

Memo

To: Town Board Members

April 4, 2015

From: Town of Westerlo Zoning Recommendation Committee

Copy: Town Attorney

Re: ZRC Committee Findings

The Zoning Recommendation Committee (ZRC) was formed by the Town Board to address potential changes to the town's Zoning Law regarding impacts of high volume horizontal hydraulic fracturing (HVHF) for Shale Gas Development (SGD).

The Board charged the ZRC as follows:

- 1. "Review current zoning laws and permit process with respect to potential applications for natural gas drilling activities within or affecting the Town of Westerlo.*
- 2. Determine what, if any, amendments or revisions should be considered to the current zoning regulation to address land use controls that maintain and support the character of the Town and way of life of its residents. All facets of hydraulic fracturing should be considered with attention to: a.) The transport, storage and disposal of chemicals associated with hydraulic fracturing. b.) The maintenance and protection of the Town's infrastructure. c.) Traffic control. d.) Public safety. e.) legality and enforceability.*
- 3. If it is the recommendation of the ZRC to revise or amend the current regulation, the committee is asked to provide specific changes in a form suitable for adoption to the Town Board not later than February 3, 2015¹ accompanied by a written rationale supporting their recommendations."*

This charge guided our research and discussions as did our study of the Comprehensive Plan.

After regular, public meetings, and review of both written and personally presented information, and lengthy discussions, the ZRC has made various findings with respect to implementation of the ideals described in the Comprehensive Plan. Our findings are set forth below, and, as a form of guidance, we have attached two sample Resolutions which support those ideals.

The Comprehensive Plan, which was passed by the Board in January 2015, and which was the work product of the Planning Board serving as the Comprehensive Planning Committee, has a

¹ At the January 6, 2015 town board meeting the ZRC was granted an extension to April 2015

main ideal running through it: ***the constituents of the Town of Westerlo appreciate the Town for its rural beauty, open space and agricultural character.*** The Plan describes the Zoning Districts, suggests certain specific corridors for commercial activity, and affirms and confirms the need to remain dedicated to the active farms in the community. The Plan further discusses the appreciation for the Basic Creek Watershed, Basic Reservoir and Alcove Reservoirs as being tax revenue bases for the Town as well as a source of beauty and fishing.

- **Shale Gas Development & High Volume Horizontal Hydraulic Fracturing (SGD/HVHF or “Hydrofracking”)**: While the ZRC recognizes that the State of New York currently has a ban on SGD/HVHF, the ZRC finds that the announced ban is still undefined and that the Town, in any case, has more authority and control over its land use by amending its zoning law to specifically exclude SGD/HVHF activities in the Town. It is clear, based on the ZRC’s findings, that SGD/HVHF is not consistent with the master plan for the Town of Westerlo, set forth in the recently adopted Comprehensive plan. More specifically:
 - A standard well site consists of 640 acres – which would consume any and all large tracts of land, thereby fully destroying the rural beauty and open space of the Town. This does not include additional equipment sites and the heavy truck traffic which would result from the placement of a SGD/HVHF well within our town.
 - The truck traffic and air pollution would create hardships to local farmers who use our town roads to transport hay, feed and move farm equipment.
 - All homes in the Town, exclusive of those in the Westerlo Water District No. One, are serviced by private wells which depend on the volume and purity of the aquifer beneath it. SGD/HVHF uses a significant amount of water, which could possibly reduce the quantity of water produced by private residential wells.
 - Further, SGD/HVHF *flowback* wastewater contains toxic chemicals, and higher than background concentrations of salt and air and water soluble radioactive materials. Wastewater is often discharged into underground wells, or contained in open lagoons, and the SGD/HVHF well casings themselves often fail, all of which potentially threatening the purity of the only source of drinking water available to the majority of the Town’s residents.
 - Further, any runoff from the SGD/HVHF injection or flowback fluid could contaminate surface waters and pose a serious danger to grazing livestock and growing crops.
 - The Town has just recovered from repairing roads destroyed by Hurricane Irene. Such a disaster made the Town acutely aware of the cost of maintenance of our roads and repairs thereto not caused by ordinary wear and tear and traffic. The Town is not in a position to undertake the repairs that would be a result of the loads and frequency of truck traffic generated by SGD/HVHF.

