



CITY COUNCIL AGENDA ITEM

Date: March 10, 2016

To: Brian Kischnick, City Manager

From: Mark F. Miller, Director of Economic & Community Development
R. Brent Savidant, Planning Director

Subject: PUBLIC HEARING (MARCH 14, 2016) – ZONING ORDINANCE TEXT AMENDMENT (File Number: ZOTA 247) – Oil and Gas Extraction

This item was initiated by the Planning Commission, who recognized that the Zoning Ordinance is presently silent on the issue of oil and gas extraction. This effort is intended to protect Troy residents and property owners against the negative secondary effects of these facilities while at the same time creating reasonable standards for oil and gas extraction facilities.

The provisions were discussed by the Planning Commission at previous meetings. The proposed provisions would regulate oil and gas extraction in Troy, including fracking.

Draft amendments include the following:

- Oil and gas facilities are permitted in IB District as a Special Use
- Requires a minimum lot size of 5 acres
- Requires increased setbacks based on adjacent use/zoning
- Requires extensive fencing, landscaping, and limited lighting
- Requires adherence to strict nuisance and performance standard requirements
- Requires submittal of a detailed Operations Plan

The Planning Commission held a public hearing on this item on June 23, 2015, and recommended approval of the text amendment with a 9-0 vote. The City Council held a public hearing on this item on July 20, 2015 and scheduled a joint meeting with Planning Commission to discuss further. Three experts attended the joint meeting on September 14, 2015 to share their expertise with the boards. At the end of the joint meeting the consensus was that the item needed to go back to the Planning Commission for further discussion and review. The experts were provided time to respond in writing to all questions raised during the meeting. The Planning Commission considered the item at the January 26, 2016 Regular meeting, including the responses provided by the experts, and voted 7-0 to make no changes to the text amendment.

At the January 26, 2016 meeting the Planning Commission discussed a drilling permit that was recently applied for in Southfield (see attached article).

It should be noted, House Bill No. 5389 was introduced February 16, 2016 and been referred to the Committee on Energy Policy for review. If passed as written, this would further restrict drilling of oil and gas wells in Oakland County.

A public hearing for this item is scheduled for the March 14, 2016 City Council Regular meeting.



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The following is a table comparison Troy's proposed regulations with the requirements of the State of Michigan Supervisor of Wells:

COMPARISON OF REGULATIONS STATE OF MICHIGAN SUPERVISORS OF WELLS VERSUS PROPOSED CITY OF TROY PROVISIONS

REGULATION	STATE OF MICHIGAN SUPERVISORS OF WELLS	CITY OF TROY PROPOSED PROVISIONS
Minimum Lot Area	No requirement	5 acres
Zoning District	No requirement	IB District only
Permitted by Right or by Special Use Approval	By right	Special Use
Min. Distance from Residential	450' from residential building (Supervisor of Wells may grant a waiver from this requirement if owner gives written consent or if Supervisor deems there is no reasonable alternative for the location of the well that will allow the rights holder to develop the oil and gas)	500' from residentially zoned or used property
Min. Distance from ROW	No requirement	500' from property
Min. Distance from Religious Facility	No requirement	500' from property
Min. Distance from School	No requirement	500' from property
Min. Distance from Hospital	No requirement	500' from property
Max. Height Requirements	No requirement	110' for drilling derrick/rig and 22' for wellhead
Min. Landscaping Requirements	No requirement	Staggered 10' tall evergreen trees placed around perimeter of fence with minimum landscape greenbelt buffer of 25' in depth
Fencing Requirements	No requirement	Site to be completely enclosed by 6' high fence
Construction Activity Hours	No requirement	Limited to between 7am and 8pm



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Approved as to form and legality:

Lori Grigg Bluhm, City Attorney

Attachments:

1. Zoning Ordinance Text Amendment Public Hearing Draft
2. Map of properties zoned IB and minimum 5 acres in area
3. Minutes from June 23, 2015 Planning Commission Regular meeting (excerpt)
4. Minutes from July 20, 2015 City Council Regular meeting (excerpt)
5. Minutes from September 14, 2015 Joint City Council/Planning Commission meeting (excerpt)
6. Written responses from experts attending joint meeting
7. Minutes from January 26, 2016 Planning Commission meeting (excerpt)
8. Article from Crain's Detroit Business, originally published January 17, 2016
9. House Bill No. 5389

CITY OF TROY

AN ORDINANCE TO AMEND
CHAPTER 39 OF THE CODE
OF THE CITY OF TROY
CITY COUNCIL PUBLIC HEARING DRAFT

The City of Troy ordains:

Section 1. Short Title

This Ordinance shall be known and may be cited as an amendment to Chapter 39, Zoning Ordinance, of the Code of the City of Troy.

Section 2. Amendment

Chapter 39 of the Code of the City of Troy is amended as follows:

Add the following definitions in Section 2.02 to read as follows:

DERRICK – Any portable framework, tower mast and/or structure which is required or used in connection with drilling or re-working a well for the production of oil or gas.

DRILLING PAD-- The area of surface operations surrounding the surface location of a well or wells. Such area shall not include an access road to the drilling pad.

HYDRAULIC FRACTURING OR FRACKING-- The process of injecting water, customized fluids, sand, steam, or gas into a gas well under pressure to improve gas recovery.

HORIZONTAL DRILLING- The drilling of an oil or natural gas well at an angle so that the well runs parallel to the formation containing the oil or gas.

OIL AND GAS -- Crude oil, natural gas, methane gas, coal bed methane gas, propane, butane and/or any other products or similar substances that are produced by drilling an oil or gas well.

OIL AND GAS DEVELOPMENT -- The well site preparation, construction, drilling, redrilling, hydraulic fracturing, and/or site restoration associated with an oil or gas well of any depth; water and other fluid storage, impoundment and transportation used for such activities; and the installation and use of all associated equipment, including tanks, meters, and other equipment and structures whether permanent or temporary; and the site preparation, construction, installation, maintenance and repair of oil and gas pipelines and associated equipment and other equipment and activities associated with the exploration for, production and transportation of oil and gas. The definition does not include natural gas compressor stations and natural gas processing plants or facilities performing the equivalent functions.

OIL OR GAS WELL--A pierced or bored hole drilled or being drilled in the ground for the purpose of, or to be used for, producing, extracting or injecting gas, oil, petroleum or another liquid related to oil or gas production or storage, including brine disposal.

OIL OR GAS WELL SITE -- The location of facilities, structures, materials and equipment (whether temporary or permanent), that are necessary for or incidental to the preparation, construction, drilling, production or operation of an oil or gas well. This definition also includes exploratory wells.

NATURAL GAS COMPRESSOR STATION -- A facility designed and constructed to compress natural gas that originates from a gas well or collection of such wells operating as a midstream facility for delivery of gas to a transmission pipeline, distribution pipeline, natural gas processing plant or underground storage field, including one or more natural gas compressors, associated buildings, pipes, valves, tanks and other equipment.

NATURAL GAS PROCESSING PLANT -- A facility designed and constructed to remove materials such as ethane, propane, butane, and other constituents or similar substances from natural gas to allow such natural gas to be of such quality as is required or appropriate for transmission or distribution to commercial markets but not including facilities or equipment that is designed and constructed primarily to remove water, water vapor, oil or naturally occurring liquids from the natural gas.

STORAGE WELL-- A well used for and in connection with the underground storage of natural gas, including injection into or withdrawal from an underground storage reservoir for monitoring or observation of reservoir pressure.

Revise the following table in Section 4.21 to read as follows:

	R1A-R1E	RT	MF	UR	MHP	CF	EP	CB	GB	IB	O	OM	RC	PV	P
Oil and Gas Well or Development	NP	NP	NP	NP	NP	NP	NP	NP	NP	S	NP	NP	NP	NP	NP

Add Section 6.33 to read as follows:

Section 6.33: Oil and Gas Well/Development Standards for Special Use Approval:

The purpose of this section is to provide for the reasonable development of land for oil and gas drilling while providing adequate health, safety and general welfare protections of the residents of Troy. It is necessary and appropriate to adopt reasonable requirements for oil and gas resource development so that these resources can be obtained in a manner that protects the environment, protects residential properties and residential property values, and mitigates negative impacts.

The following requirements shall apply to the location, installation, drilling and operation of any well for the commercial extraction of oil, gas or other hydrocarbons in the City:

- A. Spacing and Well Setbacks. In addition to the spacing and setback requirements of the State of Michigan and the regulations of its Supervisor of Wells, the drilling, completion, or operation of oil or gas wells or well site shall not be located within 300 feet from any road right-of-way, 500 feet of a residentially zoned or used property or any property used for a religious facility, public or private school, or hospital, and 100 feet from any other property line. The setbacks in this section also apply to the area underground, and

preclude any horizontal drilling within the setback unless the applicant demonstrates to the City's satisfaction a legal entitlement to drill on adjacent properties through mineral rights acquisition or other means.

