

HOME-RULE HOPE: A COMMUNITY GUIDE TO KEEPING HYDRAULIC FRACTURING OFF LOCAL PROPERTY

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Introduction.....	85
I. The Ohio Supreme Court took away local zoning authority in <i>State ex rel. Morrison v. Beck Energy Corp.</i>	86
II. The Ohio Supreme Court mistakenly found that Chapter 1509 preempts all local zoning ordinances because it is inconsistent with Ohio’s Home Rule.	90
The Ohio Supreme Court should have followed the examples of other states that have reconciled state and local oil and gas regulations. ...	92
1. New York	92
2. Colorado	93
3. Pennsylvania.....	94
III. There is still hope: Municipalities can still create zoning ordinances that do not conflict with general law.	95
There are options for local zoning ordinances that will limit or restrict fracking in communities.....	96
1. Site Access/Restrictions on Road Usage.....	96
2. Distance Requirements.....	98
3. Noise Standards.....	99
4. Aesthetic Requirements.....	99
5. Use of Public Water Supplies.....	101
6. Dust, Vibration, and Odors.....	101
7. Lighting	102
8. Lobby!	102
Conclusion	103

INTRODUCTION

In 1926, the landmark case *Village of Euclid v. Ambler Realty Co.* established that local zoning ordinances that preserve the common welfare are a proper use of police power.¹ In 2011, Munroe Falls—another small town in Ohio—enacted a local municipal ordinance seeking to prevent Beck Energy Corporation from drilling for gas or oil within its city limits.² However, in February of 2015, the Ohio Supreme Court decided that a state statute preempts local hydraulic fracturing (fracking) bans, striking down such an ordinance.³ In this decision, *State ex rel. Morrison v. Beck Energy Corp.*, the Ohio Supreme Court overturned a local ban on fracking.⁴ The court rejected the city's, Munroe Falls's, argument that the Home Rule Amendment to the Ohio Constitution allowed the city to enforce its own permitting system beyond the requirements of the Ohio state system of permitting.⁵ The decision in *Morrison* seems to contradict the basic principles of zoning laws and of Home-Rule authority that were upheld in *Euclid*, as it stripped citizens' rights to decide what happens in their own hometown.⁶

This concerns many Ohio communities because the increasing use of fracking to extract natural gas from shale rock formations deep within the earth has raised many public health and environmental issues in the past few years.⁷ These issues range from potential water contamination, air pollution, noise, dust, truck traffic, groundwater spills, methane emission leaks, and even earthquakes.⁸ This is why many citizens want to keep fracking away from their homes.⁹

1. *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388–90 (1926) (upholding a local zoning ordinance against apartment housing that would be a nuisance to single-family housing, thus finding that the use of the police power to protect the public welfare in this manner is proper).

2. Derek Rocha, *No Fracknation Without Representation: Stripping Away a City's Right to Regulate the Stripping Away of Its Natural Resources in State ex rel. Morrison v. Beck Energy Corp.*, B.C. J.L. & SOC. JUST. 39, 39 (2016).

3. *See State ex rel. Morrison v. Beck Energy Corp.*, 143 Ohio St. 3d 271, 272, 2015-Ohio-485, ¶4, 37 N.E.3d 128, 131 (holding that the City of Munroe Falls's ordinances requiring Beck energy to obtain permits from the city were preempted by state law, ORC 1509, which grants ODNR the sole authority to regulate oil and gas activities in the state).

4. *Id.* at 272, 2015-Ohio ¶4, 37 N.E.3d at 131; 15 OHIO REV. CODE ANN. § 1509.02 (LexisNexis 2013).

5. *Morrison*, 143 Ohio St. 3d at 280, 2015-Ohio ¶34, 37 N.E.3d at 138.

6. *See Euclid*, 272 U.S. at 388–90 (holding that a town's use of zoning regulations is proper use of its police power).

7. Joel Minor, *Local Government Fracking Regulations: A Colorado Case Study*, 33 STAN. ENVTL. L.J. 59, 67–68 (2013).

8. *Id.* at 70; *see generally* U.S. ENVTL. PROT. AGENCY, ASSESSMENT OF THE POTENTIAL IMPACTS OF HYDRAULIC FRACTURING FOR OIL AND GAS ON DRINKING WATER RESOURCES, EPA/600/R-15/047a (2015) (providing a review and synthesis of available scientific data to assess the

Proponents of fracking claim that the technology brings economic benefits to communities.¹⁰ However, the economic benefits are outweighed by the substantial harms.¹¹ Royalty payments from oil and gas developers only go to those who own the rights to the oil and gas on their properties.¹² Unfortunately for most people in the country, “the legal doctrine of split estates allows one party to own the rights to minerals and other resources below the surface while someone else hold[s] the rights to property above ground.”¹³ Therefore, when oil and gas companies encroach upon a town, split estates leave millions, all without compensation, to deal with the adverse impacts of drilling, such as increased truck traffic, chemicals, lights at all hours of the night, noise from heavy equipment and construction, dust and noxious air emissions, and water contamination.¹⁴

This article first explains why the Ohio Supreme Court’s decision in *Morrison* is mistaken because it takes away local communities’ Home-Rule authority. Next, this article offers examples of how other states have properly interpreted local ordinances with respect to oil and gas development. And finally, this article explains what local communities can do, in light of this decision, to regain some control over the way they use their land.

