

CHAPTER VIII

HOW MAY ANY STATE REGULATIONS AFFECT THE TOWN OF RENSSELAERVILLE? WHAT ARE THE ISSUES INVOLVED?

The Town Board has the legal right and obligation to anticipate future problems and to guard against them. It also has the fiduciary responsibility (highest legal duty) to protect Town roads and all of the Town's assets, including rural/residential character, health, safety, and general well-being of its citizens. Municipal Home Rule Law 10(11) (12) gives authority to towns to enact laws to protect property, physical and visual environment, conduct, safety, health, and well-being of its citizens. This would seem a clear mandate to local officials. However, a local town board in New York State also has to take into account the many laws affecting this authority. This chapter specifically outlines the most important of these laws which will impact the Town of Rensselaerville as the Town Board makes crucial decisions about hydraulic fracturing for natural gas.

- **ZONING LAWS** that are congruous with the Town's Comprehensive Plan may be developed to protect the *"health, safety and general welfare of the people of the Town and to consider the needs of the people."*¹
- **N.Y.S. TOWN LAW § 272-a:** NY Code - Section 272-A: Town Comprehensive Plan. State statutes require that all land use laws in the town must be consistent with the comprehensive plan. One of the most important powers town government has is the authority and responsibility to regulate land use for protecting the public health, safety and general welfare of its citizens. The comprehensive plan is a critical tool to help elected officials make decisions that are in the best interest of the people.

From the TOR Comprehensive Plan, 2007:

- In defining who we are, where we want to be, and how to get there, this plan's principal theme is *"to protect the abundant natural features and resources that contribute to those aspects of life in Rensselaerville most valued by residents."*
- This Comprehensive Plan *"is not a law, but State statutes require that all land use laws in a municipality be consistent with a comprehensive plan. New York State considers adoption of a comprehensive plan to be a critical tool to promote the health, safety and general welfare of the people of the Town and to consider the needs of the people. A comprehensive plan is the policy foundation upon which communities are built."*
- *"Protection of rural character and the Town's environment is a primary goal of this comprehensive plan."*

¹ "Municipal Powers and Limitations with Respect to Natural Gas Drilling," Bradley G. Allen, Esq., Whiteman, Osterman, & Hanna, LLP, Legal Education Workshop, Guilderland Public Library, December 2, 2011.

State laws allow municipalities to adopt local laws on a variety of topics. These laws may incidentally infringe on gas drilling and may not be preempted.²

- Wetlands Protection Laws (ECL Article 24, Title 5)
- Flood Plain Protection Laws (ECL Article 36)
- Solid Waste Management Laws (ECL Article 27)
- Air Pollution Laws (ECL § 19-0709)
- Tree Preservation Laws (GML § 96-b)
- Water Basin Laws (GML § 99)
- Building Code Laws (Executive Law Article 18)
- Real Property Taxes (ECL § 23-0303(2) & Real Property Tax Law)
- Road Protection Laws (VTL & ECL § 23-0303(2))
- Miscellaneous local laws

These local laws must apply equally to everybody in the Town. They cannot apply to natural gas drilling operations only.

This Local Home Rule Authority or Municipal Home Rule Law is embedded in the NYS Constitution and is the power granted to local governments to adopt local laws. Article IX of the Constitution grants home rule powers to local government to adopt and implement by the Municipal Home Rule Law authority to municipalities to act by local law with respect to its “property, affairs, or government,” and other powers granted in statute whether or not they relate to its property, affairs, or government. Local Home Rule Authority or Municipal Home Rule Law is applied to the legal tools listed above that towns have available.

Proponents of natural gas drilling cite **ECL §23-0303(2)** that states “*the Department’s Oil, Gas and Solution Mining Law supersedes all local laws relating to the regulation of oil and gas development except for local government jurisdiction over local roads or the right to collect real property taxes. Likewise, ECL §23-1901(2) provides for (a superseding) of all other laws enacted by local governments or agencies concerning the imposition of a fee on activities regulated by ECL 23. And to provide in similar fashion for the underground storage of gas, the solution mining of salt and geothermal, stratigraphic and brine disposal wells.*”³

NYS DEC has the authority to regulate gas development; local governments do not have the power to regulate gas development. “Regulate” meaning that which pertains to regulating the operational processes of the natural gas industry.⁴

A significant number of towns across NYS have challenged this preemption of local home rule with the opinions that local governments have the power to determine how

² “Municipal Powers and Limitations with Respect to Natural Gas Drilling,” David R. Everett, Esq., Whiteman, Osterman, & Hanna, LLP, Association of Towns 2012 Annual Meeting & Training School, New York City, February 21, 2012.

