

IN THE SUPREME COURT OF OHIO

STATE OF OHIO EX REL.) CASE NO. 2015-1019
BECK ENERGY CORPORATION)
Relator)
vs.)
CITY OF MUNROE FALLS, OHIO) ORIGINAL ACTION IN MANDAMUS
By and through its Chief Building Official and)
Zoning Inspector and Director of the)
Department of Public Services, Jim Bowery, et)
al.)
Respondents)

**MEMORANDUM IN RESPONSE TO RELATOR'S
MEMORANDUM SUPPORTING MANDAMUS**

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TABLE OF CONTENTS

	Page
I. Introduction.....	2
II. Factual Background	6
A. The Sonoco Well Site	8
B. Prior Litigation involving the Sonoco site	8
C. Concerns supporting the Sonoco property’s zoning classification	11
III. Law and Argument	13
A. Relator’s Proposition of Law	13
B. <i>State ex rel. Morrison v. Beck Energy Corp.</i> , ____ Ohio St.3d ____, 2015-Ohio-485, ____ N.E.3d ____ did not announce controlling law.	14
C. Beck Energy’s calculation of the area available for oil and gas development is flawed.	15
D. Nothing in the legislative history of 2004 Sub.H.B. 278 suggests preemption of local zoning.	17
E. No conflict exists between R.C. 1509.02 and the Munroe Falls Zoning Ordinance. The two may be easily harmonized.	19
IV. Conclusion	21
V. Certificate of Service	24

TABLE OF CASES, STATUTES AND OTHER AUTHORITY

Cases	Page
<i>Canton v. State</i> 95 Ohio St. 3d 149, 2002-Ohio-2005, 766 N.E.2d 963	19,20
<i>Cleveland Trust Co. v. Eaton</i> 21 Ohio St.2d 129, 256 N.E.2d 198 (1970)	17
<i>Drake v. Bucher</i> 5 Ohio St.2d 37 (1966).....	13
<i>Kraly v. Vannewkirk</i> 69 Ohio St. 3d 627, 635 N.E.2d 323, (1994)	14
<i>Munroe Falls v. Div. of Mineral Res. Mgmt.</i> 10th Dist. No. 10AP-66, 2010 -Ohio- 4439, (Sept. 21, 2010).....	8
<i>Newbury Twp. Bd. Of Trustees. v. Lomak Petroleum (Ohio), Inc.</i> 62 Ohio St.3d 387, 583 N.E.2d 302 (1992)	12,16,22
<i>N. Ohio Patrolmen's Benev. Assn v. City of Parma</i> 61 Ohio St.2d 375, 402 N.E.2d 519, (1980)	20
<i>Sheffield v. Rowland</i> 87 Ohio St.3d 9, 716 N.E.2d 1121	20
<i>Smith v. Juillerat</i> 161 Ohio St. 424, 119 N.E.2d 611 (1954)	12
<i>State ex re. Morrison v. Beck Energy Corp.</i> ____ Ohio St.3d ____, 2015-Ohio-485, ____ N.E.3d ____	<i>passim</i>
<i>United States v. Missouri Pacific R. Co.</i> 278 U.S. 269, 278, 49 S.Ct. 133, 136, 73 L.Ed. 322 (1929).....	17
<i>Willott v. Beachwood</i> 175 Ohio St. 557, 197 N.E.2d 201 (1964)	20
 Ohio Constitution	
Article II, Section 36.....	19
Article XVIII, Section 3	14

Statutes

R.C. §519.21117

R.C. § 713.0714

R.C. § 1509.0214

R.C. § 1509.0311

R.C. § 1509.068,21

R.C. § 1509.3511

R.C. §1509.3918

R.C. §3734.0517

R.C. §3772.2617

R.C. §5103.031817

R.C. §5104.05417

R.C. §5123.1917

I. Introduction

Beck Energy argues that Munroe Falls has adopted a zoning code that unreasonably stifles development, by zoning all but a small portion of the city for residential use. Beck Energy presents its argument as though Munroe Falls reacted to Beck Energy's desire to drill for oil and gas by adopting draconian zoning measures. But the fact of the matter is that Munroe Falls' zoning classifications were adopted in 1995, long before there was any hint of an oil and gas boom in Ohio, and after almost all of the development of Munroe Falls had taken place. Munroe Falls' zoning code is almost entirely residential because Munroe Falls, in 1995 and in the present day, was and is almost entirely residential. It is a bona fide zoning code which, in 1995, considered existing uses, population densities, congruous uses, potential nuisances, the character of the community, and the health and safety of its population.

