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## **Jones Day: Ohio Supreme Court Strikes Down a Municipality's Efforts to Regulate Oil and Gas Production.**

The rise of oil and gas production in the Utica and Marcellus shale plays, encouraged by state policies, has led many municipalities to seek to exert some control over oil and gas drilling within their borders. In the past two years, the highest courts in Pennsylvania and New York have sided with municipalities and have upheld municipal zoning ordinances against challenges that such ordinances were preempted by state regulation.

The Ohio Supreme Court has weighed into this controversy, striking down a municipality's zoning and oil and gas ordinances on preemption grounds. The case produced five opinions, including a lead opinion signed by only three justices and concurred in by another. Because of the breadth of the ordinance at issue and the limited holding by the majority of justices, the Ohio court's decision leaves open the possibility that more traditional zoning approaches limiting drilling could be upheld.

### ***In State ex rel. Morrison v. Beck Energy Corp., Slip Op. No. 2015-Ohio-485 (Feb. 17, 2015)***

On February 17, 2015, the Supreme Court of Ohio issued its opinion in *In State ex rel. Morrison v. Beck Energy Corp.*,<sup>1</sup> holding that several municipal ordinances were preempted by Ohio's oil and gas wells and production operations statute, Chapter 1509 of the Ohio Revised Code. The decision was split, with four of seven justices in favor of striking the ordinances. Three justices joined in the lead opinion. The concurring opinion agreed with the result because the ordinances at issue set up a parallel licensing and permitting scheme that conflicted with the licensing and permitting scheme set forth in Chapter 1509. Notably, however, the concurring justice, drawing on recent decisions in New York and Pennsylvania, appeared to favor allowing municipal ordinances reflecting traditional zoning concerns that would indirectly prohibit oil and gas drilling. Thus, the Beck decision leaves open the possibility that municipal zoning ordinances that have the effect of prohibiting oil and gas drilling could be upheld.

### **Relevant Facts and Procedural History**

Beck Energy Corporation ("Beck Energy"), an Ohio oil and gas driller, entered into a lease agreement with a landowner who owned several acres of property within the corporate limits of the City of Munroe Falls (the "City").<sup>2</sup> Pursuant to that agreement, Beck Energy acquired the right to produce any natural gas under the landowner's property.<sup>3</sup> In 2011, Beck Energy obtained a permit from the Ohio Department of Natural Resources ("ODNR") to begin drilling operations.<sup>4</sup> The permit was issued pursuant to Section 1509.02 of the Ohio Revised Code.<sup>5</sup>

Amended in 2004 to provide "uniform statewide regulation"<sup>6</sup> of oil and gas well operations, Section 1509.02 provides that the ODNR "has sole and exclusive authority to regulate the permitting, location, and spacing of oil and gas wells and production operations within the state...with respect to all aspects of the locating, drilling, well stimulation, completing, and operating of oil and gas wells within this state..."<sup>7</sup> Further, "Nothing in this section affects the authority granted to...local authorities in section 723.01 or 4513.34 of the Revised Code, provided that the authority granted

under those sections shall not be exercised in a manner that discriminates against, unfairly impedes, or obstructs oil and gas activities and operations regulated under this chapter.”<sup>8</sup>

After Beck Energy began surface activities related to drilling, the City served Beck Energy with a stop-work order and filed a complaint for injunctive relief.<sup>9</sup> The complaint alleged that Beck Energy violated several municipal ordinances related to oil and gas drilling and zoning. The oil and gas ordinances established a local permitting process, including a public hearing requirement, with fines and penalties attached for failure to comply.<sup>10</sup> The zoning ordinances required the issuance of general and conditional use zoning certificates prior to the commencement of drilling and incorporated the permitting process set forth in the oil and gas ordinances.<sup>11</sup> On May 3, 2011, the trial court granted the City’s request for injunctive relief until Beck Energy complied with the City’s ordinances.<sup>12</sup> On appeal, the appellate court reversed and held that the ordinances at issue could not be enforced because they were “in direct conflict” with Section 1509.02.<sup>13</sup>

## **Lead Opinion**

In its lead opinion written by Justice Judith French and joined by two other justices, the Court held that the Home Rule Amendment to the Ohio Constitution did not grant the City the power to enforce the ordinances under review. The Home Rule Amendment provides that “Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws.”<sup>14</sup> Ordinances in conflict with a state law, however, are preempted. Specifically, a “municipal ordinance must yield to a state statute if (1) the ordinance is an exercise of the police power, rather than of local self-government, (2) the statute is a general law, and (3) the ordinance is in conflict with the statute.”<sup>15</sup>

