

Towns Resisting Gas Drilling Find Favor in Court

Candor Town Supervisor Weighs in on NYS Supreme Court Decision

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On Tuesday, February 21, NY State Supreme Court Judge Phillip Rumsey ruled that the Town of Dryden in Tompkins County can ban natural gas drilling within its boundaries. And, on Friday, February 24, Otsego Supreme Court Acting Judge Donald Cerio upheld the right of the Town of Middlefield to ban fracking. In both decisions the judges clarified that zoning where an activity can take place is distinctly different from regulating that activity.

Last August, the Dryden Town Board amended the town's zoning law by including, under "prohibited uses" the exploration for natural gas and/or petroleum and drilling wells. The new law also prohibits transferring, storing or processing natural gas or petroleum and disposing of gas production wastes within town limits. A month later, Colorado-based Anschutz Exploration Corporation sued the town. Anschutz has extensive leases in the town, but no permits to drill.

In his ruling last week, Judge Rumsey noted that "Local governments may exercise their powers to regulate land use to determine where within their borders gas drilling may or may not take place." Meanwhile, he noted, the NY State Department of Environmental Conservation (DEC) "regulates all technical operational matters on a consistent statewide basis..." Furthermore, he pointed out that the NY Court of Appeals has held that a total ban on extraction of natural resources is permissible.

The court ruling was announced last Tuesday afternoon, at the Association of Towns Annual meeting in NYC. According to Candor Town Supervisor Bob Riggs, who was in attendance at the training school and annual meeting with other Candor officials, they learned of the ruling during a workshop focusing on "home rule". The Town of Dryden Supervisor, Mary Ann Sumner, received a call on her cell phone and made the announcement.

Riggs shared his reactions to the Dryden decision last Thursday night, while keeping an eye on sap that he and Skip Jackson were boiling. "There are lots of opinions about whether fracking is a good idea," Riggs said. "But this court case is about something different. It's about home rule and zoning." He's not certain that the question of whether towns have the authority to regulate where drilling happens has been suitably addressed.

"There seems to be case law on both sides," Riggs said, though some seemed more pertinent to mining rather than drilling. Riggs also attended a presentation by Steven Russo, Deputy Commissioner and General Counsel to the DEC. Russo addressed the regulatory plan proposed to regulate high-volume hydraulic fracturing that is currently under review. He told town supervisors that DEC anticipates a decision on the Supplemental Generic Environmental Impact Statement (SGEIS) sometime this year.

If DEC does allow drilling, Riggs said it sounds as though the agency will take a conservative approach to ensure safety. "The point [Russo] made is that DEC's staff is so small and the permitting process so involved that permits would be slow in coming," Riggs said.

Would Riggs consider zoning in Candor to limit where drilling and other heavy industry can operate? While he's not 100 percent in favor of zoning, Riggs can see places where it can be useful. But he's not for banning any particular industry or enterprise, either.

"As far as the Dryden ban, if they had said 'we want to protect our aquifer' I'd be fine with that," said Riggs. "But to say that they're against this [gas] industry – that I can't embrace." Having said that, Riggs emphasized that, while landowners can pretty much do as they please with their

property, they can't harm their neighbors. "That's where zoning could help," he said, then pointed out that there were other ways, such as ordinances, to control land use.

While the job of town government is to protect the community and the land, nothing is risk free, Riggs said, indicating that drilling may be an acceptable risk. Right now Candor has an opportunity to think about how to prepare for shale gas and other energy development. "We still have time to do some planning," Riggs said.

Fortunately there are plenty of resources available for town boards to draw on as they prepare for future energy development. Last spring Tioga Investigates Natural Gas (TING) presented each town government with a huge binder full of resources, such as sample noise ordinances, road use agreements and emergency services plans. Those resources are also posted on the Tioga County website at www.tiogacountyny.com/agencies/ting-tioga-investigates-natural-gas.html.

In January the Tompkins County Council of Governments (TCCOG) released their report, "Tompkins County Community Impact Assessment – High Volume Hydraulic Fracturing (HVHF)" which is posted online at www.tompkins-co.org/TCCOG. The report is intended to provide municipal officials, community members, and business leaders with a tool they can use to assess how shale drilling might impact their town.

One of the biggest concerns the report notes is that without local land use controls, wells could be sited within 150 feet of schools and too close to homes and domestic water supplies. Municipalities without local land use controls or comprehensive plans will have little say in where drilling happens. As with the TING binder, a large portion of the Tompkins County report is dedicated to helping town governments prepare for potential drilling.