

December 3rd, 2013

Mayor Mike Rawlings and the Dallas City Council
1500 Marilla, 5th floor
Dallas, TX 75201

Mayor Rawlings and Council members,

As you know, the City Plan Commission drafted a comprehensive new gas drilling ordinance over the summer, and its fate is set to be decided at a City Council meeting on December 11th. Whatever policy is ultimately adopted will govern any potential future gas drilling operations in Dallas for years to come. Will city-owned park land be open for future drilling proposals? How far away from homes, schools or businesses will drilling sites need to be? Will gas processing facilities and compressor stations be allowed in residential areas? The stakes are as high as they've ever been. **We urge you to vote to pass the gas drilling ordinance as proposed by the City Plan Commission and reject any efforts to delay or weaken it.**

Gas companies have lobbied hard against the new rules – especially the proposed 1,500 foot setback or buffer zone between drilling sites and residents. Their attorneys have apparently argued that a strong setback requirement would force them to sue the city for taking away industry's "right to drill" near neighborhoods. It's unconstitutional, they say. If this sounds familiar, it's because some also suggested a massive lawsuit when the Trinity East drilling permits were being debated. Those applications were denied, of course, and we're all still waiting for the suit. But it's also familiar because another municipality here in D/FW has already provided a perfect test case.

Flower Mound passed a new drilling ordinance that required gas companies to stay at least 1,500 feet away from homes, schools, parks, businesses, essentially anywhere people might be. Some gas companies did not think that was fair, and applied for drilling permits closer than 1,500 feet. Flower Mound stuck to its guns and denied the permits, so the gas companies promptly sued, five times. Flower Mound has won each time. Four cases have been dismissed and one case is pending, but it has been inactive since being filed in 2010.

Municipalities have the authority to enforce rules designed to protect their residents. Under previous state and federal rulings, determining the constitutionality of an ordinance includes an examination of the character and motivation of the governmental action. When considering setback requirements, Dallas is legally authorized to assess the role of the public health, safety and welfare in setting minimum distances. If that weren't true, then any setback distance above 300 feet – the weak, default state law for gas drilling – could be labeled as unconstitutional.

The heart of this policy is the idea that residents should be able to enjoy their private property and quality of life without being subjected to the negative impacts of a nearby industrial operation. Distance has much to do with this. Recent peer-reviewed studies have suggested a correlation between living near gas drilling sites and serious public health risks. Hazardous air and water pollution doesn't stop at property lines. Due to the uncertainty about the public health and environmental aspects of gas drilling, as well as the decrease in property values of surrounding neighbors, municipalities have a legal, justifiable basis for increased setbacks. Several D/FW cities have passed new rules increasing this distance. Fort Worth went to 600 feet, Southlake went to 1,000, Denton went

to 1,200, and Flower Mound set the bar at 1,500 feet. No city in Texas has been found to have unconstitutionally restricted property rights due to gas drilling setbacks.

We've had over three years of debate on this proposed ordinance, with a special Gas Drilling Task Force and a wealth of work by the City Plan Commission. It's time for Dallas to set strong standards and ensure that any future drilling operations will include the best possible public health and safety protections. After all, you shouldn't be guided by fear of litigation, but by your resolve to leave Dallas better than you found it. Mayor Rawlings, you put it this way during the City Council vote on the Trinity East gas drilling permits:

"We continue to grow, and there are generally too many unknowns in respect to urban drilling and its effects on our community's health and safety.... I will be supporting the efforts of our City Plan Commission on new gas drilling ordinances, to make sure the standards are such to ensure the safety of our citizens."

Please live up to this promise on December 11th.

Thank you,

Claudia & Ed Meyer, Mountain Creek Neighborhood Alliance
Marla Beikman, North Dallas Neighborhood Alliance
Terrence Welch & Cherelle Blazer, City of Dallas Gas Drilling Task Force members
Susybelle Gosslee, League of Women Voters of Dallas
Molly Rooke, Dallas Sierra Club
Zac Trahan, Texas Campaign for the Environment
Jim Schermbeck, Downwinders at Risk
Sharon Wilson, Earthworks' Oil & Gas Accountability Project

Attached:

Summary of case histories and legal justifications for a protective gas drilling ordinance
Summary of recent epidemiological studies concerning public health impacts

Drilling Setbacks are not Unconstitutional or “Inverse Condemnation”

- Under state (*Sheffield v. Glenn Heights*) and federal (*Penn Central v. City of New York*) case law, in determining whether there has been an unconstitutional taking, a court looks at (1) the character of the governmental action, (2) the economic impact of the regulation upon the claimant and (3) the extent to which the regulation has interfered with distinct investment-backed expectations.

- Looking solely at the drilling setback distance legally misses the point—if Dallas is concerned that increased setbacks will result in an unconstitutional taking of property, then why would adopting a 1000-foot setback or a 600-foot setback instead of the current 300-foot setback be constitutional, but a setback of 1500 feet is unconstitutional? Wouldn't any setback in excess of the current 300-foot setback result in an unconstitutional taking of property? There simply is no case authority in Texas that a 1000-foot setback is constitutional whereas a 1500-foot setback is unconstitutional.

