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To: New York Conference of Mayors (NYCOM)
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Re: Negotiating a Municipal Oil & Gas Lease

Legislative/Policy decision first: WHETHER to lease!

I. Authority to Lease Municipal Lands

(Town Law §64; Village Law §1-102(1) and §4-412; and General City Law §20)

- Duty to safeguard public lands is paramount
- IF it will not interfere with the public use (see Opn. State Comptroller 80-113)
- Must be fair and adequate consideration (see 1975 Opn. Atty General [Inf.] 130).
- Towns - subject to permissive referendum (Town Law §64)
- Villages - by resolution only, but see additional requirements of §4-412(3)(10)
- Not subject to competitive bidding (See 16 Opn. State Comptroller 489)
- Subject to SEQRA review (for authorization of the lease)

II. BUT Different for Parklands.

- Lease of municipal parkland is subject to the ALIENATION process
- Requires special legislation from New York State ("home rule legislation")
- "No net loss" of parkland.
- Go to www.nysparks.state.ny.us and click on publications for the "Handbook on the Alienation and Conversion of Municipal Parkland."
- Old Comptroller's opinion (77-430) regarding gas "pooling" agreement.
- BUT according to counsel for NYSOPR&HP, still an alienation.

III. Important Lease Negotiation Considerations:

- **Whether to do an addendum or a new lease**
 - Some companies are very detailed with their “standard” lease, others are not
 - If you write a whole new lease, you know what is in the document and can clean up a lot of ambiguous language
 - Some companies may not negotiate unless you use their standard lease
- **Check the definitions!** Assume nothing. Oil & gas leases use a lot of defined terms (example: “Force Majeure”)
- **Define the lease operations carefully** - Is it subsurface only? Is it drilling only? Does it include storage, compression, or any other operations?
- **What (exactly) is being leased?**
 - Need to check the property descriptions and tax map numbers to ensure you are leasing the correct parcels
 - Roads - are lands under municipal roads included? Should they be? (subsurface only)
 - Distinguish: is the road owned in fee (by deed) or only an easement?
 - Beware of leases that have language including contiguous or adjacent or adjoining land, even if it is not specifically designated in the lease as the leasehold premises.
- **Don't be afraid to re-define the lease term.** Most leases have language that makes it very easy for the oil & gas company to easily extend the lease term. The municipality should limit the ways the lease can be extended. Obviously if there is a producing well, the municipality may want to make sure the lease stays in place, as there will be continuing royalty checks. However, the municipality will not want the land tied up by the company because they are storing oil or gas, or if they are doing exploratory work. Figure out how activity in the unit will affect your lease.
- **Figure out how the royalties are calculated and make sure it works for your municipality.**
 - Do not allow the companies to take their expenses off the top.
 - When exactly are the payments to be made? Mailed? Received?
 - Who is authorized to accept payment? Designate one person, such as the Clerk.
 - Require meters on wells so everyone knows how much production is occurring
 - Require sworn statements providing: (1) itemized accounting of oil and/or gas produced from each well, (2) the gross amounts of oil and/or gas

produced since the last report, (3) the market value of Oil on the applicable delivery dates and (4) the Lease price of gas during the applicable Lease periods.

- **Public Emergencies**

- Require Lessee to cease operations in the event of a declared public emergency.
- Require Lessee to meet with municipality's emergency services prior to commencing operations, to determine emergency protocols and inform the municipality of routes of ingress and egress to and from the Leasehold.

- **Notices** - Designate who is going to receive any notices and at what address. Don't want a situation where the Highway Department is receiving notices that would be more appropriately sent to the Town or Village Clerk.

