



ONEIDA COUNTY BOARD OF LEGISLATORS

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June 29, 2011

The Kirkland Town Board
3699 NYS Rte. 12B
Clinton, NY 13323

Re: Proposed Hydrofracking Moratorium – Public Hearing – June 29, 2011

Dear Supervisor Meelan and Honorable Town Board Members:

In connection with the Town Board's consideration of a town-wide, one-year ban on hydrofracking, I'd like to briefly address how gas drilling may negatively impact real property values and Mortgage Lending.

My perspective comes, in part, from a land title insurance standpoint – as I have worked in this business since 1983.

As backdrop, I like to first mention a word-of-art in the real estate industry known as 'Marketable Title'. The concept of title marketability, or 'Marketable Title', in simple terms relates to the ability, or inability, of a title holder to favorably convert home-ownership in real property into money or liquid cash.

A good and marketable title is typically free from reasonable suspicion or possible doubt. That is, the title should be of such sound and good quality that a willing purchaser will readily accept it, and pay fair and valuable consideration for it, at a good market rate.

Said another way, the real property should be of such good quality and potential – in terms of intended use and enjoyment – that an unwilling purchaser could still be compelled to accept it – if already under Contract to do so.

That said, some very troubling conditions, circumstances and unknowns are now appearing on the horizon relative to the newly proposed wide-spread deployment of horizontal hydrofracking – which may serve to threaten the good and marketable titles within the Town of Kirkland, as well as other portions of Southern Oneida County and the Southern Tier of New York.

Along that line, here are some 'specifics' – in the form of bullet points – with certain exhibits (attached to this letter) backing-up my points.

- Many Banks and Commercial Lenders have recently put in place new business practices in which Mortgage Applications will be denied if the subject real property has gas wells on it, or, if the neighboring lands have gas wells on it.

Attached is a list of eleven banks that will not make loans on properties, or the adjoining properties, that have a 'gas lease' on it for hydrofracking purposes.

Obviously, if such a 'class' of real property is now going to be targeted by the Banks and other Lenders, how marketable, I ask, is the title?

The straight-up answer is... that it is not very marketable... because very few people purchase real property with cash these days; and, even if cash is used, would anyone want to "box themselves in" so-to-speak, e.g., by purchasing property that could not be readily 'flipped' to a subsequent proposed purchaser?

- Also attached to this letter is a summary of informational points generated by Greg May, Vice-President of Tompkins Trust Company, (a Bank that does a lot of Residential Mortgage Lending), in which his research on the impact of Gas Leases on Residential Mortgage Lending uncovered, among other things, the following: (1.) The fact that the Federal Housing Administration (FHA), (which facilitates the making and selling of loans by Banks throughout the United States), has also set-forth certain standards that will drive and condition lending practices among local banks. For example, all properties lying within 300 feet of surface, or subsurface, well rights would not be acceptable to the FHA for financing purposes. (2.) The fact that a certain commonly used Title Insurance Endorsement, known as the 'Comprehensive Endorsement', required by many lenders, will not insure over, or against, the negative impacts of commercial gas drilling. That is, the title insurance endorsement is rendered void if the premises are used for any commercial gas venture. (3.) And, the fact that presently there is no cost-effective, or reliable way, for a real estate appraiser to discover whether or not a certain piece of real property has a gas lease on it, or near it. As a result, Appraisers will have a hard time establishing an appraised value. When that happens, that is, when the true value of real property cannot be regularly and reliably obtained – then the standards set by the Secondary Mortgage Market can't be met either; and, lenders will not be able to sell their loans to other lenders – which is a common practice.

When the Governor of the State of New York issued 'Executive Order No. 41' - which required further Environmental Review – for the purpose of determining whether or not all environmental and public health impacts are mitigated or avoided – this Executive Order was fundamentally shortsighted in that it failed to

consider the impact that hydrofracking will have on (i) Mortgage Lending Practices and (ii) How Titles to Real Property might be rendered unmarketable.

