

IN THE SUPREME COURT OF OHIO

THE STATE OF OHIO ex rel. JACK MORRISON, JR., LAW DIRECTOR, CITY OF MUNROE FALLS, OHIO, et al.

Plaintiffs-Appellants

vs.

BECK ENERGY CORPORATION, et al.

Defendants-Appellees

CASE NO.

13-0465

APPEAL FROM THE SUMMIT COUNTY COURT OF APPEALS, NINTH APPELLATE DISTRICT, CASE NO. 25953

APPELLANT, CITY OF MUNROE FALLS' MEMORANDUM IN SUPPORT OF JURISDICTION

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Representing Appellant Munroe Falls

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## I. WHY THIS CASE IS OF GREAT PUBLIC AND GENERAL INTEREST

The appellate jurisdiction of the Ohio Supreme Court is invoked when a controversy presents either a substantial constitutional question or a matter of great public or general interest. Ohio Constitution, Article IV, §2(B); *See Also Franchise Developers, Inc. v. City of Cincinnati*, 30 Ohio St.3d 28, 31, 505 N.E.2d 966 (1987). This case should be accepted both as a matter of great public interest and as a substantial constitutional question.

This case concerns the extent of preemption of local ordinances by Revised Code Chapter 1509, which regulates most aspects of oil and gas drilling in Ohio. On the one hand, municipalities are granted home-rule authority under Section 3, Article XVIII of the Ohio Constitution, and that authority may not be abridged by the General Assembly absent the passing of a general law on the same subject matter. *Fondessy Enterprises, Inc. v. Oregon*, 23 Ohio St.3d 213, 215 (1986), *citing Akron v. Scalera*, 135 Ohio St. 65, 66 (1939). On the other hand, the version of R.C. §1509.02 in effect at the time the dispute arose committed to the Department of Natural Resources Division of Mineral Resources Management the "sole and exclusive authority to regulate the permitting, location, and spacing of oil and gas wells, and production operations within the State of Ohio."<sup>1</sup>

This case presents the question of whether local zoning ordinances are wholly displaced by the authority granted to the ODNR to control the location and spacing of wells. Or whether, as is the position of Munroe Falls, the power of the ODNR and municipal zoning is concurrent,

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<sup>1</sup> After this dispute arose, the General Assembly enacted H.B. 153, effective September 28, 2011 which amended ODNR's authority to include "well stimulation," "completing," "construction" of the site, and "permitting related to those activities." However, this change does not reduce the need for this Court's interpretation of the statute. As will be explained below, even with the change made by H.B. 153, there remains a question as to whether the ODNR's power to determine the "location" and "spacing" of oil and gas wells displaces local zoning authority.

so that local zoning decides what land is available for oil and gas drilling, and for the land that is available for drilling, the ODNR controls the particulars of oil well construction, determining whether the location is geologically sound, and managing the spacing of wells to protect the correlative rights of neighboring landowners.

Further, this case asks that the Court re-affirm the *Fondessy* decision, supra, and find that, notwithstanding Chapter 1509 of the Revised Code, municipalities retain the right to enforce ordinances which are designed to apprise the municipality of what steps are being undertaken to build the well, and to fund emergency services, so that the municipality is equipped to respond in the event of a well mishap.

There are hundreds of cities in the State of Ohio, many of which sit atop the Marcellus and Utica shale deposits that run below the Eastern part of the State. There is a widely reported "boom" in Ohio Oil and Gas drilling.<sup>2</sup> Cities and drillers are currently at odds concerning the operation of preemption of local ordinances under R.C. Chapter 1509. The dispute in this case is likely to repeat itself many times over. Accordingly, this Court should exercise its discretionary authority and accept this case for review, in order to promote uniformity in the analysis of these issues.

## II. STATEMENT OF CASE AND FACTS

In early 2011, Appellee Beck Energy acquired a State-issued permit to drill for oil and gas on a parcel within the city of Munroe Falls. Because Beck Energy had previously drilled a well in Munroe Falls that led to litigation, Munroe Falls advised Beck Energy of the local ordinances it was expected to comply with. Because it had a State-issued permit, Beck Energy took the

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<sup>2</sup> Ellen McGregor, newsnet5.com, *Ohio has oil & gas reserves to rival Saudi Arabia, energy executive says*, [http://www.newsnet5.com/dpp/news/local\\_news/ohio-has-oil-gas-reserves-to-rival-saudi-arabia-energy-executive-says](http://www.newsnet5.com/dpp/news/local_news/ohio-has-oil-gas-reserves-to-rival-saudi-arabia-energy-executive-says) (last visited Mar. 11, 2013).

position that it was not required to comply with any local ordinances of Munroe Falls, including those ordinances which would apply to any other person who engaged in development of property or the conduct of commercial operations within the boundaries of the City.

Beck Energy began surface preparation for the well without complying with Munroe Falls' Ordinances, and Munroe Falls served Beck Energy with a stop-work order. Munroe Falls then filed suit in April of 2011, seeking to enforce local ordinances of three basic types. The first type was ordinances regarding streets and right-of-ways, which must be complied with by any person using the roads in Munroe Falls. Examples of these ordinances include a permit requirement to move oversized loads, and to connect a private road to a City right-of-way. The second basic category was zoning ordinances, which must be complied with by any person seeking to use land in Munroe Falls. Examples include the requirement that a person obtain a zoning certificate before commencing construction. Finally, Munroe Falls sought to enforce ordinances specifically regarding oil and gas drilling, which among other things, require notice to adjoining landowners prior to commencing drilling.

Munroe Falls obtained an injunction from the Common Pleas Court, forestalling drilling operations until Beck Energy complied with the ordinances. The trial court found that, despite the enactment of R.C. §1509.02, municipalities retained a significant interest in enforcing local ordinances to assure the safety and security of their residents. As such, the trial court granted an injunction to Munroe Falls requiring Beck Energy to comply with each of the three types of ordinances prior to commencing construction of the well.

Beck Energy appealed to the Ninth District, and the Ninth District affirmed the trial court's decision that Beck Energy must comply with the local street and road ordinances before undertaking actions that affected Munroe Falls' roads and rights-of-way. But the Ninth District

reversed the trial court as to the other categories of ordinances, finding that R.C. Chapter 1509 preempted local zoning ordinances and any ordinances speaking directly to oil and gas drilling. (February 6, 2013 Opinion, and February 8, 2013 Judgment Entry, Appendix p. 18-21, ¶63-73).

Munroe Falls now seeks review of the Ninth District's decision in this matter.

### III. ARGUMENT IN SUPPORT

**PROPOSITION OF LAW ONE: R.C. Chapter 1509 does not divest municipalities of their power to enact and enforce zoning laws.**

**A. Prior to 2004, the Ohio Department of Natural Resources and municipalities had concurrent jurisdiction over oil and gas exploration and drilling.**

In 1965, at the time of initial passage of R.C. Chapter 1509, the General Assembly committed to the Ohio Department of Natural Resources the responsibility to assure that oil and gas wells were constructed properly, in areas with appropriate geology. Consistent with this authority, the ODNR has promulgated regulations concerning the proper construction of wells. See O.A.C. §1501:9-1-08. These regulations mandate that certain casing materials and cement be used, wellbore diameters be a certain size, that drilling fluids be handled in certain ways, and further sets standards for properly constructing wells. Also delegated to the ODNR was the development of a comprehensive approach for the management of a system of correlative rights. "Correlative rights" are defined in R.C. §1509.01(I) as "the reasonable opportunity to every person entitled thereto to recover and receive the oil and gas in and under the person's tract or tracts...." As such, the ODNR's rules on the location of wells also delve heavily into the proper spacing of wells, such that no landowner could exploit oil below the tracts of his or her neighbors. O.A.C. §1501:9-1-04.