- Further, there is not enough revenue to be generated by SGD/HVHF to offset the costs to the taxpayers., and
- We do not have the type of commercial base that will benefit from the influx of transient workers used to support SGD/HVHF.
- The Town constituents are very protective of their rights to use their land. Allowing one land owner to lease his/her property for SGD/HVHF could result in the loss of property rights by neighboring property owners through eminent domain, what NYSDEC calls “Compulsory Integration.”
 - Certainly large tracts of land currently used for agriculture would be ripe for eminent domain in the event a neighbor engaged in an lease agreement to permit SGD/HVHF on his/her property.

The ZRC finds that it is important that the Zoning Law of the Town of Westerlo specifically address and restrict/prohibit SGD/HVHF activity in accordance with the vision of the Comprehensive Plan. To support that vision, the ZRC has drafted a Sample Resolution regarding the formation of a carefully constructed Zoning Law amendment by a *pro-bono* expert in such law.

- **Economic Development:** The ZRC acknowledges, understands and most importantly appreciates the Town’s rural/agricultural character. In reviewing the Comprehensive Plan, the ZRC supports the Plan’s call for upgrading the municipal infrastructure and telecommunications could result in protection of our open space, rural beauty and agricultural character by limiting and minimizing the stress on the land. In fact, the ZRC fully recognizes that there are areas in town ready for the influx of the small niche businesses, specialty farming, and other low impact uses – and many buildings which would benefit from the investment of funds to renovate, upgrade and be used for such purposes.
 - The ZRC understands, however, the establishment and/or improvement of certain infrastructure (which would, reasonably, be located in the hamlets) would be a burden on the taxpayers of the districts that benefit by the upgrades because of the concentration of costs borne by very few people. We know from the development of the water district (which provides municipal water to a set number of homes, and provides the potential for use of properties in the water district for the niche businesses spoken of in the Plan), those burdened with the cost (because they are the only ones who benefit) were not necessarily uniformly in support of such upgrades. The issue was not the improvement but rather the cost associated.

Therefore:

- The ZRC suggests the formation of an Economic Development Team (EDT), which could work with area communities, encouraging Westerlo to become more involved with the “hilltown” activities, such as the farmer’s markets,

maple syrup tours, conservation easements, etc. The EDT could also look into grants and other sources of funding for municipal projects. We have seen recently in our neighboring towns many activities that are compatible with the ideas described in the Comprehensive Plan:

- **Berne:** the purchase of a large tract of land on Game Farm Road in conjunction with the Open Space Land Institute Trust, Inc., providing a space for community activities, etc.
- **Berne/Knox:** the annual maple syrup tour, breakfasts, etc.
- **Knox:** the weekly farmer's market and craft sale
- **Rensselaerville:** the weekly farmer's market
- **Rensselaerville:** a large parcel of land purchased by Open Space Land Institute Trust, Inc., with a smaller parcel sold back to a private owner, who subsequently restored the mansion thereon to its original glory (Albany Hill Road), and such mansion being considered for placement on the National Registry of Historic Places; a 46 acre parcel of land preserved through a conservation easement with the Mohawk Hudson Land Conservancy; the current application for a conservation easement on 220 acres between CR 361 and CR 351 involving both the Mohawk Hudson Land Conservancy and the Open Space Land Institute Trust, Inc.

To this end, the ZRC has drafted a Sample Resolution regarding the formation of the Economic Development Team.

Thank you for the opportunity to conduct this evaluation on behalf of our community.

Sincerely,

Zoning Recommendation Committee:

Edwin Lawson, Chairman
Kathleen Bobb
Patricia Britton
Pamela Schreiber
Dianne Sefcik

Attachments: Sample Resolution #1 and Sample Resolution #2

Resolution #1: Create A Carefully Customized Zoning Amendment

RESOLUTION TO CONSTRUCT A CAREFULLY CUSTOMIZED ZONING AMENDMENT TO ADDRESS IMPACTS TO THE TOWN OF SHALE GAS DEVELOPMENT, INCLUDING HIGH VOLUME HORIZONTAL HYDRRAULIC FRACTURING, WITHOUT IMPOSING UNRELATED RESTRICTIONS