I. THE OHIO SUPREME COURT TOOK AWAY LOCAL ZONING AUTHORITY IN *STATE EX REL. MORRISON V. BECK ENERGY CORP.*

The issue in *Morrison* was “whether the Home Rule Amendment to the Ohio Constitution grants to the city of Munroe Falls the power to enforce its own permitting scheme atop the state [permitting] system.”¹⁵ In 2011, the Ohio Department of Natural Resources (ODNR) issued the appellee, Beck Energy Corporation (Beck), a permit to drill an oil and gas well on property within the corporate limits of the appellant, the city of Munroe Falls.¹⁶ This permit was issued through Chapter 1509 of the Ohio Revised Code (ORC), which was amended in 2004 to provide statewide regulation of oil and gas production within Ohio and repealed “all provisions of law

potential for fracking to impact the quality or quantity of drinking water resources, and identifies factors affecting the frequency or severity of adverse impacts).

9. Minor, *supra* note 7, at 104.

10. *Drilling vs. the American Dream: Fracking Impacts on Property Rights and Home Values*, RESOURCE MEDIA (Mar. 14, 2014), <https://perma.cc/79C9-JLBM>.

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Morrison*, 143 Ohio St. 3d at 272, 2015-Ohio ¶ 1, 37 N.E.3d at 131.

16. *Id.* at 272, 2015-Ohio ¶ 2, 37 N.E.3d at 131.

that granted or alluded to the authority of local governments to adopt concurrent requirements with the state.”¹⁷ After Beck started drilling, the city of Munroe Falls issued a stop-work order and filed a complaint seeking an injunction in the Summit County Court of Common Pleas.¹⁸ The city claimed that Beck violated at least five provisions of the Munroe Falls’s Codified Ordinances, which were passed between 1980 and 1995.¹⁹

First, the city claimed that Beck violated a zoning ordinance that prohibited construction or excavation without a zoning certificate issued by the zoning inspector.²⁰ The other violations specifically relate to oil and gas drilling, in that

Munroe Falls Codified Ordinances 1329.03 prohibits any person from drilling a well for oil, gas, or other hydrocarbons “until such time as such persons have wholly complied with all provisions of this chapter and a conditional zoning certificate has been granted by Council to such person for a period of one year.”²¹

An applicant pays a fee and deposit for a performance bond under Munroe Falls Codified Ordinances 1329.04 and 1329.06.²² “Finally, Munroe Falls Codified Ordinances 1329.05 requires a public hearing at least three weeks prior to drilling and requires the permit applicant to schedule the hearing and notify all property owners and residents within 1,000 feet of the well head.”²³

The trial court granted the city’s request for a permanent injunction, prohibiting Beck from drilling until it complied with all of the city’s ordinances.²⁴ Beck then appealed.²⁵ The court of appeals reversed the decision, denying the city’s request for injunctive relief.²⁶ On appeal, the court “rejected the city’s argument that the Home Rule Amendment allowed it to impose its own permit requirements on oil and gas drilling

17. *Id.* at 272, 2015-Ohio ¶ 3, 37 N.E.3d at 131 (quoting H. Legis. Serv. Comm’n 125-278, at 3 (Ohio 2004); OHIO REV. CODE ANN. § 1509.02).

18. *Id.* at 273, 2015-Ohio ¶ 7, 37 N.E.3d at 132.

19. *Id.*

20. MUNROE FALLS, OHIO, Code of Ordinances § 1163.02(a) (2005).

21. *Morrison*, 143 Ohio St.3d. at 274, 2015-Ohio ¶ 9, 37 N.E.3d at 133.

22. *Id.*

23. *Id.*

24. *Id.* at 274, 2015-Ohio ¶ 11, 37 N.E.3d at 133.

25. *Id.*

26. *Id.*

operations.”²⁷ Instead, they agreed with Beck’s assertion that the city’s argument conflicted with the state statute, ORC Chapter 1509.²⁸

The city appealed and the Ohio Supreme Court affirmed, stating that the Home Rule Amendment to the Ohio Constitution, Article XVIII, Section 3, did not allow a municipality to discriminate against, unfairly impede, or obstruct oil and gas activities and production operations that the state permitted under ORC Chapter 1509.²⁹ The court noted that the Home Rule Amendment allows municipalities the authority to exercise all powers of local self-government and to create any local police, sanitary, or other similar regulations so long as they do not conflict with general laws.³⁰ This broad power, however, does not allow municipalities to exercise their police powers in a manner that would conflict with an Ohio general law.³¹ “Therefore, 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.”³² The court held that the ordinances were an exercise of police power, the statewide oil and gas drilling statute was general law, and the ordinances conflicted with the state statute.³³

The court found that a state law qualifies as a general law if it satisfies four conditions:

It 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 prescribe those regulations, and (4) prescribe a rule of conduct upon citizens generally.³⁴

The court found that the city’s ordinances conflicted with ORC 1509.02 because it prohibits state-licensed oil and gas production, which ORC 1509.02 allows.³⁵

27. *Id.* at 274, 2015-Ohio ¶ 12, 37 N.E.3d at 133.

28. *Id.*

29. *Id.* at 280, 2015-Ohio ¶ 34, 37 N.E.3d at 138.

30. *Id.* at 274–75, 2015-Ohio ¶ 14, 37 N.E.3d at 133.

31. *Id.*

32. *Id.* at 275, 2015-Ohio ¶ 15, 37 N.E.3d at 133.

33. *Id.* at 277, 2015-Ohio ¶¶ 24–25, 37 N.E.3d at 135.

34. *Id.* at 275, 2015-Ohio ¶ 19, 37 N.E.3d at 134.

35. *Id.* at 277, 2015-Ohio ¶ 25, 37 N.E.3d at 135.

