

## In the Supreme Court of Ohio

STATE OF OHIO ex rel. JACK )  
MORRISON, JR., Law Director, )  
City of Munroe Falls, Ohio, et al., )  
) Case No. 13-0465  
Plaintiffs-Appellants, )  
) On Appeal from the Ninth Appellate  
v. ) District Court of Appeals, Summit County,  
) Ohio (Case No. 25953)  
BECK ENERGY CORPORATION, et al., )  
) )  
Defendants-Appellees. )

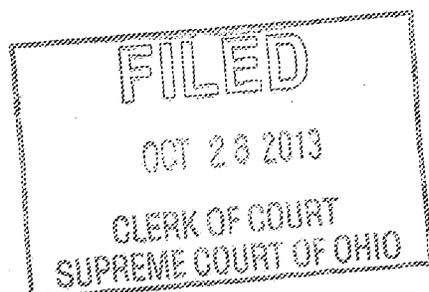
## APPELLEES' MERIT BRIEF

Jack Morrison, Jr. (0014939)  
Thomas M. Saxer (0055962)  
Thomas R. Houlihan\* (0070067)  
\**Counsel of Record*  
AMER CUNNINGHAM CO., L.P.A.  
159 S. Main Street, Suite 1100  
Akron, Ohio 44308-1322  
Tel: (330) 762-2411  
Fax: (330) 762-9918  
[Houlihan@Amer-law.com](mailto:Houlihan@Amer-law.com)

*Counsel for Plaintiff-Appellant  
City of Munroe Falls*

Barbara A. Tavaglione (0063617)  
9191 Paulding Street NW  
Massillon, Ohio 44646  
Tel: (330) 854-0052  
[bartavaglione@gmail.com](mailto:bartavaglione@gmail.com)

*Counsel for Amicus Curiae People's Oil  
and Gas Collaborative - Ohio*



John K. Keller\* (0019957)  
\**Counsel of Record*  
VORYS, SATER, SEYMOUR AND PEASE  
LLP  
52 East Gay Street  
P.O. Box 1008  
Columbus, Ohio 43216-1008  
Tel: (614) 464-6389  
Fax: (614) 719-4794  
[jkkeller@vorys.com](mailto:jkkeller@vorys.com)

*Counsel for Defendants-Appellees  
Beck Energy Corporation and Joseph  
Willingham*

Meleah Geertsma\* (PHV #4257-2013)  
\**Counsel of Record*  
Katherine Sinding (PHV #4256-2013)  
Peter Precario (0027080)  
NATURAL RESOURCES DEFENSE  
COUNCIL  
20 N. Wacker Drive, Suite 1600  
Chicago, Illinois 60606-2600  
Tel: (312) 663-9900  
Fax: (213) 234-9633  
[mgeertsma@nrde.org](mailto:mgeertsma@nrde.org)

*Counsel for Municipal Amicus Curiae*

David C. Morrison (0018281)  
MORRISON & BINDLEY  
987 Professional Parkway  
Heath, Ohio 43056  
Tel: (740) 323-4888  
Fax: (740) 323-1000  
[dm.morrisonbindley@alink.com](mailto:dm.morrisonbindley@alink.com)

*Counsel for Amicus Curiae City of Heath*

Trent A. Dougherty (0079817)  
OHIO ENVIRONMENTAL COUNCIL  
1207 Grandview Avenue, Suite 201  
Columbus, Ohio 43212-3449  
Tel: (614) 487-7506  
Fax: (614) 487-7510  
[tdougherty@theoec.org](mailto:tdougherty@theoec.org)

*Counsel for Amicus Curiae Ohio Local  
Businesses*

Richard C. Sahli (0007360)  
981 Pinewood Lane  
Columbus, Ohio 43230-3662  
Tel: (614) 428-6068  
[rsahli@columbus.rr.com](mailto:rsahli@columbus.rr.com)

and

Deborah Goldberg (PHV #4255-2013)  
EARTHJUSTICE  
156 William Street, Suite 800  
New York, NY 10038-5326  
Tel: (212) 845-7376  
Fax: (212) 918-1556  
[dgoldberg@earthjustice.org](mailto:dgoldberg@earthjustice.org)

*Counsel for Amicus Curiae Health  
Professionals*

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## STATEMENT OF FACTS

- A. Pursuant to its "sole and exclusive authority" under R.C. 1509.02, the State of Ohio issued a permit to Beck Energy to drill a gas well subject to comprehensive and detailed conditions.**

Appellee Joseph Willingham owns several acres of property located within the corporate limits of appellant City of Munroe Falls. He leased the right to produce the natural gas under his property to appellee Beck Energy Corporation, which applied to the Ohio Department of Natural Resources, Division of Mineral Resources Management (later reorganized as the Division of Oil and Gas Resources Management) for a permit to drill a gas well.

The State reviewed the application, inspected the property in the presence of City officials, and granted the drilling permit subject to seven pages of detailed terms and conditions. These include 29 separate Urbanized Area Permit Conditions imposing site-specific requirements that range from fencing, parking, and noise, to erosion control, drainage, landscaping, and restoration of the premises. The City does not question the validity of Beck Energy's state drilling permit.

The permit was issued pursuant to R.C. 1509.02, which gives the State "sole and exclusive authority to regulate the permitting, location, and spacing of oil and gas wells and production operations within the state" in order to achieve "uniform statewide regulation." Oil and gas activities had previously been subject to a patchwork of inconsistent municipal ordinances with widely varying local requirements, and a municipality could enact ordinances with such onerous or time-consuming requirements that they effectively precluded drilling operations. The General Assembly gave sole and exclusive regulatory authority to the State in R.C. 1509.02 to end the confusion,

inefficiency, and delays under the earlier patchwork of local ordinances, and to ensure that Ohio's oil and gas resources are developed on a uniform statewide basis.