Munroe Falls is the smallest city in the State of Ohio by population, having just over 5,000 residents¹ It is bordered on four sides by four other fully developed communities, the Cities of Stow, Tallmadge, Cuyahoga Falls, and the Village of Silver Lake.² It is small in geographic size as well, being approximately 2.7 square miles in size.³ Munroe Falls' residents live in 2,313 housing units, the overwhelming majority of which are single family homes.⁴ Those homes were mostly built prior to the adoption of the 1995 Zoning Code Revision, 1,977 of

¹ Wikipedia, *List of cities in Ohio*, https://en.wikipedia.org/wiki/List_of_cities_in_Ohio (as of July 7, 2015).

² Munroe Falls Zoning Map, <http://www.munroefalls.com/downloads/building/Monroe%20Falls%20Zoning%20Map%204-26-13.pdf> (as of July 7, 2015).

³ Munroe Falls (city) QuickFacts from the US Census Bureau, <http://quickfacts.census.gov/qfd/states/39/3953312.html> (last visited July 7, 2015).

⁴ American FactFinder - Results, <http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk> (last visited July 7, 2015).

the homes were built before 1995.⁵ The 1994 Aerial Photograph attached as Exhibit A to the Affidavit of Frank Larson truly and accurately depicts the extent of Munroe Falls' Development in 1994:



Munroe Falls 1994 Aerial Photograph

⁵ American FactFinder - Results, <http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk> (last visited July 7, 2015).

Much of the city that is not residential in character is parkland. Munroe Falls is home to a Summit County Metropark, taking up approximately 222 acres, with around another 30 acres of city parks, comprising around 15% of the city's surface area. (Larson Affidavit at ¶6). The Cuyahoga River bisects the city, further reducing its developable area. (Larson Affidavit at ¶7). Part of the Cuyahoga Falls municipal golf course and Cuyahoga Falls water treatment plant are also in Munroe Falls. (Larson Affidavit at ¶8). As for industry, there is an old paper manufacturing plant on the banks of the river, and a few machine shops. There are a few retail uses, and a handful of restaurants. (Larson Affidavit at ¶9-10).

This was more or less the state of Munroe Falls when Munroe Falls revised its zoning code after considerable work by planning consultants D.B. Hartt, Inc. and its Planning Commission, as well as multiple public hearings. (Exhibit B to Affidavit of Frank Larson). The zoning code revision was passed, and not much has changed since. What has changed is the desire of Beck Energy to drill oil and gas wells in this residential city. Of the five well permits listed in Exhibit E to the Affidavit of Raymond Beck, Beck Energy is responsible for drawing four of those permits.

Under the 1995 zoning code revision and prior to its disputes with Beck Energy, oil and gas wells were not a permitted use in the majority of the city. That is consistent with Munroe Falls' status in 1995 as being an almost entirely developed residential community. However, if someone wanted to drill an oil and gas well, he or she had two options. First, the proponent could seek a zoning variance to obtain permission to drill. Second, Munroe Falls had Chapter 1329 in its zoning code, which essentially acted as an overlay over the whole city. A resident in any zoning classification could make application under Chapter 1329 for permission to drill a

well, and so long as the requirements of that chapter were met, Munroe Falls would issue a local permit under Chapter 1329. In fact, Beck Energy obtained a local Munroe Falls permit in order to drill its Twin Falls I well (API 34153230550000) in 2008. (Larson Affidavit at ¶16).

But Beck Energy tired of accommodating local controls, and in the prior proceedings which culminated in *State ex re. Morrison v. Beck Energy Corp.*, ___ Ohio St.3d ___, 2015-Ohio-485, ___ N.E.3d ___, (“*Beck Energy I*”), Beck Energy had portions of Chapter 1329 declared invalid. Munroe Falls then repealed the chapter, and that leaves oil and gas developers with only a zoning variance as an avenue for seeking local permission to drill in an area not zoned for oil and gas wells.

Beck Energy has alleged in this suit that seeking a variance is futile. Beck Energy has not sought a variance and has thus technically not exhausted its administrative remedies. But in fairness to this Court and to Beck Energy (whose state drilling permit would expire if the matter were pursued through lower court proceedings), based upon the particular characteristics of this proposed well site and the criteria to be considered by the Munroe Falls Board of Zoning Appeals, a variance in this situation is very, very unlikely to be granted.

So unlike *Beck Energy I*, Beck Energy has framed a direct conflict between R.C. Chapter 1509 and local zoning codes. There is no “dual licensing” scheme at issue in this case, as was important in the prior case, but rather the question is simply whether state law trumps local zoning. The Court’s decision on this question will determine whether municipalities retain any power to zone oil and gas land usages statewide.

