

AN ANALYSIS OF GARDINER'S LAWS IN RESPECT TO THE PRESERVATION OF THE
SHAWANGUNK KILL'S RIPARIAN ZONE AND FLOODPLAIN FOREST

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For presentment at the November 20, 2018 Planning Board Meeting

At our October 2018 meeting, the Planning Board Chair requested that I provide the basis for the assertion that the proposed Heartwood development must include a riparian buffer zone that would place all structures (other than fences) well outside of the natural floodplain forest that lines the perimeter of the Shawangunk Kill and adhere to the 535-foot buffer recommendation in the Open Space Plan.

Below is the legal authority for this assertion.

First, Gardiner's Zoning Law Special Permit provisions require protection of environmentally sensitive areas. This protection is for all wildlife and not confined to threatened and endangered species.

§220-65 D (1)(a) states:

To the maximum extent practicable, development shall be located to preserve the natural features of the site and to avoid wetland areas, steep slopes, significant wildlife habitats and other areas of environmental sensitivity.

Second, Gardiner's Zoning Law's scope and authority explicitly refers to Gardiner's Comprehensive Plan and the purpose of this plan

§220-3 states in relevant part:

This chapter is enacted pursuant to the authority and power granted by the Municipal Home Rule Law of the State of New York, Article 2, § 10 et seq., and Chapter 62, Article 16, of the Consolidated Laws, in conformance with the updated Town of Gardiner Comprehensive Plan, adopted by the Town Board in December, 2004 (as it may be modified from time to time), to advance the goals of the Town of Gardiner Comprehensive Plan. This chapter is adopted to protect and promote public health, safety, comfort, convenience, economy, natural, agricultural, and cultural resources, aesthetics, and the general welfare, and for the following additional specific purposes:

The Zoning Law's Scope and Purpose is replete with provisions that protect the environment and specifically the Shawangunk Kill and its adjacent areas. Relevant provisions include:

§220-3 A

To conserve the natural resources and rural character of the Town by encouraging development in appropriate locations and by limiting building in areas where it would adversely affect the Town's predominantly rural pattern and scale of settlement;

§220-3 B

To minimize negative environmental impacts of development, especially in visually and environmentally sensitive areas such as the Shawangunk Ridge, along the Wallkill River, **Shawangunk Kill**, Palmaghatt Kill, Mara Kill, and their tributaries, in aquifer and aquifer recharge areas, and on steep slopes, erodible soils, wetlands and their buffers, floodplains, active farmlands, and other designated open space resources identified in the Comprehensive Plan;

§220-3 D

In recognition of the economic value of Gardiner's natural beauty and environmental amenities, to protect the integrity of scenic views, ridgelines, steep slopes, agricultural land, existing and potential recreation areas, waterways, ground and surface water supplies, ecological systems, wetlands, wildlife habitat, and natural vegetation, and to maintain environmentally significant open space in its predominantly undeveloped state, in order to maintain property values and preserve the open and rural character of the Town;

§220-3 N

To preserve the natural beauty of the Town as provided in the Comprehensive Plan, especially the unique ecological and scenic resources of the Shawangunk ridge and escarpment, and to guide development consistent with maintaining the Town's natural, scenic, and ecological resources.

§220-3 O

To provide a flexible system of land use regulation that enables the Town's economy and population to grow, while preserving the most important natural, historic, scenic, architectural, and cultural features; and

§220-3 P

To base such flexible land use regulations on the unique characteristics of the landscape, the needs of the people of the Town of Gardiner, the property rights of landowners to make economically beneficial use of their land, and the impact of proposed land uses on the natural and human environment, and to

avoid patterns of development that adversely affect the scenic, historic, rural, and natural character of the Town.

As set forth in Gardiner’s Zoning Law Definitions, the “Comprehensive Plan or Master Plan adopted by the Town Board for the future preservation and development of the Town of Gardiner pursuant to § 272-a of the Town Law, including any part of such plan separately adopted and any update or amendment to such plan.”

Page 29 of Gardiner’s Comprehensive Plan discusses protection of riparian zones, not just surface waters:

The Town of Gardiner should seek to protect the riparian zones associated with the Shawangunk Kill and other important waterways in the Town. According to the “Rural Design Workbook” published by the Southern Tier Regional Planning Board (STRPB):

Riparian zones are vegetated areas along the banks of streams, consisting mainly of trees, that form a transitional boundary between aquatic and terrestrial ecosystems. Riparian zones are critical to the health of the environment by acting as a buffer that protect and maintain streams within their respective watersheds. In riparian zones, upland areas merge with nearby streams, rivers, lakes, and other water bodies, allowing for a crucial exchange of energy and matter to occur. (STRPB, Rural Design Workbook, p. f-2.)

The Town can protect these zones by ensuring it requires adequate setbacks for development, and/or require site plan review for activities with riparian zones established by the Town. In addition, the Town should coordinate its efforts with the Shawangunk Kill watershed study being conducted by the National Resources Conservation Services (nee Soil and Water Conservation Service) in Orange and Ulster counties.

Page 29 of Gardiner’s Comprehensive Plan further discusses creation of an open space plan.

The Town should create its own open space plan. As indicated earlier, the community survey indicated some willingness of Town residents to support bonds or taxes to acquire open space. However, the open space plan does not have to be strictly a land acquisition plan. It should include an inventory of existing open space, a system for establishing priorities for protection and specification of implementation techniques, including the identification of funding sources to support any acquisition associated with the plan. While acquisition of key parcels can play a role in implementation, **much open space can be protected using regulations (e.g., setback standards, incentive zoning,**

etc.) voluntary donation of conservation easements by land owners (including easements to provide access to adjoining public lands) and other approaches.