State drilling permits are subject to comprehensive statutory regulations that address the concerns that the City claims to address in its municipal ordinances. These include minimum distance restrictions for gas wells relative to property lines, dwellings, other buildings, and streets and roads (R.C. 1509.021); terms and conditions that make drilling operations safe, protect public and private water supplies, address fencing and aesthetic issues, and mitigate noise (R.C. 1509.03); enforcement mechanisms to ensure compliance and to suspend drilling operations that threaten public safety or the environment (R.C. 1509.04); and mandatory insurance and surety requirements (R.C. 1509.07).

**B. The City's local ordinances prohibit Beck Energy from drilling the gas well that the State has permitted under R.C. 1509.02.**

After the State issued the permit to Beck Energy to drill the well on Mr. Willingham's property, the City issued a Stop Work Order and filed this lawsuit for injunctive relief to permanently prohibit Beck Energy from drilling the well unless the City gives its approval. The City alleged that the drilling would violate eleven of its ordinances: (1) a zoning ordinance that prohibits any construction or excavation unless approved by the City (Munroe Falls Ord. 1163.02); (2) four ordinances that prohibit oil and gas drilling unless additional requirements for a municipal permit are met (Munroe Falls Ord. 1329.03, 1329.04, 1329.05, and 1329.06); and (3) six ordinances that govern the use of the City's streets and rights-of-way for all purposes (Munroe Falls Ord. 916.04, 916.05, 916.06, 916.07, 916.08, and 905.02). The zoning ordinance and the four drilling ordinances are at issue in this appeal.

The City claims that it has the legal right to prohibit Beck Energy from drilling the well on Mr. Willingham's property that has been permitted by the State, despite the State's "sole and exclusive authority to regulate the permitting, location, and spacing of oil and gas wells and production operations" under R.C. 1509.02. The City wants to use its zoning ordinance and drilling ordinances to impose onerous and time-consuming requirements and effectively prevent all drilling. See *City of Munroe Falls v. Ohio State Dept. of Nat. Resources*, Franklin Cty. C.P. No. 09-CVF-09-14080, at 6 (Dec. 30, 2009) ("[i]t is clear from reviewing the arguments of [Munroe Falls] that **no drilling** is the only reasonable drilling that it would accept") (original emphasis), *affirmed*, 10th App. Dist. No. 10A66, 2010 Ohio 4439, *appeal denied*, 127 Ohio St.3d 1535, 2011 Ohio 376.

**C. The trial court recognized that R.C. 1509.02 is a general law but concluded that it does not conflict with the City's ordinances, even though it permits drilling that the ordinances prohibit.**

The trial court believed that the "need for local oversight" over drilling operations outweighs "Ohio's need for uniformity in oil and gas regulation throughout the state," and it permanently enjoined Beck Energy from using its state permit to drill on Mr. Willingham's property unless the City approves the drilling and issues a municipal permit. (Order, at 4.) The trial court agreed with Beck Energy that R.C. 1509.02 is a general statute and therefore prevails over conflicting City ordinances under the limits that the Ohio Constitution imposes on municipal home rule authority. (*Id.*, at 2-3.) However, it found no conflict in this case, even though the ordinances prohibit Beck Energy from drilling a well that the State has authorized under R.C. 1509.02. The trial court reached that conclusion after citing the same local public policy considerations that the General Assembly had rejected when it eliminated the previous patchwork of local drilling regulations and gave the State "sole and exclusive authority" to enforce

“uniform statewide regulation” of oil and gas operations in R.C. 1509.02. According to the trial court:

The ordinances were enacted to protect Munroe Falls residents' interests, and if defendants are allowed to flout these regulations, the city and its residents would suffer irreparable harm .... Ohio 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 regulation.

(*Id.*, at 2, 4.) The trial court did not explain how a "uniform system of permitting" is possible if operators must comply with non-uniform local permit requirements.

**D. The Court of Appeals held that the City's zoning and drilling ordinances “undeniably conflict” with the State's sole and exclusive authority over oil and gas drilling permits and are preempted.**

The Court of Appeals reversed the trial court's ruling with respect to the City's zoning ordinance and four drilling ordinances. (Opinion, 2013 Ohio 356.) It found that these ordinances prohibit Beck Energy from drilling the well that the State specifically permitted on Mr. Willingham's land and therefore "are in direct conflict" with R.C. 1509.02. (*Id.*, at ¶ 74.) Accordingly, the Court of Appeals reversed the order granting injunctive relief and instructed the trial court to enter judgment that the City's zoning ordinance and its four drilling ordinances "are preempted by the state law and cannot be enforced against Beck Energy's drilling activity." (*Id.*, at ¶ 76.) It also held that Beck Energy must comply with the six municipal street and right-of-way ordinances, which the statute expressly exempts from the State's exclusive authority as long as they are not enforced "in a manner that discriminates against, unfairly impedes, or obstructs oil and gas activities and operations." R.C. 1509.02 (*Id.*, at ¶¶ 74, 76.)

The City now appeals from the portion of the Court of Appeals' decision that found a conflict between R.C. 1509.02 and its zoning ordinance (Proposition of Law

One) and between R.C. 1509.02 and its four drilling ordinances (Proposition of Law Two). Beck Energy did not appeal from the portion of the decision that found no conflict with the nondiscriminatory enforcement of the right-of-way ordinances.

## ARGUMENT

### ***Appellants' Proposition of Law One:***

*R.C. Chapter 1509 does not divest municipalities of their power to enact and enforce zoning laws.*

### ***Appellees' Counter-Proposition of Law:***

*Section 3, Article XVIII of the Ohio Constitution preserves the State's authority to enact general laws, such as R.C. 1509.02, that prevail over conflicting local zoning ordinances.*

In its first proposition of law, the City argues that the Court of Appeals erred in finding that Munroe Falls Ordinance 1163.02 conflicts with state law. The City contends that R.C. 1509.02 does not divest Ohio municipalities of the authority to utilize a local zoning ordinance to regulate the permitting and location of gas wells. But that statute gives "sole and exclusive authority to regulate the permitting, location, and spacing of oil and gas wells and production operations" to the Ohio Department of Natural Resources, 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....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, and operating of oil and gas wells within this state, including site construction and restoration, permitting related to these activities, and the disposal of wastes from those wells.

