

**IN THE COURT OF COMMON PLEAS
CIVIL DIVISION
CUYAHOGA COUNTY, OHIO**

BASS ENERGY, INC., et al.

Plaintiffs,

v.

CITY OF BROADVIEW HEIGHTS,
OHIO

Defendant.

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CASE NO. CV-14-828074

JUDGE MICHAEL K. ASTRAB

OPINION and JUDGMENT ENTRY

Michael K. Astrab, Judge:

The Court opines today on Motions for Summary Judgment filed by Plaintiffs, Bass Energy, Inc. and Ohio Valley Energy Systems Corp. (collectively, “Plaintiffs”), and by Defendant, City of Broadview Heights, Ohio (“Broadview Heights” or the “City”). At issue in this case is whether Defendant’s Charter Amendment Article XV (“Article XV”) is preempted by R.C. Chapter 1509. Plaintiffs seek a declaratory judgment from this Court stating that Article XV is invalid and cannot prevent them from drilling and operating an oil and gas well within Broadview Heights. The State of Ohio, Department of Natural Resources has also filed an *Amicus Curiae* Brief for the Court’s consideration.

FACTS

R.C. Chapter 1509

In 1965, the General Assembly enacted R.C. Chapter 1509 for the purpose of regulating oil and gas drilling throughout Ohio.¹ To ensure for more centralized and uniform regulation, the General Assembly amended R.C. Chapter 1509 by passing House Bill 278 (effective 09/16/04). As codified in R.C. 1509.02, this amendment specifically granted the Ohio Department of Natural Resources’ (“ODNR”) Division of Mineral Resources Management with the “sole and exclusive

¹ As subsequently declared by the General Assembly, “the regulation of oil and gas activities is a matter of *general statewide interest* that requires *uniform statewide regulation*, and this chapter and rules adopted under it constitute a *comprehensive plan* with respect to all aspects of the locating, drilling, well stimulation, completing, and operating of oil and gas wells *within this state*, including site construction and restoration, permitting related to those activities, and the disposal of wastes from those wells.” R.C. 1509.02 (emphasis added).

authority” to regulate the permitting, locating, and spacing of oil and gas wells within Ohio. Additionally, R.C. 1509.02 contains an express prohibition against local governments from exercising powers in a way that “discriminates against, unfairly impedes, or obstructs oil and gas activities and operations” regulated by the State under R.C Chapter 1509. Pursuant to R.C. 1509.05 and 1509.06, any person desiring to drill an oil and gas production well must submit an application and obtain a permit issued by ODNR.

Broadview Heights’ Article XV

Subsequent to the passage of House Bill 278, over ninety new wells were drilled in Broadview Heights. As a result of this proliferation, residents of Broadview Heights circulated petitions to place an environmentally-focused amendment to the City’s Charter on the ballot for the November 2012 election. Of relevance, the proposed amendment included language that would make it illegal for any person or corporation to engage in new oil and gas drilling and the related maintenance of oil and gas wells. Despite concerns by both the City’s Mayor and Law Director regarding the enforceability of the proposed amendment in light of state law, the voters of Broadview Heights passed the proposed amendment on 11/06/12. The passed amendment became Article XV of the Charter of the City of Broadview Heights, and the most relevant sections at issue are as follows:

1. It shall be unlawful for any person or corporation to engage in the extraction of gas or oil within the City of Broadview Heights, with the exception of gas and oil wells installed and operated at the time of the enactment of the Charter provision, provided that the extraction of gas or oil from existing wells does not involve an [sic] practice or process not previously used for the extraction of gas or oil from those wells and providing those wells are capped securely when production ceases.
2. It shall be unlawful for any person or corporation, or any director, officer, owner or manager of a corporation to use a corporation, to deposit, store or transport waste water, “produced” water, “frack” water, brine or other materials, chemicals or by-products used in the extraction of gas or oil within, upon or through the land, air or water of the City of Broadview Heights.

Article XV, § 1 and § 2.

In addition to these prohibitions, Article XV also contains general provisions that attempt to strip corporate entities of their rights and protections under the United States and Ohio Constitutions. Article XV, § 5 and § 6. Furthermore, Article XV seeks to invalidate

any state or federal permit, license, privilege or charter that authorized activities which would violate the terms of the City's Charter. Article XV, § 7.

