

IN THE SUPREME COURT OF OHIO

SUNOCO PIPELINE L.P.,	:	Case No. 2016-1486
	:	
Plaintiff-Appellee,	:	
	:	
v.	:	On Appeal from the Harrison
	:	County Court of Appeals,
	:	Seventh Appellate District
CAROL A. TETER, TRUSTEE,	:	
	:	
Defendant-Appellant.	:	Court of Appeals Case Nos.
	:	16HA0002 and 16HA0005

**PLAINTIFF-APPELLEE SUNOCO PIPELINE L.P.'S
SUGGESTION OF MOOTNESS AND MOTION TO DISMISS**

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TABLE OF CONTENTS

TABLE OF AUTHORITIES..... ii

I. INTRODUCTION AND BACKGROUND 1

II. LAW AND ARGUMENT 2

III. CONCLUSION 7

TABLE OF AUTHORITIES

Cases:

Bd. of Commrs. v. Saunders, 2d Dist. Montgomery No. 18592, 2001-Ohio-17105

Burger Brewing Co. v. Liquor Control Comm., 34 Ohio St.2d 93, 97-98, 63 O.O.2d 149,
296 N.E. 2d 261 (1973).....3

Flast v. Cohen, 392 U.S. 83, 94-95, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968).....3

Fortner v. Thomas, 22 Ohio St.2d 13, 14, 257 N.E.2d 371 (1970).....3

Franchise Developers, Inc. v. Cincinnati, 30 Ohio St.3d 28, 31, 30 OBR 33, 505 N.E.2d
966 (1987).....5

Kinder Morgan Cochin, L.L.C. v. Simonson, Case No. 2016-1166, 01/25/2017 Case
Announcements, 2017-Ohio-2616

Planned Parenthood Assn. v. Project Jericho, 52 Ohio St.3d 56, 61, 556 N.E.2d 157 (1990).....3

State v. Stambaugh, 34 Ohio St.3d 34, 38, 517 N.E.2d 526 (1987)3

State ex rel. Calvary v. City of Upper Arlington, 89 Ohio St.3d 229, 231, 2000-Ohio-142,
729 N.E.2d 11824

Tschantz v. Ferguson, 57 Ohio St.3d 131, 133, 566 N.E.2d 655 (1991).....3, 4, 5

United States Parole Comm. v. Geraghty, 445 U.S. 388, 397, 100 S.Ct. 1202, 63 L.Ed.2d
479 (1980).....2

Wallace v. Univ. Hosps. of Cleveland, 171 Ohio St. 487, 172 N.E.2d 459 (1961).....6

Williams v. Akron, 54 Ohio St.2d 136, 144-146, 8 O.O.3d 125, 374 N.E.2d 1378 (1978).....3

Statutes:

R.C. Chapter 17231, 2, 5, 6

Other:

Monaghan, *Constitutional Adjudication: The Who and When*, 82 Yale L. J. 1363, 1364
(1973).....2

I. INTRODUCTION AND BACKGROUND

This matter is before the Court pursuant to a discretionary appeal from the Seventh Appellate District. The underlying dispute arises from Appellee Sunoco Pipeline L.P. (“Sunoco”)’s eminent domain action against Appellant’s property in connection with the construction of an interstate, common carrier petroleum products pipeline. However, since Appellant filed her *Notice of Appeal* in this Court, the completion of the pipeline project along a new, alternate route has resolved any real or actual controversy between the parties. Sunoco respectfully submits that this appeal is now moot and should be dismissed.

Although Sunoco prevailed before the trial court and the Seventh Appellate District Court, the Court granted a stay of execution on October 14, 2016, in connection with this appeal. In November 2016, Sunoco sought to lift the Court’s stay, conditioned on Sunoco posting a \$2.5 million bond to ensure that, if this Court accepted jurisdiction and reversed the decision of the court of appeals, the portion of the pipeline crossing the Appellant’s property would be promptly removed and the property restored to its former state. In its motion to lift the stay, Sunoco described the staggering costs and lost revenues that it would suffer if the disputed portion of the pipeline was not completed in a timely manner. On December 28, 2016, however, the Court denied Sunoco’s request to lift the stay.