³ dSGEIS, Chapter 8, Section 8.1.1.

⁴ “A Legal Plan to Control Drilling,” David Slottje Esq., and Helen Holden Slottje, Esq., Community Environmental Defense Council, Inc., Sierra Atlantic, Volume 41, Spring, 2011.

their land will be used and what is in the best interests of its citizens; there is a long legal precedent that exists for towns to zone out undesired uses.⁵

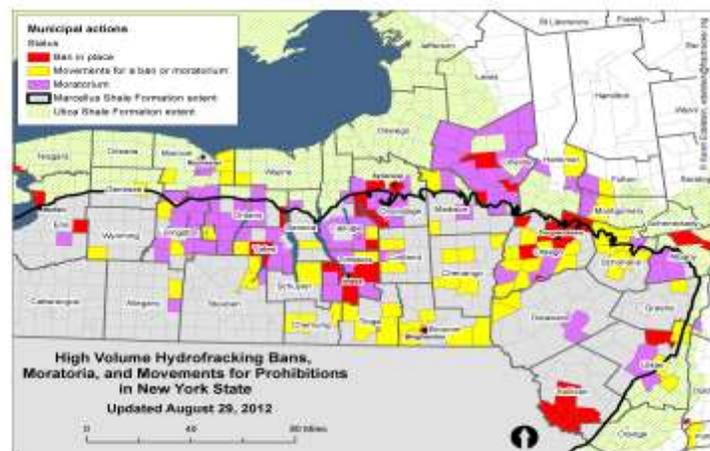
There are inherent risks involved with all kinds of industry, and because some local governments have concerns about the negative impacts of natural gas operations, they have passed bans on fracking. On February 21, 2012, addressing a fracking ban in the Town of Dreyden, NY, State Court Justice Phillip R. Rumsey stated that NY's oil and gas law gives the State the authority to decide how drilling can be done, but not where; local governments have the right to ban fracking within their borders. Judge Rumsey wrote, *"Under this construction, local governments may exercise their powers to regulate land use to determine where within their borders gas drilling may or may not take place, while DEC regulates all technical operational matters on a consistent statewide basis in locations where operations are permitted by local law."*

Middlefield, New York, also outlawed fracking last year with a zoning law banning heavy industry uses of land, including drilling for shale gas. Jennifer Huntington, a dairy farmer who had leased 380 acres of her land for drilling, sued the town, claiming that the ban caused her economic harm. On February 24, 2012, New York Supreme Court judge, Donald Cerio Jr., upheld Middlefield's ban, finding strong merit in the argument that municipalities have the right to keep harmful activities out.⁶

Bans in the Town of Dreyden, Tompkins County, and Middlefield, Otsego County that have been upheld by NYS Supreme Court decisions have been appealed.

A growing number of towns across NYS have enacted moratorium laws and bans against hydraulic fracturing. Most recently in Albany County, the Town of Berne extended their six month moratorium for another six months (August 8, 2012), and on that same date, the Town of Westerlo passed a one year moratorium on hydraulic fracturing.

Municipal movements against hydraulic fracturing. Updated 7/29/2012.⁷



⁵ "A Legal Plan to Control Drilling," David Slottje Esq., and Helen Holden Slottje, Sierra Atlantic, Volume 41, Spring, 2011.