But the city ordinances would render the permit meaningless unless Beck Energy also satisfied the permitting requirements in Chapters 1163 and 1329 of the Munroe Falls Ordinances. Section 1163.02(a) prohibited Beck Energy from building any structure or beginning “any excavation” until it followed all of the procedures necessary to obtain a zoning certificate. Even if Beck Energy were to satisfy the conditions of Chapter 1163 without violating the 67 conditions of its state permit, Beck Energy still could not “drill a well for oil, gas, or other hydrocarbons” until it “wholly complied with all provisions” in Chapter 1329. To comply with these provisions, Beck Energy would need to (1) wait one year after the city council approved the conditional zoning certificate, 1329.03(a), (2) pay a nonrefundable \$800 application fee, 1329.04, (3) deposit a \$2,000 “performance bond,” 1329.06, and (4) schedule a public meeting at least three weeks prior to drilling, 1329.05(a).³⁶

The court relied on *Clermont Environmental Reclamation Co. v. Weiderhold*, in which the court rejected a Home-Rule challenge involving a similar provision. In *Clermont*, the township enacted a zoning ordinance that prohibited any political subdivision from requiring additional zoning or other approval for the construction and operation of a state-licensed hazardous-waste facility.³⁷ Here, the court found that the zoning ordinance’s language was sufficient to supplant “any conflicting municipal ordinance,” which is why the court determined that the state law preempted the local ordinances.³⁸

Despite striking down Munroe Falls’s ordinances, the lead opinion notes, “[w]e make no judgment as to whether other ordinances could coexist with the General Assembly’s comprehensive regulatory scheme. Rather, our holding is limited to the five municipal ordinances at issue in this case.”³⁹ This is critical because it means that there are other options for municipalities to use zoning ordinances in order to prevent fracking activities. There is still hope for Home-Rule authority in Ohio.

36. *Id.* (citations omitted).

37. *See* *Clermont Envtl. Reclamation Co. v. Wiederhold*, 442 N.E.2d 1278, 1280 (Ohio 1982) (finding that state laws are “general laws” to carry out these statewide legislative goals, and municipalities are subject to its provisions notwithstanding the provisions of Section 3, Article XVIII of the Ohio Constitution).

38. *Id.* at 1282.

39. *Morrison*, 143 OhioSt.3d at 280, 2015-Ohio ¶ 33, 37 N.E.3d at 137.

II. THE OHIO SUPREME COURT MISTAKENLY FOUND THAT CHAPTER 1509
PREEMPTS ALL LOCAL ZONING ORDINANCES BECAUSE IT IS INCONSISTENT
WITH OHIO'S HOME RULE.

The Home Rule Amendment of the Ohio Constitution states that “[m]unicipalities 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.”⁴⁰ The Ohio Supreme Court’s broad interpretation of the ORC 1509.02 clause contradicts this provision. While ORC 1509.02 grants ODNR the authority to supervise oil and gas drilling, it does not take authority away from municipalities in enacting their own police, sanitary, and other regulations that have traditionally been areas of local concern. Further, the statute does not explicitly mention preempting local zoning laws. As the Ohio Supreme Court stated in *Cincinnati v. Hoffman*, in order for a conflict to exist between state laws and local ordinances, “the state statute must positively permit what the ordinance prohibits, or vice versa, regardless of the extent of state regulation concerning the same object.”⁴¹

The court determined that the ordinances conflicted with ORC 1509.02 because the General Assembly must have “intended to preempt local regulation on the subject.”⁴² They found that ORC 1509.02 not only gives ODNR the “sole and exclusive authority to regulate the permitting, location, and spacing of oil and gas wells and production operations’ within Ohio,” but it also “explicitly reserves for the state, to the exclusion of local governments, the right to regulate ‘all aspects’ of the location, drilling, and operation of oil and gas wells, including ‘permitting relating to those activities.’”⁴³ While ORC 1509.02 preserves the extensive regulatory control given to municipalities over a wide range of infrastructure—from alleys to aqueducts—it explicitly prohibits them from exercising those powers in a way that “discriminates against, unfairly impedes, or obstruct[s]” the activities and operations covered.⁴⁴

40. OHIO CONST. art. XVIII, § 3.

41. *Cincinnati v. Hoffman*, 25 N.E.2d 714, 719 (Ohio 1972).

42. See *Morrison*, 143 Ohio St.3d at 279, 2015-Ohio ¶129, 37 N.E.3d at 137 (quoting *Westlake v. Mascot Petroleum Co.*, 573 N.E.2d 1068, 1071 (Ohio 1991)).

43. *Id.* at 279, 2015-Ohio ¶130, 37 N.E.3d at 137 (quoting OHIO REV. CODE ANN. § 1509.02).

44. See also Jamal Knight & Bethany Gullman, *The Power of State Interest: Preemption of Local Fracking Ordinances in Home-Rule Cities*, 28 TUL. ENVTL. L.J. 297, 305–06 (2015) (addressing the Ohio state law that grants the ODNR sole authority to regulate fracking and finding that the Munroe Falls ordinance violated § 1509.02 restrictions).

If the General Assembly had intended to specifically prohibit local zoning ordinances as part of a statewide and comprehensive legislative scheme, then it would have stated so explicitly, as it has done in other Ohio statutes that clearly preempt local zoning ordinances. For example, ORC 3734.05(E), which regulates hazardous waste, states that “[n]o political subdivision of this state shall require any additional zoning or other approval, consent, permit, certificate, or condition for the construction or operation of a hazardous waste facility”;⁴⁵ ORC 3772.26(A), which regulates casinos, states that “no local zoning, land use laws, subdivision regulations or similar provisions shall prohibit the development or operation of the four casino facilities”;⁴⁶ ORC 5103.0318, which regulates foster homes, states that “[n]o municipal, county, or township zoning regulation shall require a conditional permit or any other special exception certification for any certified foster home”;⁴⁷ ORC 5104.054, which regulates day-care homes, states that “[n]o municipal, county, or township zoning regulations shall require a conditional use permit or any other special exception certification for any such type B family day-care home.”⁴⁸ These all show that the General Assembly knows how to prohibit local zoning authority because when they intend to, they state it explicitly within the statute. ORC 1509.02 does not contain this language; therefore, it was unreasonable for the court to read it in.

