

**Updated 12/17/13**

**PLANNING BOARD  
TOWN AND VILLAGE OF ARCADE  
17 Church Street, Arcade, New York 14009  
Village Office      585 492-1111  
Town Office        585 492-4685**

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At a meeting of the Planning Board of the Town and Village of Arcade held on Wednesday, December 11, 2013 at 7:00 P.M. in the Village Boardroom, 17 Church Street, Arcade, New York:

**MEMBERS PRESENT:** Rich Kosmerl, Don Suttell, Andy Schnitzler, Aaron Felber, Paul Bijhouwer

**MEMBERS ABSENT:** None

**OTHERS PRESENT:** Dan and Donna Barski

The meeting was called to order at 7:00 P.M. by Chairman Bijhouwer.

**APPROVAL OF MINUTES:**

**MOTION** by Rich Kosmerl, seconded by Don Suttell and carried four yes votes to one abstention, to accept the minutes of the meeting of November 13, 2013. Paul Bijhouwer abstained as he was not present at that meeting.

**THE ZONING BOARD OF APPEALS REQUESTS RECOMMENDATION AND COMMENT ON AREA VARIANCE APPLICATION, SBL NO. 175.-1-14.11, SUBMITTED BY NORMAN DWORZACK, REQUESTING DIVISION OF PROPERTY WHICH DOES NOT LEAVE MINIMUM SIDELINE SETBACK REQUIREMENTS IN AN AG DISTRICT AT PROPERTY LOCATED AT 2423 GENESEE ROAD:**

The applicant was not present as he was on vacation. The Board read the application and minutes from the Zoning Board of Appeals meeting of November 18, 2013.

In discussion:

1. The Board agreed with the findings of the Zoning Board of Appeals.
2. The applicant is causing himself additional self-created hardships by dividing the property in this manner.
3. Possible options:
  - a. The applicant could include the barn in the sale of the property. With the well located on the barn property and a permanent easement needed to transfer ownership of the well, the applicant may very well find that a buyer will find it difficult to secure a mortgage. Is the applicant prepared to hold the mortgage? The

- well situation could also decrease the value of the property in a sale offsetting what he has spent on barn renovations;
- b. The applicant could remove the garage, move the west property line 35 feet from the barn and add the footage needed to the east, eliminating the need for a variance. Both lots would then be in compliance.
  - c. The property line of the western most property could be extended eastward to include the garage and then for a sufficient distance northward from the road, then drawn back to the proposed property line, creating a rectangular offset. If there was then sufficient space to keep the garage 35 ft. from the property line and also the house and other structures on the other property 35 ft. from the property line (we could not calculate if that was feasible as there were no lateral dimensions on those structures), then both properties could be compliant. As that would take the garage off the house property, the owners could remedy that by offering a perpetual lease on the garage and right-of-way to it to any new owner of the house property, if that was their wish to include its use with the house.

The Planning Board agrees with the ZBA findings and recommends that the barn and well be sold with the house. The other possibility is to remove the garage and readjust property lines as stated above. The Planning Board strongly discourages non-compliant lots being created. Doing so is contrary to the intent of zoning. Note that buildings do not last forever but lot lines often do and it is best to leave lots compliant for future generations of the applicant's family and for posterity.

#### **PUBLIC HEARING FOR AMENDMENTS TO THE COMPREHENSIVE PLAN REGARDING ENERGY DEVELOPMENT:**

The Chairman explained the purpose of the amendments and reason for the Public Hearing.

Chairman Bijhouwer opened the Public Hearing. He asked if anyone wished to speak to which Dan Barski said he had a prepared statement and a question. The floor was given to Mr. Barski:

He thanked the Board for the hard work and effort being put in to the almost impossible task ahead of developing zoning laws for energy development.

