

**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.**

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**Abstract:** In 2011, the city of Munroe Falls, Ohio sought to prevent Beck Energy Corporation from drilling for gas or oil within its city limits until the company complied with the city’s relevant municipal ordinances. Pursuant cases sought to resolve whether Munroe Falls’ municipal ordinances were a valid exercise of the city’s home-rule power. The Ohio Supreme Court determined that the local ordinances conflicted with state law, which regulated oil and gas production within Ohio. The court held that the state law preempted the local ordinances as they sought to regulate oil and gas production in a similar manner. In response, the concurring and dissenting opinions expressed concern that the plurality opinion demonstrated a rigid deference towards preemption at the expense of traditionally recognized areas of municipal authority. This Comment argues in favor of the concurring and dissenting opinions, which rightly cautioned against the preemption of all local regulations by state law when dealing with ultrahazardous and locally impactful activity.

INTRODUCTION

The Beck Energy Corporation (“Beck Energy”) is an Ohio-based oil and natural gas company that secured a permit from the Ohio Department of Natural Resources (“ODNR”) Mineral Resources Management Division to drill a well on Joseph Willingham’s property located in the city of Munroe Falls.<sup>1</sup> Beck Energy received a permit pursuant to the conditions outlined in Ohio’s Revised Code (“R.C.”) Chapter 1509, which regulates oil and gas wells and production operations within Ohio.<sup>2</sup> Beck Energy, however, re-

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<sup>1</sup> State *ex rel. Morrison v. Beck Energy Corp. (Beck I)*, 989 N.E.2d 85, 89 (Ohio Ct. App. 2013). The ODNR is the administrative department charged with maintaining and regulating the use of Ohio’s natural resources, such as: minerals, state parks, nature preserves, wildlife areas, forests, waterways, and the exploitation of such. See History and Purpose of the Department of Natural Resources, OHIO DEP’T OF NATURAL RES., <http://ohiodnr.gov/home/history-purpose> [https://perma.cc/P393-N8VF].

<sup>2</sup> State *ex rel. Morrison v. Beck Energy Corp. (Beck II)*, 37 N.E.3d 128, 131 (Ohio 2015). R.C. chapter 1509.02 provides that the ODNR and, more specifically, its Mineral Resources

fused to comply with the necessary Munroe Falls municipal ordinances before drilling within the city limits.<sup>3</sup> The City of Munroe Falls issued a Stop Work Order and sought a permanent injunction that would prohibit Beck Energy from drilling within the city until the energy company complied with the city's municipal regulations.<sup>4</sup>

Beck Energy opposed the injunction, asserting that the Munroe Falls ordinances were unenforceable because they conflicted with Ohio's comprehensive oil and gas regulatory scheme, as embodied in R.C. Chapter 1509.<sup>5</sup> In obtaining the state permit, Beck Energy met a total of sixty-seven required conditions relating to site distribution, pit construction, waste disposal, noise mitigation, and appropriate notice to surrounding property owners.<sup>6</sup> Munroe Falls' municipal ordinances addressed similar considerations and consequently required Beck Energy to undergo a repetitive and parallel permitting process.<sup>7</sup> In contesting compliance with the ordinances, Beck Energy argued that these ordinances were not only redundant, but also violated Ohio's Home Rule Amendment.<sup>8</sup> Munroe Falls justified the enforcement of both its ordinances and the subsequent injunction as a valid exercise of its home-rule authority.<sup>9</sup> Under this doctrine, a city has

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Management Division, has "sole and exclusive authority to regulate the permitting, location, and spacing of oil and gas wells and production operation" within Ohio. OHIO REV. CODE ANN. § 1509.02 (West 2013); *see also Beck I*, 989 N.E.2d at 89. The purpose of R.C. chapter 1509.02, as amended in 2004, is to provide "uniform statewide regulation" of oil and gas production within Ohio, and to repeal "all provisions of law that granted or alluded to the authority of local governments to adopt concurrent requirements with the state." *Beck II*, 37 N.E.3d at 131 (quoting Sub. H.B. No. 278, 125th Gen Assemb. (Ohio 2004)).

<sup>3</sup> Brief for Appellant at 1, *State ex rel. Morrison v. Beck Energy Corp.*, 37 N.E.3d 128 (Ohio 2015) (No. 2013-0465), 2013 WL 5229893, at \*1.

<sup>4</sup> *Beck I*, 989 N.E.2d at 88; *see also* Brief for Appellant, *supra* note 3, at \*1.

<sup>5</sup> *Beck II*, 37 N.E.3d at 133; *see also* OHIO REV. CODE ANN. § 1509.02; *supra* note 2 and accompanying text.

<sup>6</sup> *Beck II*, 37 N.E.3d at 132.

