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Property Rights and Drilling

By Sue Smith-Heavenrich

When gas companies move into an area, whether they are looking for land to lease or developing a well pad, questions of property rights come to the fore. During one of the sessions at the recent environmental law conference at Cornell, a panel of attorneys discussed issues of conflicting property claims.

Once the New York State Department of Environmental Conservation (DEC) completes its environmental review of high-volume horizontal hydro-fracking, municipalities will be scrambling to protect themselves, said Anthony Guardino. Though the state prohibits municipalities from regulating drilling, Guardino says local governments have the tools of land use and zoning at their disposal.

The question is, he admitted, just how much power towns still have. A town can't require road permits for only gas trucks, Guardino said, but it can use zoning to prohibit certain activities. "Zoning regulates land use, and that is permitted," he said, noting that communities have successfully excluded certain industrial mining activities from areas not zoned for

that activity.

There's not much case law on fracking and property rights, said Cornell law professor Eduardo Penalver. After searching numerous databases he came up with only 44 case studies. Because hydro-fracking is a new technology, the cases tend to focus on nuisance and trespass.

Nuisance law protects an individual's use and enjoyment of his land, Penalver explained. These laws are

well-equipped to deal with localized pollution, noise and other issues. The problem is that these laws deal with events after the fact.

"Nuisance law doesn't force [polluters] to take precautions," Penalver said. "You still have to take them to court and prove harm." Generally this means proving they were negligent, or that the undertaking was "ultra-hazardous." "Even if an activity is legal, it can still be deemed a nuisance,"

Penalver clarified, noting noise and odors.

Courts are reluctant to grant injunctions against nuisances that are considered to be economically important, Penalver said. So these laws are not very useful in regulating or protecting citizens before an event. Over time, though, nuisance law helps create a foundation for regulation. That's the point at which a municipality (or a state) can enact a regulation that mitigates what might become a nuisance.

Some people are also using trespass law to get relief from actions that harm their land. Trespass, Penalver explained, prohibits intentional entry onto your land by another without your permission. For example, a neighbor can't extend an overhang above your property, or place a building on your land. Courts have held that slant drilling—drilling from neighboring property under your land at an angle to access a reservoir of oil or gas—is trespass.

However, Penalver said, hydro-fracking may extend beneath property boundaries despite the fact that, on the surface, such invasion would clearly be ruled as trespassing. In a Texas

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Clowning Around



Photo by Kathy Morris

Abby Wilder, 7, of Lansing, left, and her cousin Ava Wilder, 5, of Dryden, wait on line for another turn on the "Adrenaline Rush" at Ithaca College's annual Family Carnival held April 8 in the Fitness Center. The carnival, organized by IC student organizations, was a benefit for United Way Philanthropy Corps.

Lansing Schools Set Budget

By Rebecca Reeves

Lansing Central School District's Board of Education approved last week a \$25,275,503 budget for the 2011-12 year. The budget now goes to the public voters on Tuesday, May 17, with polls open from 7 a.m. to 9 p.m.

The board sympathized with taxpayers taking the heat from what is referred to as the "AES Cayuga effect," and unanimously approved a projected combined tax levy of 1.9 percent. Taxpayers are already burdened with compensating for changes in the taxes received from the AES Cayuga facility.

Since the last board meeting, the state has increased aid by \$175,000. This change has allowed a reduced tax levy increase to be considered, said Mary June King, district business administrator.

Board member David Dittman cast the lone vote against the budget, saying that approval of the \$25 million spending plan was a temporary solution to com-

pounding problems. Reiterating his past recommendations, Dittman warned the board members that they could only buy time for another year or two before they would have to face tough decisions in spending cuts—if the economy doesn't improve.

If voters reject the proposed budget, a contingency budget of \$24,954,054 will be used instead. This would require additional spending cuts.

Lansing has been hit with the dismal economy and assessment concerns with AES. Over the last three budget years, retirement costs increased by 8.58 percent due to ERS/TRS, while health insurance increased by 20.17 percent. Debt services also went up 22 percent, but most of the increase has matching offsetting revenue.

Superintendent Stephen Grimm recommended a community engagement advisory team that would consist of teachers, administrators, students, parents and others who would examine possible cost sav-

ing opportunities and alternative ways to deliver education. The team would also work to strengthen relations with the community, and assess sources of support.

The next step planned is to organize an advisory team in July, with the first organizational meeting in August. Research is set to begin in September.

Last week's school board meeting stretched late into the night before a decision was reached on the budget. However, it wasn't the \$25 million figure that divided the board. The hiring of a lunch specialist or head cook, an issue that could cost or save \$15,000, provided an obstacle that required several motions for an executive session after the budget vote.

Questions arose from a few board members who noted that the open position was only posted internally within the school district and not externally. This is because hiring a new employee would add the cost of about \$15,000 after health insurance and retire-

ment benefits, as opposed to using an employee already on the payroll.

"Let's get the right person, let's not make any rash decisions to save \$15,000 on a \$25 million budget," said board member Glenn Cobb. "We want our kids eating good meals."

A committee has already been put into place to examine applicants for the cook's position and oversee the hiring process. Other board members felt that since there is a committee monitoring the process to hire an experienced employee already in the system, the proposed budget was a more important topic at hand. "I'm confused as to why we're even having this conversation," said Anne Drake, board president.

