[Cite as *Munroe Falls v. Div. of Mineral Resources Mgt.*, 2010-Ohio-4439.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

City of Munroe Falls, Ohio,	:	
Appellant-Appellant,	:	
v.	:	No. 10AP-66 (C.P.C. No. 09CVF9-14080)
Chief, Division of Mineral Resources Management et al.,	:	(ACCELERATED CALENDAR)
Appellees-Appellees.	:	

D E C I S I O N

Rendered on September 21, 2010

Amer Cunningham Co., *L.P.A.*, *Jack Morrison*, *Jr.*, and *Thomas R. Houlihan*, for appellant.

Richard Cordray, Attorney General, *Molly S. Corey*, and *Daniel J. Martin*, for appellee Chief, Division of Mineral Resources Management, Ohio Department of Natural Resources.

Vorys, *Sater*, *Seymour & Pease LLP*, *John K. Keller*, *Michael J. Settineri*, and *Jocelyn N. Prewitt-Stanley*, for appellee D&L Energy, Inc.

APPEAL from the Franklin County Court of Common Pleas.

SADLER, J.

{¶1} Appellant, city of Munroe Falls ("city"), filed this appeal seeking reversal of a judgment by the Franklin County Court of Common Pleas denying the city's appeal of an order by the Ohio Oil and Gas Commission ("commission"), in which the commission denied the city's appeal challenging a permit issued by the Ohio Department of Natural Resources, Division of Mineral Resources Management ("ODNR"), to intervening appellee, D&L Energy, Inc. ("D&L"), allowing D&L to drill for gas and oil near the Cuyahoga River.

{¶2} The permit in question allowed D&L to drill on property located approximately 400 feet from the Cuyahoga River, and approximately 1200 to 1500 feet upriver from the Cuyahoga Falls well field. The city purchases its drinking water from the city of Cuyahoga Falls, which owns the well field.

{¶3} ODNR initially issued a permit on October 18, 2007. Pursuant to R.C. 1509.05, that permit was valid for a period of 12 months. The city filed an appeal of ODNR's issuance of the permit with the commission, arguing that the drilling for gas and oil could potentially contaminate the city's drinking water. The commission dismissed the appeal as untimely. The city then filed an administrative appeal of the commission's order with the Franklin County Court of Common Pleas, which dismissed the appeal on the grounds that more than 12 months had passed since the issuance of the permit, thus rendering the appeal moot based on the permit's expiration.

{¶4} D&L then filed an application for re-issuance of the permit, which was granted by ODNR on November 17, 2008. The city filed an appeal with the commission, which, on August 20, 2009, affirmed ODNR's issuance of the permit after

conducting a full evidentiary hearing. The city filed an administrative appeal with the Franklin County Court of Common Pleas. On December 29, 2009, the trial court issued a decision stating that it was dismissing the city's appeal. Although the permit had once again expired based on the passage of more than 12 months since the permit's issuance, the court determined that the appeal was not moot because the propriety of issuing the permit was capable of repetition, yet evading review. The court found that the permit issued to D&L was lawful and reasonable, and therefore entered judgment in favor of ODNR and D&L by entry dated January 13, 2010.

{¶5} The city filed this appeal, and asserts three assignments of error:

> FIRST ASSIGNMENT OF ERROR
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> The Common Pleas Court erred in dismissing Munroe Falls' appeal.
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> SECOND ASSIGNMENT OF ERROR
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> The Common Pleas Court evaluated the wrong agency's decision.
>
> THIRD ASSIGNMENT OF ERROR
>
> The Common Pleas Court erred in finding that the Order of the Chief of the Mineral Resources Management Division of the ODNR was lawful and reasonable.

{¶6} As an initial matter, we note that no party asserts, either on appeal or by way of a cross-appeal, that the trial court erred when it found that the expiration of the permit did not render the city's appeal moot because the issues regarding issuance of the permit are capable of repetition, yet evading review. The "capable of repetition, yet evading review" doctrine is an exception to the general rule against deciding moot issues that applies when: (1) the challenged action is too short in duration to be fully

litigated before its expiration, and (2) there is a reasonable expectation that the complaining party will be subjected to the same action in the future. *State ex rel. Cincinnati Enquirer v. Ronan*, 124 Ohio St.3d 17, 2009-Ohio-5947. Under the circumstances of this case, we agree with the trial court's decision that the issues surrounding issuance of the permit in question are capable of repetition, yet evading review, and will therefore address the city's assignments of error.