II. Factual Background

On March 27, 2015, Beck Energy sent a one page letter informing Munroe Falls of its intent to obtain a drilling permit at the Sonoco site, with no specification as to where in the Sonoco site the well would be located. (Page 37 of Exhibit B to Affidavit of Raymond Beck) On April 6, 2015, Munroe Falls wrote the letter attached to Frank Larson's Affidavit as Exhibit C, informing Beck Energy that the construction of an oil and gas well would be prohibited by the zoning code. (Larson Affidavit at ¶19). On April 21, 2015, the Ohio Department of Natural Resources granted the permit, (Exhibit D to Larson Affidavit), although no notice of the issuance was given to Munroe Falls. (Larson Affidavit at ¶20).

James Bowery has, at all relevant times, been the Service Director of the City of Munroe Falls, Ohio. (James Bowery Affidavit, ¶1). In that role, he enforces the Munroe Falls Zoning Code. (James Bowery Affidavit, ¶3). He also oversees the local storm water system, makes an annual report required by the Ohio EPA General Storm Water National Pollutant Discharge Elimination System (NPDES) Permit for Small Municipal Separate Storm Sewer Systems (MS4s) #OHQ00000. (James Bowery Affidavit, ¶4). In order to do that reporting, he needs information about construction projects occurring within Munroe Falls, which is one of the reasons that Munroe Falls has an excavation permit ordinance. (James Bowery Affidavit, ¶5-7).

Bowery noticed that Beck Energy erected a sign in June of 2015 next to the Sonoco driveway. (James Bowery Affidavit, ¶10). Nothing happened for a period of time, but Bowery later received a notice that Beck Energy had requested underground utilities to be marked at the Sonoco Site. (James Bowery Affidavit, ¶15). This led Bowery to suspect that Beck Energy intended to proceed with drilling an oil and gas well. (James Bowery Affidavit, ¶15).

On June 18, 2015, Bowery saw a survey crew and bulldozer at the Sonoco site, in the part of the Sonoco lot that was zoned T-C for “Town Center” zoning. (James Bowery Affidavit, ¶16-17). A portion of the Sonoco property is also zoned R-4, and neither zoning district has oil and gas wells as a permitted use. (James Bowery Affidavit, ¶18-19). The survey crew had marked off what looked like the path of a road. (James Bowery Affidavit, ¶21). It was not clear to Bowery whether the road would intersect with city streets, or empty into the Sonoco parking lot. (James Bowery Affidavit, ¶21).

At this time, Bowery was not aware of (1) the extent of planned excavation, and had not officially been given notice that it was connected to an oil and gas well, (2) whether Beck Energy had sought or obtained a variance allowing construction of an oil and gas well where not permitted by the Zoning Code, (3) whether the planned road would intersect with city streets and thus require road opening permits pursuant to Munroe Falls Ordinances 905.02 and 909.01, and/or a right-of-way permit under ordinances 919.06 and 919.07, and (4) whether Beck Energy could articulate a reason that its sign was exempt from the permitting requirements of Munroe Falls Ordinances, Chapter 1145. (James Bowery Affidavit, ¶12,20,22-24).

A man identified himself as Raymond Beck, and Bowery sought to clear up some of these issues. (James Bowery Affidavit, ¶25-26). Mr. Beck told Bowery that he was putting in an oil and gas well and that he didn’t need any permits from the city. He went on to tell Bowery that “you can tell the mayor I have started building the road” and “go ahead and give me a stop-work order.” (James Bowery Affidavit, ¶27-28). Because Mr. Beck indicated that he would not be filing for any sort of permits or variances, and because Bowery had a reasonable belief that some of Beck Energy’s activities would violate the Zoning Code or other Munroe Falls

Ordinances, he called the City Clerk and asked that a stop work order be prepared. (James Bowery Affidavit, ¶29).

The stop work order was prepared with a general reference to permits because several issues were potentially present – road opening, right of way and sign permits and the lack of a variance. (James Bowery Affidavit, ¶30). The stop work order was not intended to enforce the permits required under former Munroe Falls Ordinances Chapter 1329, related to Oil and Gas regulations, which has been repealed. (James Bowery Affidavit, ¶31). The Munroe Falls chief of police served the stop work order on Beck Energy. (James Bowery Affidavit, ¶31). The following day, June 19, 2015, Beck Energy filed this lawsuit.

A. The Sonoco Well Site

The Sonoco property is on the banks of the Cuyahoga River, surrounded by homes on one side and parkland on the others. The portion of the property that abuts a main road is in use as one of the few industries in Munroe Falls – a decades-old paper plant, and the rear portion of the lot is wooded. A portion of the Sonoco property is designated “Town Center” zoning, while the rear of the lot is designated R-4 zoning. (Larson Affidavit, ¶22). The proposed well site is believed to be around 300 feet from the waters of the Cuyahoga River, and sits over an aquifer that serves around 60,000 people. (Larson Affidavit, ¶22).