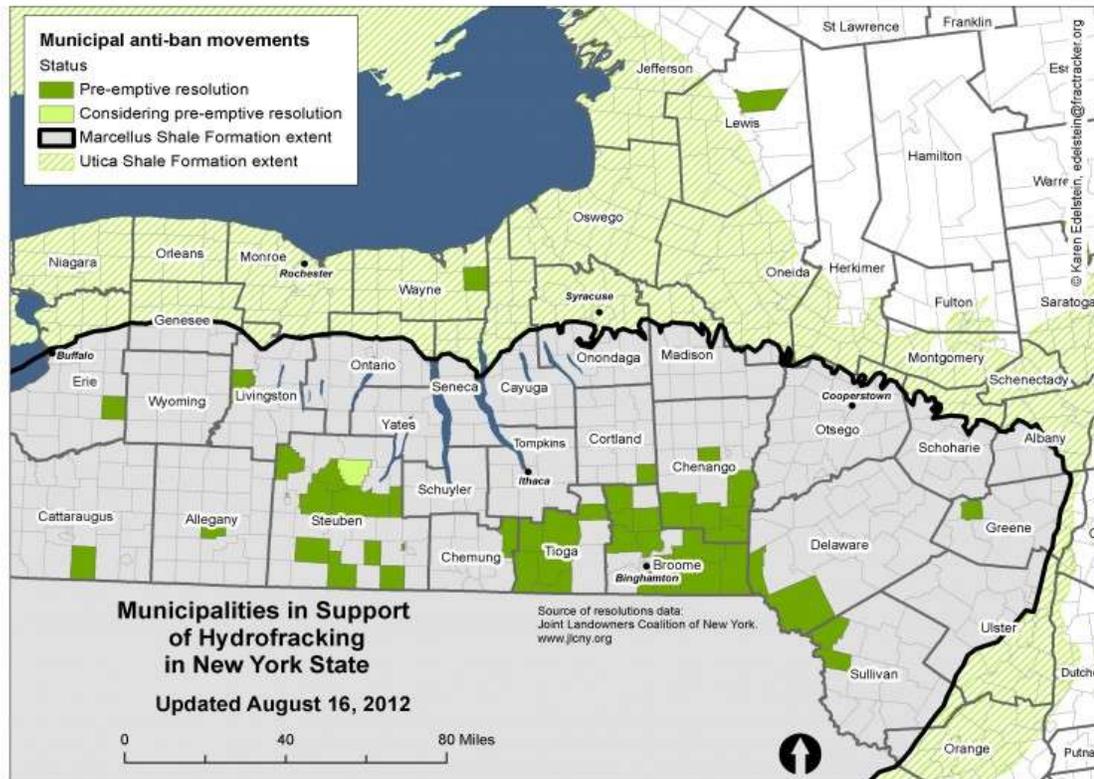
⁶ "Fracking Bans That Can Stand," Maura Stephens, YES, February 29, 2012.

⁷ <http://data.fractracker.org/cbi/snapshot/page?concept=~01533bca38c86d11e18e43c45b448b699a>.