{¶7} In its first assignment of error, the city argues that the trial court improperly dismissed its appeal. The city points out that, pursuant to R.C. 1509.37, the trial court only had two options: affirm the commission's decision if it found the decision to be lawful and reasonable or vacate or modify the commission's decision if it found the decision to be unlawful or unreasonable. Thus, the city argues that it was improper for the trial court to exercise a third option by dismissing the appeal.

{¶8} Essentially, the city takes issue with the terminology employed by the trial court in its decision. Although the trial court stated that it was dismissing the city's appeal, it is clear from a reading of the trial court's decision that it was properly exercising its review of the city's appeal, and was affirming the decision issuing the drilling permit to D&L, rather than dismissing the appeal.

{¶9} Thus, the city's first assignment of error is overruled.

{¶10} In its second assignment of error, the city argues that the trial court improperly reviewed the wrong agency's decision. Under the statutory scheme for review of drilling permits set forth in R.C. Chapter 1509, applications seeking a drilling permit are to be filed with ODNR's Division of Mineral Resources Management. R.C. 1509.06. Any person adversely affected by a decision on permitting by ODNR may

appeal that decision to the commission, which must hold a hearing and either affirm, modify or vacate the order. R.C. 1509.36. The commission's order may then be appealed to the Franklin County Court of Common Pleas, which must consider the record certified by the commission and either affirm, modify or vacate the commission's order. R.C. 1509.37.

{¶11} The city argues that the trial court's decision states that the court was considering ODNR's order issuing the permit, rather than the commission's order affirming ODNR's order issuing the permit, and was therefore improper under the statutory scheme. First, we note that the trial court stated that it reviewed the record certified by the commission, including the transcript of the hearing before the commission. Thus, it appears that, although referring specifically to ODNR's order granting the permit, the court was properly reviewing the decision by the commission affirming the grant of the permit.

{¶12} Second, assuming that the trial court erred by reviewing the order by ODNR granting the permit, the city bears the responsibility for any confusion surrounding the agency that was the correct party to the appeal. Although the notice of appeal filed by the city with the court of common pleas identified the commission's order as the subject of the appeal, the caption and certificate of service identify the appellees as the Chief of ODNR's Division of Mineral Resources Management and D&L. Nowhere in the notice of appeal is the commission identified as a party to the administrative appeal. Thus, to the extent that there was confusion regarding which agency's order the trial court was reviewing, the city created that confusion by purporting in its notice of

appeal to challenge the decision by ODNR granting the permit, and cannot complain of any error that arose from that confusion.

{¶13} Thus, the city's second assignment of error is overruled.

{¶14} In its third assignment of error, the city argues that the trial court erred when it determined that the drilling permit issued to D&L was reasonable and lawful. Under the statutory scheme set forth in R.C. Chapter 1509, the trial court's review called for the court to determine whether the commission's decision affirming the issuance of the permit was reasonable and lawful. Appellate review of the trial court's decision on an administrative appeal is more limited, with the appellate court being called on to determine whether the trial court abused its discretion in affirming the agency's order. *Martz v. Chief, Div. of Mineral Resources Mgt.*, 10th Dist. No. 08AP-12, 2008-Ohio-4003. The term "abuse of discretion" connotes more than a mere error of judgment, but rather signifies that the trial court's attitude was unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217.

{¶15} R.C. 1509.06(F) requires the denial of a drilling permit where "there is a substantial risk that the operation will result in violations of [R.C. Chapter 1509] or rules adopted under it that will present an imminent danger to public health or safety or damage to the environment." The city argues that the evidence offered at the hearing before the commission established that drilling for gas and oil in close proximity to the water well fields establishes a substantial risk of contamination to the city's drinking water supply. The city argues that the sensitive nature of the environmental setting, coupled with the high risk of disastrous consequences that can occur from drilling for gas and oil and the fact that no conditions can be imposed that would completely

eliminate all risks associated with drilling, satisfies the statutory standard for denial of the drilling permit.

{¶16} In its decision, the trial court focused on conditions that were placed on the permit at the time of its issuance for the purpose of preventing any harm to the environment, citing evidence offered at the hearing that the conditions were intentionally overbroad in order to err on the side of caution. The trial court also cited evidence that ODNR conducted a site inspection before issuing the permit. The trial court pointed out that the city's argument regarding the inability to completely eliminate all risks associated with drilling, if successful, would effectively mean that no drilling could ever be permitted. The trial court rejected this argument, finding that requiring elimination of all risks would frustrate the statutory purpose, and concluding that ODNR had taken proper steps to minimize the risks present with this drilling operation, and that these measures could be expected to prevent any harm to the environment. Thus, the trial court concluded that the city had failed to establish that the drilling would create a substantial risk of harm to the city's drinking water.

