

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. \_\_\_\_\_

**AFFIRMATION OF  
EMILY SVENSON IN  
SUPPORT OF VERIFIED  
PETITION AND  
COMPLAINT**

EMILY B. SVENSON, an attorney duly licensed to practice law in New York State,  
affirms as follows under penalty of perjury:

1. I am an attorney for the Petitioner-Plaintiffs in the instant proceeding (“Petitioners”) and make this affirmation as an officer of the court in support of the petition and complaint. I am familiar with the facts of the case.
2. Petitioners bring this action to challenge a series of determinations by the Planning Board of the Town of Gardiner (“Planning Board”) that approved an expansive and intrusive lodging facility, restaurant and wedding venue (“Project” or “Resort”) in a quiet, rural and ecologically sensitive location.
3. Petitioners are neighbors of the Project site (“Subject Property”), who purchased or renovated homes in this area because of its quiet and natural beauty. A map

showing the location of Petitioners' properties in relation to the Subject Property is attached as Exhibit A. Information about individual Petitioners is in the Verified Petition and Complaint.

4. Petitioners trusted that the Town's zoning would protect their enjoyment of their land, and their investment, by only allowing low-density residential development or similar low-intensity use on adjacent properties. *See, e.g.*, of Hilary Adler, sworn February 17, 2019 ("Adler Aff.") ¶ 2.

5. Throughout the Planning Board's review of the Project, Petitioners raised concerns about the size and intensity of the Resort proposal and the impacts it would have, including noise and nuisance, groundwater depletion, and destruction of wildlife habitat.

6. Petitioners and others also alerted the Planning Board to the Project's noncompliance with the Town Code and its ineligibility for a special permit. A key requirement is that the Project could not qualify for a special permit unless it could prove to have no greater impact on the surrounding neighborhood than development as-of-right.

7. Despite critical flaws and deficiencies, the Planning Board approved the Project. The resolution ("Approval Resolution") approving a site plan ("Site Plan Approval"), special permit ("Special Permit") and lot line revision ("Lot Line Revision") is attached as Exhibit B.

8. Petitioners ask this Court to review and vacate the Planning Board's declaration of nonsignificance ("Negative Declaration"; Exhibit C) under the State Environmental Quality Review Act ("SEQRA"; ECL Article 8), the Site Plan Approval, the Special Permit and the Lot Line Revision as arbitrary and capricious and contrary to

law, declare the site plan (“Site Plan”) unlawful, and provide other related relief. The first two pages of the Site Plan are attached as Exhibit D.

### **PROJECT LOCATION**

9. The Town of Gardiner is a rural community at the base of the Shawangunk Mountains in Ulster County. Much of the mountain ridge 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 river. Residential homes and neighborhoods are interspersed.

10. Respondent Shinrin Yoku, LLC (“Developer”) owns two parcels totaling approximately 141 acres on Route 44/55 in the Town of Gardiner (“Subject Property”).

11. 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 area is quiet and picturesque.

12. The bulk of the Subject Property is relatively flat. It was formerly used as a tree farm, the Rosedale Nursery, and in recent years it has existed as open shrub and grassland.

13. The southern portion of the Subject Property slopes down to the Shawangunk Kill and is covered in thick forest. The forest extends about 400-500 feet uphill from the Kill.

14. An aerial photo is attached as Exhibit E, showing the Subject Property, the Shawangunk Kill corridor, and the streamside forest.

## **THE APPLICABLE ZONING FOR THE SUBJECT PROPERTY**

15. The Subject Property is located in the Town's Rural Agricultural (RA) zoning district. Relevant sections of the Zoning chapter of the Town Code are annexed as Exhibit F.

16. Only limited uses are allowed by right in the Rural Agricultural district. These include residential homes, farms, timber harvesting, nature preserves, municipal services and similar uses. Town Code § 220-10(B).

17. Residential subdivision is allowed with lots of at least five acres. Town Code § 220-11, Dimensional Table. For a parcel the size of the 141-acre Subject Property, that would equate to a maximum of 28 homes. Open space subdivision may allow more homes, but only in conjunction with conservation of at least 50% of the land, including priority conservation areas. Town Code § 220-20.

