

**Danby Town Board
Minutes of Regular Meeting
June 27, 2011**

Present:

Councilpersons: Ric Dietrich, Leslie Connors, Kathy Halton, Dan Klein, Dylan Race

Others Present:

Town Clerk Pamela Goddard
Code Office Sue Beeners
Public Robert Roe, Naomi Strichartz, Steve Selin, Jack Miller Sr., Jack Miller Jr., Ramsey Brous, Rachel Brous, Ross Horowitz, Darby Kiley, Cynthia Bowman, Kevin McKinzey, Lauren Paskin-Flerlage, Betsy Wohl, Andy Gladstone, Yvonne Fisher, Jennifer Tiffany, Gay Garrison, and several others.

The Special Meeting of the Danby Town Board was opened at 7:05pm.

Discussion of Land Regulation Options Related to Gas Drilling

Town Supervisor Ric Dietrich set the framework for the discussion. Some of the efforts already underway in Danby were outlined: Road Use, CEAs, Aquifer Protection Ordinance, updates and amendments to the Town's Comprehensive Plan and Zoning Ordinance.

Town Attorney Guy Krogh gave an overview of the Dryden/Ulysses legislation. He stated that his role was to answer questions and provide guidance, as needed, so that the Board can choose a path that balances risk and expense. A zoning amendment in Danby will need to be tailored to existing zoning and must also overcome some particular hurdles related to current language in the Town Comprehensive Plan. There are elements reasonably suggesting that gas drilling is something which might occur in the town. Specific sections were cited. Krogh suggested that ambiguities be clarified.

Krogh recommended that a short term prohibition be enacted, preferably supported by a targeted moratorium. This would buy time to do something more comprehensive. He expressed concerns about, "putting all eggs in one basket." He advised that other tools would add protection to the Town.

Regarding preemption issues, Krogh said that there are still unknowns. Home rule powers can be granted to municipalities through the SEQR process. Things like CEAs, which can be referenced in SEQR, can be useful tools. He advised, "being an octopus with a lot of tentacles on the problem."

Dietrich expressed a desire among residents to have a something on the books similar to legislation proposed in Dryden and Ulysses. At the same time, there is interest in forming a volunteer citizen oversight committee, including members of the Town and Planning Boards, charged with a more in depth review of the existing Comprehensive Plan.

Krogh stated that a "shield" in the style of the simplicity of that proposed in other Towns could be produced for review by July 14. Due to Danby's specific needs, this would be slightly different from the other Tompkins County municipalities. He stated that this is not a lengthy task.

Q&A from the Town Board

Race asked about the ambiguous language in the Comp Plan and whether it was possible to add the amendment without damage to the rest of the Plan. Krogh said "maybe"—a gas company might use the ambiguity to its advantage. Krogh further explained the process of amending a Comprehensive Plan in light of new threats. Krogh recommended proceeding on two parallel tracks: get a shield in place and work on the other measures to make the ban more enforceable.

Race further asked about the preferred order of efforts, whether it was better to have a Comp Plan amendment precede an amendment to zoning ordinance. Krogh answered "yes and no." It's always better to have a zoning amendment that is directly supported by a Comprehensive Plan. At the same

time, history and precedent are considered. It is not required to have a Comp Plan update prior to a zoning amendment. Q: regarding the intent of the Comp Plan - is it already enough? A: A reading of the Plan shows that the intent is toward preserving the rural character of the Town. In Krogh's opinion, there are pieces which need to be updated and re-expressed to specifically target what the Town wants to protect.

Halton asked about a time line and urgency. She expressed concern that updating the Comp Plan is a lengthy process. If the sGEIS is released and measures are not in place, how does the Town buy time to enact legislation? Is Krogh recommending a moratorium with specific references? Krogh stated that, yes, a moratorium is a possible tool in the tool box. It could be better to lose on a moratorium claim than a zoning claim. This could buy time to look at more than gas drilling, updating a number of areas of zoning to address other development issues.

