Jersey Shore Area Sch. Dist. v. Jersey Shore Ed. Assoc.*, 548 A.2d 1202 (Pa. 1988) (although teachers had returned to work, making an injunction moot, the question of whether the loss of state subsidies was a danger to the public was an issue of public importance and could therefore be reviewed); *SEPTA v. Weiner*, 426 A.2d 191 (Pa. Cmwlth. 1981) (although SEPTA had already

implemented higher fares, the issues raised were of public importance because of their potential impact on residents in the future).

Here, this is a case of great public interest. The Court may recall that residents of Grant Township and surrounding communities turned out in large numbers for the oral argument on Grant Township’s counterclaims in October 2019, and there has been widespread media coverage of the case.¹⁷

As noted above, it is a matter of great public importance whether the Department is adequately protecting Pennsylvanians, including Grant Township,

¹⁷ See, e.g., Colin Deppen, “‘That’s not DEP’s role’: Outrage and localism after state sues towns that banned frack water wells” (PennLive, Mar. 30, 2017), https://www.pennlive.com/news/2017/03/thats_not_deps_role_outrage_an.html; Justin Nobel, “How a Small Town Is Standing Up to Fracking” (Rolling Stone, May 22, 2017), <https://www.rollingstone.com/politics/politics-news/how-a-small-town-is-standing-up-to-fracking-117307/>; Laura Legere, “‘No is no is no’: A tiny township’s fight against oil and gas waste disposal” (Pittsburgh Post-Gazette, Nov. 13, 2017), <https://www.post-gazette.com/business/powersource/2017/11/13/Grant-Township-Indiana-County-Pennsylvania-fight-oil-gas-waste-disposal-underground-shale-fracking/stories/201711120039>; Don Hopey, “Legal battle continues over drilling and fracking wastewater well” (Pittsburgh Post-Gazette, Oct. 5, 2019), <https://www.post-gazette.com/news/2019/10/04/Grant-Township-Legal-battle-drilling-fracking-wastewater-well-state-Department-of-Environmental-Protection/stories/201910040180>; Aaron Skirboll, “Nevertheless, They Persisted: How one small town in Pennsylvania is successfully fighting the fracked gas industry” (Sierra Magazine, Dec. 17, 2019), <https://www.sierraclub.org/sierra/2020-1-january-february/feature/nevertheless-they-persisted-grant-township-pennsylvania-fracking>; Chauncey Ross, “Court sides with Grant Township on injection well” (Indiana Gazette, Mar. 6, 2020), https://www.indianagazette.com/news/court-sides-with-grant-township-on-injection-well/article_4d07e3ac-5fc0-11ea-b34b-37a913e59b86.html; Jon Hurdle, “DEP revokes permit for rural injection well, citing local home rule charter” (StateImpact Pennsylvania, Mar. 27, 2020), <https://stateimpact.npr.org/pennsylvania/2020/03/27/dep-revokes-permit-for-rural-injection-well-citing-local-home-rule-charter/>; Justin Nobel, “Nature Scores a Big Win Against Fracking in a Small Pennsylvania Town” (Rolling Stone, Apr. 1, 2020), <https://www.rollingstone.com/politics/politics-news/rights-of-nature-beats-fracking-in-small-pennsylvania-town-976159/>.

from the harms caused by fracking. Earlier this year, a grand jury found that the Department is not, and the Department's failure to even notify the Township of last month's spill at the Lockhart well illustrates this fact. *See* Section II.A, *supra*.

One key issue in this case is one of first impression for the Court: What authority does a Home Rule Municipality have to enforce its rights under the ERA?

As one article noted: "The decision is bigger than the small town of Grant — other towns in Pennsylvania may be able to follow Grant's lead and use local laws to protect nature and resist the encroachment of the oil and gas industry."¹⁸

CONCLUSION

For the foregoing reasons, the Court should deny the Department's Application. There is no need for a stay. Grant Township's counterclaims are not moot, or if they are found to be moot, they fall within a recognized exception to the mootness doctrine. Therefore, Grant Township respectfully requests that this Honorable Court deny the Department's Application and allow the Township's counterclaims to proceed.

Dated: November 12, 2020

Respectfully submitted,

/s/ Karen Hoffmann
Karen Hoffmann, Esq.

¹⁸ Emily Pontecorvo, "Small town says no to fracking waste" (Grist, Apr. 6, 2020), <https://grist.org/beacon/how-one-town-said-no-to-fracking-waste/>.

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FOR RESPONDENTS GRANT
TOWNSHIP OF INDIANA COUNTY
AND THE GRANT TOWNSHIP
SUPERVISORS

CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

Dated: November 12, 2020

Respectfully submitted,

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