As noted by the Legislative Service Commission, prior to 2004, local governments had

concurrent jurisdiction in these areas, and could enact more restrictive "health and safety standards for the drilling and exploration for oil and gas..." Legislative Service Commission Bill Analysis, Sub. H.B. 278. Thus, prior to 2004, a statewide patchwork of more restrictive local ordinances concerning well drilling, construction, and location predominated. This patchwork of local oil and gas drilling ordinances were difficult for drillers to navigate, and was enforced by local governments which typically did not have geologists on staff, and generally lacked expertise in well construction.

Thus, in 2004, the General Assembly passed Sub. H.B. 278, which added language to R.C. §1509.02, making the ODNR the "sole and exclusive authority to regulate the permitting, location, and spacing of oil and gas wells" in the State of Ohio. This language sought to preempt the patchwork of more-restrictive local ordinances on well construction and spacing. But neither the express language of Sub. H.B. 278, nor the legislative history, suggests that this change to statutory language has any effect on municipal zoning.

**B. Cities derive their zoning power directly from the Ohio Constitution, and that zoning power cannot be abridged by the General Assembly unless the General Assembly enacts a conflicting general law on the same subject matter.**

Zoning regulations are an exercise of the police power, designed to promote the welfare of the residents of a municipality. *Vill. of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 387, 47 S. Ct. 114, 118, 54 A.L.R. 1016 (1926). Zoning regulations are borne from the interest that cities have in preventing nuisances, especially with respect to industrial operations in residential neighborhoods. *Id.* As noted in *Village of Euclid*, "[p]laces of business are noisy; they are apt to be disturbing at night; some of them are malodorous; some are unsightly; some are apt to breed rats, mice, roaches, flies, ants, etc. \* \* \*" *Id.* at 393, quoting *State v. City of New Orleans*, 154

La. 271, 282, 97 So. 440, (1923). Local governments are familiar with local conditions, and in the best position to enact zoning regulations to sensibly limit the use of land in areas where nuisance is likely. *See Vill. of Hudson v. Albrecht, Inc.*, 9 Ohio St. 3d 69, 71–72, 458 N.E.2d 852, 855 (1984).

Ohio municipalities' power to enact zoning regulations flows directly from Section 3, Article XVIII of the Ohio Constitution. *Garcia v. Siffrin Residential Ass'n*, 63 Ohio St. 2d 259, 270, 407 N.E.2d 1369, 1377 (1980), *overruled on other grounds*, *Saunders v. Clark County Zoning Dept.* (1981), 66 Ohio St.2d 259, 421 N.E.2d 152. Municipal zoning regulations are only limited by the constitutional provision if as they are "in conflict with general law." Section 3, Article XVIII of the Ohio Constitution. Further, the laws must be "upon the same subject matter." *Fondessy*, 23 Ohio St. 3d 213 at syllabus 2.

**C. The State of Ohio has not enacted a general law that conflicts with Munroe Falls' zoning ordinances.**

The State of Ohio, in enacting Sub. H. B. 278, did not re-zone all of the parcels in all of the municipalities in the State of Ohio. The bill itself says nothing about municipal zoning, nor does its legislative history. Neither Chapter 1509, nor the regulations promulgated thereunder, set forth any standards for determining what zones – residential, business, industrial – are appropriate for oil and gas drilling. None of the provisions of Chapter 1509 factor in concerns regarding the nuisance that may be imposed by oil and gas drilling, for example, if performed in a residential neighborhood. The State law and local zoning ordinances do not concern the same subject matter.

What the State enacted was a statute to standardize proper well construction and spacing, so that local oil and gas drilling ordinances did not interfere with technical standards concerning

safe well construction and correlative rights. The ODNR and Beck Energy have read the language in R.C. §1509.02 which grants the ODNR the exclusive power to control well "location" as overriding any and all municipal zoning restrictions which may say that certain land is, or is not, available for oil and gas development. This reading is in error.

Nothing in Chapter 1509 states that it displaces local zoning ordinances. In contrast, other similar State statutes expressly say exactly that. R.C. §3734.05(D)(3), for example, states that "[n]o political subdivision of this state shall require any additional zoning or other approval, consent, permit, certificate, or other condition for the construction or operation of a hazardous waste facility...." See also R.C. §519.211 (prohibiting township zoning from affecting public utilities); R.C. §3772.26 (prohibiting local zoning from prohibiting the development of casinos); R.C. §5103.0318, R.C. §5104.054, and R.C. §5123.19(P) (overriding local zoning for foster homes, day cares, and group homes).

Where a statute does not expressly displace local zoning, the local zoning code exists in parallel with the State law. In *Sheffield v. Rowland*, 87 Ohio St. 3d 9, 12, 716 N.E.2d 1121, 1124 (1999), this Court considered an absolute zoning ban on waste processing facilities, which are licensed by the State in a manner similar to oil and gas wells. While the absolute ban on waste facilities in the *Sheffield* zoning code was struck down, this Court noted that the municipality retained the power to place state-licensed facilities in appropriate zones: "Nothing in this decision should be construed to suggest that Sheffield cannot restrict state-authorized facilities to certain districts with appropriate zoning." *Id.*

R.C. Chapter 1509 does not expressly supplant local zoning – the State law operates in parallel to local zoning requirements. The General Assembly expressly stated that the ODNR's authority was limited to determining well construction, spacing and location regulations in order

to strip away conflicting similar safety regulations enacted by cities. It did not strip away the municipalities' power to place oil and gas wells in particular zones. And in order to determine whether an oil and gas well fits within the Munroe Falls zoning code, the driller must first file a zoning application and obtain a zoning certificate under Ordinance §1329.03 and §1163.02. It was therefore error for the Ninth District to strike those ordinances down.

Thus the local zoning code designates what land is available for oil and gas drilling, and the State's license assures that the well is constructed properly and spaced according to the correlative rights principles administered by the ODNR. If there is, for example, an absolute ban on the State-authorized activity within a local zoning code, such as what was at issue in *Sheffield*, only then is a preemption analysis appropriate.

"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." *Canton v. State*, 95 Ohio St. 3d 149, 2002-Ohio-2005, 766 N.E.2d 963, ¶9. If the State statute is read correctly, Munroe Falls' zoning ordinances do not conflict with it, because the State did not forbid local zoning of oil and gas wells, and did not itself enact any zoning laws. The test for a conflict is whether "one authority grants a permit or license to do an act which is forbidden or prohibited by the other." *Vill. of Struthers v. Sokol*, 108 Ohio St. 263, 268, 140 N.E. 519, 521 (1923).

Under this test, the Munroe Falls zoning ordinance and statute do not conflict, because the fact that the ODNR has the power to limit the location of wells requested by a driller for safety or correlative rights reasons does not grant the ODNR the right to approve a well in any particular location within municipal boundaries without regard to the zoning expectations of the residents. Nor do the Munroe Falls zoning ordinances permit what the State prohibits – Munroe

Falls cannot license an oil and gas operation without a State permit.