B. Prior Litigation involving the Sonoco site

Beck Energy mentioned in a footnote that Munroe Falls had prior litigation with D & L Energy over drilling at the site, *Munroe Falls v. Div. of Mineral Res. Mgmt.*, 10th Dist. No. 10AP-66, 2010 -Ohio- 4439, (Sept. 21, 2010), and faulted Munroe Falls for not arguing that the well was prohibited by the zoning classification in that action. But that prior action was an

administrative appeal through the Oil and Gas Commission concerning the ODNR's decision to grant a permit. Zoning was not raised in that proceeding because zoning plays no factor in the ODNR's decision to grant or deny a permit. Under R.C. §1509.06(F), the ODNR is required to grant a permit unless "there is substantial risk that the operation will result in violations of this chapter or rules adopted under it that will present an imminent danger to public health or safety or damage to the environment" and that danger has not been addressed by the placement of conditions upon the permit. No consideration is given to local zoning maps or classifications, or the character of the area, contiguous uses, or any of the other traditional concerns of local zoning.

So the prior action concerning the Sonoco site focused on the question of whether a well on the site created a substantial risk of imminent danger to health or damage to the environment. In support of the position that such a well constituted a substantial risk, Munroe Falls put on evidence in the Transcript attached as Exhibit F to the Affidavit of Frank Larson including:

- That around 1500-1700 feet downstream along the Cuyahoga River was the Cuyahoga Falls Water Treatment Plant (Transcript at p. 10);
- That the Cuyahoga Falls Water Treatment Plant pumped water from the aquifer below the proposed oil and gas wellsite, and the water well field was recharged by the waters of the Cuyahoga river through a system of dykes and channels (Transcript at p. 59, 74, 137);
- That the proposed oil well would have to be drilled through this aquifer serving 60,000 people, including the residents of Munroe Falls (Transcript at p. 213-214);

- That there is a risk of contamination in drilling through an aquifer, and that the ODNR has responded to 900 contamination complaints since 1984, around 36 per year. (Transcript at p. 278-279).
- That the Cuyahoga Falls aquifer had the highest possible contamination susceptibility rating according to the EPA, and that it was an irreplaceable, unique resource. (Transcript at p. 74);
- That in 2007, an employee of the Ohio EPA’s Groundwater Section gave a presentation to Munroe Falls officials that demonstrated both surface water and groundwater pathways to contamination of the aquifer and urged Munroe Falls to protect the resource (Transcript at p. 194-196);
- That any contamination of the aquifer would cost millions of dollars to remediate if it could be remediated at all (Transcript at p. 143);
- That the person responsible for applying the “substantial risk” standard within the ODNR approved 1400 drilling permits in 2008 and denied zero; (Transcript at p. 26, 29)
- That a geologist with more than 20 years of service to the ODNR and involvement in most of the oil and gas drilling permits issued during that time could only identify two times in his entire career when the ODNR declined an oil and gas permit based upon the environmental sensitivity of the area (Transcript at p. 293-294); and
- That ODNR Staff admitted that no set of permit conditions could eliminate the risk of groundwater contamination. (Transcript at p. 291, 291-292, 381, 434).

Munroe Falls believed this evidence demonstrated that from an environmental point of view, the Sonoco site was a bad place for an oil and gas well because of the great harm that could result if

a drilling accident took place. The Oil and Gas Commission, made up of oil and gas industry insiders,⁶ inappropriately interpreted the statutory term “substantial risk” of harm to mean “great likelihood” of harm, meaning that the ODNR would only be authorized to deny a permit when there was a great likelihood of any harm – not where there was a small risk of great harm. The Oil and Gas Commission concluded that any “slight” risk, even of catastrophic environmental harm, did not rise to the level of “substantial risk” of danger to the environment. Thus Munroe Falls lost the administrative appeal and subsequent appeals.⁷

C. Concerns supporting the Sonoco property’s zoning classification

But the fact that Munroe Falls lost an appeal raising environmental concerns under the industry-friendly language of Ohio Oil and Gas Statute doesn’t mean that it is wise, from a zoning perspective, to place a well in the proposed location. In addition to the environmental concerns, Munroe Falls also has the following more traditional zoning concerns:

Incompatible existing uses. The Sonoco lot borders a residential neighborhood on its south side, a water treatment facility on its west side, a park and the Cuyahoga River on its north side and commercial uses on its east side. (Larson Affidavit, ¶21). An oil and gas well is

⁶ Pursuant to R.C. § 1509.35, the Oil and Gas Commission is made up of five people, classed as: (1) a representative of a major petroleum company; (2) a representative of the public; (3) a representative of independent petroleum operators; (4) one learned and experienced in oil and gas law; and (5) one learned and experienced in geology. Munroe Falls drew a three-person panel comprised of the representatives of major petroleum companies and independent petroleum companies, and the member of the public. But even the “member of the public” was a professor of petroleum engineering at Marietta College.