<sup>7</sup> *Id.* at 138 (O'Donnell, J., concurring). Before drilling, Beck Energy would have had to receive various approvals from the municipal planning commission, the city council, the zoning inspector, and the board of zoning appeals. *Id.* at 132–33. Beck Energy then would have had to file for a "conditional zoning certificate" for a period of one year, pay a fee of \$800 and deposit \$2000 for a performance bond at the time of filing, and then schedule a public hearing at least three weeks prior to drilling and notify all property owners and residents within 1000 feet of the drilling location. *Id.*

<sup>8</sup> *Beck I*, 989 N.E.2d at 89–90. The Home Rule Amendment is a constitutional power granted to municipalities so that they may exercise all powers of local self-government on all matters that are strictly local in nature, provided that the exercise thereof does not conflict with a general state law. *Beck II*, 37 N.E.3d at 133; *see also* OHIO CONST. art. XVIII, § 3. A conflict exists if "the ordinance permits or licenses that which the statute forbids and prohibits, and vice versa." *Beck II*, 37 N.E.3d at 135 (quoting *Struthers v. Sokol*, 140 N.E. 519 (1923)).

<sup>9</sup> *Beck II*, 37 N.E.3d at 133.

the power to implement local ordinances that supplement, rather than conflict with, general state law.<sup>10</sup>

The Court of Common Pleas in Summit County initially granted injunctive relief that prohibited Beck Energy from drilling until it complied with all local ordinances.<sup>11</sup> Upon review, however, the Ninth District Court of Appeals held that five of Munroe Falls' municipal ordinances conflicted with state general law; the court reversed the lower court's injunction as it related to these five ordinances.<sup>12</sup> In a plurality opinion written by Justice Judith L. French, the Ohio Supreme Court upheld the Court of Appeals decision and held that these ordinances violated Ohio's Home Rule Amendment, leaving them preempted by the existing state laws.<sup>13</sup>

Part I of this Comment outlines the factual and procedural history as well as relevant legal considerations in *Beck*. Part II discusses and compares the plurality's holding that state drilling and fracking laws preempted local regulations, with the concurring and dissenting opinions, which advocated for preserving a municipality's ability to regulate locally impactful activity when at all possible. Part III advocates for the dissent's reluctance in curtailing home-rule authority in cases that have a significant bearing on the interests of a municipality's residents. With issues as impactful on local communities as fracking, the dissent's approach allows local ordinances to coexist with state law. Further, the dissent's position provides those citizens most impacted by such environmentally disruptive drilling activities with a more effective avenue for regulating the operations of a company with a particularly strong influence within the state.

#### I. LOCAL AND STATE REGULATIONS AND RELEVANT PROCEDURAL HISTORY ADDRESSING BECK ENERGY'S RIGHT TO DRILL

On February 16, 2011, Beck Energy Corporation ("Beck Energy") secured a permit from the Ohio Department of Natural Resources ("ODNR"), Division of Mineral Resources Department, to drill a conventional gas well in Munroe Falls.<sup>14</sup> Beck Energy received the state permit through Ohio's Revised Code ("R.C.") Chapter 1509, which provides uniform statewide

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<sup>10</sup> *Id.* at 139 (O'Donnell, J., concurring). Munroe Falls' argument emphasized that Ohio's drilling regulations did not completely divest municipalities of their rights to enact and enforce zoning laws, and that their zoning ordinances could coexist with state law. Brief for Appellant, *supra* note 3, at \*12–14. Munroe Falls also argued that its local drilling laws do not conflict with the state law in any meaningful way because they are grounded in educating the public as to the safety of the project and do not substantively impede the driller's operations. *Id.* at \*29.

<sup>11</sup> *Beck II*, 37 N.E.3d at 132.

<sup>12</sup> *Beck I*, 989 N.E.2d at 99; see *infra* note 31 and accompanying text.

<sup>13</sup> *Beck II*, 37 N.E.3d at 137, 138.

<sup>14</sup> *State ex rel. Morrison v. Beck Energy Corp. (Beck I)*, 989 N.E.2d 85, 89 (Ohio Ct. App. 2013).

regulation of oil and gas production within Ohio.<sup>15</sup> Beck Energy's state permit required compliance with a number of conditions related to the drilling site's location within an "Urbanized Area" as well as its designation as a "Municipal Wellhead Protection Area."<sup>16</sup> Despite complying with the state regulations outlined in R.C. Chapter 1509, Beck Energy's operation failed to comply with a number of municipal ordinances related to streets and rights-of-way, excavation, zoning, as well as oil and gas drilling.<sup>17</sup> The City of Munroe Falls issued a Stop Work Order<sup>18</sup> until such time when Beck Energy complied with these local ordinances.<sup>19</sup> Beck Energy, in response, advised the city that they did not intend to comply with this order.<sup>20</sup>