The measurement of the setback shall be made from the edge of the well site (in a straight line, without regard to intervening structures or objects), to the closest exterior point of the adjacent parcel.

- B. Height. The completed wellhead structure shall not exceed twenty-two (22) feet in height. The temporary drilling derrick/rig shall not exceed one-hundred and ten (110) feet in height.
- C. Minimum Lot Size. The minimum lot size shall be 5 acres.
- D. Fencing, Landscaping, and Lighting.
 - 1. An oil or gas well site shall be completely enclosed within a 6-foot high fence.
 - 2. Staggered ten (10) foot tall evergreen trees shall be placed around the perimeter of the fence with a minimum landscape greenbelt buffer of twenty-five (25) feet in depth. This landscaping buffer shall be in place within thirty (30) days of the removal of the temporary drilling derrick/rig. The landscape buffer and trees shall be regularly irrigated and maintained.
 - 3. Exterior lighting shall comply with Section 13.05 of the Zoning Ordinance.
- E. Nuisance Mitigation. The drilling, completion, or operation of oil or gas wells or other wells drilled for oil or gas exploration purposes shall comply with Section 12.06, Environmental Performance Standards. Those standards address potential nuisances such as noise, smoke, dust, open storage, fire and explosive hazards, odors, wastes, and vibration. Due to the unique nature of this type of operation, additional information and standards may be required.
- F. Dust, Noise, Vibration, and Odors. All operations shall be conducted in such a manner as to minimize, so far as practicable, dust, noise, vibration, or noxious odors, and shall be in accordance with the best accepted practices defined by the Michigan Department of Environmental Quality (MDEQ) for the production of oil, gas and other hydrocarbon substances in urban areas. All equipment used shall be constructed and operated so that vibrations, dust, odor or other harmful or annoying substances or effects will be minimized by the operations carried on at any drilling or production site or from anything incidental thereto, and to minimize the annoyance of persons living or working in the vicinity. Additionally, the site or structures on the property shall not be permitted to become dilapidated, unsightly, or unsafe. The City may impose additional reasonable restrictions upon such operations to reduce adverse impacts upon adjacent properties.
- G. Oil and Gas Processing Facilities. Associated processing facilities that separate oil, gas, and brine and hold said products for transport off-site for further refinement and processing are not permitted.
- H. Compliance with Laws and Permit Issuance. The drilling, completion, or operation of oil or gas wells or other wells drilled for the purpose of oil or gas exploration shall be done in conformity with all State and Federal laws, statutes, rules, and regulations pertaining thereto and particularly with the State of Michigan and the regulations of its Supervisor of Wells. This shall include obtaining the required permit from the Supervisor of Wells.

which permit shall be provided to the City before the City can grant special use approval under this section. This requirement also applies to, but is not limited to the plugging of wells, the exploring for, producing, marketing, and transporting of petroleum products, and the disposition and removal of any byproducts utilized and associated with said activities.

- I. Associated Permits and Approvals. Special use approval for the drilling, completion, or operation of oil or gas wells or other wells drilled for oil or gas exploration purposes is in addition to and are not in lieu of any permit or plan which may be required by any other provision of the City of Troy Zoning Ordinance, Building and Fire Codes, or by any other governmental agency, unless expressly outlined.
- J. Operations
 1. Permitted Construction Activity Hours. Site preparation and construction of well sites are limited to the hours of 7 am to 8 pm. Construction activities associated with establishing of the well sites may be eligible for an exception by the Building Department in accordance with the City's Special Hours Work Permit if such activities are in compliance with applicable laws and permits.
 2. The movement of drilling rigs, tanker trucks or heavy equipment used in connection with the drilling or operation of oil or gas wells over public roads and streets, shall be consistent with the City's Traffic Engineer's approval, which shall be obtained in advance. The City's Traffic Engineer shall identify the streets which may be used and any conditions that may apply.
 3. All brine, mud, slush, saltwater, chemicals, wastewater, chemical, fluids or waste produced or used in the drilling or production of oil or gas shall be safely, lawfully and properly disposed of to prevent infiltration of or damage to any fresh water well, groundwater, watercourse, pond, lake or wetland.
 4. The oil or gas well site shall be kept in a clean and orderly condition, free of trash and debris, with weeds cut. Machinery and equipment not being used in the operation of the well shall not be stored or kept at the well site.
 5. An oil or gas well shall include measures or controls satisfactory to the City Engineer to prevent migration, run-off or discharge of any hazardous materials, including but not limited to any chemicals, oil or gas produced or used in the drilling or production of oil or gas, to adjoining property or to the City of Troy sanitary sewer system, stormwater system or any natural or artificial watercourse, pond, lake or wetland. There shall be no off-site discharge of storm water except to an approved drainage system in accordance with the City's engineering requirements.
- K. Inspection. The Building Official, and any other designee of the City Manager, shall have the right and privilege at any time during the construction phase and any drilling operation to enter upon the premises covered by the special use approval for the purpose of making inspections to determine if the requirements of this section are complied with or the requirements of any other code or ordinance of the City are met.
- L. Injection wells. Injection wells used for brine disposal or other chemicals from production wells or from other sources shall be expressly prohibited within the City.

- M. Pipelines. No operator shall excavate or construct any lines for the conveyance of fuel, water, oil, gas or petroleum liquids on, under, or through the streets, alleys or other properties owned by the City without an easement or right-of-way license from the City.
- N. Submittal Requirements. In addition to submittal requirements for a Site Plan as set forth in Article 8 and Special Use as set forth in Article 9, the following information shall be submitted as part of the application:
1. Environmental Impact Statement. Applicant shall submit an Environmental Impact Statement filed with the Michigan Department of Environmental Quality in connection with a well permit under Part 615 of the Natural Resources and Environmental Protection Act, MCL 524.61501, et seq, and the administrative rules promulgated under Part 615, as amended.
 2. Hydrogeological analysis.
 3. Emergency Response Plan. Pursuant to State and Federal law, the operator shall provide any information necessary to assist the City Emergency Services Department with an emergency response plan and hazardous materials survey establishing written procedures to minimize any hazard resulting from the operation. The Emergency Response Plan should include emergency contact information.
 4. Reclamation Plan. A written statement that describes how the land will be returned to a stable and productive condition post drilling operations.
 5. Operations Plan to include:
 - i. Site ingress/egress
 - ii. Haul Route Map. Vehicle Routes for Truck Traffic. Construction vehicles and commercial trucks, associated with drilling and/or production operations shall be restricted to roads designated by the City Engineer.
 - iii. Hours of Operation. State listed hours of operation.
 - iv. Soil Erosion, Mud and Dust Control Plan.
 - v. Noise Control Plan. Prior to the granting of special use approval and the commencement of operations, the petitioner shall submit a noise management plan, detailing how the equipment used in the drilling, completion, transportation, or production of a well complies with the maximum permissible noise levels of the Zoning Ordinance. If Special Use Approval is granted, the Petitioner shall be responsible for verifying compliance with this section and the noise management plan after the installation of the equipment. The noise management plan shall:
 - i. Identify operational noise impacts
 - ii. Provide documentation establishing the ambient noise level prior to construction.
 - iii. Detail how the impacts will be mitigated. In determining noise mitigation, specific site characteristics shall be considered, including but not limited to the following:
 1. Nature and proximity of adjacent development, location, and type
 2. Seasonal and prevailing weather patterns, including wind directions
 3. Vegetative cover on or adjacent to the site

4. Topography
- vi. Odor and Fume Control Plan
 - vii. Pollution Prevention Plan
 - viii. Impact Mitigation Plan
 - ix. Monitoring controls.

Section 3. Savings

All proceedings pending, and all rights and liabilities existing, acquired or incurred, at the time this Ordinance takes effect, are hereby saved. Such proceedings may be consummated under and according to the ordinance in force at the time such proceedings were commenced. This ordinance shall not be construed to alter, affect, or abate any pending prosecution, or prevent prosecution hereafter instituted under any ordinance specifically or impliedly repealed or amended by this ordinance adopting this penal regulation, for offenses committed prior to the effective date of this ordinance; and new prosecutions may be instituted and all prosecutions pending at the effective date of this ordinance may be continued, for offenses committed prior to the effective date of this ordinance, under and in accordance with the provisions of any ordinance in force at the time of the commission of such offense.

Section 4. Severability Clause

Should any word, phrase, sentence, paragraph or section of this Ordinance be held invalid or unconstitutional, the remaining provision of this ordinance shall remain in full force and effect.