⁷ The administrative appeal pursued by Munroe Falls in connection with the D & L Energy permit is no longer an available mechanism for opponents to a drilling permit to be heard by the State Government. In 2012 S.B. 315, effective September 10, 2012, changed R.C. §1509.03(B) to deny the opponent of a drilling permit the right to administratively appeal the ODNR’s decisions. Administrative appeals by a driller who is denied a permit by the ODNR are still available.

incompatible with those uses. See *Smith v. Juillerat*, 161 Ohio St. 424, 119 N.E.2d 611 (1954) (restricting strip mining in residential neighborhoods not improper) and *Newbury Twp. Bd. Of Trustees. V. Lomak Petroleum (Ohio), Inc.*, 62 Ohio St.3d 387, 583 N.E.2d 302 (1992) (finding that oil and gas drilling is most typically appropriate to agricultural lands).

Nuisance. Oil and gas drilling is undeniably noisy, dirty and dangerous, and goes around the clock during the well drilling process. The residents in the neighborhood surrounding the proposed well site are asked to bear these burdens without compensation, unless they happen to fall within a “drilling unit.” That is just the sort of harm that zoning is designed to limit.

Property Values. Evidence is now available that confirms what land use planners viscerally understood long ago – the proximity of oil and gas drilling can drive residential home values downward, affect the availability of mortgages with lenders worrying about the value of collateral, and negatively affect the insurability of homes in proximity to oil and gas drilling.⁸ Persons who have made the investment-backed decision to live in a community with zoning protections in place should not be unexpectedly divested of those expectations.

Traffic and Road issues. The Sonoco property has a driveway that opens onto Darrow Road, a two lane road, in close proximity to a railroad crossing and a traffic light (one of three traffic lights in Munroe Falls). (Larson Affidavit at ¶27). Traffic backs up in this area considerably during the mornings and late afternoons. (Larson Affidavit at ¶28). Adding additional truck traffic for well servicing will exacerbate this problem and create further road maintenance issues for the City. (Larson Affidavit at ¶29).

⁸ Resource Media - *Drilling vs. the American Dream: Fracking impacts on property rights and home values*, <http://www.resource-media.org/drilling-vs-the-american-dream-fracking-impacts-on-property-rights-and-home-values/#.VaPJdfWKf8> (last visited July 13, 2015).

Investment in rehabilitating the Cuyahoga River. Culminating in 2006, Munroe Falls was involved in a county-wide multi-year effort to increase the water quality of the Cuyahoga River, which included removing the Munroe Falls Dam, creating a faster-moving river with smaller banks. (Larson Affidavit at ¶30). Hundreds of thousands of dollars were expended by various entities in connection with that project. (Larson Affidavit at ¶31). A riparian setback ordinance matching the ordinance adopted by Summit County was passed to protect the riverbanks and waterways.⁹ (Larson Affidavit at ¶32). This concern was heightened when Munroe Falls learned that this particular operator, Beck Energy, has been cited repeatedly by the ODNR for violating drilling regulations, including intentionally “cutting” drilling pits and allowing the material in those pits to flow into a waterway. (Larson Affidavit, ¶34, Exhibit G). Accordingly, placing an industrial use with a risk of affecting the water quality or recently-restored river banks is an undesirable use.

III. Law and Argument

A. Relator’s Proposition of Law

Beck Energy sets forth a proposition of law at the start of its Law and Argument section. Respondents are unaware of a requirement to set forth a proposition of law in an original action. If one is so required, Beck Energy’s proposition of law is flawed, because it is not stated in syllabus form. Pursuant to *Drake v. Bucher* (1966), 5 Ohio St.2d 37, 39, a proposition of law must be formulated in such a way that “if appellant were to prevail, [it] could serve as a syllabus

⁹ Munroe Falls Ordinances Chapter 1142, enacted in May of 2008. Since Beck Energy refuses to provide any pre-suit information to Munroe Falls other than minimal statutory notices, it has not yet been determined whether the well on the Sonoco site would be subject to the riparian setback.

of the case.” If Beck Energy were to prevail in this case, its proposition of law would be meaningless as applied to the rest of Ohio.

If propositions of law are required, Munroe Falls asserts the below counter-proposition of law:

The terms “location and spacing” of oil and gas wells, as referenced in R.C. 1509.02, have specialized, technical meanings in oil and gas law and the correlative rights doctrine. As a result, R.C. 1509.02, regulates a different subject matter than zoning ordinances adopted by municipalities pursuant to Article XVIII, Section 3 of the Ohio Constitution and R.C. 713.07. Thus a municipality may exercise its zoning power to designate what land is available for oil and gas development, and within those areas, the Ohio Department of Natural Resources controls the details of the location and spacing of wells according to the terms of R.C. 1509.02.