Further, even if one was to read R.C. §1509.02 as allowing the ODNR to issue a drilling permit in contravention of local zoning, R.C. §1509.02 is not a general law.<sup>3</sup> In *Canton v. State*, 95 Ohio St. 3d 149, 2002-Ohio-2005, 766 N.E.2d 963, this court was presented with a statute, which, unlike R.C. §1509.02, actively **did** seek to displace local zoning to promote the placement of manufactured homes in areas where they were prohibited by local zoning. R.C. §3781.184. But the statute contained an exception which allowed private landowners to incorporate restrictive covenants in deeds to prohibit the inclusion of manufactured homes within subdivisions.

In evaluating R.C. §3781.184, this Court found that it was not a general law, because it did not operate uniformly throughout the State. This Court found that, because of the exception, the statute "will effectively apply only in older areas of the state, i.e., cities where residential areas no longer have effective deed restrictions or no longer have active homeowner associations." As such, it did not apply uniformly to all citizens, and was not a general law.

Similarly, R.C. §1509.02 cannot be considered a general law, because it would only apply to half of the state. The below diagram<sup>4</sup> sets forth the location of all of (1) the oil and gas drilling permits issued by the ODNR in 2011, and (2) all of the wells completed, by county:

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<sup>3</sup> The Ninth District related that Munroe Falls conceded that R.C. §1509.02 was a general law. *State ex rel. Morrison v. Beck Energy Corp.*, 2013-Ohio-356, ¶58. This is in error. Munroe Falls specifically challenged the status of the statute as general law at pages 17-18 of its brief.

<sup>4</sup> This diagram is reproduced from page 3 of the *2011 Ohio Oil and Gas Summary*, from the ODNR's Division of Oil and Gas Resources Management <http://oilandgas.ohiodnr.gov/portals/oilgas/pdf/oilgas11.pdf> (last visited Mar. 11, 2013).



As demonstrated graphically by the diagram, oil and gas is not found in economically viable quantities in the Western half of Ohio, at all. Pursuant to the ODNR's *2011 Ohio Oil and Gas Summary*, at page 2, cited in footnote 4 above, among the most active counties for drilling are Stark, Knox, Mahoning, Muskingum, Belmont, and Summit counties. The cities in these counties, including Canton, Youngstown, Mt. Vernon, Akron and Munroe Falls are affected by the law, while cities in the Western part of the state, including Cincinnati, Dayton, and Toledo, are not affected. Therefore, if the Ninth District's interpretation of R.C. §1509.02 is correct – that the ODNR was granted the power to supersede local zoning – then, practically speaking, the ODNR was only provided the right to supersede local zoning for certain cities located in the Eastern part of the State. R.C. §1509.02 is therefore not a general law, but rather is a special or

local law, and does not supersede Munroe Falls' zoning code.

In making this argument, Munroe Falls is aware of *Clermont Env'tl. Reclamation Co. v. Wiederhold*, 2 Ohio St. 3d 44, 50, 442 N.E.2d 1278, 1283 (1982), where this Court held that municipal zoning restrictions could not exist in parallel with the State's regulation of hazardous waste landfills under R.C. Chapter 3734. However, there are two key differences between this case and *Clermont*. First, as detailed above, R.C. §3734.05(D)(3) contains an express statement displacing local zoning restrictions. R.C. Chapter 1509, pertaining to oil and gas wells, does not make such a statement. Second, R.C. Chapter 3734 was a general law, which could be applied uniformly throughout the State, because every part of the State has the necessary precursor to a landfill – land. In contrast, as set forth above, R.C. Chapter 1509 is not a general law because it only applies to the Eastern half of the State, which is the only part of the State with gas and oil.

Munroe Falls' zoning ordinance at §1163.02 requires any party seeking to put land to use to obtain a zoning certificate before that use commences. Because R.C. §1509.02 is not a general law in conflict with that provision, it was error for the Ninth District to find that the state law preempted the local ordinance. *State ex rel. Morrison v. Beck Energy Corp.*, 2013-Ohio-356, ¶73. This Court should accept this case to establish that municipal zoning ordinances have not been preempted by R.C. §1509.02.

**PROPOSITION OF LAW TWO: Municipal ordinances do not conflict with Ohio's Oil and Gas drilling laws at R.C. §1509.02 when local ordinances require the beneficiary of a permit issued under R.C. §1509.02 to submit information to the municipality to allow the municipality to protect the interests of its residents. *Fondessy Enters., Inc. v. City of Oregon*, 23 Ohio St. 3d 213, 492 N.E.2d 797 (1986), approved and followed.**

Like many municipalities, Munroe Falls has its own oil and gas ordinance on the books, which, prior to 2004, would have provided a parallel set of safety and construction requirements

for those drillers seeking to put a well into the municipality. However, Munroe Falls' oil and gas ordinances also include ordinances that are not directed at safe well construction, but rather ordinances that requires drillers to provide certain information to the community and pay a fee to help fund possible emergency response in the event of a well mishap. Those ordinances include §1329.03, which requires drillers to obtain a zoning certificate prior to commencing work, §1329.04, which requires an application fee be paid before drilling; §1329.05, which requires a public hearing, approval by City Council and notification to adjoining land owners before drilling may be commenced; and §1329.06, which requires a performance bond be posted before drilling can commence.

The Ninth District found that all of these provisions were preempted by the State law. *State ex rel. Morrison v. Beck Energy Corp.*, 2013-Ohio-356, ¶63-73. But the Ninth District failed to properly apply this Court's authority in *Fondessy, supra*. In *Fondessey*, the city of Oregon enacted an ordinance regarding hazardous waste landfills. The ordinance required a hazardous waste landfill to pay a monthly permit fee, in order to allow the city to generate sufficient funds to protect the environmental safety and community welfare. The ordinance required the operator to maintain records of the amount and type of waste disposed on city-supplied forms, and to remit the forms along with a permit fee monthly. 23 Ohio St. 3d at 213.

The landfill operator sued the City of Oregon, claiming that the State's comprehensive regulation of landfills under R.C. Chapter 3734 automatically preempted the ordinance in its entirety. But this Court disagreed. Reexamining its decision in *Clermont, supra*, this Court found that despite the State's decision to comprehensively regulate a field, the municipality retained the police power guaranteed by the Ohio Constitution, and an analysis of the conflict, if any, between the State and local laws must be performed. 23 Ohio St. 3d at 216.

In performing the conflict analysis in *Fondessy*, the Court looked to the language of R.C. §3734.05(D)(3), which states that “[n]o political subdivision of this state shall require any additional zoning or other approval, consent, permit, certificate, or other condition for the construction or operation of a hazardous waste facility....” 23 Ohio St. 3d at 217. Looking to this language, the Court emphasized that the statute “*may be utilized only to limit the legislative power of municipalities by the precise terms it sets forth.*” *Id.* (Emphasis in the original). Because the statute at issue in *Fondessy* set forth an express statement of what municipalities were not permitted to regulate, that language became the standard by which a conflict was measured. *Id.* In discussing *Fondessy*, the Ninth District did not recognize that the statute at issue in *Fondessy* contained an express statement that it preempted local zoning, while R.C. §1509.02 does not. *State ex rel. Morrison v. Beck Energy Corp.*, 2013-Ohio-356, ¶38-42, Appendix p. 11-13.