#### A. R.C. Chapter 1509

Ohio's Revised Code Chapter 1509 regulates all oil and gas drilling and production operations in Ohio.<sup>21</sup> In 2004, the Ohio General Assembly amended R.C. Chapter 1509.02 to give the Division of Mineral Resources Management of the ODNR the "sole and exclusive authority to regulate the permitting, location, and spacing of oil and gas wells and production operations."<sup>22</sup> Pursuant to R.C. Chapter 1509.05, a person or company must first obtain a drilling permit from the Division of Mineral Resources Management before drilling a well for oil or gas in Ohio.<sup>23</sup> In order to obtain a permit, a person or company must comply with a number of standards relating to well spacing restrictions, "safety of well drilling and operation, protection of the public and private water supply, fencing and screening of surface facilities, waste containment and disposal, construction of access roads, and noise mitigation."<sup>24</sup>

Although R.C. Chapter 1509 gives Ohio's state government central authority to regulate oil and gas drilling and production operations, it preserves certain regulatory powers granted to local governments by other statutes.<sup>25</sup> Municipal corporations have the authority to control public high-

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<sup>15</sup> State *ex rel.* Morrison v. Beck Energy Corp. (*Beck II*), 37 N.E.3d 128, 131 (Ohio 2015); *see also* OHIO REV. CODE ANN. § 1509.02 (West 2013); *supra* note 2 and accompanying text.

<sup>16</sup> *Beck II*, 37 N.E.3d at 132. An "Urbanized area" is a municipal corporation or township with a population of 5000 or more. OHIO REV. CODE ANN. § 1509.01.

<sup>17</sup> *Beck I*, 989 N.E.2d at 94–95.

<sup>18</sup> *Beck II*, 37 N.E.3d at 132.

<sup>19</sup> *Beck I*, 989 N.E.2d at 88.

<sup>20</sup> Brief for Appellant, *supra* note 3, at \*1.

<sup>21</sup> OHIO REV. CODE ANN. § 1509.02; *see also Beck II*, 37 N.E.3d at 131.

<sup>22</sup> *Beck II*, 37 N.E.3d at 131 (quoting OHIO REV. CODE ANN. § 1509.02 (West 2013)).

<sup>23</sup> *Id.* at 132; *see also* OHIO REV. CODE ANN. § 1509.05 (West 2011) (outlining permitting requirements for drilling a well).

<sup>24</sup> *Beck II*, 37 N.E.3d at 132; *see also* OHIO REV. CODE ANN. § 1509.03 (West 2012).

<sup>25</sup> OHIO REV. CODE ANN. § 1509.02 ("[n]othing in this section affects the authority granted to . . . local authorities in section R.C. 723.01 and R.C. 4513.34").

ways, streets, avenues, alleys, sidewalks, public grounds, bridges, aqueducts, and viaducts.<sup>26</sup> Further, local authorities and the Ohio Department of Transportation are given the authority to grant permits for oversized vehicles to use the roads in their respective jurisdictions.<sup>27</sup> Ohio’s Revised Code Chapter 1509.02, however, expressly forbids the local authorities from exercising these powers in a manner that “discriminates against, unfairly impedes, or obstructs oil and gas activities and operations regulated under [the statute].”<sup>28</sup>

### *B. The Munroe Falls Ordinances*

Beck Energy’s violation of five provisions outlined in the Munroe Falls Codified Ordinances was the city of Munroe Falls’ main complaint.<sup>29</sup> Municipal Code section 1163 was a general zoning ordinance that prohibited any construction or excavation without first obtaining a “zoning certificate” issued by the town’s municipal zoning inspector.<sup>30</sup> The remaining four ordinances all related to the necessary conditions for receiving permission to drill for oil and gas within Munroe Falls, as articulated in Chapter 1329 of the Munroe Falls Codified Ordinances.<sup>31</sup> Any person who drilled for gas or oil in violation of any of the provisions outlined in Chapter 1329 of Munroe Falls’ Municipal Code would be guilty of a first-degree misdemeanor and could face imprisonment of up to six months, a fine of not more than \$1000, or both, with each day constituting a separate violation.<sup>32</sup>

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<sup>26</sup> OHIO REV. CODE ANN. § 723.01 (West 2002).

<sup>27</sup> See generally OHIO REV. CODE ANN. § 4513.34 (West 2013).

<sup>28</sup> OHIO REV. CODE ANN. § 1509.02.

<sup>29</sup> *Beck II*, 37 N.E.3d at 132; see also *infra* notes 31–32 and accompanying text.

<sup>30</sup> *Beck II*, 37 N.E.3d at 132. A person wishing to receive a zoning certificate in order to drill in Munroe Falls must first obtain a “conditional zoning certificate.” MUNROE FALLS, OHIO, CODE OF ORDINANCES § 1329.04 (1993). A conditional zoning certificate would only be approved after all conditions, stipulations, and safeguards approved by the municipal planning Commission and Council had been met. MUNROE FALLS, OHIO, CODE OF ORDINANCES § 1163.02 (1995).