B. *State ex rel. Morrison v. Beck Energy Corp.*, ___ Ohio St.3d ___, 2015-Ohio-485, ___ N.E.3d ___ did not announce controlling law.

Throughout Beck Energy’s Complaint and supporting Memorandum, Beck Energy seems to be under the misimpression that this court’s decision in *Beck Energy I* announced controlling law. It did not. The lead opinion was the opinion of only three justices, with Justice O’Donnell concurring in judgment only, expressing different reasoning than the lead opinion for refusing to reverse the Ninth District’s decision. Justice Kennedy joined both the lead opinion and Justice O’Donnell’s opinion. Three other justices dissented and expressed other views of the case.

Plurality opinions which do not garner four votes in support of the legal reasoning expressed to not constitute controlling law and are of “questionable precedential value.” *Kraly v. Vannewkirk*, 69 Ohio St. 3d 627, 633, 635 N.E.2d 323, 327, 996 (1994). Thus Beck Energy’s repeated citations to the prior Beck Energy lead opinion as though it announced the law of Ohio are unavailing.

C. Beck Energy's calculation of the area available for oil and gas development is flawed.

Beck Energy presents a statistic that Munroe Falls has banned oil and gas development in 99.06% of Munroe Falls as support for its argument that Munroe Falls is discriminating against the oil and gas industry. Its calculation is flawed for several reasons.

First, in the map that it used to make its calculation (Affidavit of Raymond Beck, Exhibit E), an undeveloped tract several hundred acres in size is identified as within the boundaries of Munroe Falls and classified as being within an R-1 zoning classification. This area is actually within the boundaries of the City of Tallmadge, and is part of a Summit County Metro Park. (Larson Affidavit at ¶35-36, Exhibit G). Tallmadge may have zoned it R-1, but Munroe Falls did not, so to the extent that that area was utilized in any calculations, those calculations are flawed.

Second, in its calculation, Beck Energy applies Munroe Falls Ordinance 1141.05(bb), which sets forth setbacks for conditionally permitted oil and gas wells. This is disingenuous, because Beck Energy would undoubtedly argue that Munroe Falls Ordinance 1141.05(bb) was preempted by the location and spacing requirements of R.C. 1509.02 if Munroe Falls ever sought to enforce Ordinance 1141.05(bb).

Third, prior to *Beck Energy I*, Munroe Falls had Chapter 1329 in its zoning code, which made 100% of its land area available for oil and gas drilling, so long as the driller met the requirements of the chapter and obtained a permit. In fact, Beck Energy pursued and obtained a local Munroe Falls permit in order to drill its Twin Falls I well (API 34153230550000) in 2008. But now that Beck Energy had the majority of Chapter 1329 struck from Munroe Falls' zoning code, Beck Energy complains that it has no avenues available to develop oil and gas resources. In that regard, Beck Energy is the architect of its own mortification.

But more importantly, the fact remains that the Munroe Falls Zoning Code revision was performed in 1995, not in 2015, and not in reaction to any efforts of the oil and gas industry to engage in urban drilling. It was a bona fide application of zoning principles to what was then an almost fully developed “bedroom community” with very few industrial or commercial uses. The zoning code revision was not a disingenuous designation of agricultural lands as residential areas to do a “backdoor ban” of oil and gas drilling, such what was at issue in *Newbury Twp, supra*. Instead, the 1995 zoning code revision designated areas *already containing houses* as residential areas.

If one did a thought experiment with a one square block city containing nothing but a high rise apartment that housed 5,000 people, that city could adopt a zoning code which designated that one block as a residential zone. If it did, it would be accurate for the oil and gas industry to claim that the zoning code barred oil and gas drilling in 100% of the city. It would also be a bona fide zoning code, because it accurately reflects the existing use of land.

Munroe Falls is not so different. It is the smallest Ohio city by population, and probably also the smallest city in land area. Its nominal 2.7 square mile size is practically reduced by the fact that it has a major river running through its heart, and that it houses a large regional park. It has three stoplights and no four lane roads. It has a handful of non-residential land uses, and is almost fully built-out with residences. This is the case in 2015, and it was the case in 1995, when its Zoning Code revision was performed, before there was any hint of today’s oil boom.

So this Court should put little weight in Beck Energy’s repeated refrain that Munroe Falls has banned drilling in 99% of its land area.

