

Questions & Answers
Youngstown Charter Amendment
May 7, 2013 Primary Ballot
Section 4, Community Bill of Rights

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Author's note: This Q&A is intended to provide Youngstown voters with information regarding the proposed charter amendment. It was prepared at the request of individual city legislators and officials who asked for background information from my experience and perspective as an attorney active in representing largely landowners with their oil and gas leasing and development issues. Nothing here should be relied upon as attorney-client advice.

Q. Why this charter amendment?

A. In 2004 Ohio like many other states established state-wide uniform laws and regulations governing utilities and services needed all across the state that preempted local government organizations (including home rule cities and townships) that might desire to establish local conflicting laws. State preemption addresses “NIMBY” (Not in My Back Yard) laws that would make it impossible to have efficient development of resources, distribution of electricity, cell service, telephone service, natural gas, and many other similar public needs. Preemption laws vary from state to state. Ohio’s laws are clear: A city cannot pass laws that would preempt state laws and regulations concerning oil and gas development.

The proponents of the Youngstown Charter Amendment were guided by a national non-profit group headquartered in Pennsylvania, the Community Environmental Legal Defense Fund (www.celd.org/). The CELD and its local adherents who circulated petitions to get this issue on the ballot see Youngstown as just another battle ground in their war against fossil fuels and “corporations.” The CELD supplied the boilerplate “Community Bill of Rights” language and methods for getting sufficient petition signatures, asking residents if they would support an initiative to promote a “Community Bill of Rights to have clean air and water.” Who would not sign on to that proposition, particularly without first reading the fine print?

In fact the CELD, as reflected on its website, is a strident, partisan advocacy group challenging centralized government regulation of utilities and energy resources, and instead favors strictly individual rights and controls. Its mission is not based upon political or physical sciences, engineering, best means of governance and planning theory, but rather on pure political populism. It favors a sweeping “power to the individual” approach, and doesn’t appear to worry much about the havoc its approach would create upon public services, safety, health, and welfare. It is blatantly “anti-corporation,” but fails to provide any viable alternatives for addressing the vast needs for energy, utilities, goods and services that are particularly critical to urban populations. The CELD is pushing an “end run” around Ohio’s established system of laws, as well as the Ohio and US constitutions, by promoting this ballot initiative in Youngstown, even when at least some of what it is pushing is clearly not enforceable.

This organization is playing games with Youngstown's future, though it has little stake in the outcome or responsibility for the harm it could create.

Q. Has this been done in other cities?

A. Yes, but not under similar facts or with such critical risk to the citizens involved.

Ohio. The same promoters of this amendment have gotten laws passed in a couple of Ohio cities (like Yellow Springs and Mansfield) where there is virtually no oil and gas activity in comparison to what has been occurring in Youngstown. There has been no review by Ohio courts of this sort of charter amendment or ordinance, though Ohio courts have just again clearly upheld the constitutionality of state laws preempting local city laws regarding oil and gas. It would seem that at least some major portions of the proposed amendment (those banning oil and gas activities) would be unenforceable, or illegal.

Pittsburgh. Proponents often mention that the same law was passed in Pittsburgh. Pittsburgh did pass a law regarding certain oil and gas development, but it was significantly less strident and overreaching compared to Youngstown's proposed amendment. **But, far more important, Pennsylvania does not have the state preemption laws Ohio has regarding oil and gas development.** Therefore, the Pittsburgh law should not be compared to what is being pushed on Youngstown.

Q. Why is the defeat of this charter amendment so vital for Youngstown?

A.

1. Due to of geology and geography, northeast Ohio has become a focus for Utica shale oil and gas development. V&M Star has invested over \$1 billion in upgrading and adapting facilities, with active involvement of the City of Youngstown, in order to manufacture products for the Utica shale industry, as has Exterran, creating thousands of jobs. Other Youngstown city and area industries have benefited greatly from the new oil and gas opportunities, as have the residents and taxpayers and city government, from the influx of jobs and opportunities. The obvious intention of this amendment is to halt that opportunity, waste benefits to the city, and drive the development to other communities (where it would be welcomed with open arms).
2. The City of Youngstown and surrounding communities (particularly west into the Meander Reservoir Watershed area) have for decades and generations been very active with oil and gas drilling. According to the Ohio Department of Natural Resources website interactive maps, there appear to be around 100 permitted oil and gas wells within the limits of the City of Youngstown, and many hundreds more directly to the west of the City of Youngstown (in the Meander Reservoir area). It is highly likely that any of those wells involved in production of oil and gas over the decades has been "fracked," and many multiple times. Each of the producing wells generates brine that is transported and disposed of. Each well generates oil and gas that needs to be transported. Some of those wells were drilled into shale layers, utilizing drilling technology available at the time. The "fractivists" promoting the charter amendment apparently had no problem with this massive oil and gas development in the City of Youngstown and its surroundings until now.