Moratoria							
Town	County						
Berne	Albany	Vernon	Oneida	Pharsalia	Chenango	Tioga	Tioga
Pennesseleville	Albany	Verona	Oneida	Oxford	Chenango	Groton	Tompkins
Westerlo	Albany	Vienna	Oneida	Plymouth	Chenango	Marbletown	Ulster
Alfred	Allegany	Westmoreland	Oneida	Smithville	Chenango	New Paltz	Ulster
Genoa	Cayuga	Whitestown	Oneida	Homer	Cortland	Saugerties	Ulster
Ladyard	Cayuga	DeWitt	Onondaga	Virgil	Cortland	Macedon	Wayne
Locke	Cayuga	Elbridge (expired)	Onondaga	Masonville	Delaware	Arcade	Wyoming
Moravia	Cayuga	Lafayette	Onondaga	Sidney	Delaware	Italy	Yates
Niles	Cayuga	Marcellus	Onondaga	Ephratah	Fulton		
Scipio	Cayuga	Onondaga	Onondaga	Stafford	Genesee		
Sennett	Cayuga	Onondaga	Onondaga	Greenville	Greene		
Germantown	Columbia	Onisco	Onondaga	Dolgeville	Herkimer	Ban in place	
Cortlandville (expired)	Cortland	Tully	Onondaga	Salisbury	Herkimer	Town	County
Andes	Delaware	Bristol	Ontario	North Dansville	Livingston	Albany	Albany
Colden	Erie	Canandaigua (City & Town)	Ontario	South Dansville	Livingston	City of Binghamton	Broome
Oppenheim	Fulton	Getham	Ontario	West Sparta	Livingston	Summerhill	Cayuga
Little Falls	Herkimer	Hopewell	Ontario	York	Livingston	Beacon	Dutchess
Manheim	Herkimer	Manchester	Ontario	DeRuyter	Livingston	Buffalo	Erie
Newport	Herkimer	Naples (Vill. & Town)	Ontario	Sullivan	Madison	Wales	Erie
Avon	Livingston	Richmond	Ontario	Penfield	Madison	Niagara Falls	Niagara
Caledonia	Livingston	South Bristol	Ontario	Perinton	Monroe	Wilson	Niagara
Conesus	Livingston	West Bloomfield	Ontario	Riga	Monroe	Augusta	Oneida
Genesee	Livingston	Butternuts	Otsego	Webster	Monroe	New Hartford	Oneida
Lima	Livingston	Milford	Otsego	Canajoharie	Montgomery	Rome	Oneida
Livonia	Livingston	Oneonta	Otsego	Fort Plain	Montgomery	Camillus	Onondaga
Mount Morris	Livingston	Schoharie	Schoharie	Palatine	Montgomery	Skaneateles	Onondaga
Nunda	Livingston	Waterloo	Seneca	Canadice	Ontario	Spafford	Onondaga
Sparta	Livingston	Wayne	Steuben	Burlington	Otsego	Syracuse	Onondaga
Springwater	Livingston	Owego (Village)	Tioga	Harwick	Otsego	City and Town of Geneva	Ontario
Eaton	Madison	Caroline	Tompkins	Laurens	Otsego	Cherry Valley	Otsego
Lenox	Madison	Enfield	Tompkins	Maryland	Otsego	Middlefield	Otsego
Lincoln	Madison	Lansing	Tompkins	Morris	Otsego	New Lisbon	Otsego
Brighton	Monroe	Newfield	Tompkins	Otego	Otsego	City of Oneonta	Otsego
Mendon	Monroe	Olive	Ulster	Pittsfield	Otsego	Otsego	Otsego
City of Rochester	Monroe	Rochester	Ulster	Unadilla	Otsego	Plainfield	Otsego
Rush	Monroe	Barrington	Yates	Westford	Otsego	Springfield	Otsego
Minden	Montgomery	Benton	Yates	Philipstown	Putnam	Guilderlands	Schenectady
St. Johnsville (Vill. & Town)	Montgomery	Middlesex	Yates	Blenheim	Schoharie	Bethel	Sullivan
Annsville	Oneida	Milo	Yates	Carlisle	Schoharie	Forestburgh	Sullivan
Ava	Oneida	Starkey	Yates	Cobleskill	Schoharie	Highland	Sullivan
Boonville	Oneida			Fulton	Schoharie	Lumberland	Sullivan
Camden	Oneida	Movements for a ban or moratorium		Middleburgh	Schoharie	Tusten	Sullivan
Clinton	Oneida	Town	County	Richmondville	Schoharie	Danby	Tompkins
Deerfield	Oneida	Almond	Allegany	Seward	Schoharie	Dryden	Tompkins
Florence	Oneida	Canaseraga	Allegany	Sharon	Schoharie	Ithaca	Tompkins
Floyd	Oneida	Union	Broome	Hector	Schuyler	Trumansburg	Ulisses
Forestport	Oneida	Sanford	Broome	Ovid	Seneca	Ulysses	Tompkins
Kirkland	Oneida	Vestal	Broome	Bath	Steuben	Woodstock	Ulster
Marshall	Oneida	Windsor	Broome	Hammondsport	Steuben	Jerusalem	Yates
Paris	Oneida	Sempronius	Cayuga	Putteny	Steuben		
Remsen	Oneida	Big Flats	Chemung	Urbana	Steuben		
Sangerfield	Oneida	City of Elmira	Chemung	Newark Valley	Tioga		
Steuben	Oneida	Horseheads	Chemung	Owego (Town)	Tioga		
Trenton	Oneida	VanEtten	Chemung	Spencer	Tioga		
Utica	Oneida	Columbus	Chenango				

Bans and moratoria summary, 8/29/2012. Municipal total: 36 bans, 99 moratoria, 74 movements for prohibitions (bans or moratoria).

