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## When States' Legislation and Constitutions Collide with Angry Locals: Shale Oil and Gas Development and Its Many Masters

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# WHEN STATES' LEGISLATION AND CONSTITUTIONS COLLIDE WITH ANGRY LOCALS: SHALE OIL AND GAS DEVELOPMENT AND ITS MANY MASTERS

HEIDI GOROVITZ ROBERTSON\*

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## INTRODUCTION

This Article addresses the essential struggle between a state's interest in facilitating shale oil and gas production by creating a uniform statewide regulatory process and local governments' interest in protecting residents' safety, wishes, and environment by exerting control or influence over drilling activities within their jurisdictions. Local jurisdictions<sup>1</sup> across the country are paying attention to the shale oil and gas boom.<sup>2</sup> Some jurisdictions want to encourage it, hoping it will bring jobs, customers, and tax revenues.<sup>3</sup> Others want to control it, fearing the environmental damage it may cause.<sup>4</sup> Many would like to require it to operate, if at

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<sup>1</sup> "Local jurisdiction" or "locality" in this Article, includes chartered municipalities and non-chartered municipalities that are entitled home rule authority under the Ohio Constitution, article 18, section 3, as interpreted in *N. Ohio Patrolmen's Benevolent Ass'n v. Parma*, 402 N.E.2d 519, 523–25 (1980).

<sup>2</sup> See, e.g., Laura Arenschiold, *Athens Votes to Ban Fracking*, THE COLUMBUS DISPATCH, Nov. 6, 2014, <http://www.dispatch.com/content/stories/local/2014/11/05/athens-votes-to-ban-fracking.html> [<https://perma.cc/84FB-PVPT>]; Laura Arenschiold, *Ohio Counties Can't Vote to Ban Fracking, Husted Rules*, THE COLUMBUS DISPATCH, Aug. 14, 2015, <http://www.dispatch.com/content/stories/local/2015/08/13/Fracking-ballots-nixed-by-Husted.html> [<https://perma.cc/C27L-ZCQX>]; *Youngstown Voters Turn Down Anti-fracking Proposal—Again*, THE YOUNGSTOWN VINDICATOR, Nov. 7, 2014, <http://www.vindy.com/news/2014/nov/07/youngstown-voters-turn-down-anti-frackin/> [<https://perma.cc/9EHK-YX6J>] (discussing the four-time failure of local drilling ban legislation in the industry-oriented city of Youngstown). See also Michael Shellenberger & Tod Nordhaus, *Campaign to Stop Fracking Sacrifices Nature for Ideology: Column*, USA TODAY, July 16, 2015, <http://www.usatoday.com/story/opinion/2015/07/16/natural-gas-renewable-fuels-fracking-column/27089397/> [<https://perma.cc/KP2W-ZTFK>]; Dan Elliott, *Colorado's High Court to Decide if Cities Can Ban Hydraulic Fracturing*, CBS DENVER (Sept. 21, 2015), <http://denver.cbslocal.com/2015/09/21/colorados-high-court-to-decide-if-cities-can-ban-fracking-2/> [<https://perma.cc/RA6L-3EAX>]; Susan Phillips, *Pennsylvania Supreme Court to Hear More Arguments on Act 13*, STATEIMPACT: PENNSYLVANIA (Oct. 30, 2015, 3:12 PM), <https://stateimpact.npr.org/pennsylvania/2015/10/30/pennsylvania-supreme-court-to-hear-more-arguments-on-act-13/> [<https://perma.cc/T9F7-LMK4>].

<sup>3</sup> See, e.g., *Youngstown Voters Turn Down Anti-fracking Proposal—Again*, *supra* note 2; *Youngstown, Ohio is a City Changed by Fracking*, BUFF. NEWS, Feb. 21, 2015, <http://www.buffalonews.com/city-region/youngstown-ohio-is-a-city-changed-by-fracking-20140518> [<https://perma.cc/PCH3-ACBY>]; Ohio Oil & Gas Ass'n (OOGA), proponent testimony supporting Ohio H. Bill 278 before the Ohio H. R. 125th Gen. Assembly Energy and Env't Comm., Oct. 8, 2013, <http://208.68.184.222/wp-content/uploads/2011/12/HB278TESTimony-1.pdf>.

<sup>4</sup> See, e.g., Aaron Marshall, *New Quinnipiac Poll: Ohioans Want Hydro-fracking Stopped Until More Study is Done*, THE PLAIN DEALER, Jan. 20, 2012, [http://www.cleveland.com/open/index.ssf/2012/01/new\\_quinnipiac\\_poll\\_ohioans\\_st.html](http://www.cleveland.com/open/index.ssf/2012/01/new_quinnipiac_poll_ohioans_st.html) [<https://perma.cc/8URY-33L9>] (summarizing recent Quinnipiac polls, finding a margin of seventy-two percent to twenty-three percent of Ohio voters wanted to suspend hydraulic fracturing until there are further studies on its impact, however, the same polls show eighty-five percent to

all, on their own terms—local terms. Local jurisdictions seeking to control or influence the work of the shale oil and gas industry argue it is within their right of self-government to enact ordinances to protect the health and welfare of their citizens and communities.<sup>5</sup> They believe some ordinances that are protective of health and welfare may also sometimes effect drilling.<sup>6</sup> State legislation in many states,<sup>7</sup> including Ohio, suggests the contrary.<sup>8</sup> For example, in Ohio, the legislature long ago enacted the

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eleven percent of Ohioans believe the industry can create jobs). While public opinion seems fractured, environmental and lobbyist groups loudly oppose the promise of the natural gas economy in Ohio. *See Anti-fracking Charter Amendment to be on Nov. 4 Ballot in Youngstown*, THE YOUNGSTOWN VINDICATOR, Sept. 2, 2014, <http://www.vindy.com/news/2014/sep/02/anti-fracking-charter-amendment-be-nov-4-ballot-yo/> [<https://perma.cc/9HXY-BW6B>] (showing the tension in attitudes between industry and environmentalist groups on the impacts of drilling for the city).

<sup>5</sup> *See, e.g.*, Sara Dorn, *Anti-fracking Bill of Rights Will Be on Gates Mills November Ballot After Village Officials Change Stance*, THE PLAIN DEALER, Sept. 8, 2014, [http://www.cleveland.com/hillcrest/index.ssf/2014/09/anti-fracking\\_bill\\_of\\_rights\\_w.html](http://www.cleveland.com/hillcrest/index.ssf/2014/09/anti-fracking_bill_of_rights_w.html) [<https://perma.cc/DF6U-5L47>] (discussing a small-town petition to adopt a charter amendment preventing “fracking in the village”).

<sup>6</sup> *See State ex rel. Morrison v. Beck Energy Corp.*, 37 N.E.3d 128, 139 (Ohio 2015) (supporting the proposition that “municipalities have statutory authority to regulate land uses within zoning districts to promote the public health, safety, convenience, comfort, prosperity, and general welfare.”).

<sup>7</sup> In 2012 alone, fourteen states enacted or refined comprehensive oil and gas legislation, which in each state restricted local control to at least some degree. Enacting states included Idaho, Kansas, and Utah. *See Jacquelyn Pless, States Take the Lead on Regulating Hydraulic Fracturing: Overview of 2012 State Legislation*, NAT. CONF. OF ST. LEGISLATURES 1 (March, 2013), <http://www.ncsl.org/documents/energy/NaturalGasDevLeg313.pdf> [<https://perma.cc/YW7A-E8BC>]. In 2015, Colorado and Oklahoma were considering legislation that would explicitly preempt local oil and gas regulation. *Id.* Some of the proposed measures would allow for certain ordinances (such as those related to road use, traffic, noise, or odor) but would prevent outright bans. According to the National Conference of State Legislatures, numerous states have attempted, or are currently attempting, to preserve local control of fracking in a number of ways including: legislators in ten states have proposed restrictions about where wells can be located and how close they can be to each other, legislators in at least seven states are considering bills requiring additional disclosure rules for chemicals, and legislators in at least nine states are considering measure to regulate the transport, treatment, and disposal of wastewater produced from fracking. *Id.* In addition, several states (Colorado and North Dakota among them) have joined Wyoming in a lawsuit questioning the Bureau of Land Management’s authority to impose a regulatory framework on what has traditionally been under the jurisdiction of state officials. *See Kristy Hartman, Economies of Shale*, ST. LEGISLATURES MAG. (June 1, 2015), <http://www.ncsl.org/research/environment-and-natural-resources/economies-of-shale.aspx> [<https://perma.cc/75WV-7XX9>].

<sup>8</sup> *See, e.g.*, 58 PA. CONS. STAT. §§ 3303–3304 (2016), <http://www.legis.state.pa.us/cfdocs/legis/LI/consCheck.cfm?txtType=HTM&ttl=58> [<https://perma.cc/3JM2-Y6BF>]; N.Y. ENVTL. CONSERV. § 23-0303 (1981), <http://codes.findlaw.com/ny/environmental-conservation-law/env-sect-23-0303.html> [<https://perma.cc/29ES-4LHM>]; H.B. 40, 84th Leg. (Tex. 2015), <http://www>

original Ohio Revised Code section 1509.02.<sup>9</sup> In its current form it bestows on the Ohio Department of Natural Resources' Division of Oil and Gas Resources Management "sole and exclusive authority to regulate" in the field of oil and gas.<sup>10</sup> In recent years, the Ohio legislature has lengthened and strengthened this statute primarily with respect to its assertion that it preempts local control in a broad area of oil and gas regulation.

Still, some local jurisdictions have enacted outright drilling bans,<sup>11</sup> others have enacted local permit requirements, fees, or inspections for oil and gas activities,<sup>12</sup> and still others hope to control oil and gas operations by controlling traffic, noise, or aesthetics.<sup>13</sup> Some local jurisdictions passed resolutions opposing what they see as the Ohio legislature's special treatment of the oil and gas industry<sup>14</sup>—by attempting to exempt the industry from all local control. They argue that despite apparent preemption by state legislation local control ordinances should be permissible under the home rule authority they claim through Ohio's constitution.<sup>15</sup> This authority purports to grant local jurisdictions "authority to exercise all powers of local self-government and to adopt and enforce within their limits such

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.legis.state.tx.us/tlodocs/84R/billtext/pdf/HB00040F.pdf#navpanes=0 [https://perma.cc/3L MX-S3Q4]; S.B. 809, 55th Leg., 1st Sess. (Okla. 2015), [http://webserver1.lsb.state.ok.us/cf\\_pdf/2015-16%20ENR/SB/SB809%20ENR.PDF](http://webserver1.lsb.state.ok.us/cf_pdf/2015-16%20ENR/SB/SB809%20ENR.PDF) [https://perma.cc/BD2T-UBM4].

<sup>9</sup> OHIO REV. CODE ANN. § 1509.02 (West 2013).

<sup>10</sup> *Id.*

<sup>11</sup> Several Ohio cities and towns sought to ban fracking through the November 2014 ballot, including the cities of Athens, Youngstown, and Kent. *See, e.g.,* David DeWitt, *Anti-fracking Group Looks Beyond Ballot Initiative Toward Continuing Efforts*, THE ATHENS NEWS, Oct. 29, 2014, <http://www.athensnews.com/ohio/article-43560-anti-fracking-group-looks-beyond-ballot-initiative-toward-continuing-efforts.html> [https://perma.cc/4H85-B3YT]; David Lange, *Restore Rights to Real People*, CHAGRIN VALLEY TIMES, Oct. 2, 2014, [http://www.chagrinvalleytoday.com/viewpoint/our\\_viewpoint/article\\_cb5fba80-4992-11e4-b97a-0017a43b2370.html](http://www.chagrinvalleytoday.com/viewpoint/our_viewpoint/article_cb5fba80-4992-11e4-b97a-0017a43b2370.html) [https://perma.cc/MB75-L5BW]; Matthew Merchant, *Rallying for Local Fracking Regulations*, KENT WIRED, Oct. 12, 2014, [http://www.kentwired.com/latest\\_updates/article\\_44516b06-527f-11e4-a15c-0017a43b2370.html](http://www.kentwired.com/latest_updates/article_44516b06-527f-11e4-a15c-0017a43b2370.html) [https://perma.cc/L6K6-FW32].

<sup>12</sup> The cities of Munroe Falls and Broadview Heights are among Ohio localities that have tried to exert control over drilling activity using zoning regulations and other ordinances, rather than outright bans. *See* Sara Dorn, *The Fracking Debate: How Communities are Trying to Control Drilling*, THE PLAIN DEALER, Aug. 14, 2014, [http://www.cleveland.com/hillcrest/index.ssf/2014/07/the\\_fracking\\_debate\\_how\\_commun.html](http://www.cleveland.com/hillcrest/index.ssf/2014/07/the_fracking_debate_how_commun.html) [https://perma.cc/S93S-KJVY].

<sup>13</sup> *See* Bob Downing, *Communities Seek Ways to Override State Control of Oil and Gas Drilling Boom*, AKRON BEACON J., Sept. 10, 2012, <http://www.ohio.com/news/local-news/communities-seek-ways-to-override-state-control-of-oil-and-gas-drilling-boom-1.332880> [https://perma.cc/X7DX-7YMB].

<sup>14</sup> *Id.*

<sup>15</sup> *See* Brief of Appellant at 2–3, *State ex rel. Morrison v. Beck Energy Corp.*, 989 N.E.2d 85 (Ohio App. 9 Dist. 2013) (No. 2013-0465), 2013 WL 5229893, at 2.

local police, sanitary and other similar regulations, as are not in conflict with general laws.”<sup>16</sup>

This Article explores the nationally common problem of tension and conflict among state oil and gas statutes, constitutional home rule, and local control by considering intersections and tensions among the Ohio Constitution’s home rule authority, the Ohio oil and gas law’s preemption provision, and the many regulatory efforts of Ohio’s local governments. It explores the scope of the Ohio Constitution’s home rule authority, in part, by evaluating courts’ statements on the validity of several types of local ordinances, as they confront home rule and a legislative attempt at preemption. Types of local ordinances evaluated include those that prohibit or ban drilling, those that impose additional permitting fees, hearings or other requirements upon drillers, and those that pertain to more traditional exercises of zoning authority. The Article also considers some similar local control efforts in the region—in particular, in New York and Pennsylvania—which have constitutional home rule provisions similar to Ohio’s, and where, like Ohio, the shale oil and gas industry is active. By considering the constitutions, legislation, and local control efforts of nearby states that are, like Ohio, within the Utica, Marcellus, and Barnett shale plays, this Article gauges the legal circumstances under which localities might regulate the actions of the shale oil and gas industry within their borders, and under what circumstances these efforts might succeed. Because this problem presents itself throughout the country, this Article looks briefly at similar circumstances in other regions, in particular, Colorado and Texas. These states have active shale oil and gas industries, legislatures vigorously working to preempt local control, and some engaged local communities hoping to exert some influence over oil and gas activities in their jurisdictions.

Although it comes in many variations, the main question is this: does constitutional home rule, when coupled with statutory preemption of local control, allow *any* room for local regulation of the shale oil and gas industry?

## I. THE MANY MASTERS OF SHALE OIL AND GAS PRODUCTION: LEGISLATION, CONSTITUTIONS, AND THE COURTS

### A. *Ohio’s Oil and Gas Law*

Theoretically, localities can use their police power to regulate activities within their borders for the health, safety, and welfare of their

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<sup>16</sup> OHIO CONST. art. XVIII, § 3.



citizens.<sup>17</sup> Ohio's constitution even includes a home rule provision to help protect this authority.<sup>18</sup> Localities can enact and enforce substantial controls over the activities within their borders.<sup>19</sup> They can enact noise ordinances, zoning plans, and traffic controls. They can decide where houses can be built, and in which areas commercial and industrial activities may take place. These are traditional exercises of land use and zoning powers.<sup>20</sup>

That said, state legislatures sometimes enact laws that claim specific, and sometimes broad, regulatory authority, thereby preempting the regulatory power of the local jurisdiction. That is what the Ohio legislature did in Ohio Revised Code section 1509.02, Ohio's oil and gas law. This section will address the evolution of that statute to understand how, through serial amendments, section 1509.02 evolved to become the restrictive, putatively preemptive statute it is today.<sup>21</sup>

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<sup>17</sup> See, e.g., *State ex rel. Petit v. Wagner*, 164 N.E.2d 574, 575–76 (Ohio 1960) (noting the inherent power of municipalities to perform certain functions without state approval); *Fondessy Enter. v. City of Oregon*, 492 N.E.2d 797, 799–800 (1986) (explaining that “Section 3, Article XVIII of the Ohio Constitution grants municipalities ‘. . . the power to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws.’” This “power of home rule” is constitutionally conferred upon municipalities and may not be withdrawn by the General Assembly); *Akron v. Scalera*, 19 N.E.2d 279, 279–80 (1939). See also George L. Blum, Annotation, *Validity of Zoning Regulations Prohibiting or Regulating Removal or Exploitation of Oil and Gas, Including Hydrofracking*, 84 A.L.R. 6th 133 (2013).

<sup>18</sup> OHIO CONST. art. XVIII, § 3.

<sup>19</sup> See, e.g., *Cleveland v. Shaker Heights*, 507 N.E.2d 323, 326 (Ohio 1987) (holding that it was within a city's home rule police power to regulate traffic, despite a state statute that all cities keep their streets “open”); *Cincinnati v. Welty*, 413 N.E.2d 1177, 1178 (Ohio 1980) (holding that the City of Cincinnati had traditional home rule purview over what type of vehicle could drive on its streets when that had a “real and substantial relation” to its police powers).

<sup>20</sup> See Wendy H. Gridley, *Municipal Home Rule*, 128 MEMBERS ONLY 8 (Jan. 26, 2010), <http://www.lsc.ohio.gov/membersonly/128municipalhomerule.pdf> [<https://perma.cc/2QRL-32U7>] (explaining that a municipality has the power to enact zoning regulations to address concerns such as “traffic control, traffic volume, property values, enhancement of municipal revenue, costs of municipal improvement, land use, nuisance abatement, and the general welfare and development of the community as a whole.”). See also *Morrison*, 37 N.E.3d at 128 (O'Donnell, J., concurring) (explaining that, in addition to the Ohio Constitution, municipalities' zoning powers are derived from O.R.C. § 713.07 which provides that municipalities may regulate or restrict the use of a premises if the restriction is “in the interest of the promotion of health, safety, convenience, comfort, prosperity, or general welfare”).

<sup>21</sup> This section draws heavily on the author's previously published column in Crain's Cleveland Business regarding the development of Ohio's oil and gas law, granting increasing control to the Ohio Department of Natural Resources, and decreasing involvement of local authorities. See Heidi G. Robertson, *The Road to State Control Over Drilling*

The Ohio legislature worked hard to establish tight state regulatory control over shale oil and gas operations. It created a uniform statewide regulatory system by constraining the ability of local jurisdictions to enact their own controls, and by consolidating decision-making authority in a state agency. When Ohio Revised Code section 1509.02 was first enacted in 1964,<sup>22</sup> it merely “created in the department of natural resources the division of oil and gas . . . .”<sup>23</sup> The Ohio legislature has amended it many times since then. Most of the amendments are not relevant to the local control question—instead dealing with funding issues.<sup>24</sup>

In 2000, an amendment combined the Division of Mines and Reclamation and the Division of Oil and Gas—both within the Ohio Department of Natural Resources (“DNR”), and created the Division of Mineral Resources Management.<sup>25</sup> This change, although it affected the Division of Oil and Gas, did not yet start the legislation’s march towards eliminating local control of shale oil and gas regulation.

The legislature’s push to consolidate decision-making authority in the state agency began, in earnest, in 2004 with House Bill 278.<sup>26</sup> The legislature made some important and lasting changes. This is where it first gave the Division of Oil and Gas Resources Management “sole and exclusive authority to regulate the permitting, location, and spacing of oil and gas wells within the state.”<sup>27</sup> It declared the “regulation of oil and gas activities [to be] a matter of general statewide interest that requires uniform statewide regulation” and it declared the “rules adopted under [the new law to be] a comprehensive plan with respect to all aspects of

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*is Paved With Legislation*, CRAIN’S CLEVELAND BUS., Aug. 22, 2014, <http://www.craainscleveland.com/article/20140822/BLOGS05/140829925> [<https://perma.cc/N9VX-HYBZ>].

<sup>22</sup> See OHIO REV. CODE ANN. § 1509.02 (West 1964).

<sup>23</sup> *Id.*; OHIO REV. CODE ANN. § 1509.02 (West 1977), *amended by* OHIO REV. CODE ANN. § 1509.02 (Supp. 1984) (adding the following language: “All fines imposed under 1509.99 of the Revised Code shall be paid to the treasurer of state and credited by him to the oil and gas well plugging fund created by section 1509.071 of the Revised Code.”).

<sup>24</sup> See OHIO REV. CODE ANN. § 1509.02 (1975); OHIO REV. CODE ANN. § 1509.02 (1999); OHIO REV. CODE ANN. § 1509.02 (2001); OHIO REV. CODE ANN. § 1509.02 (1984), *amended by* OHIO REV. CODE ANN. § 1509.02 (Supp. 1995) (providing for the creation of an “oil and gas permit fee” special account which would be appropriated to the division of oil and gas biennially); OHIO REV. CODE ANN. § 1509.02 (1995), *amended by* OHIO REV. CODE ANN. § 1509.02 (1999) (removing the biennial appropriation provision and instead provided that “the fund shall be used only for the expenses of the division associated with the administration of the Natural Gas Policy Act of 1978”).

<sup>25</sup> 1999 Ohio Laws 45.

<sup>26</sup> H.B. 278, 125th Gen. Assemb. (Ohio 2004) (enacted), *updated by* 2004 Ohio Laws 98; *see also* Robertson, *supra* note 21.

<sup>27</sup> 2004 Ohio Laws 98 (codified as OHIO REV. CODE ANN. § 1509.02 (West 2004)).

the locating, drilling, and operating of oil and gas wells within this state, including site restoration and disposal of wastes from those wells.”<sup>28</sup>

As if these changes were not sufficiently damaging to local control, the Ohio Legislative Services’ bill analysis notes that the new law also “repeal[ed] all statutory authority of local governments to regulate oil and gas exploration and operation.”<sup>29</sup> Whereas the earlier version of the law allowed concurrent authority—that is, authority of the state as well as local jurisdictions—the 2004 amendment stripped that away. According to the bill analysis, under the former law, the Division of Mineral Resources Management “had a certain amount of concurrent jurisdiction with municipal corporations, counties, and townships to regulate the exploration and operation of oil and gas wells. An applicant for a state permit to drill a new oil and gas well was required to include in the application to the Division a sworn statement that the applicant would comply with all local requirements related to the drilling or operation of an oil or gas well.”<sup>30</sup> Although the aforementioned concurrent jurisdiction was found in a separate section—1509.06(i),<sup>31</sup> it was an important legislative nod to the authority of local jurisdictions.

In fact, the prior version of the law could not be construed to prevent any municipal corporation “from enacting and enforcing health and safety standards for the drilling and exploration for oil and gas, provided . . .” these standards were not less restrictive than state law.<sup>32</sup> Still, counties and townships were precluded from requiring any permits or license regarding drilling, or imposing their own minimum acreage or set-back requirements.<sup>33</sup> So, even when the statute protected local control, it limited local control.

In the 2004 amendment, section 1509.02 included language specifically reserving limited authority for localities. It stated that “[n]othing in this section affects the authority granted to the director of transportation and local authorities in section . . . 4513.34 of the Revised Code.”<sup>34</sup> Section 4513.34 provides the director of transportation and local authorities the power to issue heavy load permits for roads within the jurisdiction.<sup>35</sup>

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<sup>28</sup> *Id.*

<sup>29</sup> OHIO LEG. SERV. COMM’N, OHIO FINAL BILL ANALYSIS, 2004 H.B. 278 (2004).

<sup>30</sup> *Id.*

<sup>31</sup> OHIO REV. CODE ANN. § 1509.06(I) (West 2015).

<sup>32</sup> *Morrison*, 37 N.E.3d at 141–42.

<sup>33</sup> OHIO REV. CODE ANN. § 1509.39 (West 2016).

<sup>34</sup> OHIO REV. CODE ANN. § 1509.02 (West 2004).

<sup>35</sup> OHIO REV. CODE ANN. § 4513.34 (West 2013).

Certainly because shale oil and gas development requires substantial use of trucks, jurisdictions could use that authority to effect shale oil and gas development—yet the legislature retained it.

Later, in 2011, the Ohio legislature broadened section 1509.02's reach and tightened its grip. It added the words “and production operations” as follows: “[t]he division has sole and exclusive authority to regulate the permitting, location, and spacing of oil and gas wells *and production operations* within the state.”<sup>36</sup> This addition of production operations broadened the section's ever more inclusive list of oil and gas-related activities explicitly reserved for exclusive government control by the Ohio DNR, and thereby tightened the state agency's control over the activities of the shale oil and gas industry within Ohio.

This 2011 version also added qualifying language to the portion of the law that had preserved the limited authority granted to local government by some other sections of the Ohio Revised Code. In particular, it added language to modify Ohio Revised Code section 723.01 (to control the use of roads within the jurisdiction), curtailing that section's preservation of local authority.<sup>37</sup> Whereas the earlier version of section 1509.02 ended the relevant paragraph by preserving section 723.01's limited local authority, this newer version qualified it. It added “*provided they do not obstruct oil and gas activities and operations.*”<sup>38</sup>

In the version of section 1509.02 that was effective from September 29, 2011, to September 9, 2012, the legislature added further restrictive language, presumably to expand evidence of state control over shale and gas activities. The new language further indicated state control by “excepting only those activities regulated under federal laws for which oversight has been delegated to the environmental protection agency and activities regulated under section 6111.02 to 6111.029 of the Revised Code.”<sup>39</sup> By excepting EPA-controlled activities, the legislature impliedly reserves for the Ohio DNR all issues that do not pertain to “off pad” issues, such as EPA's traditional areas of control in air, water, and waste. The Ohio Revised Code sections the legislature excepted from Ohio DNR control pertain to isolated wetland designation, isolated wetland permits, review of proposed filling of wetlands, wetland mitigation banks and impact,

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<sup>36</sup> OHIO REV. CODE ANN. § 1509.02 (West 2011) (emphasis added).

<sup>37</sup> OHIO REV. CODE ANN. § 723.01 (West 2016) (giving municipalities “special power to regulate the use of the streets.”).

<sup>38</sup> OHIO REV. CODE ANN. § 1509.02 (West 2011) (emphasis added).

<sup>39</sup> OHIO REV. CODE ANN. § 1509.02 (West 2012).

and discharge of material into isolated wetlands, all areas within EPA's traditional areas of expertise and control.<sup>40</sup>

This iteration of section 1509.02 once again expanded the explicitly listed oil and gas related activities, for which regulatory authority would be reserved for the Ohio DNR, to include: "all aspects of the locating, drilling, *well stimulation, completing*, and operating of oil and gas wells within this state, including site *construction and restoration, permitting related to those activities*, and *the disposal of wastes from those wells* (new language in italics)."<sup>41</sup> The entire list of activities now reserved for the Ohio DNR's Division of Oil and Gas Resources Management is huge. This ultimate list results from repeated efforts, over a decade of amendments by the Ohio legislature, to ensure that the statute would deliver as much specific authority to the Ohio DNR Division of Oil and Gas Resources Management as possible by precisely enumerating the activities within the Division's authority. The continued expansions of coverage were also likely intended to encourage the sections' interpretations—by the courts and by localities—as a general law, thus preempting local control. Reserved activities now include "all aspects of the locating, drilling, well stimulation, completing, and operating of oil and gas wells within this state, including site construction and restoration, permitting related to those activities, and the disposal of wastes from those wells."<sup>42</sup>

Another notable addition in the latest change to the statute was not made to the ever-growing list of Division-controlled activities. Instead, it was three sentences added to follow that lengthy list. The new language further emphasizes the Division's "sole and exclusive authority" and strives to assist it in exercising this control.<sup>43</sup> It says:

In order to assist the Division in the furtherance of its sole and exclusive authority as established in this section, the chief may enter into agreements with other state agencies for advice and consultation, including visitations at the surface location of a well on behalf of the division. Such cooperative agreements do not confer on the other state

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<sup>40</sup> The statute specifically exempts both "activities regulated under federal laws for which oversight has been delegated to the environmental protection agency" and "sections 6111.02 to 6111.028 of the Revised Code" which are regulated by the state EPA. OHIO REV. CODE ANN. § 1509.02 (West 2013).

<sup>41</sup> OHIO REV. CODE ANN. § 1509.02 (West 2012).

<sup>42</sup> OHIO REV. CODE ANN. § 1509.02 (2013) (current version, codified Sept. 29, 2013).

<sup>43</sup> *Id.*

agency any authority to administer or enforce this chapter and rules adopted under it. In addition, such cooperative agreements shall not be construed to dilute or diminish the division's sole and exclusive authority as established under this section.<sup>44</sup>

So, the Ohio legislature has worked hard to make sure that almost everything a local jurisdiction might like to regulate regarding drilling is prohibited by virtue of the Ohio DNR's now broad and explicit statutory authority. The statute has evolved from merely creating a Division of Mineral Resources Management within the Ohio DNR to giving a Division of Oil and Gas Resources Management authority over a lengthy, enumerated list of activities. Finally, cross-referencing section 1509.02 with other areas of the Ohio Revised Code and the Ohio Administrative Code expresses how completely the Legislature has aimed to control the shale oil and gas development process as a whole.<sup>45</sup> It is no surprise that localities, like Munroe Falls, Ohio,<sup>46</sup> and others have attempted to find space, somewhere or somehow, to exercise a modicum of influence over what happens within their borders.<sup>47</sup>

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<sup>44</sup> *Id.*

<sup>45</sup> See, e.g., OHIO ADMIN. CODE 1501:9-1-01 to -08 (2012) (listing administrative rules for activities associated with natural gas drilling); OHIO REV. CODE ANN. § 1509.03 (West 2012) (allocating State power to general topics list related to drilling, including safety and waste containment); OHIO REV. CODE ANN. § 1509.021 (West 2011) (controlling locations of new wells built).

<sup>46</sup> In 2011, the City of Munroe Falls sued to stop Beck Energy from initiating a drilling project in the city. Beck Energy had obtained a state permit from the Ohio Department of Natural Resources, but Munroe Falls claimed that the driller must also comport with its municipal ordinances. See *State ex rel. Morrison v. Beck Energy Corp.*, No. 2011-04-1897 (Summit Cnty. Ct. C.P. May 3, 2011), *rev'd*, 989 N.E.2d 85 (2013).