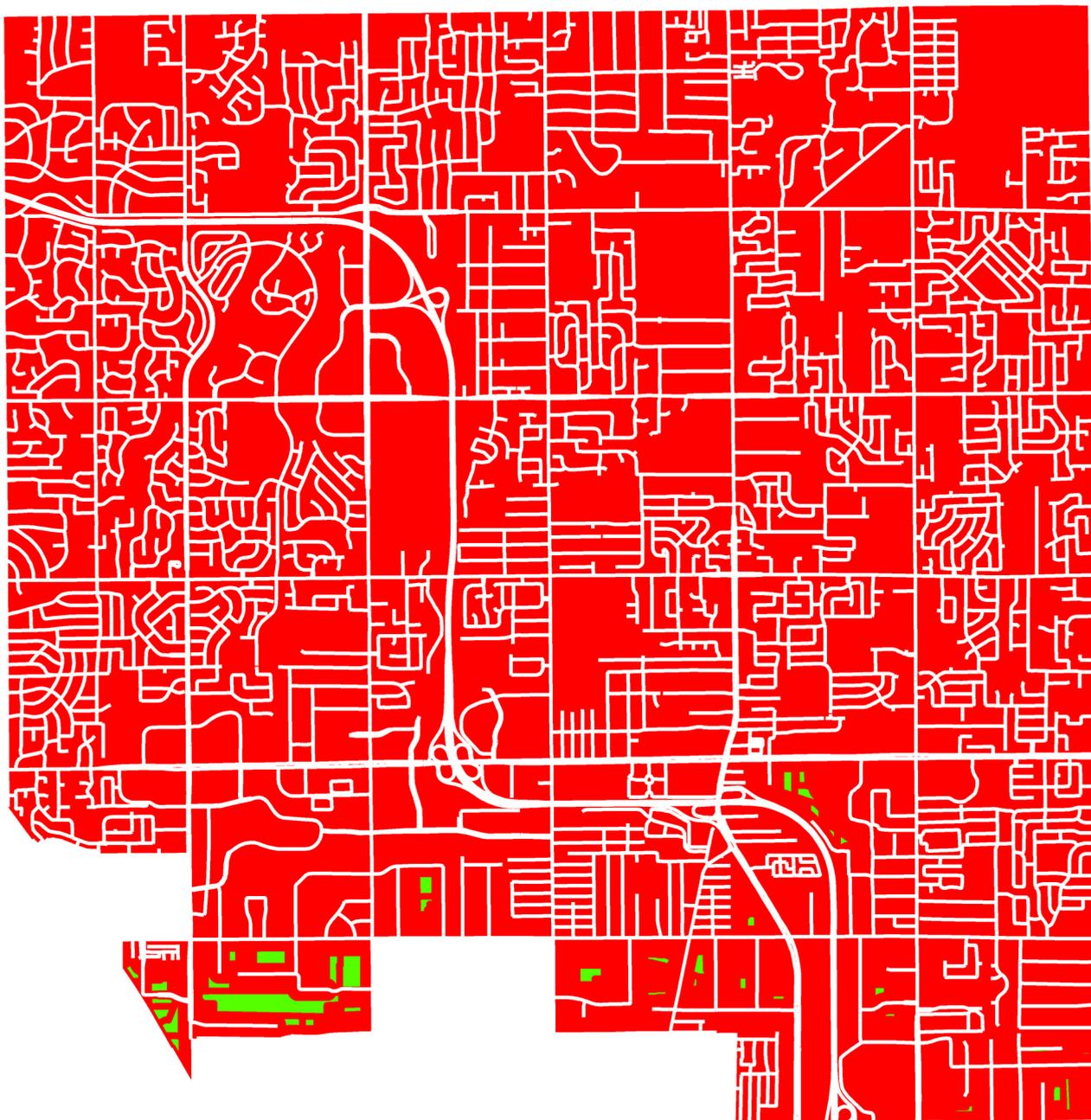
Section 5. Effective Date

This amendment to the Zoning Ordinance shall take effect seven (7) days after publication, which shall be published within 15 days of adoption, as required the Michigan Zoning Enabling Act (Act 110 of 2006).

This Ordinance is enacted by the Council of the City of Troy, Oakland County, Michigan, at a regular meeting of the City Council held at City Hall, 500 W. Big Beaver, Troy, MI, on the _____ day of _____, 2015.

Dane Slater, Mayor

Aileen Bittner, City Clerk



PROPOSED OIL AND GAS PROVISIONS

 Areas meeting criteria for Oil and Gas Facilities (as per proposed text amendment)

ZONING ORDINANCE TEXT AMENDMENT9. **PUBLIC HEARING - ZONING ORDINANCE TEXT AMENDMENT (File Number ZOTA 247) – Oil and Gas Extraction**

Mr. Savidant gave a PowerPoint presentation. He addressed the proposed regulations as relates to:

- Zoning District
- Special Use permit
- Minimum lot size and setbacks
- Screening and lighting
- Potential oil and gas sites (map)
- Nuisance performance standards
- Submittal requirements
- Comparison with Rochester Hills regulations

Mr. Motzny addressed the proposed regulations with respect to the constitutionality and non-exclusionary aspects of the law.

PUBLIC HEARING OPENED

Jennifer Halucha of 3219 Abington would like the City to strengthen its proposed regulations. She addressed regulations imposed by other communities.

Lois Pylat of 2378 Topaz encouraged members of government to contact Lansing in an effort to stop fracking. She addressed the potential for health consequences.

Cynthia Khan of 6902 Aurora addressed the dependency on other countries for energy and encouraged the use of our country's resources.

Toni Kovach of 2370 Topaz would like the City to strengthen the proposed regulations and provide protection of those who are in ill health.

Michael Ross of 152 Randall addressed the viable direction in which our country needs to go to stabilize its borders and international economy.

John Griffin of American Petroleum Institute, 124 W Allegan, Lansing, encouraged interested parties to learn more about the extraction of oil and fracking before speaking negatively on the matter. He addressed permitting in Troy, geological findings in Oakland County, protection of property rights and State regulations.

PUBLIC HEARING CLOSED

Chair Edmunds encouraged residents to contact their State legislators.

Mr. Savidant advised the audience the Planning Commission is the recommending body for a proposed text amendment and a Public Hearing will be scheduled at a future City Council meeting for consideration.

Resolution # PC-2015-06-040

Moved by: Hutson

Seconded by: Kuppa

RESOLVED, That the Planning Commission hereby recommends to the City Council that Articles 2, 4, and 6 of Chapter 39 of the Code of the City of Troy, which includes miscellaneous provisions related to oil and gas extraction, be amended as printed on the proposed Zoning Ordinance Text Amendment.

Yes: All present (9)

MOTION CARRIED

CITY COUNCIL MINUTES-Final July 20, 2015

E-2 Public Hearing – Zoning Ordinance Text Amendment – File ZOTA 247 – Oil and Gas Extraction (*Presented by Brent Savidant, Planning Director*)

The Mayor opened the Public Hearing for public comment. The Mayor closed the Public Hearing after receiving comment from Minesh Baxi and John Griffin.

Resolution #2015-07-090

Moved by Slater

Seconded by Campbell

RESOLVED, That Troy City Council **SCHEDULES** a joint meeting of the City Council and Planning Commission on Monday, September 14, 2015, at 6:00 PM in the Council Boardroom to discuss proposed amendments to the Zoning Ordinance pertaining to the regulation of oil and gas facilities, as requested by City Management.

Yes: All-7

No: None

MOTION CARRIED

A. CALL TO ORDER:

A Special Joint Meeting of the Troy City Council and Planning Commission was held on Monday, September 14, 2015, at City Hall, 500 W. Big Beaver Rd. Mayor Slater called the meeting to order at 6:01 PM.

B. ROLL CALL:

a)	<u>City Council Members</u>	<u>Planning Commission Members</u>
	Mayor Dane Slater	Chairman Donald Edmunds
	Jim Campbell	Ollie Apahidean
	Steve Gottlieb	Karen Crusse
	Dave Henderson	Carlton Faison
	Ellen Hodorek	Michael W. Hutson
	Ed Pennington – Arrived at 6:22 PM	Tom Krent
	Doug Tietz	Padma Kuppa
		Philip Sanzica
		John Tagle

C. DISCUSSION ITEMS:**C-1 Master Plan Update - Carlisle/Wortman Associates, Inc.**

Mr. Brian Kischnick, City Manager, introduced Mr. Dick Carlisle, Carlisle/Wortman Associates, Inc., who discussed the Master Plan Community Engagement and remaining tasks involved in updating the Master Plan.

C-2 Why We Are Here/Framing the Issues - City Manager Brian Kischnick

Mr. Kischnick introduced Mr. Brent Savidant, Planning Director, who provided a brief introduction to the topic of the proposed amendment to the City of Troy Zoning Ordinance in order to regulate oil and gas extraction facilities.

