SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ULSTER

Application of

HILARY ADLER, JOHN BOHAN, GERALYN TORRONE, LAURIE WILLOW, MARK GUENTHER, NEIL RINDLAUB, KATHRYN ADORNEY, JUDITH BOZSIK, EUGENE BOZSIK, GAIL YOUNG, PATRICIA HAZLETT, GEORGE HAZLETT, JONATHAN LOZIER, RICHARD SMITH and KATHRYN NAVY,

Petitioner-Plaintiffs,

For a judgment pursuant to CPLR Articles 30 and 78

-against-

PLANNING BOARD OF THE TOWN OF GARDINER and SHINRIN YOKU, LLC,

Respondent-Defendants.

Index No. _____

**VERIFIED PETITION AND COMPLAINT**

Petitioner-Plaintiffs HILARY ADLER, JOHN BOHAN, GERALYN TORRONE, LAURIE WILLOW, MARK GUENTHER, NEIL RINDLAUB, KATHRYN ADORNEY, JUDITH BOZSIK, EUGENE BOZSIK, GAIL YOUNG, PATRICIA HAZLETT, GEORGE HAZLETT, JONATHAN LOZIER, RICHARD SMITH and KATHRYN NAVY ("Petitioners"), by their attorney, EMILY SVENSON, as and for their Verified Petition and Complaint ("Petition") allege as follows:

## NATURE OF THE ACTION

1. This is a combined CPLR Article 78 and declaratory judgment proceeding to annul and void a series of determinations by respondent Town of Gardiner Planning Board ("Planning Board" or "Board") to approve the development of an 80-building

lodging, dining and event facility known as Heartwood ("Project" or "Resort") in a rural area of the Town of Gardiner.

2. This Petition requests this Court to review and annul four Planning Board determinations relating to the Project. These include 1) a determination of nonsignificance ("Negative Declaration"; Exhibit A) under the State Environmental Quality Review Act ("SEQRA"; ECL Article 8); 2) a lot line revision ("Lot Line Revision"); 3) a special permit ("Special Permit"); and 4) approval of a site plan ("Site Plan" and "Site Plan Approval"). The Planning Board issued the Negative Declaration on May 15, 2018. The Planning Board approved the Lot Line Revision, Special Permit and Site Plan Approval (collectively, the "Development Approvals") in a single resolution on January 15, 2019 ("Approval Resolution"; Exhibit B).

## JURISDICTION AND VENUE

3. This Court has jurisdiction to issue the relief requested in this proceeding pursuant to CPLR 3001, 7801, 7804(b), and the common law of this State.

4. Venue is properly laid in Ulster County, pursuant to CPLR 504(2), 506(b) and 7804(b), as the County where the Town of Gardiner is situated, where the subject development is located, and where all of the petitioners reside.

5. The Court has personal jurisdiction over Respondents pursuant to CPLR 301.

## INTRODUCTION

6. Petitioners bring this action to challenge a series of determinations by the Planning Board that approved an expansive and intrusive lodging facility, restaurant and wedding venue in a quiet, rural and ecologically sensitive location.

7. Petitioners are neighbors of the Project site ("Subject Property"), who chose to purchase or renovate homes in this area because of its quiet and natural beauty. The Town's zoning should have protected their enjoyment of their land, and their investment, by only allowing low-density residential development or similar low-intensity use on adjacent properties.

8. The size and intensity of this commercial proposal will create numerous environmental impacts, including loud and frequent noise, wildlife habitat destruction, and groundwater demand. The Planning Board failed to thoroughly analyze these impacts as required by the State Environmental Quality Review Act ("SEQRA"; ECL Article 8).

9. The Project does not qualify for a special permit because it could not fulfill the Town Code's requirement that it would have equal or less impact than uses allowed by the zoning.

10. The Project also failed to comply with several zoning requirements of the Town Code.

11. Despite these deficiencies, the Planning Board approved the Project.

12. Petitioners ask this Court to review and vacate the Negative Declaration and Approval Resolution as arbitrary and capricious and contrary to law, declare the Site Plan unlawful, and provide other related relief.

**PETITIONER-PLAINTIFFS**

13. Thirteen of the fifteen Petitioners own property within 500 feet of the Project site. As a result, they received notice of the Project's application and public hearings pursuant to Town Code Section 220-59.1.

14. All Petitioners will experience multiple direct impacts from the Project, as detailed below.

15. JUDITH and EUGENE BOZSIK have owned and resided on a 22-acre parcel of land at 2746/2750 Route 44-55 in the Town of Gardiner for 36 years. The eastern boundary of the Bozsiks' property abuts the Subject Property. The area designated for agriculture in the Project proposal would abut the Bozsiks' land. The noise and visual impacts of the Resort as well as the barn, farmstand, home, and related activities that could occur in the agricultural area would damage the Bozsiks' quality of life and their ability to enjoy their property. Increased runoff from the Project will also damage their property. The Bozsiks' property is a significant asset for them, and they have planned to subdivide or sell the property in the future to support their retirement. The area of their property nearest the Subject Property would be the most valuable for a new home as it has views of the Shawangunk Ridge. The Bozsiks' property will be significantly less desirable with a Resort directly adjacent, causing a substantial decrease in the value of this important asset.

16. NEIL RINDLAUB and KATHRYN ADORNEY have lived at 31 Pure Honey Lane full-time since 2009, after building their home on 62 acres of wooded land in 1999. Their property abuts the Subject Property, and the southern boundary borders the

Shawangunk Kill. The residential neighborhood to their west is quiet and unobtrusive. The Resort will introduce hundreds of guests and employees, and regular amplified music, in jarring contrast to their current quality of life and ability to enjoy their property. The project will also damage their property value.

17. LAURIE WILLOW and MARK GUENTHER have owned a 10-acre lot on the Shawangunk Kill at 40 Pure Honey Lane since 1997, and built their home there a few years ago. Noise from the project will travel through the Shawangunk Kill river corridor and infringe on their enjoyment of their home. While enjoying the outdoors on their deck, they have heard amplified music from the Yogi Bear Jellystone campground 1.7 miles down river. At only approximately 2,000 feet away, the Resort's noise will also reach their property. Ms. Willow has also expressed concerns about the agricultural operation which could become an additional tourist attraction on the Subject Property, as agri-tourism is popular in Ulster County.

18. JOHN BOHAN and GERALYN TORRONE own and reside at 38 Tinkers Lane in the Town of Gardiner. Their property is approximately 300-400 feet from the Subject Property to the northeast. They can see the Subject Property from their yard. Mr. Bohan and Ms. Torrone chose their home because of its quiet, rural setting, and they spend a significant amount of time outdoors on their 1.7 acres. Ms. Torrone enjoys gardening and caring for her yard. Mr. Bohan reads on the patio. They regularly entertain outdoors with family and friends. Ms. Torrone is very sensitive to sound and appreciates living in a quiet place where she can sleep with the windows open in nice weather. The noise from weddings and events at the Resort which will force them to close windows and curtail outdoor activities on their property, significantly infringing

their ability to enjoy their property. They anticipate that the noise and nuisance of the Resort will reduce the value of their property by 15-20%. Groundwater use at the Resort could affect their well. There is no public water available, so all residents rely on individual wells. If the Resort's water use depletes the groundwater, especially during the summer months, Mr. Bohan and Ms. Torrone risk having their well run dry.