<sup>47</sup> Ohio localities that have established regulations on the oil and gas drilling industry include: Broadview Heights (struck down by *Bass Energy, Inc., v. Broadview Heights*, No. CV-14-828074 (Cuyahoga Cnty. Ct. C.P. Mar. 10, 2015) (Norton Rose Fullbright), Niles, Mansfield, Yellow Springs, and Oberlin, banning drilling using rights-based city ordinances; the Village of Hartville, Hinckley Township, Medina Township, York Township, Bowling Green, Brunswick, the Village of Burton, Plain Township, Sharon Township, Canal Fulton, the City of Girard, Madison Township, the City of Athens, and Munroe Falls (ruled unconstitutional in *Beck Energy Corp.*, 37 N.E.3d at 128) regulating drilling through city ordinances based on municipal police powers; Heath, placing local regulations on drilling not amounting to a ban; and Canton, North Canton, the Village of South Russell, Stow, Randolph Township, Cincinnati, Chester Township, the Village of Meyers Lake, passing resolutions disapproving of the Governor or Ohio General Assembly's development of state control of drilling projects. Copies of the original ordinances are no longer available online, but are available with the author; for a list of local regulations in Ohio and other states, see *Local Resolutions Against*

Ohio State Representative Debbie Phillips has attempted to reverse the Ohio legislature's persistent march toward eliminating local control. In May 2016, she introduced House Bill 522. HB522, the short title of which is "Oil and gas wells—local approval/ conversion-injection wells," seeks to amend portions of the Ohio oil and gas law to, among other things, require municipal or township approval prior to the issuance of an oil or gas well permit.<sup>48</sup> It would remove the language in section 1509.02 declaring oil and gas regulation a matter of statewide general interest requiring uniform statewide control.<sup>49</sup> It would remove the entire sentence indicating the many oil and gas related activities over which the Ohio DNR has sole and exclusive regulatory authority.<sup>50</sup> Though these changes would remove the statutory preemption problem for local jurisdictions seeking to regulate oil and gas activities, and add an explicit approval for local governments, they are highly unlikely (in the author's opinion) to be reported out of the Ohio House Energy and Natural Resources Committee.<sup>51</sup>

#### B. *The Ohio Constitution's Home Rule Provision*

In amending section 1509.02, the Ohio legislature expanded that statute's regulatory authority over oil and gas related decisions to the apparent exclusion of all local regulation. But to what extent does that expansion, however large, leave room for localities to regulate—if it leaves any room at all? Ohio was once known for its strong Constitutional support of its abundant local governments.<sup>52</sup> Article XVIII, Section 3, of the Ohio Constitution gives municipalities "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>53</sup> So, when an Ohio municipality wants to control land use

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*Fracking*, FOOD & WATER WATCH (Sept. 12, 2016), <http://www.foodandwaterwatch.org/insight/local-resolutions-against-fracking> [<https://perma.cc/KU42-NYDS>].

<sup>48</sup> H.B. 522, 131 Gen. Assemb., Reg. Sess. (Ohio 2016) (referring to Energy and Natural Resources Committee May 26, 2016).

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> Dan Langshaw, *HB 522: Letter to the Editor*, THE PLAIN DEALER, May 6, 2016, [http://www.cleveland.com/opinion/index.ssf/2014/02/ohio\\_cities\\_home\\_rule\\_rights\\_f.html](http://www.cleveland.com/opinion/index.ssf/2014/02/ohio_cities_home_rule_rights_f.html).

<sup>52</sup> See generally Mayo Fesler, *The Progress of Municipal Home Rule in Ohio*, 5 NAT'L MUN. REV. 242 (2006) (discussing the history of the home rule amendment to the Ohio Constitution); but cf. Harvey Walker, *Municipal Government in Ohio Before 1912*, 9 OHIO ST. L.J. 1 (1948) (analyzing the traditions of municipal control in Ohio before the home rule amendment was passed).

<sup>53</sup> Ohio's home rule amendment was ratified in 1912, see OHIO CONST. art. XVIII, § 3. See also Jonathon Angarola, *Ohio's Home-Rule Amendment: Why Ohio's General Assembly*

decisions within its borders by setting spacing or set-back requirements for shale oil and gas wells, it sounds at first blush, like that action might be permissible under the Ohio Constitution's home rule provision.

Home rule advocates champion local control as an example of democracy at its best, where local citizens have a real say in what their government does on their behalf.<sup>54</sup> Those in favor of local control in many areas of law characterize Ohio's history of home rule as part of Ohio's identity.<sup>55</sup> Through the 1990s, there was an apparent tradition of home rule in Ohio, across numerous areas of law.<sup>56</sup> Some areas have been, and remain, squarely in the purview of municipalities—for instance, the structure and organization of local governments, and the procedures controlling local police powers.<sup>57</sup> But around the turn of the 21st century, the Ohio legislature began, in earnest, to erode this tradition—not just in the area of oil and gas development—but in multiple areas of economic interest to the state. In his twenty-year review of municipal home rule in Ohio, George Vaubel calls this trend an inevitable product of a national movement towards centralization.<sup>58</sup> Since the 1980s, Ohio's courts have moved from a restrictive to a sweeping construction of the notion of “general laws.”<sup>59</sup> The result has been to construe the police power scope

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*Creating Regional Governments Would Combat the Regional Race to the Bottom under Current Home-Rule Principles*, 63 CLEV. ST. L. REV. 865 (2015) (discussing the history and policy behind Ohio's home rule provision and its role in encouraging unhealthy competition among local jurisdictions).

<sup>54</sup> See generally Stephen Cianca, *Home Rule in Ohio Counties: Legal and Constitutional Perspectives*, 19 U. DAYTON L. REV. 533, 534 (1994).

<sup>55</sup> See, e.g., *Ohio Cities' Home Rule Rights Face Another Threat, This Time Over Traffic Cameras*, THE PLAIN DEALER, Feb. 18, 2014, [http://www.cleveland.com/opinion/index.ssf/2014/02/ohio\\_cities\\_home\\_rule\\_rights\\_f.html](http://www.cleveland.com/opinion/index.ssf/2014/02/ohio_cities_home_rule_rights_f.html) [<https://perma.cc/D3V3-AEW7>]; Robert Higgs, *In Victory for Home Rule, Supreme Court Says Cleveland, Other Cities, Can Regulate Tow Trucks*, THE PLAIN DEALER, Jan. 21, 2014, [http://www.cleveland.com/open/index.ssf/2014/01/in\\_victory\\_for\\_home\\_rule\\_supre.html](http://www.cleveland.com/open/index.ssf/2014/01/in_victory_for_home_rule_supre.html) [<https://perma.cc/ZAM3-FJCY>]; *Oberlin Should Assert Its Home-Rule Rights and Not Surrender Public Safety to Armed Bullies*, THE PLAIN DEALER, Sept. 12, 2013, [http://www.cleveland.com/opinion/index.ssf/2013/09/outgunned\\_by\\_the\\_erosion\\_of\\_ho.html](http://www.cleveland.com/opinion/index.ssf/2013/09/outgunned_by_the_erosion_of_ho.html) [<https://perma.cc/H8JG-UYUH>]; Kevin O'Brien, *Ohio Supreme Court Undermines Home Rule and Cleveland's Future*, THE PLAIN DEALER, June 11, 2009, [http://www.cleveland.com/opinion/index.ssf/2009/06/ohio\\_supreme\\_court\\_undermines.html](http://www.cleveland.com/opinion/index.ssf/2009/06/ohio_supreme_court_undermines.html) [<https://perma.cc/JE2R-M6NR>].

<sup>56</sup> George D. Vaubel, *Municipal Home Rule in Ohio (1976–1995)*, 22 OHIO N.U. L. REV. 143 (1995); see also Lavea Brachman, *Legislating Sustainable Design: The Challenge of Local Control and Political Will*, 40 ENVTL. L. REP. NEWS & ANALYSIS 10740 (Aug. 2010).

<sup>57</sup> See, e.g., *Wagner*, 164 N.E.2d at 578 (noting the “inherent” power of municipalities to perform certain functions without state approval).

<sup>58</sup> *Id.*

<sup>59</sup> Vaubel, *supra* note 56, at 144–45.



of local control ever more strictly.<sup>60</sup> In the 1990s, the Ohio Supreme Court began to make more frequent its use of the doctrine that a local regulation may not conflict with the general laws of the state.<sup>61</sup> This has produced a marked shift towards state control of once-locally regulated concerns, including labor, welfare, waste disposal, utilities, and more.<sup>62</sup>

More recently, Ohio's regulatory balance has tipped even more towards statewide control of areas from behavioral control to commerce. This has occurred through legislative restructuring of regulatory regimes<sup>63</sup> and through courts' increasingly stringent construction of the "general law" preemption doctrine.<sup>64</sup> Some specific areas that have experienced reductions in local control back include municipal residency requirements for public officials,<sup>65</sup> municipal lending and housing regulations,<sup>66</sup>

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<sup>60</sup> *Id.* at 177–78.

<sup>61</sup> *See* *Rispo Realty & Dev. Co. v. Parma*, 564 N.E.2d 425 (Ohio 1990).

<sup>62</sup> *Dorn*, *supra* note 12.

<sup>63</sup> *Canton v. State*, 766 N.E.2d 963, 965 (Ohio 2002) (articulating a new, four-part test for determining what is a general law for the purposes of home rule analysis); *see, e.g.*, *Lima v. State*, 909 N.E.2d 616 (Ohio 2009) (upholding a state regulatory scheme controlling wages and employment conditions after a home rule challenge). For a thorough summary of regulatory and court-made limitations on home rule powers, *see* *Gridley*, *supra* note 20.

<sup>64</sup> *Compare* *Vill. of W. Jefferson v. Robinson*, 205 N.E.2d 382 (Ohio 1965) (applying the relaxed general law test characteristic of early home rule jurisprudence) *with* *Canton*, 766 N.E.2d at 965 (announcing a new, 4-part general law analysis, amounting to heightened scrutiny). *See, e.g.*, *Lima*, 909 N.E.2d at 616 (upholding a statute which prohibited political subdivisions from imposing residency requirements on employees as a condition of their employment and holding that the home rule provision of Ohio's Constitution could not impair the legislature's power to enact legislation pursuant to the general welfare clause). *See also* *Rocky River v. State Emp't Relations Bd.*, 539 N.E.2d 103, 104 (Ohio 1989) (approving a state mandate for binding arbitration between a city and safety forces if negotiations between the parties broke down).

<sup>65</sup> *See, e.g.*, *Am. Fin. Servs. Ass'n v. Cleveland*, 858 N.E.2d 776 (Ohio 2006) (holding that Ohio's predatory lending statutes are general laws within the meaning of Ohio's home rule amendment because, in enacting these laws, the General Assembly was acting on a matter of statewide concern). Accordingly, city ordinances that sought to forbid certain types of loans, which were expressly authorized under the statute, conflicted with the state statute and therefore, the city ordinances were deemed unconstitutional. *See also* *Joe Mulligan, Not in Your Backyard: Ohio's Prohibition on Residency Requirements for Police Officers, Firefighters, and Other Municipal Employees*, 37 U. DAYTON L. REV. 351, 366 (2012); *Lima*, 909 N.E.2d at 616.

<sup>66</sup> *See, e.g.*, OHIO REV. CODE ANN. § 1332.22(J) (West 2007) ("The continued development of Ohio's video service market and promotion of infrastructure investment are matters of statewide concern and are properly subject to exercises of this state's police power."). *See also* *Brett Altier, Municipal Predatory Lending Regulation in Ohio: The Disproportionate Impact of Preemption on Ohio's Cities*, 59 CLEV. ST. L. REV. 125, 139 (2011); *Am. Fin. Servs. Ass'n*, 858 N.E.2d at 776.

and cable television and video regulation.<sup>67</sup> Still, even though the home rule provision seems to be eroding, some have noted its powerful political hold on Ohioans.<sup>68</sup>

The oil and gas industry argues that Ohio's oil and gas statute amounts to an occupation of the field of oil and gas regulation, and that it is a general law, against which local rules would conflict and therefore be preempted and void.<sup>69</sup> This means they believe local oil and gas regulation falls outside the protection of the Ohio Constitution's home rule provision. But does it? The Ohio Supreme Court has written, on many occasions, about its process for carrying out a home rule analysis to determine whether a local action is preempted by state statute or protected by home rule.<sup>70</sup> The Ohio courts current rule on home rule protection is that "a state statute takes precedence over a local ordinance when (1) the ordinance is in conflict with the statute; (2) the ordinance is an exercise of the police power, rather than of local self-government; and (3) the statute is a general law."<sup>71</sup>

The first question is whether the local ordinance effecting oil and gas operations is an exercise of local self-government or an exercise of local police power.<sup>72</sup> This matters because an exercise of local self-government will stand on its own and an exercise of police power requires further review to determine whether it is in conflict with a general law.<sup>73</sup> For the ordinance to fall into the local self-government category, and thereby stand without question under the Ohio Constitution's home rule provision, it must pertain "solely to the government and administration of the internal affairs of the municipality."<sup>74</sup> If so, the ordinance will survive because the Ohio Constitution says that it should.<sup>75</sup> The Ohio court has provided

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<sup>67</sup> Gregory M. Saul, *Constitutional Issues Under Ohio's New Regulatory Framework for Video Service Providers*, 37 CAP. U. L. REV. 819, 837 (2009); see also OHIO REV. CODE §§ 1332.21–1332.34 (West 2009).

<sup>68</sup> Melanie Shwab, *Crossing the Home-Rule Boundaries Should be Mandatory: Advocating for a Watershed Approach to Zoning and Land Use in Ohio*, 58 CLEV. ST. L. REV. 463 (2010) (arguing in favor of state-level land use control, but identifying the localist tradition of home rule as "deeply engrained in the politics of Ohio's local governments.").

<sup>69</sup> Brief for Appellant, *supra* note 15, at 7–8.

<sup>70</sup> See, e.g., *Canton*, 766 N.E.2d at 963; see also *Ohioans for Concealed Carry, Inc. v. Clyde*, 896 N.E.2d 967 (Ohio 2008).

<sup>71</sup> *Canton*, 766 N.E.2d at 966.

<sup>72</sup> *Morrison*, 989 N.E.2d at 92 (citing *Clyde*, 896 N.E.2d at ¶ 24).

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* (citing *Clyde*, 896 N.E.2d at ¶ 30 (quoting *Marich v. Bob Bennett Constr. Co.*, 880 N.E.2d 906, ¶ 11 (Ohio 2008), quoting *Beachwood v. Cuyahoga Cnty. Bd. of Elections*, 148 N.E.2d 921 (Ohio 1958)).

<sup>75</sup> The Ohio Constitution vests with a municipality the power "to adopt and enforce within

a test for this, too. The task is to divine whether the results or impact of the ordinance's implementation effect only the municipality, or whether it has "extraterritorial" effect.<sup>76</sup> If there is extraterritorial impact of the ordinance, then the ordinance does not pertain "solely to the government and administration of the internal affairs of the municipality," and the court would send the question of the ordinance's status to the General Assembly for a determination.<sup>77</sup>

If the ordinance is not one of local self-government, the next piece of analysis is to determine whether the ordinance is an exercise of the municipality's police power—that is, its power to protect public health, safety, morals, or the general welfare—as opposed to its power of local self-government.<sup>78</sup> If the ordinance is one of solely local governmental concern, it will stand.<sup>79</sup> If the ordinance is an exercise of the municipality's police power, it will stand *only* if it is not in conflict with a general law.<sup>80</sup> This means that a critical part of the analysis is to determine whether the potentially conflicting statute counts as a general law. If the statute is a general law, and if the police power-supported ordinance conflicts with it, the general law will trump the ordinance.<sup>81</sup> If the statute is a general law, and if the police power-supported ordinance does not conflict with it, the ordinance may survive.<sup>82</sup> If, however, the statute is not a general law, the ordinance could stand on its own under the jurisdiction's police power authority.<sup>83</sup>

Next, then, is to determine when a statute counts as a general law, such that conflict with it would void a police power-authorized ordinance. General laws are laws "which prescribe a rule of conduct upon citizens generally, and which operate with general uniform application throughout the state under the same circumstances and conditions."<sup>84</sup> The Ohio court set forth its widely used test on this issue in *Canton v. State*:

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their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws." OHIO CONST. art. XVIII, § 3; *see also Fondessy*, 492 N.E.2d at 799.

<sup>76</sup> *Morrison*, 989 N.E.2d at 92 (citing *Kettering v. State Emp't Relations Bd.*, 496 N.E.2d 983, 993 (Ohio 1986) (quoting *Cleveland Elec. Illuminating Co. v. Painesville*, 239 N.E.2d 75 (Ohio 1968), quoting *Beachwood*, 148 N.E.2d 921 (Ohio 1958)).

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 92–93 (quoting *Clyde*, 896 N.E.2d at ¶ 25).

<sup>79</sup> *Id.* at 92 (quoting *Clyde*, 896 N.E.2d at ¶ 24).

<sup>80</sup> *Id.* at 93 (quoting *Clyde*, 896 N.E.2d at ¶ 25).

<sup>81</sup> *Id.* (quoting *Clyde*, 896 N.E.2d at ¶ 25).

<sup>82</sup> *Morrison*, 989 N.E.2d at 93) (citing *Fondessy*, 492 N.E.2d 797).

<sup>83</sup> *Id.* (citing *Fondessy*, 492 N.E.2d 797).

<sup>84</sup> *Id.* at 92 (citing *Smith Family Trust v. Hudson Bd. of Zoning & Bldg. Appeals*, 9th Dist. No. 24471, 2009-Ohio-2557, 2009 WL 1539065, at ¶ 10 (quoting *Garcia v. Siffrin Residential Ass'n*, 407 N.E.2d 1369, 1370 (Ohio 1980))).

To constitute a general law for purposes of home-rule analysis, a statute must (1) be part of a statewide and comprehensive legislative enactment, (2) apply to all parts of the state alike and operate uniformly throughout the state, (3) set forth police, sanitary, or similar regulations, rather than purport only to grant or limit legislative power of a municipal corporation to set forth police, sanitary, or similar regulations, and (4) prescribe a rule of conduct upon citizens generally.<sup>85</sup>

So, to be a general law, the statute must meet all four prongs of the *Canton* analysis. In local regulation of oil and gas law, the fourth *Canton* element is central: did the Ohio legislature prescribe a general rule of conduct on all citizens of the state?

### C. *Local Control Under Ohio's Oil and Gas Statute*

This section will discuss the Ohio courts' views on the question whether the state legislature created a general rule of conduct applicable to all citizens. It will do this by exploring courts' reactions to the regulatory efforts of local jurisdictions. The purpose is to determine whether the local efforts should be protected by the Ohio Constitution's home rule provision. To do this, this section will discuss local efforts to impose requirements on drillers beyond the requirements of the state permitting authority. It will also consider local efforts to enact total bans on oil and gas development, as opposed to imposing additional regulatory requirements. It will consider local legislative actions as well as charter-amending voter initiatives that have purported to ban drilling. The purpose of this section is to illustrate the Ohio courts' conclusion that Ohio's oil and gas statute is, in fact, a general law under the aforementioned *Canton* test, thus preempting conflicting local regulation of oil and gas activities, leaving them unprotected by constitutional home rule.

#### 1. Local Control Through Local Legislative Action

One way local jurisdictions attempt to control oil and gas activities is by imposing local requirements beyond those of the state permitting

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<sup>85</sup> *Canton*, 766 N.E.2d at 968; see also *Morrison*, 989 N.E.2d at 93 (citing *Smith Family Trust*, 2009 WL 1539065, at ¶ 10); see also *Am. Fin. Servs. Ass'n*, 858 N.E.2d at 776 (discussing generally home rule in the Ohio Constitution and referencing Vaubel, *supra* note 56).

authority. Local requirements could come in the form of additional permits, bonds, hearings, applications, or by exercise of traditional zoning powers. In addition to attempting to control or influence drilling by enforcing local restrictions or requirements, some local jurisdictions have attempted to impose outright drilling bans, usually by voter adopted amendments to local charters.<sup>86</sup>

The first portion of this section will evaluate efforts at imposing additional local requirements on drilling activities by considering the efforts of Warren, Ohio, and Munroe Falls, Ohio, to enforce longstanding local ordinances that applied to the oil and gas industry. The latter portion of this section will address local efforts to enact outright drilling bans. The purpose of both portions is to explore these efforts through the lens of the legal system in which they operate, specifically, under the state-wide legislative preemption of local control and the state constitution's home rule provision.

To review, the Ohio Constitution's home rule provision gives municipalities "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," but with the caveat that those regulations "are not in conflict with general laws."<sup>87</sup> The state oil and gas statute, expanded over several years by the Ohio legislature, now vests in the Ohio DNR's Division of Oil and Gas Resources Management control of "all aspects of the locating, drilling, well stimulation, completing, and operating of oil and gas wells within this state, including site construction and restoration, permitting related to those activities, and the disposal of wastes from those wells."<sup>88</sup> This potential conflict among local attempts to regulate oil and gas activities, a putatively preemptive oil and gas statute, and a Constitutional home rule provision presents a recurring and perplexing theme.<sup>89</sup> The question it raises is whether the Ohio oil and gas law is a

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<sup>86</sup> See, e.g., Arenschiold, *Athens Votes to Ban Fracking*, *supra* note 2; Arenschiold, *Ohio Counties Can't Vote to Ban Fracking*, *supra* note 2; *Youngstown Voters Turn Down Anti-fracking Proposal—Again*, *supra* note 2.

<sup>87</sup> OHIO CONST. art. XVIII, § 3.

<sup>88</sup> OHIO REV. CODE ANN. § 1509.02 (West 2013).

<sup>89</sup> Forty-eight states have home rule provisions in either their constitutions or legislation. Jarit C. Polley, *Uncertainty for the Energy Industry: A Fractured Look at Home Rule*, 34 ENERGY L.J. 261 at 268 (2013) (including a policy analysis of how courts in various states interpret home rule provisions) (citing RICHARD BRIFFAULT & LAURIE REYNOLDS, *STATE AND LOCAL GOVERNMENT LAW* 268 (6th ed. 2004)); Kevin J. Duffy, *Regulating Hydraulic Fracturing Through Land Use: State Preemption Prevails*, 85 U. COLO. L. REV. 817 (2014) (explaining that the state has the power to preempt local land use rules); see David J.

general law such that local regulations such as these would be void if in conflict with it?

It may seem clear that the Ohio legislature intended the oil and gas law to be a general law—they amended it time and again, making it increasingly inclusive with respect to the powers exclusively bestowed on the state agency and ever more restrictive of local authority. But does the legislature's intent that a statute be a general law make it one? This is one way to interpret the issue which the City of Munroe Falls brought to the Supreme Court of Ohio, in an ultimately unsuccessful defense of its ordinances.<sup>90</sup>

a. Local Ordinances: Warren, Ohio

Years before the Ohio Supreme Court took up the question of the validity of Munroe Falls' local ordinances—whether they were preempted by the state law or protected by home rule—Warren, Ohio, attempted to control oil and gas operations by enforcing existing local ordinances. In 2004, Everflow East, Inc. initiated a drilling project that triggered a private landowner nuisance suit based, in part, on Warren's zoning ordinances.<sup>91</sup> One Warren ordinance provided that storage tanks used in connection with any producing well may not be located within 200 feet of a house, unless the permittee obtains a waiver of the 200 foot setback requirement.<sup>92</sup> Another provision provided that it was impermissible to “drill, operate, or maintain any oil or gas well within the limits of the City in such a manner as to be injurious . . . to the welfare, comfort or property of individuals.”<sup>93</sup> The landowner complained that the well, fewer than 200 feet from his house, was a nuisance that violated the ordinance.<sup>94</sup>

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Klein, *Home Sweet Home: Clarifying and Reinforcing a Municipality's Authority to Regulate Natural Gas Activities in its Corporate Limits*, 14 TEX. TECH. ADMIN. L. J. 339 (2013); Gregory R. Nearpass & Robert J. Brenner, *High Volume Hydraulic Fracturing and Home Rule: The Struggle for Control*, 76 ALB. L. REV. 167 (2013) (discussing home rule decisions in New York state and arguing that they should not apply to the mining and oil and gas industries); Bryan M. Weynand, *Placing the Seal on a Fractured Debate: How North Carolina Clarified its Law of Hydraulic Fracturing and Can Strike the Right Balance with Preemption of Local Regulation*, 93 N.C.L. REV. 596 (2015) (discussing North Carolina's lack of constitutional home rule provision and use of legislation to strike a balance with local ordinances).

<sup>90</sup> *Morrison*, 37 N.E.3d at 139.

<sup>91</sup> *Natale v. Everflow E., Inc.*, 959 N.E.2d 602, 605 (Ohio Ct. App. 2011).

<sup>92</sup> *Id.* (citing CITY OF WARREN OHIO, CODIFIED ORDINANCES § 731.05 (1990)).

<sup>93</sup> *Id.* at 609 (citing CITY OF WARREN OHIO, CODIFIED ORDINANCES §§ 731.04–.06).

<sup>94</sup> *Id.* at 605.

Everflow East, the oil and gas company permittee in Warren, acquired the required local permits and waivers from Warren, so compliance with local ordinances was not at issue.<sup>95</sup> Instead, the legal concern was the validity of the ordinances.<sup>96</sup> The *Natale v. Everflow East* court wrestled with the problem of possible preemption of the Warren local ordinances by Ohio's oil and gas law.<sup>97</sup> The trial court held that the Warren ordinance restricting the location of oil wells was preempted by Ohio Revised Code section 1509.02.<sup>98</sup> The Ohio Court of Appeals (11th District) agreed.<sup>99</sup>

Here, the Ohio Administrative Code, through which the Ohio DNR implements the oil and gas law, includes setback requirements clearly in conflict with the Warren ordinance.<sup>100</sup> The administrative code provides that spacing of oil and gas wells be a "minimum of one hundred (100) feet from existing inhabited structures."<sup>101</sup> The Warren ordinance, however, required a 200 foot distance—a more stringent requirement than that required by state law.<sup>102</sup> The court found that the Warren ordinances concerned the "location and operation of the oil and gas well," which are precisely within the list of activities, the regulation of which the state statute reserves for the Ohio DNR with "clear, unequivocal language."<sup>103</sup> Therefore, the Warren ordinance was preempted by state law.<sup>104</sup> The 11th District Court of Appeals upheld the trial court in an August 26, 2011, decision.<sup>105</sup> The Warren case was not taken up by the Supreme Court of Ohio, but it laid the groundwork for future analysis by that Court of the ability of local jurisdictions to regulate oil and gas activities in the context of a constitutional home rule provision and a potential general law of the state.

b. Another Attempt at Local Control: Munroe Falls, Ohio

Beck Energy Corporation, an oil and gas developer, obtained permits as required from the Ohio DNR's Division of Oil and Gas Resources

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<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 610–11.

<sup>97</sup> *Natale*, 959 N.E.2d at 610–11.

<sup>98</sup> *Id.* at 610.

<sup>99</sup> *Id.* at 611.

<sup>100</sup> *Id.*

<sup>101</sup> OHIO ADMIN. CODE 1501:9-9-05(A)2 (2010).

<sup>102</sup> Compare OHIO ADMIN. CODE 1501:9-9-05(A)2 (2010) with CITY OF WARREN OHIO, CODIFIED ORDINANCES § 731.04(i) (1992).

<sup>103</sup> *Natale*, 959 N.E.2d at 611 (emphasis added).

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 612; see OHIO REV. CODE § 1509.02. The *Natale* Court also held that the landowner could not prevail against the drilling company in his alternative nuisance claims. See *Natale*, 959 N.E.2d at 612.

Management for an oil and gas project in Munroe Falls.<sup>106</sup> Unlike the driller in Warren, however, it did not meet several additional local requirements under Munroe Falls' city ordinances.<sup>107</sup> In particular, Munroe Falls' ordinances required Beck Energy to:

- (1) obtain a drilling permit, a "conditional" zoning certificate, and a zoning certificate; (2) appear before the city's planning commission in a public hearing and obtain its approval; (3) pay the necessary fees and post the requisite performance bond; and (4) obtain a rights-of-way construction permit and pay the required fees.<sup>108</sup>

When Beck Energy attempted to begin drilling, under authority of its Ohio DNR permit, Munroe Falls filed a complaint in the Summit County Court of Common Pleas seeking a preliminary and permanent injunction seeking to stop Beck Energy from drilling without complying with local law.<sup>109</sup> Munroe Falls prevailed in the trial court, obtaining an injunction preventing Beck Energy from continuing drilling operations within Munroe Falls until Beck Energy complied with the city ordinances.<sup>110</sup> In granting the injunction, the trial court found that Ohio's oil and gas law did not preempt Munroe Falls' ordinances because the statute "did not authorize drilling companies, permit-in-hand, to ignore any and all local regulation."<sup>111</sup>

#### 1) Munroe Falls in the Ohio Court of Appeals (Ninth District)

The Ohio Court of Appeals (Ninth District) reversed the trial court, holding that Beck Energy's drilling permit from the Ohio DNR did

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<sup>106</sup> Note that Beck Energy's intended well in Munroe Falls was to be a shallow well and not a well affected by horizontal drilling. *See* Ohio Div. Res. Mgmt. Well Permit #2-3126 (issued to Beck Energy on February 16, 2011).

<sup>107</sup> Munroe Falls cited eleven city ordinances the drilling company violated in its complaint and request for injunction. *See* CITY OF MUNROE FALLS OHIO, CODE §§ 1329.03-.06 (1980), § 1163.02 (1995), § 919.02 (2008), §§ 919.04-.08 (2008).

<sup>108</sup> *Morrison*, 989 N.E.2d at 89.

<sup>109</sup> Complaint at 5, *Morrison v. Beck Energy Corp.*, No. 2011-04-1897 (Ct. Com. Pl. Summit Cty., Ohio, Apr. 6, 2011).

<sup>110</sup> Order Granting Injunction at 4, *Morrison v. Beck Energy Corp.*, No. 2011-04-1897 (Ct. Com. Pl. Summit Cnty., Ohio, May 3, 2011).

<sup>111</sup> *Id.* at 4 (stating that "[l]ocal subdivisions retain a limited interest in regulating gas and oil production in their communities.").



not give the drilling company license to ignore applicable local rules.<sup>112</sup> The court of appeals acknowledged the Ohio legislature's effort to create "a uniform system for the permitting of oil and gas wells throughout the state,"<sup>113</sup> but noted that despite the state law, localities "retain a limited interest in regulating gas and oil production in their communities."<sup>114</sup> To reach this conclusion, the court of appeals applied the Supreme Court of Ohio's general law analysis to the eleven ordinances the City of Munroe Falls had applied to shale oil and gas drilling within its boundaries.<sup>115</sup> The court's purpose was to determine whether Munroe Falls was protected by the Ohio Constitution's home rule authority or whether instead, the local ordinances were void due to conflict with a general law.<sup>116</sup> Munroe Falls alleged that Beck Energy should have complied with some of these ordinances, despite the fact that Beck Energy had secured a drilling permit from the Ohio DNR as required by the Ohio oil and gas law.<sup>117</sup>

The Munroe Falls ordinances at issue dealt with drilling,<sup>118</sup> zoning,<sup>119</sup> and rights-of-way.<sup>120</sup> Of particular concern were the ordinances deriving from Munroe Falls' codified ordinances, Chapter 1329, pertaining to oil and gas drilling.<sup>121</sup> Also at issue was an ordinance requiring drillers to obtain a zoning certificate.<sup>122</sup> Munroe Falls codified ordinance Chapter 1163 requires, that before any building or other structure is erected or constructed, the builder must obtain a zoning certificate indicating that the project complies with the city's zoning scheme.<sup>123</sup> Before

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<sup>112</sup> *Morrison*, 989 N.E. 2d at 85, 99.

<sup>113</sup> *Id.* at 96.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 96–97.

<sup>116</sup> *Id.* at 88–89.

<sup>117</sup> *Id.* at 85, 89.

<sup>118</sup> CITY OF MUNROE FALLS, OHIO CODE §§ 1329.03–.06.

<sup>119</sup> *Id.* § 1163.02.

<sup>120</sup> *Id.* §§ 919.02, 919.04–.08.

<sup>121</sup> *Morrison*, 989 N.E.2d at 95 (citing CITY OF MUNROE FALLS, OHIO CODE §§ 1329.03–.06. These ordinances are: "Ordinance 1329.03 . . . no one shall commence to drill a well for oil, gas, . . . within the corporate limits unless such persons has 'wholly complied with all provisions of this chapter and a conditional zoning certificate has been granted by Council . . . ' Ordinance 1329.04 requires any person 'desiring to drill a well for oil and or/gas within the corporate limits' to apply for a 'conditional zoning certificate' to the city's Planning Commission. The ordinance also requires an application fee of \$800 to be paid when an application is filed. Ordinance 1329.05 requires a mandatory public hearing be held at least three weeks before the commencement of drilling . . . [t]his public hearing is required before the 'conditional zoning certificate' can be granted for drilling. Ordinance 1329.06 requires a \$2,000 performance bond . . .").