Because the ordinance in *Fondessy* required only recordkeeping, the submission of records to the city, and the payment of a fee to fund safety and environmental response, it did not violate the express terms of the State statute. As noted by the Court, there was “nothing in the ordinance which requires them [Fondessy] to have taller fences, or more guards or more monitoring wells.” *Id.* Because the ordinance did not impact what the State was regulating – the operation of a hazardous waste facility – it did not conflict with the State statute.

R.C. §1509.02 does not provide an express statement of what sorts of municipal ordinances would conflict with the statute. All the statute says is that the ODNR is the “sole and exclusive authority to regulate the permitting, location, and spacing of oil and gas wells.” Given the matters regulated by the statute, it is appropriate to consider this a statement that only the ODNR can issue a permit providing for the drilling of wells using certain construction methods,

located in geologically appropriate areas, spaced to protect the correlative rights of neighboring landowners. So any municipal ordinances that purport to mandate that, for example, certain cements be used in casing a well, or that certain geological features not be drilled through, or spacing wells in such a way to disrupt the State-established correlative rights scheme would be invalid. But ordinances that do not, so to speak, require "taller fences" or "more guards" are not in conflict.

The Munroe Falls ordinances in question do not change the State's requirements for permitting a well. Ordinance §1329.03 requires a driller to obtain a zoning certificate, just as any other landowner or lessee must do prior to commencing construction of any structure. Ordinance §1329.04 requires the payment of a fee before drilling, funds which can be used to fund safety and emergency response forces, as in *Fondessy*. Ordinance §1329.05 requires public hearing, notice to adjoining landowners, and approval by city council before drilling commences. These requirements are grounded in educating the public as to the project, so the city or its citizens can be prepared to respond in the event of a mishap. Finally, §1329.06 requires a two thousand dollar performance bond to be posted. The obvious purpose of this requirement is to provide the City with funds to assure safety of the drilling operation.

As with the ordinance at issue in *Fondessy*, none of the Munroe Falls ordinances impede the driller's "seminal operations in any substantive or significant way." 23 Ohio St. 3d at 217. Simply because the State chooses to regulate a field does not mean that a municipality may not also protect its interests and the interests of its citizens. *Id.* As such, the Ninth District erred by finding preemption of the Munroe Falls oil and gas ordinances.

**IV. CONCLUSION**

This Court should accept jurisdiction over the present appeal to clarify whether and to what extent R.C. Chapter 1509 preempts local ordinances. This is an issue likely to repeat itself many times over the coming years, as Ohio's oil and gas reserves are developed. It also invokes constitutional questions regarding the extent of a city's local zoning power. As a result, matters of significant public interest and compelling constitutional questions are at issue, recommending discretionary review of this case.

Respectfully submitted,

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**V. CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing was sent this 21st day of March, 2013 by ordinary U.S. Mail to **John R. Keller**, Attorney for Beck Energy, VORYS SATER SEYMOUR & PEAS, 52 E. Gay Street, Columbus, Ohio 43215.

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Attorney for Munroe Falls

**IN THE COURT OF APPEALS  
NINTH APPELLATE DISTRICT  
SUMMIT COUNTY, OHIO**

STATE OF OHIO ex rel. JACK MORRISON, JR., LAW DIRECTOR CITY OF MUNROE FALLS, OHIO, et al.,	:	<b>OPINION</b>
Plaintiffs-Appellees,	:	<b>CASE NO. 25953</b>
- vs -	:	
BECK ENERGY CORPORATION, et al.,	:	
Defendants-Appellants.	:	

Civil Appeal from the Summit County Court of Common Pleas, Case No. CV2011-04-1897.

Judgment: Reversed and remanded.

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*John W. Solomon, Vorys, Sater, Seymour and Pease LLP*, 106 South Main Street, Suite 1100, Akron, OH 44308, and *John K. Keller and Robert J. Krummen, Vorys, Sater, Seymour and Pease LLP*, 52 East Gay Street, P. O. Box 1008, Columbus, OH 43216-10008 (For Defendants-Appellants).

MARY JANE TRAPP, J., Eleventh Appellate District, sitting by assignment.

{¶1} Beck Energy Corporation secured a permit from Ohio's Department of Natural Resources to drill on Joseph Willingham's property located in the City of Munroe Falls, Ohio. When Beck Energy began drilling on the property, the city issued a Stop Work Order and filed a complaint in the Summit County Court of Common Pleas for an

injunction to stop Beck Energy from drilling. The city claimed Beck Energy did not comply with its ordinances requiring permits for drilling, zoning, and rights-of-way construction. The trial court granted the injunctive relief sought by the city and Beck Energy and Mr. Willingham brought this appeal.

{¶2} On appeal, the question to be answered is whether the City of Munroe Falls can enforce its ordinances governing oil and gas drilling and related zoning and rights-of-way issues despite the state's comprehensive statutory scheme for drilling set forth in R.C. Chapter 1509. This appears to be an issue of first impression.<sup>1</sup>

{¶3} In 2004, the General Assembly enacted statutes granting exclusive regulation over oil and gas wells in Ohio to the Ohio Department of Natural Resources. While we recognize that gas and oil drilling brings economic benefits to the entire state, we also recognize that the burden of potential risk and harm, especially to a local area's infrastructure, is borne by the local residents in the wells' immediate surroundings. But our role is not to make policy decisions and re-write either state law and regulations or local zoning ordinances; we are compelled to follow the established law in our application of the constitutional home-rule analysis to Monroe Falls' drilling ordinances. Because the drilling ordinances are in direct conflict with the state statutes, the city cannot enforce the ordinances as presently written. The city, however, is permitted to enforce pertinent right-of-way ordinances in the face of the drilling activities, provided these ordinances are not enforced in a discriminatory manner against oil and gas well drilling.

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1. All the judges from the Ninth District Court of Appeals recused themselves from the case. The instant panel from the Eleventh District Court of Appeals sits by assignment.

### **Substantive Facts and Procedural History**

{¶4} Mr. Willingham leased gas rights to Beck Energy Corporation (“Beck Energy”) for several acres of property he owns within the City of Munroe Falls. Beck Energy applied for a well permit from the Ohio Department of Natural Resources (“ODNR”), Division of Mineral Resources Management, to drill a gas well on the property. After reviewing the application, the division issued a well permit (#2-3126) to Beck Energy on February 16, 2011. The permit sets forth terms and conditions, including 29 Urbanized Area Permit Conditions, which include specific requirements governing tree trimming, fencing, parking, noise, erosion, drainage, landscaping, and site restoration.

{¶5} When Beck Energy began excavation and drilling at Mr. Willingham’s residence, the city issued a Stop Work Order, alleging Beck Energy violated several ordinances in drilling at the property without first obtaining various necessary permits from the city. On April 6, 2011, the city and its Law Director, Jack Morrison, Jr. (hereafter “the city”), filed a complaint in the Summit County Court of Common Pleas to enjoin Beck Energy from engaging in drilling activities on Mr. Willingham’s property until it complies with 11 ordinances and acquires the necessary permits pursuant to the ordinances. In conjunction with the complaint, the city also filed an application for preliminary and permanent injunction.

{¶6} The city claimed that in order to engage in the drilling activity, Beck Energy must, as prescribed in the city’s ordinances: (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.