18. Some uses are prohibited entirely, and some are allowed if they qualify for a special permit. Lodging facilities are allowed by special permit only. Town Code § 220-10, Use Table. 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.

19. 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)(12).

20. Additionally, 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.

21. 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 also places limits on structures within 150 feet of the top of a streambank. Town Code § 220-35.

### **THE PROJECT**

22. The proposed luxury camping resort and event facility is an intensive proposal that in multiple respects exceeds the limits of the Town Code. It does not qualify for a Special Permit or Site Plan Approval.

23. The Resort would include a central complex of buildings surrounded by cabin units and various outdoor recreation facilities. Exhibit D at A1.01.

24. The central complex would contain a lobby and spa building, a restaurant, and an event barn, connected by covered deck areas. All these buildings would be covered by a single roof. Exhibit D at A1.01.

25. There would be 70 luxury cabin units. They would range from 300 to 1,500 square feet, and each would house two to four people. 28 of the cabins are purposely located within or adjacent to the streamside forest under the self-serving designation as “eco-cabins.” The Special Permit and Site Plan Application is attached as Exhibit J. *See also* Exhibit D at A1.01.

26. Up to 225 guests would be regularly present at the Resort, as well as employees. Exhibit B at 41.
27. Up to 166 overnight guests could be accommodated in the cabins. Exhibit D at A1.01.
28. The restaurant would be open to the public, attracting additional guests to the Resort. Exhibit B at 1.
29. An event barn would host weddings, retreats, and other events. Exhibit B at 1. There would also be events outdoors with amplified music. *Id.* at 42.
30. The concept of the Resort is to encourage guests to spend a significant amount of their time outdoors, “highly engaged with the natural setting.” Development Plan at 2. The Development Plan is attached as Exhibit G.
31. There would be tennis courts, an outdoor pool, a yoga platform, and various accessory buildings. Exhibit D at A1.01.
32. There would be a path down to the river with a kayak launch area. *Id.*
33. There would also be roads throughout the site. Parking areas would accommodate 156 vehicles. *Id.*

### **IMPACTS OF THE PROJECT**

34. The Project will have substantial impacts on the surrounding community. Many of the Petitioners will be able to see the Resort from their homes and property, and all will be able to hear the amplified music and the lodgers’ outdoor activities. Introducing hundreds of transient vacationers into this quiet area will inevitably generate

noise and commotion, disturbing both neighbors and the ecosystem. The Resort will draw groundwater, discharge wastewater, increase traffic flow, and so on.

35. Petitioners' properties surround the Subject Property, and the impacts individual Petitioners will experience are detailed in the Verified Petition and Complaint.

36. The following are three of the most significant environmental impacts, none of which was properly analyzed by the Planning Board, and some of which result in violations of the Town Code:

Noise

37. Noise is certain to emanate from the Resort and will have a substantial effect on the neighbors. The Resort is designed to accommodate hundreds of overnight vacationers who will spend much of their time outdoors. It will also host weddings and parties with amplified music.

38. There are currently two other facilities along the Shawangunk Kill that occasionally host outdoor activities and amplified music, the Yogi Bear Jellystone campground and the Tuthilltown Distillery. Many of the Petitioners report that they are able to hear noise from these facilities as it travels through the Shawangunk Kill corridor.

Adler Aff. ¶ 6.

39. The proposed Resort would be much closer to the Petitioners and others in their neighborhood than either the Yogi Bear Jellystone campground or the Tuthilltown Distillery.

40. Only the ravine formed by the Shawangunk Kill and its banks separates the Subject Property from the homes to the south, along McKinstry Road. Both the

Project and the homes are well above the creek, essentially facing each other across the ravine.

41. The sound from the Resort will readily travel across the ravine to McKinstry Road residents' homes, including Petitioners Hilary Adler, Gail Young, Patricia Hazlett, George Hazlett, Jonathan Lozier, Richard Smith and Kathryn Navy.

42. Other neighbors about the Project site to the east and west, including Petitioners John Bohan, GERALYN TORRONE, Neil Rindlaub, Kathryn Adorney, and Judith and Eugene Bozsik. Exhibit A.