19. The following Petitioners all live on McKinstry Road. Their properties lie on the opposite side of the Shawangunk Kill from the Subject Property, facing the streamside forest. Most will be able to see and hear the cabins proposed within the forest. In addition to hearing the noise and seeing the commotion of events and activities in the central area the Resort, the vacationers lodging in the cabins and recreating in the forest and in the river itself will be directly across the Shawangunk Kill ravine from them.

20. GAIL YOUNG purchased her home at 94 McKinstry Road in 2011. Her property's 800 feet of river frontage was the main reason she chose it. She walks and sits by the river almost every day. She reports that enjoying the quiet and solitude, and communing with nature, is an integral part of her life. The buildings of the Resort will be visible from Ms. Young's home. The noise from Tuthilltown Distillery and Jellystone campground, can make it impossible to enjoy a summer evening on her deck. Noise from the Resort directly across the river will make this problem much worse. Many of the birds and animals that make their home on her property will leave as a result of activities at the resort.

21. PATRICIA and GEORGE HAZLETT have lived in their home at 102 McKinstry Road since they built the house in 1972. They have always enjoyed sitting outside in the evening enjoying the view of the river, but they already have to curtail that

due to noise from Tuthilltown Distillery and Jellystone campground. The addition of the Resort would add significant noise from events and activity. Vacationers are likely to trespass on their property as they recreate in the river corridor, if the project is built. The Hazletts also appreciate the river otter, bald eagle and other wildlife which inhabit the river corridor but will likely leave due to activity at the project if it is built. The Resort will also reduce the value of their home.

22. JONATHAN LOZIER and his wife purchased their home at 110 McKinstry Road in 2009. They grew up in the area and wanted to raise their family there, so they purchased an older home to renovate. They chose their home based on the quiet privacy for recreation and wildlife observation. They regularly observe bald eagles, osprey and owls that use the Shawangunk Kill as a flight corridor. Mr. Lozier and his family spend much of their time outdoors, including reading or eating on the back porch, swimming and fishing in the river, hosting quiet camp fires, gardening, bee-keeping, and daily walks. They keep windows open most of the year. The Resort will be directly across the ravine from them, with the cabins at a similar elevation to their home. They expect to hear amplified music until 10:00 PM, cars (and car alarms), voices of vacationers conversing and talking on their phones, and other noise from the Resort. They also expect trespassing on their property.

23. RICHARD SMITH has owned property and resided at 126 McKinstry Road in Gardiner for 19 years. His property borders the Shawangunk Kill across from the project, and his house is elevated from the river corridor at approximately the same level as the Resort's cabins. When the trees are not in full leaf, Mr. Smith will be able to see the cabins from every room in the back of his house including the kitchen, living room,

master bedroom and guest bedroom, as well as from his lower and upper decks. Mr. Smith and his wife spend a great deal of time outdoors, gardening, relaxing on their backyard deck, barbequing and entertaining friends and family. In summer, they spend a great deal of time at the river, fishing, swimming or simply sitting on the banks relaxing and enjoying the quiet and the beauty. From his property, Mr. Smith will be able to see the Resort and hear all of its activities, including guests on the paths and in the river. Currently when people occasionally swim and recreate in the river, Mr. Smith can hear them clearly from his back deck. The noise from hundreds of guests at the proposed Resort will substantially alter the quiet environment he currently enjoys, and he anticipates he will need to sell his house.

24. KATHRYN NAVY and her husband moved into their home at 132 McKinstry Road in 1986. Later they invested in a substantial renovation to add to their enjoyment of their home and property, including the views of the river. The Navys' property has 363 feet of river frontage, and they maintain trails to the river to enjoy year round. The main buildings of the Resort would be directly across from their property, and they expect to see the buildings and cabins from most of the rooms of their house and their deck. They will clearly see and hear guests recreating in the river and forest. Noise is a significant concern as Ms. Navy's husband suffers from tinnitus in both ears, and the amplified noise of the Resort will greatly aggravate the ringing in his ears.

25. HILARY ADLER moved to 184 McKinstry Road in February 1998. Her property borders the Shawangunk Kill and the home is directly across the river from the proposed cabins. In 2013, she and her partner invested in a substantial renovation, and she became part owner of the property. Their investment in the property was based on an

expectation that the property across the river would remain quiet, since the zoning would only allow it to be developed as a low-density residential neighborhood. The Resort will substantially change the view from the home, as it will be visible all year from almost every room in the river-facing side of the house including the master bedroom, guest bedroom, living room, dining room and kitchen. Ms. Adler enjoys using her property year round to walk in the woods and to the river, and play with her dogs. In nice weather she enjoys sitting on the deck, dining on the deck and gardening in the yard. She can already hear the Jellystone and Tuthilltown facilities when they have events with amplified music, and the noise from the proposed Resort will be much closer and more disruptive. Ms. Adler will experience an additional impact because she works from a home office during the weekdays and will be exposed to the noise of vacationers throughout the day. Unlike residential neighborhoods in which many people are not at home during the day, the Resort will be active with guests throughout the day.

**RESPONDENT-DEFENDANTS**

26. On information and belief, Respondent-Defendant PLANNING BOARD OF THE TOWN OF GARDINER purports to be the statutory planning board of the Town, with an address at 2340 Route 44/55, Gardiner, NY 12525. The Planning Board issued the Negative Declaration and Development Approvals.

27. On information and belief, Respondent-Defendant SHINRIN YOKU, LLC ("Developer") is a New York limited liability company with an address at 57 S. 4th Street, Brooklyn, NY 11249. On information and belief, Shinrin Yoku, LLC is the

applicant for the Project, the recipient of the Development Approvals, and the owner of the lands on which the Project is proposed.

## THE PROPERTY

28. The Project is proposed for two adjacent parcels located on Route 44/55 in the Town of Gardiner. According to the Ulster County tax maps, SBL 93.4-1-42.100 is approximately 97 acres and SBL 93.4-1-41.120 is approximately 44 acres. Both are owned by defendant Shinrin Yoku, LLC.

29. The Town of Gardiner is a rural community at the base of the Shawangunk Mountains. Much of the mountain ridge in Gardiner is preserved as Minnewaska State Park. The community consists of a quaint central hamlet surrounded by farms and forests. It is crisscrossed by the Wallkill River and Shawangunk Kill. Residential homes and neighborhoods are interspersed.

30. The Subject Property was formerly used as a tree farm, the Rosedale Nursery, and has in recent years existed as open shrub and grassland.

31. The Subject Property is surrounded by low-intensity housing, farming and forests. It is bordered on the south by the Shawangunk Kill and on the north by State Route 44/55. Residential homes surround the property to the north and west and across the Shawangunk Kill to the south.

## THE PROJECT

32. In or about February of 2017, the Developer applied to the Planning Board for several approvals to build a Resort: a Special Use Permit to allow a lodging use,

which is not allowed as of right in the zoning district; a Site Plan Approval; and a Lot Line Revision to significantly reconfigure the boundary between the two parcels.