<sup>31</sup> *Beck II*, 37 N.E.3d at 133; see also MUNROE FALLS, OHIO, CODE OF ORDINANCES § 1329.03 (prohibiting drilling a well for oil, gas, or other hydrocarbon until compliance with all provisions within § 1329 and a conditional zoning certificate has been granted for a period of one year); MUNROE FALLS, OHIO, CODE OF ORDINANCES § 1329.04 (requiring an applicant to pay an \$800 application fee); MUNROE FALLS, OHIO, CODE OF ORDINANCES § 1329.05 (requiring an applicant to schedule a public hearing at least three weeks prior to drilling and notify all property owners and residents within 1000 feet of wellhead); MUNROE FALLS, OHIO, CODE OF ORDINANCES § 1329.06 (requiring an applicant to deposit \$2000 to serve as a performance bond conditional upon compliance with § 1329, which shall be released upon compliance).

<sup>32</sup> MUNROE FALLS, OHIO, CODE OF ORDINANCES § 1329.99.

### C. Home-Rule Power

Article XVIII, section 3 of the Ohio Constitution confers upon municipalities the “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.”<sup>33</sup> This Home Rule Amendment gives municipalities the “broadest possible powers of self-government in connection with all matters that are strictly local and do not conflict with general laws or impinge upon matters of state-wide nature or interest.”<sup>34</sup>

Previously, the Supreme Court of Ohio established a three-part test for determining whether a municipality has exceeded its powers under the Home Rule Amendment.<sup>35</sup> “A municipal ordinance must yield to a state statute if (1) the ordinance is an exercise of police power, rather than of local self-government, (2) the statute is a general law,<sup>36</sup> and (3) the ordinance is in conflict with the statute.”<sup>37</sup> The Court in *Beck* employed this three-part analysis in determining that the ordinances in question did not constitute a valid exercise of Munroe Falls’ home-rule power.<sup>38</sup>

### D. Application of the Home Rule Amendment to Munroe Falls’ Municipal Ordinances by the Lower Courts

On April 6, 2011, Munroe Falls filed a complaint in the Summit County Court of Common Pleas.<sup>39</sup> The municipality sought to prevent Beck Energy from engaging in drilling activities on Mr. Willingham’s property until the company complied with all relevant municipal ordinances and received the requisite permits to begin drilling.<sup>40</sup> In reviewing the matter, the Court of Common Pleas entered a preliminary injunction on May 3, 2011 prohibiting Beck Energy from proceeding until such time as Beck Energy com-

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<sup>33</sup> OHIO CONST. art. XVIII, § 3.

<sup>34</sup> *Beck II*, 37 N.E.3d at 133 (quoting State *ex rel.* Hackley v. Edmonds, 80 N.E.2d 769, 773 (Ohio 1948)).

<sup>35</sup> *Ohioans for Concealed Carry, Inc. v. Clyde*, 896 N.E.2d 967, 971 (Ohio 2008); *see also* *Auxter v. Toledo*, 183 N.E.2d 920, 922 (Ohio 1962) (establishing the analytical framework for assessing violations of Ohio’s Home Rule Power).

<sup>36</sup> General laws are those that operate uniformly throughout the state and that impose a rule of conduct on the state’s citizenry. *Garcia v. Siffrin Residential Ass’n*, 407 N.E.2d 1369, 1378–79 (Ohio 1980). To determine a general law, a statute must be part of a statewide legislative enactment, apply equally to all parts of the state, set forth police, sanitary, or similar regulations instead of just addressing the legislative power of a municipal corporation to create the requisite regulations, and prescribe a rule of conduct on the citizens generally. *Beck II*, 37 N.E.3d at 134.

<sup>37</sup> *Beck II*, 37 N.E.3d at 133–34.

<sup>38</sup> *See id.*

<sup>39</sup> *Beck I*, 989 N.E.2d at 89.

<sup>40</sup> *Id.*

plied with all the relevant municipal ordinances.<sup>41</sup> Both the Court of Common Pleas and the parties later agreed to convert the preliminary injunction into a permanent injunction so that Beck Energy could bring an immediate appeal.<sup>42</sup> Beck Energy then appealed the Court of Common Pleas' order to the Ninth District Court of Appeals of Ohio.<sup>43</sup>

In an opinion written by Judge Mary Jane Trapp on February 6, 2013, the Ninth District affirmed the trial court's decision that Beck Energy must comply with local street and road ordinances.<sup>44</sup> The appellate court, however, reversed the trial court's ruling regarding the zoning and drilling ordinances.<sup>45</sup> Specifically, the appellate court held that R.C. Chapter 1509 was a general law and that it preempted these local regulations because the ordinances conflicted with the state's general law in violation of Ohio's Home Rule Amendment.<sup>46</sup> On March 22, 2013, the City of Munroe Falls appealed the Court of Appeals's decision to the Ohio Supreme Court.<sup>47</sup>

## II. A DIVIDED COURT: PREEMPTION V. SUPPLEMENTATION

In a 4-3 opinion written by Justice Judith L. French, the Ohio Supreme Court upheld the Court of Appeals's ruling that reversed the lower court's grant of injunctive relief.<sup>48</sup> Justice French supported the appeals court's analysis that R.C. chapter 1509 was a general law because it was part of a comprehensive statewide legislative scheme, applied uniformly throughout the state, did not purport to grant or limit municipal legislative power to prescribe the given regulations, and prescribed a rule of conduct upon citizens generally.<sup>49</sup> The court also held that the Munroe Falls ordinances conflicted with the Ohio statute.<sup>50</sup> The ordinances in question regulated the same subject matter as the state law—oil and gas drilling—and prohibited what the state law allowed—state-licensed oil and gas production in Munroe Falls.<sup>51</sup> Justice French noted that the City of Munroe Falls viewed its ordinances as an exercise of police power rather than local self-

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<sup>41</sup> *Id.*

<sup>42</sup> Brief for Appellant, *supra* note 3, at \*2.