He read his prepared statement (see Attachment A). He is concerned that the Town, Village and Planning Boards are not receiving the correct information regarding Town bans relating to horizontal hydraulic fracturing. He also presented information entitled, "STATE OF THE LAW IN NYS AS TO WHERE STATE AUTHORITY EXISTS AS OPPOSED TO WHERE (LOCAL) MUNICIPALITY LEGAL AUTHORITY EXISTS IN THE ARENA OF ALLOWING (OR NOT) GAS DRILLING ACTIVITIES."

He stated that so far lower courts have upheld bans by local municipalities and would like the Town of Arcade to enact a ban on “fracking”.

His question: Has the Planning Board or Town Board obtained an unequivocal written legal opinion that the proposed future zoning regulations listed in the amendment will be enforceable and not a ‘regulation’ of the industry.

The Board thanked Mr. Barski for his input and stated they would take it into consideration.

The Chairman asked **three times** if there were any further comments from the Public. There were none. The Chairman closed the Public Hearing.

Board discussion:

1. The Town and Village needs to obtain legal opinion and verification of what are the limits in enacting zoning laws for energy development.
2. There is a need for a severability clause in any zoning laws that are enacted. It is not necessary in the Comprehensive Plan.
3. When regulations are enacted, severability clauses must be properly applied.
4. Since the amendments to the Comprehensive Plan are statements of values only, Mr. Barski’s concerns regarding what municipalities can and cannot regulate is not an issue. They will be an issue in proposed zoning laws.
5. Although the DEC does have the right to establish setbacks for environment risks areas, this is different from property setbacks that may be proposed in zoning.
6. The Board concluded that no changes need to be made to the proposed amendments.
7. Until the Town and Village Boards act upon the amendments or refer them back to the Planning Board for changes, they will not meet in January unless there is new business.

**MOTION** by Paul Bijhouwer, seconded by Andy Schnitzler and unanimously carried, to forward the proposed amendments and these minutes with the attachments from Mr. Barski to the Town Board and Village Board for further action. Further, the Planning Board recommends that at some point in the process of approving the amendments that those Boards seek legal review and opinion from their respective attorneys.

**ADJOURNMENT:**

There being no further business brought before the Board, the meeting adjourned at 8:02 P.M. upon **motion** by Rich Kosmerl, seconded by Andy Schnitzler and unanimously carried. The next regular meeting of the Planning Board of the Town and Village of Arcade is scheduled for Wednesday, January 8, 2014 at 7:00 P.M. in the Village Boardroom, 17 Church Street, Arcade, New York.

Respectfully submitted,

Holly L. Almeter, Secretary  
December 11, 2013

Planning Board

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Attachment A PB Minutes Dec. 11, 2013

The fracking industry has tried to cast doubt on the authority of municipalities to ban drilling, hoping to intimidate them into abstaining from enacting moratoriums or bans with the threat of lawsuits. But case law is clear that NYS municipalities DO in fact have the legal authority to ban drilling. Many towns in New York already have. In fact, there is NO uncertainty as to municipal authority in this area, except in the wildest fantasies of the frackers. Four NY cases have explicitly considered this question, and all four **UNEQUIVOCALLY** held that:

- 1) New York municipalities wishing to do so DO have the legal authority to prohibit gas drilling within their borders.
- 2) Such laws are NOT considered to be regulations of the industry.
- 3) And therefore, such laws are NOT preempted.

Although two of these cases are being appealed to the NYS Court of Appeals, they were both upheld **UNANIMOUSLY** by lower courts.

It is clear that a town may, if it wishes, prohibit drilling, but attorneys on BOTH sides of this issue agree that **ONLY** the DEC can prescribe such things as setbacks and noise restrictions, which are preempted. In the absence of a ban, road use laws appear to be the only available tool for insuring a community is protected against the worst impacts of this industry. But if road use laws are the **only** means by which a town can legally protect itself, then I fail to see any meaningful potential for protection at all. I can't imagine any road use law that could keep this industry from destroying our community, while still allowing for agriculture, transport and commerce.