D. Nothing in the legislative history of 2004 Sub.H.B. 278 suggests preemption of local zoning.

Beck Energy argues that the legislative history of 2004 Sub.H.B. 278 expresses the intention of the State to preempt local zoning. In reviewing a statute, “the words employed are to be taken as the final expression of the meaning intended” unless there is an absurd result. *Cleveland Trust Co. v. Eaton*, 21 Ohio St.2d 129, 138, 256 N.E.2d 198, 204 (1970), quoting *United States v. Missouri Pacific R. Co.*, 278 U.S. 269, 278, 49 S.Ct. 133, 136, 73 L.Ed. 322 (1929). 2004 Sub.H.B. 278 did not preempt local zoning. If that was intended, the legislature could have expressly attempted to ban local zoning from touching oil and gas wells, as the legislature has done in so many other areas. See R.C. §3734.05(E)(hazardous waste facilities); 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).

The only item of legislative history submitted by Beck Energy is the Legislative Service Commission’s Bill Analysis for H.B. 278 as introduced. (Beck Energy Appendix B). This item of legislative history entirely supports Munroe Falls’ view. The LSC expresses that the bill “repeals all statutory authority of local governments to regulate oil and gas exploration.” This is entirely consistent with the ODNR’s sphere of authority – regulating the *methods* of oil and gas extraction. The LSC did not say that the bill revokes all municipal zoning authority. Instead, it repeats twice that the ODNR will be charged with the power to specify “minimum distances that oil and gas wells must be located **from** . . . zoning districts,” and other land uses. (Emphasis added). Clearly, the legislature contemplated that local zoning power would continue following this amendment.

Beck Energy also argues that the repeal of R.C. §1509.39 was an expression of legislative intent to ban zoning. Under R.C. §1509.39, municipalities were statutorily permitted to enact more restrictive “health and safety standards for the drilling and exploration for oil and gas.” The remainder of the statute referenced counties and townships only, not municipal corporations, and prohibited counties and townships from, among other things, putting into effect spacing requirements or charging additional licensing fees. But those provisions said nothing about municipal powers.

In arguing that the repeal of this provision affected municipal zoning power, Beck Energy confuses the different statuses of home-rule municipalities versus counties and townships. Municipalities have direct, home-rule authority to zone under the Ohio constitution, while townships and counties have a different status, which is why they were treated differently under R.C. §1509.39. Thus, Beck Energy’s effort to treat all political subdivisions the same under the language of that former provision is misplaced.

The 2004 changes to Chapter 1509 repealed R.C. §1509.39. That means, as to cities, the legislature only intended to revoke the permission it granted to municipal corporations to enact more restrictive health and safety standards for the drilling of wells. That is exactly what Munroe Falls has been arguing all along – that Sub. H.B. 278 sought to preempt the patchwork of more-restrictive local ordinances on the technical details of well construction. Sub. H.B. 278 presented a state-wide scheme of well construction standards that would be the same regardless of location. But the express language of Sub. H.B. 278 did not supplant local zoning – that is a different subject matter altogether and required express language in the statute to achieve that result.

E. No conflict exists between R.C. 1509.02 and the Munroe Falls Zoning Ordinance. The two may be easily harmonized.

The remainder of Beck Energy’s memorandum is an extensive application of the preemption analysis set forth in *Canton v. State*, 95 Ohio St. 3d 149, 2002-Ohio-2005, 766 N.E.2d 963. Beck Energy’s memorandum closely tracks the lead opinion in *Beck I*, which was joined by only three justices and is therefore not controlling law. The flaw in Beck Energy’s application of *Canton v. State* is that it presupposes that a conflict exists between R.C. 1509.02 and the Munroe Falls Zoning Code. No such conflict exists, making the application of *Canton v. State* unnecessary.

In Justice O’Donnell’s concurring opinion, also joined by Justice Kennedy from the three-justice lead opinion, the Justice correctly identifies that “‘location’ and ‘spacing’ have specialized, technical meanings in oil and gas law.” *Beck Energy I*, at ¶43. The concurring opinion goes on to note that the ODNR’s interest in location and spacing is limited to “the placement of wells on a tract in relation to the resource pool and to each other,” which is a different concern than a municipality’s determination of “whether an oil and gas well is compatible with the character and aesthetics of a particular zoning district....” *Id.* at 44.

In Justice Lanzinger’s dissenting opinion, joined by Justice O’Neill and Justice Pfeiffer, the Justice also identified that the ODNR’s power to regulate is derived from Article II, Section 36 of the Ohio Constitution, concerning the “regulation of *methods of mining, weighing, measuring and marketing* coal, oil, gas and all other minerals.” *Id.* at ¶ 55, emphasis in original. This again is a different subject matter than local zoning, which “exists to address such concerns as traffic control, traffic volume, property values, enhancement of municipal revenue, costs of municipal improvement, land use, nuisance abatement, and the general welfare and development

of the community as a whole.” *Id.* at ¶ 61, *citing Willott v. Beachwood*, 175 Ohio St. 557, 560, 197 N.E.2d 201 (1964).