Indeed, pursuant to the Comprehensive Plan, the Town has created such an Open Space Plan. Chapter III, Page 22 of the Open Space Plan specifically refers to the forests of the floodplain forest beside the Shawangunk Kill. It states:

Also of particular importance in Gardiner are the large **remnant patches of floodplain forest that line the Shawangunk Kill**, especially the southern reach in Gardiner. According to the Hudson River Estuary Program, there are 27 remnant patches, of which there are “two larger core areas that have the potential to be larger.” Rare plant species are also found along the Shawangunk Kill, particularly as it reaches the junction with the Wallkill River. **Protection and potential expansion of floodplain forest along the Shawangunk Kill should be given high priority.**

As such, the Plan calls for the expansion, not the impairment of the floodplain forest.

Chapter IV, page 46 of the Open Space Plan discusses the importance of wildlife, habitat, and wildlife diversity.

The 5-mile Shawangunk Kill corridor **is one of the town’s most important wildlife resources, as it provides habitat for a diversity of wildlife**, including rare and endangered species.

Chapter IV, page 46 of the Open Space Plan discusses the recommended buffer to protect such biodiversity and explicitly refers to wildlife corridors.

Similar to the Wallkill River, **a conservation buffer of 535 feet or more is recommended to protect the river’s water quality as well as its integrity as a wildlife corridor.** For more information on the many resources associated with the Shawangunk Kill, see the detailed discussion of the Shawangunk Kill South conservation hub at the end of this chapter.

The Planning Board is obligated to fulfill the provisions set forth in zoning law. Gardiner Zoning Law §220-62 H (2) states:

In granting a Special Permit, the Planning Board may impose **any conditions** which it considers necessary to fulfill the purposes of this chapter. These conditions may include increasing dimensional or area requirements, requiring the set-aside of perpetual open space land pursuant to §220-20, specifying location, character and number of vehicle access points, requiring landscaping, planting

and screening, requiring clustering of structures and uses in order to preserve environmental resources and minimize the burden on public services and facilities, and requiring action by the applicant, including the posting of performance bonds and furnishing of guarantees to insure the completion of the project in accordance with the conditions imposed.

Allowing structures to be placed within the Shawangunk Kill floodplain forest will erode the biological integrity of the forest onsite and the surrounding area. It will also set a bad precedent for the surrounding residentially-zoned land.

Gardiner's Special Permit Law §220-65 D (1)(d) states:

Where appropriate, setbacks shall maintain and continue the existing setback pattern of surrounding properties.

The Planning Board must consider the impact to the Shawangunk Kill, ecosystems, buffers areas, natural resources, environment, the land use district, and perhaps most importantly, the purpose of this section of law, which is to comply with the Comprehensive Plan.

§220-63 B states:

Before granting or denying a Major Project Special Permit, the Planning Board shall make specific written findings establishing whether or not the proposed Major Project:

1. Will comply with all applicable land use district, overlay district, floating district, and other specific requirements of this and other chapters and regulations, and will be consistent with the purposes of this chapter and of the land use district in which it is located.

6. Will not materially degrade any watercourse or other natural resource or ecosystem, or endanger the water quality of an aquifer.

7. Will be suitable for the property on which it is proposed, considering the property's size, location, topography, vegetation, soils, natural habitat, and hydrology, and, if appropriate, its ability to be buffered or screened from neighboring properties and public roads.

8. Will be subject to such conditions on operation, design and layout of structures, and provision of buffer areas or screening as may be necessary to ensure compatibility with surrounding uses and to protect the natural, historic, and scenic resources of the Town.

12. If the property is in the SP, RA, or HR district, will have no greater overall off-site impact than would full development of the property with uses permitted by right, considering relevant environmental, social, and economic impacts.

In sum, the Heartwood project should not include the siting of any structures in the floodplain forest of the Shawangunk Kill. The project should adhere to the 535-foot buffer recommendation set forth in the Open Space Plan. There is no hardship to the applicant to move these structures outside this recommended buffer zone. This is especially so when the applicant is seeking a special permit which requires the Planning Board to assess the impact to surrounding community. A wildlife corridor by its very nature requires contiguous land that reaches outside the borders of the applicant's parcels.

Out of about 100 people who have expressed their views on the proposed project, only about five people have stated their approval of the project. One of those individuals lives miles away on Sheldon Rd., a subdivision in the SP district that was approved before the zoning laws were drafted. Other individuals were in favor of it because they believe that it will help local business. Most of the other individuals that have expressed their views have cited the negative impact to the Shawangunk Kill environment should structures be placed within the 535-foot buffer zone. The Planning Board must consider these comments.

The Planning Board must also consider impairment to the floodplain forest should structure be cited in the buffer area. This includes:

- The wildlife management plan does not provide any method of pest control. Raccoons, skunks, mice, and other small mammals attracted to the structures will be a nuisance to guests and ticks will be a hazard. Virtually any method of eradication/mitigation will have a negative impact on the floodplain forest ecosystem;
- Lights and noise will have a negative impact on wildlife that use the floodplain forest for a wildlife corridor;
- Foot traffic will impair the forest floor causing erosion and disturbance to tree roots and vegetation;
- The citing of the structures including their impervious surfaces and in ground utilities will cause erosion to the banks of the floodplain forest; and
- The applicant has contended that the trees will be maintained to the maximum extent practicable, but provides no assurance as to these trees actually thriving or surviving.