R.C. 1509.02 (emphasis added). The statute contains one limited exception to the State's exclusive authority that allows some local regulation of streets and rights-of-way:

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.

(*Id.*)

The City contends that R.C. 1509.02 has no effect on its authority to enact and enforce local ordinances that regulate the permitting and location of gas wells and are unrelated to streets and rights-of-way. The City's merits brief never quotes the text of the statute, set forth above, which expressly refutes its contention. Instead, the City argues or implies that (1) local zoning ordinances trump all state statutes; (2) local zoning ordinances trump this particular statute because it purportedly is not a general law; and (3) there is no conflict between the City's zoning ordinance and the statute. The Court should reject each of these arguments for the following reasons.

**A. The Ohio Constitution gives the General Assembly the authority to enact general laws that prevail over conflicting municipal zoning ordinances.**

The City's merit brief begins with a lengthy exposition on municipal zoning powers that suggests that local zoning ordinances take precedence over all state statutes that define or regulate permissible uses of real property. It believes that "[l]ocal authorities are in the best position" to decide "whether ... their cities can accommodate ... oil and gas drilling." (Appellant's Merit Brief, at 3, 5.) According to the City, "[t]his power of the municipalities ... flows directly from Section 3, Article XVIII of the Ohio Constitution," and "this Court [has previously] found that cities had a

permanent right to 'limit the use of land in the interest of the public welfare.'" (*Id.*, at 3-4, 5, quoting *Smith v. Juillerat*, 161 Ohio St. 424, 428, 119 N.E.2d 611 (1954).)

However, the City ignores the language of the constitutional provision that it invokes, which limits rather than expands municipal zoning powers, and it fails to mention a crucial fact that distinguishes *Smith, supra*, from the present case. In addition, the City never cites the legal test this Court has adopted to determine whether a state statute takes precedence over a municipal ordinance.

**1. The Ohio Constitution prohibits municipalities from enforcing local zoning ordinances in ways that conflict with general state statutes.**

The City acknowledges that "[the] power of the municipalities to engage in land use planning [i.e., zoning] flows directly from Section 3, Article XVIII of the Ohio Constitution." (Appellant's Merit Brief, at 3-4.) However, it ignores the language of that provision, which actually restricts the power of municipalities to enact zoning ordinances:

Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their [municipal] limits **such local police, sanitary and other similar regulations, as are not in conflict with general laws.**

Ohio Constitution, Section 3, Article XVIII (emphasis added).

"The enactment of zoning ordinances is an exercise of the police power, not an exercise of local self-government," and zoning ordinances therefore "are subject to the constitutional prohibition that they not be 'in conflict with general law.'" *Garcia v. Siffrin Residential Assn.*, 63 Ohio St.2d 259, 270, 407 N.E.2d 1369 (1980), quoting *State ex rel. Klapp v. Dayton Power & Light Co.*, 10 Ohio St.2d 14, 225 N.E.2d 230 (1967). See also *City of Canton v. State of Ohio*, 95 Ohio St.3d 149, 151, 2002 Ohio 2005, ¶¶ 9-10,

766 N.E.2d 963 (holding that municipalities can constitutionally enact zoning ordinances only if they "are not in conflict with general laws").

Accordingly, it is simply not true that Ohio municipalities have constitutional authority to enact and enforce local zoning ordinances that conflict with general state laws. The City's contention that local authorities "are in the best position" and "are best equipped" to regulate local land uses is a policy argument that must be directed to the legislative branch under Ohio's Constitution, which mandates that local zoning ordinances give way to conflicting general laws enacted by the General Assembly.

**2. The City ignores the legal test that this Court employs to determine whether a state statute prevails over local zoning ordinances.**

The City claims that this Court's ruling in *Smith v. Juillerat, supra*, decreed the primacy of municipal zoning ordinances over conflicting state statutes. But the *Smith* Court did not hold that the local ordinance at issue in that case, which prohibited coal surface mining, took precedence over state law; there was no home-rule issue for the Court to decide because the statute did not give the State exclusive authority to regulate surface mining operations. See R.C. 1514.023 ("[n]othing in this chapter or rules adopted under it shall be construed to prevent any county, township, or municipal corporation from enacting, adopting, or enforcing zoning resolutions or ordinances" regulating surface mining). The statute that regulates oil and gas drilling does not contain that language; on the contrary, R.C. 1509.02 expressly gives "sole and exclusive authority to regulate" oil and gas operations to the State and proclaims the need for "uniform statewide regulation." The *Smith* decision does not support the City's position in this appeal.

The City's merits brief fails to mention the legal test that Ohio courts must use to determine whether a state statute preempts a municipal zoning ordinance. That legal test implements the constitutional limits on municipal home-rule authority in Section 3, Article XVIII, by providing 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.

*City of Canton, supra*, 95 Ohio St.3d at 151, 2002 Ohio 2005 at ¶ 9. Under this test, the City's zoning ordinance must give way to the State's exclusive authority to regulate oil and gas operations under R.C. 1509.02 if the ordinance is an exercise of municipal police powers, the statute is a general law, and the ordinance and the statute conflict.

The City has always conceded that its zoning ordinance is an exercise of its municipal police powers. (See Appellants' Mem. in Support of Jurisdiction, at 5.) It now claims that R.C. 1509.02 is not a general law because there is no oil and gas drilling in some areas of Ohio, but it did not make that argument in the lower courts, and in any event this geographical argument has been rejected by the Court, as explained below. Finally, the City contends that there is no conflict between its zoning ordinance and R.C. Chapter 1509, but that argument also fails.

**B. R.C. Chapter 1509 is a general law granting the State "sole and exclusive authority" to regulate the permitting and location of oil and gas wells and therefore prevails over conflicting municipal zoning ordinances.**

The Ohio General Assembly has expressly given the State "sole and exclusive authority to regulate the permitting, location, and spacing of oil and gas wells and production operations within the state," and has implemented this "uniform statewide regulation" through "a comprehensive plan with respect to all aspects of the locating,

drilling...and operating of oil and gas wells within this state...." (R.C. 1509.02.) The City nevertheless claims that the statute is not a general law.