{¶7} After the city filed the complaint, the parties agreed to maintain the status quo and refrain from any drilling activity, and to submit briefs to the trial court addressing whether an injunction should be issued. On May 3, 2011, the trial court entered a preliminary injunction, and subsequently entered an order granting a permanent injunction, enjoining Beck Energy from operations related to drilling on the subject property until all relevant Munroe Falls ordinances have been complied with.

{¶8} Beck Energy now appeals from that order.<sup>2</sup> It assigns the following error for our review:

{¶9} “The trial court erred as a matter of law when it held that local city ordinances, which prohibit defendants’ gas drilling operations in the absence of City-issued permits, are not in conflict with Ohio state statutes, which specifically allow those operations pursuant to a State-issued permit. The trial court’s ruling that the ordinances are within the city’s home-rule authority should therefore be reversed.”

#### **Standard of Review for Injunction**

{¶10} “An injunction is an extraordinary remedy in equity where there is no adequate remedy available at law. It is not available as a right but may be granted by a court if it is necessary to prevent a future wrong that the law cannot.’ \* \* \* The grant or denial of an injunction is within the trial court’s discretion and will not be disturbed by a reviewing court absent an abuse of that discretion. \* \* \* In order to find an abuse of that discretion, we must determine that the trial court’s decision was unreasonable, arbitrary

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2. The State of Ohio, through its Attorney General, filed an amicus curiae brief in this appeal. It states that it “supports neither party, but seeks only to protect the integrity of Ohio’s comprehensive, statewide system for regulating oil and gas drilling while allowing for local regulations that do not interfere with state law.” This court accepted the amicus curiae brief.

or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 5 Ohio B. 481, 450 N.E.2d 1140 (1983).” (Internal citations omitted.) *Heron Point Condo. Unit Owner’s Assn. v. E.R. Miller, Ltd.*, 9th Dist. Nos. C.A. Nos. 25861, 25863, 25998, 2012-Ohio-2171, ¶15.

### **Standard of Review for Conflict Determination**

{¶11} The central issue in this case is whether Monroe Falls’ ordinances governing drilling and related matters conflict with R.C. 1509.02. “Whether there is a conflict between a city’s ordinance and the state’s general law presents a question of law, which this Court reviews de novo.” *Smith Family Trust v. City of Hudson Bd. of Zoning and Bldg. Appeals*, 9th Dist. No. 24471, 2009-Ohio-2557, ¶10, citing *Ohio Bell Tel. Co. v. Pub. Util. Comm.*, 64 Ohio St.3d 145, 147 (1992).

### **R.C. 1509.02: The Oil and Gas Drilling Statute**

{¶12} This appeal concerns the scope of R.C. Chapter 1509, Ohio’s oil and gas drilling statutes. Pursuant to its constitutional authority, the General Assembly enacted R.C. Chapter 1509 in 1965 to regulate all oil and gas drilling and production operations in Ohio. See *Redman v. Ohio Dept. of Industrial Relations*, 75 Ohio St.3d 399 (1996). In 2004, the General Assembly enacted H.B. 278, which expanded the regulatory scheme and amended R.C.1509.02 to give the Division of Mineral Resources Management of the Ohio Department of Natural Resources the “sole and exclusive authority to regulate the permitting, location, and spacing of oil and gas wells.”

{¶13} Subsequently, the General Assembly enacted S.B. 165, effective June 30, 2010, which further expanded ODNR’s regulatory authority to include “production operations.”

{¶14} The General Assembly again expanded ODNR's authority in H.B. 153, effective September 28, 2011. It amended ODNR's authority to include "well stimulation," "completing," "construction" of site, and "permitting related to those activities."

{¶15} R.C. 1509.02 in its current form reads, in pertinent part:

{¶16} "There is hereby created in the department of natural resources the division of oil and gas resources management, which shall be administered by the chief of the division of oil and gas resources management. The division has sole and exclusive authority to regulate the permitting, location, and spacing of oil and gas wells and production operations within the state, excepting only those activities regulated under federal laws for which oversight has been delegated to the environmental protection agency and activities regulated under sections 6111.02 to 6111.029 of the Revised Code. The regulation of oil and gas activities is a matter of general statewide interest that requires uniform statewide regulation, and this chapter and rules adopted under it constitute a 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. Nothing in this section affects the authority granted to the director of transportation and local authorities in section 723.01 or 4513.34 of the Revised Code, provided that the authority granted under those sections shall not be exercised in a manner that discriminates against, unfairly impedes, or obstructs oil and gas activities and operations regulated under this chapter."

{¶17} R.C. Chapter 1509 thus provides a comprehensive regulatory scheme for oil and gas wells operations in the state. A person wishing to drill a well for oil or gas

must first obtain a drilling permit from the Division of Mineral Resources Management. R.C. 1509.05 and R.C. 1509.06. R.C. 1509.021 governs minimum distance restrictions on the surface location of wells and other facilities relative to existing property lines, dwellings, buildings, and streets and roads. R.C. 1509.03 governs safe operations of wells, protection of water supplies, necessity of fencing and screening, and mitigation of noise. R.C. 1509.04 authorizes ODNR's oversight after a permit is issued – by providing for enforcement mechanisms which would allow the state to suspend operations that threaten public safety or endanger natural resources. Finally, R.C. 1509.07 governs insurance and surety bond requirements.

{¶18} The statute on its face, however, reserves certain aspects of the oil and gas wells' operations to the control of other authorities, stating, "Nothing in this section affects the authority granted to the director of transportation and local authorities in section R.C. 723.01 and R.C. 4513.34."

{¶19} R.C. 4513.34, not at issue in this case, permits local authorities and the Ohio Department of Transportation to grant permits for oversize vehicles to use the roads in their respective jurisdictions.

{¶20} R.C. 723.01 ("Care, supervision, and control of public roads") is relevant to this appeal. That statute provides, in relevant part:

{¶21} "Municipal corporations shall have special power to regulate the use of the streets. \* \* \* [T]he 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."

{¶22} However, the statute expressly forbids the local authorities or the director of transportation from exercising power under R.C. 723.01 or R.C. 4513.34 in a manner

that “discriminates against, unfairly impedes, or obstructs oil and gas activities and operations regulated.” R.C. 1509.02.

### **Issue on Appeal**

{¶23} Beck Energy claims the city impermissibly applied its ordinances to prohibit drilling on Mr. Willingham’s property, which has been sanctioned by a well permit issued by ODNR, pursuant to R.C. 1509.02. It maintains the city’s attempt to use its ordinances to regulate gas wells conflicts with the express directive of R.C. 1509.02, which gives the state the sole and exclusive authority to regulate gas production operations within Ohio. Its position is that the permit issued by the state precludes any regulation or control of the drilling activity by the city.

{¶24} The city, on the other hand, maintains local municipalities have home-rule authority, under Section 3, Article XVIII of Ohio Constitution, to regulate gas drilling operations, because the authority given to the state by the statute only pertains to “permitting, location, and spacing of” oil and gas well productions.

{¶25} The issue to be resolved in this appeal, as we see it, is whether, under a home-rule analysis, R.C. Chapter 1509 precludes *any* local control or oversight of oil and gas drilling taking place within the municipality’s boundaries.