C-3 Presentation by Hal Fitch, Director, Office of Oil, Gas and Minerals, MDEQ

Mr. Kischnick introduced Mr. Hal Fitch, Director of Oil, Gas and Minerals, MDEQ. Mr. Fitch provided an introduction to the functions and rules of the Office of Oil, Gas and Minerals of the Michigan Department of Environmental Quality. He stated that his office seeks to strike a balance between the rights of mineral owners, surface property owners and environmental protection. Mr. Fitch explained the latest security controls on wells in regards to environmental impact. He provided a brief summary of the restrictions in place regarding wells and extraction facilities. Mr. Fitch commented that the proposed ordinance looks promising but he pointed out a couple areas that he thinks could be problematic. He said the proposed setback distance, restricting drilling to a smattering of locations in one corner of the City, and limiting drilling to a vertical hole versus a horizontal track are problematic amendments that could be liabilities.

C-4 Presentation by Jim Nash, Oakland County Water Resources Commissioner

Mr. Kischnick introduced Mr. Jim Nash, Oakland County Water Resources Commissioner, who discussed his perspective on the proposed amendment to the City of Troy Zoning Ordinance on extraction facilities. He provided a recommendation that the City contact an organization called Flow for Water. He commented that the proposed ordinance is a good idea, and limiting exposure of the residents to the environmental effects of drilling sites such as air quality. He recommended frequent testing of the ground water and wildlife in the area around the drilling site. He said the City has a lot of power in controlling the regulations of tank farms and other aspects of facilities. Mr. Nash summarized that water quality and air quality are his biggest concerns with these facilities.

C-5 Presentation by John Griffin, Executive Director, Associated Petroleum Industries of Michigan

Mr. Kischnick introduced Mr. John Griffin, Executive Director, Associated Petroleum Industries of Michigan, who discussed a handout he provided from the Energy Information Administration to the City Council and Planning Commission. Mr. Griffin explained that many communities are examining the issues of oil and gas extraction facilities. He said that national organizations are approaching individual communities in order to encourage communities to adopt restrictive ordinances and if enough communities adopt restrictions, there could be a de facto ban on extraction facilities. He said that everyone uses energy resources and products every day, and wells are necessary to provide those resources. He commented that the City of Troy proposed Zoning Ordinance Amendment seems very restrictive. Mr. Griffin said that the State restrictions are sufficient and consistent, and local restrictions will end up hurting consumers.

C-6 Questions/Discussion

Chairman Edmunds asked about the presenters' assessments of ordinances enacted in nearby cities. Mr. Fitch answered that some he has seen are pretty restrictive, and Troy's proposed ordinance prohibits development in too large of areas. Mr. Nash commented that there is always a risk of a law suit for having too restrictive an ordinance. He said Flow for Water has a lot of useful information on their website. Mr. Fitch commented that some of the suggestions from Flow for Water are questionable.

Mayor Pro Tem Campbell asked what takes precedence: mineral rights or property rights. Mr. Fitch answered that mineral rights are dominant over the surface property rights.

Ms. Kuppa asked Mr. Savidant if he compared Troy's proposed ordinance to Rochester Hills ordinance and if Troy's proposed ordinance is defensible. Mr. Allan Motzny, Assistant City Attorney, said that Troy's proposed ordinance is defensible and does not prohibit drilling beyond the subsurface property lines as long as the drilling company has documentation that they have the right to do so. Mr. Nash said that the City has the right to regulate where pipes are placed, and pipes have the potential to leak more than trucks.

Council Member Tietz asked if the City Council passed an ordinance, and it was challenged, would the City be sued and have damages assessed to the City. Mrs. Bluhm answered that there is a risk of being sued if the City passes an ordinance that is more restrictive than the State regulations.

Mrs. Crusse asked for confirmation regarding the statement that the area of Troy does not lend itself to what hydraulic fracturing companies are looking for. Mr. Fitch answered that the land

and reservoirs in this area does not lend itself to hydraulic fracturing. Mrs. Crusse asked Mr. Fitch to confirm that hydraulic fracturing in the State of Michigan have been safe so far. He commented that there has not been an incident of environmental contamination from a hydraulic fracturing operation itself in the State of Michigan. Mrs. Crusse asked Mr. Griffin about his statement that when cities and townships create ordinances to control hydraulic fracturing, that he was of the opinion that it was better to regulate in the big picture instead of each municipality adopting individual regulations. Mr. Griffin answered that statewide regulations are best. Mr. Nash commented that most wells in Michigan were never tested, so there is no way to know if there were leaks or contamination. He said that citizen complaints need to be addressed. Mr. Griffin commented that a former EPA Administrator testified before Congress that there had been no accidents with hydraulic fracturing. He also said that new rules passed last March require baseline water testing. Mr. Nash commented that those rules are for large-scale fracking, not small-scale fracking.

Council Member Henderson asked what is meant by the phrase 40 acres under lease and 3 acres to drill. Mr. Fitch answered that a square 40 acres is the size of the tract that is needed to form one well, and leases on the land in those 40 acres are needed in order to drill.

Mr. Krent asked if the property owner owns the mineral rights or how property owners can find out if they own mineral rights on their land and how to get them if they don't own them. Mr. Fitch answered that residents can look at the Register of Deeds to see if the mineral rights have been sold at some point.

Mr. Apahidean asked Mr. Fitch knows how many wells in Michigan are horizontal wells and what percentage are in urban areas. Mr. Fitch answered that over 1,800 wells have been drilled within cities and villages. He said that horizontal drilling started around 1980, and is more the exception than the rule, so there aren't many horizontal wells.

Mr. Tagle asked how the City can know where the drilling companies may want to drill, so as to try to avoid limiting property rights. Mr. Fitch answered that you don't know until the drilling company conducts surveys and testing.

Council Member Gottlieb asked if there has been one incident of hydraulic fracking in Oakland County. Mr. Fitch answered that he is not aware of one. Mr. Griffin commented that permit applications can be found on the MDEQ website, listed by county. Mr. Fitch commented that when the MDEQ receives an application, they contact the local governing body and will attend public meetings if the local body requests their presence. Mr. Nash asked if drilling operations are exempt from FOIA. Mr. Fitch answered that the drilling sites and locations are not confidential, but the formation and character of the formation can be held confidential.

Mr. Hutson commented that if the land in Troy is no conducive to fracking, then there will be no harm in enacting the proposed ordinance. He said the State statute is general, and the proposed ordinance fills in gaps that are in the State statute. Mr. Hutson agreed with Mr. Nash that safety is most important.

Council Member Pennington asked if there's a case in Michigan where they've been doing horizontal fracturing. Mr. Fitch answered that horizontal drilling doesn't always mean horizontal fracturing takes place. He said that there have been about 80 high-volume hydraulic fracturing operations in Michigan. He said there have been about 15 large-scale horizontal wells.

Mr. Faison asked about the settlement amounts in the lawsuits and the difference in scenarios of the cases. Mr. Fitch answered that the Ludington area lawsuit was higher because of the prospective value of the operation. He said that in the Farmington Hills case, the damages to the operator were less because the value of the potential reserves was lower. Mr. Faison asked if Troy lends itself to large-scale development in terms of opportunity. Mr. Fitch answered that one of the wells in the formation in this part of the state produces about \$8000 in revenue per day.

C-7 Wrap Up/Next Steps

Mayor Slater thanked the speakers for their information. He said that he believes there needs to be more discussion, and that the ordinance amendment needs to go back to the Planning Commission for further discussion and review. Mr. Edmunds requested that the questions asked tonight be provided to the speakers for their consideration and answers. He said that perhaps this amendment could be postponed until November or December. Mrs. Crusse commented that this topic arose so that the City of Troy would not be taken by surprise by a drilling company wishing to drill in Troy. Mr. Edmunds asked if Shelby Township was notified when the exploratory drill was proposed. Mr. Fitch answered that Shelby Township was notified. Council Member Tietz asked the Planning Commission to pay attention to the fact that there were concerns tonight about the ordinance amendment being too restrictive.

D. PUBLIC COMMENT:

Janet Moore – Troy resident, is concerned about fracking in Troy.

David Riley – Engineer, is concerned about property values near extraction sites.

Marla Wills – is concerned about the hazards of extraction facilities and the surrounding area.

E. ADJOURNMENT:

The Meeting **ADJOURNED** at 7:13 PM.



Mayor Dane Slater



M. Aileen Dickson, CMC
City Clerk

Hal Fitch
Chief, Office of Oil, Gas, and Minerals
Michigan Department of Environmental Quality

John Griffin, Executive Director
Associated Petroleum Industries of MI

Jim Nash
Oakland County Water Resources Commissioner

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1. What are the presenters' assessments of ordinances enacted in nearby cities?