Furthermore, Section 4 of Article XVIII of the Ohio Constitution provides,

Any municipality may acquire, construct, own, lease and operate within or without its corporate limits, any public utility the product or service of which is or is to be supplied to the municipality or its inhabitants, and may contract with others for any such product or service. The acquisition of any such public utility may be by condemnation or otherwise, and a municipality may acquire thereby the use of, or full title to, the property and franchise of any company or person supplying to the municipality or its inhabitants the service or product of any such utility.⁴⁹

Thus, municipalities have authority to own and operate utilities under the Ohio Constitution, which specifically grants municipal corporations the

45. OHIO REV. CODE ANN. § 3734.05(E).

46. *Id.* § 3772.26.

47. *Id.* § 5103.0318.

48. *Id.* § 5104.054.

49. OHIO CONST. art. XVIII, § 4.

right to operate utilities. The Ohio Supreme Court was mistaken to find that local authority is preempted from prohibiting fracking.

The Ohio Supreme Court should have followed the examples of other states that have reconciled state and local oil and gas regulations.

1. New York

The decision in *Morrison* is a problem because many other Ohio citizens are concerned about what is going to happen to their environment, water, land, and health.⁵⁰ Other states have not viewed the preemptive language in oil and gas regulations to preclude all local regulation of oil and gas drilling as irreconcilable with local laws.⁵¹ In *Wallach v. Dryden*, the Court of Appeals of New York held that a statute expressly superseding all local laws “relating to the regulation of the oil [and] gas industry . . . preempt[s] only local laws that purport to regulate the actual operations of oil and gas activities, not zoning ordinances that restrict or prohibit certain land uses within town boundaries.”⁵² In *Wallach*, the New York Court of Appeals was asked to determine whether towns may ban or limit oil and gas production within their boundaries under their Home-Rule authority by adopting local zoning laws.⁵³ The court concluded that the statewide Oil, Gas and Solution Mining Law (OGSML) does not preempt the Home-Rule authority vested in municipalities to regulate land use.⁵⁴ The facts in this case are nearly identical to the situation in *Morrison*, which is why the Ohio Supreme Court should have followed this precedent.

Similar to Ohio, municipal Home-Rule authority in New York arises from the state’s Constitution. Under the New York Constitution, “every local government shall have power to adopt and amend local laws not inconsistent with the provisions of this constitution or any general law . . . except to the extent that the legislature shall restrict the adoption of such a local law.”⁵⁵ The adoption of zoning ordinances is viewed as one of

50. See George L. Blum, *Validity of Zoning Regulations Prohibiting or Regulating Removal or Exploitation of Oil and Gas, Including Hydrofracking*, 84 A.L.R.6th 133 (explaining validity and supporting local regulations on fracking).

51. See Travis H. Eckley, *Developing Jurisprudence in the Marcellus and Utica Shale*, 33 ENERGY & MIN. L. INST. 445, 454 (2012) (explaining the preemption rulings in Ohio and West Virginia where courts have been holding state law preempts local law, compared to New York where two cases held local zoning laws that were not preempted).

52. See *Wallach v. Town of Dryden*, 16 N.E.3d 1188, 1195–97 (N.Y. 2014) (holding that New York state law still recognizes the authority of local community ordinances).

53. *Id.*

54. *Id.* at 1191.

55. N.Y. CONST. art. IX, § 2.

the core powers of local governance.⁵⁶ The appellants had acquired oil and gas leases in municipalities that banned such activity and claimed that local zoning was preempted by the OGSML, which states that “[t]he provisions of this article shall supersede all local laws or ordinances relating to the regulation of the oil, gas and solution mining industries; but shall not supersede local government jurisdiction over local roads or the rights of local governments under the real property tax law.”⁵⁷

The New York Court of Appeals rejected the energy company’s argument that the preemption clause should be read broadly to preempt local zoning ordinances. It found that the preemption clause was “most naturally read as preempting only local laws that purport to regulate the actual operations of oil and gas activities, not zoning ordinances that restrict or prohibit certain land uses within town boundaries.”⁵⁸ The court also stated that unlike the OGSML’s preemption clause, other statutes had clearly preempted Home-Rule zoning power, while taking into account “local considerations that otherwise would have been protected by traditional municipal zoning powers.”⁵⁹ The court held that because there was no inconsistency between the preservation of local zoning authority and the OGSML’s policies of preventing waste and promoting recovery of oil and gas, local zoning would not be preempted without a clear expression of that intent. A similar conclusion in *Morrison* would have been with Ohio’s Home Rule Amendment and consistent with principles of local governance over public utilities and public health and safety.

2. Colorado

The Colorado Supreme Court also found that state regulation of the oil and gas industry did not preempt a county’s land-use authority in *La Plata County Board of Commissioners v. Bowen/Edwards Association Inc.* The Colorado Supreme Court rejected an oil and gas company’s argument that the Colorado Oil and Gas Conservation Act preempts local counties’ land-use regulations pertaining to oil and gas activities. The court stated, “We reasonably may expect that any legislative intent to prohibit a county from exercising its land-use authority over those areas of the county in which oil development or operations are taking place or are contemplated would be

56. *Wallach*, 16 N.E.3d at 1194–95.

57. *Id.* at 1195 (citing N.Y. ENVTL. CONSERV. LAW § 23-0303(2) (McKinney 2016)).

58. *Id.* at 1197.