In conclusion, I would like to quote **Walter Hang**, the President of Toxics Targeting, (a company that compiles environmental data at government-reported toxic sites throughout New York), who wrote a letter to The Honorable NYS Governor, Andrew M. Cuomo, on May 17, 2011 to say: *"Natural gas leasing could have staggering implications for New York's Lenders, homeowners and real estate investors given the potential scope of horizontal hydrofracturing in our Marcellus Shale formation. Current lending policies and practices can preclude existing/potential homeowners and property investors from purchasing or selling real estate with gas leases due to the inability to obtain mortgage loans. Even properties located near parcels with gas leases might not qualify for mortgage loans due to the "secondary" mortgage requirements. Even Wall Street's securitization of bundled mortgage loans could be impacted."*

By reason of the above, and, by reason of the many other issues that I am sure will be discussed tonight before the Town Board, I urge the passage of the proposed Moratorium for the Town of Kirkland; and, by copy of this letter to the Governor of the State of New York, I call attention to the fact that the Draft of the Marcellus Shale Supplemental Generic Environmental Impact Statement (dSGEIS) will be woefully inadequate as it will fail to consider, (unless modified and revised), the many other major economic impacts that gas drilling will inevitably have upon our lending and real estate markets – which, in turn, surely will have a direct affect upon the health, wealth and well-being of tens-of-thousands of New Yorkers and its future generations.

Respectfully submitted,



Chad Davis, Oneida County Legislator, D-18
3438 Martin Road, Clinton, NY 13323

cc: The Honorable NYS Governor Andrew M. Cuomo

Referenced Attachments

BANKS that will not lend to properties with or adjoining to:

a "Gas Leased" property will find it very difficult to obtain financing due to the potential hazard.

Also if the Gas Leasing is new to the area there are too many unknowns such as will this have an effect on the marketability of a property, value etc.

First Place Bank,
Provident Funding,
GMAC,
Wells Fargo,
FNGB,
Fidelity,
FHA,
First Liberty,
Bank of America

Penny
Executive VP for Mortgage Loans
Wells Fargo

When properties have mortgages underwater, and owners just walk away from them, the state ends up owning degrading properties and the tax base gets eroded. Thus the "natural" consequence has been a tragic loss of property values.

Central NY banks, including but not limited to:

M&T
First Niagara

Home

EXECUTIVE ORDER NO. 41: REQUIRING FURTHER ENVIRONMENTAL REVIEW

Link to the order on the governor's web site.

WHEREAS, the 2009 New York State Energy Plan supports the development of In-State energy resources, including natural gas, to achieve the Plan's multiple public policy objectives; and

WHEREAS, low-volume hydraulic fracturing, or conventional fracking, has been used successfully and safely in New York State for many years to extract natural gas consistent with the Generic Environmental Impact Statement (GEIS) for Oil, Gas and Solution Mining Regulatory Program promulgated by the New York State Department of Environmental Conservation (Department) in 1992; and

WHEREAS, new technologies have emerged, and are being deployed in other states, to extract natural gas more efficiently through a process known as high-volume hydraulic fracturing combined with horizontal drilling; and

WHEREAS, there is a need for further study of this new technology prior to deployment in New York State; and

WHEREAS, in 2008, I directed the Commissioner of Environmental Conservation to initiate a formal public process to update the 1992 GEIS to ensure that any new technologies deployed in New York State are first thoroughly analyzed and regulated to ensure that all environmental and public health impacts are mitigated or avoided; and

WHEREAS, the Department issued a draft scope for an updated GEIS on October 6, 2008, held public meetings in the Marcellus shale region, received more than 3,000 written comments, and issued a final scope for the Supplemental Generic Environmental Impact Statement (SGEIS) on February 6, 2009. The Department released the Draft SGEIS for public review and comment on September 30, 2009, held four public hearings in the region and New York City, and received more than 13,000 written comments during a public comment period that closed December 31, 2009; and

WHEREAS, tens of thousands of citizens, landowners, local governments, large and small businesses, non-governmental organizations, and other stakeholders have expressed their heartfelt support for or opposition to the new technology, but most agree that an objective, science-based analysis is the best approach to setting new policy.

NOW, THEREFORE, I, David A. Paterson, Governor of the State of New York, by virtue of the authority vested in me by the Constitution and laws of the State of New York, do hereby order as follows:

1. The Department shall complete its review of the public comments, make such revisions to the Draft SGEIS that are necessary to analyze comprehensively the environmental impacts associated with high-volume hydraulic fracturing combined with horizontal drilling, ensure that such impacts are appropriately avoided or mitigated consistent with the State Environmental Quality Review Act (SEQRA), other provisions of the Environmental Conservation Law and other laws, and ensure that adequate regulatory measures are identified to protect public health and the environment; and
2. On or about June 1, 2011, the Department shall publish a Revised Draft SGEIS, accept public comment on the revisions for a period of not less than thirty days, and may schedule public hearings on such revisions to be conducted in the Marcellus shale region and New York City; and
3. Recognizing that, pursuant to SEQRA, no permits may be issued prior to the completion of a Final SGEIS, the Department, subsequent to the conclusion of the public comment period, shall report to the Governor on the status of the Final SGEIS and the regulatory conditions that are necessary to include in oil and gas well permits to protect public health and the environment.