Fitch: *I have not reviewed ordinances in nearby cities.*

Griffin: *API believes local ordinances are unnecessary and create a patchwork of regulations which have the impact of deterring production of minerals. Statewide regulation and oversight is best. We suggest that a particular industry should not be singled out for regulation if other industries or organizations operate in a similar fashion. (Restrictions on transportation, noise etc.)*

Nash: *Not being an attorney, I can't comment on other ordinances. I would suggest talking to FLOW for Water, at (231) 944-1568, for their opinion.*

2. What takes precedence: mineral rights or property rights?

Fitch: *First, let me clarify that mineral rights are property rights. The courts have found that the owner of the surface (if separate from the mineral owner) cannot prevent the owner of mineral rights (including oil and gas rights) from using the surface in a reasonable manner to extract his or her minerals.*

Griffin: *This issue is discussed in the attached legal memo.*

Nash: *In law, mineral rights are property rights. Most people would consider the right not to be polluted on their land as a property right. The balance of benefitting from your mineral rights and the effect on surrounding properties is what local communities must consider.*

3. If one were to compare Troy's proposed ordinance to Rochester Hills' ordinance, is Troy's proposed ordinance defensible?

Fitch: *I have not reviewed Rochester Hills' ordinance. I would advise caution in comparing ordinances as to what is "defensible," because the legal defensibility of any given ordinance may only be determined if it is challenged, and then it may depend on the specifics of the case.*

Griffin: *This question is for your attorneys to answer. The attached legal memo should be helpful in their research.*

Nash: *Again, talk to Flow for Water for legal advice on ordinances.*

4. If the City Council passed an ordinance, and it was challenged, would the City be sued and have damages assessed to the City?

Fitch: *This question calls for a legal conclusion and may depend on the details; however, another city in southeast Michigan—Farmington Hills—was sued because their ordinance was alleged to be unduly prohibitive, and the city settled for a substantial sum (see below).*

Griffin: *I again refer you to the legal memo for guidance, but we cannot speculate or give you legal advice. Answering such a hypothetical question would be difficult for anyone to answer without specifics.*

Nash: *The city could be sued over any ordinance, including this. I can't speak to the legal specifics.*

5. Could the presenters confirm the statement that the area of Troy does not lend itself for what hydraulic fracturing companies are looking?

Fitch: *The formations of interest for oil and gas development in the Troy area are not typically candidates for hydraulic fracturing.*

Griffin: *I will defer to Hal Fitch, the state geologist, who has made such a statement in the Oakland Press. A copy of the article is attached.*

Nash: *I can only repeat the claim that the formations aren't compatible with fracking. Future technologies may change that.*

6. When cities and townships create ordinances to control hydraulic fracturing, is it better to regulate in the big picture instead of each municipality adopting individual regulations?

Fitch: *First of all, it should be noted that hydraulic fracturing is just one aspect of the development of some oil and gas wells, and the practice of hydraulic fracturing itself has never caused environmental contamination in Michigan. We believe oil and gas development is most effectively regulated at the state level. The Michigan Department of Environmental Quality regulates essentially all aspects of oil and gas drilling and production intensively and comprehensively, and has the necessary technical and legal resources to do so. We have an excellent history of protecting the environment and public health and safety from damage by oil and gas development.*

Griffin: *Yes, assuming you mean statewide from a qualified regulating agency. A state's constitutional provisions relating to property rights needs to be recognized as well.*

Nash: *The companies would prefer only one set of rules for the state. Of course, all companies would prefer their industry not being regulated locally, but most don't have that option. Oil/gas extraction has many important pollution issues specific to the industry. While the basic rules are state-wide, local governments know better what their people want and need. Local health and welfare control over what can be done in their communities is important to government and people, so I believe it is our responsibility to protect our citizens as best we can locally.*

As I said when we met, the claim that "the practice of hydraulic fracturing itself has never caused environmental contamination in Michigan," is simply not accurate. Of the thousands of fracked wells in Michigan in 50+ years, almost none were ever tested before or after drilling to see if there was contamination. Lack of data is NOT proof of lack of a problem. Pre and post drill testing is important for long term public safety. And not all pollution comes from actual drilling; spills at sites, leaking

gas lines and air quality issues aren't directly related to drilling, but only happen at drilling sites and supply chain.

7. What is meant by the phrase "40 acres under lease and 3 acres to drill"?

Fitch: The DEQ establishes "drilling units," defined as a designated tract of land that can be efficiently and effectively developed by one well. The size and orientation depends on the characteristics of the target formation. For the formation of current interest in southeast Michigan (the "Trenton-Black River Formation"), 40-acre drilling units have been established. The units must be approximately square and based on government land survey lines. The oil and gas developer must have leases or other legal arrangements on all parcels within the unit giving the developer the right to drill and extract oil and gas from the unit, and each mineral owner shares in the proceeds of any production. About three acres is the minimum area needed for a drilling operation, consisting of a drill rig, pumps, fluid handling and storage, and truck loading area.

Griffin: I will defer to Hal Fitch to answer.

Nash: This is well explained by Mr. Fitch's answer.

8. Do property owners own their mineral rights and how can property owners find out if they own mineral rights on their land and how to get them if they don't own them?

Fitch: Mineral rights in a parcel may be owned by the owner of the surface or they may be owned separately by another person. A surface property owner can usually determine whether they own the mineral rights by searching the county records. Mineral rights, like other rights in a parcel, can be bought and sold, and a surface owner may negotiate with the mineral owner to purchase the mineral rights.

Griffin: It depends if the mineral and surface rights are unified or severed. That information can be found at the register of deeds office. For a surface owner to obtain mineral rights they do not own, they must acquire them from the mineral owner.

Nash: Mineral rights can go with the land, or they can be sold separately. Any particular property's mineral rights can be determined by checking the county Clerk/Register of Deeds.

9. How many wells in Michigan are horizontal wells and what percentage are in urban areas?

Fitch: About 1350 horizontal oil and gas wells have been drilled in Michigan out of a total of about 60,000 wells. There have been more than 1800 wells drilled in cities and villages in Michigan. We can confirm 17 of those to be horizontal wells; there are probably more in that category but it would require a detailed review of the records of each well to determine an exact number.

Griffin: The DEQ Oil Gas and Minerals Section compile those statistics. They can be found on their website at http://www.michigan.gov/deq/0,4561,7-135-3306_57064---,00.html

Nash: There are relatively few in urban areas, and most of those are in industrial areas. Until recently wells in highly populated areas were rare, and few state properties sold their mineral rights. Horizontal, fracked or conventional drilling all have issues that need to be addressed.

10. How does one know where the drilling companies may want to drill, so as to try to avoid limiting property rights?

Fitch: Only the oil and gas company knows where they may want to drill, and they do not generally disclose that information until they are close to making a decision. One can sometimes surmise where there is interest in drilling by learning where companies are leasing mineral rights.

Griffin: Companies will conduct seismic testing in areas where they believe recoverable oil and gas deposits could potentially be present. A company may then proceed to leasing mineral rights. Then in some cases an exploratory well is drilled. If the production company then believes sufficient deposits can be produced economically, a production well can be drilled. I will leave it to Hal Fitch to outline the public notice requirements under law and rule.

Nash: For many of the early operations that decide where to drill there is no way to know their plans. Some of their state filings are exempt from FOIA until actual operations begin. In Southfield last year the signs of development were sounding trucks driving on local roads, thumping the ground for seismic testing. The state lists all leases on the DEQ web site.

11. Has there been one incident of hydraulic fracturing in Oakland County?

Fitch: I am quite sure hydraulic fracturing has never been used in Oakland County; however, it would require a detailed review of each well record to confirm that. I can say with certainty there has never been a high-volume hydraulic fracturing operation (one using more than 100,000 gallons of fracturing fluid) in the county.

Griffin: Hal Fitch is the best to answer this.

Nash: Not that I am aware of. I am aware of a horizontal fracking operation in Livingston County and one was proposed in Washtenaw County, but I'm not sure it is operational.

12. Has there been a case in Michigan where horizontal fracturing has been undertaken?

Fitch: Hydraulic fracturing has been used in conjunction with horizontal drilling in about 40 oil and gas wells in Michigan.

Griffin: Yes. See the DEQ website for a list.

Nash: There have been some, but the industry is in its infancy in Michigan. One well in Northern Michigan used (and destroyed) 22 million gallons of water, and many communities are concerned about impacts of this technique.

13. A statement was made about settlements in two different lawsuits, please explain the difference in scenarios of the cases.

Fitch: In the first case, *Miller Brothers v. Department of Natural Resources*, the DNR refused to issue permits for oil and gas development within the Nordhouse Dunes Wilderness Area. The surface was owned by the United States and managed by the Forest Service, and the mineral rights were owned primarily by private parties and leased to Miller Brothers. There were multiple potential oil and gas reservoirs identified by Miller Brothers under the Wilderness Area, with a postulated very high value. The court ruled that the State had unlawfully deprived Miller Brothers and the mineral owners of their property rights. The State settled the case for more than \$90 million. In the

second case, *West Bay Exploration Co v. City of Farmington Hills*, the city denied permission for West Bay Exploration to drill a well from a requested surface location to a one-well target identified under the city. The city settled the case for a substantial sum (\$800,000, according to third party sources) and West Bay eventually drilled the well (a successful oil producer) from another surface location. It should be noted that every case may differ in detail, and may have to be weighed according to its merits and the degree of harm incurred.

