

Meeting, Citizens Working Committee on Hydrofracking (CWCH)

Monday, January 14, 2013 5:00 PM Rush Town Board Room

Present: Carol Barnett, Ted Barnett, Kathy Hankins, Beth Hoak, Jordan Kleiman, Bob Powers, Marianne Rizzo; Town Board Liaison Bill Riepe

Guest: David Slottje, Executive Director and Senior Attorney, Community Environmental Defense Council

The Citizens Working Committee on Hydrofracking met on 1/14/13 from 5:00 PM till 7:20 PM.

Co-Chair Jordan Kleiman started out the meeting by saying that the Committee is completing its work and is developing its report which includes extensive fact-finding and analysis. The committee has concluded as a result that hydrofracking would have serious negative impacts on our town and that our laws, as currently written, permit hydrofracking to take place throughout our town. One of the proposed recommendations to the Town Board will be to adopt an amendment to our Zoning Ordinance that addresses the current zoning issues we identified. The committee contacted and requested the assistance of David Slottje, an experienced attorney from the Community Environmental Defense Council who offered to review our current zoning ordinance and to draft a zoning amendment to resolve the problems we identified in a way that would address the specific needs of our town and prevent all possible negative impacts from hydrofracking. After receiving and studying the draft amendment to our Zoning Ordinance, we asked Mr. Slottje to meet with the whole committee to explain proposed changes to our current zoning code.

The following are highlights of the lengthy and detailed review of the proposed zoning amendment legislation:

Carol Barnett reported that under our current Zoning Ordinance, as a result of 2003 amendments, natural gas drilling is a permitted use by special permit, upon application to the Planning Board, in all but one of one of our residential districts: R-20, R-30, RR-5, R-MD, and R-MH, constituting 97.6% of the land area of our town.

Slottje said that, by putting natural gas drilling in the category of activities that are allowed by special permit, the town has declared it to be (1) a legal use in residential areas of the town and (2) compatible with our comprehensive plan. He said that when this change was made in 2003, the Town Board was likely not aware that, under state law, the town has surrendered its discretion to deny a special permit for gas drilling. He said the Planning Board is "guaranteed to fail" in court if it denies a special permit application for gas drilling under our current zoning ordinance.

Mr. Slottje explained to us that, under Environmental Conservation Law (ECL) 23-0303(2), as regards natural gas drilling, as well as related activities (oil and salt

extraction, and gravel mining when the scope of operations exceeds a certain land area), the state pre-empts the ability of the town to regulate that activity. Because of the special consideration given to resource extraction under the law, designating gas drilling activities as a special permit use is the equivalent of determining that such activities are "a legal use in the town." The town would be unable to set any conditions on the activity as would be normal for other activities granted under a special use permit, since regulation of the industry can only be done by the DEC. The ECL says that towns cannot "regulate" gas drilling, and the courts have interpreted this to mean setting restrictions on "operations and processes." Mr. Slottje agreed with our findings that if gas drilling is allowed, our town Planning Board would have no right to limit lights, noise, fumes, hours of operation, or closeness to existing buildings, as all of these negative impacts are intrinsic to the gas drilling process.

Despite this lack of *regulatory* authority, Slottje emphasized, the town is within its powers and rights under the NYS Town Law Home Rule Law provisions to manage land use, protect residents and natural resources, and exclude natural gas drilling altogether. Slottje noted that three NYS courts have ruled unequivocally in favor of towns challenged by landowners or companies for passing a moratorium or ban. There is not a single New York court decision holding that towns lack the authority to pass a ban. The endorsement of Home Rule by the courts has been a non-partisan issue, and it was noted that very conservative courts have stood by and protected Home Rule.

Councilman Bill Riepe commented that this seemed to mean that the town can say "yes or no but not how." We all agreed. We also all agreed that a central lesson learned from our field trip to Pennsylvania was an "acute awareness of how close heavy industry was to houses"; that it was disconcerting to see that there were no buffers; and that the communities we visited seemed to have given a "blank check" to industry and are now forced to live with the regrettable consequences. We noted that it is not true that when gas companies enter a rural community they only go into wide open spaces; they can be very near homes, schools and churches.

Bill Riepe asked whether supersession by New York State would prevent our town from prohibiting gas drilling. Slottje replied that this referred to the state's exclusive authority to regulate oil and gas operations. He said that every lawyer in the state agreed that towns cannot regulate gas drilling. But, he emphasized, except for a handful of law firms (most of which represent the gas industry or large landowner coalitions anxious to lease their land) every lawyer in the state agrees that towns have the ability and right to ban gas drilling.

The right to prohibit gas drilling is "not pre-empted, not superseded, not illegal." Any town seeking to pass a law prohibiting gas drilling must provide a rational basis for doing so in order to demonstrate that it has not acted in a way that is "arbitrary and capricious." In the case of *Rush*, this rational basis is readily supplied by the findings of fact which are in the Appendix to the proposed zoning amendments and which become part of the local law when adopted.

Bill Riepe asked whether gas drilling could be "grandfathered in" and thus escape the prohibition. Slottje explained that the proposed amendment has strong "grandfathering language" stating that as long as pre-existing uses are legally permitted and do not expand beyond the scope of the permit, they will be allowed to continue. From our research we have learned that there are no active gas wells in Rush (during our research, we found one abandoned well on the DEC website dating back to 1917) and certainly none that received permits, so there is nothing to be grandfathered in

Mr. Slottje answered many "nuts and bolts" questions about the amendments he had drawn up for us.

(1) Slottje took what he calls a "belt and suspenders" approach in developing a draft for the committee's review to meet our request to amend the Zoning Ordinance. He removed the language which allowed natural gas drilling as a use with a special permit. He also added language that states that gas drilling-related activities are prohibited in all districts of the town; added definitions where necessary to make clear that they cannot be interpreted to include gas drilling-related activities; and identified and eliminated potential problem areas (e.g., making sure that gravel mining, which will continue to be a permitted use, cannot be used as a "back door" to bring gas drilling into our town).

(2) The "Variance" section of the proposed Zoning Ordinance has been amplified, closely tracking the NYS statutory and case law on variances; this provides a checklist for Zoning Boards evaluating requests for a variance.

(3) We asked for clarification or revision of many aspects of Mr. Slottje's proposed amendments, including deletion of several clauses dealing with variances that we didn't think were necessary. In every case, Mr. Slottje made the requested change when he determined that the document, as changed, still protected the town from negative effects of gas drilling.

We had a lengthy discussion of the need for road protection and the differences between road use agreements and road use ordinances. Mr. Slottje said that a road use ordinance is more appropriate and more protective for a town that does not allow drilling within its borders but wants to protect against possible spillover effects from gas drilling-related activity in the region.

We also had a brief discussion of the increasingly common use of brine from fracking operations on roads for de-icing and dust control. Fracking brine can be appealing because, unlike other sources of salt, it is provided free of charge by the gas industry (essentially it is free disposal for the industry) but contains dangerously high concentrations of toxic substances (including frack-fluid chemicals and naturally occurring radioactive elements, heavy metals, and hydrocarbons). In order to determine the safety of spreading a particular brine on road surfaces, highway personnel must therefore know its contents. This information is rarely available, however, due to the gas industry's prevailing policy of non-disclosure of the precise

chemical composition of its frack fluids. Highway personnel who accept fracking brine therefore put their communities at risk.

We ended with a brief discussion of the lawsuit against the Town of Avon. Mr. Slottje noted that the town's insurance company, NYMIR, is paying for the costs of the town's legal defense.

We adjourned the meeting at 7:20 PM.

Respectfully submitted,

Carol Barnett

Co-Chair, CWCH