

Towns Urged to Implement Safeguards before DEC Issues Drilling Permits

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Environmental attorneys Helen and David Slottje are working with a number of towns throughout the Tompkins and Tioga counties to enact protective measures against negative impacts from large scale shale gas drilling. At the March 18 Owego forum on hydro-fracking, David Slottje spoke about why towns should consider a frack ban or, at the very least, a moratorium.

“It is a legislature’s right and, particularly in matters of land use and planning, its obligation to anticipate future problems and to enact measures to guard against them,” he said, citing a 1979 case. Those “anticipated events” – industrial development or gas drilling – don’t even have to happen.

Throughout his talk Slottje emphasized that towns have the power to use land use laws and/or police power authority to protect their citizens against the negative impacts from resource exploitation or other unwanted actions.

One of the primary tools municipal governments have at their disposal is zoning, said Slottje. Zoning regulates land use, including such things as lessening traffic congestion, securing safety, promoting the health and welfare of citizens, providing adequate air quality and more. He cited a court decision (*Golden v Town of Rampano, 1972*) in which the judge said that towns may use zoning to “prevent uses for which the physical and financial resources of the town are inadequate.”

“Even if you don’t have zoning, you have the same authority through police powers and home rule,” Slottje said. Those police powers empower the town to enact laws for the “protection and enhancement of its physical and visual environment” and for the “protection, order, conduct, safety, health and well-being of persons or property therein”.

Recent court rulings in Dryden and Middlefield have focused a lot of attention on the question of just how much power a town has to determine whether gas drilling can occur within its boundaries. Last summer the Town Board of Dryden amended its zoning laws to prohibit gas drilling and “related activities” from taking place in the town. Almost immediately the Anschutz Exploration Corporation, which invested thousands of dollars in leases, sued the town. A similar lawsuit was initiated in the town of Middlefield when a landowner sued the town for banning hydro-fracking.

On February 21 Judge Phillip Rumsey decided against Anschutz, upholding the Town of Dryden’s frack ban. In his decision, Rumsey clearly distinguishes the regulatory authority of DEC (Department of Environmental Conservation) from the land use authority of local governments. He explains that, while the Environmental Conservation Law clearly gives the state regulatory power over the oil and gas industry, that law doesn’t preempt local land use authority.

The state determines “how” drilling happens, wrote Judge Rumsey. The towns determine “where” it may or may not happen. The judge in the Middlefield case made a similar determination in upholding that town’s frack ban.

Now is the time to act, said Slottje. Towns cannot afford to wait for DEC to adopt drilling regulations and begin issuing permits. He encouraged towns that are considering a ban on hydro-fracking and related activities to get moving and enact a ban as soon as possible.

“If you’re not ready to enact a ban, then implement a moratorium,” he said. He compared industrialized hydro-fracking to a train coming down the track. When you see that kind of land use coming, and you want time to study the issues, a moratorium gives you that time, said Slottje.

It's a stop-gap measure specifically designed to give towns time to consider impending changes. Unlike bans, they don't last forever; all of them have some sort of expiration date built in – usually a year to 18 months, he said.

Moratoriums are particularly useful for towns which are ambivalent about what sort of measures they need and want to take to protect their roads, water, land resources and public health. People in those towns may be divided on the issues, or town board members may be undecided – and that's a perfect reason for enacting a moratorium, said Slottje. It allows the town board to preserve their options.

A town does not have to have zoning in order to enact a moratorium, Slottje said. And enacting a moratorium does not create zoning where there was none before. Once again he stressed that there is no conflict with the state oil and gas statute. “The NY Court of appeals has said unequivocally that while a town may not regulate the operations and processes of the industry [that's regulated by the state], the town may prohibit the industry altogether by using land use laws of general applicability.”

Some landowners have argued that a frack ban takes away their property rights. But, said Slottje, “Property rights are always subject to limitations, and even the pursuit of lawful activity may be regulated or banned if it is necessary to protect the welfare of the community. That's based on a 1925 decision stating that “... the general welfare of the public is superior in importance to the pecuniary profits of the individual”.

“Prevention of damage or harm to others and the community legally trumps the right to exploit natural resources,” said Slottje. And this, he pointed out, is why an argument that a moratorium or ban is a “taking” will be hard to prove.

There are towns that say “maybe we should wait”. But Slottje warned that waiting to pass a moratorium until after DEC begins issuing permits would deprive the municipality of the single protection for local control that DEC built into its draft SGEIS: the right to say that drilling in the town is “inconsistent with local land use laws”.

When asked about how bans affect existing wells, Slottje explained that moratoriums and bans included language that “grandfathers” pre-existing wells. He urged people to get their town boards – even those that are favorably inclined to drilling – to enact at least a one-year moratorium in order to put road use and other protective laws into place.