

# THE FOSTER REPORT

## State Courts Are Clarifying Legal Authority of Local Governments to Regulate Oil and Gas Activities

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This article appears as published in The Foster Report No. 3118, issued October 7, 2016

As opponents of oil and gas development increasingly look for ways to exert local control, key state court rulings over the last few years have attempted to clarify, in so-called preemptive challenge cases<sup>1</sup>, what the role of local governments actually is in regard to regulating oil and natural gas activities, explained panelists at the recent Shale Insight Conference in Pittsburgh, Pennsylvania.

Driven by citizen pressure or their own volition, local governments throughout the Appalachian Basin in West Virginia, Ohio, and Pennsylvania are increasingly attempting to limit or ban unconventional shale development through the adoption of ordinances or referenda.

The question in West Virginia and Ohio appears to be a bit clearer, due to court rulings confirming that local governments do not have the authority to regulate oil and gas activities. However, in Pennsylvania, a state that may one day be the nation's largest producer of gas, the legal authority remains murky, said conference presenter Krista-Ann Staley, an attorney at Babst Calland.

Staley told the Foster Report October 5, that the Pennsylvania Supreme Court's ruling on September 28<sup>2</sup> didn't change the scope of local authority to regulate oil and gas development. Rather, the court ruled to strike provisions concerning the PUC's and Commonwealth Court's ability to review ordinances and related penalty provisions. With those provisions of Act 13 stricken, along with the related provisions stricken in the *Robinson II* decision, the scope of local regulatory authority and the ordinance review process fall back to existing statutes. The existing statutes, interpreted in the 2009 *Huntley*<sup>3</sup> and *Range*<sup>4</sup> cases, allow local governments limited powers to regulate oil and gas development in MPC (*i.e.*, zoning, subdivision and land development) and floodplain ordinances. The local ordinances still cannot supersede state regulation of oil and gas development.

**West Virginia.** Two court cases in West Virginia with "clear outcomes," according to Staley, confirmed the stance of the state's existing Oil and Gas Act (in Code 22-6) that there is no local authority to regulate oil and gas development in the state. In the first case, *Northeast Natural Energy, LLC v. City of Morgantown* (No. 6285), Judge Susan Tucker of the Monongalia County Circuit Court on 8/12/11 ruled in favor of exploration and production company Northeast, and overturned an ordinance from the City Council of Morgantown that banned drilling and fracking of natural gas. The court held the ban was unconstitutional and preempted by the state code, which provides for the exclusive control of the state's

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<sup>1</sup> The challenge that state regulation has displaced or "preempted" the ability of local governments to regulate oil and gas development.

<sup>2</sup> *Robinson Township v. Commonwealth of Pennsylvania*, No. 104 MAP 2014 (Pa. Sept. 28, 2016).

<sup>3</sup> *Huntley & Huntley, Inc. v. Borough Council of the Borough of Oakmont*, 964 A.2d 855 (Pa. 2009),

<sup>4</sup> *Range Resources-Appalachia v. Salem Township*, 964 A.2d 869 (Pa. 2009),

Department of Environmental Protection (DEP) to regulate oil and gas development. There is no exception in the law to allow the City of Morgantown's ordinance imposing a ban on fracking.

The city contended it had the authority to enact and enforce the ordinance. Nonetheless, Judge Tucker found that the legislative purpose of the DEP was clear: and it has the primary responsibility to protect the state's environment. "The exclusive control of this area of the law is within the hands of the DEP," said Tucker. The ordinance encroached on the state's all-encompassing authority regarding oil and gas development, and therefore, is invalid.

In the second, more recent case, *EQT Production Company v. Wender* (Case 2:16-cv-00290), Fayette County Commissioners Matthew Wender, Denise Scalph, and John Lopez sought a permanent injunction to enforce a county ordinance banning the storage, disposal, or use of oil and natural gas waste (including waste water from underground injection control wells). On 6/10/16, U.S. District Judge John Copenhagen confirmed that County commissions are artificial entities created by state statute and as such, possess only the powers expressly granted to them by the state constitution or laws. The county commissioners claimed that the ordinance was an exercise of the county commission's sovereign powers. The court ruling found, however, that local ordinances are subordinate to state laws. Where an activity, such as oil and gas development, is sanctioned by the state, a local government cannot legislate independently to prohibit or impede that activity. All authority to oversee gas and oil exploration and production in West Virginia resides with the DEP, and at no point is any power to regulate such matters expressly granted to the county commissions.