On June 21, 2017, the Court accepted Appellant’s first Proposition of Law, which asks whether the term “petroleum” includes the finished product natural gas liquids propane and butane for purposes of R.C. Chapter 1723.

The stay of execution, and the anticipated delay to Sunoco’s project, compelled Sunoco to try to route the disputed pipeline around Appellant’s property. After months of effort, Sunoco acquired the necessary easements to completely circumvent Appellant’s property. (*See* Aff. of Matthew Gordon, attached as Exhibit A, ¶ 3.) The re-routed pipeline was installed this spring

and, shortly after this Court accepted jurisdiction in June, Sunoco completed its final testing of that line, confirming its viability. (*See id.*, ¶ 4.) Accordingly, Sunoco can now report that it no longer requires the use of any portion of Appellant’s property for its pipeline or any of its other operations. (*See id.*, ¶ 5.)

Further, Appellant is the last remaining landowner in the State of Ohio who has not given consent to allow the pipeline to cross her property. (*See id.*, ¶ 6.) There are no other landowner disputes on this pipeline that involve questions of eminent domain. (*See id.*, ¶ 11.) Consequently, the issue accepted for review in this appeal is not only now moot as between these parties, it is moot with respect to the entire pipeline, and the matter is nothing more than academic.

For these reasons, as more fully explained below, the sole proposition of law accepted for review by this Court – whether “petroleum” includes the finished product natural gas liquids propane and butane for purposes of R.C. Chapter 1723 – is now moot, and any decision rendered thereupon would constitute only an advisory opinion. Consequently, the instant appeal should be dismissed.

II. LAW AND ARGUMENT

“One commentator has defined mootness as ‘the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness).’” *United States Parole Comm. v. Geraghty*, 445 U.S. 388, 397, 100 S.Ct. 1202, 63 L.Ed.2d 479 (1980), quoting Monaghan, *Constitutional Adjudication: The Who and When*, 82 Yale L. J. 1363, 1364 (1973). The United States Supreme Court has explained, “the judicial power of federal courts is constitutionally restricted to ‘cases’ and ‘controversies.’ * * * [N]o justiciable controversy is presented when the parties seek adjudication of only a political question, when the parties are asking for an advisory opinion,

when the question sought to be adjudicated has been mooted by subsequent developments, and when there is no standing to maintain the action.” *Flast v. Cohen*, 392 U.S. 83, 94-95, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968).

Ohio courts follow the same rules and rationale as federal courts regarding mootness. This Court observed, “[i]t has been long and well established that it is the duty of every judicial tribunal to decide actual controversies between parties legitimately affected by specific facts and to render judgments which can be carried into effect.” *Fortner v. Thomas*, 22 Ohio St.2d 13, 14, 257 N.E.2d 371 (1970). “For a cause to be justiciable, there must exist a real controversy presenting issues which are ripe for judicial resolution and which will have a direct and immediate impact on the parties.” *State v. Stambaugh*, 34 Ohio St.3d 34, 38, 517 N.E.2d 526 (1987), citing *Burger Brewing Co. v. Liquor Control Comm.*, 34 Ohio St.2d 93, 97-98, 63 O.O.2d 149, 296 N.E. 2d 261 (1973), and *Williams v. Akron*, 54 Ohio St.2d 136, 144-146, 8 O.O.3d 125, 374 N.E.2d 1378 (1978).

Here, because Sunoco no longer needs to use Appellant’s property for its pipeline, which was the last property at issue in Ohio, there is no longer a “real controversy,” the resolution of which will have a “direct and immediate impact on the parties.” In short, the issue accepted for review is now moot, and the Court should dismiss the appeal before the parties’ resources (and those of the Court) are spent on merit briefing, oral argument, and decision.

