

Citizens, Town Councils, and Landowners: The Complex Web of Rights and Decision-Making in Shale Oil and Gas Development

Heidi Gorovitz Robertson

Will Judy Endowed Lecture, April 4, 2017

Heidi Gorovitz Robertson is the Steven W. Percy Distinguished Professor of Law at Cleveland-Marshall College of Law and Professor of Environmental Studies at the Levin College of Urban Affairs, Cleveland State University.

I'm an environmental law professor, so I often get calls from people with questions about specific environmental legal concerns. In recent years, those calls focused mostly on fracking—the development of shale oil and gas using the hydraulic fracturing technology. Callers asked whether it is dangerous and whether they can stop it or influence where it happens. When the shale oil and gas industry first made inroads into Ohio, I really did not know what to tell them because I viewed their questions as pertaining to oil and gas law. That was not what I did. As I said, I'm an environmental lawyer.

Eventually I tired of saying, “Oil and gas law is different.” The shale oil and gas industry was racing into Ohio and I needed to learn what it was all about.

I began by approaching shale oil and gas development from my own perspective—that of a law professor with interests in property, the environment, and in legislation and regulation. I'm not an environmental scientist, and I'm not an activist. So, initially, I studied a couple of specific issues more directly within my areas of expertise. I sought to evaluate the role of local government in decision-making concerning shale oil and gas development, and I studied the circumstances that befall an individual landowner who seeks to keep drilling out from under his or her land when industry and the state seek to put it there. In this piece, I will focus on the role of local governments operating within a larger legal system and how they might control or influence shale oil and gas activities within their communities.

Local governments almost universally want the authority to decide whether drilling is going to happen within their jurisdictions, and if so, under what circumstances and in which specific locations. This makes sense; the jobs of local elected officials include doing the bidding of their citizens and protecting their communities. So, of course they want a role in the process. I say this with no pre-judgment about whether the community wants to allow drilling or to prevent it. Local government theoretically represents local interests, whatever those interests might be. Some communities believe that allowing drilling will bring them money or jobs. If so, they'll want their local governments to help

facilitate it. Other communities oppose the coming of shale oil and gas development, especially when using hydraulic fracturing, because they believe it's dangerous to the water supply, to air quality, to their health. They want their local governments to be able to ban, control, or influence it.

What I have been trying to say is not that a community should fight drilling or that a community should embrace it, but rather that town or city councils should have some role in controlling whether and how drilling happens within their jurisdictions. Even if they cannot control the decision-making, at least they should be an influential voice in the conversation; in particular, regarding the questions of whether, where, and under what circumstances, drilling might take place.

One problem that's evident throughout the country is that there is wide variation in terms of state legal systems, and those legal systems are critical to the role of local governments. Local governments have to work within the state and federal legal systems. What a community can and cannot do regarding decision-making is a function of the broader legal systems in which that community is situated. The ability of a community in Pennsylvania to make or influence decisions regarding local drilling will differ from a community in Ohio and from a community in New York and elsewhere.

To begin, town councils have to work within the bounds of their state constitutions. These state constitutions vary widely, and what a town council can do depends, in part, on what the applicable state constitution allows it to do. Here, I'm referring to "home rule" authority, which theoretically gives local jurisdictions the power to make decisions about what happens in their communities. But the decisions that fall within home rule authority vary widely by the language in the relevant state constitutions and in how that language is interpreted by that state's courts. Some state constitutions give local jurisdictions broad decision-making authority under the auspices of home rule, and for some, it's much narrower. Some state courts, in particular, Ohio's, have interpreted home rule very narrowly, as applying virtually only to decisions regarding the structure and operation of local government.

What the local jurisdiction can do also depends on state legislation. Some states' legislation preempts local control, meaning that the state law says local jurisdictions cannot govern in a specific context because the state government is doing so instead. Ohio's legislature says that with respect to oil and gas development. It preempts local control of decision-making regarding shale oil and gas activities and specifically delegates that authority to a state agency—the Ohio Department of Natural Resources, Division of Oil and Gas Resources Management. Some state legislation allows local decision-making, or allows it in areas of local concern.