### **The Home-Rule Analysis**

{¶26} Ohio Constitution, Article XVIII, Section 3 confers upon municipalities the “authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws.” *Morris v. Roseman*, 162 Ohio St. 447, 449 (1954). This section “is self-executing, and [ ] the power of local self-government is inherent in all

municipalities regardless of enabling legislation and the existence of municipal charters.” *Id.* at 450.

{¶27} The Supreme Court of Ohio reiterated a three-step process for a home-rule analysis in *Ohioans for Concealed Carry, Inc. v. City of Clyde*, 120 Ohio St.3d 96, 2008-Ohio-4605.

**A. First Step: Whether the Ordinance is an Exercise of Local Self-government**

{¶28} The first step is to determine whether the ordinance is an exercise of local self-government or an exercise of local police power. *Clyde* at ¶24. “An ordinance created under the power of local self-government must relate ‘solely to the government and administration of the internal affairs of the municipality.’” *Clyde* at ¶30, quoting *Marich v. Bob Bennett Constr. Co.*, 116 Ohio St.3d 553, 2008-Ohio-92, ¶11, quoting *Beachwood v. Cuyahoga Cty. Bd. of Elections*, 167 Ohio St. 369 (1958), paragraph one of the syllabus. The Supreme Court of Ohio provided the following test to determine whether a particular ordinance is an exercise of local self-government:

{¶29} “To determine whether legislation is such as falls within the area of local self-government, the result of such legislation or the result of the proceedings thereunder must be considered. If the result affects only the municipality itself, with no extraterritorial effects, the subject is clearly within the power of local self-government and is a matter for the determination of the municipality. However, if the result is not so confined it becomes a matter for the General Assembly.” *Kettering v. State Employment Relations Bd.*, 26 Ohio St.3d 50, 54 (1986), quoting *Cleveland Elec. Illuminating Co. v. Painesville*, 15 Ohio St.2d 125, 129 (1968), quoting *Beachwood* at 371.

{¶30} Once a local ordinance is determined to relate solely to matters of self-government, it is the end of the analysis, because the Constitution authorizes a municipality to exercise all powers of local self-government within its jurisdiction. *Clyde* at ¶24.

**B. Second Step: If the Ordinance is an Exercise of Police Power, then We Apply General-Law Analysis**

{¶31} The second step is necessary if the local ordinance is determined to be an exercise of police power, rather than local self-government. *Clyde* at ¶25. Police-power ordinances are those that “protect the public health, safety, or morals, or the general welfare of the public.” *Id.*

{¶32} If an ordinance is determined to be an exercise of police power, the court then is required to review the statute at issue to determine whether the statute is a “general law.” *Clyde* at ¶25. If the statute qualifies as a “general law,” it trumps the local ordinance, *if* the local ordinance conflicts with the state statute. *Id.*

{¶33} “General laws are those ‘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.’” *Smith Family Trust, supra*, at ¶10, quoting *Garcia v. Siffrin Residential Assn.*, 63 Ohio St.2d 259, 271 (1980), overruled on other grounds by *Saunders v. Clark County Zoning Dept.*, 66 Ohio St.2d 259 (1981).

{¶34} The Supreme Court of Ohio set forth a four-part test in *Canton v. State*, 95 Ohio St.3d 149, 2002-Ohio-2005, to determine if the statute qualifies as a general law:

{¶35} “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.” *Id.* at syllabus.

{¶36} “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.” *Id.* at 151.

{¶37} At the same time, a municipality “is vested with primary authority to enact police power ordinances not in conflict with the state’s general laws. 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.” *Fondessy Enterprises, Inc. v. Oregon*, 23 Ohio St.3d 213, 215 (1986). “Nor can this power of home rule, expressly conferred upon municipalities, be withdrawn by the General Assembly.” *Id.* citing *Akron v. Scalera*, 135 Ohio St. 65, 66 (1939). “The authority conferred by Section 3, Article XVIII of the Ohio Constitution upon municipalities to adopt and enforce police regulations is limited only by general laws in conflict therewith upon the same subject matter.” *Id.* at paragraph one of the syllabus.

### **C. Third Step: the Conflict Analysis**

{¶38} The final step in the home-rule analysis is, therefore, to determine whether the ordinance conflicts with the statute. The test is “whether the ordinance prohibits that which the statute permits, or vice versa.” *Clyde, supra*, at ¶53, citing *Struthers v. Sokol*, 108 Ohio St. 263 (1923), paragraph two of the syllabus. *See also Marich, supra*, at ¶30. “Determining whether a conflict exists requires us to examine inconsistencies and

contradictions between the ordinance and the statute.” *Rispo Realty & Dev. Co. v. Parma*, 55 Ohio St.3d 101, 105 (1990).

{¶39} Applying the *Struthers* conflict test, the Supreme Court of Ohio in *Fondessy, supra*, validated a local ordinance which appeared to regulate an area seemingly preempted by a state statute.

{¶40} 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 did not “alter, impair, or limit” the operation of the hazardous waste facility licensed, as prohibited by the statute.

{¶41} The court held that “[w]here state laws and municipal ordinances concerning the monitoring of hazardous waste landfill facilities located within the corporate limits of the city do not conflict, the state and municipality have concurrent authority under their respective police powers to enforce their respective directives within the corporate limits of the city.” *Fondessy* at paragraph four of the syllabus. In addition, “[t]he 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 authority.” *Id.* at paragraph five of the syllabus.

{¶42} The court explained that the city’s requirement for the waste facility operator to keep daily records and to report to the municipality did not impede the operator “in any substantive or significant way.” *Id.* at 217. It observed, for example, that nothing in the ordinance required the operator to have taller fences, more guards, or more monitoring wells. Thus, although the statute regulating the hazardous waste landfill facility (R.C. 3734) seemingly preempted the regulations of such facilities, the court nonetheless validated the municipal ordinance, which it deemed not in conflict with the state law.<sup>3</sup>

{¶43} With the three-step home-rule analysis in mind, we are now ready to review the 11 ordinances the City of Munroe Falls sought to enforce regarding Beck Energy’s drilling activities on Mr. Willingham’s property.

### **Munroe Falls Ordinances**

{¶44} The city’s complaint for injunction cited 11 ordinances the city believed to be implicated by Beck Energy’s drilling activity. The 11 ordinances are from various chapters of the Munroe Falls Codified Ordinances, enacted in the 1980’s and 1990’s. They fall into three categories, drilling, zoning, and rights-of-way. Among the 11, four are from Chapter 1329, which specifically governs oil and gas drilling and were enacted in 1980.

### **Drilling Permit and Public Hearing Required**

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3. The Eighth District, in *Cleveland v. GSX Chemical Services, Inc.*, 8th Dist. No. 60512, 1992 Ohio App. LEXIS 2353 (May 7, 1992), a case also concerning whether R.C. Chapter 3734 preempted a municipal ordinance governing hazardous waste facilities, applied *Fondessy* and validated the ordinance, which required reporting to the local authority upon the breakdown of an emission source and subsequent release of excessive air contaminants. The Eighth District concluded that the local regulation did not impair or limit the operation of a chemical company; the local regulation included additional requirements that were “not contained in or required by the state law and were also not proscribed by state law.” *Id.* at \*18.

{¶45} Ordinance 1329.03, at the heart of this appeal, states that no one “shall commence to drill a well for oil, gas, or other hydrocarbons” within the corporate limits until such a person has “wholly complied with all provisions of this chapter and a conditional zoning certificate has been granted by Council.”