The Court should reject that claim and hold that R.C. 1509.02 falls squarely within the legal definition of a general law:

[T]o 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.

*City of Canton, supra*, 95 Ohio St.3d at 153, 2002 Ohio 2005 at ¶ 21. The Court of Appeals properly held that R.C. 1509.02 is a general law under this legal definition, for the reasons set forth below.

- 1. The City waived its present argument that R.C. 1509.02 is not a general law by failing to raise that argument in the Common Pleas Court or the Court of Appeals.**

The City argues, for the first time in this litigation, that R.C. 1509.02 is not a general law because it fails to meet the second prong of the four-part legal test adopted in *City of Canton, supra*. (Appellant's Merit Brief, at 18.) The City had conceded in the Court of Common Pleas that "prongs 1, 2 and 4" of this test "may be met" and argued only that "prong 3 is not [met]," *i.e.*, the statute purportedly does not involve police, sanitary, or similar regulations. (See Memorandum of Law in Support of Preliminary and Permanent Injunction, April 18, 2011, at 13.) The Court of Common Pleas disagreed and held that R.C. Chapter 1509 is a general law, citing *Smith Family Trust v. City of Hudson Board of Zoning and Building Appeals*, 9th Dist. No. C.A. 24471, 2009 Ohio 2557, 2009 Ohio App. Lexis 2251, ¶¶ 10-11, in which the Ninth District Court of

Appeals held that R.C. Chapter 1509 is "unquestionably a general law" that "prescribe[s] a rule of conduct upon citizens generally" and "operate[s] with general uniform application throughout the state under the same circumstances and conditions."

In the Court of Appeals, the City again argued that R.C. 1509.02 is not a general law because it fails to meet "prong 3" of the legal test in *City of Canton*. (See Brief of Appellees, August 22, 2011, at 17.) Once again, the City conceded that "prongs 1, 2 and 4" of this legal test "may be met"; it never claimed that the statute does not apply to all parts of the state alike under the second prong. (*Id.*) The Court of Appeals rejected the City's argument that the third prong of the test had not been met and reiterated that the ruling in *Smith Family, supra*, "already determined" that "R.C. Chapter 1509 et seq ... is unquestionably a general law." (Opinion, *supra*, at ¶ 58.)

In short, the City did not contest, in either the Court of Common Pleas or the Court of Appeals, that R.C. 1509.02 applies to all parts of the state alike and therefor meets the second prong of the legal definition of a general law. However, the City now argues, for the first time, that "R.C. 1509.02 cannot be considered a general law because it only applies to half the state." (Appellant's Brief, at 19) The lower courts have had no opportunity to rule upon this argument, and the alleged error of law thus never occurred; it cannot be "reviewed" by this Court, for the first time, in this appeal.

**2. R.C. 1509.02 is a general law that applies and operates uniformly throughout Ohio.**

The City's new argument, that R.C. 1509.02 fails to meet the second prong of the legal definition of a general law, is incorrect as a matter of settled Ohio law even if it has not been waived. The City claims that R.C. Chapter 1509 does not "apply to all parts of the state alike and operate uniformly throughout the state" because no applications for

oil and gas state drilling permits were filed in 2011 for property located in western Ohio. (Appellant's Brief, at 19-20.) According to the City, this means that, "practically speaking, the ODNR was only provided the right to supersede local zoning for certain cities" located in one part of the state when the General Assembly enacted R.C. 1509.02. (*Id.*, at 20.) This argument is wrong for several reasons.

**a. This Court has expressly rejected the argument that a statute is not a general law if it regulates activities that are currently conducted in only some areas of Ohio.**

This Court previously rejected the same geographical argument that the City makes here. In *Clermont Environmental Reclamation Co. v. Wiederhold*, 2 Ohio St.3d 44, 442 N.E. 2d 1278 (1982), the Court held that a state statute that regulated operation of hazardous waste facilities was a general law that applied to all parts of the state alike, and thus preempted conflicting municipal ordinances, even though those facilities are geologically feasible in only some parts of the state:

[T]he General Assembly may limit the application of a statute to a given class of people or objects, even if the result of the classification is that the statute does not operate in all geographic areas within the state, so long as the classification is a reasonable one and the statute operates equally upon every person and locality within such classification ....

[I]n enacting R.C. 3734.05(D)(3), the General Assembly evidenced the intent that such measure would operate uniformly through the state .... The General Assembly has created no classifications in this section; rather, it has passed a statute which by its language applies uniformly throughout the state .... The fact that some areas of the state may not ultimately be approved by the board for the situs of such facilities because of the ecological, geological and other factors being considered, makes the operation of the law none the less uniform .... [W]e hold that R.C. 3734.05(D)(3) is a "law, of a general nature," or a "general law" .... [S]uch section being a general law enacted within a reasonable exercise of the police power of the state takes

precedence over laws in conflict therewith enacted by municipalities pursuant to home rule power granted by Section 3, Article XVIII of the Ohio Constitution.

2 Ohio St.3d at 49-50 (citations omitted).

The City maintains that the Court's ruling in *Clermont, supra*, is not controlling here due to "two key differences" in the cases. (Appellant's Merit Brief, at 20.) First, it points out that the statute at issue in *Clermont* "contains an express statement displacing local zoning restrictions." (*Id.*) But that is irrelevant; by the City's reasoning, the statute in that case would "practically speaking" displace zoning restrictions only in areas of the state where construction of a hazardous waste facility is geologically feasible, and thus would not be a general law, yet this Court specifically held that it is. The statute at issue in the present case, R.C. 1509.02, is similarly a general law even if drilling for oil and gas is geologically feasible only in some areas of the state at the present time. Moreover, the statute *expressly* states that regulation of oil and gas activities "is a matter of general statewide interest that requires uniform statewide regulation." Here, as in *Clermont*, "a statute which by its language applies uniformly throughout the state" is "a general law". 2 Ohio St.3d at 50.