<sup>122</sup> *Morrison*, 989 N.E.2d at 85, 96; *see also* CITY OF MUNROE FALLS OHIO, CODE § 1163.02.

<sup>123</sup> CITY OF MUNROE FALLS OHIO, CODE § 1163.02.

the city will issue a zoning certificate the applicant must first attend a hearing.<sup>124</sup> In the case of drilling, the applicant would need a conditional zoning certificate because drilling is included as a conditional use in Munroe Falls.<sup>125</sup> These requirements apply to all types of construction and are not directed towards oil and gas operations in any apparent way.

Munroe Falls argued that six additional Munroe Falls ordinances applied to the Beck Energy conflict.<sup>126</sup> These pertained to rights-of-way construction permits and excavation permits.<sup>127</sup> In particular, “[Munroe Falls] Ordinance 919.04 requires a rights-of-way construction permit and a street opening permit for any activities impacting the city’s roads in any manner.”<sup>128</sup> Other ordinances prohibit the obstruction of rights-of-way without the city’s prior consent,<sup>129</sup> govern the application and issuance of rights-of-way construction permits,<sup>130</sup> govern the fees for these permits<sup>131</sup> and require anyone seeking to “make any tunnel, opening, or excavation of any kind in or under the surface of any street” to secure an excavation permit from the city.<sup>132</sup>

Munroe Falls argued that Beck Energy, and any other person or entity hoping to begin drilling within the city limits, must comply with the long preexisting ordinances<sup>133</sup> applicable to their activities.<sup>134</sup> Here, that meant that Beck Energy needed to:

- (1) appear at a public hearing three weeks before the drilling starts, (2) obtain a drilling permit (which is granted only after [the applicant has] a “conditional zoning certificate. . .” approved by the city council), (3) receive a “zoning certificate” (which also requires the prior issuance

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<sup>124</sup> *Morrison*, 989 N.E. 2d at 98, *see also* CITY OF MUNROE FALLS OHIO, CODE § 1329.05. (providing that “[a]fter the first reading, but before the third reading of the legislation granting a conditional zoning certificate, Council shall require the applicant to schedule a public hearing . . .”).

<sup>125</sup> *Morrison*, 989 N.E.2d at 95.

<sup>126</sup> *Id.* at 96.

<sup>127</sup> *Id.*; *see generally* CITY OF MUNROE FALLS OHIO, CODE §§ 1163.02, 1329.03–.06.

<sup>128</sup> *Morrison*, 989 N.E.2d at 95; CITY OF MUNROE FALLS OHIO, CODE § 919.04.

<sup>129</sup> CITY OF MUNROE FALLS OHIO, CODE § 919.05.

<sup>130</sup> *Id.* §§ 919.06–.07.

<sup>131</sup> *Id.* § 919.08.

<sup>132</sup> CITY OF MUNROE FALLS OHIO, CODE § 905.02 (1959).

<sup>133</sup> The ordinances were all enacted in the 1980s and 1990s; the ordinances specific to oil and gas drilling were all enacted in the year 1980, *see Morrison*, 989 N.E.2d at 94.

<sup>134</sup> *Id.*

of a “conditional zoning certificate”), (4) apply for a rights-of-way construction permit and street excavation permit, and (5) pay all permit fees and [a] performance bond.”<sup>135</sup>

Beck Energy argued that because it had obtained a drilling permit from Ohio DNR,<sup>136</sup> it did not need to comply with these Munroe Falls requirements, which, it argued, were void due to conflict with the Ohio oil and gas law which grants to the Ohio DNR “sole and exclusive authority” to regulate oil and gas operations in Ohio.<sup>137</sup>

The primary issue before the court of appeals was whether Munroe Falls’ ordinances were protected by the Ohio Constitution’s home rule provision against preemption by the Ohio oil and gas law.<sup>138</sup> To answer this question, and thus to determine whether to uphold or reverse the trial court’s drilling injunction, the court of appeals evaluated the ordinances under a Ohio Supreme Court’s home rule analysis.<sup>139</sup>

To accomplish this task, the court of appeals applied a home rule analysis as prescribed by the Supreme Court of Ohio.<sup>140</sup> In crafting Ohio’s oil and gas statute, the Ohio legislature wrote that the regulation of oil and gas development “is a matter of general statewide interest that requires uniform statewide regulation, and [Chapter 1509] constitutes a comprehensive plan” for such activities.<sup>141</sup> The court also noted that “[a] statement by the General Assembly of its intent to preempt a field of legislation is a statement of legislative intent’ that may be considered in a home rule analysis but does not dispose of the issue.”<sup>142</sup> However, just because the legislature says a statute is of statewide interest does not make it a general law for home rule purposes.<sup>143</sup> The courts must evaluate the statute’s operation, not only its words.<sup>144</sup>

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<sup>135</sup> *Id.* at 95.

<sup>136</sup> Beck Energy obtained a well permit (#2-3126) from Ohio DNR on February 16, 2011. It commenced excavation of the Munroe Falls site, for which it had obtained gas rights, but Munroe Falls issued a Stop Work Order for failure to comply with the applicable ordinance. *Id.* at 90.

<sup>137</sup> *Id.* at 90.

<sup>138</sup> *Morrison*, 989 N.E.2d at 88, 92.

<sup>139</sup> *Id.* at 92.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 96 (citing OHIO REV. CODE § 1509.02).

<sup>142</sup> *Id.* (citing *Clyde*, 896 N.E.2d at ¶ 29 (citing *Am. Fin. Servs. Ass’n*, 858 N.E.2d at 776, ¶ 31)).

<sup>143</sup> *Morrison*, 989 N.E.2d at 96.

<sup>144</sup> *Id.*

The court of appeals evaluated whether the Munroe Falls ordinances at issue constituted exercises of local self-government—the first piece of the Supreme Court of Ohio’s home rule analysis.<sup>145</sup> If an ordinance survives this analysis, it survives. This is because the Ohio constitution specifically authorizes municipalities to exercise powers of self-government.<sup>146</sup> But if the ordinance is not self-government, and is an exercise of police power, it is not protected in the same way by the Ohio constitution.<sup>147</sup> Because this case called into question the validity of several types of ordinances, the court of appeals addressed them in groups according to their function.

With respect to the ordinances that required a conditional zoning certificate prior to drilling,<sup>148</sup> the court of appeals found these to be exercises of police power, not self-government.<sup>149</sup> In fact, all parties agreed that the rights-of-way ordinances were exercises of Munroe Falls’ police power—designed to protect the public safety and general welfare, not self-government.<sup>150</sup> When an ordinance is an exercise of police power, as opposed to one of self-government, it does not fall within the home rule safe harbor and the court must decide whether the statute with which it might be in conflict is a “general law.”<sup>151</sup> If so, the statute trumps the local ordinance, only if the local ordinance conflicts with the state statute.<sup>152</sup>

The court of appeals cited a previous case indicating the Ohio oil and gas statute “regulates the conservation of natural resources and is unquestionably a general law.”<sup>153</sup> It did not, therefore, pursue the general law question further, instead moving on to the question of the ordinances’ potential conflicts with the oil and gas statute.<sup>154</sup>

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<sup>145</sup> *Id.* at 92; see also *Canton*, 766 N.E.2d at 963.

<sup>146</sup> *Morrison*, 989 N.E.2d at 92 (citing *Clyde*, 896 N.E.2d at ¶ 24).

<sup>147</sup> *Id.* at 92–93 (citing *Clyde*, 896 N.E.2d at ¶ 30).

<sup>148</sup> CITY OF MUNROE FALLS OHIO, CODE §§ 1163.02, 1329.03–.06 (these five ordinances are the “drilling” and “zoning” ordinances, while the other six ordinances at issue dealt with rights-of-way and did not require a conditional zoning certificate).

<sup>149</sup> *Morrison*, 989 N.E.2d at 96 (citing *Rispo Realty & Dev. Co.*, 564 N.E.2d at 425 (citing *Garcia*, 407 N.E.2d at ¶ 2)) (stating that “Ohio law has long recognized that the enactment of zoning laws by a municipality is an exercise of its police power as described under Section 3, Article XVIII of the Ohio Constitution”).

<sup>150</sup> *Id.* at 96.

<sup>151</sup> *Id.* at 93 (citing *Clyde*, 896 N.E.2d at ¶ 25).

<sup>152</sup> *Id.*

<sup>153</sup> *Id.* at 96 (citing *Smith Family Tr.*, 2009 WL 1539056 ¶ 11).

<sup>154</sup> The appellate court disposed of the “general law” inquiry stating that “[t]his court has already determined, in *Smith Family*, that ‘R.C. 1509 et seq., regulates the conservation of natural resources and is unquestionably a general law.’” *Morrison*, 989 N.E. 2d at 96–97; see also *Smith Family Tr.*, 2009 WL 1539056 at ¶ 10. Furthermore, the City of

To explain its method for deciding whether an ordinance is in conflict with a statute, that is, “whether the ordinance prohibits that which the statute permits, or vice versa,”<sup>155</sup> the court of appeals turned to Supreme Court of Ohio’s analysis as illustrated in a case pertaining to local efforts to regulate hazardous waste in potential conflict with a state statute:

In *Fondessy*, the court considered whether there was a conflict between the state statute that granted the state the power to license and regulate hazardous waste facilities (R.C. Chapter 3734), and a municipal ordinance that imposed a permit fee on all hazardous waste landfills located within the city, and also required that waste facility operators keep complete and accurate records. The court, applying the conflict test, concluded that the municipal ordinance did not conflict with the statute regulating the state’s hazardous waste landfills, because the ordinance did not permit anything prohibited by the state statute, or prohibit anything permitted by the statute. The court held that the reporting requirement [imposed by the ordinance] did not “alter, impair, or limit” the operation of the hazardous waste facility licensed, as prohibited by the statute.<sup>156</sup>

Ultimately, the *Fondessy* court held that the ordinance at issue there and the potentially conflicting state statute could co-exist because, although both concerned the monitoring of hazardous waste landfill facilities, they did not directly conflict with one another.<sup>157</sup> The court found it possible for the two government entities to exercise their respective police powers concurrently.<sup>158</sup> The *Fondessy* court said, “the authority of the Environmental Protection Agency to license, supervise, inspect and regulate hazardous waste facilities does not preclude municipalities from enacting police power ordinances which do not conflict with that

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Munroe Falls conceded that R.C. 1509.02 is a general law. *Id.* Thus, the court found it unnecessary to engage in a new “general law” analysis and instead moved on to the third step of the home rule analysis—the Conflicts analysis. *See id.*

<sup>155</sup> *Morrison*, 989 N.E. 2d at 93 (citing *Clyde*, 896 N.E.2d at ¶ 53 (citing *Vill. of Struthers v. Sokol*, 108 Ohio St. 263, 140 N.E. 519 ¶ 2 (1923))); *see also Marich*, 880 N.E.2d at ¶ 30.

<sup>156</sup> *Morrison*, 989 N.E.2d at 94 (citing *Fondessy*, 492 N.E.2d at 800).

<sup>157</sup> *Fondessy*, 492 N.E.2d at 800, 802.

<sup>158</sup> *Cf. City of Cleveland v. GSX Chem. Servs. of Ohio, Inc.*, 1992 WL 95735 at 6–7 (Ohio Ct. App. 1992) (applying *Fondessy*, and holding the City of Cleveland could impose pollution reporting requirements on a chemical services company because the municipal regulations were neither “proscribed by State law,” nor “in conflict” with it).

authority.”<sup>159</sup> The city had required waste facility operators to maintain daily records and to submit a report to the municipality. These requirements were different from those imposed by the state, such as fence size, number of guards, and number of monitoring wells.<sup>160</sup> So, despite the reality that the ordinance and the state statute both imposed requirements on municipal waste facilities, and appeared initially to be in conflict with one another, the court ruled that they were not actually in conflict and could operate concurrently.<sup>161</sup>

With respect to the Munroe Falls' drilling ordinances, however, the court of appeals held that the state statute did not allow for additional local regulations.<sup>162</sup> Munroe Falls originally argued, and the trial court agreed, that the statute only limited local efforts to control permitting, location, and spacing of oil and gas wells.<sup>163</sup> Had Munroe Falls been faced with an earlier version of the statute, this argument might have prevailed in the appellate court. But, as discussed above, the legislature worked hard to expand the reach of the oil and gas statute beyond mere permitting, location, and spacing. The court of appeals, therefore, disagreed with Munroe Falls and with the trial court, instead focusing on the statute's inclusive nature.<sup>164</sup> The court of appeals was swayed by the language: “comprehensive plan with respect to all aspects of the locating, drilling, well stimulation, completing, and operating of oil and gas wells within this state, including site construction and restoration, permitting related to those activities, and the disposal of wastes from those wells.”<sup>165</sup>

For the same reason, the court of appeals found Munroe Falls' permit application fee and performance bond also to conflict with the state law.<sup>166</sup> Because Munroe Falls' public hearing requirement was tied to its permit requirement, the hearing requirement, too, was void for conflict with state law.<sup>167</sup> Munroe Falls' right of way and excavations ordinances, unlike those more closely related to drilling, did not conflict with the state law.<sup>168</sup> The reason was the statute's language leaving the regulation of

<sup>159</sup> *Morrison*, 989 N.E.2d at 93 (citing *Fondessy*, 492 N.E.2d at 800).

<sup>160</sup> *Id.*

<sup>161</sup> *Fondessy*, 492 N.E.2d at 800, 802.

<sup>162</sup> *Morrison*, 989 N.E.2d at 97–98.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.* at 90–91, 97–98 (noting that the Ohio General Assembly has regularly expanded Ohio DNR's regulatory authority since 2004 and that the current form of O.R.C. 1509.02 “is more encompassing than Munroe Falls claims.”).

<sup>165</sup> *Id.* at 97 (citing OHIO REV. CODE § 1509.02).

<sup>166</sup> *Id.* at 98.

<sup>167</sup> *Morrison*, 989 N.E.2d at 98–99.

<sup>168</sup> *Id.* at 99.

streets to local authorities.<sup>169</sup> The court of appeals did not dive deeply into Munroe Falls' zoning ordinances, holding only that, to the extent it interferes with the state drilling permit, it is in conflict with the state law. In particular, the court of appeals stated:

[Munroe Falls] Ordinance 1163.02 . . . governs zoning in general, requiring a zoning certificate for the construction of any building or structure, which, in turn, can only be issued if a "conditional zoning certificate" has been approved. Because drilling necessarily involves the construction of a well, this ordinance, to the extent it requires a zoning certificate and "conditional zoning certificate" for drilling, conflicts with [the state oil and gas statute] and cannot be enforced against a person seeking to drill.<sup>170</sup>

Although, as in *Fondessy*, Munroe Falls argued that its ordinances should stand on home rule grounds, Ohio's Ninth District court of appeals overturned the trial court's drilling injunction, holding that some, but not all, of the local ordinances were void because they conflicted with section 1509.02, which the court found was, unlike the statute at issue in *Fondessy*, indeed, a general law.<sup>171</sup>

## 2) Munroe Falls in the Supreme Court of Ohio

If the Ohio Court of Appeals was the end of the line, many of Munroe Falls' ordinances would have been dead in the water long ago, along with local efforts in other Ohio jurisdictions to enact similar ordinances affecting shale oil and gas wells.<sup>172</sup> But their ultimate demise took some time.

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<sup>169</sup> *Id.* at 97 (citing OHIO REV. CODE § 1509.02) (providing that "[n]othing in this section affects the authority granted to local authorities in section 723.01 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."). OHIO REV. CODE ANN § 723.01 (West 1997) provides that "[m]unicipal corporations shall have special power to regulate the use of the streets. . . the legislative authority of a municipal corporation shall have the care, supervision, and control of the public highways, streets, avenues, alleys, sidewalks, public grounds, bridges, aqueducts, and viaducts within the municipal corporation.").

<sup>170</sup> *Morrison*, 989 N.E.2d at 99.

<sup>171</sup> *Id.* at 96–97; see also *Fondessy*, 492 N.E.2d at 797.

<sup>172</sup> Among Ohio cities that enacted drilling bans between 2010 and 2014 are Athens, Ohio and Mansfield, Ohio—these cities and others wait to see if their laws will remain effective.

Munroe Falls appealed the appellate court's decision to the Supreme Court of Ohio on March 22, 2013.<sup>173</sup> Almost a year later, on February 26, 2014, the Court heard oral argument on two specific issues.<sup>174</sup> The Court first considered whether the state oil and gas law deprives municipalities such as Munroe Falls of their Ohio constitutional home rule authority.<sup>175</sup> The second issue the Court heard was whether Munroe Falls' ordinances, some of which required oil and gas drillers to submit information to Munroe Falls via a permit requirement (ostensibly to protect local residents' interests), conflict with the state's oil and gas statute when the driller has already secured a drilling permit from Ohio DNR.<sup>176</sup> After holding the case for close to a year, the Ohio Supreme Court released its decision on February 17, 2015.<sup>177</sup>

Regarding the first issue, Munroe Falls hoped that, while the Ohio statute gave Ohio DNR the power to regulate drilling operations, the Ohio constitution's home rule provision would allow the city some control over drilling that would occur within its jurisdiction. According to Munroe Falls, the home rule provision preserves its power to issue zoning ordinances regarding the location of shale oil and gas wells within its borders, because localities are best-suited to decide the locations that would not create excessive noise, traffic and other factors that impact property owners. Munroe Falls' position was that this is the purpose of Ohio's home rule provision.<sup>178</sup> Ohio and the affected driller, Beck Energy, argued that if the court allowed localities to create their own rules, even zoning rules, the practice would undermine the state's ability to carry out the legislature's statutory directives. They argued that "local ordinances [that] restrict oil and gas drilling . . . would conflict with the state law."<sup>179</sup> Munroe Falls, however, argued that local land-use regulation could

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*See, e.g.,* Laura Arenschiold, *Athens Votes to Ban Fracking*, THE COLUMBUS DISPATCH (Nov. 6, 2014, 3:03 AM), <http://www.dispatch.com/content/stories/local/2014/11/05/athens-votes-to-ban-fracking.html> [https://perma.cc/S56E-2Y8G]; Aaron Marshall, *Mansfield Leads Legal Fight Against Injection Wells Holding Fracking Waste*, THE PLAIN DEALER (Sept. 10, 2012, 12:04 PM), [http://www.cleveland.com/open/index.ssf/2012/09/mansfield\\_leads\\_legal\\_fight\\_ag.html](http://www.cleveland.com/open/index.ssf/2012/09/mansfield_leads_legal_fight_ag.html) [https://perma.cc/JL5N-V93V].

<sup>173</sup> See Brief for Appellant, *supra* note 15, at 1.

<sup>174</sup> See generally Oral Arguments of Appellant—State of Ohio and Appellee—Beck Energy, State *ex rel.* Morrison v. Beck Energy Corp., 143 N.E.2d 271 (2015) (No. 2013-0465), <http://www.ohiochannel.org/MediaLibrary/Media.aspx?fileId=142427> [https://perma.cc/HKV4-FXV4].

<sup>175</sup> *Morrison*, 37 N.E.3d at 131.

<sup>176</sup> *Id.* at 136.

<sup>177</sup> *Id.*

<sup>178</sup> *Id.* at 134.

<sup>179</sup> Oral Argument, *supra* note 174, at 29:15.



operate in harmony with the state's control of drilling operations and would not, therefore, be preempted by the state law.<sup>180</sup>

Munroe Falls maintained that Beck Energy violated local rules and failed to meet local requirements prior to drilling, despite having already obtained a drilling permit from the Ohio DNR.<sup>181</sup> Munroe Falls required that Beck Energy obtain, in addition to the Ohio DNR permissions, a local zoning certificate and a right-of-way construction permit, pay an application fee, and post a performance bond.<sup>182</sup> Beck Energy claimed that because it had secured the required permit from the Ohio DNR, it did not need to comply with the additional local rules. The notable aspect of the challenged Munroe Falls ordinances is that they are directly related to the development of oil and gas wells, as opposed to focusing on more traditional aspects of local zoning authority, such as creating and defining residential, commercial, or industrial zones within the city.

### 3) Oral Argument<sup>183</sup>

The Ohio Supreme Court justices forecasted the sharply split decision by expressing their concerns at the oral argument. For example, some of the justices expressed serious doubts that Ohio DNR really has “sole and exclusive authority” to preclude all local oversight with no administrative appeal.<sup>184</sup> Justice William O’Neill, in particular, seemed bothered that the oil and gas statute does not expressly state a preclusion for municipal zoning authority, whereas the legislature has shown that it knows how to include preclusions in other statutes.<sup>185</sup> Although some other state laws specifically exclude local zoning ability, Ohio’s oil and gas law does not.<sup>186</sup> The two sides argued over whether a specific preclusion was required or whether preclusion by implication was satisfactory.<sup>187</sup>

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<sup>180</sup> *Id.* at 01:43.

<sup>181</sup> Brief for Appellant, *supra* note 15, at 1–2.

<sup>182</sup> *Id.* at 1.

<sup>183</sup> This section draws upon a column the author wrote on this issue for Crain’s Cleveland Business’ Energy Report. See Heidi G. Robertson, *Awaiting the Court’s Word on Validity of Local Zoning Control of Well Locations*, CRAIN’S CLEVELAND BUS. (Apr. 4, 2014), <http://www.crainscleveland.com/article/20140404/BLOGS05/140409906> [<https://perma.cc/67J3-LDVV>].

<sup>184</sup> Oral Argument, *supra* note 174, at 19:21 (inferring that Justices O’Neill and Lanzinger are particularly doubtful about Munroe Falls’ position).

<sup>185</sup> *Id.* at 13:50.

<sup>186</sup> *Id.* at 17:21.

<sup>187</sup> *Id.* at 14:26.

At the oral argument, Justice Paul Pfeifer pressed Munroe Falls' attorney on the question of where, within its borders, it would have allowed the drilling.<sup>188</sup> The Justice appeared to be interested in whether a local jurisdiction might use its zoning powers to effectively prohibit drilling when that drilling would otherwise be allowed by the State. Munroe Falls contended that drilling within the city might be allowed as a conditional use in one of the city's three industrial zones, but was not specific as to where that might occur.<sup>189</sup> This matters because the Ohio legislature, in enacting the state legislation in the first place, must have wanted to create a regulatory system that was predictable statewide—and likely to facilitate an industry that promised economic reward. To allow a local jurisdiction to enforce an ordinance thwarting the statewide system would seem to undermine the legislature's purpose. In fact, it could effectively prohibit an activity that Ohio allows.

Justice Pfeifer later focused on the fact that under Ohio's oil and gas statute, a driller can appeal a denied drilling permit request to the state agency, but a landowner has no opportunity to appeal the state's decision to grant a driller's permit request.<sup>190</sup> This dichotomy did not seem to sit well with him. Justice Pfeifer said, "For those [landowners] who object [to the drilling], there is nowhere to go . . . the Director of Natural Resources is God in this case."<sup>191</sup> This comment indicated Justice Pfeifer's concern with the statutory truth that local citizens have virtually no recourse to appeal a state drilling decision by Ohio DNR that would allow drilling in a residential area, or anyplace else. Ohio DNR seems to be granting drilling permits without any regard to whether the driller has complied with local zoning.

Justice William O'Neill also expressed some disbelief. He focused on the densely populated suburb of Shaker Heights, Ohio, with relatively small residential lots and said: "You're saying that this statute would permit a driller to go into Shaker Heights and (if the driller has convinced ODNR that there is money in it for everyone) then it's full steam ahead?"<sup>192</sup>

These concerns were reflected in the split decision the Justices ultimately issued. Three Justices signed a "majority" opinion authored by Justice Judith French, with Chief Justice O'Connor and Justice Kennedy concurring. Justice O'Donnell concurred in the judgment only,

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<sup>188</sup> *Id.* at 15:38.

<sup>189</sup> Oral Argument, *supra* note 174, at 16:12.

<sup>190</sup> *Id.* at 21:22.

<sup>191</sup> *Id.* at 22:04.

<sup>192</sup> *Id.* at 38:09.

issuing his own separate opinion, but creating the majority through his concurrence. The remaining three Justices, Pfeifer, O'Neill, and Lanziger each dissented and issued separate opinions.

#### 4) The Decision of the Ohio Supreme Court

Although the Ohio Supreme Court's decision confirmed that the Ohio Constitution's home rule provision is quite limited indeed—it does not give as much authority to local jurisdictions as its name suggests—the Court did not seem entirely to close out all possibility of local influence.<sup>193</sup> The Justices were divided almost evenly, with three voting to void the ordinances and three voting to uphold them. Justice O'Donnell made the difference by concurring with the majority in the result.

Without Justice O'Donnell, the decision would have been a tie. Justice French wrote the majority opinion, joined by Chief Justice O'Connor, and Justice Kennedy with Justice O'Donnell concurring in judgment only; Justices Pfeiffer, O'Neill, and Lanzinger formed the minority, each filing a separate dissenting opinion. Three of the Justices who joined the majority struck down Munroe Falls' ordinances as conflicting with the state oil and gas law, but the other three Justices would not, holding that the local ordinances could co-exist with the state law. Justice O'Donnell was torn by this case, as evidenced by his authoring a separate concurring opinion.<sup>194</sup> In it, he agreed with the result, that the Munroe Falls ordinances had to be struck down, but he had more to say beyond the rationale Justice Judith French and the majority provided in their opinion.

Justice O'Donnell wrote that the Munroe Falls ordinance requiring a local permit to drill an oil and gas well went too far.<sup>195</sup> The Justice found that as written, the ordinances conflicted with a general law.<sup>196</sup> Even though it was not a new ordinance and was not enacted either in

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<sup>193</sup> See Heidi G. Robertson, *Ohio Supreme Court Leaves Room for Traditional Zoning as It Rejects Munroe Falls' Ordinances*, CRAIN'S CLEVELAND BUS. (Mar. 6, 2015), <http://www.crainscleveland.com/article/20150306/BLOGS05/150309881> [<https://perma.cc/PSC5-F3QP>].

<sup>194</sup> See generally *Morrison*, 37 N.E.3d at 138, 143 (O'Donnell, J., concurring in judgment only).

<sup>195</sup> *Id.* at 137–39.

<sup>196</sup> *Id.* at 138 (O'Donnell, J., concurring in judgment only) (explaining that imposing a municipal permitting process to Munroe Falls' Codified Ordinance 1329.03 conflicted with OHIO REV. CODE § 1509.02—a general law—and was therefore preempted by Ohio Revised Code Chapter 1509); CITY OF MUNROE FALLS, OHIO CODE § 1329.03 (prohibiting any person from drilling a well for oil, gas, or other hydrocarbons “until such time as such persons have wholly complied with all provisions of this chapter and a conditional zoning certificate has been granted by Council to such person for a period of one year.”).

response to Beck Energy's drilling aspirations, or in preparation for it, O'Donnell wrote that because it amounted to a permit scheme for oil and gas drilling, it directly conflicted with the state law which gave 'sole and exclusive authority' for those decisions to Ohio DNR.<sup>197</sup> But Justice O'Donnell would have evaluated each ordinance, examining how it would work, and showing on a fact-bound basis why the state law would preempt it.<sup>198</sup> He wanted to "emphasize the limited scope" of the Court's holding.<sup>199</sup>

Moreover, O'Donnell wrote that the other four ordinances, from Munroe Falls' zoning code, were too intertwined with the aforementioned local oil and gas permitting scheme to be upheld on their own as pure exercises of zoning authority.<sup>200</sup> Munroe Falls' zoning ordinances indicated that oil and gas wells were a conditional use in an industrial zone, requiring a conditional use certificate.<sup>201</sup> For oil and gas wells, though, the required conditional use certificate amounted to the very same local drilling permit that conflicted with state law. Hence, it was a zoning ordinance too intertwined with a permit scheme that conflicted with state law.

If the zoning ordinances had just been traditional exercises of zoning authority, though, it appears that Justice O'Donnell would have upheld them. Justice O'Donnell suggested that local jurisdictions use measures "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, by limiting oil and gas wells to certain zoning districts."<sup>202</sup> He wrote that these types of ordinances were not before the court for decision in this case, and that they would present a different issue altogether.<sup>203</sup>

Further, Justice O'Donnell wrote that the Ohio legislature could have included traditional zoning in the description of powers it intended

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<sup>197</sup> *Id.* at 139–40 (O'Donnell, J., concurring in judgment only).

<sup>198</sup> *Id.* at 138–39.

<sup>199</sup> *Morrison*, 37 N.E.3d at 138.

<sup>200</sup> *Id.* (explaining that "[b]ecause [Munroe Falls'] zoning code incorporates the parallel municipal permitting scheme that is applicable only to oil and gas wells before allowing drilling as a conditional use, it too conflicts with general law and is also preempted by R.C. Chapter 1509.").

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

<sup>203</sup> *Id.* at 138–39, 141 (stating that ". . . in my view, 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 . . . [and] whether a municipality has authority to enact zoning ordinances that affect oil and gas wells within its territory is a question yet to be decided, and for that reason, I concur in the resolution of this case.").

to preempt, but it did not.<sup>204</sup> According to Justice O'Donnell, local zoning ordinances that limit specific land uses to certain zoning districts, such as residential, commercial, or industrial, without regulating the details of oil and gas drilling that were expressly addressed in the Ohio oil and gas law would present an entirely different case than that addressed by the court here. Either Justice O'Donnell is making a legitimate suggestion to local jurisdictions, the ordinances conflicted with a general law, or he is signaling to the legislature that they need to finish the job of tightening the legislation even further, to preempt even traditional zoning powers.

It appears that the three justices in the dissent would agree with Justice O'Donnell—that traditional zoning ordinances unrelated to oil and gas permitting schemes should be upheld, if they were to come before the court.<sup>205</sup> Justice Lanziger here refers to zoning ordinances geared towards preserving property values and ensuring compatibility with local neighborhoods, assuming they are only applied in a non-discriminatory manner to an oil and gas drilling operation.<sup>206</sup>

In that scenario, which is not the one this court considered, Justice O'Donnell likely would join the three justices in the current minority, thus forming a new majority in support of non-discriminatorily created and enforced traditional zoning. Even the existing majority in the Munroe Falls decision was clear that its opinion applies only to the ordinances that were before it<sup>207</sup>—and that they were not the traditional zoning ordinances about which Justice O'Donnell wrote.

Cities, towns, and villages in Ohio likely will move forward using their traditional zoning authority and enforcing it in a non-discriminatory manner. This way, they exercise only their police power, in a manner that does not conflict with a general law. For example, a city, if merely enforcing residential use in a residentially zoned area, might withstand a preemption argument. Similarly, public safety rules, also applied universally, may stand as well. In some instances, non-discriminatorily enforced zoning

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<sup>204</sup> *Morrison*, 37 N.E.3d at 141 (explaining that the General Assembly could also have created a statutory scheme that addresses local land use and planning issues, yet it did not do so).

<sup>205</sup> *Id.* at 141–47 (Pfeifer, Lanzinger, & O'Neill, JJ., dissenting).

<sup>206</sup> *Id.* at 143 (Lanzinger, J., dissenting).