Griffin: See the legal memo for information on the cases.

Nash: Mr. Fitch made a fair statement of the cases in his statement. I would again suggest you contact Flow for Water for better legal advice on this issue.

14. Does Troy lend itself to large-scale development in terms of opportunity?

Fitch: The potential scale of oil and gas development can only be determined by drilling.

Griffin: One can never know what the future holds. There has been limited development to date when compared to other areas. See the DEQ OGM website for a map of all wells drilled in the state. Note: The map has more than oil and gas wells so look at the legend.

Nash: This is only determined by the oil/gas extraction companies themselves, as determined by the testing they do themselves. The DEQ only regulates the actual drilling and ancillary issues once the permitting process actually begins.

15. Was Shelby Township notified when the exploratory drill was proposed?

Fitch: Yes. The DEQ notified the Shelby Township Supervisor, Richard Stathakis, twice – once when the first application for a permit to drill was received, and again when an amended application was filed.

Griffin: Hal Fitch can answer.

Nash: DEQ followed normal policy of notice. Again, only once actual drilling is decided on and the process officially begins do public notices begin, until then no one outside the company knows their plans.

Memorandum

To: The Honorable Arlan B. Meekhof, State Senator
The Honorable Kevin Cotter, State Representative

From: William A. Horn

Date: October 14, 2015

Subject: Analysis of Constitutional Protections for Property Rights, Including Oil and Gas Interests

Introduction

This paper examines the protections afforded to owners and lessees of oil and gas interests by the United States Constitution and the Michigan Constitution of 1963. The protections afforded those interests accrue because oil and gas interests are real property interests. There also are state constitutional protections that flow from the fact that oil and gas in place is a natural resource.

Executive Summary

A. Property Interests Enjoy Special Protections Under the State and Federal Constitutions

Both the federal and the state constitutions provide special protections for property. Both constitutions prohibit the taking of private property for public use “without just compensation.” See United States Constitution, Amendment V (“[N]or shall private property be taken for public use, without just compensation.”) Michigan Constitution of 1963, Article X §2 (“Private property shall not be taken for public use without just compensation. . . .”). Both constitutions also preclude state or local governments from depriving a person of property without due process of law. See United States Constitution, Amendment XIV (“[N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . .”) Michigan Constitution of 1963, Article I § 17 (“No person shall . . . be deprived of life, liberty or property, without due process of law.”).

B. Oil and Gas Interests are Property Interests Protected by These Constitutional Provisions

Whether or not a particular interest is “property” and, thus, protected under the constitutions is an issue resolved by reference to state property law. See *Board of Regents of State Colleges v Roth*, 408 US 504, 577 (1972) (“Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or

understandings that stem from an independent source such as state law-rules.”). There can be no question that oil and gas interests are property in Michigan:

We have held that oil and gas are a part of the realty until severed therefrom. *Eadus v. Hunter*, 249 Mich. 190, 228 N.W. 782; *Attorney General v. Pere Marquette Ry. Co.*, 263 Mich. 431, 248 N.W. 860, 94 A.L.R. 520. And it follows that a transfer of title or of a right in the unsevered oil and gas, together with the right to go upon the land for the purpose of taking the oil and gas therefrom, involves a granting of rights in real estate

Jaenicke v Davidson, 290 Mich 248, 303 (1939).

Further, “[o]il, gas, and leasehold interests such as those held by the plaintiff in the instant case are viable property interests with a value derived from the ability to produce the oil and gas.” *West Bay Exploration Co v City of Farmington Hills*, unpublished opinion per curiam of the Court of Appeals, issued June 19, 2001 (Docket No. 217590), p. 5. See also *Bass Enterprises Production Co v United States*, 381 F3d 1360 (Fed Cir 2004).

Discussion

A. Neither the State of Michigan Nor Its Political Subdivisions May Take Oil and Gas Interests Without Just Compensation

1. Regulatory Taking

The United States Supreme Court has long recognized that the government effectively takes a person’s property by overburdening the property with regulations. *Pennsylvania Coal Co v Mahon*, 260 US 393, 415 (1922) (“The general rule, at least, is that, while property may be regulated to a certain extent, if regulation goes too far, it will be recognized as a taking.”). “The rub, of course, has been-and remains-how to discern how far is ‘too far.’” *Lingle v Chevron USA Inc*, 544 US 528, 538 (2005).

The Supreme Court has split its discernment of what is “too far” into three categories (or, more accurately, two categories and one set of standards):

Our precedents stake out two categories of regulatory action that generally will be deemed *per se* takings for Fifth Amendment purposes. **First, where government requires an owner to suffer a permanent physical invasion of her property-however minor-it must provide just compensation.** See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982) (state law requiring landlords to permit cable companies to install cable facilities in apartment buildings effected a taking). **A second categorical rule applies to regulations that completely deprive an owner of “all economically beneficial use” of her property.** *Lucas*, 505 U.S., at 1019, 112 S.Ct. 2886 (emphasis in original). . . . **Outside these two relatively narrow categories** (and the special context of land-use exactions discussed below, see *infra*, at 2086-2087), **regulatory takings challenges are governed by the standards set forth in Penn Central Transp. Co. v. New York City**, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978).

The Court in *Penn Central* acknowledged that it had hitherto been “unable to develop any ‘set formula’” for evaluating regulatory takings claims, but identified “several factors that have particular significance.” *Id.*, at 124, 98 S.Ct. 2646. Primary among those factors are “[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations.” *Ibid.* In addition, the “character of the governmental action” - for instance whether it amounts to a physical invasion or instead merely affects property interests through “some public program adjusting the benefits and burdens of economic life to promote the common good” - may be relevant in discerning whether a taking has occurred. *Ibid.* The *Penn Central* factors-though each has given rise to vexing subsidiary questions-have served as the principal guidelines for resolving regulatory takings claims that do not fall within the physical takings or *Lucas* rules.

Lingle, 544 US at 538-539 (emphasis added). The Michigan Supreme Court has recognized all of the types of claims described in *Lingle*. *K & K Construction Inc v Department of Natural Resources*, 456 Mich 570, 576-577 (1998). So too has the Sixth Circuit Court of Appeals. *Tennessee Scrap Recyclers Association v Bredson*, 556 F3d 412 (CA 6, 2009).

a. Categorical Takings

A regulation resulting in a deprivation of all economically beneficial use is a taking for which compensation is due. Although several earlier Supreme Court cases acknowledged the “category,” *Lucas v South Carolina Coastal Council*, 505 US 1003 (1992) provides the most complete rationale for the rule:

We have never set forth the justification for this rule. Perhaps it is simply, as Justice Brennan suggested, that total deprivation of beneficial use is, from the landowner’s point of view, the equivalent of a physical appropriation. *See San Diego Gas & Electric Co. v. San Diego*, 450 U. S., at 652 (dissenting opinion). “[F]or what is the land but the profits thereof[?]” 1 E. Coke, *Institutes*, ch. 1, § 1 (1st Am. ed. 1812). Surely, at least, in the extraordinary circumstance when no productive or economically beneficial use of land is permitted, it is less realistic to indulge our usual assumption that the legislature is simply “adjusting the benefits and burdens of economic life,” *Penn Central Transportation Co.*, 438 U. S., at 124, in a manner that secures an “average reciprocity of advantage” to everyone concerned, *Pennsylvania Coal Co. v. Mahon*, 260 U. S., at 415. And the functional basis for permitting the government, by regulation, to affect property values without compensation—that “Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law,” *id.*, at 413—does not apply to the relatively rare situations where the government has deprived a landowner of all economically beneficial uses.

* * *

We think, in short, that there are good reasons for our frequently expressed belief that when the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking.

Lucas, 505 US at 1017-1019 (footnotes omitted).

b. Penn Central Balancing

Even if the regulation does not rise to the level of a categorical taking (for example by reducing but not eliminating all beneficial economic use), it may still require compensation if it is deemed a taking under the balancing test of *Penn Central*. The Michigan Supreme Court described application of the balancing test as follows:

In the . . . balancing test, a reviewing court must engage in an “ad hoc, factual inquir[y],” centering on three factors: (1) the character of the government’s action, (2) the economic effect of the regulation on the property, and (3) the extent by which the regulation has interfered with distinct, investment-backed expectations.

K & K Construction, 456 Mich at 577.

c. Denial of Oil and Gas Drilling Permits Has Been Found to Result in an Unconstitutional Taking

The Michigan Court of Appeals has decided takings claims involving owners and developers of oil and gas interests, finding that refusal to issue drilling permits deprived the owners and developers of all economically viable use of the property. In 1994, the court reasoned:

Plaintiffs’ mineral interests in the Nordhouse Dunes Area had one, and only one, economically viable use: the extraction of any oil or gas that might be found under the land. To extract oil and gas from the land, a well is needed. To be able to drill a well, a permit issued by the Supervisor of Wells is required. M.C.L. § 319.23; M.S.A. § 13.139(23). The director of the DNR is the Supervisor of Wells. M.C.L. § 319.3(1); M.S.A. § 13.139(3)(1). The director’s administrative action made it clear that no permits would be issued for drilling in the protected area. The director’s action prevents plaintiffs from extracting any oil or gas from the land. Consequently, by the exercise of its regulatory power, the government had so restricted the use of plaintiffs’ property rights that plaintiffs had been deprived of all economically viable use.

