

Ohio Supreme Court: oil and gas drilling statutes preempt "home rule" power

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On February 17, 2015, in a 4-3 decision, the Ohio Supreme Court affirmed the lower appellate court's decision in *State of Ohio ex rel. Jack Morrison, Jr. v. Beck Energy Corp.*, Slip Opinion No. 2015-Ohio-485, recognizing the sole and exclusive authority of the Ohio Department of Natural Resources (ODNR), Division of Oil and Gas Resources Management over the regulation of oil and gas well production statewide, albeit in a limited context. The four-justice majority concluded that the five city ordinances in question could not be enforced, because they were not a valid exercise of the municipality's home rule powers. The majority opinion, however, made it very clear that the holding leaves open the question of whether general zoning ordinances (e.g., those under Ohio Revised Code (R.C.) 713.07) can co-exist with a comprehensive regulatory scheme under R.C. Chapter 1509.

Background Facts

Joseph Willingham owned several acres of property in Munroe Falls, a city located northeast of Akron in Summit County, Ohio. After entering into an oil and gas lease with Beck Energy Corporation (Beck), ODNR granted Beck an oil and gas drilling permit in February 2011. The permit contained 67 conditions, including 29 specific to drilling wells in urbanized areas, which included Munroe Falls.

Shortly after Beck started excavation and drilling work on Willingham's land, the city issued a stop work order and filed a complaint in the Summit County Court of Common Pleas. The city alleged that Beck violated 11 local ordinances and failed to obtain mandatory zoning permits from the city. (Notably, only five of the local ordinances were subject to the Ohio Supreme Court's ruling — one general zoning ordinance and the other four specifically relating to oil and gas development.) The trial court agreed with the city, issuing an order ceasing Beck's operations on the property until Beck complied with all of the local ordinances. Beck appealed the order.

Appellate Court Decision: State Drilling Statutes Trump the City's Ordinances

The Ninth District Court of Appeals reversed the trial court's decision, holding that the city cannot enforce its "home rule" drilling ordinances because they directly conflict with the state's drilling statutes, which are general laws of uniform application. Interestingly, the case was heard and decided by three Eleventh District judges sitting by designation, as all of the judges from the Ninth District recused themselves.

More specifically, the appellate court focused on the Ohio Supreme Court's longstanding three-part analysis used to determine when a state statute preempts a local "home rule" ordinance — namely, when (i) the ordinance is an exercise of the police power rather than local self-government; (ii) the statute is a general law; and (iii) the statute and ordinance conflict. *Canton v. State*, 95 Ohio St.3d 149, 151 (2002). Thus, a city's home rule authority is limited by a state's general laws to the extent that the two conflict.

The intermediate appellate court observed that R.C. Chapter 1509 "provides a comprehensive regulatory scheme" governing oil and gas well operations. The city's ordinances — which required a permit, application fees and performance bond prior to the commencement of drilling activities — directly conflicted with Ohio law. In fact, the court noted that the city's ordinances prohibited exactly what the state statutes permitted. Because the city's "home rule" ordinances conflicted with R.C. Chapter 1509

— which are general laws — the ordinances were “therefore preempted by this state law.”

Ohio Supreme Court: A Splintered Decision

Engaging in the same analysis as the lower appellate court, the majority opinion (written by Justice French and joined by Chief Justice O’Connor and Justice Kennedy) concludes that the five city ordinances in question violate the Ohio Constitution by discriminating against, unfairly impeding and/or obstructing oil and gas development. Specifically, the majority explained that: (1) the enactment of local zoning laws (including the ordinances in question) represent an exercise of police power — an issue the city did not contest; (2) R.C. 1509.02 is a general law because it is part of a comprehensive regulatory scheme that operates uniformly throughout the state, even though oil and gas development may not occur in all geographical areas of the state; and (3) the ordinances conflict with R.C. 1509.02 because R.C. 1509.02 embodies the General Assembly’s intent to preempt local regulation of oil and gas development, and the specific ordinances in question restrict what R.C. Chapter 1509 permits. Although Justice O’Donnell joined the majority opinion, he emphasized that “it remains to be decided whether the General Assembly intended to wholly supplant all local zoning ordinances limiting land uses to certain zoning districts without regulating the details of oil and gas drilling expressly addressed by R.C. Chapter 1509.”

The dissenting opinions of Justice Lanzinger, Justice Pfeiffer and Justice O’Neill, however, leave open the question of whether general zoning ordinances can be harmonized with the regulatory scheme in R.C. Chapter 1509. As Justice Pfeiffer explained, “I would find that R.C. 1509.02 leaves room for municipalities to employ zoning regulations that do not conflict with the statute.” Going a step further, Justice Lanzinger notes that “R.C. 1509.02 does not specifically prohibit local zoning regulation,” and points to New York, Pennsylvania and Colorado as examples of states that have allowed local governments to supplement general oil and gas statutes with non-conflicting zoning ordinances. She concludes her dissent by noting that the issue of whether local zoning ordinances can supplement the state regulatory scheme remains an open issue.

Conclusion

Although the Ohio Supreme Court’s decision confirms ODNR’s status as the “sole and exclusive authority to regulate” oil and gas well permitting and related activities in Ohio, the holding of *State of Ohio ex rel. Jack Morrison, Jr. v. Beck Energy Corp.* is somewhat limiting. Following *Morrison*, municipalities will have difficulty enforcing ordinances that conflict with the ODNR’s express regulatory authority under R.C. 1509.02. But whether the General Assembly intended R.C. Chapter 1509 to wholly supplant local zoning remains a live litigation issue. Relatedly, the ambiguity in *Morrison* raises the question of whether the General Assembly will revisit this issue to more explicitly address whether ODNR trumps municipal “home rule” in the context of oil and gas operations. The only certainty is that the “state vs. local” debate will not end with this decision.

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