State Preemption Trumps Municipal Home Rule in Ohio Fracking Cases

BY CARTER E. STRANG

A number of local communities in Ohio have passed laws attempting to ban or severely limit hydraulic fracturing (aka “fracking”). Two such laws — enacted in Munroe Falls and Broadview Heights — were recently challenged and held to be invalid exercises of their home rule powers because of state preemption of oil and gas drilling and related operations.

Munroe Falls Ordinances
The Munroe Falls laws were challenged by Beck Energy Corporation (Beck), which had obtained a permit in 2011 from the Ohio Department of Natural Resources (ODNR) to drill an oil and gas well on property within the city of Munroe Falls.

Soon after Beck began drilling pursuant to its permit, the city of Munroe Falls issued a “stop-work” order and filed a complaint seeking injunctive relief, alleging Beck had violated multiple provisions of the Munroe Falls Codified Ordinances. The ordinances created a city permitting requirement for the drilling of oil or gas wells within the city and provided criminal penalties for any violation.

Beck argued that the city’s ordinances were in conflict with the State of Ohio regulatory scheme for oil and gas well drilling and operation, as set forth in R.C. Chapter 1509. That chapter provides that ODNR has “sole and exclusive authority to regulate the permitting, location, and spacing of oil and gas wells and production operations” within Ohio, explicitly reserving to the state, and to the exclusion of local government, the right to regulate “all aspects” of those activities, including permitting.

The city of Munroe Falls contend that its ordinances at issue were a valid exercise of the Home Rule Amendment of the Ohio Constitution which provides in Article XVIII, Section 3 that: 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 are not in conflict with general laws.

The trial court held for the city of Munroe Falls, ruling that Beck was permanently enjoined from drilling until it complied with the Munroe Falls permitting requirements. The appellate court reversed.

The Ohio Supreme Court agreed to hear the case, and — after applying an analysis of the limits of a city’s police powers under the Home Rule Amendment of the Ohio Constitution — struck the local ordinance and held for Beck. The Court concluded — in State ex rel. Morrison v. Beck Energy Corp., Slip Opinion No. 2015-Ohio-485 (2/26/15) — that the Munroe Falls ordinances imposed a separate, additional permitting scheme in direct conflict with that created by R.C. Chapter 1509.

The Court held that city law must yield to state law if (1) the city law is an exercise of its police powers rather than of local self-government, (2) the state law is a general law, and (3) the local law is in conflict with the state statute.

Addressing each element of that analysis, the Court first held that the city law did not regulate the form and structure of local government; rather, it prohibited — indeed criminalized — the doing of something (drilling without a city permit), which constitutes a clear exercise of police powers.

Secondly, the Court held that state law is a general law because it is part of a statewide comprehensive legislative enactment applying uniformly throughout the state, setting forth regulations not purporting to only grant or limit the city’s power to prescribe the regulations, and it prescribes a rule of conduct upon citizens generally.

Finally, the Court held that a conflict between a city and state statute exists where “the ordinance permits or licenses what the statute forbids and prohibits, and vice versa.” Here, the city law conflicts by prohibiting what R.C. Chapter 1509 allows: state-licensed oil and gas production in Munroe Falls. The Court held that Beck’s license from ODNR was rendered meaningless without also satisfying the Munroe Falls permitting process, which imposed a number of additional hurdles above and beyond that required by the ODNR.

The Court further held that the Ohio General Assembly intended to preempt local regulation on the subject by the clear language of R.C. Chapter 1509 which gives “sole and exclusive authority” — to the exclusion of local governments — to ODNR to regulate “all aspects” of oil and gas wells and production operations in Ohio. However, it did not entirely shut the door, stating, “[w]e make no judgment as to whether other ordinances could coexist with the General Assembly’s comprehensive regulatory scheme.”

The lead opinion was written by Justice French, with O’Connor and Kennedy concurring and Justice O’Donnell concurring only in the judgment. Justices Pfeifer, Lanzinger, and O’Neil dissented.

Broadview Heights Charter Amendment
In 2012, Broadview Heights voters enacted a charter amendment — a “Community Bill of Rights” — that banned new drilling within city limits and attempted to limit constitutional and statutory rights of violators of the ban. The charter amendment was put on the ballot as a result of a voter initiative petition lead by the “Mothers Against Drilling in Our Neighborhood.”

The charter amendment was challenged in Bass Energy, Inc. v. City of Broadview Heights, Cuy. C.P, Case No. CV-14-828074, 45 ELR 20048 (3/11/15). ODNR filed an Amicus Curiae Brief supporting plaintiffs’ declaratory judgment.

Judge Michael K. Astrab of the Cuyahoga Court of Common Pleas — in an eight-page opinion — applied the same three-pronged analysis used by the Ohio Supreme Court in Morrison, holding that the Broadview Heights Charter Amendment at issue was an invalid exercise of the city’s home rule powers, preempted by R.C. Chapter 1509.

While Bass Energy was pending, a class-action lawsuit was filed — Mothers Against Drilling in Our Neighborhood v. Ohio, Cuy. CP,
Case No. CV-14-836899 (7/1/15) — seeking declarative and injunctive relief to “enforce the Charter Amendment’s provisions and to enjoin the Defendants from violating the people of Broadview Heights’ inherent and unalienable civil and political rights.” Defendants were the State of Ohio, Governor Kasich, the City of Broadview Heights, and two drilling companies.

Cuyahoga Court of Common Pleas Judge Timothy McCormick granted defendants’ motions to dismiss, holding:

Like Bass Energy, this court rules that the principles articulated in Morrison necessitate a finding that Article XV [the Broadview Heights Charter Amendment] is preempted by R.C. Chapter 1509. Thus, Article XV is unenforceable. An appeal of the trial court’s ruling has been filed.

Conclusion
Local laws enacted by Ohio cities — pursuant to their home rule powers — attempting to ban or severely restrict oil and gas drilling and related operations are not likely to be upheld in light of these rulings, which hold that such laws are preempted by R.C. 1509.

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