Miller Brothers v Department of Natural Resources, 203 Mich App 674, 679-680 (1994).¹

¹ The *Pennsylvania Coal* case that serves as the foundation of all regulatory takings cases was also about severed mineral rights:

“For practical purposes, the right to coal consists in the right to mine it.” *Commonwealth v. Clearview Coal Co.*, 256 Pa.St. 328, 331. What makes the right to mine coal valuable is that it can

In 2001, the Court of Appeals stated: “Oil, gas, and leasehold interests such as those held by plaintiff in the instant case are viable property interests with a value derived from the ability to produce the oil and gas. Denial of permits to drill for and produce oil and gas consequently cause actual and concrete injury to the holder of such interests, so much so that such denials have been held to be unconstitutional takings of property” *West Bay Exploration Co v City of Farmington Hills*, unpublished opinion per curiam of the Court of Appeals, issued June 19, 2001 (Docket No. 217590), pp. 5-6.

Where the legislation or regulation does not preclude all economically beneficial use there is no categorical taking even where the property at issue is an oil and gas interest. *Schmude Oil Inc v Department of Environmental Quality*, 306 Mich App 35 (2014) (Where oil and gas could be accessed through directional drilling, albeit at higher cost, economically beneficial use remained.). The *Penn Central* balancing test is then used to assess whether a taking has occurred based upon the unique facts of each case. While one can disagree with the factual findings and whether the proper balance was struck by the court in *Schmude Oil*, the correct legal principles were applied.

In summary, an otherwise valid regulation of oil and gas development can, and has been found in several cases to, constitute a taking of the oil and gas interest. The takings clauses of the federal and state constitutions do not invalidate such a regulation, or preclude its application; rather, they can require that just compensation be paid for the value of the oil and gas interest.

B. Neither the State of Michigan Nor Its Political Subdivisions May Deprive a Person of Oil and Gas Interests Without Due Process of Law

Although one might expect “due process” protections to be limited to the fairness of government procedures, it encompasses more. “[T]he United States Supreme Court has interpreted [the due process] clause to ‘guarantee [] more than fair process,’ [citation omitted] and to cover a substantive sphere as well, ‘barring certain government actions regardless of the fairness of the procedures used to implement them’ [citations omitted].” *Mettler Walloon LLC v Melrose Township*, 281 Mich App 184, 197 (2008).

“The essence of a claim of a violation of substantive due process is that the government may not deprive a person of liberty or property by an *arbitrary* exercise of power.” *Landon Holdings Inc v Grattan Township*, 257 Mich App 154, 173 (2003). In evaluating the due process propriety of zoning ordinances which limit or exclude certain land uses, the Michigan courts have stated:

To show a violation of substantive due process, “a plaintiff must prove (1) that there is no reasonable governmental interest being advanced by the present zoning classification, or (2) that the ordinance is unreasonable because of the purely

be exercised with profit. To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it.

Pennsylvania Coal Co., 260 US at 414.

arbitrary, capricious and unfounded exclusion of other types of legitimate land use from the area under consideration.”

Grand/Sakwa of Northfield LLC v Northfield Township, 304 Mich App 137, 153 (2014) citing *A & B Enterprises v Madison Township*, 197 Mich App 160, 162 (1992); see also *Landon Holdings*, 257 Mich App at 173-174. Reasonableness, in turn, depends on the facts in each case. *Korby v Redford Township*, 348 Mich 193, 197-198 (1957).

Therefore, state or local regulation of the development of oil and gas interests must comply with the due process provisions in the federal and state constitutions. Arbitrary, capricious, or unfounded exclusion or restriction of oil and gas development is constitutionally invalid.

C. Oil and Gas Interest Owners are Entitled to Equal Protection

The equal protection clauses in the federal and state constitutions also offer constitutional protections. “The Michigan and United States Constitutions provide coextensive provisions on equal protection. Both guarantee equal protection of the law.” *Maple BPA Inc v Bloomfield Charter Twp*, 302 Mich App 505, 519 (2013) (footnotes omitted).

The equal protection clauses apply to land use decisions made by governmental entities: “On its face, an ordinance which totally excludes from a municipality a use recognized by the constitution or other laws of this state as legitimate also carries with it a strong taint of unlawful discrimination and a denial of equal protection of the law as to the excluded use.” *Kropf v Sterling Heights*, 391 Mich 139, 155-156; 215 NW2d 179 (1974).

As is discussed in the next section, development of natural resources, including oil and gas, is deemed to be of paramount public concern by the Michigan Constitution. Thus, regulations prohibiting or excluding oil and gas development are subject to an equal protection challenge.

D. The Development of Natural Resources Such as Oil and Gas is of Constitutional Significance

Article IV of the Michigan Constitution of 1963 provides:

§ 52 Natural resources; conservation, pollution, impairment, destruction.

The conservation and development of the natural resources of the state are hereby declared to be of paramount public concern in the interest of the health, safety and general welfare of the people. The legislature shall provide for the protection of the air, water and other natural resources of the state from pollution, impairment and destruction.

Oil and gas are natural resources. *Northern Michigan Exploration Co v Michigan Public Service Commission*, 153 Mich App 635, 638 (1986); *Addison Township v Gout*, 432 Mich 627, 636 (1989) opinion vacated 433 Mich 1201 (1989) reasoning readopted 435 Mich 809 (1990). Thus, the Michigan Constitution declares that the development of oil and gas is of paramount public concern. The scope and extent to which this clause acts as a constitutional limitation on state and local regulation of oil and gas rights has not been definitively addressed by the courts.

However, as a constitutional provision, it is at a minimum, a background principle which warrants consideration when the state or local government seeks to regulate the development of oil and gas, or other natural resources.²

Conclusion

The federal and state constitutions contain coextensive protections that preclude the taking of property, including oil and gas interests, either directly or by way of burdensome regulation, without compensation. Both constitutions likewise preclude the government from depriving a person of property such as oil and gas interests without due process.

Both constitutions prohibit the government from adopting laws or regulations that treat oil and gas interest owners differently from other land users unless that differentiation is rationally related to a legitimate government interest. Finally, the Michigan Constitution of 1963 declares that development of Michigan's natural resources such as oil and gas is of paramount public concern.

Takings, due process, and equal protection claims have been frequently litigated in the federal and Michigan courts. The tests and factors to be considered are well-developed, but fact intensive and complicated to apply, whether by a court, or by a state or local unit of government considering regulation of oil and gas development. Judicial applications of the natural resource development provision in §52 of the Michigan Constitution of 1963 are rare; however, being part of the constitution, it should not be ignored by government decision-makers contemplating regulation of oil and gas development.

Mika Meyers PLC

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² Perhaps in recognition of this background constitutional principle, the Legislature has restricted local units of government in the use of their zoning authority to limit development of natural resources, "An ordinance shall not prevent the extraction, by mining, by valuable natural resources from any property unless very serious consequences would result from the extraction of those natural resources." MCL 125.3205(3).

ZONING ORDINANCE TEXT AMENDMENT

9. PUBLIC HEARING – ZONING ORDINANCE TEXT AMENDMENT (File Number ZOTA 247) – Oil and gas Extraction

Mr. Savidant reviewed the proposed Zoning Ordinance Text Amendment.

After a brief discussion, the members concurred the proposed language meets the intent of Planning Commission.

Resolution # PC-2016-01-008

Moved by: Hutson

Seconded by: Krent

RESOLVED, That the Planning Commission, after review of the comments of Hal Fitch, John Griffin and Jim Nash in connection with the draft of the oil and gas extraction ordinance, believes the proposed Zoning Ordinance Text Amendment is in the best interest of the City of Troy and that the City Council of the City of Troy adopt it as an ordinance.

Yes: All present (7)

Absent: Faison, Kuppa

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January 17, 2016 8:00 a.m. UPDATED 12 DAYS AGO

Oil drilling permit sought for church land in Southfield

UPDATED



By JAY GREENE

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Michigan Department of Environmental Quality

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Active oil and gas wells by county



Jordan Development Co. LLC, one of the oldest and largest oil and gas exploration companies based in Michigan, is betting against long-term low crude oil prices and has applied for a drilling permit in Southfield.

Raising some eyebrows and bucking a six-month moratorium on fossil fuel extraction recently approved by the **Southfield City Council**, Jordan has signed a lease agreement for the drilling with the **Word of Faith International Christian Center Inc.** at Evergreen and Nine Mile roads.

