

Towns prepare for fracking future

TOM WILBER, twilber@gannett.com | [@wilberwrites](#) 12:18 p.m. EDT August 7, 2015

A propane fracking proposal in Barton sets the stage for a new set of policy tests



(Photo: KELLY GAMPEL / Staff Photo)

The proposed propane frack in the Town of Barton is setting the stage for a new set of policy tests that could shape the long-term fate of shale gas development in the state.

The Cuomo administration has banned the use of high volume hydraulic fracturing because too little is known about its impacts on health and the environment. But that ban could be lifted with a new administration, changing technology, shifting politics, more information and establishment of case law.

In the meantime questions of what exactly falls under the ban, how it's applied, and what happens if and when the ban is lifted are circulating among law and government offices with stakes tied to the future regulatory landscape of New York's shale gas reserves.

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From the onset, the application of Tioga Energy Partners raised the question of whether a frack with propane is allowable under the state's ban. But the matter goes deeper. Before the well in Bucky Snyder's hay field can be fracked, it must be drilled. And how Barton's local land use plan accounts for drilling and related build-out of shale gas infrastructure — before and after fracking — is another matter that may become a prime target for legal challenges.

Prior to the shale gas boom and the rise of unconventional drilling, the state acted as the lead agency in siting oil and gas wells in conventional plays. But in July, 2014, with new concerns about impacts on local communities from the unprecedented scope and intensity of shale gas development, the state's high court ruled that drilling must comply with local land use plans.

That decision granting control to local governments, known as "home rule," adds another layer of complexity and uncertainty to the review process for the Town of Barton well. Unlike the old days, the permitting process now involves both state and local controls and requires due diligence from both governments.

In wake of the high court's decision, the status of a town where drilling is proposed, in legal terms, has gone from "an interested agency" to an "involved agency" and Barton is no exception, according to Helen Slottje, an Ithaca attorney who fought successfully for the precedent-setting bans in Dryden and Middlefield.

Consequently, in reviewing the drilling application, the town will need to reconcile a comprehensive plan geared toward agriculture with the industrial impacts associated with shale gas development, Slottje said.

"The home rule decision made it crystal clear that land use constraints do apply to drilling, and towns have to follow their own laws on this. They can't just say their laws don't apply to a particular activity," Slottje said.

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Slottje's assessment doesn't square with Barton Town Supervisor Dick Carey's view, however. The town does not plan to have hearings and is deferring the entire matter to the state DEC, Carey said. "They are the lead agency, and we really don't have a say," he said.

In July, the Barton Town Board passed a resolution that stated that the propane fracking proposal "is proven, safe and reliable" and "compatible with and not disruptive to our rural way of life." It also cites rights of landowners to extract resources from under their lands, makes other points endorsing the project and urges the DEC to complete "a thorough but timely review."

But the drilling proposal, at a minimum, still has to go before the local planning board for a review, and the state will be legally obliged to see how the application complies with local land use laws, Slottje said.

The outcome of the Barton application will provide an indication for other pro-drilling rural localities that need to reconcile existing land use laws geared toward agriculture and recreation with the industrial development pressures that accompanies shale gas development, pipelines, compressor stations, and other industrial activities.

Many stakeholders are carefully watching the process to ensure that local reviews are complete and sufficiently public. Slottje said a board resolution passed unilaterally cannot displace public input needed for an environmental site review. If it does, "Given the nature of this discussion so far, and the fact that people are willing to step forward who are negatively impacted, this would be subject to a lawsuit and a review by courts," she said.

The Barton case study will be a learning exercise for other towns that have been moving tentatively ahead to update land use plans to account for the many question of shale gas development. "We're waiting, holding our breath, to see how this all plays out," said Cheryl Sacco, an attorney who specializes in municipal law for Coughlin and Gerhart.

Frank Evangelisti, director of Broome County's Planning Department, said local governments need to periodically update their comprehensive plans to inform zoning and planning decisions — a rigorous process that requires gauging the values of the community through history and current surveys — but they don't want to get too far ahead of themselves on the shale gas issue.

"As municipalities develop these plans, they want to do it in a way where they can leave a bookmark to revisit these important decisions about energy development," he said.

A working draft of the 2015 Town of Colesville plan, for example, simply states that land leased for gas development in Broome County "sits above a large reserve of natural gas" and the state "has been in a long term holding pattern." But the wording offers little in specifics as to how this might play into the town's planning.

A land use plan for the Town of Chenango — in the works since 2012 — once proposed an "energy development zone" that would allow fracking, windmills and solar panel developments in an area with a one-mile radius — approximately 10 percent of the 33-square-mile town. The draft plan was set to go before a public hearing but was withdrawn due to unresolved legal issues, according to Evangelisti.

Colesville Town Supervisor Glenn Winsor said that he expected that the state's fracking ban would not be permanent, but he had no idea of how or when it might end. "Whether I live long enough to see it happen, I don't know," he said. "A lot is changing with world politics, resources and energy needs and a lot more can change in a five or 10 year period."

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