43. As described in the Verified Petition and Complaint, most Petitioners spend a great deal of time outdoors on their property, and the noise will damage their ability to enjoy their decks, yards and gardens, or even keep their windows open. *See also* Adler Aff. ¶¶ 8-9.

44. As the accompanying affidavit of certified planner J. Theodore Fink ("Fink Aff.") notes, chronic noise can also have significant effects on people's physical and psychological health. Fink Aff. ¶¶ 26-33. It can affect wildlife. Fink Aff. ¶ 34. It can also significantly diminish property values. Fink Aff. ¶ 35.

45. The Developer produced a simplistic, two-page noise study, attached as Exhibit K. The study purports to show that if amplified music is limited to a specified decibel limit, there will not be an appreciable increase in noise at the property lines.

46. The study did not and could not accurately analyze the actual impacts to the neighbors because of several significant omissions.

47. First, the study did not measure actual ambient noise during the evening or night time hours, only during the day. "The quiet of a rural evening in the summer, when

people have their windows open and expect to hear crickets, not booming bass guitars, is when it is most critical to assess impacts.” Fink Aff. ¶ 42.

48. Second, the study only considered receptor points along two property boundaries: State Route 44/55 and the Shawangunk Kill. Of all the property boundaries, the highway and river have the highest levels of background noise. The applicant tactically used the elevated baseline to assert that amplified noise from the project would not raise noise levels substantially above ambient levels.

49. 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.

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

51. A proper noise study following state guidance would have considered topography. Fink Aff. ¶ 43. It would have analyzed impacts to actual homes, not two conveniently selected property lines. Fink Aff. ¶ 38.

52. 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.

53. 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.

54. The design of the Resort will encourage vacationers to spend the day in and along the river, and to gather around their cabins in the forest in the evening. These noise sources are much closer to the neighbors across the Shawangunk Kill than the event space is, but they were not quantified or analyzed.

55. In addition to the volume of noise, the frequency of loud events is an additional concern. The Resort could host multiple weddings and parties each week, causing frequent disturbance to neighbors.

56. In fact, 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. The Ulster County Planning Board recommendation is attached as Exhibit L.

57. Further, the noise study was based on limiting noise to the maximum decibel limits specified in the Town Code for daytime and overnight hours. But the Planning Board and Developer ignored a second Code restriction that prohibits nuisance sound levels regardless whether they meet the numerical code 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).

58. The Planning Board ignored all of these issues and simply accepted the results of the noise study as proof that there would be no noise problems if amplified sound was subject to a decibel cap. They accepted a proposal by the Developer to equip its outdoor amplification system with a noise limiter that would limit the decibel levels

emitted from the Resort's speakers. The limiter would be fixed at a level meant to ensure that the noise level complies with the Town Code at the property line. Exhibit B at 42.

59. The Planning Board placed no limits on the frequency of amplified events. It placed no limits on noise from activities or sources other than the speaker system. It provided no meaningful protection to residents from consistent sources of noise that will inevitably cause "continual disharmony."

### Ecological Impacts

60. 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 flatter 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. Exhibit A.

61. The Project would introduce 23 cabins, with a total daily occupancy of 46 people, within this riparian forest. Some would be less than 200 feet from the water's edge. It would also construct a path through the forest to a gathering area on the creek. Hundreds of guests could traverse this path daily. Exhibit D at A1.01.

62. The placement of these cabins in the forest is completely unnecessary, since there is ample land in the flatter grassed area for the cabins.

63. The Shawangunk Kill is an unusually healthy and rich ecosystem. Much of the Shawangunk Kill corridor is forested, providing a healthy habitat for wildlife and cool, protected water that supports a variety of aquatic life. Affidavit of Dr. Erik Kiviat, sworn February 18, 2019 ("Kiviat Aff.") at 7.

64. As a result, the Shawangunk Kill and its forested corridor have been designated as a valuable natural resource through a variety of public programs

65. The United States Fish and Wildlife Service found that the “Shawangunk Valley habitat complex” supports numerous federally and state listed species of concern and concluded: “Development in the watershed will likely have negative impacts on both the rare biological communities and downstream water quality.” As a result, it recommended that development should be restricted to at least 300 meters (984 feet) from the river. October 15, 2017 Report of Greenplan, Inc. (“Greenplan Report”, attached as Exhibit H) at 8-9.