The county commissioners also challenged EQT's use of underground injection wells under the federal Safe Water Drinking Act (SWDA), which established a national program for regulating injection wells in order to protect drinking water (known as the UIC Programs). The EPA issued standards for the programs and states must meet minimum requirements to be granted primary enforcement authority. West Virginia, as approved by the EPA, has primacy over its UIC Program and vested the DEP with the authority for its implementation. The permitting program allows for the underground injection of wastewater, and the proposed ordinance attempting to prohibit permanent disposal of wastewater directly violates the statutory requirement, the court said. The state has undertaken to allow UIC wells, an action that operates to diminish a county's powers to prohibit them. The county commissioners cannot unilaterally prohibit conduct that federal and state law both expressly permit.

Furthermore, the existing regulatory scheme demonstrates that wastewater injection as permitted is a heavily regulated activity in West Virginia, contrary to the commissioners' claims. Wastewater properly injected into UIC wells pursuant to state and federal law "does not become pollution simply because the county commissioners say so," the court ruling indicated.

West Virginia has concluded that oil and gas extraction is a highly valuable economic activity subject to centralized environmental regulation by the DEP, the court said, and the county commissioners therefore cannot interfere or impeded with the state's goals.

**Ohio.** The preemption of ordinances from municipalities or local governments in regard to oil and gas activities in Ohio is less clear than in West Virginia, Staley said. Based on state court rulings in Ohio, "there is likely no local authority" to regulate oil and gas activities. The outcome of state court rulings in regard to five ordinances did leave the door open for the next case, the attorney warned.

In *State ex rel. Morrison v. Beck Energy Corp.*,<sup>5</sup> the Ohio Supreme court ruled in a 4-3 decision on 2/17/15 that the City of Munroe Falls, near Akron, could not discriminate against, unfairly impede or obstruct oil and gas activities and operations.<sup>6</sup> Beck Energy obtained a permit in 2011 from the Ohio Department of Natural Resources (DNR) to drill an oil and gas well on property in Munroe Falls. The city attempted to stop the energy company from drilling based on five of its own municipal ordinances. The issue in the case was whether Munroe Falls had the power to enforce its own permitting scheme atop the state's system. The court held that the city did not have that power.

Similar to West Virginia, Ohio's Chapter 1509 centralizes regulatory authority to state government, entrusting the DNR with sole and exclusive authority to regulate the permitting, location, and spacing of oil and gas wells and production operations within Ohio, except for certain activities regulated by federal laws. The DNR promulgated regulations regarding wells and well permitting, including standards that address the safety of drilling and operations, well spacing requirements, protection of water supplies, surface facilities, waste containment and disposal, access roads, and noise mitigation. Beck Energy's state permit to drill in Munroe Falls included 67 conditions.

While the state's laws do preserve regulatory powers granted to local governments -- including the power to control public highways, streets, sidewalks, public grounds, bridges, and aqueducts -- Chapter 1509 expressly prohibits a local government from exercising those powers against oil and gas activities.

Soon after Beck Energy began drilling, Munroe Falls issued a stop-work order and filed a complaint seeking injunctive relief in the Summit County Court of Common Pleas, alleging that Beck Energy was violating multiple provisions of Munroe Falls ordinances, and that it had powers to self-govern under the so-called Home Rule Amendment to the state's constitution. Beck argued that the city's ordinances conflicted with the statewide regulatory scheme.

In determining whether or not the city's ordinances represented a valid exercise of its home-rule power, the court found that the Home Rule Amendment does not allow municipalities to exercise their powers in a manner that conflicts with general laws. A municipal ordinance must yield to a state statute if: (1) the ordinance is an exercise of the police power, rather than of local self-government, (2) the statute is a general law, and (3) the ordinance is in conflict with the statute. The court ruled that the ordinances constituted an exercise of the police power, restricted an activity that a state license allows, and therefore could not be enforced.

One of the judges, Judge J. O'Donnell, concurred in the judgment only on the issue that the statute preempted local permitting ordinances applicable to the construction and operation of oil and gas wells within the municipality. The judge emphasized that the decision was limited in scope, holding to the five municipal ordinances at issue in the case. The case did not present the question whether Chapter 1509 conflicted with local land use ordinances that only address the traditional concerns of zoning laws without imposing a separate permitting regime applicable only to oil and gas drilling. "Thus, in my view, it remains to be decided whether the Ohio General Assembly intended to wholly supplant all local zoning ordinances limiting land uses to certain zoning districts without regulating the details of oil and gas drilling expressly addressed by Chapter 1509," O'Donnell said.

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<sup>5</sup> 143 Ohio St.3d 271 (2015).

<sup>6</sup> Judge French prepared the ruling, with Judges O'Connor and Kennedy concurring, and O'Donnell concurring in judgment only. Judges Pfeifer, Lanzinger, and O'Neill dissenting.