Therefore, five of the seven Justices, in one way, shape, or form, have embraced opinions that recognize a distinction between the ODNR’s concern in the technical “location and spacing” details of well placement for correlative rights purposes, and the interests of a municipality in controlling what areas within its borders are or are not available for oil and gas uses. With that recognition made, there is no need to apply the *Canton v. State* test, because the State and city are regulating different things.

This Court has specifically noted that the courts should make an effort to harmonize the laws of the State and local municipalities to avoid preemption, if possible. *N. Ohio Patrolmen's Benev. Assn v. City of Parma*, 61 Ohio St.2d 375, 377, 402 N.E.2d 519, 521 (1980). The most straightforward way of harmonizing the spheres of regulation between the ODNR and municipalities is to recognize that the municipality designates what land is available for oil and gas drilling, and the State sets forth the rules for operation of the drilling enterprise. If municipalities appropriately evaluate and classify lands according to demographic and local features, their zoning power does not conflict with State law. Only when the municipalities abuse their traditional zoning powers by trying to enact outright bans on certain activities through clever zoning, such as in *Newbury Twp.*, *supra* or *Sheffield v. Rowland*, 87 Ohio St.3d 9, 12, 716 N.E.2d 1121, 1124, can a conflict be found.

The alternative reading, advanced by Beck, requires language to be read into R.C. Chapter 1509, making the ODNR the arbiter of proper land use planning for the entire State. This is clearly not contemplated by the statute, as the Chief of the Mineral Resources

Management Division of the ODNR does not even collect sufficient information to make a decision regarding land use planning topics. The Chief is not empowered to collect or consider any information regarding existing zoning classifications, the use of nearby property, effect on aesthetics, or any of the matters considered by traditional zoning. R.C. §1509.06(A)

Accordingly, it is possible to harmonize R.C. Chapter 1509 and local zoning requirements by recognizing that R.C. Chapter 1509 controls technical safety and correlative rights topics, while local zoning maintains its validity in determining where those operations may take place. This is the approach taken by the far majority of states which have considered the question. See *Beck Energy I*, ¶ 67-73 (Lanzinger, J., dissenting).

It would not be necessary to overrule or modify *Beck Energy I* to recognize a dual-control harmonization. While the lead opinion found a conflict and applied *Canton v. State*, Justice O'Donnell concurred in the judgment only, and expressed that his concurring vote was cast because Munroe Falls' former Chapter 1329 itself ventured into regulating "the technical aspects of drilling." *Beck Energy I*, ¶ 36 (O'Donnell, J., dissenting). In that regard, former Chapter 1329 was different than Munroe Falls general zoning ordinances, and the *Beck Energy I* ruling may be preserved if the Court now determines that Munroe Falls has the power to control local land usages.

IV. Conclusion

Beck Energy argues that Munroe Falls' Zoning Ordinance unfairly deprives landowners of the ability to exploit oil and gas resources. It has no standing to advance those claims. Beck Energy argues that it is unfairly precluded from profiting from the oil and gas leases it signed.

Those leases were signed long after the Munroe Falls Zoning Code was adopted, and Beck Energy bought those rights with full notice of the requirements of the Zoning Code.

Beck Energy seeks panoply of relief – peremptory writs requiring Munroe Falls and Jim Bowery to rescind enforcement of its zoning code, demanding the Munroe Falls City Council repeal its zoning ordinance, and a writ requiring Munroe Falls to refrain from any efforts to touch upon its operations in any way. As to the last writ, if granted, one wonders if a Munroe Falls police officer would even be able to write a speeding ticket if a Beck Energy truck sped to the worksite.

But Beck Energy has not demonstrated a clear right to relief, and identified no clear legal duty that Munroe Falls officials are required to conduct. Mandamus should be denied on that basis alone.

If the Court is unwilling to summarily deny the peremptory writ without making a record, then this Court could issue an alternative writ requiring an evidentiary hearing on whether the 1995 Munroe Falls Zoning Code is bona fide or phony, as contemplated in *Newbury Twp., supra*, at 391-392. In *Newbury Twp.*, this Court considered a township zoning code that was alleged to have been inappropriately engineered to exclude oil and gas uses. This Court looked to the actual character of the lands where the driller wished to drill, and authorized lower courts presented with these sorts of disputes to look to population densities and “special local conditions” to determine whether or not zoning classifications was bona fide. *Id.* Because this is an original action, the Court may not remand the case to a lower court for determination of those issues, but it could appoint a special master to make that inquiry. If such a hearing were to be held, Munroe Falls is confident that it would pass the test.

Respectfully submitted,
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V. CERTIFICATE OF SERVICE

THIS CERTIFIES THAT a full and complete copy of this document was served upon the below listed individuals on July 15, 2015, by regular U.S. Mail:

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