

May 23, 2012

To Supervisor Anderson and the Rush Town Board:

Legal Workshop on Fracking, 5/18/12: Report



I went to the Legal Workshop on Hydrofracking on Friday, May 18, 2012. The speakers were Michael Kenneally of the Association of Towns of the State of New York, and David Slottje of the Community Environmental Defense Council. Both are lawyers, and they discussed and analyzed the legal issues that relate to hydrofracking, including the legal basis for home rule; the status of the two court cases challenging town bans or moratoriums on fracking; legislative efforts; and the interaction of state and local law. Here are some of the points I found most relevant to our situation in Rush.

(1) A town that wants to carefully consider the implications of fracking for its residents should get a moratorium in place before permitting starts. This was a job well done on the part of our town.

(2) Several towns (including Perinton and Pittsford) have taken the position that their zoning laws are "permitted use only" laws which will effectively keep out any activity not specifically listed as a permitted use. David Slottje summarized this position as: "My belt works fine: I don't need suspenders." The weakness of this position, according to Slottje, is that it is possible to get a "use variance" for a non-permitted use, and so activities the town did not intend to permit could be sneaked in the back door in that way. Slottje argued that you need both belt and suspenders--the suspenders being amendments to the zoning ordinance to explicitly protect against adverse effects of oil and gas development.

(3) Both speakers stated very strongly that it is important for a town to work towards a road use law at the same time that it is working towards amendments to the zoning ordinance. Kenneally has some expertise in the area of road use law and is available for consultation. Kenneally also says that the Association of Towns is working on a packet on local road use laws which will be available in early summer, and which will be free to towns that are members of NYMIR, the insurance offered by the Association.

(4) Slottje is confident that the courts will uphold home rule; Kenneally is somewhat less optimistic. In response to a question about how permitting will "roll out," Kenneally said he thought it would start where it was most welcome and most profitable, i.e. the Southern Tier. Slottje disagreed, saying that Rochester and other more northerly areas might be targeted first for permits for this reason: industry interest in Marcellus Shale is flagging because of very low prices for natural gas, but the Utica Shale product is a "wet gas" from which the gas company can strip other marketable compounds to increase profits. If Slottje is correct, we would be well advised to take steps during the moratorium period to establish more permanent protections from the adverse affects of hydrofracking.

Respectfully submitted,

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Rush Citizens Concerned about Hydrofracking