59. *Id.* at 1198.

clearly and unequivocally stated.”⁶⁰ The court concluded that state and local interests could be distinguished from each other but not in express conflict, stating:

While the governmental interests involved in oil and gas development and in land-use control at times may overlap, the core interests in these legitimate governmental functions are quite distinct. The state's interest in oil and gas development is centered primarily on the efficient production and utilization of the natural resources in the state. A county's interest in land-use control, in contrast, is one of orderly development and use of land in a manner consistent with local demographic and environmental concerns. Given the rather distinct nature of these interests, we reasonably may expect that any legislative intent to prohibit a county from exercising its land-use authority over those areas of the county in which oil development or operations are taking place or are contemplated would be clearly and unequivocally stated. We, however, find no such clear and unequivocal statement of legislative intent in the Oil and Gas Conservation Act.⁶¹

3. Pennsylvania

Similarly, the Pennsylvania Supreme Court concluded that a statute superseding all municipal ordinances purporting to regulate oil and gas well operations does not preempt a local zoning restriction excluding oil and gas wells from certain residential districts in *Huntley & Huntley, Inc. v. Oakmont Borough Council*.⁶² The Pennsylvania Supreme Court agreed with the Colorado Supreme Court's reasoning in *La Plata*. The preemptive language in Pennsylvania's Oil and Gas Act is limited to certain subjects, such that the state law did not preempt all matters in the city's ordinance. In this case, the zoning ordinance was found to serve a different purpose from those enumerated in the Oil and Gas Act.⁶³ Thus, the ordinance in question could not be preempted without clear guidance from the legislature that the restriction in the ordinance was among the subjects covered by the preemption.

60. Bd. of Cty. Comm'rs v. Bowen/Edwards Assocs., Inc., 830 P.2d 1045, 1057 (Colo. 1992).

61. *Id.*

62. *Huntley & Huntley, Inc. v. Borough Council of Oakmont*, 964 A.2d 855, 866 (Pa. 2009).

63. *Id.*

III. THERE IS STILL HOPE: MUNICIPALITIES CAN STILL CREATE ZONING ORDINANCES THAT DO NOT CONFLICT WITH GENERAL LAW.

In *Morrison*, Justice French conceded that while these five specific ordinances may be preempted, local authorities still have the right to invoke their Home-Rule authority over other areas.⁶⁴ This may include some ordinances that would permissibly limit or impede upon fracking in an area. Ohio municipalities' authority to enact zoning ordinances in ORC 713.07 states, "municipalities, 'in the interest of the promotion of the public health, safety, convenience, comfort, prosperity, or general welfare, may regulate and restrict the location of buildings and other structures.'"⁶⁵ What can Ohioans do, then, to invoke the Home Rule Amendment to regulate land uses within zoning districts to promote the public health, safety, convenience, comfort, prosperity, and general welfare?

Traditionally, courts have found that there is a strong presumption in favor of the validity of local ordinances.⁶⁶ This is because each local legislative body is familiar with local conditions and is, therefore, better suited than the courts to determine the character and degree of regulation required.⁶⁷ In *Hudson v. Albrecht*, the Ohio Supreme Court further noted that "the right of the individual to use and enjoy his private property is not unbridled, but is subject to the legitimate exercise of the local police power."⁶⁸ This power includes the right to create zoning regulations.⁶⁹ The ultimate purpose of the police power is to protect "public health, safety and general welfare, [and] its exercise in order to be valid must bear a substantial relationship to that object and must not be unreasonable or arbitrary."⁷⁰

Justice O'Donnell even wrote separately to emphasize the limited scope of the court's decision in *Morrison*.⁷¹ The decision in *Morrison* does not mean that ORC 1509.02 preempts

local land use ordinances that address only the traditional concerns of zoning laws, such as ensuring compatibility with local neighborhoods, preserving property values, or effectuating a

64. *Morrison*, 143 Ohio St.3d at 280, 2015-Ohio ¶ 34, 37 N.E.3d at 137.

65. *Id.* at 281, 2015-Ohio ¶ 41, 37 N.E.3d at 139 (O'Donnell, J., concurring) (citing OHIO REV. CODE ANN. § 713.07 (LexisNexis 2013)).

66. *Vill. of Hudson v. Albrecht, Inc.*, 458 N.E.2d 852, 855 (Ohio 1984).

67. *Id.*

68. *Id.* (citing OHIO CONST. art. XVIII, § 3).

69. *Id.*

70. *Id.* (citing *Cincinnati v. Correll*, 49 N.E.2d 412 (1943)).

71. *Morrison*, 143 Ohio St.3d at 281, 2015-Ohio ¶ 38, 37 N.E.3d at 138.

municipality's long-term plan for development, by limiting oil and gas wells to certain zoning districts without imposing a separate permitting regime applicable only to oil and gas drilling.⁷²

Therefore, other options may permissibly protect local Ohio communities based on traditional zoning concerns. The following are zoning options that Ohio communities may still enact in light of the *Morrison* decision.

There are options for local zoning ordinances that will limit or restrict fracking in communities.

1. Site Access/Restrictions on Road Usage

Ohio municipalities may permissibly create zoning ordinances to prohibit access to well sites across public property, including public roads, without prior consent of the municipality. Local authorities and the Ohio Department of Transportation have the power under ORC 4513.34 to grant permits for oversize vehicles to use the roads in their respective jurisdictions.⁷³ Additionally, ORC 723.01 provides that “[m]unicipal corporations shall have special power to regulate the use of the streets. . . . [T]he legislative authority of a municipal corporation shall have the care, supervision, and control of the public highways, streets, avenues, alleys, sidewalks, public grounds, bridges, aqueducts, and viaducts within the municipal corporation.”⁷⁴

As section 1509.02 states, “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,” so long as the regulations do not “discriminate[] against, unfairly impede[], or obstruct[] oil and gas activities and operations regulated.”⁷⁵ Fracking operations require hundreds of “trucks . . . to bring water, sand, chemicals, and equipment to . . . well sites and to haul wastewater away from well sites.”⁷⁶ This increased road use heavily impacts road infrastructure and increases traffic and congestion.⁷⁷ To drill a well in the Marcellus Shale, approximately 5.6

72. *Id.*

73. OHIO REV. CODE ANN. § 4513.34 (LexisNexis 2013).

74. *Id.* § 723.01.