<sup>207</sup> *Id.* at 137 (explaining that “the issue before us is not whether the law should generally allow municipalities to have concurrent regulatory authority, but whether R.C. 1509.02 and the home rule Amendment do allow for the kind of double licensing at issue here. They do not. We make no judgment as to whether other ordinances could coexist with the General Assembly’s comprehensive regulatory scheme. Rather, our holding is limited to the five municipal ordinances at issue in this case.”).

could affect drilling. When state-permitted drillers challenge those ordinances, a new majority may emerge around Justice O'Donnell.<sup>208</sup>

#### 5) Beck Energy Sues Again

In *State ex rel. Morrison*, the Supreme Court of Ohio struck down several of Munroe Falls' ordinances for conflict with a general law, but it did not address Munroe Falls' zoning code broadly as applied to drilling. The decision likely left local jurisdictions wondering what, if anything, they could do to control or influence drilling that might take place within their boundaries. Justice O'Donnell suggested that rather than use ordinances that duplicate, contradict, or add to the requirements of the state oil and gas law (because those surely will be rejected for conflicting with the state statute)<sup>209</sup> local jurisdictions should focus on their traditional zoning authority.<sup>210</sup> He suggested that they use traditional zoning, non-discriminatorily created and applied to oil and gas development.<sup>211</sup>

Local jurisdictions would have to have wondered what that means with respect to their existing zoning schemes. Beck Energy wondered, too, and asked the Court to issue an order stating that the Ohio constitution's home rule provision does not allow Munroe Falls to enforce a zoning code that Beck Energy says discriminates against, unfairly impedes, and obstructs oil and gas activities and production operations, that the state of Ohio expressly permits those activities and regulates them under R.C. Chapter 1509.<sup>212</sup>

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<sup>208</sup> Beck Energy sued the City of Munroe Falls for its enforcement of the City's traditional zoning ordinances, *see Ohio ex rel. Beck Energy Corp. v. Munroe Falls*, 40 N.E.3d 1178 (Table) (Ohio 2015), *see also* Complaint in Mandamus, *Ohio ex rel. Beck Energy Corp. v. Munroe Falls*, 40 N.E.3d 1178 (Table) (Ohio 2015) (No. 2015-1019), [http://supremecourt.ohio.gov/pdf\\_viewer/pdf\\_viewer.aspx?pdf=769427.pdf](http://supremecourt.ohio.gov/pdf_viewer/pdf_viewer.aspx?pdf=769427.pdf) [<https://perma.cc/D9BG-9BNB>]. That case, however, was dismissed by the Supreme Court of Ohio without explanation of the merits, *see* Merit Decisions without Opinions, Case No. 2015-1019. *State ex rel. Beck Energy Corp. v. Munroe*, <https://supremecourt.ohio.gov/rod/docs/pdf/0/2015/2015-ohio-4633.pdf> [<https://perma.cc/EAF7-PH5J>] (stating “[o]n amended answer of respondents. On S.Ct.Prac.R. 12.04 determination, cause dismissed.”).

<sup>209</sup> *Morrison*, 37 N.E.3d at 138. (O'Donnell, J., concurring in judgment only) (acknowledging that OHIO REV. CODE § 1509.02 preempts local ordinances which seek to impose permitting schemes with respect to construction and operation of oil and gas wells).

<sup>210</sup> *Id.* (stating that “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”).

<sup>211</sup> *Id.* at 141.

<sup>212</sup> Complaint in Mandamus, *supra* note 208, at ¶ 4(a); *see also* Heidi G. Robertson, *We Still Don't Know if a Drill Permit Trumps a Zoning Law in Ohio*, CRAIN'S CLEVELAND BUS. (Dec. 4, 2015), <http://www.crainscleveland.com/article/20151204/BLOGS05/151204>

Like many jurisdictions, Munroe Falls has a zoning code, dividing the city into areas—or zones—residential, commercial, industrial, as the city's government deems appropriate. Munroe Falls last enacted zoning rules in 1995, so no part of it was enacted in reaction to the more recent shale development activity in Ohio.<sup>213</sup> Beck Energy took issue with Munroe Falls's 1995 zoning ordinances, arguing that the zones effectively prohibit drilling for oil and gas in 99.06% of the city's territory, and would allow oil and gas wells only as a conditionally permitted use—for which special permission would be required—in the remainder of the city's jurisdiction.<sup>214</sup> Munroe Falls disputed Beck's calculation of these percentages, but agreed with the basic premise that most of the residential city is inappropriate for drilling—or any other industrial use.<sup>215</sup> Munroe Falls is the smallest city in Ohio and it comprises almost entirely residential and park land.<sup>216</sup>

Because Beck Energy had obtained the state-issued drilling permit and began work in an area not zoned for such activity, Munroe Falls issued a “stop-work” order.<sup>217</sup> Beck Energy would like the Ohio Supreme Court to vacate that order.<sup>218</sup>

Following the Court's *State ex rel. Morrison* decision, Beck Energy asked the Court for a Writ of Mandamus against Munroe Falls. In a mandamus action, the party bringing the action (Beck Energy) is asking the court (the Supreme Court of Ohio) to require a public body (the City of Munroe Falls) to do something it is required by law to do (allow Beck Energy to drill in a specific location despite the zoning constraints). Beck Energy's basic argument was that the Court's *State ex rel. Morrison* decision required Munroe Falls to withdraw its zoning scheme to the extent that that zoning scheme prevented Beck Energy from drilling a specific well within Munroe Falls.<sup>219</sup> Although Munroe Falls repealed the specific ordinances the Court had earlier rejected, Beck Energy was now going after

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9899/we-still-don't-know-if-a-drill-permit-trumps-a-zoning-law-in-ohio?CSAuthResp=1%3A273594042040215%3A174292%3A4%3A24%3Aapproved%3AAAAA27DB9A103212B984963CC94FC92BA [https://perma.cc/488C-FZ5M].

<sup>213</sup> See Memorandum in Response to Relator's Memorandum Supporting Mandamus at 4, 16, Ohio *ex rel.* Beck Energy Corp. v. Munroe Falls, 40 N.E.3d 1178 (Table) (Ohio 2015) (No. 2015-1019).

<sup>214</sup> See Complaint in Mandamus, *supra* note 208, at ¶ 4(b).

<sup>215</sup> See Memorandum in Response, *supra* note 213, at 15–16.

<sup>216</sup> *Id.* at 16.

<sup>217</sup> *Id.* at 8.

<sup>218</sup> See Complaint in Mandamus, *supra* note 208, at ¶ 4(c).

<sup>219</sup> *Id.* ¶ 24–37.

the rest of the city's zoning code to the extent it prevented Beck Energy from drilling a specific well.<sup>220</sup>

The well in question—the one Beck Energy hoped to drill within Munroe Falls, would be located in a T-C zone—a town center area.<sup>221</sup> This is a type of commercial zone in which industrial activities are not allowed.<sup>222</sup> Beck Energy argued that because Munroe Falls' zoning code does not allow drilling in any of the residential or commercial zones which make up most of the city, and the land available in industrial zones is not sufficient to allow drilling, the zoning code discriminates against oil and gas production in violation of state law.<sup>223</sup>

This request for a mandamus order called into question the ability of Ohio cities and towns actually to do what the Supreme Court of Ohio seemed to say they could do—use their traditional zoning authority in a non-discriminatory manner. Munroe Falls' zoning ordinances designate most of the mostly residential city as a residential zone.<sup>224</sup> Much of the area that is not residential is park land or golf courses.<sup>225</sup> According to the city, “it is a bona fide zoning code which, in 1995, considered existing uses, population densities, congruous uses, potential nuisances, the character of the community, and the health and safety of its population.”<sup>226</sup>

The three justices in the “minority” in the Court's *ex rel. Morrison* opinion, along with a fourth Justice, Justice O'Donnell, recognized the difference between the activities the legislature intends to be controlled by state statute and regulation—things like the location and spacing of wells—and things that a home rule state like Ohio leaves to the local jurisdiction—like traditional zoning.<sup>227</sup> The creation of industrial, commercial, and residential zones is just basic zoning.

Cities and towns were likely hoping to learn whether their traditional zoning schemes would hold up against efforts to install state-permitted oil and gas wells contrary to their zoning schemes. Would the

<sup>220</sup> *Id.* ¶¶ 11–17.

<sup>221</sup> *Id.* ¶¶ 14(a)–(b).

<sup>222</sup> *Id.* ¶ 14(b).

<sup>223</sup> Complaint in Mandamus, *supra* note 208, at ¶ 36(d).

<sup>224</sup> *Id.* ¶¶ 18–23 (arguing that the effect of Munroe Falls' zoning ordinance scheme is that only 16.30 acres, or 0.94% of the City's total acreage is rendered suitable for oil and gas drilling).

<sup>225</sup> See Memorandum in Response, *supra* note 213, at 4.

<sup>226</sup> *Id.* at 2, 16.

<sup>227</sup> See *Morrison*, 37 N.E. 3d at 128, 138. (O'Donnell, J., concurring) (explaining that the legislature's intent to regulate the “spacing” and “location” of wells does not mean that the statute preempts all local regulation of oil and gas as being irreconcilable with local zoning laws).



Supreme Court of Ohio find zoning codes incompatible with the state oil and gas statute—and strike them down as applied to oil and gas wells? Or would the Court uphold the right of cities to enforce their zoning codes, even as they apply to the drilling of oil and gas wells?

If the Court had struck down Munroe Falls' zoning code, this would have been the result dreaded by local jurisdictions. It would have told them that their zoning codes—no matter when and how they were created—would be invalid as applied to oil and gas wells. On November 10, 2015, however, the Supreme Court of Ohio dismissed Beck Energy's mandamus request saying nothing whatsoever about its merits.<sup>228</sup> By dismissing the request for mandamus, the Supreme Court of Ohio decided not to decide.<sup>229</sup> The Court neither discarded Munroe Falls' zoning scheme, even as applied to the oil and gas well Beck Energy hoped to drill, nor gave the zoning scheme its blessing. The Court's nondecision maintains the status quo. Munroe Falls' zoning code stands and Beck Energy cannot drill in Munroe Falls' Town Center zone. Beck Energy's state-issued drilling permit expired in April 2016, so it appears that the Court's dismissal of Beck's mandamus request was a win, this round, for local jurisdictions.<sup>230</sup>

## 2. Drilling Bans by Voter Initiative

Ohio jurisdictions, other than Munroe Falls and Warren, have tried to influence drilling locally<sup>231</sup> without the kind of push back Munroe Falls

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<sup>228</sup> See Order Dismissing Relator's Complaint in Mandamus, *State ex rel. Beck Energy Corp. v. Munroe Falls*, No. 2015-1019 (Ohio, Nov. 10, 2015).

<sup>229</sup> *Id.* See also Robertson, *supra* note 212.

<sup>230</sup> An update: although Beck Energy's Ohio DNR-issued drilling permit expired in April 2016, the company has applied for and will likely be granted an extension. But the requested well would still be located in a land use zone for which it would require a conditional use certificate from Munroe Falls. According to its complaint, filed in Summit County Court of Common Pleas, the City suggested Beck Energy apply for one, but instead of complying, Beck Energy insisted Munroe Falls' zoning ordinances do not apply to oil and gas activities, and, assuming the Ohio DNR reissues Beck Energy's permit, the company is ready to drill. Munroe Falls has sued, in Summit County Court of Common Pleas, asking the court to order Beck Energy to comply with the zoning ordinances. Beck Energy, of course, would like the courts to say that Munroe Falls' ordinances do not apply because they are preempted by the state law—even beyond those that were disallowed by the Ohio Supreme Court in the *ex. rel. Morrison* case. Munroe Falls, which brought the law suit, would like the courts to say that the zoning ordinances do apply, even to oil and gas activities, because traditional zoning is within the authority of local jurisdictions. See Complaint for Declaratory Judgement, Request for Stay, *State, ex. rel. Kostoff and Cnty. of Munroe Falls v. Beck Energy Corp.* (Ct. Com. Pl. Summit Cty., Ohio, May 27, 2016).

<sup>231</sup> See Robert D. Cheren, *Fracking Bans, Taxation, and Environmental Policy*, 64 CASE W.

received from Beck Energy or Warren received from Everflow East.<sup>232</sup> This may be because in many jurisdictions that have taken legislative action against or regarding drilling, the drilling industry has shown little interest in exploring for oil and gas.<sup>233</sup> In these jurisdictions, attempts to pass outright bans on hydraulic fracturing or related activities have been contested hotly amongst the citizenry,<sup>234</sup> and have had varying success.<sup>235</sup> Some cities and towns have purported to establish complete bans on drilling, including, for example, Yellow Springs,<sup>236</sup> or heavy regulations, including, for example, Oberlin.<sup>237</sup> Others have attempted narrower types of regulations, or non-binding resolutions, with more success, for example, in Cincinnati.<sup>238</sup> Whether a particular method of control or influence will be affected by the *State ex rel. Morrison v. Beck Energy Corp.* decision may depend on which legal mechanism the locality chose in its attempt to regulate or influence drilling, and the extent to which the imposed considerations fall inside or outside of the limited scope of the home rule.

a. Local Ban on Injection Wells for Waste Disposal Leads to Drilling Ban: Mansfield, Ohio

In 2011, the Ohio DNR approved Preferred Fluids Management, Inc.'s plan to construct two injection wells on 4.9 acres within the City of Mansfield for the purposes of disposing waste from oil and gas operations.<sup>239</sup>

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RES. L. REV. 1483, 1506 (2014) (setting forth local drilling bans and moratoria in Maryland, New York, Ohio, Pennsylvania and West Virginia).

<sup>232</sup> See, e.g., CITY OF ATHENS, OHIO CODIFIED ORD. §§ 47.01.04–.08 (2013); see also CITY OF YELLOW SPRINGS, OHIO CODIFIED ORD. § 878.07; see also CITY OF OBERLIN, OHIO CODIFIED ORD. § 521.13 (2013); CITY OF WARREN, OHIO CODIFIED ORD. § 731.05; see also CINCINNATI RES. 29-2012, Cincinnati City Council (Apr. 18, 2012).

<sup>233</sup> See Cheren, *supra* note 231; see also Heidi G. Robertson, *Support for Fracking Ban Seems to be Fueled by Gas*, CRAIN'S CLEVELAND BUS. (Nov. 15, 2013) <http://www.crainscleveland.com/article/20131115/BLOGS05/131119907/-1/blogs05> [<https://perma.cc/8DRK-83UJ>].

<sup>234</sup> See, e.g., Arenschiold, *Athens Votes to Ban Fracking*, *supra* note 2; Arenschiold, *Ohio Counties Can't Vote to Ban Fracking*, *supra* note 2; *Youngstown Voters Turn Down Anti-fracking Proposal—Again*, *supra* note 2. See also Robertson, *supra* note 232.

<sup>235</sup> For a comprehensive listing of actions taken by Ohio jurisdictions, see Cheren, *supra* note 231. See also Robertson, *supra* note 233.

<sup>236</sup> CITY OF YELLOW SPRINGS, OHIO CODIFIED ORD. § 878.07, *supra* note 232.

<sup>237</sup> CITY OF OBERLIN, OHIO CODIFIED ORD. § 521.13, *supra* note 232. CITY OF OBERLIN COMMUNITY BILL OF RIGHTS AND OBLIGATIONS ORDINANCE (2013), [http://web.archive.org/web/20140626173423/http://celdf.org/downloads/Oberlin\\_CBOR\\_and\\_Obligations\\_Ordinance\\_112014.pdf](http://web.archive.org/web/20140626173423/http://celdf.org/downloads/Oberlin_CBOR_and_Obligations_Ordinance_112014.pdf) [<https://perma.cc/8QE2-7FV3>].

<sup>238</sup> CINCINNATI RES. 29-2012, *supra* note 232.

<sup>239</sup> See Complaint for Declaratory Judgment and Permanent Injunctive Relief at 3,

Mansfield citizens objected to Preferred Fluids' planned creation of the injection wells.<sup>240</sup> Attempting to block the construction of these wells, Mansfield attempted to enforce local ordinances that required a driller of such wells to comply with zoning requirements that amounted to a local ban on injection wells, and to obtain certain permits.<sup>241</sup>

Preferred Fluids Management sued Mansfield in federal court, arguing that the local regulations were preempted by the Ohio oil and gas law, O.R.C. section 1509.02.<sup>242</sup> As in *Natale*, the question the court faced was whether the state law preempted Mansfield's local ordinances.

Before litigation could proceed, however, Mansfield citizens passed a ballot initiative amending the Mansfield charter to include a Community Bill of Rights<sup>243</sup> which contained a drilling ban.<sup>244</sup> Subsequently, Preferred Fluids Management withdrew its plans for Mansfield-based waste fluid wells and dropped its federal lawsuit in October of 2012.<sup>245</sup> In this instance,

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Preferred Fluids Mgmt. LLC v. City of Mansfield, No. 1:2012CV 01804 (N.D. Ohio 2012); see also Marshall, *supra* note 173.

<sup>240</sup> See Marshall, *supra* note 173.

<sup>241</sup> See Complaint for Declaratory Judgment and Permanent Injunctive Relief, *supra* note 239, at 5.

<sup>242</sup> *Id.* See also Marshall, *supra* note 173.

<sup>243</sup> See CTY. OF MANSFIELD COMMUNITY BILL OF RIGHTS § 1.03 (2013), [http://web.archive.org/web/20140626173423/http://celdf.org/downloads/Oberlin\\_CBOR\\_and\\_Obligations\\_Ordinance\\_112014.pdf](http://web.archive.org/web/20140626173423/http://celdf.org/downloads/Oberlin_CBOR_and_Obligations_Ordinance_112014.pdf) [<https://perma.cc/WU4N-MQRT>].

<sup>244</sup> *Id.* (stating "(B) *Right to Clean Air*. All residents, natural communities and ecosystems in the City of Mansfield possess a fundamental and inalienable right to breathe air untainted by toxins, carcinogens, particulates and other substances known to cause harm to death; . . . (H) *Securing and Protecting Rights*. To further secure and protect rights enumerated by the aforementioned Bill of Rights: (1) It shall be unlawful for any person or corporation . . . to use a corporation or state government or entity to inject, deposit, store or transport waste water, 'produced water', 'frack' water, brine or other materials, chemicals or by-products from the development of natural gas from shale formations, within, upon or through the land, air or waters of the City of Mansfield, without the written legislative consent of the City of Mansfield. (2) No permit, license, privilege or charter issued by any State or state government agency, Commission or Board to any person or any corporation or state government or any entity operating under State laws, or any director, officer, owner, or manager of a corporation or state government or any entity operating under State laws, which would violate the prohibitions of this Charter provision or deprive any City resident(s), of any rights, privileges, or immunities secured by this Charter, the Ohio Constitution, the United States Constitution, or other laws, shall be deemed valid within the City of Mansfield, without the written legislative consent of the City of Mansfield").

<sup>245</sup> See Linda Martz, *Plan for Fracking Waste Wells Withdrawn*, MANSFIELD NEWS J. (June 26, 2012, 4:02PM), <http://web.archive.org/web/20120703221006/http://www.mansfieldnewsjournal.com/article/20120626/NEWS01/120626008/Plan-fracking-waste-wells-withdrawn> [<https://perma.cc/784W-Z9N2>].

no judicial decision was reached on the validity of the local ordinances and of the drilling ban, located within the charter-based Community Bill of Rights, was not challenged.

b. Community Bills of Rights: Drilling Bans Through Local Charter Amendment

Unlike Munroe Falls and Warren, both of which sought to control drilling in their jurisdictions through local ordinances that imposed controls on drillers beyond the state requirements, several Ohio jurisdictions, like Mansfield, have opted to attempt outright bans on drilling.<sup>246</sup> A Pittsburgh-based nonprofit, the Community Environmental Legal Defense Fund [hereinafter CELDF], drafted model legislation it calls a “Community Bill of Rights,” and has lobbied for and supported efforts in the region and across the nation to encourage local jurisdictions to adopt versions of it.<sup>247</sup>

A Community Bill of Rights [hereinafter CBR], as its name suggests, is a rights-based approach to citizen control. It does not create specific rules, like those in a city ordinance, such as a requirement that wells be limited to certain specified locations. Rather, it asserts residents’ rights to an undefined clean environment, including the right to breathe air “untainted by toxins, carcinogens, particulates” and other similar pronouncements regarding areas regulated largely preemptively by both state and federal law. For example, the CBRs assert residents’ right to clean water. But water quality regulation generally is also not a matter of local control. The Federal Safe Drinking Water Act<sup>248</sup> and the Federal Clean Water Act<sup>249</sup> set forth the parameters, some of which are implemented locally.<sup>250</sup>

In addition to asserting rights for human citizens, the CBRs purport to grant rights to ‘natural communities’ to exist and flourish within

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<sup>246</sup> See, e.g., CITY OF ATHENS, OHIO CODIFIED ORD. §§ 47.01.04–.08 (2015); see also CITY OF YELLOW SPRINGS, OHIO CODIFIED ORD. § 878.07 (2012); see also CITY OF OBERLIN, OHIO CODIFIED ORD. § 521.13 (2013).

<sup>247</sup> See generally *Gas Drilling and Fracking*, COMMUNITY ENVIRONMENTAL LEGAL DEFENSE FUND (CELDf), <http://web.archive.org/web/20130617110648/http://www.celdf.org/-1-95> [<https://perma.cc/SDN5-U979>]. The CELDF-drafted Community Bill of Rights template can be found at <http://web.archive.org/web/20150813070142/http://celdf.org/downloads/Ordinance%20-%20Pittsburgh%20Protection%20from%20Gas%20Drilling.pdf> [<https://perma.cc/8R3N-2QP9>].

<sup>248</sup> 42 U.S.C.A. §§ 300f–300j (West 2016).

<sup>249</sup> 33 U.S.C.A. §§ 1251–1387 (West 2016).

<sup>250</sup> The directives and programs of the Safe Drinking Water Act and the Clean Water Act are implemented through state-level and regional EPA offices, and in conjunction with other state agencies, e.g., the Ohio EPA Division of Drinking and Ground Waters.

the adopting municipality.<sup>251</sup> In particular, CBRs grant these rights to woodlands, wetlands, rivers, aquifers and other water systems.<sup>252</sup>

Much has been written about who (or what) may have the right, or the responsibility, to protect natural communities. Professor Christopher D. Stone first wrote about it in his 1972 Southern California Law Review article *Should Trees Have Standing?*<sup>253</sup> Generally, the answer to the question near to Stone's question—that is, whether trees *do* have standing—has been no. Natural entities do not have standing to sue on their own behalf, and a CBR adopted by a local jurisdiction does not change that. Moreover, the sweeping assertions of legal rights and causes of action that a CBR purports to bestow, could preempt, or at least jeopardize, many existing local laws, creating unintended consequences. The CBR petitions that CELDF proposes would amend a village charter, which is effectively a local constitution. Because constitutions are superior to legislation, local ordinances that conflicted with the CBR-amended local charter, would be at risk. The issue came up in the Village of Gates Mills, Ohio.

1) A Community Bill of Rights Defeated in Favor of a Study Commission: Gates Mills, Ohio

A group of Village of Gates Mills, Ohio, citizens campaigned for Issue 51, a CELDF CBR that would have altered the village's charter. The citizens' proposal declared it "unlawful within Gates Mills for any corporation or government to engage in the extraction of hydrocarbons."<sup>254</sup> Aside from the fact that the prohibition seemed not to apply to persons, which in this context does not include corporations or governments, this prohibition posed a problem because Ohio law allows drilling, regulates it, and purports by statute to preempt its local regulation.<sup>255</sup> Even Munroe Falls did not attempt an outright ban on drilling.<sup>256</sup>

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<sup>251</sup> See *Gas Drilling and Fracking*, *supra* note 247; see also Heidi G. Robertson, *Community Bill of Rights Attempts to Use Rights-based Charter Amendment to Ban Drilling*, CRAIN'S CLEVELAND BUS. (Oct. 10, 2014), <http://www.craainscleveland.com/article/20141010/BLOGS05/141019983/community-bill-of-rights-attempts-to-use-rights-based-charter> [<https://perma.cc/WB6E-PZA9>].

<sup>252</sup> *Id.*; see also Alex Ritchie, *On Local Fracking Bans: Policy and Preemption in New Mexico*, 54 NAT. RESOURCES J. 255 (2014) (discussion the history, policy, rationale for, and limitations of Community Bills of Rights).

<sup>253</sup> Christopher D. Stone, *Should Trees Have Standing?—Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450 (1972).

<sup>254</sup> *Proposed for the November Election—Community Bill of Rights*, VILL. OF GATES MILLS (Sept. 7, 2014), <http://www.gatesmillsvillage.com/homepage/news/proposed-november-election-community-bill-rights> [<https://perma.cc/3HFR-D5MR>].

<sup>255</sup> See OHIO REV. CODE ANN. § 1509.02 (West 2013).

<sup>256</sup> See *Morrison*, 989 N.E.2d at 85.

The CBR presented several problems. For example, Gates Mills currently regulates solar panel placement on structures.<sup>257</sup> The proposed CBR charter amendment would have bestowed on residents a different right that runs contrary to that village ordinance—the absolute right to develop renewable energy on their property.<sup>258</sup> If adopted, that new right may well have negated the existing village limitations on placement of solar panels because a charter (which, again, is like the village constitution) trumps the ordinance (which is essentially village legislation). The type of overreaching language in this and other CBRs could have had substantial unintended consequences.

Gates Mills voters ultimately rejected the proposed CBR charter amendment. More than 68% of Gates Mills citizens struck down the would-be charter amendment, after months of local debate.<sup>259</sup>

In addition to its efforts in Gates Mills, CEDLF has fueled rights-based charter amendment efforts in Youngstown,<sup>260</sup> and in Broadview Heights,<sup>261</sup> where a CBR was adopted in November 2010 and altered the city's charter. Athens,<sup>262</sup> Cincinnati,<sup>263</sup> Mansfield,<sup>264</sup> Niles<sup>265</sup> and Yellow

<sup>257</sup> VILL. OF GATES MILLS, OHIO CODIFIED ORD. § 1157.07 (2014).

<sup>258</sup> See *Proposed for the November Election—Community Bill of Rights*, *supra* note 254.

<sup>259</sup> Sara Dorn, *Gates Mills Voters Deny Anti-fracking Bill of Rights*, *Unofficial Election Results Show*, THE PLAIN DEALER (Nov. 5, 2014, 1:43 AM), [http://www.cleveland.com/hillcrest/index.ssf/2014/11/gates\\_mills\\_voters\\_deny\\_anti-f.html](http://www.cleveland.com/hillcrest/index.ssf/2014/11/gates_mills_voters_deny_anti-f.html) [<https://perma.cc/7WXL-7A3D>].

<sup>260</sup> Jackie Stewart, *Youngstown Mayor: CELDF Anti-Fracking Community Bill of Rights “Out of State Folks Pushing an Agenda,”* ENERGY IN DEPTH OHIO (Oct. 7, 2015, 5:05 PM), <http://energyindepth.org/ohio/youngstown-mayor-celdf-anti-fracking-community-bill-of-rights-out-of-state-folks-pushing-an-agenda/> [<https://perma.cc/3LP5-5BXM>] (noting that the city of Youngstown has already rejected Community Bill of Rights measures on four separate occasions.)

<sup>261</sup> See Chris Ventura, *Community Bill of Rights is an Attempt to Suppress Economic Growth*, THE PLAIN DEALER (July 9, 2015, 7:01 PM), [http://www.cleveland.com/metro/index.ssf/2015/07/community\\_bill\\_of\\_rights\\_is\\_at.html](http://www.cleveland.com/metro/index.ssf/2015/07/community_bill_of_rights_is_at.html) [<https://perma.cc/TL3Z-2JKD>] (citing CELDF's support and backing of charter initiatives in Broadview Heights and throughout the State, which promote the enactment of a Community Bill of Rights).

<sup>262</sup> CITY OF ATHENS, OHIO CODIFIED ORD. §§ 47.01.04–.08.

<sup>263</sup> CINCINNATI RES. 29-2012, Cincinnati City Council (Apr. 18, 2012).

<sup>264</sup> See CITY OF MANSFIELD COMMUNITY BILL OF RIGHTS § 1.03.

<sup>265</sup> See, e.g., Erika Thomas & Jim Wyko, *27 Investigates: 85% of Niles Ordinances Passed as Emergencies in 2013*, WKBN FIRST NEWS 27 (May 6, 2014), <http://wkbn.com/2014/05/06/27-investigates-declaring-an-emergency/> [<https://perma.cc/A7GA-QJCE>]; City of Niles Community Bill of Rights, MEDIATRACKERS.ORG, [http://mediatrackers.org/assets/uploads/2013/09/20130821\\_NILES\\_ORDINANCE\\_COMMUNITYBILLOFRIGHTS\\_54-13.pdf](http://mediatrackers.org/assets/uploads/2013/09/20130821_NILES_ORDINANCE_COMMUNITYBILLOFRIGHTS_54-13.pdf) [<https://perma.cc/58BP-5ACF>] (last visited Oct. 24, 2016) (stating that the initiative in Niles was not put to the voters, rather, it was passed by the Niles City Council as an emergency measure).

Springs<sup>266</sup> also have adopted versions of CEDLF's model bill.<sup>267</sup> Bowling Green, Randolph Township, and Kent have had CBRs on the ballots, but to date have declined to adopt them.<sup>268</sup>

2) Challenges to Rights-Based Drilling Bans: Broadview Heights, Ohio

CBRs have sparked litigation for some Ohio localities that adopted them, thus undermining their goal of helping the local jurisdiction control drilling within its boundaries. For example, Broadview Heights' version of the CBR, which is similar to the version Gates Mills voters rejected, has sparked legal action in at least two ways since its 2012 adoption. When Bass Energy attempted to drill in Broadview Heights, in possession of an Ohio DNR drilling permit, the City of Broadview Heights ordered Bass Energy not to drill, citing the CBR drilling prohibition voters had approved.<sup>269</sup> Bass Energy sued Broadview Heights arguing that the new charter-based drilling prohibition violated Ohio law.<sup>270</sup>

In March 2015, almost immediately after the Ohio Supreme Court released its opinion in *State ex rel. Morrison v. Beck Energy Corp.*, Judge Michael Astrab of the Cuyahoga County Court of Common Pleas released

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<sup>266</sup> CITY OF YELLOW SPRINGS, OHIO CODIFIED ORD. § 878.07.

<sup>267</sup> See generally Community Environmental Legal Defense Fund, What's in a Community Bill of Rights (Aug. 31, 2015) <http://celdf.org/2015/08/whats-in-a-community-bill-of-rights-cbor/> [<https://perma.cc/B6TQ-JP78>] (providing information regarding the "anatomy" of a Community Bill of Rights).

<sup>268</sup> See, e.g., Ken Paulman, *Three Out of Four Ohio Towns Reject Anti-fracking Measures*, MIDWEST ENERGY NEWS (Nov. 4, 2014), <http://midwestenergynews.com/2014/11/04/three-out-of-four-ohio-towns-reject-anti-fracking-measures/> [<https://perma.cc/HP4Q-8UVF>] (explaining the Youngstown, Kent, and Gates Mills measures); *B.G. Residents Vote Against So-called Citizen's Bill of Rights*, THE TOLEDO BLADE (Nov. 5, 2013), <http://www.toledoblade.com/Politics/2013/11/05/B-G-residents-vote-against-so-called-citizen-s-bill-of-rights.html> [<https://perma.cc/DS5P-B6PB>] (explaining Bowling Green measures); see Bob Downing, *Judge Strikes Down Broadview Heights' Community Bill of Rights that Banned Additional Drilling*, AKRON BEACON J. (March 13, 2015, 11:26 PM), <http://www.ohio.com/news/local/judge-strikes-down-broadview-heights-community-bill-of-rights-that-banned-additional-drilling-1.574801> [<https://perma.cc/BJ7E-SVHR>] (explaining the implications of Broadview Heights' community bill of rights being struck down on other municipalities who have approved similar initiatives).

<sup>269</sup> *Bass Energy, Inc., v. Broadview Heights*, No. CV-14-828074 (Ct. Com. Pl. Cuyahoga Cty., Ohio, Mar. 10, 2015); see also Bob Sandrick, *Judge Shoots Down Broadview Heights Ban on Future Oil and Gas Wells*, THE PLAIN DEALER (May 8, 2015, 10:34 AM), [http://www.cleveland.com/broadview-heights/index.ssf/2015/03/judge\\_shoots\\_down\\_broadview\\_he.html](http://www.cleveland.com/broadview-heights/index.ssf/2015/03/judge_shoots_down_broadview_he.html) [<https://perma.cc/A6KD-RWY6>].