This map shows the towns overlaying the Marcellus and Utica shale formations that have recently passed resolutions indicating that they are open to high volume hydraulic fracturing.



COMPULSORY INTEGRATION

Compulsory Integration is a legal tool that became NYS law in 2005 where landowners who choose not to have a natural gas lease and are identified as part of a “spacing unit”⁸ are “compelled” or forced to pool their natural gas so drilling companies can gain access to it.

In plain words, what compulsory integration means is if one neighbor has a gas lease and drilling begins, the drilling company may drill under an adjacent owner’s land even if the latter does not want a gas lease.

If at least 60% of the 640 acre spacing unit of land area is leased, the landowner without a lease may be forced to have his or her land included in a spacing unit. This “compulsory

⁸ dSGEIS 2011, 5-17. “A spacing unit is the geographic area assigned to the well for the purposes of sharing costs and production. ECL §23-0501(2) requires that the applicant control the oil and gas rights for 60% of the acreage in a spacing unit for a permit to be issued. Uncontrolled acreage is addressed through the compulsory integration process set forth in ECL §23-0901(3).”

integration” allows the gas company to drill horizontally and inject fracking fluids under that property, whether the land owner likes it or not.

Thirty-eight states have some kind of forced pooling, however, no other state has the type of forced pooling as NYS.⁹

In NYS, if your land is part of a spacing unit, and not leased, you must choose one of the following options:

- Integration as a royalty owner
- Integration as a non-participating owner
- Integration as a participating owner

Each of the three options that the landowner without a lease must choose between has its own consequences.

Compulsory Integration Options¹⁰

- ***Integration as a Royalty Owner:***

Costs - If you elect this option, you are not liable for any charges or fees associated with well operation. A dry hole costs you nothing. This is the default option if you do not make a selection.

Compensation - If the well produces, the well operator will begin paying you a royalty shortly after production starts. The royalty will be no less than one-eighth of the revenue received by the well operator for the share of production attributable to your acreage. An integration order is not a "forced lease" and will not award you a signing bonus.

- ***Integration as a Non-Participating Owner:***

Costs - If you elect this option, you will have the same responsibilities as a Participating Owner, but you do not risk your own money by paying your share of costs up front. A dry hole costs you nothing.

Compensation - You will not receive any compensation from the well operator, not even a royalty, until the well operator has, through the sale of your share of production, recovered your share of the costs plus a "risk penalty" of 200% of your share of costs, for a total of 300%. This means that the well must pay for itself three times before you are compensated. After the well pays for itself three times, or if you buy out of the risk-penalty phase by making a payment, you will receive your share of production and be treated as a Participating Owner.

- If you have leased to someone other than the well operator, then your lessee may owe you a royalty during the risk-penalty phase. This is determined by your lease, and the well operator has no obligation to you.
- If your lessee elects to be integrated as a non-participating owner, then the well operator must make royalty payments to your lessee during the risk penalty

⁹ “State Laws Can Compel Landowners to Accept Gas and Oil Drilling,” Marie C. Baca, ProPublica, May 19, 2011. <http://projects.propublica.org/tables/forced-pooling>.

¹⁰ NYS DEC “Landowner Option Guide,” <http://www.dec.ny.gov/energy/1590.html>.

phase. These payments will be on a graduated scale from 1/16 up to 1/8, based on the percentage of the lessee's costs that have been recovered through sale of production.

- ***Integration as a Participating Owner:***

Costs - If you elect this option, you must pay your share of estimated well costs by the time of the integration hearing. This money will not be refunded if the well is a dry hole or does not pay for itself.

Compensation- You will receive your full share of production. However, the well operator will have a lien on your share of production to pay any outstanding amounts that you owe.