Not deterred by the Ohio Supreme Court's decision, Munroe Falls then attempted to pursue the matter through traditional zoning ordinances, Staley explained, and filed suit on 5/27/16 in the lower Summit County Court, in *Kostoff v. Beck Energy*.<sup>7</sup> The city sought a declaratory judgement on its right to enforce its zoning ordinances. A ruling from that court on 7/14/16 upheld the state's sole authority to enforce regulations in regard to oil and gas development.

**Pennsylvania.** The situation is less clear in Pennsylvania, Staley observed. The statutes do allow for local authority, but in areas where oil and gas activities occur, municipalities cannot regulate the features of a well. As companies in the state quickly expanded into oil and gas development, local governments responded with ordinances directed at zoning, streets, bridges, noise, air pollution, and civil disobedience, among other things. The number of ordinances have grown dramatically: localities issued 96 ordinances in 2014, 105 in 2015, and, so far in 2016, issued 62.

Starting with arguments in 2008, courts began to try and flesh out the role of local governments. The first ruling came in *Range Resources-Appalachia, LLC v. Salem Township* (964 A.2d 869 (Pa. 2009)),<sup>8</sup> decided on 2/19/09. On appeal from the Commonwealth Court, the Pennsylvania Supreme Court ruled that the ordinances issued by Salem Township to regulate many aspects of oil and gas drilling (including strict requirements for well permitting) are preempted by the Pennsylvania Oil and Gas Act.

Next, the same court's decision in *Huntley & Huntley, Inc. v. Borough Council of the Borough of Oakmont* (964 A.2d 855, 2009 WL 413723 (2009)) confirmed the preemption issue to some extent, concluding that the Oil and Gas Act's preemptive scope is not total in the sense that it does not prohibit municipalities from enacting traditional zoning regulations that identify which uses are permitted in different areas of the locality. This would apply only to the technical aspects of oil and gas well functioning, rather than a well's location. The court clarified that the holding is not suggesting that all or any zoning regulations of oil and gas development would be allowable.

Then, on 2/8/12, the state passed legislation to overhaul the Oil and Gas Act to increase the oversight and development of oil and natural gas resources in the state. Among other things, Act 13 placed limits on the regulatory authority of local governments in regard to the development. A year later, however, parts of the statute were challenged by seven municipalities<sup>9</sup>, two local elected officials, the Delaware Riverkeeper Network, and a physician. Since then, state courts have issued four rulings in *Robinson Township v. Commonwealth*, starting with the Commonwealth Court in Robinson I rejecting some of the various challenges to Act 13.

In the latest ruling on September 28, known as *Robinson IV*, the court, led by four Democrat judges, struck down more of Act 13 (*see* related article in this Foster Report).

Regarding the preemption issues, the *Robinson IV* ruling decided that the state's Public Utility Commission (PUC) has no authority to review municipal land use determinations to determine consistency with the requirements of Act 13. The Supreme Court found that provisions of Act 13 "severely curtailed" the ability of local municipalities to regulate the oil and gas industry. The Act

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<sup>7</sup> Munroe Falls then filed for a preliminary injunction on 6/17/16 to stop Beck's drilling activities, but Judge Gallagher overruled the injunction; Beck Energy then filed a countersuit against the city.

<sup>8</sup> The judges hearing the case included: Castille, Saylor, Eakin, Baer, Todd, Mccaffery and Greenspan.

<sup>9</sup> Robinson Township; Nockamixon Township; South Fayette Township; Peters Township; Cecil Township; Mount Pleasant Township; Borough of Yardley

prohibited municipalities from enacting any local ordinance via the state's Municipalities Planning Code (MPC) or the Flood Plain Management Act, which is the Supreme Court deemed unconstitutional.

Act 13 had provided a mechanism for the PUC and the Commonwealth Court to determine whether a local ordinance violated the MPC or state law, with the PUC either reviewing proposals from municipalities to implement an ordinance or reviewing requests from oil and gas operators aggrieved by the enactment/enforcement of a local ordinance, and allowing a de novo review in the Commonwealth Court. The law also included penalties for municipalities if their local ordinances failed to comply with the requirements of the MPC or state laws, and made local governments liable to pay reasonable counsel fees and costs of a prevailing plaintiff in an action seeking to invalidate or enjoin an ordinance if the Commonwealth Court determined that the ordinance was reckless.

The *Robinson II* decision in December 2013 found that these sections of Act 13 violated state law guaranteeing the right of the people to directly enforce obligations to natural resources. The General Assembly, in creating Act 13, did not have the authority to abrogate, via legislation, the duties and responsibilities owed by municipalities to their citizens under the Pennsylvania Constitution. In the *Robinson IV* decision, the Pennsylvania Supreme Court agreed that the portions of Act 13 were not severable from the sections of the act that were invalidated by the *Robinson II* decision, including the portions giving the PUC the jurisdiction to review local zoning ordinances.

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