The City argues that there is a second "key difference" between the *Clermont* case and this case in that "every part of the State has the necessary precursor to a landfill - land," while "only part of the State" is geologically suitable for oil and gas operations. (Appellant's Merit Brief, at 20.) But the *Clermont* Court specifically noted that the land in some areas of the state is geologically unsuitable for hazardous waste disposal (just as some areas of the state are geologically unsuitable for oil and gas drilling operations), and it nevertheless held that the statute at issue is a general law: "[t]he fact that some areas of the state may not ultimately be approved by the board for

the situs of such facilities because of the ecological, geological and other factors...makes the operation of the law none the less uniform". 2 Ohio St. 3d at 50. In short, this Court expressly rejected the City's present argument that a statute is not a general law unless it regulates an activity that currently occurs everywhere in Ohio.

The Attorney General of Ohio has agreed with Beck Energy and the lower courts that R.C. 1509.02 "is a general law, so any conflicting City ordinances must yield." (Amicus Curiae Brief of the State of Ohio in the Court of Appeals, Aug. 22, 2011, at 12.) It notes that the statute "provides a comprehensive scheme governing oil and gas drilling in Ohio" and "states its intent to be a uniform scheme, and uniformity is lost if cities may impose extra and different permit requirements. Thus, the statute is a general law." (*Id.*, at 14.)

The City's belated argument that R.C. 1509.02 is not a general law because oil and gas drilling is not currently conducted in every part of the State has been rejected by the Court's previous decision in *Clermont, supra*, and by the Attorney General. It should be rejected by the Court even if it was not waived by the City.

**b. The City's argument would preclude State regulation of any activity that does not occur everywhere in Ohio at the present time.**

Even if the City were correct that "oil and gas is not found in economically viable quantities" in some parts of Ohio at the present time, its argument that R.C. 1509.02 applies only to some parts of the State assumes that drilling will never be feasible in other parts of the State. There is no basis for that assumption; Ohio has historically had oil and gas wells throughout the state. See Ohio Department of Natural Resources, Division of Geological Survey, *Oil and Gas Fields Map of Ohio* (2004). If technological advances in drilling techniques, increases in the market price of oil and gas, or future

discoveries of oil and gas reserves increase the viability of drilling in western Ohio -- as they have in eastern Ohio in recent years -- the new drilling operations will be subject to exactly the same state regulations as drilling operations in eastern Ohio, and R.C. 1509.02 will preempt any conflicting local zoning regulations as a matter of constitutional law. The statute thus applies to all parts of the State alike and operates uniformly throughout Ohio.

The City's argument is also illogical and unworkable. By its reasoning, R.C. 1509.02 would not apply to all parts of the State, and thus would not be a general law, if there is a single county in Ohio, or even a single parcel of property, where drilling is not feasible. There would be no general laws at all, and municipalities would be free to override state statutes regulating any activity as long as they could identify one place in Ohio where that activity does not presently occur.

No Ohio court has ever endorsed the City's argument, for good reasons, and it was rejected by this Court in *Clermont, supra*. If the Court does not find that the City has waived this argument, it should hold as a matter of law that R.C. Chapter 1509 is a general law for home-rule purposes.

**C. The City's zoning ordinance conflicts with the State's sole and exclusive authority to regulate the permitting and location of oil and gas wells under R.C. Chapter 1509.**

The City also argues that its zoning ordinance does not conflict with R.C. Chapter 1509.02 and is therefore a lawful exercise of municipal home rule authority even if that statute is a general law. It contends that the State's "authority [under R.C. 1509.02]...is limited to the technical concerns of safe well drilling," and that local zoning authorities have the right to determine "where those operations may take place."

(Appellant's Brief, at 14.) The City's argument ignores the express language of the statute, which conflicts with the City's zoning ordinance in two separate ways.

**1. R.C. 1509.02 does not limit the State's sole and exclusive authority to "technical issues" and does not exempt local zoning ordinances.**

The express language of R.C. 1509.02 gives the State "sole and exclusive authority to regulate the permitting, location, and spacing of oil and gas wells and production operations within the state" but gives local officials some authority to regulate their streets and rights-of-way. This exception shows that the General Assembly knew how to limit the State's authority in this area when it intended to do so, and it did not include an exception allowing municipalities to decide the location of oil and gas wells. On the contrary, R.C. 1509.02 provides that oil and gas operations are "a matter of general statewide interest that requires uniform statewide regulation" and creates "a comprehensive plan with respect to all aspects of the locating, drilling...and operating of oil and gas wells." (*Id.*)

The General Assembly enacted R.C. 1509.02 in response to the inefficiency, waste, and delays that occurred under the previous patchwork of inconsistent local ordinances, which had allowed municipalities to effectively preclude drilling for oil and gas, just as the City has attempted to do in this case. By adopting a comprehensive plan of uniform state regulation, the legislature ensured that oil and gas resources throughout the State would be developed on a uniform basis. The City does not claim that local authorities are "in the best position" to dictate Ohio's natural resources policies. In fact, it has previously admitted that the State has expertise with respect to oil and gas drilling and that it does not. (See Beck Energy Opp. to Injunctive Relief, Apr. 18, 2011, Exhibits E, F, and G.)

The City claims that the General Assembly intended to regulate only the "technical aspects" of drilling, while leaving local officials the power to decide whether a well may be drilled at all. But the statutory language creates no such exception to its "uniform statewide regulation." If it did, municipalities would be able to delay or prohibit drilling under the same patchwork of inconsistent regulations that R.C. Chapter 1509 was intended to eliminate. The legislature chose to have the State, rather than city councils, control Ohio's energy policy.

**2. The State's regulatory permit process under R.C. 1509.02 considers safety, aesthetic, and other concerns addressed by the City's ordinance.**

The City argues next that the General Assembly must have left all oil and gas regulation that involves traditional zoning concerns to local officials, because those issues are not considered by the State when it approves drilling permits. The City's premise is factually incorrect. State drilling permits are subject to comprehensive statutory regulations and administrative rules, including minimum distance restrictions on the locations of oil and gas wells relative to property lines, neighboring residences or other buildings, and streets and roads (R.C. 1509.021); terms and conditions that make drilling operations safe, protect public and private water supplies, require fencing and screening for aesthetic and safety reasons, and mitigate noise (R.C. 1509.03); enforcement mechanisms to ensure compliance and to suspend drilling operations that threaten public safety or damage natural resources (R.C. 1509.04); and mandatory insurance and surety requirements (R.C. 1509.07).