Plaintiffs' Oil and Gas Lease

Over five years prior to the passage of Article XV, Plaintiffs entered into an oil and gas lease (effective on 05/01/07) with St. Sava Serbian Eastern Orthodox Church of Cleveland ("St. Sava"). St. Sava, which is located in Broadview Heights, owns approximately 100 acres of land surrounding the Church. Pursuant to this lease, St. Sava granted Plaintiffs the exclusive right to explore for, drill for, and produce oil and gas from its property. In accordance with R.C. Chapter 1509, Plaintiffs obtained permits issued by ODNR and lawfully drilled and operated three wells on the property.

Plaintiffs' Permit for Well #5D

In order to drill a fourth well ("Well #5D"), Plaintiffs obtained a new permit from ODNR on 06/28/2013. On 07/09/14, ODNR renewed the permit for Well #5D and granted Plaintiffs authority to drill the well by 07/09/15. However, Plaintiffs have yet to commence drilling Well #5D because Broadview Heights intends to enforce Article XV's provisions banning the drilling and operation of new oil and gas wells.

Plaintiffs argue that Broadview Heights' Article XV's ban on drilling new wells is unenforceable and preempted because it directly conflicts with R.C. Chapter 1509, which grants ODNR the sole and exclusive authority to regulate the drilling and operating of gas and oil wells within Ohio. Under Ohio's home rule authority framework, Plaintiffs contend that Article XV is an exercise of Broadview Heights' police power and that R.C. Chapter 1509 is a general law. Thus, since the City's exercise of police power is in direct conflict with a general state law, Plaintiffs argue that Article XV is invalid as a matter of law and cannot prevent Plaintiffs from drilling Well #5D pursuant to Plaintiffs' state-issued permit from ODNR. Plaintiffs argue that declaratory judgment is proper because this is a purely legal dispute that constitutes a real controversy that is justiciable in character and that necessitates speedy relief.

In opposition and despite the state law to the contrary, Defendant argues that Article XV is controlling and should not be preempted by R.C. Chapter 1509. While Defendant does not dispute the Plaintiffs' analysis under Ohio's home rule authority framework, Defendant argues that this analysis alone is insufficient in determining the validity and enforceability of Article XV.

LAW

Summary Judgment Standard

Under Rule 56(C), summary judgment is appropriate when (1) no genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds can come to but one conclusion, viewing the evidence most strongly in favor of the nonmoving party, which conclusion is adverse to the nonmoving party. *State ex rel. Duganitz v. Ohio Adult Parole Auth.*, 77 Ohio St.3d 190, 191, 672 N.E2d 654 (1996); citing *State ex rel. Cassels v. Dayton City School Dist. Bd. of Edn.*, 69 Ohio St. 3d 217, 219, 631 N.E.2d 150 (1994). The burden of showing that no genuine issue exists as to any material fact falls upon the moving party in requesting a summary judgment. *Dresher v. Burt*, 75 Ohio St.3d 289, 294, 662 N.E.2d 264 (1996); citing *Harless v. Willis Day Warehousing Co.*, 54 Ohio St. 2d 64, 66, 375 N.E.2d 46 (1978).

Home Rule Authority

Under the Home Rule Amendment to the Ohio Constitution, municipalities are granted with the home rule 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.*” Article XVIII, Section 3 (emphasis added). While municipalities then generally have broad police powers to pass related city ordinances, they do not have the authority to exercise such police powers in a way that conflicts with a general state law. *State ex rel. Morrison v. Beck Energy Corp.*, Slip Opinion No. 2015-Ohio-485, ¶¶ 14-15 (Feb. 17, 2015). With regard to municipal ordinances relating to oil and gas activities, the Ohio Supreme Court recently held that “the Home Rule Amendment to the Ohio Constitution, Article XVIII, Section 3, does not allow a municipality to discriminate against, unfairly impeded, or obstruct oil and gas activities and production operations that the state has permitted under R.C. Chapter 1509.”² *Id.* at ¶ 37.