{¶46} 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 of \$800 to be paid when an application is filed.

{¶47} Ordinance 1329.05 requires a mandatory public hearing be held at least three weeks before the commencement of drilling. All property owners and residents within 1,000 feet of the well head are to be notified of the hearing. This public hearing is required before the “conditional zoning certificate” can be granted for drilling.

{¶48} Ordinance 1329.06 requires a \$2,000 performance bond at the time of an application under Chapter 1329.

#### **Zoning Certificate Required**

{¶49} Next, one of the 11 cited ordinances is from Chapter 1163, which governs zoning. Ordinance 1163.02 governs the issuing of zoning certificates and was enacted in 1995. The zoning ordinance is implicated in this case because the city requires a zoning certificate to be obtained before any “building or other structure” is erected or constructed. This ordinance also requires that a “conditional zoning certificate” be approved before a zoning certificate can be issued.

#### **Rights-of-Way Construction Permit and Excavation Permit Required**

{¶50} Six of the 11 cited ordinances govern rights-of-way matters within the city’s limit. 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. Ordinance 919.05 prohibits the obstruction of rights-of-way without the city's prior consent. Ordinance 919.06 and 919.07 govern the application and issuance of a rights-of-way construction permit. Ordinance 919.08 governs the fees for such permits. Ordinance 905.02 requires 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.

{¶51} Citing the 11 ordinances, the city claims that for a drilling activity to begin, the person seeking to drill must (1) appear at a public hearing three weeks before the drilling starts, (2) obtain a drilling permit (which is granted only after a "conditional zoning certificate" is approved by the city council), (3) receive a "zoning certificate" (which also requires the prior issuance 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 performance bond.

### **The Trial Court's Judgment**

{¶52} In its application of the home-rule analysis to these ordinances, the trial court pointed out that the ordinances governing the public roads fall clearly within the authority over public roads reserved for the local authorities in the statute, and further, that Beck Energy did not claim that the ordinances were applied to it in an unreasonable manner prohibited by the statute.

{¶53} Regarding the ordinances unrelated to the city's rights of way, the court opined that, although the General Assembly has created a uniform system for the permitting of oil and gas wells throughout the state, it did not authorize drilling companies, "permit-in-hand," to ignore any and all local regulations. Without elaborating, the court concluded local subdivisions retain a limited interest in regulating

gas and oil production in their communities. The court held that Beck Energy is enjoined from the drilling operations until it has complied with “all relevant Munroe Falls ordinances.”

### **Our Application of Home-Rule Analysis to the Munroe Falls Ordinance**

{¶54} We begin with the recognition that oil and gas drilling statute specifically states that the regulation of oil and gas activities “is a matter of general statewide interest that requires uniform statewide regulation, and [Chapter 1509] constitutes a comprehensive plan” for such activities. We are reminded by the Supreme Court of Ohio, as recently as 2008, however, 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.” *Clyde* at ¶29, citing *Am. Fin. Servs. Assn. v. City of Cleveland*, 112 Ohio St.3d 170, 2006-Ohio-6043, ¶31. When a statute embodies the General Assembly’s intent to occupy a certain field, that intent “does not trump the constitutional authority of municipalities to enact legislation pursuant to the Home Rule Amendment, provided that the local legislation is not in conflict with general laws.” *Id.* Thus, although the statute seemingly preempts local ordinances in oil and gas drilling, we still must engage in the home-rule analysis to determine whether any local regulations survive under the home-rule power. *Id.* We begin with the inquiry of whether the ordinances are local self-government or police power legislation.

{¶55} In the first step of the analysis, we consider whether the ordinances implicate a municipality’s exercise of local self-government. If the subject matter relates to a municipality’s self-governance under the analysis given by the Supreme Court of Ohio in *Beachwood, supra*, and *Kettering, supra*, the analysis ends because the

Constitution authorizes a municipality to exercise powers of local self-government within its jurisdiction. *Am Fin. Serv. Assn.* at ¶23. If, on the other hand, the ordinances implicate health, safety, or the general welfare of the public, then it is an exercise of a municipality's police power. *Clyde* at ¶30.

{¶56} Regarding Munroe Falls' ordinances that require a "conditional zoning certificate" before drilling (Ordinances 1163.02, 1329.03, 1329.04, 1329.05, 1329.06), 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. *Rispo Realty & Dev. Co., supra*, at 103, citing *Garcia, supra*, at paragraph two of the syllabus.

{¶57} Regarding the rights-of-way ordinances, the parties do not dispute that they are the city's exercise of its police power, as they seek to protect the public safety and general welfare.

{¶58} The next step in the home-rule analysis asks whether the oil and gas drilling statute is a "general law." This 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." *Smith Family* at ¶11. The city concedes it is a general law; thus, we will refrain from engaging anew in the "general law" analysis provided in *Canton, supra*, and follow the precedent from this court.

{¶59} Therefore, the issue to be resolved in this appeal boils down to whether the ordinances Munroe Falls attempts to enforce are in conflict with R.C. 1509.02. "In the event of a direct conflict, the state regulation prevails." *Smith Family* at ¶10, citing *Garcia* at 271

**Rights- of-Way Ordinances Do Not Conflict with R.C. 1509.02**

{¶60} Ordinances from Chapter 905 (Excavations) and Chapter 919 (Rights-of-Way) do not conflict with R.C. 1509.02. R.C. 1509.02 specifically leaves the regulation of rights-of-way to the municipalities, stating, “Nothing 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.” R.C. 723.01, in turn, provides “[m]unicipal corporations shall have special power to regulate the use of the streets. \* \* \* [T]he 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.”

{¶61} Munroe Falls’ rights-of-way ordinances regulate the care, supervision, and control of the city’s public roads. Therefore, they fall under the authority expressly reserved for the municipalities in R.C. 1509.02 and R.C. 723.01. By the statute’s own terms, no conflict exists.

{¶62} We now turn to the heart of this appeal: whether Munroe Falls’ drilling ordinances, which require a permit, application fees, and performance bond prior to the commencement of drilling activities, are in conflict with the statute.

### **The Drilling Ordinances Conflict With R.C. 1509.02**

{¶63} Munroe Falls’ position, with which the trial court agreed, is that R.C. 1509.02 limits the state’s authority to the “permitting, location, and spacing” of oil and gas wells. And, as Monroe Falls maintains, because none of the ordinances infringe upon “permitting, location, and spacing” of oil and gas wells, they are not in conflict with the statute. Munroe Falls bases its claim on the second sentence of R.C. 1509.02,

which states, “[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>4</sup>

{¶64} Munroe Falls’ position is difficult to maintain, because the statute goes on to state that, “this chapter and rules adopted under it constitute a 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.”

{¶65} Thus, the statute is more encompassing than Munroe Falls claims. It includes not only “permitting, locating, and spacing” but also “drilling, well stimulation, completing, and operating” of oil and gas wells. In our view, the city’s requirement for a permit directly conflicts with the statute, as it could prohibit what the state has permitted.