In the present case, State officials reviewed Beck Energy's permit application, inspected the property in the presence of City officials, and issued the drilling permit subject to seven pages of detailed terms and conditions, including 29 separate

Urbanized Area Permit Conditions that impose site-specific requirements ranging from parking, fencing, and noise mitigation, to erosion control, drainage, restoration of the premises, and landscaping. It is simply untrue that ODNR "is not empowered to promulgate rules considering the existing uses of land, protecting the property values of neighbors, maintaining neighborhood aesthetics, or any other lawful considerations of local zoning." (Appellant's Merit Brief, at 13.)

**3. The City's zoning ordinance conflicts with R.C. 1509.02 by prohibiting drilling that the State has permitted.**

As explained above, R.C. Chapter 1509 is not limited to the "technical aspects" of oil and gas drilling, and it does not authorize local authorities to decide whether a state-permitted well can be drilled. The City's zoning ordinance impermissibly conflicts with R.C. 1509.02 under settled Ohio law because it prohibits Beck Energy from drilling a well that the State has permitted it to drill.

A conflict exists for home rule purposes whenever "the ordinance prohibits that which the statute permits." *Ohioans for Concealed Carry, Inc. v. City of Clyde*, 120 Ohio St.3d 96, 2008 Ohio 4605, at ¶ 53, 896 N.E.2d 967, citing *Struthers v. Sokol*, 108 Ohio St. 263, 140 N.E. 519 (1923), paragraph 2 of syllabus. That is precisely the effect of the City's zoning ordinance in this case. Indeed, the City relied on the ordinance when it filed this lawsuit for a permanent injunction to prohibit Beck Energy from drilling the gas well that the State permitted. See also *Am. Fin. Servs. Assn. v. City of Cleveland*, 112 Ohio St.3d 170, 2006 Ohio 6043, at ¶ 46, 858 N.E.2d 776 ("local ordinances that seek to prohibit conduct that the state has authorized are in conflict with the state statutes and are therefore unconstitutional").

More specifically, Ohio courts have consistently held that municipal ordinances that prevent someone from exercising rights granted by a state-issued permit are in conflict with state law. In *Village of Sheffield v. Rowland*, 87 Ohio St.3d 9, 12, 1999 Ohio 217, 716 N.E.2d 1121, this Court found such a conflict where local ordinances prohibited the defendant from operating a construction and demolition facility that the State had licensed under R.C. Chapter 3714:

Upon compliance with the requirements of R.C. Chapter 3714 and the issuance of a license, the operator of a proposed construction and demolition facility is authorized to establish such a facility. R.C. 3714.06 (A). However, it is readily apparent that the Sheffield Village Codified Ordinances prohibit such a facility. Thus, the ordinances prohibit what the statute permits and are therefore in conflict with R.C. Chapter 3714.

Similarly, in *Fondessy Enterprises, Inc. v. City of Oregon*, 23 Ohio St.3d 213, 217, 492 N.E.2d 797 (1986), this Court allowed a city to monitor activities at a landfill that operated under a state permit, but it specifically noted that "if the instant city ordinance would have required that Fondessy apply for a city permit for construction or operation of its landfill, the instant city ordinance would be directly in conflict with the first part of R.C. 3734.05 (D)(3) [which authorizes the State to license landfills] and would be declared invalid." In the present case, the City's zoning ordinance required Beck Energy to obtain a City permit to construct and drill a well and thus is directly in conflict with R.C. 1509.02.

**4. The City's zoning ordinance conflicts with R.C. 1509.02 by interfering with the State's sole and exclusive authority and comprehensive plan to regulate oil and gas drilling.**

As described above, the City's zoning ordinance conflicts with R.C. 1509.02 because it prohibits drilling that the State has specifically permitted under that statute.

*City of Clyde, supra*. It also conflicts with the statute for home rule purposes in a second way: it infringes upon the State's exclusive statutory authority over matters that require uniform, statewide regulation. The General Assembly gave the State "sole and exclusive authority" in this area because it decided that proper development of Ohio's oil and gas resources "requires uniform statewide regulation" and a "comprehensive plan." R.C. 1509.02. A conflict exists for home rule purposes when municipal ordinances are incompatible with "the uniform application of a statewide statutory scheme." *Am. Fin. Servs. Assn. v. City of Cleveland, supra*, at ¶ 43. See also *Viola Park, Ltd. v. City of Pickerington*, 5th Dist. Nos. 2006 CA 00017, 2006 CA 00030, 2007 Ohio 2900, ¶¶ 49-50, 2007 Ohio App. Lexis 2669, *appeal denied*, 115 Ohio St.3d 1473, 2007 Ohio 5735, 875 N.E.2d 627 (2007), in which the Court of Appeals struck down municipal ordinances that allowed a city to vacate recorded plats for reasons that were not included in the state statutes that regulate plats, after finding that "there is a need for uniformity, state-wide, in the platting process."

In the present case, the City's zoning ordinance conflicts with state law not only by prohibiting drilling that the State has permitted, but also by imposing restrictions that are incompatible with the State's need for a uniform, statewide, comprehensive regulatory plan. The Court of Appeals correctly found that the City's zoning ordinance conflicts with R.C. 1509.02 for home rule purposes, and its ruling should be affirmed.

***Appellants' 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.*

***Appellees' Counter-Proposition of Law:***

*Municipal ordinances that attempt to impose additional requirements on oil and gas drilling authorized by the State of Ohio conflict with R.C. Chapter 1509.*

In its second proposition of law, the City argues that its four drilling ordinances do not conflict with R.C. Chapter 1509 and are thus within its home rule authority. Once again, the City ignores the legal test that this Court has adopted to determine whether a state statute takes precedence over a municipal ordinance. See *City of Canton, supra*, 95 Ohio St.3d at 151, 2002 Ohio 2005 at ¶ 7 (holding that a statute preempts a local ordinance "when (1) the ordinance is in conflict with the statute, (2) the ordinance is an exercise of the police power ... and (3) the statute is a general law").