33. The Resort is an expansive proposal that would include a central complex comprised of a lobby, restaurant, event barn, spa and pool; 70 cabin units housing two to four lodgers; outdoor facilities including tennis and bocce courts; parking lots; roads; and pathways throughout the site including down to the Shawangunk Kill.

34. Up to 225 guests would be regularly present at the Resort, in addition to employees. Guests would come to the site for events including weddings and parties, to dine at the public restaurant, or to lodge in the cabins. The cabins offer sleeping and bathroom accommodations, but much of the lodgers' time would be spent outdoors on the site.

35. Events would be held both inside the event barn and outdoors. These events would include amplified music until 10:00 PM.

**THE APPLICABLE ZONING FOR THE SUBJECT PROPERTY**

36. The Subject Property is located in the Town's Rural Agricultural zoning district.

37. The Rural Agricultural zoning district allows residential subdivision with a 5-acre minimum lot size. Town Code § 220-11, Dimensional Table. For a parcel the size of the 141-acre Subject Property, that would equate to approximately 28 homes.

38. In addition to residential homes, uses allowed by right in the Rural Agricultural district include farms, timber harvesting, nature preserves, municipal services and similar low-intensity uses.

39. Some uses are prohibited entirely, and some are allowed if they qualify for a special permit. Lodging facilities are allowed by special permit only. Restaurants are allowed by special permit in limited circumstances: "[o]nly in connection with agricultural use, or as provided in § 220-10I," which allows adaptive reuse of existing buildings. Town Code § 220-10, Use Table.

40. For any use to be granted a special permit, the Planning Board must make detailed findings, including that the use would have no greater off-site impact than development by right. Town Code § 200-63(B).

41. In order to maintain Gardiner's "historic scale and character" the Town Code places a limit on the size of nonresidential structures. Town Code § 220-11, Dimensional Table, at footnote 10. In the Rural Agricultural zoning district, the "maximum footprint for nonresidential structures" is 6,000 square feet. Town Code § 220-11, Dimensional Table.

42. The Town Code also applies protections to sensitive environmental resources. The Wetlands and Watercourse Protection law prohibits structures within 100 feet of the top of a streambank. It further places limits on structures within 150 feet of the top of a streambank. Town Code § 220-35.

**PROCEDURE BEFORE THE PLANNING BOARD**

43. Shinrin Yoku's representatives first appeared before the Planning Board on January 17, 2017 for a preliminary sketch plan review and presentation of the Project.

44. On February 3, 2017, the Building Inspector forwarded Shinrin Yoku's application to the Planning Board. The Building Inspector's letter explained that a lodging facility would need a Special Use Permit.

45. On March 10, 2017, the Building Inspector issued an additional letter describing his interpretation of how building footprint would be calculated.

46. At the March 21, 2017 Planning Board meeting, the Board commenced its SEQRA review. The Board was required by SEQRA to identify and analyze potential environmental impacts. 6 NYCRR § 617.7.

47. The Board determined that the project was a Type I action under SEQRA for three reasons: it would alter more than 10 acres, it would introduce a nonagricultural use within an agricultural district, and it is near the historic Tuthilltown Grist Mill. 6 NYCRR §§ 617.4(b)(6)(i), 617.4(b)(8) and 617.4(b)(9).

48. The Planning Board held public hearings in August, September and October 2017. Numerous neighbors of the project spoke out about the Project's environmental impacts. These impacts included noise, visual intrusion, groundwater depletion, and harm to the Shawangunk Kill and its riparian habitats.

49. The public hearing was closed in October 2017 even though additional materials were still being produced.

50. At no point did the Planning Board thoroughly analyze noise impacts, wildlife habitat impacts, or groundwater impacts. *See,* Affirmation of Emily Svenson, sworn February 18, 2019 ("Svenson Aff."); Affidavit of J. Theodore Fink, sworn February 18, 2019 ("Fink Aff."); Affidavit of Dr. Erik Kiviat, sworn February 18, 2019 ("Kiviat Aff.").

51. At its May 15, 2018 meeting, the Planning Board voted to issue a SEQRA Negative Declaration, certifying that the Project would have no significant impacts on the environment. As it was based on wholly inadequate analysis of substantial impacts, the Negative Declaration was arbitrary and capricious. Svenson Aff. ¶¶ 91-136

52. The Negative Declaration specifically cited and relied on the preservation of 54 acres as open space, protected by a conservation easement, in determining that the project would not cause any significant adverse environmental impact.

53. The Planning Board held public hearings on the Site Plan and Special Permit applications at its August and September 2018 meetings.

54. Numerous residents spoke out with concerns about the Project, including its ineligibility for a special permit and its violations of Town Code. Svenson Aff. ¶¶ 137-44.

55. The public hearing was closed on September 18, 2018.

56. In October and November 2018, the Developer submitted proposed easement language for the agricultural parcel of the Subject Property, after all opportunity for public comment had closed. The easement revealed plans for an intensive agribusiness use on lands that had been relied upon as open space. Svenson Aff. ¶¶ 145-55.

57. On January 15, 2019, the Planning Board adopted the Approval Resolution, granting Site Plan Approval, Special Use Permit and Lot Line Revision.

58. For the following reasons, those approvals should be annulled.

**SEQRA REVIEW**

59. The Planning Board's SEQRA review of the Project glossed over several critical issues that indicated the likelihood of significant adverse environmental impact, which requires a positive declaration and a full environmental impact statement.

*Noise*

60. Noise is certain to emanate from the Resort, and will have a substantial effect on the surrounding neighborhood. Svenson Aff. ¶¶ 37-59.

61. The Resort is designed to accommodate hundreds of daytime guests and overnight vacationers who will spend much of their time outdoors. It will also host weddings and parties with amplified music, including outdoor amplified events.

62. The project is separated from the homes to the south, along McKinstry Road, only by the ravine formed by the Shawangunk Kill and its banks. Both the Project and the homes are well above the creek, essentially facing each other across the ravine.

63. Accordingly, sound from the Resort will readily travel across the ravine to neighboring homes.

64. Other neighbors abut the Project site to the east and west.

65. The applicant produced a simplistic, two-page noise study. The study did not and could not accurately analyze the noise impacts because of three significant omissions.

66. First, the study did not measure actual ambient noise during the evening or night time hours, only during the day. Fink Aff. ¶ 42.

67. Second, the study only considered receptor points along two property boundaries: State Route 44/55 and the Shawangunk Kill. Svenson Aff. ¶ 48.

68. Of all the property boundaries, the highway and river have the highest levels of background noise.

69. The applicant tactically used the elevated baseline to assert that amplified noise from the project would not raise noise levels substantially above ambient levels.

70. However, the study did not consider how much noise would reach homes surrounding the site, including properties that abut the site directly to the west, with no river or highway in between.

71. On the south side of the property, noise was modeled at the Shawangunk Kill at the bottom of the ravine.

72. However, in reality, noise from the Resort will travel directly across the ravine to the homes and will not be masked by the sound of the river below.