66. The New York State Department of Environmental Conservation Wildlife Habitat Conservation Framework for the Hudson River Estuary watershed named the Shawangunk Kill as one of the regionally significant habitats. It emphasized the importance of preserving the streamside forest, stating “Further development or agricultural use should be directed at least 1,000 feet from the [Shawangunk Kill] river.” Exhibit H at 10.

67. New York State has also designated the Shawangunk Kill as a Recreational River pursuant to the state Wild, Scenic and Recreational Rivers System Act. Exhibit H at 5.

68. The Town of Gardiner gave special emphasis to the Shawangunk Kill in its Open Space Plan, stating: “The 5-mile Shawangunk Kill corridor is one of the town’s most important wildlife resources . . .” It concluded: “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.” Gardiner Open Space Plan at 46. Chapter 4 of the Town of Gardiner Open Space Plan is attached as Exhibit I.

69. The Shawangunk Kill meets the Wallkill River just downstream from the Subject Property. The Town’s Open Space Plan also identified the Shawangunk Kill/Wall Kill Confluence as a “conservation hub.” Exhibit I at 44. The Subject Property is squarely within this hub.

70. The resulting Priority Conservation Network map in the Open Space Plan ranks the streamside forest on the Subject Property in the highest category of conservation priority. Exhibit I, map.

71. As its analysis of the Resort’s impact on the riparian forest and stream corridor, the Developer produced 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. The Developer’s report is attached as Exhibit M.

72. 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 for robust ecological communities. They described the erodibility of the soils, which can introduce damaging silt into the river if disturbed. They cited numerous scientific and governmental reports describing the importance of preserving the forests along the Shawangunk Kill. The Hudsonia report is attached as Exhibit N and the Greenplan Report as Exhibit H.

73. Because of these concerns, the Developer “reduce[d] the number of cabins located near the stream bank and within the stand of mature trees for 40 to 28.” Exhibit C at 3. Based on this minor adjustment, the Planning Board determined that there would be no significant impact.

74. They were flat wrong, as the accompanying affidavit of ecologist Dr. Erik Kiviat explains.

75. At least thirteen protected species live in the Shawangunk Kill corridor. Bald eagles use the Shawangunk Kill and may forage for fish in the stream and roost and nest in streamside trees on the site. “Human actions on the bluff top and slopes (cabin construction and use, trail construction, walking to the stream banks) would potentially disturb eagles.” Kiviat Aff. ¶ 15.

76. The Shawangunk Kill supports a population of wood turtle, a New York State Species of Special Concern. The slopes and top of the bluff could provide habitat for this species which has not been studied or protected. Kiviat Aff. ¶ 13.

77. Unusual assemblages of fish inhabit the creek, as do brook floater mussels, which are very sensitive to sedimentation and contaminants. Kiviat Aff. ¶¶ 10, 14. Construction on the site will mobilize sediment, as will frequent pedestrian use of the streamside forest and bluff. Kiviat Aff. ¶¶ 19-22. The sediment will degrade habitat in the river.

78. Kiviat notes: “The forest bordering the Shawangunk Kill is almost certainly important in stabilizing the steep slopes and protecting the stream. Any removal of trees or other disturbance of this forest would have a negative impact on the stream . . .” Kiviat Aff. ¶ 33.

79. Incredibly, the Planning Board ignored all of these impacts and stated in its Approval Resolution: “There are no potential impacts to the Shawangunk Kill. . .” Exhibit B at 13.

### Groundwater

80. The neighborhood surrounding the Project Site entirely relies on well water to supply their homes. The Resort’s new well will withdraw a substantial amount of water. The water use is likely to draw down the groundwater table, particularly in the dry summer months.

81. The Developer estimated water use of 12,600 gallons per day. Exhibit G at 5. Based on that, the Developer undertook a 24-hour pumping test.

82. 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 noted 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. An excerpt from the Sterling letter is attached as Exhibit O.

83. 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.” An excerpt from the Developer’s engineer’s letter is attached as Exhibit P.