The City does not dispute that its drilling ordinances (Munroe Falls Ordinances 1329.03, 1329.04, 1329.05 and 1329.06) are exercises of its police power, and R.C. 1509.02 is a general law for the reasons discussed above. In its argument in support of this Proposition of Law, the City argues only that its drilling ordinances do not conflict with that statute. The City's argument rests entirely on a misreading of this Court's decision in *Fondessy Enterprises, Inc. v. City of Oregon*, 23 Ohio St.3d 213, 492 N.E. 2d 797 (1986), and should be rejected.

**A. The City misreads this Court's decision in *Fondessy Enterprises*, which involved a different statute and different ordinances.**

**1. The City's drilling ordinances do not impose fees for emergency response or collect information.**

The City's contention that its drilling ordinances do not conflict with R.C. 1509.02 is based solely upon *Fondessy Enterprises, supra*. The statute in that case, R.C. 3734.05, expressly prohibits municipal ordinances that impair the authority granted in a state permit to operate a hazardous waste facility, and the Court held that it did not

preempt an ordinance that merely required those facilities to provide records of the wastes they handled and to pay a fee to the City for environmental protection. The statute and ordinances in that case bear no resemblance to the statute and ordinances in the present case.

None of the drilling ordinances at issue in this case require Beck Energy to provide information to the City or to pay fees for environmental protection or emergency responses. For example, Munroe Falls Ordinance 1329.03(b) prohibits operators from drilling more than two wells at once -- a restriction that has nothing to do with providing information or obtaining fees for emergency response services. In fact, none of the City's drilling ordinances require any information or impose any fees related to safety or the environment:

1. Ordinance 1329.03 provides that no well can be drilled unless the City first grants a permit (a "conditional zoning certificate"), and that no operator can obtain a permit for more than one well at a time.
2. Ordinance 1329.04 requires operators to pay a fee of \$800 to apply for a city permit and provides that the fee must be paid even if no well is ever drilled.
3. Ordinance 1329.05 requires a public hearing, with notice by mail and publication, before the City grants a permit to drill a well, but does not require the driller to provide any information.
4. Ordinance 1329.06 requires a city permit applicant to pay a \$2,000 "performance bond" that will be refunded after drilling and clean-up are completed.

(Appellant's Appendix, at 103-106.)

The City claims that the \$800 permit fee "can be used to fund safety and emergency response forces, as in *Fondessy [supra]*," and that all of the ordinances "are grounded in educating the public ... so the city or its citizens can be prepared to

respond in the event of a mishap." (Appellant's Brief, at 29.) The City never quotes the actual text of the City's drilling ordinances because they do not impose fees for emergency response or require information that will "educate the public" about how to "respond in the event of a mishap." Instead, they require a municipal permit for drilling operations, establish a purely local procedure to determine whether a city permit should be approved, require a fee even if no well is drilled and no "mishap" is possible, and require a performance bond that is used for site restoration (or refunded to the driller) rather than for emergency response costs.

In short, the City's drilling ordinances bear no resemblance to the ordinance at issue in *Fondessy*, which required the landfill operator "to keep complete and accurate records ... showing the amount, type, and volume of hazardous waste disposed within the facility" and to provide that information to the municipal clerk each month with a fee that is collected "for the sole purpose of generating sufficient funds in order to protect the environmental safety, health and welfare of its citizens." 23 Ohio St.3d at 213. As this Court pointed out, the ordinance "merely ... requir[ed] administrative records to be kept daily and provided to [the city] monthly." *Id.*, at 217.

In the present case, the City's ordinances do not require well operators to keep records or to provide information of any kind. Instead, they do the very thing that this Court said they cannot do, *i.e.*, create a municipal permit process that requires the City's approval before any drilling operations are allowed. The Court was clear on this point in *Fondessy*:

[I]f the instant city ordinance would have required that Fondessy apply for a city permit for construction or operation of its landfill, the instant city ordinance would be directly in

conflict with the first part of R.C. 3734.05(D)(3) and would be declared invalid.

*Id.* The Court upheld the ordinance at issue in *Fondessy* because it "does not constitute an additional condition for the construction or operation of the hazardous waste facility, nor does the ordinance alter, impair, or limit the authority of the landfill operators to operate said facility" under their state-issued permit. *Id.*, at 218.

In the present case, the City's drilling ordinances do both of those things: they expressly require operators to obtain a city permit and to pay fees as an additional condition for drilling a well under a state permit, and thus limit the authority to drill that was granted by the state permit. See Munroe Falls Ord. 1329.03 ("[n]o person, corporation or other entity shall commence to drill a well for oil, gas, or other hydrocarbons ... until ... a conditional zoning certificate has been granted by Council"). Accordingly, the reasoning and holding of the Court in *Fondessy* do not apply to the drilling ordinances at issue in this case.

**2. Unlike the statute in *Fondessy*, R.C. 1509.02 grants the State sole and exclusive authority to regulate drilling operations.**

In addition to the differences between the ordinances in *Fondessy* and in this case, the statute at issue here, R.C. 1509.02, is much broader than the statute at issue in that case, which prohibited any ordinance that "alters, impairs, or limits the authority granted in the [state-issued] permit." R.C. 3734.05(D)(3). The City concedes that statute at *Fondessy* "set forth an express statement of what municipalities were not permitted to regulate," and "that language became the standard by which a conflict was measured." (Appellant's Brief, at 28.) In *Fondessy*, the monitoring ordinance did not "alter, impair, or limit" the operation of the waste facility and therefore did not "prohibit anything permitted by [the statute]." 23 Ohio St.3d at 217.