Another issue over which the state legislatures have control is determining which executive branch agency will control the various aspects of permitting for oil and gas development. It can make a very big difference whether the state legislature delegates this authority to a state environmental agency,

to a natural resources agency, or to both. The missions of these agencies can differ widely, as can the extent to which they involve local governments in their administrative processes.

Then there are the state courts, especially the state supreme courts. They interpret applicable statutes—on oil and gas permitting, preemption, home rule, and they interpret the state constitutions’ provisions on home rule, environmental protection, and anything else that’s relevant. State supreme courts are political creatures, usually populated by elected justices, and they vary dramatically in how they interpret statutory language that could be similar or even identical.

There is virtually no federal law that governs shale oil and gas development. The vast majority of applicable law comes from the states, and as you might imagine, we have fifty states choosing their terms for governing shale oil and gas development. Still, there is a lot of consistency in which shale-related activities states with shale petroleum choose to regulate. Among other things, they regulate the location and spacing of wells, methods of drilling, disposal of oil and gas wastes, and site restoration. Those activities all have something in common: they concern how shale oil and gas will be developed and where.

There is also substantial heterogeneity in state regulation of shale oil and gas development. That is, although they tend to regulate the same types of activities, states differ in how they do it and the extent to which they regulate. Why does it vary so much? States differ from one another in important ways—in their residents’ perceptions of environmental risks, in the actual environmental risks, in their geography and geology, in their political environments, economic concerns, history, and more.

The top five states in terms of the number of active shale wells are: Texas, West Virginia, Pennsylvania, Ohio, and Oklahoma. Much of my work focuses on Ohio, but Pennsylvania is a big player here, too, and it provides a good subject of comparison for my work because its relevant statutory and constitutional provisions are similar to Ohio’s. Communities in Ohio, Pennsylvania, and elsewhere care about this stuff.

One problem citizens and local officials face is that there is propaganda floating around on all sides of the divisive question of whether local jurisdictions should support or oppose shale oil and gas development. Again, I’m not on any side here but that of the local governments—and local governments want a voice in the decisions. Confusion abounds surrounding what hydraulic fracturing is and what dangers it presents, making it difficult for communities to know what their position should be. This confusion is problematic for people and their representatives who legitimately seek a voice in the conversation about hydraulic fracking.

Without coming down on one side or the other, here’s how fracking works. A developer drills a deep well, sometimes about a mile deep. Just below the surface of the ground is the water table—sometimes a drinking water source, often a vital part of the water system. Drillers must drill through the

water table and also through layers and layers of different types of rock to get to the oil and gas trapped deep in a layer of shale. Once the well is drilled down vertically, the driller will use new technology to turn it to a horizontal direction from which it can go far from the original well site in several directions. The developer then injects a high volume of water, mixed with chemicals and a special form of sand, at very high pressure. This causes fissures, or splits, in the rock which, while propped open by the added sand, allows oil and gas to move back up through the well. Most of the injected water comes back out, too. The used water still includes the original added chemicals, but it has also picked up metals and other contaminants during its travels belowground.

Hydraulic fracking is not a new technology. What's new-ish is its use in combination with the horizontal drilling of very deep wells. The combination of these technologies—hydraulic fracturing and horizontal drilling—has allowed developers to efficiently and economically develop the oil and gas beneath larger radii of land. And the recent visibility of these technologies has focused public attention on a number of problems associated with it, for example, its need for large amounts of previously clean freshwater, complicated issues surrounding disposal of contaminated water, the escape of methane and other gasses at the wellheads, increases in ground traffic, and noise.

When people began voicing concerns about the coming of drilling and hydraulic fracturing, they protested in their communities, asking their local governments to ban use of the technology. In some ways, these protests were really about citizens' desire to have some control in the decision-making process.