73. Petitioners alerted the Planning Board to this deficiency in the study, but the Board made no attempt to assess the noise levels that would reach existing homes. Such a study could have easily been conducted. Fink Aff. ¶ 38, 43.

74. As a third flaw, the noise study only considered amplified music at the event space and did not assess other noise from the project, including the impact of vacationers recreating around the cabins and at the river.

75. This noise source is much closer to the neighbors across the Shawangunk Kill than the event space is.

76. The Planning Board never studied the volume or range of noise from human activity in the forest, separate from the noise of amplified music.

77. In addition to the volume of noise, the Planning Board should have considered the frequency of loud events. The Resort could host multiple weddings and parties each week.

78. The Ulster County Planning Board recommended that the Planning Board consider limiting the number of events to be hosted annually, or imposing conditions like limiting musical performances to inside the event barn. Svenson Aff. ¶ 56. The Board did not.

79. Further, the noise study was based on limiting noise to the maximum decibel limits specified in the Town Code, but the Planning Board ignored a second Code restriction that prohibits nuisance noise whether or not it meets the numerical code standard. Town Code § 220-40(C)(3).

80. The Planning Board failed to thoroughly analyze any of these issues as required by SEQRA.

*Ecological Impacts*

81. Along the Shawangunk Kill on the southern border of the Subject Property, there is a slope rising steeply from the water's edge which then levels off to a flat area that comprises the bulk of the site. The slope is heavily forested from the water's edge to approximately 400-500 feet from the stream. The flat area is generally open grassland.

82. The streamside forest is an important part of the Shawangunk Kill ecosystem, an unusually healthy and rich riparian ecosystem. Kiviat Aff. ¶¶ 7-15. Svenson Aff. ¶¶ 63-67.

83. The Resort would introduce 28 cabins, with a total daily occupancy of 56 people, in and adjacent to this riparian forested slope, as well as a path through the forest to a gathering area on the creek. Hundreds of guests could traverse this path daily.

84. The placement of these cabins in the forested slope is completely unnecessary, since there is ample area on the flat land for the cabins.

85. The Developer's analysis of the Resort's impact on the riparian forest and stream corridor, consists only of a short ecological report. The report mischaracterized the Project as "primarily in a pre-existing cleared area formerly used as agricultural lands." It went on to consider habitat for only three species of animals and one species of plant, and concluded that they would not be affected. Svenson Aff. ¶ 71.

86. In response, Petitioners submitted reports from experts Hudsonia and Greenplan that described the important ecosystem value of the Shawangunk Kill not only for endangered species but also for robust ecological communities. They described the erodiblity of the soils. They cited numerous scientific and governmental reports supporting the importance of preserving the forests along the Shawangunk Kill.

87. These reports should have triggered the need for further SEQRA analysis of the Project's effects on the streamside forest habitat, including analysis of alternatives like relocating the cabins outside the natural forest.

88. In addition to other government agencies and private research, the Town of Gardiner itself has designated the forests beside the Shawangunk Kill as essential for protection. The Subject Property is squarely within two categories of protected land under the Town of Gardiner's Open Space Plan: the Shawangunk Kill corridor and the

Shawangunk Kill/Wallkill Confluence hub. Svenson Aff. ¶¶ 68-70, Open Space Plan appended as Svenson Aff. Exhibit I.

89. The Open Space Plan, adopted by the Gardiner Town Board in January 2007, ranks land in the town using an Open Space Priority Score system to measure the importance of preserving respective parcels. The land along the bank of the Shawangunk Kill at this site was ranked in the highest category.

90. The Open Space Plan states: "The 5-mile Shawangunk Kill corridor is one of the town's most important wildlife resources . . ." It recommends "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." Svenson Aff. Exhibit I at 46.

91. The Planning Board's November 15, 2017 discussion reflected a fundamental misunderstanding, suggesting that the 535-foot buffer recommendation was a conservation ideal but not a Town-adopted policy. During a discussion of whether a 535-foot buffer is appropriate, "Mr. [Planning Board member Warren] Wiegand noted that the Town Board had not approved or adopted that proposal." Svenson Aff. ¶ 112.

92. Contrary to Mr. Wiegand's statement and apparent confusion the Open Space Plan was duly adopted by the Town Board.

93. The Planning Board was obligated to consider and apply the Open Space Plan in determining the impact of proposed development in sensitive areas addressed by the Plan.

94. In addition to misunderstanding the Town's own environmental policies, the Planning Board further erred by relying on the Project's compliance with different river-related law, the state Department of Environmental Conservation ("DEC")

regulations for Recreational Rivers, as proof that the river corridor was adequately protected. Svenson Aff. ¶ 115-19.

95. A permit certifying that the Project is compatible with recreational use of the river does not equate to an evaluation of the impact of the Project on the river corridor's wildlife habitats, let alone a judgment that the Project will not affect the habitat and water quality that the Open Space Plan sought to protect.

96. Operating under these misunderstandings, the Planning Board failed to recognize its responsibility to fully analyze the Project's impacts on the streamside forest.

97. As the accompanying affidavit of Dr. Erik Kiviat details, the placement of cabins within the streamside forest is likely to disturb habitat for multiple species and degrade water quality. Kiviat Aff. ¶¶ 10-22, 33. Dr. Kiviat has directed the ecological research organization Hudsonia for more than 30 years.

98. If the Board had recognized the potential significant impact of allowing development to intrude into this forest, it would have required the Developer to complete an Environmental Impact Statement that would have required consideration of an alternative that preserved the forest habitat.

*Groundwater*

99. The neighborhood surrounding the Project Site entirely relies on well water to supply drinking water.

100. The Resort's new well will withdraw a substantial amount of water, and likely would draw down the aquifer, particularly in the dry summer months.

101. The Developer submitted a report in July 2017 that included results of a 24-hour pumping test.

102. The Planning Board's environmental consultant, Sterling Environmental, questioned the sufficiency of this test. In a September 14, 2017 letter, Sterling recommended that a 72-hour pumping test would ensure "a higher level of confidence with respect to the long-term well yield." It also determined that the report's conclusion that the pumping test had no effect on nearby private wells was "unsubstantiated" because the test had improperly been conducted while the wells were in use. Svenson Aff. ¶ 82.

103. The Developer's only response regarding well water was: "[Ulster County Department of Health] was consulted before the test was performed, and its requirement was a 24 hour pump test." Svenson Aff. ¶ 83.

104. Fulfilling the Health Department's requirement for well testing does not demonstrate that the Project's water use would not have an impact on the water table that would affect neighboring residents.

105. Residents continued to demand a more rigorous pumping test, to ensure not only that there is adequate water for the Resort, but that the Resort's use would not draw down the groundwater levels to the point that neighbors' wells would run dry.

106. The Planning Board never required any follow up testing, as recommended by its own consultant. Without any further investigation, the Board had no way of knowing whether the Resort's water usage would affect neighboring wells.

**REPLACEMENT OF MITIGATIVE OPEN SPACE WITH FARM USE**

107. Throughout the project review, the applicant repeatedly promised to place the portions of the Subject Property that the Resort would not utilize into conservation easements.