<sup>270</sup> *Bass Energy, Inc.*, No. CV-14-828074 (2015).

his decision in *Bass Energy, Inc., et al. v. City of Broadview Heights*. Citing the Ohio Supreme Court's *ex rel. Morrison* decision, Judge Astrab found the Broadview Heights CBR or "Charter Amendment Article XV," to be preempted by the Ohio oil and gas statute, section 1509.02.<sup>271</sup>

To be clear, the legal natures of the two cases were quite different. Munroe Falls had attempted to enforce pre-existing local ordinances that would effect permitting or location of oil or gas wells. Broadview Heights, on the other hand, amended its city charter, which is effectively its local constitution, to ban all drilling within its boundaries. Still, Judge Astrab felt that the Munroe Falls case, *State ex rel. Morrison v. Beck Energy Corp.*, spoke clearly enough on the preemptive power of section 1509.02—and he voided the Broadview Heights charter-based drilling ban.

In a separate lawsuit involving Broadview Heights' CBR-induced charter amendment prohibiting drilling, *Kempen v. Bass Energy* is currently pending before Judge Gaul in the Cuyahoga Court of Common Pleas.<sup>272</sup> Here, individual Broadview Heights residents sued Bass Energy for violating deed restrictions prohibiting drilling, but also for violating the drilling prohibition now in the city's charter via the CBR.<sup>273</sup> A class action suit at Common Pleas surrounding the same matter is pending before Judge McCormack.<sup>274</sup> In this suit, the non-profit Mothers Against Drilling In Our Neighborhoods joined Bass Energy and the Governor and State of Ohio, alleging that the drilling activities and the statutory preemption both violate the Ohio Constitution.<sup>275</sup>

The Ohio legislature worked hard to be clear about its intention to prohibit local regulation of shale oil and gas development.<sup>276</sup> It is possible that the Ohio Supreme Court will allow localities still to issue some limited

<sup>271</sup> *Id.*

<sup>272</sup> Paul Kempen v. Bass Energy, Inc., No. CV-13-807931 (Ct. Com. Pl. Cuyahoga Cty., May 23, 2013) (stating that it appears that this case is still pending. As of October 20, 2015, the docket indicates that the latest activity was on September 14, 2015. The reply brief was filed by plaintiff(s) Paul Kempen, Agina Kempen, and Sean S. Kelly, titled Plaintiffs' Reply in Support of Plaintiffs' Updated Motion for Partial Summary Judgment and Motion for a Hearing on Attorneys' Fees and Cost).

<sup>273</sup> Complaint, Paul Kempen v. Bass Energy, Inc., No. CV-13-807931 (Ct. Com. Pl. Cuyahoga Cty., May 23, 2013).

<sup>274</sup> Mothers Against Drilling in our Neighborhood v. Bass Energy, Inc., No. CV-14-836889 (Ct. Com. Pl. Cuyahoga Cty., Dec. 4, 2014).

<sup>275</sup> Complaint at 19, Mothers Against Drilling in our Neighborhood v. Bass Energy, Inc., No. CV-14-836889 (Ct. Com. Pl. Cuyahoga Cty., Dec. 4, 2014); see also Bob Sandrick, *Two Drilling Companies Sue Broadview Heights Over Ban on Oil and Gas Wells*, THE PLAIN DEALER (May 8, 2015, 12:02 PM), [http://www.cleveland.com/broadview-heights/index.ssf/2014/07/two\\_drilling\\_companies\\_sue\\_bro.html](http://www.cleveland.com/broadview-heights/index.ssf/2014/07/two_drilling_companies_sue_bro.html) [<https://perma.cc/J9DZ-VKT3>].

<sup>276</sup> See Robertson, *supra* note 21.



zoning rules, as Justice O'Donnell explained in *State ex rel. Morrison v. Beck Energy Corp.*<sup>277</sup> It is hard to imagine, however, any locality succeeding with an outright ban, like those included in the various iterations of the CBR, given the language of the Ohio statute and its interpretation by the Supreme Court of Ohio in *State ex rel. Morrison v. Beck Energy Corp.*

### 3) Community Bill of Rights in Other Ohio Jurisdictions

Ohio localities that have enacted a CBR, in addition to Mansfield,<sup>278</sup> Warren,<sup>279</sup> and Broadview Heights,<sup>280</sup> include Yellow Springs,<sup>281</sup> Oberlin,<sup>282</sup> Athens,<sup>283</sup> and Niles.<sup>284</sup> With the exception of the lawsuits facing Broadview Heights,<sup>285</sup> the consequences that Gates Mills foresaw have yet to play out in these cities, but neither, so far, have the expected benefits.

The small college town of Oberlin passed a town-wide outright ban on hydraulic fracturing in 2013, in the form of a CBR.<sup>286</sup> The ban includes several activities related to drilling, including the actual activity of drilling, the handling of its waste, the extraction of water to use for it, and the building of infrastructure to support it.<sup>287</sup> The town of Oberlin passed the ballot measure by a vote of seventy-one percent to thirty-nine percent. Broadview Heights had passed its drilling ban in a similar way in 2012, after a lengthy drilling moratorium.<sup>288</sup> In the 2014 midterm elections, voters in the Ohio University town of Athens passed a ban by seventy-eight percent of the votes—the only city in Ohio to do so during

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<sup>277</sup> See *Morrison*, 143 Ohio St.3d at 271, 284–85 (O'Donnell, J., concurring in judgment only) (explaining that “if the legislature had intended to override all local zoning ordinances that affect oil and gas drilling, it could have declared that intent, such as it did in the case of hazardous waste facilities, R.C. 3734.05(E), public utilities, R.C. 519.211(A), casinos, R.C. 3772.26(A), and licensed residential facilities, R.C. 5123.19(P). It could also have created a statutory scheme that addresses local land use and planning issues. Yet it did not do so.”).

<sup>278</sup> CITY OF MANSFIELD CMTY. BILL OF RIGHTS § 1.03(H)(1).

<sup>279</sup> CITY OF WARREN, OHIO CODIFIED ORD. § 731.05.

<sup>280</sup> CITY OF BROADVIEW HEIGHTS, OHIO ORDINANCE NO. 115-12 (2012).

<sup>281</sup> CITY OF YELLOW SPRINGS, OHIO ORDINANCE NO. 2011-25 (2011).

<sup>282</sup> CITY OF OBERLIN, OHIO ORDINANCE NO. 13-41 (2013).

<sup>283</sup> CITY OF ATHENS, OHIO CODIFIED ORD. §§ 47.01.04–.08.

<sup>284</sup> Thomas & Wyko, *supra* note 265.

<sup>285</sup> See Sandrick, *supra* note 269.

<sup>286</sup> Valerie Richardson, *Fracking Foes Pump Out Votes in Colorado and Ohio Where Wells Are Dry*, WASH. TIMES, Nov. 11, 2013, <http://www.washingtontimes.com/news/2013/nov/11/fracking-foes-pump-out-votes-in-colorado-and-ohio/?page=all> [<https://perma.cc/2RCK-S6PP>].

<sup>287</sup> OBERLIN ORDINANCE NO. 13-41; see AC CMS, *supra* note 237, at § 4–6.

<sup>288</sup> *Gas & Oil Well Information*, BROADVIEWHEIGHTS.ORG (Sept. 24, 2014), <http://www.broadview-heights.org/315/Gas-Oil-Well-Information> [<https://perma.cc/MZJ5-74WY>].

that election cycle.<sup>289</sup> Critics of the “victory for local rule” view of drilling have pointed out that towns like Oberlin tend to be non-industrial, with little economic interest in natural gas.<sup>290</sup>

Similar attempts to ban drilling in larger, or more industry-driven Ohio towns have failed. The same “community bill of rights” that Oberlin passed was rejected in 2013 by the cities of Bowling Green and Youngstown.<sup>291</sup> In Bowling Green, nearly three-quarters of voters defeated the ban.<sup>292</sup> In Youngstown, voters rejected the proposal twice within the first six months after its introduction, first by fifty-five percent against the ban and then by fifty-seven percent.<sup>293</sup> Youngstown voters rejected the ban again in the November 2014 election<sup>294</sup> and most recently, in November 2015.<sup>295</sup> In November 2015, Youngstown residents voted for the *fifth* time on a CEDLF-based CBR, and once again, voters rejected the measure fifty-one percent to forty-nine percent.<sup>296</sup> The city of Kent also voted down the “community bill of rights” in the November 2014 election,<sup>297</sup> as did the Village of Gates Mills.<sup>298</sup>

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<sup>289</sup> Conor Morris, *Athens the Only Ohio City to Pass a Fracking Ban This Election*, THE ATHENS NEWS (Nov. 5, 2014), [http://www.athensnews.com/ohio/election/athens-the-only-ohio-city-to-pass-a-fracking-ban/article\\_feda6903-Oaf2-5609-b16d-8s660f555d00.html](http://www.athensnews.com/ohio/election/athens-the-only-ohio-city-to-pass-a-fracking-ban/article_feda6903-Oaf2-5609-b16d-8s660f555d00.html) [<https://perma.cc/ZH5Y-ZZL6>].

<sup>290</sup> See Robertson, *supra* note 233.

<sup>291</sup> Barclay Nicholson, *Fracking Bans in Colo. And Ohio May be Unenforceable*, LAW360 (Nov. 20, 2013, 7:21 PM), <http://www.law360.com/articles/488030/fracking-bans-in-colo-and-ohio-may-be-unenforceable> [<https://perma.cc/9QXD-SVT8>].

<sup>292</sup> *Id.*

<sup>293</sup> *Id.*

<sup>294</sup> Daniel Moore, *Disagreement on Legal Authority Complicates Local Fracking Bans*, PITTSBURGH POST-GAZETTE (Nov. 11, 2014, 12:15 AM), <http://powersource.post-gazette.com/powersource/policy-powersource/2014/11/11/Law-remains-ambiguous-on-local-authority-to-ban-fracking/stories/201411110011> [<https://perma.cc/24LV-6K99>].

<sup>295</sup> Stewart, *supra* note 260; see also Dave Sess, *Frackfree Group to Put Fracking Ban on Youngstown Ballot Again*, WKBN FIRST NEWS (June 27, 2016), <http://wkbn.com/2016/06/27/frackfree-group-to-put-fracking-ban-on-youngstown-ballot-again/> [<https://perma.cc/NA53-J6H2>]; see also *Youngstown Voters Turn Down Anti-fracking Proposal—Again*, *supra* note 3.

<sup>296</sup> Bob Downing, *Youngstown Group to Submit Community Bill of Rights Petition*, AKRON BEACON J. (Aug. 26, 2014), <http://www.ohio.com/blogs/drilling/ohio-utica-shale-1.291290/youngstown-group-to-submit-community-bill-of-rights-petition-1.693173> [<https://perma.cc/6XS7-GHRN>].

<sup>297</sup> Christina Bucciere, *Kent's Community Bill of Rights Fails to Pass*, KENTWIRED.COM (Nov. 4, 2014), [http://www.kentwired.com/election\\_2014/article\\_2d3293e2-6480-11e4-ae0a-001a4bcf6878.html](http://www.kentwired.com/election_2014/article_2d3293e2-6480-11e4-ae0a-001a4bcf6878.html) [<https://perma.cc/HEL4-EFPK>].

<sup>298</sup> Clifford Krauss, *Split Decision by Voters on Local Tracking Bans*, N.Y. TIMES, Nov. 5, 2014, <http://www.nytimes.com/2014/11/06/business/energy-environment/split-decision-by-voters-on-local-fracking-bans-.html?module=Search&mabReward=relbias%3Ar> [<https://perma.cc/GUK2-L9XU>].

### 3. More Methods Ohio Local Jurisdictions Use to Attempt to Influence Drilling

As discussed above, local jurisdictions have attempted to control or influence oil and gas development activities through local regulatory ordinance, local zoning, and charter-based drilling bans. To date, in Ohio, these efforts have been largely unsuccessful. This section discusses some other methods that local jurisdictions have found to exert some control over oil and gas related activities.

#### a. Influencing Drilling by Regulating Related Activities

While Ohio local jurisdictions have had varied success in passing the legally questionable outright drilling bans,<sup>299</sup> some cities and towns have tried to influence drilling in a more targeted, though less direct way. For example, in 2012, the City of Cincinnati passed Local Ordinance No. 314, which altered the City's municipal code to prohibit disposal of hydraulic fracturing waste within the city.<sup>300</sup> This measure represents an attempt to avoid conflict with state law by focusing on an activity other than the siting or drilling of wells. In addition to prohibiting disposal of waste from hydraulic fracturing, it called upon the state to reform many drilling regulations<sup>301</sup> and requested the Governor and the Legislature to ban the construction of new wells throughout the state.<sup>302</sup> Although it is unclear whether Ohio courts would uphold this ban against the Ohio oil and gas law as interpreted in the *State ex rel. Morrison* decision because there have been no permit requests filed with the Ohio DNR for waste disposal wells in southwestern Ohio, Cincinnati's ban has not been challenged.<sup>303</sup>

Like Cincinnati, the Village of Burton sought a targeted ordinance that would have some influence on local oil and gas development without running afoul of the state statute. It passed a research moratorium, by resolution of the city council, in 2011, purporting to temporarily ban hydraulic fracturing.<sup>304</sup> In the same resolution, the Village of Burton asked the

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<sup>299</sup> See Cheran, *supra* note 231, at 1492, 1516–17.

<sup>300</sup> Andy Brownfield & German Lopez, *Council Approves Ban on Injection Wells*, CITYBEAT CINCINNATI (Aug. 1, 2012), [http://citybeat.com/cincinnati/blog-3764-council\\_approves\\_ban\\_on\\_injection\\_wells.html](http://citybeat.com/cincinnati/blog-3764-council_approves_ban_on_injection_wells.html) [<https://perma.cc/74FD-WTQ8>].

<sup>301</sup> *Id.*

<sup>302</sup> *Id.*

<sup>303</sup> *Ohio Supreme Court Decision Makes Future of Local Fracking Regulations, Unclear*, FROST BROWN TODD LAW FIRM (Feb. 23, 2015), <http://www.frostbrowntodd.com/resources-1780.html> [<https://perma.cc/QDE5-8WV3>].

<sup>304</sup> VILL. OF BURTON CODIFIED ORD. § 725.01 (1964), <http://whdrane.conwaygreene.com>

state legislature to use its preemptive power to pass a statewide ban.<sup>305</sup> To date, the Ohio legislature has not acted on Burton's request.

b. Controlling Drilling by Using the Administrative Process

Even when localities cannot regulate in their own right they have some very limited recourse through the administrative process. In North Royalton, Ohio, Cutter Oil sought to package sufficient contiguous land parcels to satisfy the state's spacing and acreage requirements for oil and gas drilling.<sup>306</sup> In Ohio, for wells predicted to be between 2,000 and 4,000 feet deep, the drilling unit must include at least twenty acres.<sup>307</sup> For wells predicted to be deeper than 4,000 feet, a forty-acre drilling unit is required.<sup>308</sup> Cutter Oil predicted that this particular well would be 3,999 feet, just one single, miraculous foot shy of the state requirement that it double the average size of the drilling area.<sup>309</sup>

To reach even the required twenty-acre regulatory threshold, Cutter Oil sought to have two acres of North Royalton's municipal streets included in its drilling area via a request to Ohio DNR's Division of Oil and Gas Resources Management for a mandatory pooling order.<sup>310</sup> The order, if granted, would add those two acres of North Royalton's city streets to Cutter's drilling unit, making it a unit of sufficient size and shape for drilling.<sup>311</sup> North Royalton, not wishing its streets to be included in the drilling area, or 'pool', objected to Cutter Oil's request for a mandatory pooling order, complaining that, in addition to other reasons, Cutter Oil had been a safety problem in North Royalton.<sup>312</sup>

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[/NXT/gateway.dll?f=templates&fn=default.htm&vid=whdrane:OHBurton](https://perma.cc/BC7U-2XZF) [https://perma.cc/BC7U-2XZF].

<sup>305</sup> *Id.*

<sup>306</sup> OHIO OIL & GAS COMM'N, FINDINGS, CONCLUSIONS & ORDER OF THE COMMISSION (Appeal No. 856), at 5, findings 3–5 (Dec. 13, 2014); *see also* Heidi G. Robertson, *Ohio Cities May Have a New Way to Control Oil and Gas Drilling Within Their Borders*, CRAIN'S CLEVELAND BUS. (Sept. 11, 2015), <http://www.crainscleveland.com/article/20150911/BLOGS05/150919963/ohio-cities-may-have-a-new-way-to-control-oil-and-gas-drilling> [https://perma.cc/4ZPN-NXLN].

<sup>307</sup> OHIO ADMIN. CODE 1501:9-1-04 (2010).

<sup>308</sup> *Id.*

<sup>309</sup> OHIO OIL & GAS COMM'N, *supra* note 306, at 5, fn. 3 (stating that the mandatory pooling order [issued to Cutter] set forth a total depth of 3,999 feet and explaining the "critical importance" of that one additional foot).

<sup>310</sup> *Id.* at 5, 10, findings 4, 17.

<sup>311</sup> *Id.*

<sup>312</sup> *Id.* at 12, findings 33–34. There had been three spills or accidents at the seventeen conventional oil and gas wells Cutter Oil operates within North Royalton, *see id.* at finding 11.

Despite North Royalton's safety concerns, Ohio DNR's Division of Oil and Gas Resources Management issued Cutter Oil's requested mandatory pooling order and North Royalton quickly took advantage of its statutory right to appeal the Division's decision to the Ohio Oil and Gas Commission.<sup>313</sup>

At the Commission's hearing on this matter, it considered whether Cutter Oil had met certain statutory requirements for obtaining a mandatory pooling order—in particular, whether the proposed unit was “compact,” as the statute requires, whether North Royalton's streets count as tracts of land which could be subject to a mandatory pooling order, whether Cutter Oil's mandatory pooling application was in order in light of some potentially important changes it made in its affidavit supporting the application, and whether Cutter Oil's negotiation efforts regarding the required but unleased land were “just and equitable” in light of the historical relationship between North Royalton and Cutter Oil.<sup>314</sup>

The first issue was simple. The statute does not provide a definition, so the Commission used a dictionary and noted “compact” to mean close, solid, or packed together.<sup>315</sup> The Commission looked at a map and determined the proposed drilling unit to be “compact” because it was shaped basically like a rectangle without outlying parts.<sup>316</sup>

The next issue was touchier. Are municipal streets “tracts” that can be subject to mandatory pooling?<sup>317</sup> The Commission wrestled with several definitions of the word “tract”, but ultimately relied on that word's use in the oil and gas law and also on testimony of oil and gas commission geologists indicating that public roads had been mandatorily pooled into drilling units in the past.<sup>318</sup>

Next, the Commission discussed whether Cutter Oil's application was proper given that the company made many alterations to it.<sup>319</sup> The Commission appeared irritated by some discrepancies between the application and its supporting documents, but it let those go.<sup>320</sup>

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<sup>313</sup> *Id.* at 13–14, findings 36–38.

<sup>314</sup> OHIO OIL & GAS COMM'N, *supra* note 306, at 16.

<sup>315</sup> *Id.* at 16–17.

<sup>316</sup> *Id.* at 17.

<sup>317</sup> *Id.* at 18.

<sup>318</sup> *Id.* at 18–19.

<sup>319</sup> OHIO OIL & GAS COMM'N, *supra* note 306, at 21.

<sup>320</sup> *Id.* at 24 (“[T]estimony revealed that, in the Division's view, the ‘just and equitable’ standard has been distilled down to only a consideration of the financial aspects of lease negotiations.”).

Ultimately, the Commission revoked the drilling company's mandatory pooling order on the grounds that the Division had not considered adequately North Royalton's documented and legitimate safety concerns.<sup>321</sup> The Commission decided that the Division's failure to consider North Royalton's safety concerns rendered the Division's effort not "just and equitable."<sup>322</sup> The Chief conceded that when issuing the order, the Division had only considered economics, not North Royalton's safety concerns.<sup>323</sup>

The Commission revoked Cutter Oil's Ohio DNR-issued mandatory pooling order in December 2014.<sup>324</sup> The order, had it stood, would have allowed Cutter Oil to include portions of North Royalton's city streets in a drilling unit despite North Royalton's objections on grounds that Cutter Oil has a poor safety record with its existing wells in North Royalton.<sup>325</sup> On March 23, 2015, the Chief of Ohio DNR's Division of Oil and Gas Resources Management—the agency that issued the original order—appealed the Commission's decision to void it to the Franklin County Court of Common Pleas, hoping the court would overturn the Commission decision and reinstate the mandatory pooling order.<sup>326</sup>

On August 27, 2015, the Franklin County Court of Common Pleas upheld the Oil and Gas Commission's decision to void the mandatory pooling order.<sup>327</sup> By upholding the Commission's voiding of the order, the Franklin County court has given hope to local jurisdictions that would like a voice in drilling decisions that effect health, safety, and welfare within their borders—traditional home rule controls.<sup>328</sup>

Cities and other localities in Ohio have long been attempting to find some measure of influence over drilling activity within their borders.<sup>329</sup> The Commission's North Royalton decision, and the Franklin County Common Pleas Court's recent support of that decision, might provide some

<sup>321</sup> *Id.* at 27.

<sup>322</sup> *Id.*

<sup>323</sup> *Id.* at 25 ("Division Chief Simmers testified that safety issues are not considered during the evaluation of a mandatory pooling application.").

<sup>324</sup> See OHIO OIL & GAS COMM'N, *supra* note 306, at 1, 27.

<sup>325</sup> *Id.*

<sup>326</sup> See *Simmers v. City of North Royalton*, No. 15 CV-000042 (Franklin Cty. Ct. Com. Pl. Aug. 27, 2015).

<sup>327</sup> See *id.*

<sup>328</sup> Mary Kilpatrick, *Court Upholds Decision to Revoke Drilling Permit for North Royalton Well*, CLEVELAND.COM (Aug. 31, 2015, 3:45 PM), [http://www.cleveland.com/north-royalton/index.ssf/2015/08/court\\_upholds\\_decision\\_to\\_revo.html](http://www.cleveland.com/north-royalton/index.ssf/2015/08/court_upholds_decision_to_revo.html) [https://perma.cc/9ML8-GVFU].

<sup>329</sup> See Arenschiold, *Athens Votes to Ban Fracking*, *supra* note 2; see also Arenschiold, *Ohio Counties Can't Vote to Ban Fracking*, *supra* note 2.

fodder. It suggests that a community's concerns—at least well-documented safety concerns—might have some influence over administrative decisions.

c. Next Steps for Local Jurisdictions: Thoughts from the  
Regional Commission to Study and Address Shale Oil and  
Gas Development

In light of the legal circumstances in Ohio, where the state legislature has placed a stricture on the power of local governments to regulate drilling and related activities, communities have struggled with how best to act in the interests of their residents. The Ohio Constitution's home rule provision does not protect them from the preemptive power of the state oil and gas law. The Ohio Supreme Court has made that clear.

Communities certainly vary in their desires regarding oil and gas development—some communities want it to come to their jurisdiction for its economic development potential, others want to block its arrival for fear of environmental, social, and other concerns, some likely just want to have a say in how it effects the community. In an effort to respond to citizen concerns with their eyes open, one Ohio community reached out to citizens and experts for analysis and advice.

Although voters in Gates Mills, Ohio, overwhelmingly defeated a proposed CBR in 2014, the heated community-wide debates that preceded the election sent a strong message to the village council. Even residents who understood the weaknesses of using a charter-altering CBR to try to control drilling were concerned about the possibility of deep well drilling and hydraulic fracturing in their village. In response to the citizens' concerns, the Gates Mills council "approved the concept of preventing, controlling or limiting the further extraction of hydrocarbons."<sup>330</sup> The council then announced that it would form a commission to study drilling and to recommend actions the council could take and efforts the council could support. The new commission would include "residents, land conservancy representatives, experts in science and in law, government representatives and others to consider legal, political, sociological, and legislative approaches to identify the current and future status of Gates Mills Village within the Marcellus, Utica, and other possible geological formations . . ."<sup>331</sup> Gates Mills' mayor soon appointed Commissioners answering the above descriptions to the newly created Regional

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<sup>330</sup> Gates Mills Village Press Release, on file with the WM. & MARY ENVTL. L. & POL'Y. REV.

<sup>331</sup> *Id.*

Commission to Study and Address Oil and Gas Well Drilling and Exploration (“the Commission”).<sup>332</sup> The Commission was to be a forum for education and discussion leading to the development of a regional response to oil and gas development that will address the concerns of communities.<sup>333</sup>

The Commission by-laws tasked the legal and legislative action committee with evaluating communities’ options within Ohio’s legal environment.<sup>334</sup> Populated with volunteers, the committee tackled this daunting task and came up with some recommendations for future Commission actions. First, in light of the Ohio Supreme Court’s analysis in *State ex rel. Morrison*, the committee recommended that local jurisdictions look closely at their zoning codes to ensure that those codes, using only their traditional zoning authority, protect their zoned areas as intended. Further, the committee recommended that local jurisdictions evaluate their ordinances that focus on health, safety and the environment. These areas of local control may well fall into the category of local power that Justice O’Donnell, in his concurring opinion, intended to protect. The committee recommended that the Commission, when appointed for 2016, focus on drafting model ordinances that local communities could adapt to their preferences.

The committee understood that law may well not be on the side of communities here. It therefore recommended taking a close look at voluntary agreements amongst landowners. The committee suggested that the Commission and local communities consider drafting model documents that could be used by private citizens to agree amongst themselves, but perhaps under the encouragement or leadership of the jurisdiction or conservation groups, not to lease their land for drilling. This could not be made mandatory under law, but if it is the will of a community to banish drilling, presumably, there would be sufficient will to enter into individual agreements towards that end. In so agreeing, it is possible that citizens could create at least a patchwork of properties for which landowners would agree not to consent to drilling. For deep wells, without

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<sup>332</sup> The author is a commissioner and co-chair of the legal and legislative action committee. For more information about the Regional Commission, see *Purpose of the Regional Commission*, <http://www.rcogw.com> [<https://perma.cc/N5J9-9FA9>].

<sup>333</sup> *Report and Recommendations*, REGIONAL COMMISSION TO STUDY AND ADDRESS OIL & GAS WELL DRILLING AND EXPLORATION, at 1 (Dec. 2015), <http://www.rcogw.com/sites/default/files/files/Regional%20Commission%20on%20Oil%20and%20Gas%20Drilling%20Report%20and%20Recommendations.pdf> [<https://perma.cc/2W8V-46R6>].

<sup>334</sup> See *Welcome to the Legal and Legislative Affairs Committee*, REGIONAL COMMISSION TO STUDY AND ADDRESS OIL & GAS WELL DRILLING AND EXPLORATION, <http://www.rcogw.com/legal> [<https://perma.cc/KHC7-2WUV>].



sixty-five percent of the mineral rights owners in a 650 acre area consenting to drilling, developers would be unable to petition the state to mandatorily include the dissenting landowners in a drilling unit. For shallower wells, Ohio prefers to have more than ninety percent landowner agreement in a forty acre area. If unable to create a drilling unit of sufficient size and shape for the depth of well to be drilled, developers would be unable to earn a drilling permit. The committee will delve into the possibilities here in the coming year, presumably, the documents will take the form of conservation easements or deed restrictions.

## II. LOCAL CONTROL IN OHIO'S MARCELLUS AND UTICA REGION NEIGHBORS

When trying to determine how courts might rule on important matters, one often looks for insight from neighboring states. Two of Ohio's neighbors, Pennsylvania and New York, faced similar tensions concerning the intersection of state oil and gas laws and local efforts to control shale oil and gas activities within their local boundaries. Like Ohio, large areas of Pennsylvania and New York sit atop the Marcellus and Utica shale plays.<sup>335</sup> This means that the three states share the majority of natural gas development potential out of the entire Eastern and Midwestern regions.<sup>336</sup> But because of the particulars of each state's constitutional language related to home rule, and to environmental conservation, despite the similarity in geography and resources, the three similarly situated states have met local oil and gas drilling control efforts with very different responses.

This section will evaluate the legal environments in Pennsylvania and New York. It will consider the oil and gas statutes in those states, as well as the language of the state constitutions. Finally, it will compare the relative interpretation of those state courts to Ohio.

### A. *Pennsylvania*

Shale plays do not respect state lines. Because the Utica and Marcellus shale formations run deep beneath Pennsylvania,<sup>337</sup> as well as

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<sup>335</sup> See *Marcellus and Utica Shales Data*, OHIO DEP'T NAT. RES. DIV. OF GEOLOGICAL SURVEY (2015), <http://geosurvey.ohiodnr.gov/energy-resources/marcellus-utica-shales> [<https://perma.cc/P428-XRTV>].

<sup>336</sup> *Id.*

<sup>337</sup> See Chris Amico et al., *Shale Play*, NPR STATE IMPACT, <http://stateimpact.npr.org/pennsylvania/drilling/> [<https://perma.cc/SP78-7TKB>].

beneath Ohio (and New York, West Virginia, and others),<sup>338</sup> Pennsylvania has faced issues similar to Ohio's on the subject of local control bumping up against a state statute and the state Constitution. This section illustrates Pennsylvania's approach to the problem by exploring that state's oil and gas legislation, its applicable Constitutional provisions, and the decisions of its highest court.

### 1. Legislation: Pennsylvania's Act 13

Like the Ohio legislature, Pennsylvania's legislature was clear about its intent to preempt local regulation of oil and gas operations. Pennsylvania's legislature enacted Act 13 in an effort to revamp its oil and gas laws. The Pennsylvania law was old, originally enacted in 1961 as the Oil & Gas Conservation Law.<sup>339</sup> The original iteration did not address the new technologies, like horizontal drilling or hydraulic fracturing, that were quickly arriving in the state due to the developing shale oil and gas industry surrounding the Marcellus shale play.<sup>340</sup> Because of this omission, Pennsylvania regulated the new technologies through a "patchwork of regulatory responses by the state as well as local governments."<sup>341</sup>

Act 13 substantially revised Pennsylvania's old Oil and Gas Act with a codified statutory framework regulating oil and gas operations.<sup>342</sup> It included a system for collecting impact fees from drilling companies using hydraulic fracturing to tap the enormous natural-gas supplies in the Marcellus Shale region.<sup>343</sup> It provided that significant revenue from those fees be returned to effected municipalities and the state agencies running the regulatory system.<sup>344</sup> Pennsylvania had been "the only major gas-producing state that did not tax natural-gas production, and it was projected to collect \$175 million" in 2012.<sup>345</sup> The new law regulated the

<sup>338</sup> See *Lower 48 States Shale Plays*, U.S. ENERGY INFORMATION ADMINISTRATION, [http://www.eia.gov/oil\\_gas/rpd/shale\\_gas.pdf](http://www.eia.gov/oil_gas/rpd/shale_gas.pdf) [<https://perma.cc/HK6D-CF3K>].

<sup>339</sup> 58 PA. STAT. ANN. § 419 (West 1961); Oil and Gas Conservation Law, 1961 PA. LAWS, <http://files.dep.state.pa.us/oilgas/bogm/bogmportalfiles/LawsRegsGuidelines/Act359uc.pdf> [<https://perma.cc/2HGX-P78W>].

<sup>340</sup> John Dernbach et al., *Robinson Township v. Commonwealth of Pennsylvania: Examinations and Implications*, 67 RUTGERS L. REV. 1169, 1171 (2015).

<sup>341</sup> *Id.* at 1171–72.