G I V E N under my hand and the Privy Seal of the State in the City of Albany this thirteenth day of December in the year two thousand ten.

BY THE GOVERNOR

Secretary to the Governor

Documents & Data

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**Gas and Oil Leases
Impact on Residential Lending**
by Greg May
VP – Residential Mortgage Lending Tompkins Trust Company

March 24, 2011

NOTICE

The information in this presentation is general in nature and is to be used only for informational purposes.

Consult with a Real Estate Attorney to address specific issues as they relate to a specific property or lease.

No opinion is being expressed or implied on the practice of leasing mineral rights, environmental impact or regulations surrounding gas and oil leases.

Summary Points

- 1) There is not a cost effective or reliable way to determine if a residential property has a gas lease to allow an Appraiser to establish an appraised value. Title examinations of each property would add significant cost to each transaction in NYS.
- 2) Surface or sub surface rights within 200 feet of a residential structure would not be acceptable for conventional financing in the Secondary market.
- 3) NYS title insurance gas endorsements specifically void title insurance coverage if the premises are used for any commercial venture.
- 4) Lenders are responsible to warrant several items to the investor in the Secondary market that can not be done leaving lenders with significant liability.
- 5) NYS licensed Appraisers are not able to consider the impact on value if a gas lease exists as noted in item #1 above and hence their Appraisals would not meet Secondary market requirements.
- 6) Surface or sub surface rights within 300 feet of a residential structure OR within 300 feet of property boundary lines would not be acceptable for FHA (Department of HUD) financing.

Summary Points
Gas and Oil Leases as they relate to Residential Lending
Greg May, VP, Residential Mortgage Lending – Tompkins Trust Company
March 24, 2011

For purposes of this discussion, I will utilize the word “lender” or “bank” to refer to traditional banks as well as credit unions and mortgage bankers.

In general terms, banking regulators on a federal and state level monitor how much a bank has in lending compared to deposits and assets. The regulators also establish certain requirements for bank liquidity, funds not loaned or pledged in some fashion, in an effort to provide for a sound financial system. The same holds true for credit unions and their regulators.

In an effort to provide a steady and potentially unlimited source of funding for residential mortgage loans, the secondary market was established and remains one of the only consistent methods for lenders to provide affordable and consistent funding for residential mortgage lending. Most lenders utilize secondary market standards for underwriting and property review. These standards allow a lender to sell loans to Fannie Mae, Freddie Mac or other investors because of the known and accepted standards and a track record of performance.

In addition, to secure the FHA Insurance or VA Guarantee, these government programs have established similar underwriting and minimum property standards that are required to be followed.

Without the mortgage secondary market, banks would only be able to lend based on the assets (or deposits) they have available. Once those assets are fully loaned, they would not be able to lend additional funds until one of the current loans were paid in full. With the secondary market, banks are able to lend, sell the mortgage to Fannie Mae, Freddie Mac or another investor and then relend those same funds to another borrower. This process provides for a consistent, equitable and affordable method for borrowers to purchase homes.

The issue of leased land to gas or oil companies creates challenges for banks. Below is a summary of those challenges linked to the numbers noted on page one:

- 1) Secondary market requirements establish property value for residential properties by comparable sales (similar properties that have sold within a short time and distance from the subject). Since there is not a reliable mapping system to identify properties with gas leases, the appraiser is not able to identify potential comparable properties. In addition, many gas leases only have a memorandum of lease recorded which do not provide the necessary details to compare leases.

- 2) Secondary market requirements state (Freddie Mac guide 39.4 (i)):
 - a. Exceptions for outstanding oil, gas, water or mineral rights are acceptable if commonly granted by private institutional Mortgage investors in the area where the Mortgaged Premises are located, and:
 - i) The exercise of such rights will not result in damage to the Mortgaged Premises or impairment of the use or marketability of the Mortgaged Premises for residential purposes and **there is no right of surface or subsurface entry within 200 feet of the residential structure**, or
 - ii) There is a comprehensive endorsement to the title insurance policy that affirmatively insures the lender against damage or loss due to the exercise of such rights

- 3) A title insurance comprehensive endorsement in NYS contains the following restrictions which would likely result in the title insurance coverage being void if they occurred. Typical gas leases allow gas companies to perform these activities. The loss or inability to provide title insurance would restrict lending on properties with gas leases if title insurance was not available.
 - a. No structure shall be erected on the premises which exceeds three (3) stories or thirty five (35) feet in height...
 - b. The premises shall not be used for the storage of any material, machinery, equipment or supplies of any kind...
 - c. The premises shall not be used for any commercial purpose of any kind...