75. *Id.* § 1509.02.

76. Sorell E. Negro, *Man Camps, Boomtowns, and the Boom-and-Bust Cycle: Learning from Rifle, Colorado, and Williams County, North Dakota*, in BEYOND THE FRACKING WARS: A GUIDE FOR LAWYERS, PUBLIC OFFICIALS, PLANNERS AND CITIZENS 193, 203–04 (Erica Levine Powers & Beth E. Kinne eds., 2013).

77. *Id.*

million gallons of water is required, which is delivered by hundreds of truckloads. Once fracking begins in an area, roads require more maintenance due to increased intensity of use.⁷⁸ Maintaining infrastructure becomes extremely costly for communities; for example, “Sublette County, Wyoming, spent over \$60 million on its roads and water and sewage systems in 2009 alone, and it still needed an additional \$160 million.”⁷⁹

Local roads are typically not built to withstand the compression of such heavy truck use.⁸⁰ Therefore, to protect local roads, ordinances may be enacted that would apply “to all truck traffic, not just [those] related to the oil and gas industry.”⁸¹ Municipalities may create ordinances “establish[ing] weight, height, and length limitations.”⁸² Then, a fee may be charged to any vehicle not meeting those standards.⁸³ Enforcing penalties and permit fees for trucks ensures that local roads are protected, ensures compliance, and also limits or impedes the oil and gas industry if they do not want to pay for such permits.⁸⁴

The court has also stated in *City of Dublin v. State* that a municipality’s power of self-government includes the power to control its “public ways” by utility service providers and cable operators.⁸⁵ When the use involves installing and operating their equipment and facilities within the town border, state law does not preempt the town’s rules.⁸⁶ Municipalities have enacted regulations to minimize the impacts from trucks, such as regulations that restrict when trucks are permitted on the roads. For example, Collier Township, Pennsylvania requires the following information when applying for a gas drilling permit:

- (1) the proposed routes of all trucks to be used for hauling;
- (2) the trucks’ estimated weights;
- (3) evidence of compliance with weight limits on its streets, or a bond and an excess maintenance agreement to ensure repair of road damage; and
- (4) evidence that

78. *Id.* at 203.

79. *Id.*

80. Charles C. Grubb, *Getting Ahead of Drilling Companies in the Haynesville Shale: The Caddo Parish, Louisiana, Experience*, in BEYOND THE FRACKING WARS: A GUIDE FOR LAWYERS, PUBLIC OFFICIALS, PLANNERS AND CITIZENS 213, 219 (Erica Levine Powers & Beth E. Kinne, eds., 2013).

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *City of Dublin v. State*, 769 N.E.2d 436, 464 (Ohio Ct. Com. Pl. 2002).

86. *Id.* at 468.

the intersections on the proposed routes have a sufficient turning radius.⁸⁷

Therefore, other municipalities may be able to control the “number of truck trips and which routes will be used, as it can help regulators understand how each operator will impact roads.”⁸⁸ This will not prevent fracking operations entirely, but it will ensure minimal harm to the community.

2. Distance Requirements

Ohio municipalities can—and should—require wells and other “equipment be located a minimum distance from specified locations or structures.”⁸⁹ The Ohio Supreme Court has ruled that distance requirements are not preempted by ORC 1509.02 or by the Ohio Administrative Code (OAC) 1501: 9-1-05, which authorizes Ohio municipalities to do this.⁹⁰ In *Smith Family Trust v. City of Hudson Board of Zoning & Building Appeals*, the Court held that distance requirements are left up to local authorities to decide because distance requirements are not addressed by state regulations.⁹¹

As fracking increasingly moves into densely populated areas, many municipalities throughout the country have started creating setback requirements as “recent developments in technology have revealed more oil and gas deposits in shale and have allowed a single well to extract gas from one to two miles away.”⁹² Such setback or distance requirements can prevent fracking operations that are located too close to vulnerable areas that present special health, safety, or environmental concerns.⁹³ For example, some setback regulations “require[] that wells be kept away from watercourses, parks, inhabited buildings, public buildings, or schools.”⁹⁴

87. Negro, *supra* note 76, at 204.

88. *Id.*

89. Shaun A Goho, *Municipalities and Hydraulic Fracturing: Trends in State Preemption*, 64 PLAN. & ENVTL. L. 3, 5 (2012).

90. *Smith Family Tr. v. City of Hudson Bd. of Zoning & Bldg. Appeals*, 2009-Ohio-2557, ¶ 12 (Ohio Ct. App. 2009).

91. *Id.* ¶¶ 11–12.

92. Sorell E. Negro, *The Thirst of Fracking: Regulating to Protect the Linchpin of the Natural Gas Boom*, in 2015 ZONING AND PLANNING LAW HANDBOOK 277, 294–95 (Patricia E. Salkin ed., 2015).

93. *Id.* at 295.