<sup>342</sup> See Pa. Dep't Env'tl. Prot., ACT 13 OF 2012 (2015), [http://web.archive.org/web/20120417153326/http://www.portal.state.pa.us/portal/server.pt/community/act\\_13/20789](http://web.archive.org/web/20120417153326/http://www.portal.state.pa.us/portal/server.pt/community/act_13/20789) [<https://perma.cc/Z97C-4EZ3>].

<sup>343</sup> *Id.*

<sup>344</sup> *Id.*

<sup>345</sup> Bill Reed, *Controversy Abounds Over New Pennsylvania Drilling Law*, THE PHILA.

location of wells, specifically allowing drilling within 500 feet of buildings and water wells; within 300 feet of springs, rivers, and wetlands larger than an acre; and within 1,000 feet of sources of public drinking water.<sup>346</sup>

Act 13 also regulated the shale oil and gas permitting process by providing new and modified requirements to be carried out by the Pennsylvania Department of Environmental Protection.<sup>347</sup> It prevents doctors from gaining information pertinent to their patients' care, concerning the risks of exposure to chemicals used in the production process unless they sign a confidentiality agreement—ostensibly to protect drilling companies' proprietary information.<sup>348</sup> If a doctor releases obtained information regarding the risks of chemical exposure, in violation of the confidentiality agreement, he or she will be subject to civil and criminal liability.<sup>349</sup>

Significantly, and at issue here, Act 13 attempted to preclude local regulation of oil and gas drilling.<sup>350</sup> Act 13's section 3303 provides:

Notwithstanding any other law to the contrary, environmental acts are of Statewide concern and, to the extent they regulate oil and gas operations, *occupy the entire field of regulation*, to the exclusion of all local ordinances. The Commonwealth, by this section, *preempts and supersedes the local regulation of oil and gas operations* regulated by the environmental acts, as provided in this chapter (emphasis added).<sup>351</sup>

This represents a clear statement of the legislature's intent to occupy the field of the regulation of shale oil and gas production. The Act also includes a specifically stated expression of preemption of local regulation. In section 3304, entitled 'Uniformity of Local Ordinances', the Act states that "[A]ll local ordinances regulating oil and gas operations shall allow for the reasonable development of oil and gas resources."<sup>352</sup> The Act

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INQUIRER (Apr. 17, 2012), [http://articles.philly.com/2012-04-17/news/31355843\\_1\\_drilling-law-unconventional-drilling-natural-gas-drilling](http://articles.philly.com/2012-04-17/news/31355843_1_drilling-law-unconventional-drilling-natural-gas-drilling) [<https://perma.cc/FKM6-8PE3>].

<sup>346</sup> *Id.*

<sup>347</sup> *Id.*; see also Pa. Dep't Envtl. Prot., *supra* note 342.

<sup>348</sup> See Scott Detrow, *What You Need to Know About Act 13's Confidentiality Requirements*, NPR STATE IMPACT (Apr. 19, 2012, 1:33 PM), <http://stateimpact.npr.org/pennsylvania/2012/04/19/what-you-need-to-know-about-act-13s-confidentiality-requirements/> [<https://perma.cc/9RU2-SMZM>].

<sup>349</sup> *Id.*

<sup>350</sup> 58 PA. CONS. STAT. § 3303 (2012), *abrogated by* Robinson Twp. v. Commonwealth, 83 A.3d 901 (Pa. 2013).

<sup>351</sup> *Id.*

<sup>352</sup> *Id.* § 3304(a).

then proceeds, in the specific, to explain that localities must allow “well and pipeline location assessment operations,”<sup>353</sup> are prohibited from imposing requirements more stringent than the state with respect to drilling construction and operations,<sup>354</sup> and must complete any local review of drilling proposals quickly—within time limits specified by statute.<sup>355</sup> This Act was superior to the Ohio oil and gas law, in terms of clarity and specificity to preempt local regulation.

## 2. The Pennsylvania Constitution

The Pennsylvania Constitution includes a home rule provision,<sup>356</sup> similar to that in Ohio’s Constitution<sup>357</sup> and to those of many other states.<sup>358</sup> It also includes an Environmental Rights amendment<sup>359</sup> which provides an additional tool for local jurisdictions in their quest to exercise some control or influence over drilling within their boundaries. This section will address these two provisions as they have been applied in the Pennsylvania courts to issues of local control of shale oil and gas development.

### a. The Home Rule Provision

Like Ohio, the Pennsylvania Constitution includes a home rule provision in Article IX, § 2.<sup>360</sup> It says that “municipalities shall have the right and power to frame and adopt home rule charters,” and that “a municipality which has a home rule charter may exercise any power to perform any function not denied by this Constitution, by its home rule charter or by the General Assembly at any time.”<sup>361</sup> The interesting point here, though, is not the similarity of Ohio’s and Pennsylvania’s home rule provisions, but, as discussed below, the fact that Pennsylvania’s highest court did not rely on the home rule provision in the dispositive case on this issue. Instead, it relied on the environmental rights amendment.<sup>362</sup>

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<sup>353</sup> *Id.* § 3304(b)(1)–(2).

<sup>354</sup> *Id.* § 3304(b)(2)–(3).

<sup>355</sup> 58 PA. CONS. STAT. § 3303, at § 3304(b)(4).

<sup>356</sup> PA. CONST. art. IX, § 2.

<sup>357</sup> OHIO CONST. art. XVIII, § 3.

<sup>358</sup> *See, e.g.*, N.Y. CONST. art IX, § 2; *see also* COLO. CONST. art. XX § 6; ILL. CONST. art. VII, § 6(a).

<sup>359</sup> PA. CONST. art. I, § 27.

<sup>360</sup> PA. CONST. art. IX, § 2.

<sup>361</sup> *Id.*

<sup>362</sup> *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 985 (Pa. 2013).

b. The Environmental Rights Amendment

The Pennsylvania Constitution includes a provision for which there is no comparable language in the Ohio Constitution. Pennsylvania's Constitution boasts an "environmental rights amendment" stating:

The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.<sup>363</sup>

This provision was adopted in 1971, by referendum, during a period where public awareness of environmental dangers had led to the adoption of many of the federal environmental laws.<sup>364</sup> Pennsylvania, in particular, had been suffering pollution from industrialization, mining activities, and other damaging industries.<sup>365</sup>

3. Judicial Interpretation: *Robinson Township v. Commonwealth of Pennsylvania*

Like local jurisdictions in other states, Pennsylvania cities and towns sought to impose their zoning rules and other ordinances on oil and gas activities, but found themselves in potential conflict with Act 13, which had purported to preempt their authority.<sup>366</sup> They hoped the state Constitution would help.<sup>367</sup> In 2013, the Pennsylvania Supreme Court applied the state's Constitutional provisions to a group of Pennsylvania townships' efforts to enforce their zoning ordinances against oil and gas activities in the face of Act 13.<sup>368</sup>

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<sup>363</sup> PA. CONST. art. I, § 27.

<sup>364</sup> During the 1970s, Pennsylvania adopted state regulatory mechanisms under cooperative federalism structures of the Federal Clean Air and Clean Water Acts. *See, e.g.*, 25 PA. CODE § 127.81-83 (adopting regulatory mechanisms of the Federal Clean Air Act).

<sup>365</sup> *See* Dernbach, *supra* note 340, at 1170.

<sup>366</sup> *Id.* at 1173.

<sup>367</sup> *Id.*

<sup>368</sup> *Robinson Twp.*, 83 A.3d at 902.

a. Background

In 2012, Robinson Township, along with six other townships and individuals, as well as an environmental group, sued Pennsylvania, arguing that Act 13's preemptive provisions were inconsistent with the environmental rights amendment of the Pennsylvania Constitution, among other challenges.<sup>369</sup> Plaintiffs alleged that among the seven complaining townships—all sitting atop the Marcellus Shale—oil and gas drillers had set up at least 150 wells within township limits.<sup>370</sup> These townships argued that Act 13 had unconstitutionally negated their traditional police powers to control, among other things, where in their jurisdictions the wells could be safely located. As written, the Act would force them to change their zoning and traffic laws, and it would usurp their home rule powers.<sup>371</sup>

b. *Robinson Township* in the Commonwealth Court

In July 2012, the Pennsylvania Commonwealth Court, an intermediate court acting here as the trial court,<sup>372</sup> upheld most of Act 13, but struck down sections 3215(b)(4) and 3304 as unconstitutional.<sup>373</sup> The Commonwealth Court held that these sections failed on substantive due process grounds. The reason was that Pennsylvania courts had previously required that land use decisions be directed at the whole community and justified by a balancing of costs and benefits in order to satisfy substantive due process.<sup>374</sup> Instead, section 3304 fails to protect “the interests of neighboring property owners from harm, alters the character of neighborhoods, and makes irrational classifications” because it allows incompatible uses to persist within zoning districts.<sup>375</sup>

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<sup>369</sup> See Christopher Lewis, *Case Study: Robinson Township v. Commonwealth of Pa.*, LAW360 (Aug. 31, 2012, 12:38 PM), <http://www.law360.com/articles/372293/case-study-robinson-township-v-commonwealth-of-pa> [<https://perma.cc/JGU6-VPGX>].

<sup>370</sup> *Id.*

<sup>371</sup> *Id.*

<sup>372</sup> The Commonwealth Court of Pennsylvania is an appellate level court that hears appeals of final orders from state agencies and handles matters concerning state and local governments. It serves as the trial court for cases brought against the Commonwealth of Pennsylvania. See *Learn About the Pennsylvania Judicial System*, <http://www.pacourts.us/learn> [<https://perma.cc/V3J8-3ZR4>] (last visited Oct. 24, 2016).

<sup>373</sup> *Robinson Twp. v. Commonwealth*, 52 A.2d 463, 485, 493 (Pa. Commw. Ct. 2012), *overruled by Robinson Twp.*, 83 A.3d at 901.

<sup>374</sup> See Dernbach, *supra* note 340, at 1173–74.

<sup>375</sup> *Robinson Twp.*, 52 A.3d at 482; *see also id.* at 1174.

The Commonwealth Court considered section 3303, but upheld it over the parties' environmental rights amendment challenges.<sup>376</sup> Earlier Pennsylvania court decisions had laid the groundwork for this result in two ways. First, Pennsylvania courts had held that the environmental rights amendment only applies when specifically invoked by the legislature within the legislation itself,<sup>377</sup> and then setting forth a three-part balancing test for analyzing its applicability.<sup>378</sup> The three parts are:

- (1) Was there compliance with all applicable statutes and regulations relevant to the protection of the Commonwealth's public natural resources?
- (2) Does the record demonstrate a reasonable effort to reduce the environmental incursion to a minimum?
- (3) Does the environmental harm which will result from the challenged decision or action so clearly outweigh the benefits to be derived therefrom that to proceed further would be an abuse of discretion?<sup>379</sup>

In Act 13, the legislature did not invoke specifically the environmental rights amendment. And because, according to the Commonwealth Court, Act 13 freed municipalities "of their responsibilities to strike a balance between oil and gas development and environmental concerns," as required in the three-part test, section 3303 survived the constitutional challenge.<sup>380</sup>

Because the Commonwealth Court found for Robinson Township when it struck down sections 3215(b)(4) and 3304, but ruled for the Commonwealth of Pennsylvania when it upheld section 3303, both sides appealed to the Supreme Court of Pennsylvania.<sup>381</sup>

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<sup>376</sup> *Robinson Twp.*, 52 A.3d at 485.

<sup>377</sup> Dernbach, *supra* note 340, at 1174.

<sup>378</sup> *Id.* For more on Pennsylvania's Environmental Rights Amendment, see John C. Dernbach, *Taking the Pennsylvania Constitution Seriously When it Protects the Environment: Part I—An Interpretative Framework for Article I, Section 27*, 103 DICK. L. REV. 693 (1999); see also John C. Dernbach, *Taking the Pennsylvania Constitution Seriously When it Protects the Environment: Part II—Environmental Rights and the Public Trust*, 104 DICK. L. REV. 97 (1999).

<sup>379</sup> Dernbach, *supra* note 340, at 1189 (citing *Payne v. Kassab*, 312 A.2d 86, 94 (Pa. Cmmw. 1973), *aff'd*, 361 A.2d 263, 264 (Pa. 1976)).

<sup>380</sup> *Robinson Twp.*, 52 A.3d at 489.

<sup>381</sup> *Id.* at 485, 493.

c. *Robinson Township* in the Pennsylvania Supreme Court

As was widely predicted, the Robinson Township decision was appealed immediately to the Pennsylvania Supreme Court. Pennsylvania Governor Tom Corbett even requested expedited review.<sup>382</sup> In December 2013, approximately 18 months after the appeal, Pennsylvania's highest court issued an opinion.<sup>383</sup> The Pennsylvania Supreme Court said that, "few could seriously dispute how remarkable a revolution is worked by [Act 13] upon the existing zoning regimen in Pennsylvania."<sup>384</sup> In saying this, the Pennsylvania Supreme Court seems to be marveling at the attempt by the state legislature to control local zoning decisions through the preemption provisions of Act 13. The Court then returned to Pennsylvania's local governments the authority to regulate hydraulic fracturing as an industrial use under their land use and zoning ordinances. In particular, the Pennsylvania Supreme Court upheld the Commonwealth Court regarding the two provisions that court had found unconstitutional—sections 3215(b)(4) and 3304.<sup>385</sup> It added to the townships' victory by also finding section 3303 unconstitutional under the environmental rights amendment of the state's constitution.<sup>386</sup>

1) The Environmental Rights Amendment

The essential question in the Pennsylvania Supreme Court was whether the environmental rights amendment confers any rights upon citizens or responsibilities upon municipalities. The state argued that it does not.<sup>387</sup> Instead, the state argued, the environmental rights amendment is merely a guide to the legislature as it does its job to decide what is best for the citizens, the natural resources, and the environment of Pennsylvania.<sup>388</sup> The municipalities argued that the environmental rights amendment does confer rights upon Pennsylvania's citizens and responsibilities upon its municipalities, and is a foundational piece of the state's

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<sup>382</sup> Brief of Appellants, *Robinson Twp. v. Commonwealth*, 83 A.3d 901 (Pa. 2013) (No. 63 MAP 2012), 2012 WL 3875605.

<sup>383</sup> *Robinson Twp.*, 83 A.3d at 902.

<sup>384</sup> *Id.*

<sup>385</sup> *Id.*

<sup>386</sup> For an in-depth analysis of the Pennsylvania Supreme Court's 162-page plurality opinion, see Dernbach, *supra* note 340.

<sup>387</sup> *Robinson Twp.*, 83 A.3d at 933–34.

<sup>388</sup> *Id.*



constitution, imbued with meaning of its own.<sup>389</sup> The question was crucial. If the Amendment gave the citizens rights and the municipalities responsibilities, they would have to be able to exercise these rights and responsibilities by creating rules or standards in their communities.

On this point, the Supreme Court's plurality sided with the municipalities, in part because the environmental rights amendment, like the constitution's language on freedom of speech, is located in the state constitution's equivalent of the Bill of Rights.<sup>390</sup> The proper place and interpretation of the environmental rights amendment was a new issue for the Supreme Court of Pennsylvania, and to address it, the Court began with the plain language of the amendment.<sup>391</sup> The amendment says "[t]he people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment." This appeared, to the Court, to confer a right on the people of the state—as stated, the right to clean air, pure water, and the preservation of certain environmental values. The Court, though, found a second right inherent in this sentence. It found a "limitation on the state's power to act contrary to this right."<sup>392</sup>

The amendment goes on to say, "Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people."<sup>393</sup> The Court found these later sentences to refer to a public trust that the state holds on behalf of the people—both current citizens and future generations.<sup>394</sup> As a trustee of the resources of Pennsylvania, the Commonwealth has a duty to, as the environmental rights amendment states, conserve and maintain them. The court says, "[t]he plain meaning of the terms conserve and maintain implicates a duty to prevent and remedy the degradation, diminution, or depletion of our public natural resources."<sup>395</sup> In addition, the Court found an additional duty, the duty "to act affirmatively to protect the environment, via legislative action."<sup>396</sup> So, rather than merely providing guidance for the legislature, the Court imposed a duty upon it.

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<sup>389</sup> *Id.*

<sup>390</sup> *Id.* at 962; see Dernbach, *supra* note 340, at 1178.

<sup>391</sup> Dernbach, *supra* note 340, at 1170.

<sup>392</sup> *Id.* at 1179 (citing *Robinson Twp.*, 83 A.3d at 951).

<sup>393</sup> *Robinson Twp.*, 83 A.3d at 948–49; PA. CONST. art. I, § 27.

<sup>394</sup> Dernbach, *supra* note 340, at 1179 (citing *Robinson Twp.*, 83 A.3d at 954–55).

<sup>395</sup> *Id.*

<sup>396</sup> *Robinson Twp.*, 83 A.3d at 958.

Following the Court's analysis of the text of the environmental rights amendment, it rejected the idea that the balancing test, relied upon by the Commonwealth, was an appropriate substitute for the language of the Amendment itself.

2) Act 13's Section 3303

Section 3303 preempted local regulation of oil and gas operations.<sup>397</sup> The Supreme Court of Pennsylvania found that this provision violated the Pennsylvania Constitution's environmental rights amendment "because 'the General Assembly has no authority to remove a political subdivision's implicitly necessary authority to carrying into effect its constitutional duties.'"<sup>398</sup> Presumably, this means that the legislature cannot take away the municipality's duty, under the Constitution, to regulate as it deems necessary to protect the environment.

3) Act 13's Section 3304

Section 3304 attempted to control local land use ordinances.<sup>399</sup> In particular, it required that "all local ordinances . . . allow for the reasonable development of oil and gas resources" and puts in place a uniform system of oil and gas regulation.<sup>400</sup> The Court found this section to violate the Pennsylvania Constitution because "a new regulatory regime permitting industrial uses as a matter of right in every type of pre-existing zoning district is incapable of conserving or maintaining the constitutionally-protected aspects of the public environment and a certain quality of life."<sup>401</sup> Even though the language of Section 3304 calls for municipalities to "allow for the reasonable development of oil and gas resources,"<sup>402</sup> Section 3304 would impose its regulatory system on all land use zones, already determined by municipalities, thus effectively depriving the municipality from enforcing its own land use zones.<sup>403</sup> The section would even impose itself on already existing residential zones.<sup>404</sup>

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<sup>397</sup> 58 PA. CONS. STAT § 3303 (2012).

<sup>398</sup> Dernbach, *supra* note 340, at 1180 (citing *Robinson Twp.*, 83 A.3d at 977).

<sup>399</sup> 58 PA. CONS. STAT. § 3304 (2016).

<sup>400</sup> *Id.*

<sup>401</sup> *Robinson Twp.*, 83 A.3d at 979.

<sup>402</sup> 58 PA. CONS. STAT. § 3304.

<sup>403</sup> *Robinson Twp.*, 83 A.3d at 971–72.

<sup>404</sup> *Id.* at 972.

In addition, the Court felt that enforcement of section 3304 would lead to inequitable burdens of environmental damage across the Commonwealth and that this was a violation of the Commonwealth's duty under the environmental rights amendment, to serve as trustee for all of the Commonwealth's people.<sup>405</sup> The Court said "some properties and communities will carry much heavier environmental and habitability burdens than others," and it found this violates the environmental rights amendment.<sup>406</sup>

#### 4) Conclusion re: the Pennsylvania Supreme Court's Decision

The Act 13 preemption of all local regulation of hydraulic fracturing was dead. Despite strong support from Pennsylvania's governor, and the best efforts of the Pennsylvania legislature to vest the state with complete control of oil and gas decision-making, the Pennsylvania Constitution preserved the locality's ability to regulate.<sup>407</sup> The ruling was a blow to Pennsylvania's Governor Corbett, who was counting on the preemption provision of Act 13 to help attract gas drilling and associated jobs to Pennsylvania.<sup>408</sup> According to Nancy Alessi, a supervisor in Nockamixon Township, Bucks County, one of the plaintiffs in the suit, "[e]very citizen in the state should be pleased that the concept of local zoning has been upheld. . . . This was a huge portion of the act, and the court ruled definitively, overturning it."<sup>409</sup>

#### 4. Pennsylvania Conclusion: Environmental Rights Amendment Serves Pennsylvania Communities

Act 13 was a clear expression of legislative intent to occupy the field and thereby to preempt local regulation of oil and gas, and it was overturned under the Pennsylvania Constitution's environmental rights amendment, in favor of local regulation. The plurality of the Pennsylvania court wrote about the environmental rights amendment as if it has foundational value similar to free speech and freedom of the press.<sup>410</sup> This was new in Pennsylvania. In addition to having foundational value, the

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<sup>405</sup> *Id.* at 975.

<sup>406</sup> *Id.* at 980.

<sup>407</sup> *Id.*

<sup>408</sup> Bill Reed, *Major Parts of Pa.'s Natural-Gas Law Ruled Unconstitutional*, THE PHILA. INQUIRER (July 28, 2012), [http://articles.philly.com/2012-07-28/news/32890243\\_1\\_major-gas-producing-state-natural-gas-law-marcellus-shale](http://articles.philly.com/2012-07-28/news/32890243_1_major-gas-producing-state-natural-gas-law-marcellus-shale) [<https://perma.cc/6C27-JKUG>].

<sup>409</sup> *Id.*

<sup>410</sup> *Robinson Twp.*, 83 A.3d at 934.

environmental rights amendment was used to strike down a statute as unconstitutional. This, too, was new. The Court set forth two specific rights derived from the environmental rights amendment. First, it noted the citizens' rights to clean air, pure water, and the preservation of natural, scenic, historic, and aesthetic values of the environment.<sup>411</sup> Second, it noted a public trust in public natural resources through which the Commonwealth has the duty to conserve and maintain for the citizens of Pennsylvania, both present and future.<sup>412</sup> In highlighting these two rights, grounded in the Pennsylvania Constitution, the Court rejected the Commonwealth's preference for applying a balancing test, as set forth in *Payne v. Kassab*, except in certain limited cases.<sup>413</sup> Instead, the Court stated a preference for a constitutional, text-based analysis.<sup>414</sup>

Ohio's constitution does not include an environmental rights provision like the one in Pennsylvania. Perhaps it should, but it does not. Ohio's constitution does include several provisions in its Bill of Rights protecting property rights as they pertain to the environment,<sup>415</sup> but they differ substantially from the environmental protection provided in Pennsylvania's constitution. In Ohio, then, only the Ohio Constitution's home rule provision remains as a constitutional means to protect local action effecting oil and gas activities. Although not a statewide provision, Mansfield, Ohio, has passed an "environmental bill of rights" to add to its city charter,<sup>416</sup> but so far, no such effort has added environmental rights to the Ohio constitution.

Pennsylvania's Supreme Court might well have relied on its own home rule provision to decide this case. The fact that it did not might tell us that it did not believe it could strike down the relevant Act 13 provisions on home rule grounds. Or, it might just mean that the environmental rights argument was stronger. Regardless, Ohio's constitution does not include an environmental rights provision and Ohioans will have to wait

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<sup>411</sup> *Id.*

<sup>412</sup> *Id.*

<sup>413</sup> *Id.*

<sup>414</sup> Dernbach, *supra* note 340, at 1179–80.

<sup>415</sup> *See, e.g.*, OHIO CONST. art. I, §§ 1.19–1.20.

<sup>416</sup> *See* Section I.C.2.a, *supra*. Preferred Fluids Mgmt., LLC v. City of Mansfield, No. 1:12-cv-01804 (N.D. Ohio July 13, 2012) (Plaintiff, Preferred Fluids, filed a Complaint for Declaratory Judgment and Permanent Injunction in which Plaintiff sought: (1) declaration that the City of Mansfield has no authority to require permits or licenses of Preferred Fluids in order to construct and operate injection wells within the City of Mansfield, and (2) to enjoin the City of Mansfield from requiring any permits [of Preferred Fluids] to operate the wells and/or regulate the location, construction, or operation of the wells); *see also* Marshall, *supra* note 173.

until an appropriate test case goes to Ohio's Supreme Court before they know whether Ohio's oil and gas statute, Ohio Rev. Code sec. 1509.02, which preempts local regulation, runs afoul of the Ohio constitution.<sup>417</sup>

According to Professor Dernbach's work on environmental constitutionalism,<sup>418</sup> Pennsylvania is not alone in finding strength in its constitution for supporting environmental rights.<sup>419</sup> The Supreme Court in Alaska relied on its state constitution's public interest standard for resource development to hold that the courts in that state must consider whether, in their decision-making, state agencies adequately valued the cumulative environmental impacts of oil and gas leases.<sup>420</sup> Dernbach has also noted that the Supreme Court of Montana has "subjected state decisions that implicate environmental rights provisions in its constitution to strict scrutiny."<sup>421</sup> Still, Dernbach and Professor Barton Thomson have found that most of the environmental rights provisions in state constitutions have been made comparatively obscure due to the decisions of the relevant state courts.<sup>422</sup>

## B. *New York*

### 1. New York's Constitution and Legislative Background

Like the constitutions of Ohio and Pennsylvania, New York's constitution has a home rule provision. Article IX of the New York Constitution says: "every local government shall have power to adopt and amend local laws not inconsistent with the provisions of this constitution or any general law . . . except to the extent that the legislature shall restrict the adoption of such a local law."<sup>423</sup> The New York legislature enacted the Municipal Home Rule Law to implement the Constitutional provision.

<sup>417</sup> See Heidi Gorovitz Robertson, *Pennsylvania's environmental rights might snag drillers*, CRAIN'S CLEVELAND BUS. (Jan. 31, 2014), <http://www.craigslist.com/article/20140131/SHALEBLOGS/301319996> [<https://perma.cc/8W8C-256U>].

<sup>418</sup> See, e.g., Dernbach et al., *supra* note 340; JOHN DERNBACH, ACTING AS IF TOMORROW MATTERS: ACCELERATING THE TRANSITION TO SUSTAINABILITY (2012); ENVIRONMENTAL LAW INSTITUTE, AGENDA FOR A SUSTAINABLE AMERICA (John Dernbach ed., 2009); ENVIRONMENTAL LAW INSTITUTE, STUMBLING TOWARD SUSTAINABILITY (John Dernbach ed., 2002).

<sup>419</sup> *Id.*

<sup>420</sup> Dernbach et al., *supra* note 340, at 1195 (citing *Sullivan v. Resisting Env'tl. Destruction on Indigenous Lands*, 311 P.3d 625 (Alaska 2013)).

<sup>421</sup> *Id.*

<sup>422</sup> *Id.* (citing Barton H. Thompson, Jr., *Constitutionalizing the Environment: The History of Montana's Environmental Provisions*, 64 MONT. L. REV. 157, 158 (2003)).

<sup>423</sup> N.Y. CONST. art. IX, § 2(e)(ii).

The Municipal Home Rule Law empowers local governments to pass laws both for the “protection and enhancement of [their] physical and visual environment”<sup>424</sup> and for the “government, protection, order, conduct, safety, health and well-being of persons or property therein.”<sup>425</sup>

In addition to the Municipal Home Rule Law, the New York legislature enacted the Town Law which authorized towns to enact zoning laws to foster “the health, safety, morals, or the general welfare of the community,”<sup>426</sup> and the Statute of Local Governments, which granted towns the power to “adopt, amend, and repeal zoning regulations.”<sup>427</sup>

## 2. New York's Oil and Gas Statutes

New York also has a statute stating that New York state rules supersede local ordinances regulating oil and gas. Commonly referred to as “Article 23”, New York's entire oil and gas law resides in the Environmental Conservation section of the Laws of New York, titled “Mineral Resources.”<sup>428</sup> The policy statement in Article 23 §2703 says “this title shall supersede all other state and local laws relating to the extractive mining industry.”<sup>429</sup> But the clause includes caveats, wiggle room that states like Ohio do not have. For example, the statute does not prohibit local governments from “enacting or enforcing local laws or ordinances of general applicability” unless they regulate mining that the state has already regulated.<sup>430</sup> The statute contains similar subsections allowing for local zoning regulations, and allowing localities to regulate in areas the state does not require permitting.<sup>431</sup> Moreover, Article 23 also contains what is known as the Supersession Clause, providing the state law “shall supersede all local laws or ordinances relating to the regulation of the oil, gas and solution mining industries.”<sup>432</sup> As a whole, these laws are known as New York's Oil, Gas and Solution Mining Law (“OGSML”)<sup>433</sup> and the regulatory agency responsible for enforcement is the Department of Environmental Conservation (“DEC”).<sup>434</sup> The tension in New York home

<sup>424</sup> N.Y. MUN. HOME RULE LAW, § 10(1)(ii)(a)(11) (McKinney 2014).

<sup>425</sup> N.Y. MUN. HOME RULE LAW, § 10(1)(ii)(a)(12) (McKinney 2014).

<sup>426</sup> N.Y. TOWN LAW § 261 (McKinney 2014).

<sup>427</sup> N.Y. STAT. LOC. GOVS § 10(6) (McKinney 2014).

<sup>428</sup> N.Y. ENVTL. CONSERV. LAW, § 23 (McKinney 2014).

<sup>429</sup> N.Y. ENVTL. CONSERV. LAW, § 23-2703 (McKinney 2014).

<sup>430</sup> *Id.* at 2(a).

<sup>431</sup> *Id.* at 2(b)(c).

<sup>432</sup> *Id.*

<sup>433</sup> See Wallach v. Town of Dryden, 16 N.E.3d 1188 (N.Y. 2014).

<sup>434</sup> *Id.*

rule lawsuits is the degree to which the Policy and Supersession Clauses conflict with home rule language elsewhere in New York's legal and political traditions.

### 3. New York Law as Compared with Pennsylvania and Ohio

In comparison to Ohio and Pennsylvania—and indeed, to most states in the country—New York localities have attempted to regulate and even ban drilling in huge numbers.<sup>435</sup> The Town of Dryden enacted a drilling ban by amending its zoning rules to prohibit the practice.<sup>436</sup> The Town of Middlefield also enacted a ban.<sup>437</sup> Both were sued; Dryden by an energy company that had acquired oil and gas leases prior to the zoning amendment, and Middlefield by a dairy farm that had leased its land to a drilling company.<sup>438</sup> In both circumstances, the argument was that the towns had no right to enact drilling bans because New York state law preempted those actions.<sup>439</sup> On June 30, 2014, the New York Court of Appeals upheld a lower court decision supporting the local ordinances.<sup>440</sup> The lower court found, and the high court agreed, that the state statute did not eliminate the towns' authority to ban hydraulic fracturing within their borders using their local zoning authority.<sup>441</sup> The Court's rationale for allowing the local drilling bans to stand was that New York's Oil, Gas, and Solution Mining Law cannot preempt the New York Constitution's home rule provision, despite the statute's intent to suppress local regulation of land use.<sup>442</sup> The state legislature's attempt to emasculate that provision, by including suppression language in the oil and gas law, was not effective. The state statute cannot trump the state constitution.

According to the New York Court of Appeals in *Dryden*, “the Legislature has recognized that the local regulation of land use is ‘[a]mong the most significant powers and duties granted . . . to a town government.’”<sup>443</sup> The Court also noted that, in addition to the legislature having recognized

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<sup>435</sup> See Chris Dolmetsch & Daniel Sanzone, *N.Y.'s Local Fracking Bans Spur Debate Before Top Court*, BLOOMBERG BUS. (June 4, 2014, 11:36 AM), <http://www.bloomberg.com/news/articles/2014-06-03/cuomo-ponders-drilling-as-fracking-bans-reach-top-court> [<https://perma.cc/6EUG-C82U>]; see also Cheren, *supra* note 231.

<sup>436</sup> See *Town of Dryden*, 16 N.E.3d at 1193.

<sup>437</sup> *Id.*

<sup>438</sup> *Id.* at 1188, 1193.

<sup>439</sup> *Id.*

<sup>440</sup> *Id.* at 1203–04.

<sup>441</sup> *Id.* at 1204.

<sup>442</sup> *Town of Dryden*, 16 N.E.3d at 1204.