The proposed charter amendment would literally make those who own or operate the wells, transport the oil and gas and brine, or in any way facilitate those wells into law breakers and criminals. According to ODNR website information, many of these wells are owned by local Youngstown churches, schools, and non-profit charities.

3. It is unlikely regardless of the charter amendment that there would be much 'unconventional' large scale horizontal shale oil and gas drilling activity within the City of Youngstown. The multiple-well drilling pads and related activities involved are located away from urban areas or residential concentrations. Most shale gas development, particularly surface activities, would be impossible in Youngstown due to regulations already in place in Ohio. The amendment would likely make very little difference as to actual drilling activity within the city. But, it would make a huge difference in terms of economic opportunities to the city, and the image that would be portrayed to the nation and the world with Youngstown, a major city in northeast Ohio, refusing to allow, and even criminalizing shale gas development.

Q. What are the existing rules that protect residents, properties, and the environment with respect to oil and gas development in the City of Youngstown?

- A. Section 1509.02 of the Ohio Revised Code states:

“There is hereby created in the department of natural resources the division of mineral resources management, which shall be administered by the chief of the division of mineral resources management. The division has sole and exclusive authority to regulate the permitting, location, and spacing of oil and gas wells within the state. 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, and operating of oil and gas wells within this state, including site restoration and disposal of wastes from those wells.”

Ohio Revised Code Chapter 1509, and the extensive book of regulations developed under that statute (Ohio Administrative Code 1501:9-1-01 et seq.) establishes a well developed, science-based body of regulations, backed by uniform statewide enforcement, that no local government entity (such as the City of Youngstown) could possibly hope to provide.

Following are just a few examples of protections for city residents, property owners, and the environment already well established under state law:

- ❖ 1509.01 provides an exclusive set of rules for “urbanized areas” which would apply in the City of Youngstown. Those rules, including setbacks of a well from an occupied dwelling or a parcel of land not included in a drilling unit, were designed for conventional wells located in urban areas and probably have no application to horizontal wells which would need larger setbacks.
- ❖ Detailed notice and application and permitting procedures are set forth in ORC 1509.06
- ❖ Testing of all water wells within 300 feet of any new well, and within 1500 feet of any horizontal well (ORC 1509.06)

- ❖ Detailed assurance bond and liability insurance requirements (5 million for horizontal wells, with environmental endorsement).
- ❖ Detailed maintenance and safety requirements ORC 1509.03 and OAC 1501:9-9
- ❖ A “Best Management Practices for Oil and Gas Well Site Construction Manual” is mandated as to minimum standards for oil and gas development by Ohio Administrative Code Section 1501:9-1-01.
- ❖ Detailed requirements for well casings and requirements for groundwater protection are set forth in OAC 1501: 9-1-08.
- ❖ Reclamation and restoration requirements ORC 1509.06.
- ❖ For oil and gas to be drilled, each owner of those oil and gas rights has to agree in writing (usually through a lease) for this to happen. In Ohio oil and gas rights cannot be taken from the owner without this consent, and laws establish means whereby oil and gas cannot be “stolen” or siphoned away from a non-consenting owner. The only instance otherwise (very rare) is if owners of minerals in a relatively small percentage of the acres included in an area to be developed (called a drilling unit) refuse to go along, and thus prevent all the neighboring mineral owners from being able to realize benefits from developing their minerals. In that case, there are provisions for including those mineral acres after a due process procedure and appropriate compensation being paid to the recalcitrant owner (ORC 1509.27 and 1509.28). These rules requiring drilling units (which for horizontal shale wells likely require at minimum nearly 100 acres) make it practically impossible for much of any horizontal drilling activity to take place in urban areas. It would simply be near impossible for the oil and gas driller seeking a permit to obtain leases from the large numbers of individual lot and parcel owners which, in Youngstown’s situation, almost always include ownership of the mineral rights as well as the surface. Thus, under Ohio’s laws, it is unlikely that much actually horizontal shale drilling activity could occur within the city.