Sunoco recognizes that there exist two exceptions to the mootness doctrine under which this Court may review nonjusticiable matters in extraordinary circumstances. First, this Court may consider a moot issue if it is “capable of repetition yet evading review.” *Planned Parenthood Assn. v. Project Jericho*, 52 Ohio St.3d 56, 61, 556 N.E.2d 157 (1990). Second, a moot issue may be considered if it is a “debatable constitutional question or a matter of great

public or general interest.” *Tschantz v. Ferguson*, 57 Ohio St.3d 131, 133, 566 N.E.2d 655 (1991). Sunoco respectfully asserts that neither of these exceptions applies in this case.

First, regarding the “capable of repetition yet evading review” exception, this Court has explained:

This exception applies only in exceptional circumstances in which the following two factors are both present: (1) the challenged action is too short in its duration to be fully litigated before its cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again.

State ex rel. Calvary v. City of Upper Arlington, 89 Ohio St.3d 229, 231, 2000-Ohio-142, 729 N.E.2d 1182. It is Appellant’s burden to show that such exceptional circumstances exist (*see Id.*), but Appellant cannot satisfy that burden here.

Specifically, there is nothing fleeting or elusive about the exercise of eminent domain that makes it likely to evade review. To the contrary, the taking of private property via eminent domain requires a court order and cannot be accomplished independently. As this case demonstrates, obtaining the requisite court order typically takes months or even years. This action has been pending since the Complaint was filed in Harrison County in early 2015. Thus, Sunoco submits that acquiring property by eminent domain in this context cannot meet the first factor required to invoke the “capable of repetition” exception to mootness.

Likewise, there is no reasonable expectation that Appellant will be subject to this same action again. Sunoco’s pipeline is already constructed on the new route and Sunoco has no need to use any part of Appellant’s property.

Appellant may nevertheless contend that she may be subject to future eminent domain actions by *other* pipeline companies seeking an easement across her property, and that the current situation is therefore likely to repeat itself. In addition to being wholly speculative, such

a scenario falls outside the mootness exception as any such eminent domain matter would be a separate action capable of being reviewed by this Court. Moreover, the solitary issue accepted for review by this Court is limited to consideration of the eminent domain authority of a very narrow subset of pipelines – those transporting the finished product natural gas liquids propane and butane. Consequently, this Court’s review is unlikely to address the eminent domain authority of other speculative pipelines that may attempt to cross Appellant’s property in the future. Because there is no reasonable expectation that Appellant will be subject to this same action, the issue before the Court is not capable of repetition yet evading review.

Second, “Ohio recognizes an exception to the mootness doctrine for cases which present a debatable constitutional question or a matter of great public or general interest.” *Tschantz v. Ferguson*, 57 Ohio St.3d 131, 133, 566 N.E.2d 655 (1991), citing *Franchise Developers, Inc. v. Cincinnati*, 30 Ohio St.3d 28, 31, 30 OBR 33, 505 N.E.2d 966 (1987). Here, however, the pipeline in question is complete, and the only question accepted – whether “finished product natural gas liquids propane and butane” are considered “petroleum” for purposes of R.C. Chap. 1723 – is very narrow. Considering this narrow question, as well as the subsequent developments (completion of the pipeline), there is no matter of great public interest for the Court to decide. This Court, and other courts who have confronted similar situations, have come to the same conclusion.

For example, in *Bd. of Commrs. v. Saunders*, 2d Dist. Montgomery No. 18592, 2001-Ohio-1710, the Second Appellate District held that the County Commissioners’ completion of a drainage-improvement project mooted the landowners’ challenges to the condemnation of their land after the landowners failed to obtain a stay of execution. The Court held, “[the] issues presented have been rendered moot by the completion of the project. In addition, we find that

this issue involves neither an issue capable of repetition but evading review, nor a matter of great public or general interest.” *Id.* at *4.

In *Wallace v. Univ. Hosps. of Cleveland*, 171 Ohio St. 487, 172 N.E.2d 459 (1961), the Court dismissed an appeal as moot when a defendant hospital finally agreed to produce the treatment records sought by the plaintiff in the underlying litigation. While the factual context of that dispute may be different than the dispute at hand, the reasoning is equally applicable. In that case, this Court reasoned:

It is obvious that the plaintiff has obtained all that she asks for in this action and no order could be made by this court that would give her more than she already has. As between these parties, therefore, the case is moot.

