

Property Pooling Pits Ohio Municipalities Against State

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In a case of importance to property owners in Ohio and drillers alike, the Franklin County Court of Common Pleas held in *Simmers v. City of North Royalton*[1] that the mandatory pooling of property, particularly that of a municipality, cannot be approved without evidence that safety and other intangible concerns were considered by the Ohio Department of Natural Resources.

Pooling Request and Order

The land at issue is a city-owned parcel that the pooling applicant, Cutter Oil Co., sought to include with adjacent parcels to create a well site that would meet state minimum acreage requirements based on well depth.

The city of North Royalton opposed the application citing safety concerns, including past incidents involving Cutter wells operating within the city.

Cutter's application was submitted for approval to the chief of the Ohio Division of Oil & Gas Resources Management ("Division"). The chief referred the matter to the Technical Advisory Council on Oil & Gas ("TAC"), which exists to, among other things, review and provide recommendations regarding mandatory pooling requests at the chief's discretion. TAC recommended approval of the application.

The chief then issued an order approving the mandatory pooling application at issue. The chief stated he believed he was complying with Ohio law regarding his responsibilities by considering only the economics underlying the pooling application, not the city's safety concerns about drilling.

North Royalton appealed the order to the Ohio Oil & Gas Commission, which hears appeals from those "aggrieved or adversely affected" by an order by the chief of the Division.

The commission conducted hearings and held that the chief should have considered the city's safety concerns.

The commission not only overturned the chief's order, but it also remanded the matter to the TAC for further consideration of the city's concerns. The chief administratively appealed the commission's action to the Franklin County Court of Common Pleas.



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Simmers v. City of North Royalton

The court noted that under Ohio law, where a tract of land is insufficient in size or shape to meet ordinary requirements for drilling, and adjacent land owners are unable to form a drilling unit by agreement, an owner can apply to the Division for issuance of a mandatory pooling order.

If satisfied that certain procedural formalities are met and that mandatory pooling is necessary to protect “correlative rights and to provide effective development, use, and conservation of oil and gas,” the chief of the Division shall issue a mandatory pooling order.

Essentially, the court notes, the process permits the state to override individual landowners’ concerns, whether about potential damage to their surface or mineral rights, health or pollution, or the financial arrangements offered for their share in the pool.

In addressing the commission’s order overriding the chief’s approval of the pooling application, the court noted that Ohio Revised Code § 1509.27 requires — as a statutory predicate to issuance of a mandatory pooling order — a showing that the applicant initially attempted to negotiate a lease for the property at issue “on a just and equitable basis.”

In addressing that issue, the court noted that the chief limited his review to the financial aspects of Cutter’s pooling offer to the city. On that issue, the court noted that the commission found the Cutter offer was generous by industry standards and when compared to others participating in the pool.

The court, however, held that the chief should have considered North Royalton’s safety concerns:

As the Exxon Valdez and Gulf of Mexico oil spills surely demonstrated, no matter how much attention is purportedly given to ‘safety,’ [sic] serious mistakes, with long-lasting consequences, still occur. With such risk always in the background, it would be illogical to narrowly construe the law and force landowners into a mandatory pool – even for compensation superficially deemed just and equitable – while completely ignoring legitimate safety and other intangible concerns important to a sensible property owner. Potential safety issues understandably have increased importance in this case where local government property, in an urban area, is involved.

The court, noting that Cutter Oil and other producers would be “ill advised” to ignore the important role local governments have under Ohio law [2], stated that:

[U]nder the Ohio Constitution’s ‘Home Rule’ provisions, local governments [sic] occupy a key role. It requires no citation of case law to observe that, generally speaking, municipalities like North Royalton are vested with very broad authority to speak for their citizens on matters of health, safety, and welfare. They are not, in that sense, just ‘ordinary’ landowners.

The court further stated that a “related, equally important point” is that North Royalton is participating in the case “as a property owner, not just as a municipality.” It noted that under the Ohio Constitution, property rights are deemed “fundamental rights,” which cannot be “trodden upon lightly, no matter how great the weight of other forces.” To many property owners, safety and other intangible rights may be more important than what they may receive from pooling their property.

In holding the commission's order "lawful and reasonable" on the mandatory pooling issue, the court did hold that the commission could not remand the matter to TAC because it is merely "an advisory board impaneled at the chief's discretion" and not authorized to issue orders. Thus, the chief is free to use TAC "as he sees fit" in his reconsideration of the application.

Analysis and Commentary

The *Simmers* ruling may represent a small victory for Ohio municipalities that have attempted to limit oil and gas drilling activities within their borders.

Environmental law Professor Heidi Gorovitz Roberts of the Cleveland-Marshall College of Law, commenting on the ruling, said:

The Simmers ruling has given hope to local municipalities – like North Royalton – which want a voice in oil and gas drilling and related operations that impact the health, safety and welfare of their residents – all of which are traditional Home Rule powers under the Ohio Constitution.

It is important to place the *Simmers* ruling in the context of several recent decisions regarding the power of local governments in Ohio to control oil and gas drilling and related operations, which have not gone well for two municipalities that attempted to ban or severely limit drilling.

Most notable was the Ohio Supreme Court's ruling in *State ex. rel. Morrison v. Beck Energy Corp.*[3], which held that a state statute giving regulatory power over oil and gas drilling operations to the Division preempted the local law at issue.

While the challenge to the pooling application in *Simmers* involved a challenge by a municipality to the mandatory pooling of public property, a private property owner facing a mandatory pooling application of its land can cite the case as holding that safety and other intangible factors must also be considered where private property is the subject of mandatory pooling.

Robert S. Frost, former chairman of the commission, commenting on the impact of the *Simmers* ruling, cautions against an overly broad reading of it:

As Chairman of the Oil & Gas Commission at the time we heard and decided the underlying administrative appeal, I would caution against a broad reading of the Court's decision, as the circumstances of the case in controversy, while not entirely unique, are certainly atypical. If there is a general principal to be taken from the case, in my opinion, it is that the duty contained in the Ohio mandatory pooling statute to negotiate in good faith has real meaning and that the totality of the circumstances between the parties must be considered.

In Ohio, the war between local municipalities and the state over the power to regulate oil and gas drilling and related operations continues, with the court's ruling in *Simmers* being the most recent battle. As noted, it remains to be seen how important that battle will be in the outcome of that war.

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[1] Case No. 15CV-42 (8/27/15)

[2] The Ohio Constitution, Article XVII, Section 3, sets forth the “Home Rule” powers of local government: *Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as not in conflict with general laws.*

[3] Slip Opinion No. 2015-Ohio-485 (2/26/15)

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