

12/11/2005 Comments to the Gardiner Town Board

Last Tuesday I spoke of the proposed zoning law as a regulatory taking. Some of you seemed very interested in hearing more about that and asked that I submit something in writing.

I'm going to break my comments down into the following:

- 1) Is there a loss of value to landowners affected by the zoning law?
- 2) If so, does this constitute a regulatory taking?
- 3) Is this fair?
- 4) What can the board do?
- 5) Regulatory takings in the courts.

Is there a loss of value to landowners affected by the zoning law?

In a word, yes.

I know my own lot best so I'll use that as an example. My lot goes from 44/55 to the top of the ridge. Under the proposed zoning law, because some of my lot is in SP-2 and SP-3, the building site all the way back at 1800', with the most privacy, in SP-3, would be prohibited. Because of the provision requiring me to build at the lowest possible elevation, according to the law, I wouldn't even be able to build in SP-2, because the lowest part of my lot is in SP-1. Because of the provision in the law that requires limiting driveway length to the first available building site, again I wouldn't even be able to build in SP-2, as the first available building site is in SP-1. All of these things mean any house I would be allowed to build under the law would be very close to my neighbors and very close to 44/55. My lot is only 225' wide. The only way one can gain any degree of privacy and any degree of value is to build as far back as possible.

Under current zoning law the value of my lot has been estimated at 400-450K. Under the proposed law, with a building site a few hundred feet off 44/55 and close enough to my neighbors to hear their phone ring, the value of my lot would be much less. Other landowners along the ridge would be similarly affected.

Proponents of the law argue regulated lots will increase in value because: abutting protected land increases lot value, and the economics of reducing supply (with regulation) and therefore increasing demand, will result in higher lot prices. Neither of these rebuttals makes any sense. Almost all of the lots being regulated already abut the approximately 24,000 acres that comprise the Mohonk Preserve, Minnewaska State Park, Sam's Point Preserve, and other contiguous protected lands. Requiring lot owners to add to that will not raise lot values. Regarding the supply and demand argument, restricting what landowners can do with pre-existing lots neither increases or decreases supply. My one lot will still be my one lot. Restricting the use of pre-existing lots does nothing to decrease supply or increase value. The only affect will be to decrease value.

A credible argument could be made that, all other things being equal, design restrictions will increase value. The decrease in value as a consequence of extreme siting restrictions greatly offsets any marginal increase in value as a result of design restrictions.

Last Tuesday night, Matt argued that the \$6500 an acre TPL is paying for Awosting demonstrates that regulations increase the value of land. But land not threatened by the cloud of the zoning law is selling for much more than \$6500 an acre in Gardiner. Let's look at Bill Connor's lot(s) as an example. Bill is selling 44 acres with three houses for \$1,680,000. The houses are small so let's say the total square footage is 3000 feet and the value per square foot, because of the poor condition, is \$100. That makes for \$300,000 in housing on the land. Let's generously estimate that Bill has done \$100,000 of engineering and site work. Deduct \$400K from \$1.68M, then divide by 44 acres and a value of just over \$29,000 an acre is established. That's what raw land is selling for in Gardiner under the current zoning law, at least in my neighborhood.

Matt's argument about the value of Bradley's land is disingenuous. The threat of the zoning law scared many offers away when Awosting went on the market. Without the cloud of the proposed draconian zoning law, Awosting is probably worth at least twice what TPL is paying for it.

If a committee of three objective real estate appraisers and three objective realtors were to assess the impact of the law on land values, they would likely agree unanimously that land values would decrease significantly. The only people who argue that the zoning will increase or not affect the value are ideologically oriented. To them any rationalization will do. The ends of preserving the land justifies the means of harming their neighbors.

Is this decrease in value a regulatory taking?

Again, in a word, yes.

Emminent domain is a taking in which title to the land changes. A regulatory taking is one in which development rights are taken through regulation but title does not change hands.

Is this fair?

No.

The courts grant regulatory bodies wide discretion in balancing the rights of the many against the rights of a few in regulatory, or partial, takings of property, and rightly so. Without this discretion, any zoning change, however insignificant, would entitle the regulated to compensatory relief. The great discretion afforded the town board should be used wisely and unfairly however. The proposed zoning law is an unwise and unfair use of that discretion.

It's unfair because for every modification in the zoning law, responding to landowner concerns, there has been a countervailing modification, restricting use. Now land use is so restricted in the proposed SP-3 that building is effectively prohibited.

The proposed zoning law is unwise because abutting land conservation organizations, who offered paltry sums in the past, have been involved so intimately in the development of both the master plan and the proposed zoning law. The resulting zoning law that so greatly

favors the interests of the local land preservation community, at the expense of their small abutting landowners, has enraged those landowners.

The proposed zoning law is unfair and unwise because it requires great sacrifice from a few for the benefit of the many. The many have shown no interest in paying for the goods (open space on the ridge) they are ordering through their elected officials. Simultaneously, talk of protecting open space in the valley seems predicated on the use of TDR programs and of bonds to fund voluntary PDR programs. This has sown great distrust among ridge landowners and it will inspire an enmity that will last for years.

The proposed zoning law is unfair and unwise use of the discretion afforded the town board because it will bring great harm to long time residents Charlie Bales, Bruce and Carol Keeping, Charlie and Marybeth Majestic, and Pauline Alexander, among others. Pauline is a great example. If the ridge has a Grande Dame, it's Pauline. She is far too gracious to be contentious. But she will be harmed by this law. How can the proponents of the law treat such a gracious woman so thoughtlessly? How can the board condemn Charlie Bales to an anxiety ridden retirement where he cruises the pet food aisle at the supermarket for food, for himself?

The board, arguably, has a mandate from the electorate to protect open space on the ridge. There are fair, wise, and equitable ways to do that. The proposed zoning law, as written, isn't one of them.

What can the board do?

- 1) Eliminate all siting restrictions in 200-13.1. I'd be happy to go through the law, with anyone interested, to propose specific changes.
- 2) Change the law to encourage shared driveways to minimize environmental impact while still allowing landowners to extract the value they currently have in their land.
- 3) Use the same TDR and PDR programs likely proposed for protection of open space in the valley, to protect open space on the ridge.
- 4) Facilitate fair market offers from land conservation organizations like the \$100 million Open Space Institute, the Mohonk Preserve, and the \$4 billion Nature Conservancy.
- 5) Above all, collaborate with ridge landowners to protect open space on the ridge without destroying the fabric of our community.

Regulatory Takings in the Courts

A concise, but still comprehensive, discussion of the constitutionality of regulatory takings is here:

<http://www.cato.org/pubs/regulation/reg16n3g.html>

Two other illuminating sites are here:

<http://www.law.georgetown.edu/gelpi/takings/>

<http://www.law.georgetown.edu/gelpi/takings/courts/index.htm>

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