Responsibilities of Integrated Participating and Non-Participating Owners¹¹

A decision to be integrated as a participating or non-participating owner subjects you to obligations that do not enter the picture if you elect to be integrated as a royalty owner. Some of the additional considerations are as follows:

- ***Actual well costs.*** *The actual cost to drill or plug the well may exceed the estimate that was provided before the hearing. You will be held liable for your share of the additional costs.*
- ***Completion and operating costs.*** *If the well is successful, it will cost money to complete and operate. You will be liable for your share of these costs for the life of the well.*
- ***Gathering line costs.*** *If the well is a producer, the well operator will provide you with the estimated costs to install a gathering line to bring the gas to market. You will have the option of paying your share up front or having your share plus 100% withheld from your share of production proceeds.*
- ***Subsequent operations.*** *The law defines certain operations in the spacing unit, including additional work on the existing well or drilling of another well, when you again must decide to either pay up front or be subject to a risk penalty. Subsequent operations may cost as much as or more than the original drilling.*
- ***Other liabilities.*** *As an integrated participating or non-participating owner, you are liable for your proportionate share of taxes and third-party claims related to drilling and operation of the well.*

EMINENT DOMAIN

“Even if you are not forced into a spacing unit, eminent domain may be invoked by New York State to route pipelines across your land. This is already well underway in the Southern Tier. Laser Northeast is filing with the Public Service Commission for status to allow it to use eminent domain to site a pipeline in Broome County and Central NY Oil and Gas Company is asking the Federal Energy Regulatory Commission to grant a "Certificate of Public Convenience and Necessity" for its planned compressor stations

¹¹ Ibid.

and pipelines in Tioga County, NY and Bradford County, PA. The certificate allows the company to use eminent domain as needed.”

(The Marcellus Accountability Project for Tompkins County)

Pipeline Construction¹² >10 miles

*“An Article VII application for a transmission line ten miles or longer in length must be accompanied by proof that notice was published in a newspaper(s) of general circulation in all areas through which the facility is proposed to pass, for both its primary and alternate routes. The notice must contain a brief description of the proposed its proposed location, along with a discussion of reasonable alternative locations. **An applicant is not required to provide copies of the application or notice of the filing of the application to individual property owners of land on which a portion of either the primary or alternative route is proposed.** However, to help foster public involvement, an applicant is encouraged to do so.”*

Pipelines <10 miles. See PSC – No notification required

The Iroquois natural gas pipeline cuts through the Town of Westerlo. The proximity of this pipeline to TOR lands, should natural gas extraction occur in the TOR, creates the possibility that pipelines could run through properties without public notice and without standards of larger and longer pipelines.

LOCAL GOVERNMENT NOTIFICATION¹³

“ECL §23-0305(13) requires that the permittee notify any affected local government and surface owner prior to commencing operations. Many local governments have requested notification earlier in the process, although it is not required by law or regulation. The Department would notify local governments of all applications for high-volume hydraulic fracturing in the locality, using a continuously updated database of local government officials and an electronic notification system that would both be developed for this purpose.”

The following site on gas well permitting is reportedly updated every half-hour. Towns that would want to know the status of potential gas leases and gas drilling activity within their town are required to check the gas well data base site:

<http://www.dec.ny.gov/cfm/EXTAPPS/GasOil/search/wells/index.cfm>

The actual process and time-line for towns to develop road use agreements with drilling companies after a permit is granted and noticed on this site above is not known or available from DEC. *“We don’t know... we’ve never done anything like this before,”* was one response from a DEC official.¹⁴

¹² dSGEIS, 2011, Chapter 8, p. 14.

¹³ dSGEIS 2011, Chapter 8, p. 4.

¹⁴ Association of Towns for the State of New York Conference, NYC, February, 21, 2012.