94. Goho, *supra* note 89, at 5.

3. Noise Standards

Cities should adopt a noise ordinance to ensure a proper limit on noisy activities within their community. Oil and gas drilling creates a significant amount of noise from construction, traffic, pump jacks, engines, and compressor stations.⁹⁵ Even after drilling and fracking, compressor stations, which push gas through pipelines, remain in place and create loud humming noises for years—even decades.⁹⁶ Residents’ actual perception of the noise levels, however, “depend on the distance between the receptor and the equipment, the topography, vegetation, and meteorological conditions,” such as wind speed and direction, temperature, and humidity.⁹⁷ A recent study done in La Plata County, Colorado indicates that a required “45 dBA [decibels] (or lower) residential noise standard is reasonable, but will ensure residents’ health, safety, and enjoyment of property are not significantly harmed.”⁹⁸ Therefore, to protect the communities’ peace and enjoyment of their land, ordinances should be adopted to require maximum noise levels that would apply to any industry—or even private—use of land.⁹⁹

4. Aesthetic Requirements

Cities in Ohio may enact zoning ordinances that relate to aesthetic considerations.¹⁰⁰ In *Hudson v. Albrecht*, for example, the Ohio Supreme Court found that aesthetic considerations could be taken into account by the legislative body in enacting zoning legislation because there is a legitimate governmental interest in maintaining the aesthetics of a community.¹⁰¹ The court also found that aesthetics of the community relates to property values, which is also a legitimate concern because protecting real estate from impairment and destruction of value are “includable under the general welfare aspect of the municipal police power and may therefore justify its

95. *Oil and Gas Noise*, EARTHWORKS, <https://perma.cc/6C4M-3H3V> (last visited Dec. 3, 2016).

96. Marie Cusick, *All Things Considered: Long After Fracking Stops, The Noise Lives On*, NAT’L PUB. RADIO (Oct. 14, 2014, 5:32 PM), <https://perma.cc/4L84-TBSW>.

97. EARTHWORKS, *supra* note 95.

98. *Id.*

99. *See, e.g.*, Arlington, Tex., Nuisance Ordinance § 7.01(A)(21), (F) (1989) (requiring mufflers on all engines and setting maximum noise levels); FORT WORTH, TEX., REV. ORDINANCES ch. 15, art. II, § 42(a)(25), (b) (requiring mufflers on all engines and setting maximum noise levels); Twp. of Cecil, Pa., Ordinance No. 2-2010, § 3(16) (2010) (setting maximum noise levels and prescribing mitigation measures).

100. *Vill. of Hudson*, 458 N.E.2d at 856.

101. *Id.*

reasonable exercise.”¹⁰² Also, in *State v. Buckley*, the court stated that the appearance of a community relates closely to its citizens’ happiness, comfort, and general wellbeing.¹⁰³

Accordingly, Ohio municipalities should enact aesthetic requirements for any property because there is a legitimate governmental interest in maintaining the aesthetics of the community; thus, aesthetic considerations may legally be taken into account by the legislative body in enacting zoning legislation.¹⁰⁴ In Ohio, land-use regulations related to aesthetic considerations are valid if the regulation is substantially related to a legitimate public purpose (other than aesthetics), or if the regulation is based on purely aesthetic considerations, then it can be valid so long as the harm to the aesthetic character of the surrounding area that the regulation prevents is “generally patent and gross, and not merely a matter of taste.”¹⁰⁵ Aesthetic regulations have been found to be within the scope of police power regulation.¹⁰⁶ Such aesthetic regulations include: screening fences; parking; the size, type, and location of signs and billboards; and the architectural style of structures on the land.¹⁰⁷ The validity of an aesthetic regulation, therefore, is judged on whether the effect of the regulation on the particular land use prevents an appearance that is “patently or grossly out of harmony with the visual character of the surrounding area.”¹⁰⁸

Fracking operations often destroy land and create dust, vibrations, and odors that cause people to view these drill sites as being grossly out of harmony with the visual character of any given area.¹⁰⁹ Therefore, zoning ordinances should “require drill sites to be free of high grass, weeds, and trash and impose fence and screen requirements.”¹¹⁰ Aesthetic ordinances are more likely to be permissible when they also reflect the “monetary interests of protecting real estate from impairment and destruction of value.”¹¹¹ The Ohio Supreme Court stated that the goal of protecting property values is “includable under the general welfare aspect of the municipal police power and [thus] . . . justif[ies] the reasonable exercise.”¹¹²

102. *Id.*

103. *State v. Buckley*, 243 N.E.2d 66, 71 (Ohio 1968).

104. *Id.* at 70.

105. Edward H. Ziegler, Jr., *Aesthetics in Ohio Land Use Law: Preserving Beauty in the Parlor and Keeping Pigs in the Barnyard*, 19 AKRON L. REV. 1, 19 (1985).

106. *Id.* at 2.

107. *Id.*

108. *Id.* at 13.

109. *Id.*; *Drilling vs. the American Dream*, *supra* note 10.

110. Grubb, *supra* note 80, at 217.

111. *Vill. of Hudson*, 458 N.E.2d at 857.

112. *Id.*

Further, fracking operations decrease property values because nobody wants to live near the noise, odors, traffic, or chemicals.¹¹³ For example, in April of 2014, a Texas family was awarded nearly \$3 million after their health and lives were ruined by emissions coming from dozens of wells that had been drilled near their home.¹¹⁴ This verdict included \$275,000 for the loss in market value of their property caused by all the drilling.¹¹⁵ Further, a 2013 study published in the *Journal of Real Estate Literature* reveals that a strong majority of people would decline to buy a home near drilling sites.¹¹⁶ The study also showed that people who would bid on a home near a fracking location would diminish their offer by up to 25 percent.¹¹⁷

5. Use of Public Water Supplies

Ohio municipalities could also require state and local permits for accessing public water supplies for fracking operations; therefore, prohibiting access to the water supply without securing necessary permits.¹¹⁸ Water is the largest component of fracking fluids.¹¹⁹ A drilling operation consumes approximately “6,000 to 600,000 US gallons of fracking fluids, but over its lifetime an average well may require up to an additional 5 million gallons of water for full operation and possible restimulation frac jobs.”¹²⁰ Thus, without access to water, energy companies would not be able to perform the operation.