I will tell you a little bit about local communities in Ohio. Ohio's governor sought to encourage the development of the shale oil and gas industry in the state, believing it to be good for the state's economy. To do it, he said we needed a unified system of regulation, which meant we needed a regulatory system that was the same statewide, precluding local variations in the rules. The original oil and gas law in Ohio did not say anything about preemption of local authority or delegation of regulatory authority to a specific state agency. But all that changed. The legislature amended the oil and gas statute to give "sole and exclusive authority" over the location, spacing, and permitting of oil and gas wells to the Ohio Department of Natural Resources' Division of Oil and Gas Resources Management. Industry immediately held up the new statutory language as preemptive of local authority. Still, over a period of two years, the legislature serially amended the state oil and gas law to expand the number and scope of oil and gas-related activities for which the Ohio DNR has "sole and exclusive authority" and explicitly to preempt local control.

The Ohio Constitution has a home rule provision, though, which theoretically would give the local jurisdiction some authority, or at least that's what Ohio localities hoped. The City of Munroe Falls applied its existing municipal code to control oil and gas companies by requiring local drilling permits

and some additional hearing and certification requirements. Broadview Heights and several other Ohio communities attempted to ban the practice by amending their charters to make it illegal. These two local efforts are different in important ways. First, Munroe Falls’s effort was an attempt to control or influence drilling, and it used existing ordinances. Broadview Heights and others didn’t try to control or influence drilling. They instituted a flat-out ban on drilling and they did it, not through ordinances, but by amending their charters—which are like local constitutions. Here I will focus on Munroe Falls with a brief look at some relevant cases from Pennsylvania and New York.

The legal environment in which Munroe Falls was working was a difficult one. Here is a summary. Ohio legislation gave the Ohio DNR Division of Oil and Gas Resources Management “sole and exclusive authority” to regulate pretty much every activity related to oil and gas development . The Ohio Constitution includes a home rule provision, but the Ohio Supreme Court had been interpreting it narrowly for many years, limiting it largely to decisions regarding the structure and function of local government. The Ohio Supreme Court had not yet spoken on questions of local control regarding oil and gas development.

Munroe Falls tried to issue ordinances that would require a local land permit. Beck Energy, an oil and gas developer, came to Munroe Falls with an Ohio DNR-issued drilling permit in hand, but Munroe Falls told Beck Energy that it also had to get a Munroe Falls drilling permit, pay a fee, post a bond, wait a certain number of days to attend a public hearing regarding a land use variance, and more. The driller argued that all drilling activity was regulated only by the Ohio DNR, so Munroe Falls—a local jurisdiction—could not add these additional requirements. Beck Energy sued Munroe Falls in 2014 for putting a stop work order in place, and the Supreme Court of Ohio ruled in favor of Beck Energy. Munroe Falls was not allowed to enforce its local ordinances because the Ohio oil and gas law, delegating “sole and exclusive authority” to Ohio DNR, preempted local authority.

As I said, these issues of local control are present everywhere drilling is making inroads. Pennsylvania is active in drilling and, in Pennsylvania Act 13 the state legislature amended the state’s oil and gas laws, in part, to preempt local control of shale oil and gas production, much like Ohio. Like Munroe Falls, Pennsylvania’s Robinson Township sought to make local decisions regarding oil and gas permitting and its case went to the Pennsylvania Supreme Court in 2013. While the Pennsylvania Supreme Court was making its decision, I was waiting with great interest. Here is why. The Pennsylvania Constitution has a home rule provision like Ohio’s and the Ohio Supreme Court had not yet decided the Munroe Falls case. I was hoping that the Pennsylvania court would rule in favor of Robinson Township on home rule grounds—and that that would be an example for the Ohio Supreme Court to follow in the Munroe Falls case.

But that is not what happened. The Pennsylvania court issued an opinion that struck down Act 13's preemption provision, giving back some control to the local jurisdiction. This was a good thing. However, the Pennsylvania court did not use home rule as the grounds for its decision. Instead, it used the Pennsylvania Constitution's Environmental Rights Amendment, which forced the court to rule in favor of the local jurisdiction. The Environmental Rights Amendment protects local jurisdictions' rights to impose land use and zoning restrictions designed to protect local environments.