Klein asked whether the proposed Comp Plan amendment addressed the ambiguities? Krogh responded positively, but it might not cover other issues and concerns that might impact the Town. Krogh identified five or six areas of potential ambiguity which he recommended be clarified.

Beeners asked for clarification as to why not use Dryden legislation as a model? She commented that Dryden's accompanying resolution could provide a useful framework for Danby. Beeners also suggested that the Town pursue a ban on gas drilling to be followed by more comprehensive zoning regarding high impact land uses. She advised against a moratorium. Krogh agreed that, yes, the Town could do it that way and, yes, such a resolution could be longer as the courts might consider this as part of a Comprehensive Plan. Ultimately, the only thing that will "live or die" is the legislation itself.

There was a general discussion about the process, and the levels of risk related to either a "ban" amendment to zoning or a moratorium. Krogh stated that a moratorium opens the door to an immediate law suit. Unless dealing with a resident suit, there will not be an industry claim against a ban until there is a permit application in process. There has to be some direct impact before a suit can be brought. There is a question as to how long a moratorium can stand.

Dietrich asked for more information regarding resident law suits. Krogh advised that some residents are already considering this in neighboring Towns. This is based on a presumption of a right to make money from mineral rights in land ownership. Krogh can't predict whether it would happen here or how it would play out. Dietrich asked whether the Comp Plan should address this? Krogh stated that, generally, no, as all zoning already is technically a "taking." Krogh explained the need to balance individual and public need. Krogh cited the challenges of exclusionary and spot zoning.

Klein asked how long would it take Krogh to make changes addressing the current Comp Plan ambiguities. Krogh suggested that it would take less than an hour, but he would like documentation supporting the rationale of current Comp Plan suggestions. Krogh stated that the "sound bites" are not time consuming. Backing the Plan up with documentation takes time.

Halton asked about the level of specificity needed in a Comp Plan. Should this be a line-by-line fix, or an additional amendment? Krogh answered, both, and be specific. Don't rely on generalities.

Connors asked for clarification as to the differences between a moratorium and a ban, in regards to the permitting process? Krogh replied, if there is a ban and a permit application is in process, a company may sue on the grounds that it is being singled out and treated unfairly. If that claim is lost, it's over and the rigs will be in place. A moratorium a tool to buy time, in that the moratorium would have to be overthrown before a company could force a municipality to change or enact the zoning. Krogh stated that the oil and gas companies are "on standby" for challenging municipalities on this issue. They want to create a scenario where "all of the dominoes fall." If a Town does not have all of its eggs in one basket it is less likely to fall down on this issue.

Race asked a follow up to this question: might a moratorium throw up a red flag too soon? Apparently, yes. Both are tools and both have some risks.

Clarification of sGEIS Issuance Process

Town Code Officer Sue Beeners asked Krogh to explain the process of issuing the supplemental EIS. Krogh explained some of the options available to the state. The soonest that the sGEIS could be issued would be 60 days after release for public comment. It is likely to take somewhat longer.

Q&A from the Public

Steve Selin asked for further clarification regarding a challenge to a moratorium or ban. According to Krogh, a challenge from a gas company could either be a direct challenge or a “ghost” land owner challenge. Through the SEQR process, there has to be “standing” meaning a direct fiscal or land development rights impact. If the DEC denies a permit, the company would have no case. If the DEC grants a permit and then comes against a Town ban, that would provoke a challenge.

Selin asked for the PB resolution to be read. Clerk Goddard read the following resolution out loud:

PLANNING BOARD RESOLUTION NO. 20 OF 2011 - HEAVY INDUSTRY BAN

Whereas, the Town of Danby Town Board charged the Planning Board with the drafting of local laws to prohibit high-impact industrial activity, including gas hydrofracking; and

Whereas, it is now apparent that three Towns in Tompkins County are in process of adopting workable laws for that purpose; and

Whereas, it appears that the Town Attorney has indicated a willingness to draft similar legislation;

Now Therefor it is

Resolved, that the Planning Board recommends and requests that the Town Board direct the Town Attorney to draft an amendment to the Zoning Ordinance to clarify and to further prohibit high-impact land uses including natural gas exploration and extraction with all deliberate speed in time for Planning Board review at its July 14, 2011 meeting; and it is

Further Resolved, that the Planning Board reports that said request is made without prejudice to having the Town Attorney consult with the Community Environmental Defense Council.