<sup>43</sup> *Beck I*, 989 N.E.2d at 89; *see also* Brief for Appellant, *supra* note 3, at \*2.

<sup>44</sup> *Beck I*, 989 N.E.2d at 85, 99.

<sup>45</sup> *Id.* at 99.

<sup>46</sup> *Id.* at 96–99.

<sup>47</sup> Brief for Appellant, *supra* note 3, at appendix 1.

<sup>48</sup> *State ex rel. Morrison v. Beck Energy Corp. (Beck II)*, 37 N.E.3d 128, 138 (Ohio 2015).

<sup>49</sup> *Id.* at 134, 135.

<sup>50</sup> *Id.* at 135.

<sup>51</sup> *Id.*

government.<sup>52</sup> Consequently, the court upheld the appeals court's decision that the ordinances must yield to R.C. 1509.02.<sup>53</sup>

In a separate opinion concurring in the judgment only, Justice Terrence O'Donnell emphasized the narrow scope of the court's ruling, which was limited to the five municipal ordinances at issue in the case.<sup>54</sup> Justice O'Donnell reasoned that the four ordinances related to the operation of oil and gas wells within Munroe Falls precluded drilling without first obtaining a permit from the city.<sup>55</sup> Consequently, complying with the requisite municipal regulations established a parallel municipal permitting process for oil and gas that conflicted with the conditions outlined in Ohio's Revised Code chapter 1509, a general state law.<sup>56</sup> Justice O'Donnell then concluded that the state statute also preempted the Munroe Falls ordinance that required a conditional use certificate before drilling.<sup>57</sup> Even though this ordinance related to zoning, an area traditionally reserved for municipal regulation, it functioned to regulate drilling by incorporating the same parallel permitting scheme that is applicable only to oil and gas wells before granting a conditional use certificate.<sup>58</sup>

Justice O'Donnell stressed that the court's decision did not address whether Ohio's oil and gas drilling law conflicted with local land use ordinances that address only traditional concerns of zoning laws.<sup>59</sup> Moreover, Justice O'Donnell further articulated that the court should confer a "strong presumption" in upholding the validity of a zoning ordinance.<sup>60</sup> Revised Code chapter 1509 was enacted to preempt inconsistent local health and

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<sup>52</sup> *Id.* at 134. Further, the court noted: "Our precedent is clear on this point. '[A]ny municipal ordinance which prohibits the doing of something without a municipal license to do it, is a police regulation' within the meaning of the Home Rule Amendment." *Id.* (quoting *Auxter v. Toledo*, 183 N.E.2d 920 (Ohio 1962)).

<sup>53</sup> *Id.* at 133, 138.

<sup>54</sup> *Id.* at 138 (O'Donnell, J., concurring).

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*; see also OHIO REV. CODE ANN. §§ 1509.02, 1509.05 (West 2013) (requiring entity to comply with comprehensive, statewide drilling regulations before receiving a permit to operate); MUNROE FALLS, OHIO, MUNICIPAL CODE § 1133.03 (requiring entity to have a conditional use certificate that could only be obtained by complying with municipal drilling regulations before being allowed to drill for oil or gas).

<sup>58</sup> *Beck II*, 37 N.E.3d at 138 (O'Donnell, J., concurring).

<sup>59</sup> *Id.* at 138–39. Justice O'Donnell noted that municipal authority to enact zoning ordinances that are not in conflict with general laws is inherent in Ohio's Home Rule Amendment as well as R.C. chapter 713.07, which grants municipalities the statutory authority to regulate land uses with zoning districts to promote the public health, safety, convenience, comfort, propensity, and general welfare. *Id.* at 138–39; see also OHIO REV. CODE ANN. § 713.07 (West 1953).

