



FRACTURED HIGH COURT ISSUES LIMITED RULING IN OHIO OIL AND GAS PREEMPTION CASE

by Terrence M. Fay and Joel D. Eagle

In 2013, Ohio's Ninth District Court of Appeals ruled that local drilling and zoning ordinances in Munroe Falls conflicted with Ohio's broad oil and gas laws.¹ Since the Supreme Court of Ohio (Court) heard oral arguments in *Morrison* in February 2014, both sides of the debate over state control versus local Home Rule authority to regulate oil and gas drilling have eagerly awaited the high court's decision.

On February 26, 2015, the Court issued a fractured 4-3 decision favoring exclusive state authority to regulate oil and gas operations.² While this decision is a win for Beck Energy, it may not have provided the long-term assurances or broad victory for which the oil and gas industry had hoped. The majority limited its holding to only the specific ordinances at issue, signaling that future Home Rule challenges to Ohio oil and gas laws might come out differently. Further, the ruling was far from unanimous, with just three of the seven justices accepting the majority's reasoning. Only Justice O'Donnell's vote favoring the majority result (but not the reasoning) saved the day for Beck Energy. In a strongly worded dissent, three justices declared that the state law at issue, Ohio Revised Code (ORC) § 1509.02, does *not* grant the Ohio Department of Natural Resources (ODNR) exclusive authority over traditional land use planning concerns, portending future litigation over more traditional local zoning ordinances.

Morrison stemmed from a drilling permit that ODNR issued to Beck Energy in 2011. After Beck Energy received the permit, Munroe Falls sought and obtained from a local trial court a permanent injunction prohibiting further drilling until Beck Energy complied with all local ordinances. At issue before the Court were five ordinance provisions, one of which required Beck Energy to obtain a zoning certificate, which the town would issue only after Beck Energy paid a fee, posted a bond, held a public hearing, and waited one year before drilling. The other four related directly to oil and gas drilling, including one that prohibited drilling until the town issued the zoning certificate.

The Court of Appeals overturned the trial court's injunction, basing its decision largely upon § 1509.02, which grants ODNR "sole and exclusive authority to regulate the permitting, location, and spacing of oil and gas wells and production operations." The Ninth District held that this language conflicted with the local ordinances and that they were therefore unenforceable. The question before the Court was whether the town's ordinances represented a valid exercise of the town's authority under the Home Rule Amendment to the Ohio Constitution.

Justice French wrote the majority opinion and was joined by Justices O'Connor and Kennedy, while Justice O'Donnell wrote a concurrence in judgment only. The majority examined Ohio's traditional three-part test for whether a local ordinance must yield to state law:

¹ *State of Ohio ex rel. Jack Morrison, Jr. v. Beck Energy Corp.*, 9th Dist. Case No. 25953 (Feb. 6, 2013); see also Terrence M. Fay and Joel D. Eagle, *Ohio Court Limits Localities' Authority Over Energy Exploration*, WLF LEGAL OPINION LETTER, June 21, 2013, available at http://www.wlf.org/upload/legalstudies/legalopinionletter/06-21-13FayEagle_LegalOpinionLetter.pdf.

² *State ex rel. Morrison v. Beck Energy Corp.*, Slip. Op. No. 2015-Ohio-485, available at <http://www.supremecourt.ohio.gov/rod/docs/pdf/0/2015/2015-Ohio-485.pdf>.

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- Is the ordinance an exercise of police power rather than of local self-government?
- Is the statute a general law?
- Does the ordinance conflict with the statute?

The controversy hinged on the third question, with the majority characterizing the dispute as a “classic licensing conflict” because the ordinances restricted that which the statute allowed. The town argued that the state statute regulates the technical aspects of oil and gas drilling while the ordinances address traditional local zoning concerns. The majority disagreed, concluding that both schemes unambiguously regulate oil and gas drilling.

While the majority acknowledged the legitimacy of questioning whether § 1509.02 goes too far in removing local control over drilling, it found this to be a policy question more appropriately answered by the legislature. Ultimately, despite analyzing ODNR’s authority to regulate all aspects of oil and gas drilling under § 1509.02, the majority narrowed the import of its reasoning by declaring its ruling applied only to the ordinances at issue in the case.

The three dissenting justices’ opinions and Justice O’Donnell’s concurrence in judgment create substantial uncertainty for subsequent oil and gas Home Rule disputes, with Justice O’Donnell’s concurrence warranting particular attention. Although he did not articulate a clear test that could be adopted as the standard in future cases (as, for example, Justice Anthony Kennedy’s opinion did in the plurality U.S. Supreme Court *Rapanos* jurisdictional waters decision³), Justice O’Donnell’s legal and policy rationale could form the basis for a future majority if the Court takes up the zoning question again.

First, according to Justice O’Donnell, where § 1509.02 grants “sole and exclusive authority” to regulate the *location* of wells, the word “location” has a specialized, technical meaning in oil and gas law. Citing to oil and gas treatises, Justice O’Donnell suggested “location” in this context relates mainly to protecting correlative rights and maximizing the efficient production of oil as between adjacent properties.

He also noted that the legislature’s recent revisions to § 1509.02 were intended to preempt a patchwork of local laws related to the technical and safety aspects of oil and gas drilling. In his view, the revisions were not meant to divest local governments of their traditional authority to promulgate land-use planning regulations to ensure that uses are compatible with local neighborhoods, preserving property values, and long-term community development plans.

Although Justice O’Donnell does not make the point directly, one could argue that ODNR’s oil and gas drilling expertise and authority is limited to technical and safety concerns, and that § 1509.02’s “sole and exclusive” language must be read in the context of ODNR’s mission to protect natural resources, human health, and the environment. Otherwise, taken to the extreme, “sole and exclusive” could give ODNR authority to regulate any matter related to drilling activities, such as wage-and-hour requirements, no matter how remotely connected to ODNR’s expertise.

Finally, in a nod to statutory interpretation and legislative intent, Justice O’Donnell noted that the legislature knows how to expressly supersede local zoning ordinances, having done so for statutes related to hazardous waste facilities, public utilities, casinos, and licensed residential facilities. Justice Lazinger’s dissent (joined by Justices Pfeifer and O’Neill) likewise emphasized the legislature’s silence on zoning in § 1509.

Despite the divergence between the majority and the concurring and dissenting opinions, one common thread ran among the justices in *Morrison*: none declared that § 1509 supersedes all aspects of traditional local zoning control. Thus, if § 1509’s potential preemption of a *traditional* zoning ordinance (not one specific to oil and gas drilling) were to come before the Court, it would not be surprising to see a ruling similar to the recent New York Court of Appeals’ decision in *Wallach v. Town of Dryden*.⁴ In that case, New York’s highest court found a broadly worded statute that expressly superseded all local oil and gas regulation 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...”⁵

In sum, unless the Ohio legislature acts more definitively, *Morrison* is unlikely to be the Ohio Supreme Court’s last word on this issue.

³ *Rapanos v. United States*, 547 U.S. 715 (2006).

⁴ 23 N.Y.3d 728 (2014).

⁵ *Id.* at 746.