Ross Horowitz responded to the question of ambiguity in the Comp Plan, citing the Greenplan from the Town of Middlefield as an example. Would that specific language help? Krogh replied, yes, and such language would be good in the accompanying resolution. Further, Krogh noted that there is NYS case law for different zoning related to different impacts (e.g., big box stores vs. small local stores). This seen as valid and could be useful here.

Jennifer Tiffany stated that she heard a strong sense of consensus that there should be “many tools in the tool box.” In her view, the key strategic decision is between a moratorium and a ban as a short term shield. The question was asked, how have other municipal attorneys evaluated the pros and cons? Krogh does not know their exact rationale. It is unknown whether other municipal attorneys evaluated the moratorium/ban question. The others are going with a ban and have public hearings set.

Connors asked for a comparison of of time and costs in preparing Comp Plan and zoning amendments. There was a discussion of the process and the need to strike balance between risks and costs.

Beeners asked why not have a broader definition than the Dryden/Ulysses ban? Why not more in the direction of Cherry Valley/Springfield, including high impact heavy industrial uses such as gas drilling in the prohibition? Krogh advised doing both, suggesting that the Town get an initial shield in place as a “marker” and do more comprehensive zoning changes later. Krogh hypothesized that the Dryden/Ulysses/Ithaca wording is the result of a measured consideration of cost vs. risk. In Krogh’s words, “Simplicity has its advantages.”

Direct Town Attorney to Draft Amendments

Klein inquired about the feasibility of having a draft amendment to the Comprehensive Plan in time for Town Board review by its July 11 meeting and zoning prohibition amendment in time for Planning Board review by its July 14 meeting. Krogh stated that this could be accomplished, as long

as the Board goes with something simple, as was the case with Dryden and Ulysses. These amendments might then be ready for the TB to set public hearings at its July 18 meeting.

Beeners pointed out that the proposed Comp Plan amendment should be referred to the Planning Board for review prior to setting a public hearing. She also expressed concern about having a SEQR review completed, as a statement of action, prior to setting a public hearing. These will need to be sent to County Planning for review and response 30 days prior to a public hearing. This led to a discussion of a realistic date for a public hearing. All involved agreed that efforts will be made to accomplish these tasks in as timely a manner as possible. Extra meetings may be necessary.

Halton asked about a timeline for other measures - specifically the Road Use Laws from Delta and the Aquifer Protection Ordinance. She expressed concern that other measures not be dropped. Assurances were made that other measures will be completed.

Connors asked for further clarification about how and when a moratorium should be used. Is there a time after which a moratorium would not be useful? Can it be done after the GEIS is formally adopted? Krogh replied that a moratorium could be used after GEIS adoption, if a municipality can show legitimate reasons to do zoning updates. Krogh furthered responded that a moratorium might not cover all concerns and that a moratorium could have broad unintended consequences. He described this as a, "broad sword rather than a foil."

Bowman asked a follow up question—could a moratorium be passed more quickly? A: same 30-day notification period. A moratorium is only good for six months. It could be renewed for a second six months, but is questionable after a year.

Dietrich asked whether the Board wanted to direct the Town Attorney to proceed with the suggested timeline. There was agreement. When the question was posed as to whether this level of action needed a formal vote, Krogh stated his opinion that a vote not necessary. Krogh was then directed to proceed with drafts of prohibition amendments to the Comprehensive Plan and Zoning related to gas drilling.

Adjournment

The Meeting was adjourned at 8:43pm.

Pamela S Goddard, Town Clerk