108. These sections would include ecologically sensitive areas and an area set aside for low intensity agricultural uses.

109. At all times during the Planning Board's SEQRA review, the Project was considered limited to the Resort activities, with the rest of the Subject Property preserved as open space.

110. Accordingly, the Board's SEQRA review only considered the impacts of the Resort facilities. It assumed that the areas preserved under the Conservation Easement would have no adverse impact, and in fact would help mitigate the adverse impacts of the Resort.

111. The Negative Declaration, certifying that the Project would have no significant environmental impact, was explicitly premised on the understanding that 54 acres of land would be placed "into a deed restricted negative easement or a conservation easement to ensure that the land is preserved." Exhibit A at 3.

112. The Negative Declaration relied heavily on the reservation of the 54 acres as "preserved open space" as assurance against negative environmental impacts and buffers for the surrounding community. For example:

- "Animal habitats will be preserved by the inclusion of 54 acres of preserved open space." Exhibit A at 3.

- "With respect to plants and animals that are not endangered or threatened, the project is proposing to place 54 acres of the site into a conservation easement. That, in conjunction with the fact that only approximately 20 acres of the site will be disturbed, leaves ample room for any other native species of plants and animals to remain on site and to suitably adapt to the changes at the site." Exhibit A at 7.
- "More than 54.2 acres of the Project site will remain as a voluntary mitigation measure for open space, protected from development in perpetuity by a conservation easement." Exhibit A at 9.

113. In or around October 2018, long after the SEQRA review had ended and after the public hearing on the site plan had been completed, the Developer began submitting proposed easement language for the agricultural parcel that would provide for intensive use of that part of the property. Svenson Aff. ¶ 146.

114. The agricultural easement would support not only raising crops or livestock, but also construction of a barn, other agricultural structures, a retail farm stand and a single-family home.

115. Environmental impacts from this use could include noise, odor, dust, runoff, traffic and visual impacts.

116. Residents attempted to speak against this use but were told that there was no further opportunity for public comment.

117. If Petitioners had known about the contemplated agribusiness use earlier, they would have commented on it and would have opposed the Lot Line Revision creating the agricultural parcel.

**SPECIAL PERMIT NONCOMPLIANCE WITH THE CODE**

118. Special permit uses are not allowed as of right. Instead, a special permit is available only when specific circumstances and protections exist, to ensure that the use does not impact the adjacent community. A special permit can only be considered after an analysis of how a facility would affect adjacent properties.

119. The Code provisions governing special permits specifically mandate this review and protection. Before issuing a special permit, the Planning Board was required to "make specific written findings" that the project "will have no greater overall off-site impact than would full development of the property with uses permitted by right." Town Code § 200-63(B)(12).

120. The Approval Resolution has a mere single paragraph addressing this requirement. It makes general statements about mitigation measures in the Heartwood project and a conclusory statement that "the Project will have no more offsite impact than any of the permitted uses on the property." Exhibit B at 15.

121. The Planning Board never analyzed what type of development would be allowed by right, nor what the impacts of that development would be. Svenson Aff. ¶¶ 161-76.

122. Residential development is inherently different than commercial. Introducing a Resort within a residential/agricultural area presents a material change in the character of the community. Vacationers at the Resort would be active outdoors on the property for most of their activities, unlike typical residents. As transient visitors,

they would not have the same respect for the natural environment or their neighbors' privacy as permanent residents.

123. The Resort's business model depends on hosting large events with amplified sound on a regular basis. In contrast, events and parties would be the exception, not the rule, in a residential subdivision.

124. This Resort also presents quantitatively more impact. It would have 74 buildings hosting up to 225 people per day (plus employees), far more than would likely live in a low-density subdivision.

125. A comparison of the impacts of the Resort versus a residential subdivision could have been easily accomplished. Fink Aff. ¶ 50. Certified Planner J. Theodore Fink demonstrated a basic review in his accompanying affidavit. It showed that traffic from the Resort would be four times as much as a residential subdivision, and water use would be substantially higher. ¶¶ 51-52, Attachment K.

126. The Planning Board made no attempt to predict what size subdivision would be allowed, and made no explication of the comparative impacts, let alone quantitative comparison.

127. Without any analysis, there is no basis upon which to determine that the project meets the qualification of having "no greater overall off-site impact than would full development of the property with uses permitted by right."

*Noise*

128. In particular, there was no analysis of how the noise of the Resort would compare with the noise from a subdivision. Svenson Aff. ¶¶ 177-84.

129. As described above, the noise study was limited to comparing the noise of amplified music at the Resort's events with baseline noise levels at two property borders: the Shawangunk Kill river and Route 44/55.

130. The Developer applied two limits: the noise limits in the Town Code and a state-recommendation of no more than 3 dB over baseline noise levels. As explained above, the baseline levels were elevated at the two property boundaries chosen, as the river and the highway provide significant noise.

131. The correct limit should have been the noise that an as-of-right subdivision would have produced. This was never modeled or calculated.

132. The comparison should have also included actual noise impacts on neighboring properties, not only at two already noisy property lines.

133. Additionally, the Planning Board should have analyzed the frequency of loud events from the Resort compared to a residential subdivision.

134. The Planning Board never calculated the noise that could be expected from an as-of-right subdivision, nor compared this with the noise that can be expected from the Resort. Absent this analysis, they could not make a finding that the Project will have "no greater overall off-site impact" than development by right.

*Property values*

135. Another requirement to obtain a special permit is that the proposed use will not diminish the value of adjoining property.

136. The fundamental special permit requirement is that: "such use does not interfere with or diminish the value of adjoining property." Town Code § 220-63.

137. Neighbors of the project will experience numerous impacts to their enjoyment of their property caused by transient visitors congregating in the forest and near the creek, amplified noise from events, and other nuisance issues. These nuisances will directly affect their property values.

138. The Planning Board never required any quantitative study or considered data of any kind regarding the effect of a facility of this type on property values.

139. The Approval Resolution contains a conclusory statement that "the project, with conditions imposed by the Planning Board will not interfere with or diminish the value of adjoining property." Exhibit B at 8.

140. Without any analysis, there is no basis for this conclusion. Svenson Aff. ¶¶ 190.

**SITE PLAN VIOLATIONS OF THE TOWN CODE**

141. In addition to the Project's ineligibility for a special permit, the Site Plan directly violates the Town Code in multiple ways.

142. The Planning Board is not authorized to vary or waive elements of the Town Code, a power vested only in the Zoning Board of Appeals. There were no variances issued in connection with the Project.

143. The Site Plan should have been rejected for noncompliance with the Code.

*Scale of the resort*

144. The Resort proposes 80 nonresidential buildings totaling 48,123 square feet.

145. The Town Code places a limit on the footprint of nonresidential structures. In the Rural Agricultural zoning district, the "maximum footprint for nonresidential structures" is 6,000 square feet. Town Code § 220-11, Dimensional Table. Svenson Aff. ¶ 198.

146. The purpose of this requirement is "to maintain the historic scale and character of development in Gardiner," in particular in the rural agricultural area where it applies. Town Code § 220-11 footnote 10.