{¶66} In this case, the state had issued a permit to Beck Energy to drill at Mr. Willingham’s property. Munroe Falls cannot hinder the drilling activity by requiring a drilling permit. *See Sheffield, supra*. We note, additionally, that the permit remains valid for only 12 months, thus, even if the city ultimately approves of the drilling, the application process could potentially consume much of that time and effectively

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4. In *Natale v. Everflow Eastern, Inc.*, 195 Ohio App.3d 270, 2011-Ohio-4304 (11th Dist.), appellant filed a nuisance action against a neighbor who operated a drilling well. The Eleventh District held that, because appellant’s claims were based on the *location* and *operation* of the well, the local nuisance ordinance is preempted by the statute.

prevents the drilling already permitted by the state.<sup>5</sup> The drilling ordinance (Ordinance 1329.03) undeniably conflicts with the state statute.

{¶67} Indeed, the city's own Ordinance 1329.02 recognizes that its drilling ordinances cannot conflict with R.C. Chapter 1509. Ordinance 1329.02 states:

{¶68} "(a) It is hereby expressly stated to be the intent of this chapter in addition to prescribing minimum standards to make drillings as safe as possible within the Municipality and to also cause drilling activities to be carried on within the Municipality in non-industrial and industrially zoned areas, in accordance with Ohio R.C. 1509." By the city's own recognition, the intent of its drilling ordinances is to prescribe "minimum standards to make drillings as safe as possible" and to cause drilling activities to be carried out "in accordance with Ohio R.C. 1509."

{¶69} Similarly, we find the city's imposition of an \$800 local permit application fee and a \$2,000 performance bond to be in conflict with the state law, which already imposes a fee of \$2,000 and a performance bond.

{¶70} We now turn to the city's requirement for a pre-drilling public hearing.

**Public Hearing Requirement Also Conflicts with R.C. 1509.02**

{¶71} Ordinance 1329.05 requires 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 \* \* \* and the permittee shall cause all

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5. As a side note, we observe that Beck Energy's permit expired on February 12, 2012. The expiration of the permit, however, did not render the instant appeal moot, because the issue presented here is capable of repetition, yet evading review. The "capable of repetition, yet evading review" doctrine is an exception to the general rule against deciding moot issues that applies when: (1) the challenged action is too short in duration to be fully litigated before its expiration, and (2) there is a reasonable expectation that the complaining party will be subjected to the same action in the future. See *City of Munroe Falls v. Chief, Div. of Mineral Res. Mgmt.*, 10th Dist. No. 10AP-66, 2010-Ohio-4439, citing *State ex rel. Cincinnati Enquirer v. Ronan*, 124 Ohio St.3d 17, 2009-Ohio-5947. In any event, appellant filed a "Notice of Supplemental Authority" informing us that the subject permit has been extended to June 12, 2013.

property owners and residents \* \* \* within 1,000 feet of the well head to be notified of such hearing \* \* \*.” It also requires that the public meeting occur no less than three weeks before the drilling commences. It states that compliance with the hearing provision is a mandatory condition precedent to the commencement of drilling under the permit.

{¶72} The elected representatives of Munroe Falls enacted the ordinance to allow, understandably, the residents in the adjacent area most directly affected by the drilling activity to publicly voice their concerns by way of a public hearing. However, Ordinance 1329.05(d) states: “Compliance with the hearing provision of this chapter shall be mandatory conditions precedent to the commencement of drilling under the permit.” Because the public hearing provision is tied to the issuance of a drilling permit, which we have determined the city has no authority to require, Ordinance 1329.05, as drafted, is invalid as it is in conflict with R.C. 1509.02. However, the statute does not expressly prohibit a public hearing, thus, in our view, the city is within its authority to require a public hearing. Such a requirement may be achieved by a proper redrafting of the ordinance, where it is not a condition precedent to the issuance of a drilling permit.

**Zoning Ordinance Invalid to the Extent it Interferes with the State’s Permit**

{¶73} Ordinance 1163.02 was enacted 15 years after the city’s drilling ordinances, and is not a model of clarity. It 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 R.C. 1509.02 and cannot be enforced against a person seeking to drill.

## **Conclusion**

{¶74} With the state permit in hand, Beck Energy began drilling at the residence of Mr. Willingham. The city issued a Stop Work Order and sought to enjoin Beck Energy from drilling without first obtaining various permits from the city pursuant to its 11 ordinances. Stating “local communities retain a right to oversee [drilling] activities within their territory,” the trial court granted the city the injunctive relief it sought and ordered Beck Energy to comply with the ordinances cited by the city. As we have concluded in the foregoing analysis, the drilling ordinances (Ordinances 1329.03, 1329.04, 1329.05, and 1329.06) are in direct conflict with R.C. 1509.02 and therefore preempted by this state law. Moreover, the provision of the zoning ordinance (Ordinance 1163.02) cannot be applied to drilling activities as it is similarly in conflict with R.C. 1509.02. The city, however, may enforce ordinances governing rights-of-way and excavations (Ordinances 919.04, 919.05, 919.06, 919.07, 919.08, and 905.02), but cannot enforce these rights-of-way ordinances in a way that discriminates against, unfairly impedes, or obstructs oil and gas activities and operations.

{¶75} We therefore conclude the trial court abused its discretion by enjoining its drilling operations until Beck Energy has complied with all the ordinances cited by the city of Munroe Falls in its complaint.

{¶76} Therefore, we reverse and remand the matter to the trial court with instructions to enter judgment stating that Ordinances 1329.03, 1329.04, 1329.05, 1329.06, and 1163.02 are preempted by the state law and cannot be enforced against Beck Energy’s drilling activity. Beck Energy, however, must apply for pertinent permits in compliance with the ordinances governing rights-of-way and excavations (Ordinances

919.04, 919.05, 919.06, 919.07, 919.08, and 905.02), if its activity impacts in any manner the city's streets.

{¶77} The judgment of the Summit County Court of Common Pleas is reversed and remanded.

TIMOTHY P. CANNON, P.J.,  
Eleventh Appellate District,  
Sitting by assignment,

THOMAS R. WRIGHT, J.,  
Eleventh Appellate District,  
Sitting by assignment,

concur.

STATE OF OHIO

COUNTY OF SUMMIT

COURT OF APPEALS  
DANIEL M. HERRIGAN, CLERK

2013 FEB 6 AM 8:41

IN THE COURT OF APPEALS

NINTH DISTRICT

STATE OF OHIO ex rel. JACK MORRISON, JR., LAW DIRECTOR et al.,

JUDGMENT ENTRY

CV 2011-04-1897

Plaintiffs-Appellees,

CASE NO. 25953

- vs -

BECK ENERGY CORPORATION, et al.,

Defendants-Appellants.

DANIEL M. HERRIGAN  
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SUMMIT COUNTY  
CLERK OF COURTS

For the reasons stated in the opinion of this court, it is the judgment and order of this court that the judgment of the Summit County Court of Common Pleas is reversed, and this matter is remanded to the trial court for further proceedings consistent with the opinion.

Costs to be taxed against appellees.

*Mary Jane Trapp*  
\_\_\_\_\_  
JUDGE MARY JANE TRAPP  
Eleventh Appellate District,  
Sitting by assignment.

TIMOTHY P. CANNON, P.J.,  
Eleventh Appellate District,  
Sitting by assignment,

THOMAS R. WRIGHT J.,  
Eleventh Appellate District,  
Sitting by assignment.

concur.

I certify this to be a true copy of the original  
Daniel M. Herrigan, Clerk of Courts.

*Daniel M. Herrigan*  
\_\_\_\_\_  
Deputy