<sup>60</sup> *Beck II*, 37 N.E.3d at 139 (O'Donnell, J., concurring) (citing *Hudson v. Albrecht Inc.*, 458 N.E.2d 852 (1984)); see also OHIO REV. CODE ANN. § 1.51 (West 1971) ("If a general provision conflicts with a special or local provision, they shall be construed, if possible, so that effect is given to both . . .").



safety regulations governing the technical aspects of drilling, and nothing in the law expressly addressed zoning.<sup>61</sup> Therefore, according to Justice O’Donnell, the issue of whether R.C. chapter 1509 preempted all local zoning ordinances limiting land uses to certain zoning districts without regulating the details of oil or gas drilling was left undecided by the court.<sup>62</sup>

Although three justices wrote separate dissenting opinions, each justice disagreed with the holding that the Munroe Falls zoning ordinances actually conflicted with the state statute.<sup>63</sup> Justice Paul E. Pfeifer emphasized that R.C. chapter 1509 leaves room for municipalities to employ local zoning ordinances.<sup>64</sup> He reasoned that, by allowing municipal regulation to supplement the state law, the General Assembly recognized that a big picture approach with local input was the most effective model for the sustainable development of Ohio’s natural resources.<sup>65</sup> Justice William M. O’Neill articulated that this decision “unceremoniously” stripped local control of drilling-location decisions from the citizens of Ohio.<sup>66</sup> He further criticized the decision on the grounds that it provided local authorities with little recourse for attempting to regulate oil and gas drilling within their borders.<sup>67</sup> Justice Judith Ann Lazinger stated that the local zoning ordinances and R.C. chapter 1509 had distinct legislative purposes that presented dual conditions to the operation of the oil and gas industry.<sup>68</sup>

Justice Lazinger acknowledged that, although R.C. chapter 1509.02 grants broad authority to the Ohio Department of Natural Resources (“ODNR”) to regulate the operations of oil and wells within the state, its preemption statement was alone insufficient to create a conflict or dispossess municipalities of their home-rule authority.<sup>69</sup> Moreover, the construction of R.C. chapter 1509.02 does not expressly take away any municipal zoning authority, nor does the statute expressly prohibit supplemental, non-conflicting local regulation.<sup>70</sup>

Justice Lazinger emphasized that the distinct legislative intents behind the state and local regulations further demonstrated that there was no con-

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<sup>61</sup> *Beck II*, 37 N.E.3d at 140, 141 (O’Donnell, J., concurring).

<sup>62</sup> *Id.* at 138–39.

<sup>63</sup> *Id.* at 141 (Pfeifer, J., dissenting); *id.* at 141 (Lazinger, J., dissenting); *see id.* at 147 (O’Neill J., dissenting).

<sup>64</sup> *Id.* at 141 (Pfeifer, J., dissenting).

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 147 (O’Neill, J., dissenting).

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 144 (Lazinger, J., dissenting).

<sup>69</sup> *Id.* at 142. Both Justices O’Neill and Pfeifer joined Justice Lazinger’s dissent. *Id.* at 141 (Pfeifer, J., dissenting); *id.* at 147 (O’Neill, J., dissenting).

<sup>70</sup> *Id.* at 142 (Lazinger, J., dissenting).

flict between the two.<sup>71</sup> Munroe Falls' ordinances demonstrated an exercise of local police power to promote health, safety, and general welfare of the public, and R.C. chapter 1509.02 had the distinct purpose to regulate methods of producing oil and gas statewide.<sup>72</sup> According to Justice Lazinger's dissent, the appeals court struck down the municipal ordinances without considering the possibility that they supplemented rather than supplanted state regulation.<sup>73</sup> Consequently, Justice Lazinger suggested that she would remand the case to the appellate court with the instruction to examine whether Munroe Falls' city ordinances could "stand separate and apart" from Ohio's oil and gas regulations.<sup>74</sup> Moreover, Justice Lazinger advocated that Ohio should make an effort to avoid preemption of the laws of local municipalities whenever possible, and that there is no need for the state to exercise exclusive authority over the oil and gas industry without leaving some authority of home rule to municipalities.<sup>75</sup>

### III. THE DANGERS OF RIGID APPLICATION OF PREEMPTION OVER MUNICIPAL REGULATION AND ITS IMPACT ON MUNICIPAL RESIDENTS

Justice O'Neill's dissent astutely described chapter 1509 of Ohio's Revised Code as creating "[a] zookeeper to feed the elephant in the living room."<sup>76</sup> Fracking and natural gas companies represent a powerful influence on statewide politics.<sup>77</sup> R.C. Chapter 1509 and the subsequent Ohio Su-

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<sup>71</sup> *Id.* at 143 ("The General Assembly knows how to specifically prohibit the enforcement of local zoning ordinances as part of a statewide and comprehensive legislative scheme . . . R.C. Chapter 1509 has no similar language.").