WHEREAS, the Town of Westerlo is located in Marcellus Shale and Utica Shale Basins; and

WHEREAS, the Marcellus Shale and Utica Shale are fine grained sedimentary rock deposited by a shallow sea and that such Shale is a porous rock that contains hydrocarbons but has practically no permeability; and

WHEREAS, due to technological advances and energy related issues, the exploration and production of natural gas in the Marcellus Shale and Utica Shale Gas Fields has become economically feasible in the recent past; and

WHEREAS, shale gas operations include the construction of access roads, clearing and leveling of a well pad site, substantial local water extraction and water storage, potential digging of waste reserve pits or creation of underground waste wells, management of both solid and liquid waste, and the construction of infrastructure that would include gathering lines, valve stations, and connection to pipelines, which may be local pipelines and/or interstate pipelines, and such infrastructure may also include compressor stations, storage facilities such as Liquefied Natural Gas (LNG) facilities, and/or Compresses Natural Gas (CNG) facilities, and waste facilities; and

WHEREAS, well stimulation, which is the process of creating or enlarging existing pores to allow gas to more readily reach the producing well, and HIGH VOLUME HORIZONTAL HYDRALIC FRACTURING (HVHF) (“fracking”), associated therewith, that includes the use of a fracturing fluid, which is water that is amended with chemicals, some of which are known to be carcinogenic and endocrine disruptive, and proppants, such as sand, and that such fracturing fluid is applied at high pressure, and may use explosives, to create fractures in Shale and prop open those fractures; and

WHEREAS, drilling and high volume horizontal hydraulic fracturing involves the use of heavy equipment, including large trucks to transport many tons of water, sand and other proppants, hazardous and non-hazardous chemicals, solid and liquid waste, construction and related material; and

WHEREAS, such construction and related material requires local storage areas of several acres; and

WHEREAS, two to ten million gallons of water per well would likely be drawn from local water sources, and that such operations generally involve the development of several wells per well pad, multiplying water requirements; and

WHEREAS, HVHF infrastructure, such as pipelines, compressor stations, LNG, CNG, and waste management facilities, etc. have cumulative impacts that are independent of local or regional HVHF development and will not likely be affected by a New York State (NYS) ban on HVHF; and

WHEREAS, oil and natural gas exploration and operations are exempt from the Federal Clean Air Act (CAA), Federal Clean Water Act (CWA), Federal Safe Drinking Water Act (SDWA), the Federal Resource Conservation and Recovery Act (RCRA), the Federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA, commonly known as The Superfund), the Federal Toxic Substances Control Act (TSCA), and the Federal Energy Policy Act of 2005 (which contains the “Halliburton Loophole”), and from Underground Injection Control (UIC), except for diesel fuel UIC; and

WHEREAS, oil and natural gas exploration and operations in NYS are regulated by the NYS Department of Environmental Conservation Oil, Gas and Solution Mining Law (OGSML), which has the authority to permit and define when and where such operations occur, and that such authority includes the right of NYS to impose forced pooling (“Compulsory Integration”), which compels a property owner to cede land use to a well unit regardless of whether said landowner wants that land used for that purpose, and that landowners may also lose control of their property through eminent domain proceedings to construct federally regulated pipelines and other shale gas infrastructure, and that residential properties with industrial operations may also forfeit lending options, be subject to substantial liability, and loss of value that upon reassessment would impact the Town's tax base; and

WHEREAS, the New York Environmental Conservation Law (ECL) Section 23-0303, preempts towns from regulating land use of Gas and Oil Mining in NYS; and

WHEREAS, the NYS Constitution provides remedy for such preemption by granting significant land use authority to local government in the Municipal Home Rule Law (MHRL), and that local land use amendments using the authority of MHRL to prohibit unwanted industrial operations has been tested in NYS lower courts and upheld in NYS Court of Appeals, and that exercise of MHRL gives a local government the most independent control over its land use; and

WHEREAS, shale gas development operations in the Town of Westerlo would have significant industrializing impacts on our rural/agricultural community character; and

