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***There may be more than meets the eye when local officials – particularly those who themselves have leased or whose patrons favor drilling – say they want to wait to enact protective laws out of a desire to be ‘responsible.’  
Responsible to whom?***

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Governor Cuomo’s Department of Environmental Conservation is moving inexorably toward publicly announcing its foreordained conclusion that hydrofracking is “safe” for our state - or at least for that portion of it (outside the NYC and Syracuse watersheds) inhabited by those whose health, safety, and votes are considered to be expendable by the Governor.

In response, numerous local governments across upstate New York are using their home rule and other constitutionally derived powers to enact land use laws (zoning amendments, police power-based laws in towns that don’t have zoning, or moratoria) to prohibit high-impact land uses such as fracking within their borders.

But in some communities, certain local officials are urging that efforts to enact such laws be stalled. These officials offer a variety of explanations for wanting to delay.

Some of them claim to be ‘undecided’ about the advisability of a fracking ban even at this late date, and say that they need more time to make an informed decision. Some of them say they want to wait to make a decision until *after* the DEC has finalized its regulations and begins issuing drilling permits. And some of them cite the recent filing of two lawsuits challenging the authority of localities to enact such laws, and say they want to wait for those cases to wind their way to the Court of Appeals, even though by most accounts that process will take two years at best, and even though during that time the DEC certainly will have begun issuing drilling permits.

Supporters of the fracking industry admit that part of the reason the lawsuits were filed was to have a ‘chilling effect’ on the movement to enact municipality-level bans of the industry. *What they don’t tell you* however is that they are *at least* as concerned about *when* a ban is enacted as *whether* a town enacts a ban.

Indeed, I believe that the real goal of industry's present legal challenge is to forestall the enactment of as many local bans and moratoria as possible, until sometime **after** the DEC begins issuing permits.

In evaluating the bona fides of those local officials who claim to believe that waiting to pass a ban is “the responsible thing” to do, “particularly in these trying financial times,” it is worthwhile to determine whether those local officials have themselves signed gas leases, whether they belong to local (pro-drilling) landowners' coalitions, or whether they are beholden to pro-drilling groups or individuals. **This is because there is absolutely no question that – for legal reasons – both the gas drilling industry and the people who want the industry to drill on their land will be significantly advantaged if zoning laws or moratoria prohibiting drilling are passed after the DEC begins issuing permits.**

Local officials who favor allowing the drilling industry to enter their community should have enough respect for their constituents to stand up and declare their position. Hiding behind the fig leaf of the lawsuits in other towns is worse than disingenuous. Most neutral attorneys agree that the towns should win such suits at the appellate level, and plaintiffs in such suits typically do not seek financial damages (and did not seek them in the Dryden or Middlefield suits). Thus, the ‘cost’ to the municipality is essentially legal fees. And in fact there are very competent lawyers and law firms out there who are willing to defend municipalities for steeply discounted or even no fees in these suits.

But as these supposed ‘responsible’ local officials well know, the costs of doing nothing, of waiting to pass protective laws until DEC permitting begins, deprives the town of the single protection for local control that the DEC has built in to the draft SGEIS – the right to say that a proposal to frack in the town is “inconsistent with local land use laws.” Can any local official acting in good faith have ANY doubt that the costs of rebuilding even one road will dwarf whatever the town might spend on lawyers to defend a land use law?

Sitting back and not acting under the *guise* of acting responsibly will preclude the town and its residents from bringing a lawsuit of their own – one that challenges a drilling permit issued for a well site in their town. A properly drafted local law is both a sword and a shield that a town can wield to protect its residents from unconventional drilling. A town without a ban or moratorium has no such weapon; it

is defenseless. Such state of affairs may be acceptable to those local officials who have themselves leased or whose patrons favor drilling, but is that state of affairs what is in the best interests of the community as a whole?

Of critical importance, and as I believe many local officials who have themselves leased are quite aware, if a town *waits* to pass a land use prohibition until after the DEC has begins issuing permits, the town runs the risk that so-called “vested rights” may ripen. This fact is why it is so important to many industry supporters that protective laws get passed – whatever the excuse – **after** the DEC begins permitting.

Citizens in communities who desire their elected local representatives to take steps to protect their way of life from fracking are entitled to know where those officials stand on such an important issue, and need to be aware that there may be much more at play than meets the eye when these officials – **particularly those who have leased or want to lease, or are serving the interests of pro-industry patrons** – claim to be going slow “to be responsible.” Because in point of fact that definition of being “responsible” *has the legal effect* of depriving the community of the only locality-level control the DEC has built into the draft SGEIS, and potentially exposes the community to financial liability *which would not exist* if the protective law was passed before DEC permitting begins. Seriously now, how can that be responsible?

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