In reaching this conclusion, the Ohio Supreme Court reiterated its traditional framework that Ohio courts have used to determine whether a local ordinance is preempted by state law. Applying this analysis, “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, and (3) the ordinance is in conflict with the statute.” *Morrison*, 2015-Ohio-485 at ¶ 15; *Mendenhall v. Akron*,

² In this case, the City of Munroe Falls passed an ordinance that created its own oil and gas drilling permitting scheme that was separate from the state’s scheme of permitting issued by ODNR. The city’s ordinance prohibited and even criminalized oil and gas drilling without a *municipal permit*.

117 Ohio St.3d 33, 2008-Ohio-270, 811 N.E.2d 255, ¶ 17; *Canton v. State*, 95 Ohio St.3d 149, 2002-Ohio-2005, 766 N.E.2d 963, ¶ 9.

Under the first prong of the home rule authority test, a local law is an exercise of self-government if the law relates “solely to the government and administration of the internal affairs of the municipality.” *Ohioans for Concealed Carry, Inc. v. City of Clyde*, 120 Ohio St.3d 96, 2008-Ohio-4605, 896 N.E.2d 967, ¶ 30. In contrast, a local law is an exercise of police power if the law seeks to “protect the public health, safety, or morals, or the general welfare of the public.” *Id.*

In order to qualify as a general law under the second prong, a state statute 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 set forth police, sanitary, or similar regulations; and
- (4) prescribe a rule of conduct upon citizens generally.

Morrison, 2015-Ohio-485 at ¶ 19; *Mendenhall v. Akron*, 117 Ohio St.3d at ¶ 20; *Canton v. State*, 95 Ohio St.3d at syllabus.

In reviewing R.C. Chapter 1509, Ohio courts have expressly determined that R.C. Chapter 1509 is “unquestionably” a general law within the home rule authority framework. *Morrison*, 2015-Ohio-485 at ¶ 23; *Smith Family Trust v. City of Hudson Bd. of Zoning & Bldg. Appeals*, 2009-Ohio-2557, ¶ 11 (9th Dist.).

Finally, under the last step of the home rule analysis, a conflict exists if “the ordinance permits or licenses that which the statute forbids and prohibits, and vice versa.” *Morrison*, 2015-Ohio-485 at ¶ 24, citing *Struthers v. Sokol*, 108 Ohio St. 263, 140 N.E. 519 (1923), paragraph two of the syllabus; *see also Clyde*, 120 Ohio St.3d at ¶ 53. With regard to state permits, the Ohio Supreme Court has determined that city ordinances which prevent a person from exercising rights granted by state-issued permits are in conflict with the state law. *See Village of Sheffield v. Rowland*, 87 Ohio St.3d 9, 13, 1999-Ohio-217, 716 N.E.2d 1121 (holding that a city’s ordinances prohibiting the defendant’s operation of a construction and demolition facility were in conflict with the applicable state statute that had permitted the State to license the defendant to operate the facility).

Declaratory Judgment

Under R.C. 2721.03, a court shall grant declaratory relief if a party can show the following: “(1) there exists a real controversy between the parties, (2) that the controversy is justiciable in character, and (3) speedy relief is necessary to preserve the rights of the parties.” *Schwartz v. Stewart Title Guar. Co.*, 134 Ohio App. 3d 601, 615, 731 N.E.2d 1159 (8th Dist. 1999); *see also Freedom Found v. Ohio Dept. of Liquor Control*, 80 Ohio St.3d 202, 204, 685 N.E.2d 1324 (1997).

To qualify as a real controversy, the controversy must be “between parties having adverse legal interests, of *sufficient immediacy and reality* to warrant the issuance of a declaratory judgment.” *Burger Brewing Co. v. Liquor Control Com., Dep’t of Liquor Control*, 34 Ohio St.2d 93, 97, 296 N.E.2d 261 (1973), citing *Peltz v. S. Euclid*, 11 Ohio St.2d 128, 131, 228 N.E.2d 320 (1967) (emphasis added). In determining whether a controversy is “justiciable in character,” the court must determine that a controversy presents issues that are ripe for judicial resolution and that are sufficiently direct and immediate as to render the issues proper for judicial review. *Burger Brewing Co.*, 34 Ohio St.2d at 97-98.

ANALYSIS

In this case, all parties are in agreement that there are no material facts in dispute, and so there only remains an application of the relevant law to the material facts under Rule 56(C). Here, Ohio law is clear with regard to the process of determining the validity of a city’s ordinance in light of a state statute. In addition, the Ohio Supreme Court recently reiterated this analysis in the specific context of R.C. Chapter 1509. As such, the Court finds that reasonable minds could come to only one conclusion: Defendant’s Article XV is preempted by R.C. Chapter 1509 as a matter of law under Ohio’s home rule authority framework.