The position titles being considered were compared side by side. A head cook would be under general supervision while a lunch specialist may work under a school lunch director or district administrator.

Property

Continued from page 1

case, Coastal Oil & Gas Corp versus Garza, hydraulic fractures from a well drilled near a boundary extended under a neighbor's land. In what Penalver calls "a brazen opinion" the judge determined that since the neighbor was leased, the fracks beneath her property did not deprive her of anything to which she was entitled.

But, Penalver said, the gas company had to intrude upon her land to get the gas trapped in rock. This case highlights inconsistencies in what companies are saying about their ability to control hydro-fracking technology, he said. On the one hand, the industry says it can control where fractures go. In this case they said they couldn't help it if the fractures extended under her property line.

Local governments do have broad power to regulate land use, Penalver said. "Zoning may be your last, best option." Also, given court activity in Pennsylvania, it looks as though drilling may be deemed an "ultra-hazardous" activity, like using explosives, he added. If that is so, then landowners wouldn't have to prove negligence to be compensated for harm. Still, it does little to prevent or regulate potential harm from happening.

Ithaca attorney Helen Slottje, from the Community Environmental Defense Council, addressed the nature of property rights. "People often say, 'It's my property and I can do anything I want to,'" she said, adding that there is an overarching understanding of public welfare. In addition, property ownership does not grant a person the right to use his property in a manner that interferes with another's use of his land.

"Each landowner has the right to quiet enjoyment of his property," Slottje said. And the rights property owners have over activities conducted on their land change with time.

"A very fundamental property right is the right to exclude," Slottje said. But New York law allows compulsory integration: the pooling of unleased landowners into drilling

units when 60 percent of the land in a unit is leased. When drilling into conventional reservoirs, where gas and oil flow from unleased land to the well, compulsory integration makes sense. But in shale, drillers must break the rock to release gas and that, said Slottje, involves a trespass.

"When you are integrated, you are left with no right to exclude," Slottje said. "You are left with toxic compounds beneath your land and you are not even compensated at market value." [At this time integrated landowners are not paid for use of the land and receive the lowest possible royalty, 12.5 percent.]

Slottje warned municipal officials to avoid getting trapped into thinking they have to provide road use agreements. In a 1969 case, the courts found that a corporation's claim to the right to profit was not greater than the residents' right to not be impacted. What that means, she explained, is that no corporation has the right to use local residential roads for high-impact industrial traffic. New York law implies that communities can say "no" to heavy trucks, preserving residential roads for local use.

The biggest problem Slottje sees facing municipalities is the increased erosion of enforcement of environmental regulations. "So we're swinging back to protecting the environment through property rights and home rule," she said.

Printmaker

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a row of unwieldy, improbably constructed row houses opening up to show single specimens from three species endangered by the nesting habits of the starling: the Gila woodpecker, the wood duck and the American kestrel.

Although "Starlings and Saguaros" purportedly shows the birds having taken over woodpecker nests in cacti—to the detriment of the native birds—there is a strange, though not artistically unsuccessful, lack of mooring. The stark black and white birds seem merely pasted on, as if they do not fully inhabit their thinly



"Elle in the Middle," a color-reduction woodcut by Jenny Pope.

colored environment. A similar disconnection can be seen elsewhere. In part it is an artifact of Pope's flat, cartoon-like style; here it is particularly striking and metaphorically suggestive.

In another desert scene, "Ellie in the Middle," Pope's pet poodle Elliot (a frequent protagonist in her work) eyes a crouching starling with its beak open. Perspective and scale come unmoored from reality.

A dull-pink flamingo is literally and figuratively wrapped up in itself in "Floyd's Only Friends," forming a figure eight shape with its head, beak and tail in the foreground of a seemingly barren landscape. Flying through the gray sky above, seemingly oblivious is a dense flock of starlings, headed rightward. Along the distant horizon, near the right edge, is an elaborate, onion-domed building.

According to the story, "Pink Floyd" escaped from an aviary into the wilds of Utah. Although some want to release flamingo "friends" into this non-native habitat, Pope's text suggests that this is folly; something that is reinforced by the intimidating cloud of starlings above.

Finally, a menagerie of species inhabits the boldly colored, claustrophobia-inducing "Shakespearean Flock." Although incoherent at a quick glance, an intricate rhythm of curves and zigzags is discernable upon closer attention. A rickety two-story cottage with numerous perched birds and oversized ostrich poking its neck out of a shingled roof dominates the middle. A curtain-like sweep of tree trunk and ornithology obscures the landscape to the right. To the left, a path leading to the house, a river leading from a drainpipe, red flowers, smaller birds. A cautionary tale indeed, if this is what Schieffelin's dream has wrought!

"Sturnis Vulgaris" is compelling both as an already well-developed body of work and as a suggestion of things to come. Pope's lighthearted approach appears well suited for the children's picture book. It will be interesting to see how these images work out with the full incorporation of writing.

Show-related text and images can be found on Jenny Pope's weblog: <http://jpopstudios.wordpress.com/2011/01/19/starlings-starlings-everywhere/>.



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