The lead opinion observed that the ordinances constituted an “exercise of police power,” stating that the “[ordinances] prohibit—even criminalize—the act of drilling for oil and gas without a municipal permit.”<sup>16</sup> The lead opinion also stated that Section 1509.02 was a general law that operated uniformly throughout the State because it “imposes the same obligations and grants the same privileges to anyone seeking to engage in oil and gas drilling” anywhere in Ohio.<sup>17</sup>

Justice French reasoned that the ordinances conflicted with Section 1509.02 in two ways. First, the ordinances prohibited what the statute permitted: “state-licensed oil and gas production within Munroe Falls.”<sup>18</sup> She said: “This is a classic licensing conflict under our home-rule precedent. We have consistently held that a municipal-licensing ordinance conflicts with a state licensing ordinance if the ‘local ordinance restricts an activity which a state license permits’.”<sup>19</sup>

Second, the lead opinion observed that the ordinances conflicted with Section 1509.02 because the language of the statute demonstrated that “the General Assembly intended to preempt local regulation on the subject.”<sup>20</sup> The lead opinion noted that by designating ODNR as the “sole and exclusive authority to regulate the permitting, location and spacing of oil and gas wells” and by reserving to the State “all aspects” including “permitting” relating to the location, drilling and operation of oil and gas wells, the General Assembly intended to preempt any local regulation of the same.<sup>21</sup> In concluding that such a “double licensing” scheme was impermissible, the lead opinion cautioned, however, that its review was “limited to the five municipal ordinances at issue in this case.”<sup>22</sup>

The City had argued that no conflict existed “because the statute and the ordinances regulate two different things,” i.e., the ordinances supposedly addressed “traditional concerns of zoning” while the statute related to “technical safety and correlative rights topics.”<sup>23</sup> This argument drew on recent decisions in New York and Pennsylvania for support. In *Wallach v. Dryden*,<sup>24</sup> the Court of

Appeals of New York held that local zoning ordinances that in effect prohibited “all oil and gas exploration, extraction and storage activities” within a municipality’s corporate limits were not preempted by New York’s oil and gas statute.<sup>25</sup> As that Court further held, New York’s oil and gas statute preempted “only local laws that purport to regulate the actual operations of oil and gas activities, not zoning ordinances that restrict or prohibit certain land uses within town boundaries.”<sup>26</sup> The zoning ordinances at issue did not run afoul of this distinction because they were “directed at regulating land use generally and do not attempt to govern the details, procedures or operations of the oil and gas industries.”<sup>27</sup>

Similarly, in *Huntley & Huntley v. Borough of Oakmont*<sup>28</sup>, the Supreme Court of Pennsylvania held that a local zoning ordinance which had the effect of restricting the site selection of oil and gas wells was not preempted by Pennsylvania’s Oil and Gas Act.<sup>29</sup> The Huntley court noted that the intent behind the ordinance was to promote “the safety and welfare of [the Borough’s] citizens, encouraging the most appropriate use of land throughout the borough [and] conserving the value of property.”<sup>30</sup> The Huntley court also reasoned that while government interests regarding oil and gas development and land-use control may on occasion overlap, those interests are at base distinct.<sup>31</sup> The state’s interest in oil and gas development seeks to further the efficient use of natural resources while a municipality’s interest in “land-use control ... is one of orderly development and use of land in a manner consistent with local demographic and environmental concerns.”<sup>32</sup>

Justice French derided the City’s argument and the notion that zoning ordinances could survive a preemption challenge because they dealt with an area that was different than the subject addressed by oil and gas statutes and regulations. Specifically, she called this alleged distinction “fanciful”:<sup>33</sup> “The ordinances and R.C. 1509.02 unambiguously regulate the same subject matter—oil and gas drilling—and they conflict in doing so.”<sup>34</sup>

### **Concurring Opinion**

In a separate opinion concurring in the judgment only, Justice Terrence O’Donnell agreed that the City had created a “parallel municipal permitting process for oil and gas wells” that conflicted with Section 1509.02, a general law, whereby the City’s oil and gas and zoning ordinances were preempted.<sup>35</sup> The concurring opinion, however, emphasized “the limited scope of our decision,”<sup>36</sup> i.e., to wit:

This appeal does not present the question whether R.C. 1509.02 conflicts with local land use ordinances that address only the traditional concerns of zoning laws, such as ensuring compatibility with local neighborhoods, preserving property values, or effectuating a municipality’s long-term plan for development.<sup>37</sup> [Further] “it remains to be decided whether the General Assembly intended to wholly supplant all local ordinances limiting land uses to certain zoning districts” that did not regulate the “details of oil and gas drilling expressly addressed” by Section 1509.02.<sup>38</sup>