147. The code further makes clear that the limitation on building size constrains the total nonresidential footprint on the site: "The intent of this provision shall not be evaded through the placement of multiple large buildings on the same site or otherwise in a pattern that is inconsistent with the scale and character of the Town." *Id.*

148. At 48,123 square feet, the Resort's facilities exceed the allowed footprint by more than eight-fold.

149. The central buildings, housing the administration, spa, restaurant, event center, laundry and others, totals 13,553 square feet under a single roof, separated only by exterior walls designed to keep individual structures under 6,000 square feet. Accordingly, even the central facilities total more than twice the allowed footprint.

150. A facility of this size clearly does not "maintain the historic scale and character" in an area surrounded by farms, residential homes, a state recreational river, pastoral open space and ecologically important habitat.

151. The massing of large buildings to evade the 6,000 square foot limit is expressly prohibited.

152. The Approval Resolution incorrectly states that in "correspondence dated March 10, 2017 the structure foot prints were determined to not exceed the 6,000 s.f. limits in the RA Zone." Exhibit B at 2.

153. In fact, the March 10, 2017 letter from the Building Inspector responded to a request from the Developer's attorney asking about the definition of footprint. In the letter, the Building Inspector offered the interpretation that only areas enclosed by "exterior walls and footings and covered by roofing" should be included in determining footprint." Svenson Aff. at 207.

154. The letter does not state that the proposed collection of buildings complies with the Town Code.

155. The Planning Board had a responsibility to apply requirement of the Code regarding multiple buildings: "The intent of this provision shall not be evaded through the placement of multiple large buildings on the same site . . ." It did not.

*Restaurant prohibited*

156. The Resort includes a public restaurant, a use explicitly prohibited by the Town Code for this zoning district. Svenson Aff. ¶ 211.

157. The zoning code strictly restricts restaurant uses in the RA district. Restaurants are allowed, subject to special permit, under only two circumstances: "in connection with an agricultural use" or as a reuse of an existing building. Town Code § 220-10, Use Table.

158. The Resort is not an agricultural use, and the restaurant is not proposed in an existing building. There are no existing buildings on the site.

159. In response to neighbors' comments that the restaurant is not permitted, the Planning Board's consultant Sterling Environmental Engineering wrote a memo opining that "a restaurant associated with a lodging facility is allowed by Special Use Permit." Svenson Aff. ¶ 214.

160. This interpretation is incorrect. The specific limitations on restaurants in the use table control the circumstances in which restaurants can be allowed.

161. Moreover, the Planning Board has no authority to interpret the Town Code, a power that is vested in the Building Inspector and Zoning Board of Appeals.

*Cabins violate stream setback*

162. The Town's Wetlands and Watercourse law prohibits structures within 100 feet of the top of a streambank. Town Code § 220-35(E). It further places limits on structures within 150 feet of the top of a streambank. § 220-35(D).

163. The purpose of the regulation is that "protection of [the Town's] wetlands and watercourses helps to maintain water quality and the health of natural ecosystems, reduces flooding, erosion, and sedimentation, and protects important wildlife habitat areas." Town Code § 220-35.

164. Some of the cabins within the forest are within 100 feet of the top of the streambank within the meaning of the Town Code. Svenson Aff. ¶ 220.

165. The Town Code defines streambank as:

> The land immediately adjacent to, and which naturally slopes toward, the bed of a watercourse, which is necessary to confine the watercourse in its natural channel. A stream bank is not considered to extend more than 50 feet horizontally from the mean high water line, except that ***where a generally uniform slope of 25% or greater adjoins the stream bed, the bank is considered to extend to the crest of the slope or to the first definable break in slope***,

> which may be a natural feature or a constructed feature (such as a road), lying generally parallel to the watercourse.

§ 220-74 (emphasis added) ("Town-Defined Streambank").

166. The site plan does not show the Town-Defined Streambank.

167. Instead, it shows a 150 setback from the water's edge and a boundary line for the "top of 15% slope." Both these parameters are regulated in the Part 666 regulations. 6 NYCRR 666.13. They do not match the town's Wetlands and Watercourse regulations. Svenson Aff. ¶ 223.

168. Along parts of the stream corridor, the slope up from the creek exceeds 25%, making it part of the Town-Defined Streambank. In those areas, a 100 foot buffer should have been applied from the top of the bank.

169. The cabins that are within 100 feet of the top of the bank are prohibited under the Town Code. Other cabins that are within 150 feet of the top of the bank could only be allowed with certain findings.

170. Petitioners raised this issue in a December 14, 2018 letter to the Planning Board. The letter included diagrams of the slopes. Svenson Aff. ¶ 225.

171. The Planning Board's engineer responded with a memo dated January 8, 2019, in which he concluded, in pertinent part, that: "I believe . . . the proposed location of the cabins provides more than the required 100 foot setback stipulating under § 220-35 E.1.a." Svenson Aff. ¶ 228.

172. This "belief" was not substantiated with any diagrams or measurements.

173. In the Approval Resolution, the Planning Board emphasized the Project's approval by New York State DEC under the Part 666 regulations for Recreational Rivers.

174. As described above, the Part 666 regulations focus on recreational access to rivers and are not intended to fulfill the same functions as the Town's stream regulations, to wit, maintaining water quality and ecosystem health.

175. Moreover, the Approval Resolution misstates the law by repeatedly stating that no project components are located "within 150 feet of the water's edge." Exhibit B at 28, 29. Accordingly, the Planning Board only applied the buffer from the stream, not from the top of the Town-Defined Streambank.

176. The Site Plan does not comply with the Town Code because the Town-Defined Streambank was never demarcated and a 100-foot buffer was not preserved.

*Noise violates performance standards*

177. The environmental performance standards in the Town Code set a maximum decibel level during day and night hours, but they also provide an additional standard:

> Sounds emitted at levels lower than those prohibited by Subsection C(2) above [prescribing maximum decibel levels] shall not be permitted if, because of the ***type or frequency*** of the noise emitted, such sounds are ***offensive, disruptive or in continual disharmony with the character of an adjoining or nearby residential neighborhood***.

Town Code § 220-40(C)(3) (emphasis added).

178. The noise of the Resort, including amplified music and human activity, will violate this provision. Svenson Aff. ¶¶ 236-41.

## LACK OF PLANNING BOARD AUTHORITY

179. Throughout some or all of the period that the Planning Board was conducting its review, it had no authority to do so.

180. In or around 2017, the Town of Gardiner became aware that it had no local law creating or establishing a Planning Board.

181. The Town Board has admitted that there is no local law creating or establishing the Planning Board, and discussed the problem at its December 5, 2017 meeting. The minutes state: "The Board discussed the adoption of a Town of Gardiner Local Law establishing the Planning Board. Currently there is no local law." Svenson Aff. ¶ 257.

182. Residents admonished the Planning Board not to take action as it lacked authority.

183. The Planning Board conducted its SEQRA review during late 2017 through 2018 and on May 15, 2018 purported to approve the Negative Declaration, despite not being a legally established body.