- 4) Secondary Market requirements state (Freddie Mac guide 39.4 (m)) that lenders must warrant the following, each of which would not be possible with gas/oil leases in place. These leases restrict use of the property by the borrower and there is not reliable data to support what impact a gas lease has on value or marketability:
 - a. ...must not interfere with the use and enjoyment of any present or proposed improvements on the mortgaged premises or with the use and enjoyment of the balance of the Mortgaged Premises not occupied by improvements.
 - b. ...must not affect the marketability of the Mortgaged Premises
 - c. ...must have no or minimal effect on the value of the Mortgaged Premises
 - d. ...must be commonly acceptable to private institutional Mortgage investors in the area...

Banks could not warrant any of these issues due to lack or comparable sales and details regarding gas leases attached to other properties.

- 5) Secondary market requirements state (Freddie Mac guide 44.3 (d)) regarding any detrimental conditions such as underground mines... "The Appraiser must also consider the effect of such conditions in estimating the subject property's market value and/or marketability." Since there is not any way to determine if other gas/oil leases exist, the Appraiser can not fulfill this requirement.

- 6) FHA requirements are similar in all forms to the above with the exception that FHA requires **there is no right of surface or subsurface entry within 300 feet of the residential structure OR within 300 feet of the property boundary lines**

CONCLUSION:

While the secondary market and FHA do not specifically prohibit gas and/or oil leases, the following items, as addressed above, cause a high level of concern for prudent banks and lenders.

1) Comparable sales, subject to gas/oil leases, are not able to be documented reliably at this time by NYS licensed appraisers. Many of the leases are recorded only in memorandum form so it is impossible for the appraiser to be able to review comparable leases and perform the duties and responsibilities of the Appraisal standards.

2) Historical data to support value and marketability is not able to be documented reliably at this time by NYS licensed appraisers. Tax roles, assessment roles, multiple listing databases and other forms of determining property sales have not and currently do not track the existence or terms of gas/oil leases. Therefore, the impact, either positive or negative, on value and marketability is not able to be documented reliably at this time by NYS licensed appraisers.

3) Since the appraisers can not supply the comparable sales, historical data and conclusive impact on value and/or marketability, the appraisal report they produce would not meet secondary market minimum standards, banking regulatory standards or NYS Appraisal standards. That would leave the lender with exceptional liability to warrant for value and marketability that the appraiser has not documented with data as being supported by comparable sales, historical data, etc.

4) Gas/oil leases are generally NOT accepted by lenders such as Wells, First Place Bank, Provident Funding, GMAC, FNCF, Fidelity, FHA, First Liberty or Bank of America. It would be difficult, if not impossible, to meet the "acceptable if commonly granted" rule.

5) The set back of 200 feet noted above means 200 feet each direction for a lot size of at least 440 x 440 or 193,600 sf or 4.48 acres...to account for the house, well, septic size...hence the need to release 5 acres from all lease rights. 1 acre = 43,264sf. 5 acres = 216,320 sf.

6) FHA loans are more commonly utilized by lower income borrowers and lower valued properties. For FHA, the set back of 300 feet noted above means 300 feet each direction for a lot size of at least 640 x 640 or 409,600 sf or 9.47 acres...to account for the house, well, septic size...hence the need to release 10 acres from all lease rights. 1 acre = 43,264sf. 10 acres = 432,640 sf. This does not address the 300 feet from property boundary lines issue and will related to #7 below.

7) If the property is set closer to the road or a property boundary than the 200 or 300 ft setback, a neighboring property that has a gas lease may prevent the un-leased property from being able to be financed. A central reporting database on all gas leases mapped is needed to allow appraisers to determine if a neighboring property has a gas lease. Currently the only method to determine if a gas lease exists is to have an attorney do a title review on surrounding properties that would add significant expense and time delays to each residential transaction.

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Letter to Governor Cuomo Regarding Natural Gas Leasing Impacts on Mortgage Lending

May 17, 2011

Honorable Andrew M. Cuomo
Governor of New York State
The State Capitol
Albany, NY 12224

Dear Governor Cuomo:

As you will see from the information I am providing for your review, New York lenders are gravely concerned about natural gas leasing potentially reducing property values, threatening the "quiet enjoyment" of homes and preventing the granting of mortgage loans in our state.