WHEREAS, such operations may adversely affect the health, safety and welfare of the community, such concern being documented by many sources, including by the NYS Department of Health in its review of HVHF for Shale Gas Development impacts to Public Health; and

WHEREAS, such operations are incompatible with the Westerlo Comprehensive Plan;

NOW, THEREFORE, BE IT RESOLVED THAT THE TOWN BOARD OF THE TOWN OF WESTERLO, APPROVES THAT ACTION MUST BE TAKEN TO ACCOMPLISH THE GOALS OF MAINTAINING AND SUPPORTING THE RURAL/AGRICULTURAL CHARACTER OF THE TOWN, PROMOTING THE HEALTH, SAFETY AND WELFARE OF THE COMMUNITY, AND SUPPORTING THE KEY OBJECTIVES OF THE COMPREHENSIVE PLAN:

BE IT FURTHER RESOLVED that the Town will engage expert legal counsel, experienced in Municipal Home Rule Law, to review the Town's Comprehensive Plan and Zoning Law, and any other relevant documentation, for the purpose of constructing a carefully customized land use amendment to the Town Zoning Law in order to address shale gas development impacts to the Town; and

BE IT FURTHER RESOLVED that such carefully constructed amendment be reviewed by the Town Board, the Town Attorney, and the Public, and considered for adoption into the Town Zoning Law; and

BE IT FURTHER RESOLVED that additional Home Rule authority is necessary to ensure that the tax burden is not increased or passed on to the residents of the Town due to impacts of the natural gas industry as it relates to impacts on infrastructure.

Date Passed: _____

Certification: _____

Kathleen Spinnato
Town Clerk

Resolution #2: Create an Economic Development Team

RESOLUTION TO CREATE AN ECONOMIC DEVELOPMENT TEAM TO EVALUATE OPPORTUNITIES AND RECOMMEND ACTIONS CONSISTENT WITH THE TOWN'S RURAL/AGRICULTURAL CHARACTER AND WITH THE KEY OBJECTIVES OF THE WESTERLO COMPREHENSIVE PLAN

WHEREAS, the Town of Westerlo is a rural/agricultural and a Right to Farm community; and

WHEREAS, a stronger local economy and an innovative relationship to the wider economy, can give Westerlo residents, and future generations, improved economic opportunities; and

WHEREAS, a stronger local economy would give the Town better immunity to pressures that threaten our rural/agricultural community character and the health and safety of our residents; and

WHEREAS, a stronger local economy would provide more financial support for Town services; and

WHEREAS, two of the key objectives of The Comprehensive Plan relate to economic development:

- *Improve and expand municipal infrastructure to support new development and encourage state of the art telecommunications infrastructure to spark business development and technology growth. (Note: Article 17 Section of the Local Law #1 of 1989- Wireless Communications Facilities) , and*
- *Promote commercial expansion, niche retail and specialty farming, along with small technology companies, which will flourish with enhanced telecommunications infrastructure:*

NOW, THEREFORE, BE IT RESOLVED THAT THE TOWN BOARD OF THE TOWN OF WESTERLO, APPROVES THAT ACTION BE TAKEN TO CREATE AN ECONOMIC DEVELOPMENT TEAM (EDT) TO ACCOMPLISH THE GOALS OF IMPROVED OPPORTUNITIES FOR RESIDENTS AND FUTURE GENERATIONS, AND TO SUPPORT THE ECONOMIC DEVELOPMENT OBJECTIVES OF THE COMPREHENSIVE PLAN:

BE IT FURTHER RESOLVED that the Economic Development Team be comprised of seven volunteers of diverse backgrounds and points-of-view, including at least three people unaffiliated with Town government; and

BE IT FURTHER RESOLVED that the Economic Development Team be non-partisan; and

BE IT FURTHER RESOLVED that the Economic Development Team produce timely and

actionable recommendations , including, but not limited to:

- Identifying business opportunities and supportive infrastructure that is compatible with our rural/agricultural character
- Grants
- Improving community involvement and volunteerism
- Attracting new residents
- Improving opportunities for and participation of young people
- Improving tax base
- Partnership with other Hilltown communities for better regional opportunities and representation in Albany County

Date Passed: _____

Certification: _____
Kathleen Spinnato
Town Clerk