Section 27 of the Pennsylvania Constitution says: "The people have a right to clean air, pure water, and to the preservation of the natural scenic, historic, and aesthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all people." Under this section of the Pennsylvania Constitution, the Commonwealth of Pennsylvania is required to protect the rights of the local jurisdiction when it comes to matters of environmental protection.

This is great for Pennsylvania, but the Ohio Constitution, although similar to Pennsylvania in the home rule area, does not include a similar provision on environmental rights. The Pennsylvania decision would not be of much interest or help to Munroe Falls because it didn't rest on home rule grounds.

I have also looked at New York, where there has also been a lot of local effort to control and/or ban drilling. The situation is a little different, of course, from Ohio or Pennsylvania. In New York, the governor issued a temporary moratorium on drilling and extended it a couple of times on the grounds that the state government needed to study the health and environmental effects of hydraulic fracturing. At the same time, New York's highest court heard the Town of Dryden case, in which the town successfully defended its effort at banning drilling. Like the cases in Ohio and Pennsylvania, Dryden relied on the New York Constitution. In 2012, the court allowed the local jurisdiction not only the power to regulate drilling, like they did in Pennsylvania, but the power to ban hydraulic fracking. Again, however, it relied on an environmental rights provision, not on home rule.

In addition to a favorable decision for local governments in the New York court, New York used a completely different legal tool to approach control evaluation and ultimately control of drilling. New York has the State Environmental Quality Review Act (SEQRA). This is affectionately referred to as a "little NEPA" law—and it is a state version of a federal law called the National Environmental Policy Act, or NEPA. NEPA requires any federal agency to consider the environmental impact of its actions. If a federal agency is going to make a decision that could have significant environmental impact, NEPA requires that agency to consider that environmental impact of its decision. New York's little NEPA goes beyond the requirements of the federal law. The New York SEQRA requires the state agency not only to consider the environmental impact of its decisions but also to act in the best interest of the environment

according to its environmental review. The health and environmental impact studies the New York agencies conducted as required by the SEQRA led the health agency to ban hydraulic fracking in New York.

About fifteen states have their own state versions of this law, but Ohio is not one of them. Ohio does not have the same legal tools available to it that other states have had at their disposal to control or allow local governments control over oil and gas drilling activities. Ohio lacks an environmental rights provision in its constitution similar to those that allowed Pennsylvania and New York to give regulatory authority back to local jurisdictions. Ohio also lacks a “little NEPA” law that would require its state agencies to study and consider the environmental impact of their decisions—and perhaps even to act in accordance with what they learned.

Environmental organizations have been trying to put a Community Bills of Rights in place to amend local charters to prohibit oil and gas related activities, but these efforts have not been effective in terms of changing the role of local jurisdictions likely because they are unenforceable, certainly in Ohio. That said, I do have some respect for the people who are trying to do this because Ohio does need environmental rights protection of some sort and perhaps starting locally will help get the issue addressed on a statewide basis. The ultimate goal would be to get an environmental rights provision into the Ohio Constitution.

One of the Ohio Supreme Court opinions in the Munroe Falls case noted that rather than using local ordinances that can be found to conflict with state law, local jurisdictions should use traditional zoning authority to protect their communities. They could do this by creating noise ordinances and residential and commercial zoning restrictions. One Ohio Justice suggested that if local jurisdictions were to do this—use traditional zoning, nondiscriminatorily created and nondiscriminatorily applied to oil and gas activities—this might withstand state preemption of local authority.

I serve on a regional commission created to work with local political leaders to determine how to adapt zoning codes. The goal is to adapt zoning codes in ways that would allow local governments to influence drilling in whatever ways that suit their communities, within the boundaries of the existing legal system. Of course they cannot regulate drilling activities directly because that would violate the Ohio Supreme Court’s interpretation of the Ohio legislature’s delegation of “sole and exclusive” authority to the state agency, as well as its preemption of local control—but local jurisdictions can do other things, and they should.