Legal Opinion Letter

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OHIO COURT LIMITS LOCALITIES' AUTHORITY OVER ENERGY EXPLORATION

by
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In *Morrison v. Beck Energy Corp.*, Ohio's Ninth District Court of Appeals found a city's drilling and zoning ordinances to be in direct conflict with the provision of Ohio's oil and gas laws granting exclusive jurisdiction over oil and gas drilling and related matters to the Division of Oil and Gas Resources of the Ohio Department of Natural Resources (ODNR), thereby rendering the local ordinances unenforceable. 9th Dist. No. 25953, 2013 Ohio App. LEXIS 312. *Beck Energy* is the first appellate decision in the state to weigh in on local home-rule authority over Ohio's fast-growing natural gas hydraulic fracturing (fracking) industry. In contrast to *Beck Energy*, recent home-rule decisions in New York and Pennsylvania have granted local governments broader zoning control over oil and gas operations, acting as *de facto* limits to fracking operations in those municipalities. Although each preemption decision turned on the language of the specific ordinances, *Beck Energy* represents a distinctly narrower view of home-rule authority over local zoning, at least in the oil and gas field.

In enacting Ohio's oil and gas laws, codified in Chapter 1509 of the Ohio Revised Code (O.R.C.), the Ohio General Assembly clearly articulated its intent to create a comprehensive program to regulate oil and gas drilling and production in the state, and vested control over that program in ODNR's Division of Oil and Gas Resources. In 2004, the Ohio General Assembly amended O.R.C. §1509.02 to expand ODNR's control over drilling by granting it "sole and exclusive authority to regulate the permitting, location and spacing of oil and gas wells and production within the state…." A 2011 amendment to O.R.C. 1509 again extended ODNR's authority to include regulation of all aspects of "locating, drilling, well stimulation, completing, and operating of oil and gas wells within the state."

In response to the recent proliferation of fracking in the Marcellus and Utica Shale formations in Ohio, Pennsylvania, and New York, many local governments have passed ordinances aimed at banning or severely curtailing the drilling practices. At issue in *Beck Energy* was a series of ordinances that the city of Munroe Falls, Ohio alleged Beck Energy had violated by commencing operations without first obtaining a drilling permit, a zoning certificate, and right-of-way and excavation permits. After Munroe Falls filed a complaint with the Summit County Court of Common Pleas, the trial court granted a permanent injunction against Beck Energy, enjoining further drilling until the company complied with eleven separate ordinances.

The issue on appeal was whether under the home-rule provisions of Ohio's Constitution, Munroe Falls could require an oil and gas driller to obtain drilling and other permits from the city notwithstanding the provision of O.R.C. §1509.02, which purports to grant exclusive jurisdiction over oil and gas operations to ODNR. Beck Energy contended that its O.R.C. 1509 permit precluded any local regulation of its drilling activities, while the city argued that under the Ohio Constitution it had home-rule powers to regulate various aspects of drilling operations within its borders.

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Article XVII, Section 3 of the Ohio Constitution grants municipalities the "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*" (emphasis added). The Supreme Court of Ohio applies a three-part test to analyze a municipality's home-rule authority:

(1) Is the ordinance an exercise of local self-government or an exercise of police power?

(2) If the ordinance is an exercise of police power, is the state statute a general law?

(3) If the statute is a general law, does the ordinance conflict with the statute?

The Court of Appeals in *Beck Energy* found that the disputed zoning and right-of-way ordinances were clearly exercises of police power, and the parties did not dispute that O.R.C. 1509 was a general law. The case therefore turned on whether the city's ordinances conflicted with O.R.C. 1509.

The long-established test in Ohio for determining whether a local ordinance and a state statute conflict is "whether the ordinance prohibits that which the statute permits, or vice versa." *See*, *Struthers v. Sokol*, 108 Ohio St. 262 (1923). If the ordinance alters, impairs, or limits the operation of the state-permitted entity, the statute will preempt the ordinance. If there is no direct conflict, the state and municipality may exercise concurrent jurisdiction over the regulated entity and activity.

Ohio's oil and gas laws use terms such as "sole and exclusive authority," "comprehensive plan," "matter of general statewide interest" and "uniform statewide regulations." They also regulate a wide range of activities, including "well stimulation, completing, construction and permitting." In light of this expansive language, the Ninth District found that the city's drilling and zoning ordinances were in direct conflict with O.R.C. 1509 and were preempted. In contrast, because O.R.C. §1509.02 expressly acknowledges the authority of units of local government in Ohio to adopt right-of-way regulations, Munroe Falls' rights-of-way ordinances at issue in the case were found not in conflict with O.R.C. 1509, and were not preempted.

Since 2012, New York courts have rendered a series of decisions addressing home-rule authority over oil and gas operations. New York's Oil Gas and Solution Mining Law contains a clause providing that the law "shall supersede all local laws or ordinances relating to the regulation of the oil, gas and solution mining industries." Despite this broad language, New York trial courts have consistently found that local and state laws do not conflict, upholding home-rule authority.

In *Cooperstown v. Town of Middlefield*, the trial court found that the New York state law only preempts local regulation of the *method* of oil and gas mining and drilling but not local zoning, because of the "distinct interests" of local land use control. 943 N.Y.S. 2d 722, 780 (2012); *Anschutz Expl. Corp. v. Town of Dryden*, 940 N.Y.S. 2d 458 (2012); *Lenape Resources, Inc. v. Town of Avon*, No. 1060-2012 (March 15, 2013). Similarly, Pennsylvania courts have held that traditional zoning ordinances have a different purpose than oil and gas statutes and are not in conflict or preempted by comprehensive statutes regulating the technical aspects of oil and gas drilling. *Huntley & Huntley Inc. v. Borough Council of Oakmont*, 950 A.2d 267 (2008); *Penneco Oil Co., Inc. v. County of Fayette*, 4 A.3d 722 (Pa. Commw. 2010).

Arguably, the *Beck Energy* decision is not at odds with the home-rule decisions in New York and Pennsylvania because Ohio's oil and gas statute represents a more comprehensive regulatory scheme than the other states' laws. Ohio law addresses not only technical components of oil and gas drilling activities, but also the location of wells and related activities. Considering the potential high stakes and controversy surrounding the issue, the conflict between state and local control over oil and gas operations will surely continue as entities seek to expand into new areas.

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