**AS AND FOR A FIRST CAUSE OF ACTION**

**The Planning Board failed to take a "hard look" at noise impacts as required under SEQRA.**

184. Petitioners repeat and reallege paragraphs 1 through 183 as if fully set forth herein.

185. Under SEQRA, agencies such as the Planning Board must review proposed actions for potential adverse environmental impacts prior to undertaking or approving the actions.

186. As explained in numerous court holdings over the last four decades, SEQRA requires the agency to identify the likely impacts of the action, take a "hard look" at them, and issue a reasoned written elaboration of its findings. *H.O.M.E.S. v New York State Urban Development Corp*., 69 AD2d 222, 231-2 (4th Dept 1979); *Matter of Adirondack Historical Assn. v Village of Lake Placid*, 161 AD3d 1256, 1258 (3d Dept 2018).

187. The critical stage in a SEQRA review is the declaration of significance, where the agency determines if there might be at least one adverse environmental impact. If such an impact might occur, the agency must issue a positive declaration and require a draft environmental impact statement.

188. Under the SEQRA regulations, the agency must "thoroughly analyze" identified environmental issues. 6 NYCRR § 617.7(b).

189. Contrary to these requirements, the Negative Declaration failed to include a hard look at the impacts.

190. Regarding noise, the Planning Board failed to analyze the impacts because it only addressed music from the event space and only at the perimeter locations. It did not consider noise from transient vacationers in the forest, and it did not consider noise impacts to neighboring homes.

191. It also did not consider the frequency of the occurrence of loud events at the Resort, including an unlimited number of amplified weddings and parties.

192. Accordingly, the Planning Board violated SEQRA and acted arbitrarily and capriciously in failing to properly identify the noise impacts of the project and by failing to take the requisite "hard look" at those impacts.

**AS AND FOR A SECOND CAUSE OF ACTION**

**The Planning Board failed to take a "hard look" at the effects of the Project on wildlife habitat as required by SEQRA.**

193. Petitioners repeat and reallege paragraphs 1 through 192 as if fully set forth herein.

194. The Planning Board had a responsibility to take a hard look at the impacts of introducing dozens of cabins directly within the streamside forest, despoiling a top priority ecological area.

195. The Board ignored the reports of experts describing the high ecological value of the Shawangunk Kill corridor and the water quality impacts of development in the streamside forest.

196. The Board failed to apply the Town's own Open Space Plan, which recommended preserving a forested buffer of 535 feet.

197. The Board improperly relied on a state regulation protecting recreational rivers rather than applying the more stringent town standards and conducting its own analysis.

198. The despoiling of the riparian forest was gratuitous and unnecessary because of the ready availability of less sensitive land for the cabins.

199. Accordingly, the Planning Board violated SEQRA and acted arbitrarily and capriciously in failing to properly identify the impacts of development within the streamside forest, and by failing to take the requisite "hard look" at those impacts.

## AS AND FOR A THIRD CAUSE OF ACTION

**The Planning Board failed to take a "hard look" at the effects of the Resort's water use on neighbors' wells.**

200. Petitioners repeat and reallege paragraphs 1 through 199 as if fully set forth herein.

201. The Developer's well test was inadequate to determine whether the Resort's water use would cause neighbors' wells to run dry.

202. In particular, the well test was only conducted for 24 hours and neighboring wells were in use during the test.

203. The Planning Board failed to require any follow-up investigation, after being advised by its own engineering consultant that the test protocol was faulty.

204. Accordingly, the Planning Board violated the provisions of SEQRA and acted arbitrarily and capriciously in failing to properly identify the groundwater impacts of the Project and by failing to take the requisite "hard look" at those impacts.

## AS AND FOR A FOURTH CAUSE OF ACTION

**The Negative Declaration does not authorize the Development Approvals because it did not consider the agricultural development added to the Project after SEQRA review.**

205. Petitioners repeat and reallege paragraphs 1 through 204 as if fully set forth herein.

206. The applicant introduced a significant change to the project in the final stage of the review, after the Planning Board issued the Negative Declaration.

207. The agricultural easement presented after the Negative Declaration for the first time detailed the Developer's plans for structures and businesses on what was promised to be a conservation area.

208. In particular the easement would allow future use of the conservation area for construction of a retail farm stand a barn, other agricultural structures, and a single-family home, in addition to raising crops or livestock, .

209. None of the prospective new structures or uses were reviewed for their environmental impact, which include added traffic, noise, nuisances and removal of habitat.

210. The Negative Declaration for the Project was premised instead on 54 acres of open space preservation.

211. The Negative Declaration does not authorize or support the Development Approvals because it did not contemplate any of the impacts of the farm operation.

**AS AND FOR A FIFTH CAUSE OF ACTION**

**The Planning Board failed to make findings as to off-site impacts as required to grant a special permit.**

212. Petitioners repeat and reallege paragraphs 1 through 211 as if fully set forth herein.

213. The Planning Board was required to make findings demonstrating that the impact of the Project on neighboring properties was no greater than the impact from an as-of-right use. Town Code § 200-63(B)(12).

214. The most likely, and highest impact, as-of-right use in the Rural Agricultural zone is residential subdivision.

215. The Planning Board failed to make any serious investigation of the impacts from a subdivision on the Subject Property. Impacts such as traffic and water use would likely be higher from the Resort than a subdivision.

216. In particular, the Planning Board failed to compare the amount of noise that the Project will generate with the amount of noise expected from a subdivision that would be allowed on the site.

217. Under the Town Code the Planning Board is required to make these findings to issue a Special Permit.

218. Absent these findings, the Special Permit is invalid.

219. To the extent that Respondents argue that the Approval Resolution included such a comparison, it did not reflect any rational analysis and was therefore arbitrary and capricious. CPLR 7803.

## AS AND FOR A SIXTH CAUSE OF ACTION

**The Planning Board failed to determine the effects of the project on adjoining property values as required to grant a special permit.**

220. Petitioners repeat and reallege paragraphs 1 through 219 as if fully set forth herein.

221. The Town Code explicitly requires the Planning Board to ensure that there is no substantial impact to neighboring property values from the issuance of a special permit. Town Code § 220-63.

222. The Planning Board failed to undertake any substantial review of the impact of the Project on neighboring property values.

223. In particular, the Planning Board failed to make any quantitative findings about the impacts to property values from the Resort.

224. Lacking these findings, the Special Permit is invalid.

225. To the extent that Respondents argue that the Approval Resolution included such findings, they did not reflect any quantitative data or rational analysis. Therefore any reliance of this data was arbitrary and capricious. CPLR 7803.

## AS AND FOR A SEVENTH CAUSE OF ACTION

**The Site Plan violates the size limit for nonresidential buildings in the Town Code.**

226. Petitioners repeat and reallege paragraphs 1 through 225 as if fully set forth herein.

227. The Town Code allows a maximum footprint of 6,000 square feet for nonresidential buildings and states that the limit "shall not be evaded through the

placement of multiple large buildings on the same site." Town Code § 220-11, Dimensional Table.

228. The purpose of this provision is to ensure that the intensity of development is consistent with the nature of the district and its quality of life.

229. The Project proposes 80 buildings totaling 48,123 square feet.

230. The Project is a nonresidential use.

231. The Site Plan directly violates the size limit in the code, and the Site Plan Approval is therefore contrary to law.