That is why I write to request that you immediately expand the scope of the Marcellus Shale Supplemental Generic Environmental Impact Statement (SGEIS) to address gas leasing impacts on homeowners, real estate investors and financial institutions.

Given the wide-ranging economic implications of these mortgage lending concerns, this issue warrants your urgent, top priority attention. I believe it is imperative that all lending concerns be fully resolved by your administration's efforts to revise the draft SGEIS' fundamental shortcomings pursuant to Executive Order No. 41.

March 24, 2011 Memorandum: Gas and Oil Leases Impact on Residential Lending

This document is a detailed, self-explanatory memorandum circulated by a Vice President for Residential Mortgage Lending at the Tompkins County Trust Company headquartered in Ithaca, NY. It notes:

"Gas/oil leases are generally NOT (emphasis in the original) accepted by lenders such as Wells, First Place Bank, Provident Funding, GMAC, FNGB, Fidelity, FHA, First Liberty or Bank of America. It would be difficult, if not impossible, to meet the 'acceptable if commonly granted' rule."

"Surface or sub surface rights within 200 feet of a residential structure would not be acceptable for conventional financing in the Secondary market."

"NYS title insurance gas endorsements specifically void title insurance coverage if the premises are used for any commercial venture."

"Lenders are responsible to warrant several items to the investor in the Secondary market that can not be done leaving lenders with significant liability."

"Surface or sub surface rights within 300 feet of a residential structure OR within 300 feet of property boundary lines would not be acceptable for FHA [Federal Housing Administration] (Department of HUD [Housing and Urban Development]) financing."

See: <http://toxicstargeting.com/sites/default/files/pdfs/TTC-Gas-Res-Lend-HL.pdf>

PowerPoint Presentation

These PowerPoint slides summarize a wide array of mortgage lending issues.

According to slide nine: Legal Issues

"Executing a lease or easement may have the potential to restrict the property from being sold, building... (emphasis added)"

According to slide 15: Residential Lending Issues

"Secondary Market Requirement:

Title insurance endorsements required to affirmatively insure the lender against damage or loss due to exercise of drilling rights

NYS title insurance comprehensive endorsement contains the following restrictions that would likely void coverage if they exist:

No structures over 35 feet tall on premises

No storage of any material, machinery, equipment or supplies on premises

Premises shall not be used for any commercial purposes

All allowed in typical gas lease - coverage likely void (emphasis added)."

See: http://toxicstargeting.com/sites/default/files/pdfs/110512_tompkins_trus...

Conclusion

Natural gas leasing could have staggering implications for New York's lenders, homeowners and real estate investors given the potential scope of horizontal hydrofracturing in our state's Marcellus Shale formation. Current lending policies and practices can preclude existing/potential homeowners

and property investors from purchasing or selling real estate with gas leases due to the inability to obtain mortgage loans. Even properties located near parcels with gas leases might not qualify for mortgage loans due to "secondary" market requirements.

Individuals who have signed gas leases very likely had no inkling of these onerous implications. There has been extensive discussion of the alleged economic benefits of gas drilling in New York. The banking documents I am providing raise profound concerns that gas leasing could impair the state's mortgage lending and real estate markets. Even Wall Street's securitization of bundled mortgage loans could be impacted.

Nearly 5,000 elected officials, business owners, farmers, civic and environmental groups, citizens, students and religious leaders are signatories to a coalition letter requesting that you require immediate public comment regarding expanding the scope of the SGEIS to include key concerns that were excluded from the scope of the proceeding when it began more than three years ago.

See: http://www.toxicstargeting.com/MarcellusShale/cuomo/coalition_letter

A total of 62 legislators, including Democrats and Republicans in the Assembly and State Senate, have similarly written you in that regard.

See: <http://www.toxicstargeting.com/MarcellusShale/documents/letters/2011/04/13/assembly>

To date, you have not provided a favorable reply to these requests.

In the more than three years that shale gas horizontal hydrofracturing has been discussed in New York State, I had not seen a single word written about mortgage lending impacts until I read the documents I am providing for your review. That scenario underscores why you must require immediate public comment to identify all other issues that your administration should address as the draft SGEIS is revised pursuant to Executive Order No. 41. Please afford the public a comment period without further delay.

Thank you for your consideration. Please do not hesitate to contact me if you have any questions that I might be able to answer regarding my request.

Very truly yours,

Walter Hang

Letters

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