- **Assignment** - Gas leases are often assigned. Who remains obligated in the event of an assignment? (Sample Language: *No assignment by the Lessee or change or division of ownership of the Leasehold Premises, rentals or royalties, however accomplished, shall operate to enlarge the obligations or liabilities or diminish the rights, powers or privileges of Lessor. No such assignment or change or division in ownership shall be binding upon Lessor for any purpose until Lessor shall be furnished with a certified copy of the recorded instrument or other legally authenticated written evidence of such assignment or change. Should Lessee assign this Lease in whole or in part, Lessor shall look solely to the Lessee for the performance of all duties and obligations hereunder, whether express or implied.*)

- **Surface Notice and Site Approval** -

- Will there be any structures allowed on the municipal property? Should there be?
- How close to buildings? Buildings in existence at the time of signing the lease, or buildings that may be in existence in the future? What about neighboring properties?
- If allowed, only upon prior written approval from the Lessor.

- **Water** - Protect the water supply!

- Restrict or prohibit operations near the water supply.
- Consider a baseline water quality test of nearby water sources(before, during and after drilling)
- Clarify responsibility in the event of damage. (*Sample Language: In the event any activity carried on by Lessee pursuant to the terms of this Lease damages, disturbs, or injures Lessor's fresh water well or other water source, Lessee shall at its sole cost and expense, correct any such damage, disturbance or injury.*)
- Consider bonds, letters of credit, etc.

- **Environmental Concerns-** What should the municipality be able to expect during and after production? Need to address:
 - Soil erosion
 - Top-soils and sub-soils
 - Returning the land to its pre production state, post production
 - Debris
 - Fencing & gates
 - Equipment
 - Timetable for doing the above
 - Removal/disposal of waste water
 - Truck traffic and routes

- **Indemnification** - Use broad indemnification language, including defense of claims, payment of judgments, reasonable attorney fees, and ability for the municipality to participate in a defense.

- **Environmental Indemnification** - Need to consider not only local codes, ordinances and state law, but also (1) the Clean Air Act; (2) The Federal Water Pollution Control Act of 1972; (3) the Resource and Recovery Act of 1976; (4) The Comprehensive Environmental Response, Compensation and Liability Act of 1980; (5) the Toxic Substances Control Act; (6) The New York State Environmental Conservation Law; (7) The New York State Public Health Law; (8) The New York State Navigation Law; and (9) RCRA and SARA- The Superfund Amendment and Reauthorization, including future environmental laws.
 - Use broad environmental indemnification language which includes the actions of Lessee, its agents, employees, contractors, subcontractors, visitors, customers, sub-lessees, heirs, successors or assigns.

- **Warranties and Representations of Lessee**
 - Validly formed legal entity
 - Duly permitted by all applicable government agencies to conduct its operations.
 - Agreement to obtain all permits required by law prior to commencing operations and to provide copies of permits to the Lessor.
 - No violations or notices of violations of any governmental order, law or regulation.

- **Independent Contractor Status** - Make sure there will be no future claims for workers' compensation coverage, unemployment insurance benefits, social security coverage, or retirement membership or credit.

- **Insurance** - The kinds of insurance that should be required are as follows:
 - Policy covering the obligations of the Lessee in accordance with the provisions of the Worker's Compensation Law, Employers Liability, and Disability Benefits.
 - Commercial General Liability Insurance, covering liability arising from premises operations, independent contractors, products-completed operations, broad form property damage, personal and advertising injury, pollution, cross liability assumed in the Lease (including tort liability of another assumed in the Lease).
 - Comprehensive Business Automobile Liability Insurance. Such insurance should cover liability arising out of any automobile including owned, leased, hired and non-owned automobiles.
 - The gas company should require that any assignee, or subcontractor(s) hired carry insurance with the same limits and provisions as provided herein.
 - Establish appropriate required limits for the insurance policies.

- **Freedom of Information Law concerns** - The Lessee should agree to provide the municipality with any records which must be released in order to comply with a request pursuant to the Freedom of Information Law. Possible compromise is to allow the oil company time and opportunity to identify material which may be protected from release and to support its position.

- **Boilerplate language** -
 - Choice of law and venue- most oil & gas companies are from out of state
 - Arbitration
 - Contradiction between Lease and Addendum- Addendum prevails
 - If there is criminal activity- municipality will want a built in mechanism to get out of the lease
 - Entire agreement
 - No changes unless in writing
 - Failure to insist on strict performance- no waiver
 - Waiver not binding unless in writing