The concurring opinion noted that under Ohio law “municipalities have...authority to regulate land uses within zoning districts to promote the public health, safety convenience, comfort, prosperity and general welfare”<sup>39</sup> and the zoning ordinances enjoy a “strong presumption ... of ... validity.”<sup>40</sup> Justice O’Donnell stated that while the statute vests ODNR with “sole and exclusive authority” regarding the location and spacing of oil and gas wells, the lead opinion purportedly ignores the fact that “‘location’ and ‘spacing’ have specialized, technical meanings in oil and gas law.”<sup>41</sup> “Scientific expertise” is thus required for the proper placement of oil and gas wells, thereby requiring special regulations directed to their location and spacing.<sup>42</sup> “In contrast, that same scientific and regulatory expertise is not required to determine whether an oil and gas well is compatible with the character and aesthetics of a particular zoning district, such as a residential neighborhood, and we generally presume that zoning authorities are far more familiar with local conditions and therefore are better

able to make land use decisions.”<sup>43</sup>

In contrast to the lead opinion, the concurring opinion relied on Dryden and Huntley to support the proposition that “Courts of last resort in other jurisdictions have declined to view preemptive language in oil and gas statutes that preclude all local regulation of oil and gas drilling as irreconcilable with local zoning laws.”<sup>44</sup> The concurring opinion further observed that the Ohio legislature enacted Chapter 1509 to “preempt the inconsistent patchwork of local health and safety regulations governing the technical aspects of drilling....”<sup>45</sup> Unlike other Ohio statutes which expressly preempt local zoning ordinances, such as laws dealing with hazardous waste facilities, casinos, or public utilities, Chapter 1509 does not do so. “Nothing in R.C. Chapter 1509 expressly addresses zoning or requires ODNR to regulate the location of oil and gas wells to ensure compatibility with local land use, preserve property values, effectuate a municipality’s long-term plan for development, or uphold any of the other traditional goals of zoning.”<sup>46</sup>

## **Conclusion**

Municipal ordinances that directly attempt to regulate the means or manner of oil and gas drilling are now not permitted in Ohio. Given the limited nature of the majority holding, however, Beck expressly leaves open the question of whether a zoning ordinance that bans or limits oil and gas drilling using more traditional zoning concepts would be permitted.

## **Footnotes**

1 Slip Op. No. 2015-Ohio-485 (Feb. 17, 2015).

2 Appellees’ Merit Br. at 2 (Oct. 23, 2013).

3 Id.

4 Beck Energy at 2, ¶3.

5 Id.

6 Id. citing Legislative Service Commission Bill Analysis, Sub H.B. No. 278 (2004).

7 R.C. 1509.02.

8 Id. Section 723.01 grants municipalities “special power” to regulate public rights of way and Section 4513.34 vests municipalities with the authority to grant permits regarding the operation of heavy vehicles on local highways.

9 Beck Energy at 4, ¶7.

10 Id. at ¶9.

11 Id. at ¶¶8; 37.

12 The State of Ohio ex. rel. Jack Morrison, Jr., Law Director of Munroe Falls, Ohio v. Beck Energy Corp., Case No. 2011-04-1897 at 3-4 (Summit Cty. C.P. May 3, 2011).

13 The State of Ohio ex. rel. Jack Morrison, Jr., Law Director of Munroe Falls, Ohio v. Beck Energy Corp., Case No. 25953 at 2 (Summit Cty. Ct. App. Feb. 6, 2013).

14 Ohio Const., Article XVIII, Section 3.

15 Beck Energy at 6, ¶15, citing *Mendenhall v. Akron*, 117 Ohio St.3d 33, 2008-Ohio-270, ¶17.

16 Id. at ¶18.

17 Id. at 8, ¶23.

18 Id. at 9, ¶25.

19 ¶26 citing *Ohio Assn. of Private Detective Agencies, Inc. v. N. Olmsted*, 65 Ohio St.3d 242, 245 (1992); *Anderson v. Brown*, 13 Ohio St.2d 53, 58 (1968).

20 Id. at 11, ¶29 citing *Westlake v. Mascot Petroleum Co.*, 61 Ohio St.3d 161, 164 (1991).

21 Id. at ¶¶29-30.

22 Id. at 12-13, ¶33.

23 Id. at 10, ¶28.

24 23 N.Y. 3d 728 (2014).

25 Id. at 739.

26 Id. at 746.

27 Id.

28 600 Pa. 207 (2009).

29 Id. at 217; 224.

30 Id. at 224.

31 Id.

32 Id. at 225. The Huntley court, however, affirmed the appellate court's holding that the Borough had improperly denied the driller a conditional use certificate. See id. at 226-230.

33 Id.

34 Id.

35 Id. at 13-14, ¶36.

36 Id. at 14, ¶38.

37 Id.

38 Id. at 15, ¶39.

39 Id. at ¶41.

40 Id. at 16, ¶42.

41 Id. at ¶43.

42 Id. at 17, ¶44.

43 Id.

44 Beck Energy at 17-18, ¶45.

45 Id. at 18, ¶46.

46 Id. at 19, ¶47.

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