We need to understand that the gas industry would like nothing better than for a town to enact useless laws, rather than bans, under the illusion that such laws afford adequate protection to the residents who discover, later on, when it's too late, that those laws are invalid. If Arcade insists on passing regulations governing drilling operations, such as setbacks, the drillers will be able to ignore them with impunity.

Consequently, we need to come to terms with the fact that, if we are to avoid the fate of other communities that have been gutted by this industry, only a total ban on future drilling will suffice.

*Question:* Has the planning board or the town board obtained an unequivocal written legal opinion that the proposed zoning regulations listed in the amendment will be enforceable and not a 'regulation' of the industry?

Attachment B PB minutes Dec. 11, 2013

**WHAT FOLLOWS IS THE STATE OF THE LAW IN NEW YORK STATE AS TO WHERE STATE AUTHORITY EXISTS AS OPPOSED TO WHERE (LOCAL) MUNICIPALITY LEGAL AUTHORITY EXISTS IN THE ARENA OF ALLOWING (OR NOT) GAS DRILLING ACTIVITIES.**

It is true that as a matter of state law [ECL 23-0303(2)], there is no authority at the local level to issue drilling permits, or (if and where drilling is allowed) to regulate the operations or processes of drilling - such as how far down the driller may go, or how many layers of casing must be used or what the casing must be made of, or what kind of insurance requirements must be in place in order for the drillers to be allowed to drill. Those are all matters for the state (the DEC) alone, and local authority in that area has been preempted.

**BUT PROVIDING THAT ONLY THE STATE MAY REGULATE DRILLING WHEN AND WHERE IT IS ALLOWED IS NOT THE SAME THING AS SAYING THAT A TOWN DOES NOT HAVE THE LEGAL AUTHORITY TO SAY THAT DRILLING IS NOT ALLOWED (THERE) IN THE FIRST PLACE.**

Indeed, only four New York cases (the *Dryden*, *Middlefield*, *Binghamton*, and *Avon* decisions, respectively issued by the Tompkins, Otsego, Broome, and Livingston County Supreme Courts) have explicitly considered this question, and all four unequivocally held:

- (i) New York municipalities wishing to do so DO have the legal authority to pass local land use laws of general applicability to prohibit gas drilling activities within their municipal borders,
- (ii) such local laws are NOT 'regulations' within the meaning of ECL 23-0303(2), and
- (iii) accordingly such local laws are NOT preempted by or in any manner 'illegal' under ECL 23-0303(2).

Two of those cases - *Dryden*, and *Middlefield* - were appealed, and on May 2, 2013 the Third Department unanimously upheld both decisions. (Those unanimous decisions have now been appealed to the highest court of NYS, the Court of Appeals, and are expected to be heard sometime in summer of 2014.) It is a **FACT** that **no New York court at any level has ever held that a (local) municipality does not have the legal authority to say that drilling is not allowed within its municipal borders. Not one.**<sup>1</sup>

So please understand that pro-fracking people who point to ECL 23-0303(2) and state or imply that local municipalities do not have the legal authority to enact moratoria or other protective laws either do not understand the law in this area, or are trying to mislead their audience.

<sup>1</sup> Many pro-drilling *non-lawyers* attempt to hang their hats on the *Envirogas v. Town of Kiantone* decision, but (as the judges have confirmed) such reliance is misplaced. *Envirogas* did **NOT** involve an attempt by a municipality to prohibit gas drilling within its borders. Rather, that case involved an attempt by a town that *actually allowed drilling* to impose upon the drilling company insurance requirements and other fees above and beyond those prescribed by the DEC. The *Envirogas* case simply confirmed what every lawyer working in this area knows: *where drilling is allowed in a town, only the DEC (and not the town) may regulate the (otherwise allowed) drilling operations.*  
Nov.18, 2013 David F. Slottje, Senior Attorney, Community Environmental Defense Council, Inc.