6. Dust, Vibration, and Odors

Cities should establish “a best practice standard to minimize the generation of dust, vibration and offensive odors and further require operators to incorporate reasonable feasible technological improvements in industry standards in the future to accomplish these goals.”¹²¹ The current debate around nuisance suits against fracking companies is “whether [the] industry’s interest in producing natural gas outweighs residents’ interest in

113. *Drilling vs. the American Dream*, *supra* note 10.

114. Jess Krochtengel, *Jury Awards Texas Family \$2.9M for Fracking Nuisance Claim*, LAW360 (Apr. 22, 2014, 5:25 PM), <https://perma.cc/6PYM-ADLF>.

115. *Id.*

116. Ron Throupe et al., *A Review of Hyrdo “Fracking” and its Potential Effects on Real Estate*, 21 J. REAL EST. LITERATURE 1, 16 (2013).

117. *Id.*

118. Grubb, *supra* note 80, at 216.

119. *Fracking and Water Consumption*, SOURCE WATCH, <https://perma.cc/42SW-RUNG> (last visited Oct. 3, 2016).

120. *Id.*

121. Grubb, *supra* note 80, at 216.

peace and quiet.”¹²² A mass litigation suit for nuisance against an oil and gas company, Antero and Hall, for fracking in neighborhoods is set for trial in West Virginia in 2016.¹²³ The main complaints are about traffic, noise, and odors from the natural gas wells, compressor stations, and pipelines.¹²⁴ This case may serve as a model for evaluating fracking nuisances under the common law nuisance question: “Does an action unreasonably interfere with the enjoyment of one’s property?”¹²⁵ The fact that there are so many plaintiffs involved in this case shows how undesirable it is to live near fracking sites.

7. Lighting

Because oil and gas extraction occurs at all hours, lights are left on throughout the night.¹²⁶ Cities can prohibit lighting from shining directly on public roads, adjacent property, or property within 300 feet of the site.¹²⁷ These provisions can require that the site lighting be directed downward and internally so as to avoid glare on public roads, adjacent dwellings and other buildings, and any such dwellings or buildings within 300 feet of the site.¹²⁸ This would prevent the nuisance of heavy lighting disrupting the community all throughout the night.

8. Lobby!

In *Morrison*, the city presented strong “policy reasons [for] why local governments and the state should work together, with the state controlling the details of well construction and operations and the municipalities designating which land within their borders is available for those activities.”¹²⁹ The court thought that the issue in *Morrison* was not whether the law should allow municipalities to have concurrent regulatory authority

122. Ellen M. Gilmer, *Marcellus Shale: W.Va. Shale Fields Fertile Ground for Nuisance Lawsuits*, ENERGYWIRE (Sept. 9, 2015), <https://perma.cc/EF2J-UNHA>.

123. *Id.*

124. *Id.*

125. *Id.*

126. See *Drilling vs. the American Dream*, *supra* note 10 (explaining that even Exxon Mobile’s CEO and board chairman Rex Tillerson is “suing to stop construction of a water tower that would supply nearby drilling operation because of the nuisance of, among other things, heavy truck traffic, noise and traffic hazards from the fracking operations the tower would support because even “the head of the single largest drilling company in the world acknowledges the ‘constant and unbearable nuisance’ that would come from having ‘lights on at all hours of the night . . . traffic at unreasonable hours . . . noise from mechanical and electrical equipment.’”).

127. Grubb, *supra* note 80, at 216.

128. *Id.*

129. *Morrison*, 143 Ohio St.3d at 279, ¶ 33, 37 N.E.3d at 137.

but whether ORC 1509.02 and the Home Rule Amendment allow the situation of double licensing.¹³⁰ Instead, they indicated that the city's policy ideas should be presented to the "elected representatives in the General Assembly, not the judiciary."¹³¹ Grassroots movements are powerful tools deeply rooted in American society to lobby for more just laws. Concerned citizens in Ohio, therefore, must act quickly to lobby their Home-Rule concerns at each legislative level to ensure that the laws are clarified and are reevaluated or rewritten such that principles of Home-Rule authority, as well as public health and safety, may be restored.

CONCLUSION

The court's decision in *Morrison v. Beck Energy* is mistaken in finding that the Ohio state statute preempts local towns from creating their own oil and gas regulations. The court misinterpreted ORC 1509.02 when it found that the state law preempts any and all local ordinances because it did not explicitly state so, as the General Assembly has done in other statutes that were intended to preempt local authority. Additionally, the Ohio State Constitution grants municipalities the authority to regulate utilities in the Home Rule Amendment.¹³²

The concerns about fracking are reasonable, and citizens in Ohio and other states have the right under the Home Rule Amendment to create land use regulations in the interest of public health, safety, and to avoid nuisances. Although in this case, the Ohio Supreme Court found that state law preempted Munroe Falls's local ordinances, the court noted that "[w]e make no judgment as to whether other ordinances could coexist with the General Assembly's comprehensive regulatory scheme. Rather, our holding is limited to the five municipal ordinances at issue in this case."¹³³ This is critical because it means that there are other options for municipalities to use zoning ordinances in order to prevent fracking activities.

Cities must act quickly to enact ordinances that will still protect their health, safety, environment, and enjoyment of land. Creating zoning ordinances for rights-of-way or road restrictions, distance or setback requirements, noise standards, aesthetic requirements, dust, vibrations, or odor limitations, lighting restrictions, and restrictions on the use of public water supplies will all ensure the safety and wellbeing of Ohio

130. *Id.* at 279–80, 2015-Ohio ¶ 33, 37 N.E.3d at 137.

131. *Id.* at 280, 2015-Ohio ¶ 33, 37 N.E.3d at 137.

132. OHIO CONST. art. XVIII, § 3.

133. *Id.*

communities. Furthermore, citizens should lobby the legislature so that Home-Rule power may be returned to the people of Ohio.