<sup>443</sup> *Id.* at 1188, 1194 (citing N.Y. TOWN LAW § 272-a (1)(b)).

that local zoning authority should be vested in local government, the Court has also found, itself, that local control of zoning is “one of the core powers of local governance.”<sup>444</sup>

The Court fully understood the implications of a statutory/legislative conflict. It understood the concept of preemption, too. The Court said “a town may not enact ordinances that conflict with the State Constitution or any general law.”<sup>445</sup> It noted that “[u]nder the preemption doctrine, a local law promulgated under a municipality’s home rule authority must yield to an inconsistent state law as a consequence of ‘the untrammelled primacy of the Legislature to act with respect to matters of State concern.’”<sup>446</sup> But, the Court found the suppression of local zoning control to be sufficiently important that it would only allow it in cases of a “clear expression of legislative intent to preempt local control over land use.”<sup>447</sup>

The Court, therefore, focused on whether the New York legislature evidenced sufficiently clear intent to preempt local control over land use decisions. It started by looking at the statutory language: “The provisions of this article [the OGSML] shall supersede all local laws or ordinances relating to the regulation of the oil, gas and solution mining industries; but shall not supersede local government jurisdiction over local roads or the rights of local governments under the real property tax law.”<sup>448</sup>

Unsurprisingly, the towns’ opponents argued that the legislature’s suppression language should “be interpreted broadly to reach zoning laws that restrict, or as presented here, prohibit oil and gas activities, including hydrofracking, within municipal boundaries.”<sup>449</sup> Like the Ohio courts, New York has a three part test for determining whether a suppression (preemption) clause in a state statute is sufficiently clear to preempt a local ordinance. The New York test looks to: “(1) the plain language of the supersession clause; (2) the statutory scheme as a whole; and (3) the relevant legislative history.”<sup>450</sup>

In *Matter of Frew Run*, the town had attempted to create a zoning district that would prohibit sand and gravel production.<sup>451</sup> The disappointed sand and gravel company which had sought permission to operate within the town pointed to language in New York’s Mined Land Reclamation

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<sup>444</sup> *Id.* (citing *DJL Rest. Corp. v. City of New York*, 96 N.Y.2d 91, 96 (2001)).

<sup>445</sup> *Id.* at 1195 (citing N.Y. MUN. HOME RULE LAW § 10(1)(i)–(ii)).

<sup>446</sup> *Id.* (citing *Albany Area Bldrs. Ass’n v. Town of Guilderland*, 74 N.Y.2d 372, 377 (1989)).

<sup>447</sup> *Id.* (citing *Gernatt Asphalt Prods., Inc. v. Town of Sardinia*, 87 N.Y.2d 668, 682 (1996)).

<sup>448</sup> *Town of Dryden*, 16 N.E.3d at 1188, 1195 (citing N.Y. ENVTL. CONSERV. LAW § 23-303(2)).

<sup>449</sup> *Id.*

<sup>450</sup> *Id.* (citing *Matter of Frew Run Gravel Prods. v. Town of Carroll*, 71 N.Y.2d 126 (1987)).

<sup>451</sup> *Frew Run Gravel Prods., Inc.*, 71 N.Y.2d at 126.



Law (“MLRL”) and argued that that state law superseded the town’s zoning ordinance.<sup>452</sup> The MLRL said, “[T]his title shall supersede all other state and *local laws relating to the extractive mining industry*; provided, however, that nothing in this title shall be construed to prevent any local government from enacting local zoning ordinances or other local laws which impose stricter mined land reclamation standards or requirements than those found herein.”<sup>453</sup>

The Court found that the words “local laws relating to the extractive mining industry” did not include the town’s zoning provisions.<sup>454</sup> It held that zoning laws do not relate to the extractive mining industry.<sup>455</sup> Instead, they related to land use decisions within the town.<sup>456</sup> The Court found this to be “an entirely different subject matter and purpose.”<sup>457</sup> The Court distinguished between local rules that attempt to control operations and processes concerning mining, which would be superseded by the state law, and those that pertain to land use questions within the town’s borders, which instead, are a matter for local discretion.<sup>458</sup>

The Court found the circumstances for the towns of Dryden and Middlesex to be substantially similar to those in *Matter of Frew*. Still, it dutifully applied the aforementioned three part test. First, it looked at the plain language of the statute. The NY oil and gas law preempts local laws “relating to the regulation of the oil, gas and solution mining industries” whereas the state statute in *Matter of Frew* purported to preempt local laws “relating to the extractive mining industry.”<sup>459</sup> As it did in *Matter of Frew*, the Court found that local zoning ordinances are not local laws relating a specific industry, here the regulation of the oil, gas, and solution mining industries.<sup>460</sup> Instead, as in *Matter of Frew*, the *Dryden* court held that local zoning ordinances relate to how land may be used within the town borders—an issue of local concern.

#### 4. Other Local Ordinances Enacted in New York

Despite the New York legislature’s effort at statutory preemption of local oil and gas activities, many New York jurisdictions enacted local

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<sup>452</sup> *Town of Dryden*, 16 N.E.3d at 1188, 1196.

<sup>453</sup> *Id.* (citing N.Y. ENVTL. CONSERV. LAW § 23-2703 former (2)) (emphasis added).

<sup>454</sup> *Id.*

<sup>455</sup> *Id.*

<sup>456</sup> *Id.*

<sup>457</sup> *Id.* at 1196 (citing *Matter of Frew Run Gravel Prods., Inc.*, 71 N.Y.2d at 126, 131).

<sup>458</sup> *Town of Dryden*, 16 N.E.3d at 1188.

<sup>459</sup> *Id.* at 1197.

<sup>460</sup> *Id.*

ordinances, some including outright drilling bans.<sup>461</sup> More than 150 jurisdictions, mostly in upstate New York, enacted local bans on shale oil and gas drilling, or on the use of the hydraulic fracturing technology.<sup>462</sup> They enacted these drilling bans, in various forms, including zoning regulations and charter amendments, in anticipation of New York Department of Environmental Conservation (New York “DEC”) completing an environmental review and ultimately lifting a state moratorium on the use of the hydraulic fracturing technology that had been in effect since 2008.<sup>463</sup>

Even before the now-famous actions from Dryden and Middlefield, New York has experienced more localities issuing drilling regulations than any other state. Food and Water Watch, a policy-monitoring organization that has audited New York localities for years, documented local action on drilling regulations.<sup>464</sup> The organization splits local actions into three categories: 1) outright bans; 2) moratoria or other regulations; and 3) places where local authorities seem to be moving towards action, though none has yet occurred. The Food and Water Watch list included 266 localities in New York as of 2014. Eighty had outright bans, 99 more have moratoria or other regulations, and 86 more were expected to follow. Another often-cited tracker of New York regulations is John Hoff of Perinton, NY, the chairperson of Keuka Citizens Against Hydrofracking. His research from January 2, 2014, put the number of localities with some type of moratorium or ban at 213, and identified another 90 with draft legislation.<sup>465</sup> Whatever the exact number, it is large.

Local jurisdictions regulating drilling in New York arise at several levels of government (towns, cities, and counties) and regulate using

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<sup>461</sup> See Cheren, *supra* note 231; see also *Interactive Map of High Volume Hydrofracking Bans, Moratoria, and Movements for Prohibitions in New York State*, FRAC TRACKER ALLIANCE (Dec. 30, 2014), <http://maps.fractracker.org/latest/?appid=68f3de3fc2a1462aaf700fff5ec0ab47> [<https://perma.cc/AL87-L7UY>].

<sup>462</sup> *Id.*

<sup>463</sup> In June 2015, the New York Department of Environmental Conservation (DEC) finished its review and concluded that high volume hydraulic fracturing should be prohibited due to its significant adverse impacts to land, air, water, natural resources and potential public health impacts that could not be adequately mitigated. See Glenn Coin, *New York State Officially Bans Fracking*, SYRACUSE.COM (June 29, 2015, 12:15 PM) [http://www.syracuse.com/new/index.ssf/2015/new\\_york\\_officially\\_bans\\_hydrofracking.html](http://www.syracuse.com/new/index.ssf/2015/new_york_officially_bans_hydrofracking.html) [<https://perma.cc/KCB2-BHAG>].

<sup>464</sup> *Local Actions Against Fracking: Passed Measures*, FOOD & WATER WATCH (Mar. 10, 2015), <http://www.foodandwaterwatch.org/water/fracking/fracking-action-center/local-action-documents/#newyork> [<https://perma.cc/7Z86-EUHV>].

<sup>465</sup> *New York Localities Act to Reign in Fracking*, SIERRA CLUB NEW YORK CITY GROUP (Apr. 8, 2013), <http://nyc.sierraclub.org/new-york-localities-act-to-reign-in-fracking/> [<https://perma.cc/SEM3-97UH>].

various mechanisms (zoning regulations, mandated research moratoria and city council votes on general legislation are examples). Since the Court issued the *Dryden/Middlefield* decision, and even while those cases were progressing through appeals courts, New York state experienced a surge of jurisdictions following suit.<sup>466</sup> For example, in June 2014, the Canandaigua city council voted unanimously to ban drilling within city limits.<sup>467</sup> The local law “permanently bans natural gas exploration and the storage, treatment or disposal of drilling wastewater disposal within city limits.”<sup>468</sup> The city’s ban followed two previous actions: a temporary drilling moratorium within the city, and an earlier prohibition on the city wastewater treatment plant from accepting water from drillers.<sup>469</sup> A regional newspaper observed, “in New York, even if the statewide moratorium is lifted, such a patchwork of (local) regulation may deter companies from investing in the small areas that remain available for fracking in fears that similar bans . . . could require the companies to pull out.”<sup>470</sup>

The story from Canandaigua notes that the city ban may be symbolic, because companies were unlikely to seek to drill inside city limits, but still influential because of its contribution to a larger trend. Indeed, it appears that local drilling regulations are clustered regionally in New York State.<sup>471</sup> In certain counties, especially Ostego, Ulster, and Onondaga, well over half of the towns, cities and villages have banned drilling altogether. In other counties, Oswego, Steuben, and Cattaragus,

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<sup>466</sup> See Steven Mufson, *How Two Small New York Towns Have Shaken up the National Fight Over Fracking*, THE WASHINGTON POST, July 2, 2014, [http://www.washingtonpost.com/business/economy/how-two-small-new-york-towns-have-shaken-up-the-national-fight-over-fracking/2014/07/02/fe9c728a-012b-11e4-8fd0-3a663dfa68ac\\_story.html](http://www.washingtonpost.com/business/economy/how-two-small-new-york-towns-have-shaken-up-the-national-fight-over-fracking/2014/07/02/fe9c728a-012b-11e4-8fd0-3a663dfa68ac_story.html) [https://perma.cc/5RBV-V8T8]. See *Town of Kirkland bans hydrofracking*, THE UTICA OBSERVER-DISPATCH (Jan. 7, 2014, 12:57 PM), <http://www.uticaod.com/article/20140107/NEWS/140109610#ixzz2po3yKWTG> [https://perma.cc/SE4S-CQGN]. See Claudia M. Barrett, *2014 Should Be Pivotal For Fracking Regulation*, LAW360 (Feb. 10, 2014, 5:58 PM), <http://www.gibsondunn.com/publications/Documents/BarrettFrackingRegulation.pdf> [https://perma.cc/GE3A-C4BY]. See Jay Rey, *Amherst Town Board agrees to draft a local law banning “fracking,”* THE BUFF. NEWS (April 29, 2014, 11:34 AM), <http://www.buffalonews.com/feed/amherst-town-board-agrees-to-draft-a-local-law-banning-fracking-20140429> [https://perma.cc/SZ3A-RRUF].

<sup>467</sup> See Steve Orr, *Canandaigua Joins Fracking Bans*, DEMOCRAT & CHRON., (June 6, 2014, 2:21 PM), <http://www.democratandchronicle.com/story/news/2014/06/06/canandaigua-fracking-ban/10079289/> [https://perma.cc/YPT2-ESST].

<sup>468</sup> *Id.*

<sup>469</sup> *Id.*

<sup>470</sup> See Claudia M. Barrett, *2014 Should Be Pivotal For Fracking Regulation*, LAW360 (Feb. 10, 2014, 5:58 PM), <http://www.gibsondunn.com/publications/Documents/BarrettFrackingRegulation.pdf> [https://perma.cc/BJP3-NG5L].

<sup>471</sup> Orr, *supra* note 467.

for example, there has been little action, though the Utica Shale lies beneath each of them.

It is not only small symbolic gestures that accumulated in New York. Large cities, including Buffalo and Syracuse, have passed total bans on hydraulic fracturing through charter amendments or zoning ordinances. The legislation from the City of Syracuse, for example, clarifies the definition of “fracking,” and involves three prohibitions dealing with exploration, waste, and pollution associated with drilling.<sup>472</sup>

Like action in New York, the move towards local action on shale oil and gas drilling has grown. A national policy watch program, Keep Tap Water Safe, counts the number of local actions in the United States (drilling bans or related actions) at 418.<sup>473</sup> Still, with research indicating between 179 and 266 town or county actions, that puts well over a third of national local action in New York State.<sup>474</sup>

## 5. A Critical Wrinkle in New York: The Statewide Drilling Ban

In December 2014, New York took a step that no neighboring state has seen, and one that mooted much of the home rule debate there: Governor Andrew M. Cuomo ratified a binding statewide drilling ban.<sup>475</sup> The ban followed a lengthy moratorium, and some have argued that its enactment was the result of the many local bans wounding the state like a thousand paper cuts.<sup>476</sup>

On July 23, 2008, then-Governor Paterson first marshalled a moratorium on high volume hydraulic fracturing (“HVHF”) through the New York legislature.<sup>477</sup> The moratorium mandated the state environmental agency, the Department of Environmental Conservation (DEC) to produce

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<sup>472</sup> SYRACUSE GENERAL ORD. 38 (Oct. 24, 2011).

<sup>473</sup> KEEP TAPWATER SAFE, <http://keaptapwatersafe.org/global-bans-on-fracking/> [<https://perma.cc/932H-L5SB>].

<sup>474</sup> *Id.*

<sup>475</sup> See Heidi Gorovitz Robertson, *New York will ban hydraulic fracturing through a review requirement Ohio lacks*, CRAIN'S CLEVELAND BUS. (Jan. 16, 2015, 9:11 AM), <http://www.crainscleveland.com/article/20150116/BLOGS05/150119883> [<https://perma.cc/3UZN-FGNN>].

<sup>476</sup> See, e.g., Wendy Koch, *Could New York's Fracking Ban Have Domino Effect?*, NAT. GEOGRAPHIC (Dec. 18, 2014), <http://news.nationalgeographic.com/news/energy/2014/12/14-1218-fracking-ban-new-york-states-oil-gas-drilling-energy-news/> [<https://perma.cc/R62W-ACHH>].

<sup>477</sup> Shannon Ayala, *The Story of NYS's Fracking Moratorium*, THE EXAMINER (Nov. 29, 2011, 11:33 PM), <http://www.examiner.com/article/the-story-of-nys-s-fracking-moratorium> [<https://perma.cc/WZN4-VS42>].

a new Supplemental Generic Environmental Impact Statement (“SGEIS”) about statewide hydraulic fracturing, and prohibited companies from drilling before its results unless they produced their own satisfactory impact study.<sup>478</sup> Because it required this expensive and arduous analysis, the moratorium effectively banned drilling in the state. The statewide moratorium was reinforced in many areas of the state by local moratoria; even drilling projects that predated the moratorium were effected.<sup>479</sup> For example, “John Holko, president of Lenape Resources, sent a letter . . . to [NY] State DEC Commissioner Joe Martens saying a [local] moratorium prohibiting natural gas development in the Livingston County town of Avon forced his company to shut down its wells there.”<sup>480</sup>

When the Governor’s original order expired in 2010, the New York legislature proposed a bill to limit drilling.<sup>481</sup> Governor Paterson vetoed the bill, and issued an executive order establishing another six-month statewide drilling moratorium. It required the New York DEC to complete the impacts study before the moratorium would lift. The following Governor, Andrew M. Cuomo, continued this executive moratorium, which unlike a legislative measure, did not have to go up for renewal at a designated time—in other words, it did not have to expire.

Between 2008 and 2014, the New York DEC drafted two sets of environmental impact reviews, and corresponding rules, but published none.<sup>482</sup> In 2012, the New York DEC brought in the New York Department of Health (New York “DOH”) to its study to analyze the impacts of the New York’s DEC’s findings on public health and safety.<sup>483</sup> To do this, the New York DEC requested an extension of time to complete its review from the New York State Department.<sup>484</sup> The notice-and-comment process for this review closed in January of 2013, and for quite some time no significant progress followed. Nirav Shah, the Health Commissioner, resigned in

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<sup>478</sup> *Id.*

<sup>479</sup> Mary Esch, *New York Drilling Moratorium: Gas Company Threatens to Sue State Over Fracking Ban*, ASSOCIATED PRESS (Sept. 30, 2012, 5:12 AM), [http://web.archive.org/web/20131228215907/http://www.huffingtonpost.com/2012/07/31/new-york-ny-drilling-moratorium\\_n\\_1724171.html](http://web.archive.org/web/20131228215907/http://www.huffingtonpost.com/2012/07/31/new-york-ny-drilling-moratorium_n_1724171.html) [<https://perma.cc/N6S7-TC2J>].

<sup>480</sup> *Id.*

<sup>481</sup> Naveena Sadasivam, *New York State Fracking: A ProPublica Explainer*, PROPUBLICA (July 22, 2014, 9:45 AM), <http://www.propublica.org/article/new-york-state-of-fracking-a-propublica-explainer> [<https://perma.cc/H3FR-94HC>].

<sup>482</sup> See N.Y. DEP’T ENVTL. CONSERV., 6 ENVTL. CONSERV.52, 290, 550–56, 560, 750.

<sup>483</sup> N.Y. Dep’t of Pub. Health, *A Public Health Review of High Volume Hydraulic Fracturing for Shale Gas Development* (Dec. 2014), [http://www.health.ny.gov/press/reports/docs/high\\_volume\\_hydraulic\\_fracturing.pdf](http://www.health.ny.gov/press/reports/docs/high_volume_hydraulic_fracturing.pdf) [<https://perma.cc/4NG5-PEF6>].

<sup>484</sup> *Id.*

2014 and was replaced by an interim director, which slowed the study.<sup>485</sup> In early 2014 the New York General Assembly ratified the review to continue through 2015.<sup>486</sup>

Finally, in December of 2014, the New York Department of Health published its 184-page study, “A Public Health Review of High Volume Hydraulic Fracturing for Shale Gas Development.”<sup>487</sup> Based on the findings of that study, Governor Cuomo initiated the statewide ban.<sup>488</sup>

The legal mechanism through which the ban took effect is unique among states enmeshed in drilling regulation debates. Most often—as was the case in Ohio—drilling laws have taken the form of local ordinances, passed through city councils, or statewide laws, passed through the legislative body. But New York took a different approach.

Cuomo’s administration, specifically the New York DEC, issued an official finding supported by the recent recommendation of New York’s health commissioner prohibiting the use of the technology.<sup>489</sup> The prohibition is legally binding. The section below will describe how New York’s laws made this possible, where Ohio’s laws do not.

## 6. New York Conclusion: “Little NEPA” Sets New York Apart

New York state has unique environmental laws, which contextualize the hydraulic fracturing ban’s development. New York is one of at least 15 states (along with New York City, Washington, D.C., and Puerto Rico) that have what are affectionately known as “little NEPA” laws.<sup>490</sup> Little NEPAs are state laws modeled after the federal law, the National Environmental Policy Act (the “Big NEPA”).

These laws require that agencies study the environmental consequences of their actions before they take actions that could have significant

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<sup>485</sup> *Id.*

<sup>486</sup> *Id.*

<sup>487</sup> *Id.*

<sup>488</sup> Thomas Kaplan, *Citing Health Risks, Cuomo Bans Fracking in New York State*, N.Y. TIMES (Dec. 17, 2014), [http://www.nytimes.com/2014/12/18/nyregion/cuomo-to-ban-fracking-in-new-york-state-citing-health-risks.html?\\_r=0](http://www.nytimes.com/2014/12/18/nyregion/cuomo-to-ban-fracking-in-new-york-state-citing-health-risks.html?_r=0) [<https://perma.cc/B43T-RJ68>].

<sup>489</sup> See N.Y. Dep’t Pub. Health, *supra* note 496; Associated Press, *New York releases final environmental review of fracking*, THE AUBURN CITIZEN (May 14, 2015), [http://auburnpub.com/news/local/state-and-regional/new-york-releases-final-environmental-review-of-fracking/article\\_42bcccdf9ef-11e4-9d6e-6b231511973f.html](http://auburnpub.com/news/local/state-and-regional/new-york-releases-final-environmental-review-of-fracking/article_42bcccdf9ef-11e4-9d6e-6b231511973f.html) [<https://perma.cc/F6XN-E442>]; N.Y. Dep’t Env’tl. Conserv., *Final SGEIS on the Oil, Gas and Solution Mining Regulatory Program* (May 2015), <http://www.dec.ny.gov/energy/75370.html> [<https://perma.cc/ZW88-2H8X>].

<sup>490</sup> See U.S. Dep’t of Energy, *States with NEPA-like Environmental Planning Requirements* (2015), <http://energy.gov/nepa/downloads/states-nepa-environmental-planning-requirements> [<https://perma.cc/8K46-2RMP>].

adverse environmental effects. New York DEC's major study was spurred by a proposed set of New York regulations called "Well Permit Issuance for Horizontal Drilling and High-Volume Hydraulic Fracturing to Develop the Marcellus Shale and Other Low-Permeability Gas Reservoirs."<sup>491</sup>

The Big NEPA is largely procedural. It requires that the decision-making agency conduct an environmental review prior to taking the action, but it does not require that the agency make decisions based on the findings of that review.<sup>492</sup> New York's version of the law is different in an important way. It requires more than the procedural obligation that the decision-making agency do an environmental study. The New York law directs agencies to make their decisions while actually considering the environmental effects that were revealed through the environmental study.<sup>493</sup> It even requires agencies to choose alternative actions that would minimize or avoid identified negative environmental effects.<sup>494</sup> That goes well beyond the procedural requirements of the Big NEPA.<sup>495</sup>

So, before taking an action that could have significant adverse environmental impact, such as here issuing a regulation concerning hydraulic fracturing, New York's State Environmental Quality Review Act (New York's "little NEPA" or "NYSEQRA") requires agencies to consider environmental factors, consistent with social and economic factors, when they make decisions, such as promulgating a set of regulations governing the permitting of shale oil and gas wells using hydraulic fracturing technology. In the Big NEPA, the general idea is that the agency taking an action (like proposing a regulation or issuing a permit) should understand the environmental impact of the action before taking it.<sup>496</sup> Under NYSEQRA, New York agencies actually have to consider what they have learned and try to avoid adverse environmental consequences.<sup>497</sup>

To study the environmental consequences of its proposed oil and gas permitting program, the New York DEC prepared a study, here a Draft Supplemental Generic Environmental Impact Statement (or "Draft SGEIS") and asked the New York Department of Health to review and

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<sup>491</sup> N.Y. Dep't Env'tl. Conserv., *Well Permit Issuance for Horizontal Drilling and High-Volume Hydraulic Fracturing to Develop the Marcellus Shale and Other Low-Permeability Gas Reservoirs* (Sept. 7, 2011), [http://www.dec.ny.gov/docs/materials\\_minerals\\_pdf/rdsgeisexecsum0911.pdf](http://www.dec.ny.gov/docs/materials_minerals_pdf/rdsgeisexecsum0911.pdf) [<https://perma.cc/2SAY-LEVN>].

<sup>492</sup> 42 U.S.C. § 4333–4334 (2014).

<sup>493</sup> N.Y. ENVTL. CONSERV. LAW § 8-0109 (McKinney 2015).

<sup>494</sup> *Id.*

<sup>495</sup> Compare 42 U.S.C. §§ 4331–4347, with ENVTL. CONSERV. LAW § 8-0109 (McKinney 2015); see also 38 AM. JUR. PROOF OF FACTS 3D § 547 (1996).

<sup>496</sup> 38 AM. JUR. PROOF OF FACTS 3D § 547 (1996).

<sup>497</sup> N.Y. ENVTL. CONSERV. LAW § 8-0109 (McKinney 2015).

comment on it.<sup>498</sup> The final version of the SGEIS was released in May 2015.<sup>499</sup>

The report of the New York health department was done to satisfy New York DEC's review request and it concluded that, due to "the questions and risks to public health which as of yet are unanswered,"<sup>500</sup> hydraulic fracturing should not take place in New York State.

In addition to requesting that the New York DOH (and several other agencies) review the Draft SGEIS, an important part of environmental review is allowing the public to comment at various stages of the process. The New York DEC reported that over 260,000 public comments were submitted regarding the various versions of the SGEIS<sup>501</sup> and that the comments ran heavily against the use of hydraulic fracturing technology in New York State.<sup>502</sup>

So, supported by the health department's report reviewing New York DEC's draft SGEIS, and bolstered by the flood of public comments opposing the use of hydraulic fracturing in New York State, New York DEC issued a findings statement that bans hydraulic fracturing in New York State.<sup>503</sup> This becomes binding law.

Unlike New York, Ohio does not have a "little NEPA" law that would require state agencies to conduct an environmental review before taking action that might adversely effect the environment. In Ohio, state legislation not only allows the use of the hydraulic fracturing technology, but encourages its use by creating a uniform statewide system of regulation through the Ohio Department of Natural Resources.<sup>504</sup>

<sup>498</sup> N.Y. Dep't Env'tl. Conserv., *supra* note 491 (This one was "supplemental" because the agency had already studied shale oil and gas permitting in 1992 and issued a GEIS on it. The new combination of horizontal drilling and high-volume hydraulic fracturing technology was not considered in the earlier study and thus a supplemental study was needed prior to issuing new regulations.).

<sup>499</sup> N.Y. Dep't Env'tl. Conserv., Regulatory Program for Horizontal Drilling and High-Volume Hydraulic Fracturing to Develop the Marcellus Shale and Other Low-Permeability Gas Reservoirs (May 2015), [http://www.dec.ny.gov/docs/materials\\_minerals\\_pdf/findingstatehvhf62015.pdf](http://www.dec.ny.gov/docs/materials_minerals_pdf/findingstatehvhf62015.pdf) [<https://perma.cc/WP5B-V2PV>].

<sup>500</sup> N.Y. Dep't Env'tl. Conserv., *New York State Department of Health Completes Review of High-Volume Hydraulic Fracturing* (Dec. 17, 2014), <http://www.dec.ny.gov/press/100055.html> [<https://perma.cc/K2DL-M6WN>].

<sup>501</sup> N.Y. Dep't Env'tl. Conserv., *supra* note 491.

<sup>502</sup> *Id.*

<sup>503</sup> N.Y. Dep't Env'tl. Conserv., *New York State Officially Prohibits High-Volume Hydraulic Fracturing* (June 29, 2015), <http://www.dec.ny.gov/press/102337.html> [<https://perma.cc/QF87-US2E>].

<sup>504</sup> OHIO REV. CODE ANN. § 1509.02.



The fact that Ohio lacks a “little NEPA” does not mean that Ohio’s agencies do not consider the environmental consequences of their actions. It means that Ohio has no law similar to the NEPA that requires them to study the environmental consequences of the proposed actions or to consider those consequences in their decisions.

### III. A QUICK LOOK AT LOCAL CONTROL ELSEWHERE

Clearly, the Utica and Marcellus regions are not the only areas struggling with the legal tension between local desire to control and influence drilling and state efforts to preempt local control. This section takes a brief look at two other regions, Colorado and Texas, because, like Ohio, New York, and Pennsylvania, they have seen active engagement on this issue by their legislatures, courts, and local communities.

#### A. *Colorado*

This section provides a brief, fundamental overview of the tensions among Colorado’s oil and gas statute, its constitutional home rule provisions, and its courts. Like many other areas of the country, Colorado has experienced a shale oil and gas drilling boom. Its constitution provides for local home rule and several home rule jurisdictions have attempted to regulate under that perceived authority. Like Ohio, Colorado’s oil and gas law has conferred exclusive regulatory authority for oil and gas activities on a state agency. Naturally, the question of whether and the extent to which local jurisdictions can act has reached Colorado’s courts.

#### 1. Constitutional Home Rule Authority

Colorado’s constitution has two different home rule provisions—one governing the home rule authority of cities and towns and the other governing the home rule authority of counties. Article XX, Section 6 of Colorado’s constitution governs home rule authority for cities and towns. It provides that people of each city or town within Colorado, with a population of at least 2,000 inhabitants, have the power “to make, amend, add to, or replace the charter of said city or town, which shall be its organic law and extend to all its local and municipal matters.”<sup>505</sup>

Article XIV, Section 16 of Colorado’s constitution gives counties the authority to adopt home rule charters as well; however, “home rule

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<sup>505</sup> COLO. CONST. ART. XX, § 6 (amended 1913).

counties” are much more limited in terms of their authority to regulate.<sup>506</sup> For instance, a home rule county may establish the organization and structure of county government, but it must continue to provide all mandatory county functions, services, and facilities in a consistent manner with Article XIV and other state statutes enacted pursuant to it.<sup>507</sup> To the contrary, when a city or town adopts a home rule charter, the charter and any ordinances enacted pursuant to it that seek to address local and municipal matters will “supersede any law of the state in conflict therewith.”<sup>508</sup> The rationale for the differential in regulatory authority is that home rule municipalities derive their authority directly from the state constitution, whereas home rule counties are considered subdivisions of the state.<sup>509</sup> Thus, the preemption analysis differs for home rule municipalities versus home rule counties when either adopts a local regulation that conflicts with state law.<sup>510</sup>

## 2. The Colorado Oil and Gas Conservation Act and Commission (“COGCC”)

The Colorado Oil and Gas Conservation Act<sup>511</sup> created the Colorado Oil and Gas Conservation Commission (“COGCC”) and vested the Commission with exclusive authority to promulgate statewide rules and regulations with respect to oil and gas drilling activities.<sup>512</sup> Thus, the COGCC promotes the exploration, development, and conservation of Colorado’s oil/gas resources, and has the exclusive authority to create regulations governing permitting of oil/gas wells and ensuring industry compliance with statewide oil and gas statutes and regulations.<sup>513</sup>

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<sup>506</sup> See COLO. CONST. ART. XIV, Sec. 16; see also Debra Kalish et al., *The Doctrine of Preemption and Regulating Oil and Gas Development*, 38 COLO. LAW. 47, 48 (Oct. 2009).

<sup>507</sup> *Id.*

<sup>508</sup> COLO. CONST. ART. XX, § 6.

<sup>509</sup> Debra Kalish et al., *The Doctrine of Preemption and Regulating Oil and Gas Development*, 38 COLO. LAW. 47 (Oct. 2009).

<sup>510</sup> Kalish et al., *supra* note 506, at 48.

<sup>511</sup> Colo. Rev. Stat. § 34-60-100.

<sup>512</sup> Colo. Rev. Stat. § 34-60-105(1); see also Intermountain Oil and Gas BMP Research, *Colorado Laws*, [http://www.oilandgasbmps.org/laws/colorado\\_law.php](http://www.oilandgasbmps.org/laws/colorado_law.php) [<https://perma.cc/5MLD-CCG5>]; Ralph A. Cantafio, *Overview of Permitting of Oil and Gas Wells in Colorado: Understanding the Doctrine of Preemption and the Authority of “Home Rule Municipalities,”* at 7, <http://www.cantafiolaw.com/A-Discussion-of-Permitting-of-Oil-and-Gas-Wells-in-Colorado-Understanding-the-Docctrine-of-Preemption-and-the-Authority-of-Home-Rule-Municipalities.pdf> [<https://perma.cc/57X2-VQDZ>].