- The key factor that is being overlooked by many in Dallas is the basis for the proposed 1500 foot setback. When considering setbacks, Dallas is legally authorized to assess the role of the public health, safety and welfare in setting setback distances. Due to the uncertainty about the public health and environmental aspects of gas drilling as well as the decrease in property values of surrounding neighbors, Dallas has legal, justifiable bases for increased setbacks, including but not limited to:

- Protection of property values of nearby residents
- Protection from noise/sound and light
- Protection of surface and subsurface water
- Air quality protection
- Environmental safeguards
- Gas drilling is a heavily regulated industry unlike other property uses
- Insurance requirements in the event of an accident
- Visual safeguards such as landscape screening, walls and fences and other buffering techniques
- Protection of public health

- No city in the State of Texas has been found to have unconstitutionally taken someone's property (mineral or surface estate) due to gas drilling setbacks.

- One city that has been sued, Flower Mound, has withstood every legal challenge to its drilling regulations (which regulations at the time had as little as 300-foot setbacks in certain instances). The legal challenges were not to the setback distances, but the failure to approve variances to the setback distances. Five lawsuits have been filed against Flower Mound since 2008—4 cases have been dismissed, one case is pending, but it has been inactive since being filed in 2010. There has been no finding by any court of an unconstitutional taking of property.

- The closer gas drilling is allowed to protected uses through setback variances, the “bar is set” at that reduced distance. In Flower Mound, 80% of drilling sites obtained variances, the majority of which were setback distance variances, even when setbacks could be lowered to 300 feet in certain instances. It is reasonable to anticipate that practically every application to drill will contain a setback variance request, regardless of the mandated setback.

Public Health Studies Providing Evidence to Support Protective Setbacks

The following are four recent epidemiological studies and a statement from the Center for Disease Control for your review. All of these were published after the Dallas Gas Drilling Task Force completed its work and issued its official recommendations. The City Plan Commission was given this material during its deliberations in drafting its recommended gas drilling ordinance.

1) Published in 2012, University of Colorado Denver School of Public Health: "*Human health risk assessment of air emissions from development of unconventional natural gas resources*". This is widely considered, for the time being, as the most comprehensive epidemiological study done in the gas field itself. It was conducted over a 3 year period. Residents living up to a half-mile away from drilling sites were found to have a 66% greater risk of cancer.

"Residents living $\leq \frac{1}{2}$ mile from wells are at greater risk for health effects from natural gas drilling than are residents living $> \frac{1}{2}$ mile from wells. Subchronic exposures to air pollutants during well completion activities present the greatest potential for health effects. The subchronic non-cancer hazard index (HI) of 5 for residents $\leq \frac{1}{2}$ mile from wells was driven primarily by exposure to trimethylbenzenes, xylenes, and aliphatic hydrocarbons."

2) A study published this year by the Winship Cancer Institute of Emory University. It is very relevant because elevated levels of benzene were found in air monitoring samples at over 90% of the hundreds of gas drilling sites tested during a city-wide air pollution study in Fort Worth.

Home distance from benzene sites linked to lymphoma risk
Reuters Health, 7/29/2013

"How far a person lives from a manufacturing plant that releases the chemical benzene into the environment may determine their risk of developing immune system cancer, a new study suggests. Researchers at the Winship Cancer Institute of Emory University in Atlanta looked at rates of non-Hodgkin lymphoma in that state found that risk for the disease fell with every mile between a person's home and facilities that release benzene."

3) A 2012 report from Elaine L. Hill of Cornell University, "*Unconventional Natural Gas Development and Infant Health: Evidence from Pennsylvania*". This is a study released in 2012 that established a link between fracking wells and low-weight births, this time as far as a mile and a half.

"A mother's exposure to fracking before birth increases the overall prevalence of low birth weight by 25 percent. Hill also found a 17 percent increase in 'small for gestational age' births, and reduced health scores. Hill's paper looked at birth measures, including birth weight and premature birth, for those born in Pennsylvania starting in 2003, before fracking began. The study used data through 2010 and focused on those living up to 1.5 miles from gas development sites."

4) A 2012 study of animal health in the gas field - *"Impacts of gas drilling on human and animal health"*.

“Reduced milk production, gastrointestinal, neurological, urological issues and sudden death are just a few of the symptoms experienced by livestock living near natural gas fracking sites, according to by a veterinarian and a researcher from the Department of Molecular Medicine at Cornell University. The paper was reportedly the first peer-reviewed study linking fracking with health issues in animals that are intended for human consumption. It examined case histories of 24 farms in six states in which fracking occurs. The authors say their study illustrates how certain aspects of gas drilling operations may lead to health problems for humans and animals, although they also caution that ‘complete evidence regarding health impacts of gas drilling cannot be obtained due to incomplete testing and disclosure of chemicals, and nondisclosure agreements.’

In addition, homes near some of the gas drilling sites were tested. Two families, whose homes showed high levels of benzene, were experiencing ‘fatigue, headaches, nosebleeds, rashes and sensory deficits,’ among other symptoms.”

5) A 2012 statement on fracking by the Centers for Disease Control: *“We don’t know enough to say whether drilling near residents is safe.”*

“Dr. Vikas Kapil of the National Center for Environmental Health at the U.S. Centers for Disease Control and Prevention gave a presentation in January 2012, calling for more research on gas drilling before committing to it as a nation because medical experts don’t know enough about the potential risks from fracking liquids.

‘We do not have enough information to say with certainty whether shale gas drilling poses a threat to public health.’

Chemicals used in fracking should be monitored, and drinking water wells should be tested before and after drilling. Studies should examine ‘all the ways people can be exposed’ to fracking products, including through air, water, soil, plants and animals. One huge issue is that there is no accepted medical standard for the symptoms that may come from exposure to gas drilling activities.”