Q. Why is this a “Community Bill of Rights” and what does that mean?

- A. Promoters, including the local Frackfree America Coalition blithely assert in their materials that voting “yes” will assert “the right of residents of the City to local self-government, to pure water, clean air, peaceful enjoyment of home, freedom from toxic trespass, local self-governing rights and the right of residents to establish energy policies for future sustainability.” Sounds absolutely wonderful — who could resist this? Until you read the actual amendment text. This law reads like a radical political manifesto, rather than having any semblance to a logical, comprehensible, enforceable and constitutional law.

Some examples:

- A. **“Pure”** water (Amendment part d): This is not defined, other than giving any resident and “natural community” the right to draw water from “natural water cycles.” What, by the way, is a “natural community” or a “natural water cycle” under the law? Does this mean every resident has the legal, enforceable right to drill his/her own well for water supply, which by law must be “pure” rather than utilizing treated city water as required by health laws?
- B. **“Clean”** air (Amendment part b). Each resident and “natural community” has the absolute right to “breathe air untainted by toxins, carcinogens, particulates, and other substances known to cause harm to health.” This would appear to allow

any resident to unilaterally outlaw internal combustion engines, aerosols, anything causing odors, insect control, painting, etc. The law does not allow any degree of reasonableness or balance; rather it gives each individual this “fundamental and inalienable right.”

- C. Free from **“Toxic Trespass”** (Amendment part d). Each resident and “natural community” has the “fundamental and inalienable right” to not have “trespass by manufactured chemicals, toxins, pathogens, or radioactive substances and progeny.” This would appear to allow any resident to prohibit contact or exposure to any industrial uses, any burning of fossil fuels, being around anyone with anyone using cosmetics, TV and radio signals, etc.
- D. **“Sustainable Energy Future”** (Amendment part f). This gives any resident the legal right to demand energy from “renewable and sustainable fuel sources”, rather than from coal, natural gas, and nuclear generated power.
- E. **The Individual Trumps Representative Government** (“h” in amendment). The charter amendment “shall not be construed to limit or surrender the sovereign authority or immunities of the people to a municipal corporation that is subordinate to them in all respects at all time”. “The people at all times enjoy and retain an inalienable and indefeasible right to self-governance in the community where they reside.” This sounds like chaos and anarchy.
- F. **“Hydrofracturing”** (not defined) is illegal. This would outlaw practices undertaken within the city for decades that up until now seemed to create no problems (Amendment j(1)). Note: The Youngstown injection well associated with earthquakes had nothing to do with “hydrofracking.”
- G. **Wells Illegal** No one can have anything to do with operating a well of any type (such as transporting bi-products and products from a well). This would outlaw the continued use of many operating wells in the city (Amendment j(2)).
- H. **Extends the ban of oil and gas development far outside the City of Youngstown**, including the Meander Creek area, where hundreds of existing wells are operating (Amendment j(5)).
- I. **Strips corporations and individuals of property and due process rights** clearly guaranteed by the laws and constitutions of the United States and the State of Ohio, which obviously should not and cannot be done (unless the proponents actually are intending to completely overthrow our form of government). (Amendment j(6, 7, 8, 9))
- J. **Would make anyone outside the City of Youngstown that operated an oil and gas well “strictly liable”** for “all harms” caused within the city and within the Meander Reservoir Watershed regardless of whether the well operations had anything whatsoever to do with the harm observed (Amendment j(5)).
- K. **Does not allow “corporations”** to even challenge this strange proposed law. The promoters and clearly the CELD hate corporations. Curious as to what they think about LLC’s, partnerships, trusts, individuals, and other entities that can do many of the same things as corporations! (Amendment j(7))
- L. **Reverses “preemption”** to make this law (which has no definitions, standards, means of enforcement or legality) “preempt” the well developed state laws and regulations on any of the issues mentioned in the amendment (“j(8)”).
- M. **Automatic Guilt** Summarily (with no due process whatsoever) determines that anyone operating an oil and gas well or related business or operation is guilty and issued the maximum penalty (Amendment j(9)).
- N. **Enforcement by “any city resident.”** This would not require the city attorney or prosecutor to review an alleged infraction; rather anyone could bring suit, and

create havoc and disruption of almost any area of life and commerce imaginable within the city. Any fringe political or environmental group could easily fund these “any resident” lawsuits.