<sup>513</sup> See Intermountain Oil and Gas BMP Research, *supra* note 512.

### 3. Colorado Oil & Gas Preemption in the Courts

With respect to home rule municipalities, Colorado courts have tailored the preemption analysis depending under which of three “categories” the regulated matter falls: (1) Matters of Local Concern (such as land use regulation and zoning), (2) Matters of State Concern, and (3) Matters of Mixed State-Local Concern.<sup>514</sup> When regulations fall under the first category the local concern generally controls, when regulations fall under the second category local governments may not legislate unless authorized by state statute, and when regulations fall under the third category the local regulation may co-exist with the state statute as long as there is no conflict.<sup>515</sup> To determine under which of the three categories a local regulation falls, the Colorado Supreme Court announced a four-part test:<sup>516</sup>

- (1) Whether there is a need for statewide uniformity in regulation;
- (2) Whether the municipal regulation has an extraterritorial effect;
- (3) Whether the subject matter is one traditionally governed by state or local government; and
- (4) Whether the Colorado constitution specifically commits the particular matter to state or local regulation.

Note that no single criterion is determinative and the purpose of the multi-factor test is to weigh the respective state and local interests on a case-by-case basis.<sup>517</sup> However, for purposes of this Article, the Colorado Supreme Court has already determined that “the exercise of zoning authority for the purposes of controlling land use within a home rule city’s municipal borders is a matter of local concern.”<sup>518</sup>

*Voss v. Lundvall Bros.* is a landmark case addressing the question whether Colorado’s Oil and Gas Conservation Act preempts a home rule municipality’s ordinance which seeks to ban oil and gas drilling activities

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<sup>514</sup> *Id.*

<sup>515</sup> *Id.* (it should be noted that when a local regulation is on a matter of mixed state-local concern and the local regulation conflicts with the state statute, the state statute supercedes the conflicting local regulation).

<sup>516</sup> See Colorado Mining Ass’n v. Bd. of County Comm’rs of Summit County, 199 P.3d 718, 723 (Colo. 2009); see also *Voss v. Lundvall Bros. Inc.*, 830 P.2d 1061, 1067 (Colo. 1992).

<sup>517</sup> See *City of Northglenn v. Ibarra*, 62 P.3d 151, 155 (Colo. 2003).

<sup>518</sup> *Voss*, 830 P.2d at 1061, 1064.

within the municipality's borders.<sup>519</sup> In *Voss*, the city council in Greeley, Colorado, enacted an ordinance prohibiting the drilling of any well for the purpose of exploration or production of any oil or gas or other hydrocarbons within the corporate limits of Greeley. Although the ordinance would not become effective until approved by local voters, Lundvall Brothers, an oil and gas operator, sued and obtained a Declaratory Judgment from the District Court of Weld County granting Summary Judgment and declaring the ordinance void because "the entire area of oil and gas exploration regulation, including sites within municipalities had been preempted by the State of Colorado and such regulation delegated to the COGCC such that there existed no area of regulation of oil and gas exploration to be left to Greeley."<sup>520</sup>

The case eventually reached the Colorado Supreme Court which found that, while the exercise of zoning authority is a matter of local concern, the ordinance at issue created a matter of mixed state and local concern.<sup>521</sup> The Court struck down the ordinance despite finding that "nothing in the Oil and Gas Conservation Act manifests a legislative intent to expressly or impliedly preempt all aspects of a local government's land-use authority over land that might be subject to oil and gas development and operations within the boundaries of a local government."<sup>522</sup> The Court ultimately held that Colorado's statewide interest in the efficient development of oil and gas was "sufficiently dominant" to override the home rule municipality's outright ban on all oil and gas drilling within the city limits.<sup>523</sup>

Unlike Greeley's attempt at a total drilling ban, La Plata County, Colorado attempted to exert control in a different way. La Plata County issued land use regulations that categorized oil and gas facilities into major facilities and minor facilities and required mitigation processes according to their land use impacts. This was a much more nuanced effort at regulation than that of an outright ban.<sup>524</sup> Oil and gas operator Bowen/Edwards Associates challenged the regulations arguing that they were preempted by Colorado's oil and gas statute.<sup>525</sup> La Plata defended its regulations in the Colorado Supreme Court, arguing that the Act did

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<sup>519</sup> Cantafio, *supra* note 512, at 7.

<sup>520</sup> *Voss*, 830 P.2d at 1061, 1063.

<sup>521</sup> *Id.* at 1066.

<sup>522</sup> *Id.*

<sup>523</sup> *Id.* at 1068.

<sup>524</sup> Cantafio, *supra* note 512, at 7.

<sup>525</sup> Board of County Commissions, La Plata County v. Bowen/Edward Associates, Inc., 830 P.2d 1045 (Colo. 1992).

not preempt all local land use regulation and that these specific land use regulations were enacted within the county's legislative authority.<sup>526</sup> The Colorado Supreme Court agreed with La Plata.<sup>527</sup> In rejecting the drillers' argument that the county regulations were preempted by state law, the Court said it found "no such clear and unequivocal statement of legislative intent in the Oil and Gas Conservation Act."<sup>528</sup>

Although there have been intervening cases in Colorado since *Voss* and *Bowen/Edwards*, the current state of affairs resides in the Longmont case. In 2011, the City of Longmont imposed a 120-day moratorium on accepting applications for oil and gas well permits due to residents' concerns regarding the safety, health, and environmental effects of hydraulic fracturing.<sup>529</sup> During a period in which the moratorium was extended, the City issued a draft of oil and gas regulations it intended to impose.<sup>530</sup> The Director of the COGCC expressed concern that the draft regulations would be preempted by the Oil and Gas Conservation Act, infringing on COGCC authority.<sup>531</sup> Longmont issued several successive iterations of draft regulations, and then conditionally approved them.<sup>532</sup> Following another expression of concern from the COGCC, Longmont delayed imposition of its regulations, but extended the permit moratorium.<sup>533</sup> Over the objections of the COGCC, Longmont City Council approved its oil and gas drilling regulations on July 17, 2012.<sup>534</sup>

On behalf of the COGCC, the Colorado Attorney General filed a Complaint for Declaratory Relief, asking the District Court of Boulder County to declare Longmont's regulations preempted by the state statute.<sup>535</sup>

In addition, Longmont voters approved a charter amendment banning both the use of hydraulic fracturing and the storage or disposal of solid or liquid wastes associated with drilling.<sup>536</sup> COGCC filed its own

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<sup>526</sup> *Id.*

<sup>527</sup> *Id.*

<sup>528</sup> *Id.* at 1057.

<sup>529</sup> Cantafio, *supra* note 512, at 7.

<sup>530</sup> *Id.*

<sup>531</sup> *Id.*

<sup>532</sup> *Id.*

<sup>533</sup> *Id.*

<sup>534</sup> *Id.*

<sup>535</sup> See Complaint for Declaratory Relief, *COGCC v. City of Longmont*, Col. (D. Colo. 2012).

<sup>536</sup> In the fall of 2012, the residents of Longmont, a home rule municipality, voted to add Article XVI to Longmont's home rule charter.

Article XVI provides: It shall hereby be the policy of the City of Longmont that it is prohibited to use hydraulic fracturing to extract oil, gas, or other hydrocarbons within the City of Longmont. In addition, within

lawsuit, in Weld County District Court (later removed to Boulder County), seeking a Declaratory Judgment that the voter approved charter amendment is preempted by state law.

Longmont was originally the subject of two actions, one challenging its oil and gas regulations—though this case was ultimately dismissed, and the other challenging its charter amendment banning hydraulic fracturing and the storage and disposal of liquid drilling wastes. In May 2016, the Colorado Supreme Court struck down Longmont's voter-approved ban on hydraulic fracturing—the charter amendment case,<sup>537</sup> and, at the same time, it struck down Fort Collins' drilling moratorium.<sup>538</sup> Both cases, especially Longmont's, are expected to have a longstanding effect on the ability of local jurisdictions to influence hydraulic fracturing in the state. Focusing on the need for statewide uniformity, the Court struck down the Longmont regulations on the grounds that the ban interfered with the state's interest in oil and gas development and with state regulations.<sup>539</sup> In effect, it was preempted by state law and on public policy grounds.<sup>540</sup>

Interestingly, although the Longmont decision struck down that city's charter-based ban on hydraulic fracturing, the opinion, written by Justice Greeley, noted that Longmont retains its ability to use its home rule based power of traditional zoning.<sup>541</sup> Justice Greeley recognized "Longmont's traditional authority to exercise its zoning authority over land where oil and gas development occurs."<sup>542</sup> As discussed above, Longmont enacted regulations, based on its zoning authority to, among other things, prohibit drilling in a residential zone but allow drillers to seek exceptions to that prohibition if it would obviate their access to their mineral rights. Although the Colorado Oil and Gas Association had sued Longmont over those regulations, it dropped the lawsuit as part of a compromise brokered by the Colorado governor.<sup>543</sup>

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the City of Longmont, it is prohibited to store in open pits or dispose of solid or liquid wastes created in connection with the hydraulic fracturing process, including but not limited to flowback or produced wastewater and brine.

See *City of Longmont v. Colo. Oil and Gas Association*, 369 P.3d 573, 577 (Colo. 2016).

<sup>537</sup> *Id.*

<sup>538</sup> See *City of Fort Collins v. Colo. Oil and Gas Assn.*, No. 15SC668, at 5 (Colo. May 2, 2016).

<sup>539</sup> See *City of Longmont*, 369 P.3d at 577.

<sup>540</sup> Karen Antonacci, *Colorado Supreme Court Strikes Down Longmont's Voter-Approved Fracking Ban*, [http://www.timescall.com/longmont-local-news/ci\\_29839751/colo-supreme-court-strikes-down-longmont-fracking-ban](http://www.timescall.com/longmont-local-news/ci_29839751/colo-supreme-court-strikes-down-longmont-fracking-ban) [<https://perma.cc/QZZA-7J2D>].

<sup>541</sup> *City of Longmont*, 369 P.3d at 579.

<sup>542</sup> *Id.*

<sup>543</sup> Antonacci, *supra* note 540.

How Colorado jurisdictions will respond to the Colorado Supreme Court's *Longmont* decision remains to be seen. But, like Ohio's *State ex rel. Morrison* decision, it appears that the Colorado Supreme Court has left an opening for local jurisdictions to use their traditional zoning powers in historically customary ways—presumably, non-discriminatorily created and non-discriminatorily applied.

*B. Texas*

1. Texas's Constitutional Home Rule Authority

Texas's constitution grants [some] local governments total authority to regulate, but the legislature can withdraw or limit the municipality's home rule authority via statute.<sup>544</sup> Article 11, Section 5, of Texas's Constitution governs home rule authority for cities with a population of at least 5,000 inhabitants.<sup>545</sup> Section 5 provides that such cities may, by a majority vote of qualified voters, adopt or amend their city charter.<sup>546</sup> However, Texas's home rule provision immediately limits this authority by providing that:

the adoption or amendment of charters is subject to such limitations as may be prescribed by the Legislature, and no charter or any ordinance passed under said charter shall contain any provision inconsistent with the Constitution of the State, or of the general laws enacted by the Legislature of the State.<sup>547</sup>

So, in Texas, home rule municipalities must look to the state constitution and statutes to determine what they may not do, rather than what they

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<sup>544</sup> Chester James Antieau, *Antieau on Local Government Law* § 21.021 (Sandra M. Stevenson ed., 2d ed. 2011).

<sup>545</sup> TEX. CONST. art. 11, § 5 (amended 2011); *see also* TEX. CONST. art. 11, § 4 (providing that cities with less than 5,000 residents may only be chartered by general law); *see also* Texas Municipal League, *Local Government in Texas*, <http://www.tml.org/pdf/texts/HRHChapter1.pdf> [<https://perma.cc/QN6D-LBDY>] (explaining that general law cities have limited powers and operate according to specific state statutes that define their powers and duties. Thus, they are only permitted to do what the state directs or permits them to do and, without an express or implied grant of power by the state to perform a particular action, none may be taken).

<sup>546</sup> TEX. CONST. art. 11, § 5.

<sup>547</sup> *Id.*

are permitted to do.<sup>548</sup> If the city's proposed action has not been prohibited (or preempted) by the state, the city generally can regulate.<sup>549</sup>

## 2. Erosion of Home Rule in Texas

Historically, Texas courts had a strong track record of upholding a municipality's authority to regulate oil and gas development based on the municipality's broad authority to protect its citizens and property under the municipality's police powers.<sup>550</sup> In fact, the Texas Supreme Court has held, on numerous occasions, that for the legislature to preempt a subject matter that is within the purview of the home rule city's broad powers, it must do so with "unmistakable clarity."<sup>551</sup> However, after Denton, a home rule city, voted in November 2014 to ban hydraulic fracturing within its borders,<sup>552</sup> the political and legal landscape rapidly changed with respect to home rule municipalities' ability to regulate oil and gas drilling. The Texas legislature quickly enacted House Bill 40 which "relates to the exclusive jurisdiction of [Texas] to regulate oil and gas operations in this state and the express preemption of local regulation of those operations."<sup>553</sup> H.B. 40 was filed in March 2015, approved by the Texas House in April 2015, approved by the Texas Senate in May 2015, and became law in May 2015, a little over two months after the bill was introduced.<sup>554</sup> Among other things, H.B. 40 provides that:

The legislature recognizes that in order to continue this prosperity and the efficient management of a key industry

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<sup>548</sup> See also Texas Municipal League, *supra* note 545.

<sup>549</sup> *Id.*

<sup>550</sup> See, e.g., *Tysco Oil Co. v. R.R. Comm'n of Tex.*, 12 F. Supp. 195, 200–01 (S.D. 1935) (establishing, for the first time, that Texas's municipalities have authority to regulate oil and gas development within their corporate limits); see also *Trail Enterprises, Inc. v. City of Houston*, 957 S.W.2d 625, 628, 635 (Tex. App. 1997) (upholding a city ordinance which prohibited oil and gas drilling within its watershed on the grounds that the ordinance was a valid exercise of the city's police power which was reasonably related to the legitimate goal of protecting the water supply from pollution).

<sup>551</sup> See *Dallas Merch.'s & Concessionaire's Ass'n v. City of Dallas*, 852 S.W.2d 489, 490–91 (Tex. 1993); see also *City of Streetwater v. Geron*, 380 S.W.2d 550, 552 (Tex. 1964).

<sup>552</sup> Clifford Krauss, *Split Decision by Voters on Fracking Bans*, N.Y. TIMES (Nov. 8, 2014) [http://www.nytimes.com/2014/11/06/business/energy-environment/split-decision-by-voters-on-local-fracking-bans-.html?\\_r=0](http://www.nytimes.com/2014/11/06/business/energy-environment/split-decision-by-voters-on-local-fracking-bans-.html?_r=0) [<https://perma.cc/A9JK-U6T3>].

<sup>553</sup> Texas Legislative Guide, *House Bill 40*, <https://txlege.texastribune.org/84/bills/HB40/> [<https://perma.cc/D267-FC94>].

<sup>554</sup> *Id.*



in this state, it is in the interest of this state to explicitly confirm the authority to regulate oil and gas operations in this state. The legislature intends that this Act expressly preempt the regulation of oil and gas operations by municipalities and other political subdivisions, which is impliedly preempted by the statutes already in effect.<sup>555</sup>

This bill, now law, now known as “the ban on bans” or the “Denton Fracking Bill” has drawn the ire of home rule advocating Texans across the state.<sup>556</sup> Governor Greg Abbott justified the bill as a measure to prevent “a patchwork of local regulations that threaten oil and gas production” and to protect private property rights.<sup>557</sup> Supporters of the bill agree with the governor and believe that the bill strikes an appropriate balance between private property and local control, whereas critics of the bill have described it as a fundamentally flawed attempt to invalidate all local drilling ordinances across Texas and “a gold mine for lawyers” due to the uncertainty regarding what municipalities can and cannot regulate.<sup>558</sup> Indeed, moving forward, the only certainty in Texas is that cities and municipalities are now significantly more limited (if not prevented altogether) in their ability to regulate oil and gas drilling activities.

Soon after Texas passed the ban on bans, Oklahoma followed suit. Governor Mary Fallin signed into law a bill specifically prohibiting towns, cities and counties from banning hydraulic fracturing and other oil and gas activities.<sup>559</sup> The Oklahoma legislature had considered several similar bills

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<sup>555</sup> H.B. 40, 2015 Leg., 84th Sess. (Tex. 2015), <http://www.legis.state.tx.us/tlodocs/84R/billtext/pdf/HB00040F.pdf#navpanes=0> [<https://perma.cc/9DA2-53PH>].

<sup>556</sup> Mose Buchele, *After HB 40, What's Next for Local Drilling Rules in Texas?*, STATE IMPACT: TEXAS (July 2, 2015, 8:58 a.m.), <https://stateimpact.npr.org/texas/2015/07/02/after-hb-40-whats-next-for-local-drilling-bans-in-texas/> [<https://perma.cc/8TQ6-C9WG>]; see also Mark W. McCord, *The Most Blatant Assault on Home Rule Authority in Texas' History*, DALLAS MORNING NEWS (May 28, 2015, 01:20 p.m.), <http://www.dallasnews.com/opinion/latest-columns/20150522-marc-w.-mccord-the-the-most-blatant-assault-on-home-rule-authority-in-texas-history.ece> [<https://perma.cc/CC44-EVZH>]; see also Jim Malewitz, *Abbott Signs "Denton Fracking Bill,"* TEXAS TRIBUNE (May 18, 2015), <http://www.texastribune.org/2015/05/18/abbott-signs-denton-fracking-bill/> [<https://perma.cc/4ADZ-NYRK>].

<sup>557</sup> Malewitz, *supra* note 556.

<sup>558</sup> *Id.*; see also 52 Okl. St. Ann. § 137.1 (2016).

<sup>559</sup> Joe Hurtz, *Gov. Fallin Signs Bill to Prevent Towns, Cities and Counties from Banning Fracking*, STATE IMPACT OKLAHOMA (June 1, 2015, 10:14 AM), <https://stateimpact.npr.org/oklahoma/2015/06/01/gov-fallin-signs-bill-to-prevent-towns-cities-and-counties-from-banning-fracking/> [<https://perma.cc/6TRL-36RD>].

during the 2015 legislative year, reportedly due to the actions of Denton, Texas, and of the Oklahoma cities of Norman and Stillwater, which had sought to enact local regulations governing oil and gas activities.<sup>560</sup> The new law allows local governments to enact local rules regulating oil and gas-related nuisances, such as noise, traffic and odors, only when those rules are “reasonable.”<sup>561</sup> The law was opposed by the Oklahoma Municipal League and supported by the energy industry and mineral owners, and the Oklahoma Chamber.<sup>562</sup> The Oklahoma action reflects the goal of many state officials around the country of adopting reliable statewide uniform regulatory systems by excluding local participation in the oil and gas regulatory process.

#### CONCLUSIONS

Local jurisdictions want a voice in the decisions that affect oil and gas activities within their borders. This is evident throughout the country. Some jurisdictions would like to encourage these activities, while others want to ban, control, or influence them. As with many other activities affecting local jurisdictions, the state in which jurisdictions are located is vital. For example, New York’s and Pennsylvania’s lower and appellate courts have supported their jurisdictions’ ability to regulate oil and gas activities; for New York, via the state constitution’s home rule provision, and for Pennsylvania, via the state constitution’s Environmental Rights Amendment. Despite legislative efforts in both New York and Pennsylvania to the contrary, courts have interpreted the law to value local control over legislative efforts towards unified state control.

As evidenced by the *ex rel Morrison* case, Ohio has been different. Like Pennsylvania and New York, the Ohio oil and gas statute explicitly preempts local regulation. Unlike the courts in Pennsylvania and New York, though, the Supreme Court of Ohio supported the state legislature’s efforts to bestow on the Ohio DNR sole power to regulate all aspects of oil and gas operations rather than to preserve local regulatory authority.

So, what is left for local jurisdictions in Ohio and in states with similar legal circumstances? The answer is not yet known, but the following section will explain some possibilities that are nothing short of fantasy, and others that may present a workable reality if attempted by a motivated community.

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<sup>560</sup> *Id.*

<sup>561</sup> *Id.*; see also OKLA. STAT. ANN. tit. 52, § 137.1.

<sup>562</sup> Hurtz, *supra* note 559.

A. *The Fantasy World*

This portion of the conclusion describes methods some states have used to secure the ability of local jurisdictions to act on oil and gas activities, but which, in Ohio and likely many other states, would be a fantasy in the current political climate.

1. An Environmental Rights Amendment

Because of the environmental rights amendment to the Pennsylvania Constitution, local jurisdictions there can use their local regulatory authority to protect their citizens and communities by keeping oil and gas development in places they deem appropriate. Ohio's constitution lacks a comparable provision. Still, many communities across Ohio have attempted to insert the idea of environmental rights into city and village charters using the so-called Community Bills of Rights.<sup>563</sup> So far, the CBRs have not protected any community from an impending oil or gas well, or helped in winning for any community the ability to regulate in light of Ohio's (or any other state's) oil and gas statute. They have also led to litigation against the very cities whose citizens enacted them. The Community Bills of Rights may have misplaced the rights and responsibilities. Rather than placing a blanket of ill-defined rights on citizens and hoping that jurisdictions will be able to enforce them locally, it might be preferable to hear the valid cries of those seeking a rights-based approach, but to implement it differently—in an amendment to the state constitution.

Pennsylvania's environmental rights amendment places environmental responsibility on the Commonwealth. Recall that the Pennsylvania Supreme Court held this in the *Robinson Township* case, in particular, finding that responsibility was not vested singularly in the state legislative body, the General Assembly, but instead that responsibility filtered down through all levels of government, including the General Assembly, but also including local governments.<sup>564</sup> Local governments thus were invested in, not only the power to exercise their environmental responsibility through local zoning, but also the Constitutional responsibility to do so.

It would benefit Ohio communities enormously to have a similar environmental rights amendment to the Ohio Constitution. Admittedly,

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<sup>563</sup> See Robertson, *supra* note 251.

<sup>564</sup> See Dernbach, *supra* note 340.

if one is not seeking to vest private parties with casino authority, or the right to grow medicinal marijuana, it is not easy to change Ohio's Constitution. But with the Ohio Constitutional Modernization Commission<sup>565</sup> charged with studying the Constitution and proposing changes to the Ohio General Assembly, perhaps an Environmental Rights Amendment can at least earn consideration.

## 2. Statutory and/or Judicial Clarity Regarding Local Regulatory Authority

Despite the New York legislature's attempt to preempt local control of oil and gas activities, that state's highest court interpreted the state oil and gas law *not* to preempt local land use controls, including local ordinances that would ban or negatively impact oil and gas development. The New York court found that the legislature's intent to preempt such activities was not sufficiently clear in the statute. Unlike the Ohio statute, however, the New York statute was not written and expanded many times to increasingly exclude local control. Local jurisdictions in New York gained the right to make their own decisions regarding the desirability or undesirability of drilling in their communities because New York's highest court ruled in their favor. They were able, if they chose, to enact total bans on drilling or on hydraulic fracturing within their boundaries and many did.

In *State ex rel. Morrison v. Beck Energy Corp*, the Supreme Court of Ohio held that the Ohio legislature intended to preempt conflicting local regulation of oil and gas activities.<sup>566</sup> But in declining to act on Beck Energy's request for a mandamus order invalidating Munroe Falls' entire zoning scheme, that Court sent no message regarding the validity of traditional local zoning ordinances, even as applied to oil and gas activities. Local jurisdictions need to know, either through statutory clarity or judicial decision that their traditional zoning authority is secure. Justice O'Donnell indicated that local jurisdictions ought to be able to use their traditional zoning authority, non-discriminatorily created and non-discriminatorily applied to the oil and gas industry.<sup>567</sup> Jurisdictions would take comfort, though, in an affirmative message on this authority. This message could come from the legislature, by clarifying the statute.

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<sup>565</sup> For information about the Ohio Constitutional Modernization Commission, see <http://www.ocmc.ohio.gov/ocmc/home> [<https://perma.cc/L47N-ENPZ>].

<sup>566</sup> See *Morrison*, 143 Ohio St.3d.

<sup>567</sup> *Id.*

Clearly, though, this is a dangerous request because the legislature could, instead, clarify that such authority does not exist. Of course, this clarity could also come from the courts.

Ohio state Representative Debbie Phillips' bill, H.B. 522, represents another foray into legislative action that would reverse the current tide running against local efforts to regulate oil and gas activities.<sup>568</sup> It would remove the language from the oil and gas law that granted exclusive regulatory authority to the state agency, remove language barring local action, and add language requiring local approval prior to permit issuance. Though many local jurisdictions will appreciate Representative Phillips' efforts, this bill is presented to the same body that created the language it seeks to reverse. It will likely die where sits, in the Ohio House Committee on Environment and Natural Resources.

### 3. Environmental Review

New York state was able to ban, administratively, the use of the hydraulic fracturing technology. This was achieved because New York's state version of the National Environmental Quality Act, the New York State Environmental Quality Review Act, requires that agencies complete a comprehensive environmental review prior to making decisions that would adversely effect the environment. The New York law goes beyond the largely procedural national act by requiring that state agencies consider and act on the findings of the required environmental review. Because the administrative review indicated health and environmental dangers associated with hydraulic fracturing, the state agency was able to recommend a ban on the use of the technology.

Ohio has no environmental quality review act. For that matter, Ohio has no law requiring that state agencies study the environmental consequences of their decisions. Of course, this does not mean that agencies do not study or consider environmental consequences. Sometimes they do. It means they are not required to do so by a statute similar to the National Environmental Policy Act. The welcome adoption of an Ohio environmental quality review act unfortunately resides in the fantasy section.

#### B. *Reality in an ex rel. Morrison Environment*

This portion of the conclusion describes methods to secure some local control or influence over oil and gas activities which might move beyond fantasy and into the realm of possibility.

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<sup>568</sup> See H.B. 522, *supra* note 48 and accompanying text.

## 1. Traditional Zoning

Ohio Supreme Court Justice O'Donnell indicated in his *ex rel. Morrison* concurrence that local jurisdictions, although preempted from regulating in conflict with the state oil and gas law, could use their traditional zoning authority to protect the interests of their communities.<sup>569</sup> He was clear to say that such zoning must be non-discriminatorily created as to the oil and gas industry—that is, it must not target the industry's activities—and it must also be non-discriminatorily applied to the oil and gas industry.

Zoning is something local jurisdictions know how to do. Still, Justice O'Donnell provided little information about what zoning efforts would be allowed as they pertain to the oil and gas industry, except to say that zoning ordinances must be non-discriminatory. Driller Beck Energy was sufficiently concerned about local jurisdictions using traditional zoning and applying it to oil and gas activities that it sought, unsuccessfully, to have the Ohio Supreme Court invalidate the City of Munroe Falls' entire zoning code as applied to drilling.<sup>570</sup> The fact that the Court dismissed Beck Energy's mandamus petition indicates that the Court was not ready to address an entire zoning code as it pertains to drilling. By taking no action, the Court found Munroe Falls' zoning code, as a whole, neither valid nor invalid. A decision on that question will have to wait for another case.

Although uncertainty remains regarding zoning that would not conflict with the state oil and gas law when applied to oil and gas activities—there has been no statement of the Ohio Supreme Court confirming its acceptability—Justice O'Donnell's advice seems sound. In light of *ex rel. Morrison* and Justice O'Donnell's concurrence, now would be a good time to review local zoning and ensure that zoning ordinances are written to support the community's goals.

In Colorado, too, the Supreme Court noted that in striking down the city of Longmont's charter-based ban on hydraulic fracturing, it was leaving—for the present—the city's traditional zoning authority.<sup>571</sup>

## 2. Health and Safety Ordinances

The Ohio Oil and Gas Commission's decision in the North Royalton case confirms that communities should be vigilant about their health and

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<sup>569</sup> See *Morrison*, 143 Ohio St.3d (O'Donnell, J. concurring in judgment only).

<sup>570</sup> *Id.*

<sup>571</sup> See *City of Longmont*, 369 P.3d at 573.

safety concerns. In throwing out the Ohio Department of Natural Resources' Division of Oil and Gas Resources Management's mandatory pooling order against North Royalton, the Commission said that the Division had not given sufficient consideration to North Royalton's legitimate safety concerns.<sup>572</sup> The driller, Cutter Oil, had applied to the Division for an order to have some of North Royalton's city streets mandatorily included in a drilling unit.<sup>573</sup> The addition would make the drilling unit of a sufficient size and shape to obtain a state drilling permit. But Cutter Oil had several other wells within North Royalton and those wells had presented numerous safety-related problems.

Local jurisdictions should clarify their safety goals and concerns, and document them. Although the Ohio Oil and Gas Commission order was quite specific in its application to a given case, it made clear that a community's legitimate health and safety concerns must be considered by the decision-making agency.

### 3. Voluntary Agreements Amongst Neighbors

The Gates Mills-based Regional Commission has been working to find solutions to the question of what actions local jurisdictions can take in a legal environment where the state statute preempts local regulation, a home rule provision is held by the state supreme court not to apply, but where local residents want some input into local oil and gas industry activities. The Commission has considered zoning and health and safety ordinances, but hopes also to advise the communities in the Utica and Marcellus region regarding some agreements that individual landowners might enter into amongst themselves. For example, if a sufficient number of landowners would like to prevent drilling, they might consider using the requirements of Ohio's mandatory pooling and unitization statutes. To add land to a drilling unit under the unitization provision, the applicant must show that 65% of the landowners have already agreed to be included in the drilling unit.<sup>574</sup> If a community really wants to prevent drilling from occurring, it might, with the helpful coordination and facilitation of local government or non-profits, encourage landowners to agree amongst themselves not to lease their land. In this case, the driller would not be able to assemble the needed 65% of landowners. Similarly, the Division usually requires that 90% of the land

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<sup>572</sup> See OHIO OIL & GAS COMM'N, *supra* note 306.

<sup>573</sup> *Id.*

<sup>574</sup> OHIO REV. CODE ANN. § 1509.28 (West 2013).

owners in a drilling unit agree to be included before it will force a hold-out landowner to participate. In a community that seeks to block drilling, the community would have to obtain agreement from only a small percentage of landowners to refuse inclusion in order to block the ability of the driller to successfully force a dissenting landowner's inclusion.

Similarly, some organizations are working on plans that would involve community land trusts coordinating conservation easements in which landowners would agree, for themselves and future owners of their land, not to use the land for oil and gas production. There are some major questions and unknowns that will apply to this solution, such as whether land subject to a conservation easement can be included in a drilling unit through unitization or mandatory pooling, but that is an issue for another day.

#### 4. What Local Jurisdictions Can Do Today

Today, local jurisdictions can focus on their traditional zoning codes, revising them to ensure that they protect their residential, commercial and industrial zones as is best for their communities. They should re-evaluate their traffic, noise, light, and similar ordinances to preserve their communities as their residents intend. They should also seek clarity regarding their zoning ordinances' applicability to oil and gas activities.

Local jurisdictions can work with their residents to help them agree amongst themselves to refuse drilling leases. If residents are motivated to regulate oil and gas activities, they should be willing to enter into agreements regarding not leasing their land. As such, they could prevent land from being unitized or mandatorily pooled under the requirements of the state law.

Communities should document safety and health-related incidents and concerns and make those known to regulators. It is now clear that, at least in Ohio, the responsible state agency must take local safety concerns into account when making decisions. Jurisdictions should be aware that this is the case, and be prepared with documentation to make the case on their own behalf.

Jurisdictions could stretch to the fantasy world, too. They could push for the addition of an environmental rights amendment to the Ohio Constitution, for Ohio to adopt a "little NEPA" law that would require state agencies to consider the environmental implications of their decisions, or for the Ohio legislature to amend the oil and gas law to eliminate the local preemption provisions and require local approval prior to issuing a drilling permit.