In the present case, however, R.C. 1509.02 gives the State "sole and exclusive authority to regulate the permitting, location and spacing of oil and gas wells and production operations" and specifies that "regulation of oil and gas activities is a matter of general statewide interest that requires uniform statewide regulation." Instead of listing the specific things that municipal ordinances cannot do, as in *Fondessy*, this statute prohibits any municipal interference with the State's sole and exclusive authority to regulate the permitting and location of oil and gas wells, with a single limited exception for some municipal regulation of streets and rights-of-way. The City's suggestion that the statutory reference to "location" gives the State only the limited authority to determine whether a proposed well is "located in geologically appropriate areas" (Appellant's Brief, at 28) adds restrictive language to the statute that the General Assembly did not enact and flies in the face of the "sole and exclusive" authority it granted to the State. The Court's analysis of the statute at issue in *Fondessy* does not apply to the very different statute and ordinances at issue in the present case.

**B. The City ignores the legal tests this Court has adopted to determine whether municipal ordinances conflict with a State statute.**

The City insists that its drilling ordinances do not conflict with R.C. 1509.02, but it never addresses the legal test that this Court uses to determine whether an ordinance conflicts with a statute. As discussed above, a conflict exists for home rule purposes when "the ordinance prohibits that which the statute permits." *Ohioans for Concealed Carry, supra*, 120 Ohio St.3d at 105, 2008 Ohio 4605 at ¶ 53, citing *Struthers v. Sokol*, 108 Ohio St. 263, 140 N.E. 519 (1923). See also *Village of Sheffield v. Rowland*, 87 Ohio St.3d 9, 12, 1999 Ohio 217, 716 N.E.2d 1121 (where the State has issued a license to construct and operate a construction and demolition facility, and municipal

ordinances prohibit such a facility, "the ordinances prohibit what the statute permits and are therefore in conflict" for home rule purposes). In the present case, the ordinances prohibit state-permitted drilling unless additional municipal requirements are met and the City's approval is obtained -- a head-on collision with the statute and a clear conflict under Ohio law. Indeed, the City cited these drilling ordinances when it issued a Stop Work Order and prohibited Beck Energy from drilling the well that the State had permitted.

The City's drilling ordinances also conflict with R.C. 1509.02 in a second way. As described above, a conflict exists for home rule purposes when municipal ordinances are incompatible with "the uniform application of a statewide statutory scheme." *Am. Fin. Servs. Assn.*, *supra*, 112 Ohio St.3d at 179, 2006 Ohio 6043 ¶ 43. Here, R.C. 1509.02 provides that "regulation of oil and gas activities is a matter of general statewide interest that requires uniform statewide regulation" under a "comprehensive plan". Non-uniform municipal drilling ordinances that impose local regulation are inherently incompatible with comprehensive uniform statewide regulations.

The City's drilling ordinances plainly conflict with R.C. 1509.02 in both of these ways. They purport to prohibit drilling that the State has permitted, and they assert municipal authority over activities for which the State has adopted comprehensive, uniform state-wide regulations. The Court of Appeals correctly found that the four drilling ordinances impermissibly conflict with state law, and this Court should affirm that ruling.

### **CONCLUSION**

The Ohio General Assembly has made the public policy decision that the development of Ohio's oil and gas resources should be regulated at the state level

rather than by local officials. The City wants to turn back the clock to the patchwork of local control and regulation that the General Assembly replaced with a comprehensive plan of uniform statewide regulation under the sole and exclusive authority of the State. The City must address its concerns to the legislature, not the judiciary.

The Court of Appeals applied settled principles of Ohio law and properly found that the City's zoning and drilling ordinances conflict with R.C. 1509.02 and therefore exceed the constitutional limits of its home rule authority. The Court of Appeals committed no errors of fact or law and its ruling should be affirmed by this Court.

Respectfully submitted,

  
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John K. Keller\* (0019957)

*\*Counsel of Record*

VORYS, SATER, SEYMOUR AND PEASE LLP  
52 East Gay Street  
P.O. Box 1008  
Columbus, Ohio 43216-1008  
Telephone: (614) 464-6389  
Facsimile: (614) 719-4794  
[jkeller@vorys.com](mailto:jkeller@vorys.com)

*Counsel for Defendants-Appellees  
Beck Energy Corporation and Joseph  
Willingham*

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing was served upon the following persons, by regular U.S. Mail on this 28<sup>th</sup> day of October, 2013:

Jack Morrison, Jr.  
Thomas M. Saxer  
Thomas R. Houlihan  
AMER CUNNINGHAM CO., L.P.A.  
159 S. Main Street, Suite 1100  
Akron, Ohio 44308-1322

*Counsel for Plaintiff-Appellant  
City of Munroe Falls*

Barbara A. Tavaglione  
9191 Paulding Street NW  
Massillon, Ohio 44646

*Counsel for Amicus Curiae People's Oil  
and Gas Collaborative - Ohio*

David C. Morrison  
MORRISON & BINDLEY  
987 Professional Parkway  
Heath, Ohio 43056

*Counsel for Amicus Curiae City of Heath*

Meleah Geertsma  
Katherine Sinding  
Peter Precario  
NATURAL RESOURCES DEFENSE  
COUNCIL  
20 N. Wacker Drive, Suite 1600  
Chicago, Illinois 60606-2600

*Counsel for Municipal Amicus Curiae*

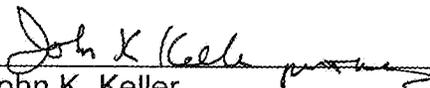
Trent A. Dougherty  
OHIO ENVIRONMENTAL COUNCIL  
1207 Grandview Avenue, Suite 201  
Columbus, Ohio 43212-3449

*Counsel for Amicus Curiae Ohio Local  
Businesses*

Richard C. Sahli  
981 Pinewood Lane  
Columbus, Ohio 43230-3662

Deborah Goldberg (PHV #4255-2013)  
EARTHJUSTICE  
156 William Street, Suite 800  
New York, NY 10038-5326

*Counsel for Amicus Curiae Health  
Professionals*

  
John K. Keller

*Counsel for Defendants-Appellees*