ROAD USE AGREEMENTS

Anticipated Traffic Impacts (from SGEIS Section 6.11)

- Local roads are not typically designed to sustain a high level of vehicle trips or loads (Section 6.11.3)

AUTHORITY to REGULATE LOCAL ROADS¹⁵:

- The NY Constitution and the Municipal Home Rule Law (“MHRL”) give municipalities the power to adopt local laws related to the “acquisition, care, management and use of its highways, roads, streets, avenues and property.” N.Y. Const. art 9, § 2(a)(6) and MHRL § 10(1)(ii)(a)(6).
- ECL § 23-0303(2) allows municipalities to regulate local roads used in gas drilling operations
- NY Vehicle and Traffic Law (“VTL”) allows municipalities to regulate roads
- VTL imposes limitations on municipalities to require permits and fees for road use
- Under MHRL municipalities can adopt laws requiring payment of road damage caused by users

Municipal Powers Under VTL:

- Exclude trucks and commercial vehicles from certain roads
- Establish truck routes for trucks in excess of 10,000 pounds (gross weight)
- Exclude trucks and commercial vehicles in excess of **any** designated weight, length or height
- Exclude trucks with gross weight over four tons to prevent road damage and issue permits based on hardship
- Adopt local laws and ordinances with respect to traffic as local conditions may require

Municipal Limitations Under VTL:

- Section 1604 generally prohibits municipalities from requiring “... any tax, fee, license or permit for use of public highways or excluding an owner or operator ... from the free use of public highways...” EXCEPT as authorized in the VTL

Who Pays for Highway Repairs?

Generally, the Town Law and Highway Law set forth comprehensive rules for budgeting and funding for local road improvements, maintenance and repair

- Municipal burden to raise funds via general taxes
- Imposition of general fees for future road maintenance and improvement upon private parties based on use of public roads has been ruled invalid

¹⁵ “Municipal Powers and Limitations with Respect to Natural Gas Drilling,” David R. Everett, Esq., Whiteman, Osterman, & Hanna, LLP, Association of Towns 2012 Annual Meeting & Training School, New York City, February 21, 2012.

- *Albany Area Builders Ass’n v. Town of Guilderland*, 74 N.Y.2d 372(1989) attempt by Town to impose fees upon developers for road improvements found invalid as preempted by State regulation of these areas
- Municipalities have power to seek damages for damage caused to public highways (but not general fees)
- Developers often recognize the need not only to undertake repairs at their cost but to upgrade existing roads to accommodate their construction traffic

ROAD PRESERVATION PROGRAM GOALS¹⁶

Goals:

- Avoid or minimize damage to local roads resulting from construction traffic
- Ensure municipality not burdened with costs of repairs to roads resulting from such use
- Ensure that users who may cause damage to local roads:
 - Identify its haul routes
 - Cooperate in assessing condition of such roads identified
 - Undertake any upgrades to accommodate traffic and repairs as needed during construction
 - No fees or taxes levied – only security/bonding to ensure work can be completed if developer fails to do so

3 BASIC OPTIONS FOR ROAD PRESERVATION:

1. Post roads, issue permits (where allowed), and obtain security for damage
2. Rely on voluntary Road Use Agreements (RUAs)
3. Adopt local road use and preservation laws

A “TAKING” and what must be proven:

Property owners with natural gas leases may threaten legal action when confronted with zoning ordinances that prohibit heavy industry and natural gas extraction operations within a town. The Fifth Amendment to the U.S. Constitution is usually cited in such cases.

“To prove a ‘taking’, the plaintiff has to prove that they have been deprived of ALL economic use of their property, and prove what they have lost in order to establish a dollar amount. Diminution (decreasing the property value) is insufficient to establish a takings, neither is loss of potential profit on a speculative well. The owner/plaintiff has to be deprived of all beneficial use of their property, not some use; they have to prove what that loss was worth – not estimate.” (James Northrup)

See Appendix VIII “Banning Hydrofracking Is Not A “Taking” of Property,” Mary Jo Long, Esq.

¹⁶ Ibid.

CONCLUSION

In light of the possibility of having heavy industrial activity in the TOR, the Rensselaerville Town Board has been placed in a position of utmost responsibility and authority to consider all that has been presented in this report. Given this authority, the Board has the obligation to enact laws to protect property, environment, conduct, safety, health, and well-being of its citizens.

The following chapter contains the recommendations to local town laws that will provide the protection needed for the greater good, and is based on the goals and visions citizens identified in the Comprehensive Plan, the research provided within this report, and consult with attorneys who are expert in this field.