{¶17} We cannot say that the trial court abused its discretion in concluding that the commission's decision affirming ODNR's issuance of the drilling permit to D&L was lawful and reasonable. It is clear that the statutory framework governing issuance of drilling permits requires minimization, not complete elimination, of risks associated with drilling, and the trial court did not abuse its discretion in concluding that the permit here appropriately addressed those risks.

{¶18} Therefore, the city's third assignment of error is overruled.

{¶19} Having overruled the city's three assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

McGRATH, J., concurs.
TYACK, P.J., concurring separately.

TYACK, P.J., concurring separately.

{¶1} Since I believe that this case is moot, I would dismiss this appeal.

{¶2} It has long been the law in Ohio that it is not the duty of the courts to answer moot questions. *James A. Keller, Inc. v. Flaherty* (1991), 74 Ohio App.3d 788, 791. " 'Actions or opinions are described as "moot" when they are or have become fictitious, colorable, hypothetical, academic or dead.' " *Grove City v. Clark*, 10th Dist. No. 01AP-1369, 2002-Ohio-4549, ¶11, quoting *Culver v. Warren* (1948), 84 Ohio App. 373, 393.

{¶3} " 'The doctrine of mootness is rooted both in the "case" or "controversy" language of Section 2, Article III of the United States Constitution and in the general notion of judicial restraint. * * * While Ohio has no constitutional counterpart to Section 2, Article III, the courts of Ohio have long recognized that a court cannot entertain jurisdiction over a moot question.' " *Grove City* at ¶12, quoting *Flaherty* at 791. When an appeal is pending and an event occurs without the fault of either party, which renders it impossible for the court to render any relief, the court will dismiss the appeal as moot. *Miner v. Witt* (1910), 82 Ohio St. 237, syllabus.

{¶4} Moreover, it is also well-settled that appellate courts do not grant advisory opinions. *Paolucci v. Ohio Div. of Real Estate*, 10th Dist. No. 09AP-450, 2009-Ohio-

5551, ¶13. "The duty of a court of appeals is to decide controversies between parties by a judgment that can be carried into effect, and the court need not render an advisory opinion on a moot question or a question of law that cannot affect the issues in a case." *Schwab v. Lattimore*, 166 Ohio App.3d 12, 2006-Ohio-1372, ¶10. " 'Courts only have the power to resolve present disputes and controversies, but do not have the authority to issue advisory opinions to prevent future disputes.' " *Serbin v. Hartville*, 5th Dist. No. 2008 CA 00293, 2009-Ohio-6940, ¶28, quoting *Kuhar v. Medina Cty. Bd. of Elections*, 9th Dist. No. 06CA0076-M, 2006-Ohio-5427, ¶14.

{¶5} An exception to the doctrine of mootness arises when a court decides to hear an appeal where the issues are "capable of repetition, yet evading review." *Grove City* at ¶12, quoting *State ex rel. Plain Dealer Pub. Co. v. Barnes* (1988), 38 Ohio St.3d 165, paragraph one of the syllabus. This exception applies only in exceptional circumstances and two other factors must be present. First, the challenged action is too short in its duration to be fully litigated before its cessation or expiration, and second, there is a reasonable expectation that the same complaining party will be subject to the same action again. *State ex rel. Calvary v. Upper Arlington*, 89 Ohio St.3d 229, 231, 2000-Ohio-142.

{¶6} Here, the controversy became moot when the permit expired and the appeal before the court of common pleas was still pending. I do not find that the present matter is one where the issues were capable of repetition yet evading review. While it is true that the city of Munroe Falls could conceivably thwart implementation of a future permit, I am loathe to issue an advisory opinion on a matter that is possible to be litigated in one year if the tribunal places the case on an accelerated docket or holds

the parties to an abbreviated briefing schedule. The General Assembly had a reason for allowing permits to be valid for only 12 months pursuant to R.C. 1509.05. The legislature apparently weighed the need for drilling to commence within one year against the need to allow time for full review by the Commission and any further appeals. At this point, it has been almost three years since the permit in question was issued, and conditions could have changed in the intervening time that might affect the decision of the Division. I believe any decision by this court is speculative, advisory, and without any legal effect.

{¶7} Again, because I believe the issues are moot, I would dismiss this appeal.

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