<sup>72</sup> *Id.* at 144. Further, Justice Lazinger noted that "[n]o court has yet examined whether these city ordinances can stand separate and apart as zoning regulations that supplement the state regulatory scheme." *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* Justice Lazinger then emphasized that other jurisdictions have expressly determined that local zoning ordinances do not conflict with state regulation of the oil and gas industry, and such local ordinances can coexist with state law. *Id.*; see also *Bd. of Cnty. Comm'rs, La Plata City v. Bowen/Edwards Assoc.*, 830 P.2d 1045, 1059–60 (Colo. 1992) (holding that Colorado's Oil and Gas Conservation Act did not preempt local authority to regulate oil and gas operations within the county); *Voss v. Lundvall Bros.*, 830 P.2d 1061, 1068–69 (Colo. 1992) (holding that, although the city's home-rule authority did not permit the city to ban all oil and gas development, home rule power allowed such regulation as could be harmonized with the state's Oil and Gas Conservation Act); *Wallach v. Dryden*, 16 N.E.3d 1188, 1202–03 (N.Y. 2014) (holding that statewide Oil, Gas and Mining Law did not preempt municipalities' home rule authority to regulate land use); *Huntley & Huntley, Inc. v. Oakmont Borough Council*, 964 A.2d 866, 869 (Pa. 2009) (holding that local zoning restrictions on oil and gas drilling in residential districts was not preempted by state statute that superseded all municipal ordinances regulating oil and gas operations).

<sup>75</sup> *Beck II*, 37 N.E.3d at 146 (Lazinger, J., dissenting).

<sup>76</sup> *Id.* at 147 (O'Neill, J., dissenting).

<sup>77</sup> See generally Aaron Marshall, *Ohio's Oil and Gas Industry Emerging as a Big Player in the Political Process*, PLAIN DEALER, Apr. 9, 2012, <http://www.cleveland.com/open/index.ssf/2012/>

preme Court opinion in *Beck Energy Corporation* granted a state agency seemingly exclusive authority to regulate drilling for oil and gas.<sup>78</sup> This system will almost certainly have a favorable impact on the drilling operations of natural gas companies while failing to allow local municipalities to exercise concurrent authority to regulate gas and oil drilling within their borders.<sup>79</sup> Given the potentially devastating effects that drilling for oil or gas can have on a local environment, individual citizens should have some form of control over regulating such an activity.<sup>80</sup> Consequently, the courts should be reluctant to cede absolute authority to the state regulatory agencies for such a locally impactful activity, particularly when municipal regulations can be read to supplement general law rather than conflict with it.<sup>81</sup> Additional regulations can allow a municipality to prevent drilling in certain zoning designations within their borders and can provide additional safeguards for this inherently dangerous activity.<sup>82</sup>

Justice French's majority opinion fails to consider whether municipal authority can supplement the broad and exclusive authority of the state to regulate oil and gas production within the municipality's own borders.<sup>83</sup> Instead, Justice French rigidly finds a conflict between the local ordinances

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04/ohios\_oil\_and\_gas\_industry\_eme.html [http://perma.cc/3Q4R-22YZ] (describing the impact of the oil and gas sector on Ohio politics). In addition to increased investment in lobbying efforts, oil and gas well production continues to increase in Ohio, and the number of wells and actual production numbers are the highest that they have ever been. *See, e.g.*, Dan Gearino, *Ohio Oil, Gas Production Still Rising Despite Price Drop*, COLUMBUS DISPATCH, Aug. 28, 2015, <http://www.dispatch.com/content/stories/business/2015/08/27/ohio-oil-gas-production-robust.html> [perma.cc/3TXF-SPJJ] (1020 wells are now operational in Ohio, producing 5.6 million barrels of oil and 222 billion cubic feet of gas as of the second quarter of 2015).

<sup>78</sup> *See Beck II*, 37 N.E.3d at 146 (Lazinger, J., dissenting) ("There is no need for the state to act as the thousand-pound gorilla, gobbling up exclusive authority over the oil and gas industry, leaving not even a banana peel of home rule for municipalities.").

<sup>79</sup> *See id.* at 147 (O'Neill, J., dissenting) ("What the drilling industry has bought and paid for in campaign contributions it shall receive.").

<sup>80</sup> *See id.* Oil and gas drilling operations require a variety of toxic chemicals and have been known to produce large volumes of toxic waste. Brief for City of Munroe Falls as Amici Curiae Supporting Appellants at 5–6, *Ohio ex rel. Morrison v. Beck Energy Co.*, (2013), 2013 WL 5229894, at \*4–5. Natural gas drilling also poses high risks of explosions and fire. *Id.* Moreover, such operations can contaminate water and lead to local air and noise pollution. *Id.* at \*6. Moreover, the fracking procedure of wastewater disposal into deep wells has been determined to increase the risk of earthquakes in the surrounding area, and such operations have even been linked to an earthquake in Youngstown, Ohio, less than an hour west of Munroe Falls. Sean Rigby, *Earthquake Litigation Shaking Up the Fracking Industry*, GEO. INT'L ENVTL. L. REV. ONLINE (Feb. 4, 2015), <http://gelr.org/2015/02/27/earthquake-litigation-shaking-up-the-fracking-industry-georgetown-international-environmental-law-review> [http://perma.cc/LX6B-D8H3].

<sup>81</sup> *See Beck II*, 37 N.E.3d at 141 (Pfeifer, J., dissenting).

<sup>82</sup> *See id.* at 147 (O'Neill, J., dissenting) ("Under this ruling, a drilling permit could be granted in the exquisite residential neighborhoods of Upper Arlington, Shaker Heights, or the village of Indian Hill—local zoning dating back to 1920 be damned."); *see also infra* note 86 and accompanying text.