In applying Ohio’s home rule authority analysis, the Court first finds that Article XV’s ban on oil and gas drilling is a clear exercise of the Defendant’s police power. By attempting to ban oil and gas drilling, the City is trying to protect the “public health” and “general welfare of the public” in addressing environmental concerns within the community. *Clyde*, 120 Ohio St.3d at ¶ 30. The language and purpose of Article XV’s environmental provisions are in no way related “solely to the government and administration of the internal affairs of the municipality.” *Id.* As such, the Court finds that Article XV falls squarely under Broadview Heights’ police power.

Secondly, the Court finds that R.C. Chapter 1509 is indisputably a general law under the home rule authority analysis. As evidenced by the language of the statute and as held by Ohio courts, R.C. Chapter 1509 is a clear example of a “comprehensive” and “statewide” enactment that

applies “uniformly” throughout Ohio in setting regulations that prescribe a general rule of conduct upon citizens. R.C. 1509.02; *Morrison*, 2015-Ohio-485 at ¶ 23; *Smith Family Trust*, 2009-Ohio-2557 at ¶ 11.

Finally, the Court finds that Article XV’s ban on new or expanding drilling of oil and gas wells directly conflicts with R.C. Chapter 1509’s state regulatory scheme. It is clear in this case that the “ordinance prohibits that which the statute permits” because Article XV attempts to prohibit Plaintiffs from oil and gas drilling activities which ODNR has expressly allowed them to perform pursuant to R.C. Chapter 1509 and via a state-issued permit. *Morrison*, 2015-Ohio-485 at ¶ 24; *See Rowland*, 87 Ohio St.3d at 13.

Since the Court then finds that Article XV’s ban on oil and gas drilling is an exercise of police power that is in direct conflict with general law R.C. Chapter 1509’s permitting of oil and gas drilling, the Court holds that Article XV is an invalid exercise of Broadview Heights’ home rule authority and is preempted by R.C. Chapter 1509 as a matter of law. This holding is consistent with Ohio’s home rule authority analysis and the Ohio Supreme Court’s recent ruling in *Morrison* that declared a city cannot “unfairly obstruct or impede” oil and gas activities which the State of Ohio has permitted under R.C. Chapter 1509. *Morrison*, 2015-Ohio-485 at ¶ 37.

In considering Plaintiffs’ request for declaratory judgment, the Court finds that all elements under R.C. 2721.03 are met in this instance. First, this case presents a real controversy in which the parties’ interests are clearly adverse and in need of immediate resolution because Plaintiffs wish to drill Well #5D timely pursuant to their state-issued permit and the City intends to prevent them from ever doing so. *Burger Brewing Co.*, 34 Ohio St.2d at 97. Second, this case constitutes a justiciable controversy of immediate need because the dispute regarding the enforceability of Article XV revolves around an Ohio constitutional law issue that is ripe for judicial resolution. *Id.* at 97-98. Finally, speedy relief is necessary to avoid any further delay in allowing Plaintiffs to exercise their right in timely drilling Well #5D by their 07/09/15 deadline as required by their renewal permit from ODNR.

CONCLUSION

For the foregoing reasons, the Court **GRANTS** Plaintiffs' Motion for Summary Judgment and **DENIES** Defendant's Motion for Summary Judgment. The Court finds that reasonable minds could only conclude that Defendant's Article XV is preempted by R.C. Chapter 1509 as a matter of law and cannot prevent Plaintiffs from exercising their rights as granted by their state-issued permit.

In so holding, the Court grants Plaintiffs' request for declaratory judgment and the Court hereby declares that Broadview Heights has no authority to prevent Plaintiffs from drilling Well #5D pursuant to their permitted issued by the State of Ohio. The City cannot rely on Article XV to prohibit such drilling because it is unenforceable in light of R.C. Chapter 1509. In connection, the Court hereby enters an Order enjoining the City from preventing the Plaintiffs from exercising their rights pursuant to their state-issued permits.

IT IS SO ORDERED. FINAL.

JUDGE MICHAEL K. ASTRAB

DATE