Q. But don't the promoters say that this amendment only really is intended to stop fracking?

A. Talk is cheap. Regardless of what promoters might say, **the voters must look at the actual wording of this proposed law.** It goes far, far beyond “anti-fracking” and a sweet-sounding “Bill of Rights.”

There are numerous other means by which Youngstown citizens can positively change laws and rules regarding oil and gas development in a much more effective way than using this overly broad and poorly conceived “sledge hammer” approach that could bankrupt and ruin the city and surrounding areas.

Q. What would this amendment do to a City of Youngstown landowner's rights to lease or develop minerals, including oil and gas?

A. It would take away from private property owners basically any and all mineral rights, including oil and gas rights. Under any reading of American – model justice and constitutional law, rights taken by the public (by a law such as this) must be fairly compensated. This “taking” of mineral rights would be analogous to taking ones' land for a highway or other public use. Affected mineral owners could bring suits and claim millions in damages from the City of Youngstown if the amendment should become law.

Q. If I vote “no” against this charter amendment, does it mean that I am “pro-fracking”?

A. Not at all. Many are reasonably concerned about the safety of oil and gas development, transportation, and disposal of wastes. Many reasonably and logically want to see the active development of alternative energy sources besides fossil fuels. Those concerns and beliefs have nothing to do with this very poorly conceived proposed charter amendment. If passed, this charter amendment would only hurt many existing oil and gas well owners and operators, as well as businesses and industries in the area that have begun to benefit from the oil and gas development. It would not limit “fracking” or other development at all, including within the City of Youngstown, because it is not enforceable because of existing State of Ohio preemption laws. Voting “yes” for this bad law is absolutely a no-win proposition. Though the oil and gas and fracking issues are preempted by state law, some of the other dangerous provisions (such as “pure” water and “no toxins” might not be, and could pose huge costs to the city and taxpayers as the issues are litigated at the behest of extreme environmental groups.

Q. What other means are available to address my concerns about fracking and its effects on the environment?

A. Individuals and organizations concerned about oil and gas development and environmental issues should work with their state legislators, some of whom (particularly those from Youngstown) are currently very active in developing better Ohio laws and regulations concerning oil and gas development. These issues are a matter of state law — not city charter or ordinance.

Contact: State Senator Joe Schiavone, Senate District 33
 Senate Building
 1 Capital Square, 2nd Floor
 Columbus, OH 43215
 (614) 466-8285

State Representative Bob Hagan, District 58
 77 South High Street
 10th Floor
 Columbus, OH 43215
 (614) 466-9435

Here are some practical issues you might ask to have considered (none of which would be addressed by the proposed charter amendment):

- 1) Applicants for drilling permits provide documented track records, references, accident, incident, rule infraction, completion and reclamation history.
- 2) Applications for permits, along with associated maps and documents be published in the locality where the well is located, with opportunity for local comment (particularly from local government and public safety forces) before a permit is granted.
- 3) More distant set-back requirements from property lines of properties not in drilling unit, and dwellings and water features for unconventional drilling operations (including access roads and pipelines) in urban areas.
- 4) Maximum levels for sound and light emissions and hours of operation for unconventional drilling operations in urban areas.
- 5) Formalized accountability for impacts on local infrastructures and resources (roads and other) for unconventional drilling operations.
- 6) A more robust “best industry practices” requirement, or at least an update of the now almost nine year-old standards incorporated in OAC 1501:9-1-0; require Ohio drillers to comply with the new Center for Sustainable Shale Development standards developed together by industry, scientists, and environmentalists, and championed by Ohio’s own EPA (see www.sustainableshale.org/). New standards would require water recycling and limit flaring, for example.
- 7) Better inspection documentation, and immediate publication on ODNR website of inspection data and incident reports.
- 8) Better coordination and communication procedures between operators, ODNR and local safety forces.
- 9) In addition to the 2012 changes to regulations for Class II Disposal Wells, establish additional science and engineering-based lateral and vertical spacing and set-back requirements and designated operational units within which the injected materials will be contained without migrating into neighboring properties and strata; require that well owner secure rights from any property owner whose property is invaded by injected materials.
- 10) If state preemption is to be adjusted to allow more local control, it must happen through state-level legislation — a law passed by the state house and senate, signed by the governor.

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