<sup>83</sup> *See generally Beck II*, 37 N.E.3d at 131 (plurality opinion).

and the state law because they prohibit what the state law allows.<sup>84</sup> If this were the only consideration to preempt local regulation, then even traditional zoning ordinances would be unable to prevent the drilling of gas or oil in otherwise residential areas if the state granted a permit for drilling on property within that zone.<sup>85</sup> Moreover, Justice French's second consideration that R.C. chapter 1509.02 almost automatically preempts any form of local regulation over activities related to oil or gas within a municipality's borders appears to not only act contradictory to the interests of Ohio citizens, but also presents a dangerous precedent for future home-rule analysis.<sup>86</sup> Moreover, although Justice French admits that the court's holding is limited to the five municipal ordinances at issue in the case, she does so almost as an aside, and the reasoning employed in the decision could have broad implications moving forward.<sup>87</sup> Although it might be hyperbolic to state that a plurality opinion could theoretically allow Ohio to grant drilling permits in traditionally residential areas, the plurality's reasoning has the possibility to establish such a precedent.<sup>88</sup>

In his concurring opinion, Justice O'Donnell emphasized the limited scope of the court's holding, suggesting that Munroe Falls could potentially have regulated Beck Energy's operations through zoning authority traditionally granted to municipalities.<sup>89</sup> His concurrence with the majority rested on the position that the ordinances in question created a redundant permitting process that was parallel to the related state law, and were thus preempted; however, this opinion articulated a more cogent, narrow interpretation of preemption in R.C. chapter 1509 and its interaction with areas of traditional local authority.<sup>90</sup>

Each of the three dissenting opinions justly lamented the restriction of local authority regarding oil and gas operations within their boundaries.<sup>91</sup> The majority's reasoning clumsily threatens to grant the state exclusive authority in regulating activity related to oil and gas drilling, and it was appropriate for the dissenting justices to point out the dangers of the decision

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<sup>84</sup> See *id.* at 135.

<sup>85</sup> See *id.* at 147 (O'Neill, J., dissenting).

<sup>86</sup> See *id.* at 142 (Lazinger, J., dissenting) (quoting *Am. Fin. Servs. Ass'n. v. Cleveland*, 858 N.E.2d 776, 782 (Ohio 2006)) ("[A] declaration by the General Assembly of its intent to preempt a field of legislation 'does not trump the constitutional authority of municipalities to enact legislation pursuant to the Home Rule Amendment, provided that the local legislation is not in conflict with general laws.'").

<sup>87</sup> See *id.* at 137 (plurality opinion).

<sup>88</sup> See *id.* at 147 (O'Neill, J., dissenting).

<sup>89</sup> See *id.* at 141 (O'Donnell, J., concurring).

<sup>90</sup> See *id.* at 138.

<sup>91</sup> See *id.* at 141 (Pfeifer, J., dissenting); *id.* at 144, 148 (Lazinger, J., dissenting); *id.* at 149 (O'Neill, J., dissenting).

in their opinions.<sup>92</sup> It is noteworthy that there was a clear conflict in the parallel permitting process created by the similarity between the state and local regulations.<sup>93</sup> However, the recurring theme present within the dissenting opinions and in the concurring opinion is that there should be some room left for municipalities to exercise concurrent authority over local land use that supplemented state regulation.<sup>94</sup> Ultimately, the constitutional and statutory authority for municipalities to regulate oil and gas drilling through traditional zoning laws seems to be the most logical avenue for municipalities to address local concerns presented by such activity without directly conflicting with the statutory authority granted to state agencies.<sup>95</sup>

#### CONCLUSION

The Munroe Falls ordinances attempted to grant those most impacted by local drilling activities more control in drilling-location decisions. However, the means employed to accomplish this purpose conflicted with Ohio's Home Rule Amendment as well as the provisions articulated in R.C. Chapter 1509, Ohio's oil and gas statute. The ordinances created a parallel permitting process that Beck Energy Corporation had to comply with before beginning drilling operations. However, in its rigid conflict analysis, the plurality opinion in *Beck Energy* threatens to establish a dangerous precedent that could have devastating effects for the exercise of any local authority over oil and gas drilling in the state of Ohio. Given the impact that oil and gas drilling has on a local environment and its residents, the Court should attempt to find an appropriate balance so that municipal regulations can supplement state law moving forward.

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<sup>92</sup> See *id.* at 137–38 (plurality opinion); see also *supra* notes 87–89 and accompanying text.

<sup>93</sup> See *id.* at 138 (O'Donnell, J., concurring).

<sup>94</sup> See *id.* at 141; *id.* at 141 (Pfeifer, J., dissenting); *id.* at 141. (Lazinger, J., dissenting); *id.* at 147 (O'Neill J., dissenting).

<sup>95</sup> See *id.* at 139 (O'Donnell, J., concurring).