**AS AND FOR AN EIGHTH CAUSE OF ACTION**

**The Site Plan includes a use that is expressly prohibited by the Town Code.**

232. Petitioners repeat and reallege paragraphs 1 through 231 as if fully set forth herein.

233. The Resort includes a public restaurant. Restaurants are not allowed in the Rural Agricultural district unless one of two conditions exists, neither of which is relevant to the Resort.

234. Specifically the code only allows restaurants in the Rural Agricultural district if it is in an existing building or associated with an agricultural use. Town Code § 220-10.

235. The Site Plan does not meet either of these conditions and is therefore in violation of the Town Code.

236. The Site Plan Approval is invalid because it includes a prohibited use.

**AS AND FOR A NINTH CAUSE OF ACTION**

**The Site Plan violates the stream buffer requirement in the Town Code.**

237. Petitioners repeat and reallege paragraphs 1 through 236 as if fully set forth herein.

238. The Town Code prohibits structures within 100 feet of the top of a streambank. Town Code § 220-35. The Project features cabins that violate this provision because the area between them and the Shawangunk Kill is steeply enough sloped to qualify as a streambank under the Town Code.

239. Under the Code, an area of land qualifies as a streambank if it contains a relatively unbroken slope of at least 25 percent.

240. The streambank that the Town Code protects was never demarcated on the Site Plan and a 100-foot buffer from the top of the streambank was not applied.

241. Cabins within 100 feet of the top of the streambank violate the Town Code stream protection rules.

242. The Site Plan violates the Town Code, and the Site Plan Approval is therefore contrary to law.

**AS AND FOR A TENTH CAUSE OF ACTION**

**The Site Plan violates the noise performance standards in the Town Code.**

243. Petitioners repeat and reallege paragraphs 1 through 242 as if fully set forth herein.

244. The environmental performance standards in the Town Code prohibit noise that, because of its "type or frequency" would be "disruptive or in continual

disharmony with the character of an adjoining or nearby residential neighborhood." Town Code § 220-40(C)(3).

245. No use may be "established" that will violate this provision. Town Code § 240(A).

246. The frequent amplified music at weddings and events at the Resort, as well as the noise from human activity in the forest and at the river, will be in "continual disharmony" with the adjacent residential neighborhoods.

247. The Planning Board failed to consider or apply this provision, focusing instead on the maximum decibel levels allowed under the code.

248. Because activities in the Site Plan will violate this performance standard, the Site Plan Approval is contrary to law.

**AS AND FOR AN ELEVENTH CAUSE OF ACTION**

**The Special Permit is invalid because the Planning Board failed to hold a public hearing on the complete application.**

249. Petitioners repeat and reallege paragraphs 1 through 248 as if fully set forth herein.

250. The Town Code requires "The Planning Board shall hold a public hearing on a complete Special Permit application within 62 days of its submission." § 220-62. This requirement is also imposed by State law. Town L. § 274-b(6).

251. Heartwood submitted its proposed easement for the agricultural parcel in October 2018 after the public hearing had been closed.

252. The proposed easement for the first time indicated allowable uses of the conservation parcel including construction of a barn, other agricultural structures, a retail farmstand and a residential home.

253. The Planning Board never held a public hearing on the complete Special Permit application, including the allowed construction under the agricultural easement.

254. The failure of the Planning Board denied the public's rights to be heard, including Petitioners' rights.

255. The Planning Board's approval of the Special Permit was contrary to required procedure, and was therefore a fatal defect in the Special Permit.

**AS AND FOR A TWELFTH CAUSE OF ACTION**

**The Lot Line Revision is invalid because the Planning Board failed to hold a public hearing on the complete application.**

256. Petitioners repeat and reallege paragraphs 1 through 255 as if fully set forth herein.

257. New York State law requires the Planning Board to hold a public hearing on a complete subdivision application. Town L. § 276(6)(d)(i)(2); *Kittredge v Town of Liberty Planning Board*, 57 AD3d 1336 (3d Dept 2008).

258. The project includes a lot line revision, which is a subdivision for purposes of state law.

259. The Planning Board never posted a public hearing notice for a subdivision or lot line revision.

260. Even if the public hearings it did hold could be applied to the subdivision, the application was incomplete before the submittal of the proposed agricultural easement, which was not submitted until October 2018.

261. The proposed easement for the first time indicated allowable uses of the agricultural parcel including construction of a barn, other agricultural structures, a retail farmstand and a residential home

262. The Planning Board failed to hold a public hearing on the complete subdivision application including the plan for intensive agricultural business development of the conservation parcel.

263. The public never had a chance to comment on the complete application, including the plan for intensive agricultural business development of the conservation parcel.

264. The Planning Board's approval of the Lot Line Revision was contrary to law, and the approval is therefore null and void.

## AS AND FOR A THIRTEENTH CAUSE OF ACTION

### The Negative Declaration is invalid because the Planning Board was not officially constituted at the time of the Negative Declaration.

265. Petitioners repeat and reallege paragraphs 1 through 264 as if fully set forth herein.

266. The Town of Gardiner did not have a law constituting its Planning Board at the time the Planning Board purported to conduct the SEQRA review and issue the Negative Declaration.

267. At the time the Planning Board took action on the Negative Declaration on May 15, 2018, it had no official capacity.

268. The Negative Declaration is therefore null and void.

**WHEREFORE**, Petitioners respectfully demand an order and judgment:

(a) Annulling and vacating the Negative Declaration;

(b) Declaring that the Site Plan violates the Town Code;

(c) Annulling and vacating the Site Plan Approval;

(d) Annulling and vacating the Special Permit;

(e) Annulling and vacating the Lot Line Revision;

(f) Awarding Petitioners attorneys' fees, costs and disbursements in this action; and

(g) Such other and further relief that the Court deems just and proper.

Dated: Poughkeepsie, New York
February 19, 2019

Petitioners HILARY ADLER, JOHN BOHAN, GERALYN TORRONE, LAURIE WILLOW, MARK GUENTHER, NEIL RINDLAUB, KATHRYN ADORNEY, JUDITH BOZSIK, EUGENE BOZSIK, GAIL YOUNG, PATRICIA HAZLETT, GEORGE HAZLETT, JONATHAN LOZIER, RICHARD SMITH and KATHRYN NAVY

By their attorney,

Emily B. Svenson

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42 Catharine Street, Suite C-107
Poughkeepsie, NY 12601
(845) 489-2286

## VERIFICATION

Emily Svenson, being duly sworn, deposes and says:

Pursuant to CPLR § 3020, this Verification is made by the attorney for Petitioner-Plaintiffs. The foregoing Petition is true upon information and belief. The grounds of my belief for the matters alleged include documents obtained from the Town of Gardiner, petitioners, respondents and local residents, my own observations, and other publicly-available documents, writings, and other information.

The reason I make this affirmation instead of Petitioners is the Petitioner/Plaintiffs reside in a county other than that in which deponent has her office.

I affirm that the foregoing statements are true under penalties of perjury.

Dated: Poughkeepsie, New York
February 19, 2019

EMILY B. SVENSON