* * *

Although the temptation may be great to indulge in the theory that a case may be “moot as to the parties” but not “moot as to the public,” . . . the majority of this court are of the opinion that in *this* case we should follow the usual procedure of deciding cases only as they exist between the parties thereto and refrain from the giving of an advisory opinion.

Id. at 489 – 490 (Emphasis in original). Like the Plaintiff in *Wallace*, Appellant has obtained all that she sought (movement of the pipeline around her property), the issues presented are moot, and the Court should refrain from giving an advisory opinion in this appeal.

Any remaining doubt about the inapplicability of the two mootness exceptions to this case is erased by the Court’s recent decision to decline review of a nearly identical proposition of law in another pipeline eminent domain case. In *Kinder Morgan Cochin, L.L.C. v. Simonson*, Case No. 2016-1166, 01/25/2017 Case Announcements, 2017-Ohio-261, this Court declined to review appellant’s proposition of law asserting that “[t]he term petroleum, as used in R.C. 1723.01, is to be interpreted based upon the circumstances existing at the time of the legislative enactment that first employed the term petroleum.” This very recent opportunity to consider the meaning of “petroleum” in R.C. Chap. 1723 makes clear that the present issue is not one that is

likely to evade the Court's review, and the Court's decision to decline jurisdiction further suggests that the issue also is not necessarily one of public or great general interest.

III. CONCLUSION

For all the reasons stated above, Sunoco respectfully submits that the narrow issue accepted for review in this appeal is moot, the exceptions to the mootness doctrine are inapplicable, and this appeal should be dismissed.

Respectfully submitted,

/s/ Kathleen M. Trafford

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CERTIFICATE OF SERVICE

I certify that the foregoing *Suggestion of Mootness and Motion to Dismiss* was served by First-Class U.S. Mail upon the following counsel in this proceeding, identified below, this 24th day of July, 2017.

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AFFIDAVIT OF MATTHEW GORDON

State of Pennsylvania:

County of Berks:

I, Matthew Gordon, being duly sworn and cautioned, state that I have personal knowledge of the facts contained in this Affidavit; that I am competent to testify to the matters stated herein; and that the following statements are true:

1. I am an employee of Sunoco Pipeline L.P., a Texas limited partnership (“Sunoco”), and I am the Project Director for Sunoco’s Mariner East 2 Pipeline Project (the “Mariner Pipeline”), which is the pipeline project in dispute in the above-captioned case.

2. Earlier this year, because of concerns about delay associated with this Ohio Supreme Court appeal, Sunoco reconsidered its options for rerouting the Mariner Pipeline to bypass and circumvent Appellant’s property.

3. After great effort involving acquiring right of way from eight landowners, Sunoco successfully reconfigured its Mariner Pipeline route and acquired the necessary easements and other rights to completely circumvent and bypass Appellant’s property.

4. The re-routed pipeline was installed this spring and, shortly after this Court accepted jurisdiction in June, Sunoco completed its final testing of that line, confirming its viability.

5. No part of Appellant's property is or will be used by the new route of the Mariner Pipeline, and Sunoco no longer needs to use any portion of Appellant's property for any of its operations.

6. Appellant was the last remaining landowner in the state of Ohio who had not reached an agreement to grant Sunoco a pipeline easement for the Mariner Pipeline.

7. There are no other Ohio landowner disputes on the Mariner Pipeline that involve questions of eminent domain.

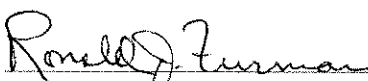
Further Affiant sayeth naught.



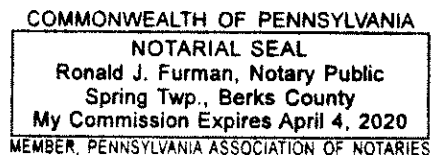
Matthew Gordon

Sworn to, acknowledged and subscribed in my presence this 20TH day of July, 2017.

Notary Public



RONALD J. FURMAN



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