If the company gets a permit, said Ben Brower, a vice president with Traverse City-based Jordan Development, drilling of the 2,900-foot well will begin immediately and initially employ 50 workers for the 10-day project. The company has 450 total wells under its belt.

Ongoing employment would include one employee checking on the pump each day and another employee hauling oil with a truck every couple of days, he said.

A decision is expected this week on the drilling permit, said Hal Fitch, chief of the office of oil, gas and minerals with the **Michigan Department of Environmental Quality**.

Fitch said DEQ decided to delay its decision past the 50-day statutory period that ran out earlier this month after Jordan's Oct. 29 application generated more than 1,500 comments.

"There were only 20 to 30 opposing the project," said Fitch, who described the details of the drilling permit application as not unusual compared with the dozens of others DEQ has received the past several years.

Fitch said supporters overwhelmingly cited benefits of the revenue to the church and how it would help charitable and community causes. Opponents cited Southfield's moratorium; the potential impacts to public health, safety and the environment; and concerns over hydraulic fracturing.

Brower said Jordan does not plan to conduct hydraulic fracturing to extract gas from shale rocks. He said the church property is on top of a geological formation called a Niagaran reef made of porous rock. That structure makes the shale naturally fractured and doesn't require water to be injected at high pressure to remove gas.

Several neighbors of the church, including Larry Quarles and Skip Davis, contacted *Crain's* last week with their environmental concerns, including that water could be used in the extraction process.

"Oil is removed through natural pressure," Brower said. "Hopefully we take out only oil, maybe some gas, and not water. If gas and water comes up, we will truck the water off the site."

If gas comes up, Brower said, normal process is to either burn it off or transport it for sale to the nearest gas pipeline.

Quarles, a retired **IBM** engineer and one of the leaders of Stop the Drilling in Southfield, said he is concerned about the oil drilling for several reasons that include reduced property values, impact from potential methane gas air pollution and additional truck traffic through a neighborhood that is populated with schools and houses.

"We are a mile from the Rouge River. There has been no regard for the health and safety of our community," said Quarles. "The state has disregarded our (City Council) who says they do not want it."

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"There are a lot of active oil or natural gas producing wells right now in Oakland County," including the one proposed by Jordan Development in Southfield, said Fitch, noting most of the several dozen active wells are in unincorporated areas outside of the county's cities and villages.

Since last September, however, only one well is producing gas within a city limit in Oakland County out of about 66 active permits, Fitch said. This gas well is on property owned by **Michigan State University** at its management education center in Troy.

Michigan has more than 14,000 active and producing wells, including about 179 in Southeast Michigan, said the DEQ.

The majority are oil wells and are in St. Clair County, with 81 producing wells, followed by 34 in Washtenaw County, 25 in Livingston, 19 in Oakland, eight in Macomb, eight in Wayne and four in Monroe, the DEQ said.

Brower said Jordan hopes to tap into a major oil supply in Southfield on the church's 110-acre property. But he said low oil prices the past two years have slowed drilling in Michigan to levels he hasn't seen in 18 years.

"The prices are terrible, \$32.25 is the national number now per barrel. Southern Michigan gets \$6 less (because of transportation costs), so we are into the \$26-per-barrel range," said Brower.

"It does affect the drilling. Nobody has done anything (drilling) the last six months," he said. "We have been working on this project such a long time we want to get it started."

Brower said he hopes oil prices will rise later this year.

"It is right at the edge of not being profitable," he said. "We hope this is a long-term project where we make money when the price goes up."

Still, Brower said some of Jordan's dozen or so Southeast Michigan wells are producing oil and gas at good levels.



Photo by Word of Faith International Christian Center

Jordan Development Co. LLC has signed a lease agreement for drilling with the **Word of Faith International Christian Center Inc.** at Evergreen and Nine Mile roads in Southfield.

For example, a joint venture project between Jordan and Traverse City-based **West Bay Exploration Co.** on MSU property has produced about \$60 million of natural gas since the well was drilled in 2002, Brower said.

Brower said the MSU gas well has generated 8 billion cubic feet of gas the past 14 years. The state has earned \$ 6 million in royalties, and MSU earned \$12 million.

Andrea Simpson, director of public relations for Word of Faith, said the church granted permission to Jordan last summer after receiving written assurances the drilling would not damage the property or environment.

Simpson said Bishop Keith Butler told Jordan Development that the church was opposed to hydraulic fracturing to remove hard-to-get gas deposits.

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Simpson said that once people opposed to the drilling get accurate information about the project, "I think they would be OK with it."

Jordan's application states it has leased 40 acres for the Word of Faith project. The nearest occupied structure is a church building 525 feet away, 75 feet more than required by law. The nearest private building to the proposed well is 900 feet.

"We have a spot in dense woods that is very sealed from public viewing," Brower said. "The church very much wants it."

Simpson said the church signed the lease agreement because "it could be a source of income or revenue for the church" if oil or gas is found.

"We could do more mission work all over the world and community programs to help Southfield," Simpson said. She declined to state the percentage of royalties the church would receive from Jordan.

Founded in Detroit in 1979, Word of Faith moved to Southfield in 1998 for more space and to upgrade its facilities, Simpson said. The church also provides mission services of clothes, food, toys for kids, end-of-life care to seniors and other services in Southeast Michigan.

"We had a transitional living home for homeless young women (Agape House) and had to close it" after three years because of funding issues, Simpson said. "The home ultimately serviced over 20 young ladies (work and life skills) during the three years it was open."

Simpson said the church might consider reopening the house depending on how much revenue is generated if the oil drilling is successful.

Brower said Jordan became interested in a lease with Word of Faith after seismic tests indicated there might be a plentiful supply of underground oil in the Southfield area.

"We have drilled with partners a little farther west in Livonia with good success," said Brower. "We have quite a few wells in (Southeast Michigan) with lots of gas and oil. Not so much in Wayne County."

Brower said Jordan is a partner in three high-producing wells in Livonia with West Bay Exploration. "One well is over 200,000 barrels. That is good for anywhere in Michigan," he said.

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UPDATE

Protests are continuing Sunday morning at the Word of Faith church. Organizations tell me they have created a Facebook page, Stop the Drilling in Southfield, where news is posted.

On Feb. 17, the DEQ will hold a public hearing before they take action on Jordan's oil drilling permit. It will be held at 6 p.m. at the **Southfield High School Auditorium**.

Two town hall meetings have been held with several hundred people attending.

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HOUSE BILL No. 5389

February 18, 2016, Introduced by Rep. Lucido and referred to the Committee on Energy Policy.

A bill to amend 1994 PA 451, entitled "Natural resources and environmental protection act," by amending section 61506b (MCL 324.61506b), as added by 1998 PA 303.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

1 Sec. 61506b. (1) Except as provided in subsections (2) and
2 (3), ~~beginning on the effective date of this section,~~ the
3 supervisor shall not issue a permit for or authorize the drilling
4 of an oil or gas well ~~if both of the following apply:~~

5 ~~— (a) The well is~~ **IN A COUNTY WITH A POPULATION OF 750,000 OR**
6 **MORE UNLESS ALL OF THE FOLLOWING CONDITIONS ARE MET:**

7 **(A) THE PROPOSED WELL WILL BE** located ~~within 450~~ **AT LEAST**
8 **1,320 feet** ~~of~~ **FROM** a residential building.

1 ~~_____ (b) The residential building is located in a city or township~~
2 ~~with a population of 70,000 or more.~~

3 (B) THE LOCATION OF THE PROPOSED WELL AND THE OPERATION OF THE
4 PROPOSED WELL WILL BE IN COMPLIANCE WITH APPLICABLE LOCAL
5 ORDINANCES.

6 (C) THE DEPARTMENT HAS HELD A PUBLIC HEARING IN THE CITY,
7 VILLAGE, OR TOWNSHIP IN WHICH THE PROPOSED WELL IS LOCATED AND HAS
8 CONSIDERED THE PUBLIC INPUT FROM THAT PUBLIC HEARING.

9 (2) The supervisor may grant a waiver from the requirement of
10 subsection (1)(a) if the clerk of the city, village, or township in
11 which the proposed well is located has been notified of the
12 application for a permit for the proposed well and if either of the
13 following conditions is met:

14 (a) The owner or owners of all residential buildings located
15 within ~~450~~ 1,320 feet of the proposed well give written consent.

16 (b) The supervisor determines, pursuant to a public hearing
17 held before the waiver is granted, that the proposed well location
18 will not cause waste and there is no reasonable alternative for the
19 location of the well that will allow the oil and gas rights holder
20 to develop the oil and gas.

21 (3) Subsection (1) does not apply to a well utilized for the
22 injection, withdrawal, and observation of the storage of natural
23 gas pursuant to this part.

24 Enacting section 1. This amendatory act takes effect 90 days
25 after the date it is enacted into law.