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

85. The Planning Board never made any further investigation of how groundwater levels would be affected by the Resort.

86. Stunningly, the Planning Board justified ignoring the public's concerns by turning the responsibility onto the public: "There were anecdotal concerns raised in public comments regarding impact to wells and groundwater supply. However, no data or studies were provided by the public." Exhibit B at 13.

## **PLANNING BOARD REVIEW PROCESS**

### *Initial Steps*

87. In or about February 2017, the Developer applied to the Planning Board for several approvals to build the Resort. These included a Special Permit to allow a lodging use, approval of a Site Plan, and a Lot Line Revision to reconfigure the boundary between the two parcels. Exhibit J.

88. 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.

89. 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 permit. That letter is attached as Exhibit Q.

90. On March 10, 2017, the Building Inspector issued an additional letter describing his interpretation of how building footprint would be calculated. That letter is attached as Exhibit R.

SEQRA Review

91. SEQRA required the Planning Board to identify and analyze potential environmental impacts. NYS ECL Art. 8. For four decades the courts have required SEQRA lead agencies such as the Planning Board considering a declaration of significance to take a “hard look” at environmental impacts and set forth a “reasoned elaboration” in its determination of significance. *H.O.M.E.S. v. New York State Urban Development Corp.*, 69 AD2d 222, 231-2 (4th Dept 1979).

92. The SEQRA regulations similarly require agencies considering a declaration of significance to:

- (1) consider the action . . . ;
- (2) review the EAF, the criteria contained in subdivision (c) of this section and any other supporting information ***to identify the relevant areas of environmental concern***;
- (3) ***thoroughly analyze the identified relevant areas of environmental concern*** to determine if the action may have a significant adverse impact on the environment; and
- (4) set forth its determination of significance in a written form containing a reasoned elaboration and providing reference to any supporting documentation.

6 NYCRR § 617.7(b) (emphasis added).

93. In short, the Planning Board had no authority to give short shrift to any area of substantial environmental concern as a result of the project.

94. Public comment raised numerous serious impacts, but the Planning Board failed to “thoroughly analyze” them as required by law.

95. The SEQRA review commenced in March 2017.

96. The Board determined that the project was classified as Type I 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.<sup>6</sup> NYCRR §§ 617.4(b)(6)(i), 617.4(b)(8) and 617.4(b)(9).

97. Type I actions are more likely to have at least one significant environmental impact. SEQRA establishes a presumption that they will require a full Environmental Impact Statement. 6 NYCRR § 617.4(a)(1); *S.P.A.C.E.*, 291 AD2d 563.

98. Residents began to identify the Resort’s prospective impacts right away. For example, Petitioner Richard Smith and his wife sent a letter to the Planning Board on March 30, 2017 describing multiple environmental impacts:

- Streamside forest: They objected to the placement of cabins within the streamside forest, explaining that the noise and commotion of vacationers in the woods would degrade wildlife habitat.
- Noise/visual: They pointed out to the Board that their home is elevated about 50 feet above the Shawangunk Creek and that they would be able to clearly see the Resort’s buildings on the opposite bluff and hear the associated activity.
- Groundwater: They also questioned groundwater use, noting that their neighbor’s well had recently run dry and that the Resort’s heavy water use

during the dry summer months could seriously deplete groundwater supply.

This letter is attached as Exhibit S. The same issues were raised numerous times throughout the review process.

99. The Planning Board held public hearings at its August, September and October 2017 meetings. The public hearing notice only applied to the Site Plan and Special Permit applications, not the lot line revision. A public hearing notice is attached as Exhibit T.

100. Each hearing was attended by numerous residents who would be affected by the Project. At the September public hearing, 21 residents described impacts expected from the Project including noise, groundwater depletion, wildlife habitat destruction, and damage to the streamside forest. The minutes of the September 19, 2017 meeting are attached as Exhibit U.

101. Groundwater depletion was a prominent issue. As described above, the Developer produced a well test, and the Planning Board's consultant identified deficiencies in the test.

102. Residents demanded a more rigorous pumping test. They demanded that the test ensure not only that there is adequate water for the Resort, but that the Resort's use would not draw down groundwater levels and affect neighbors' wells. One such letter from Petitioner John Bohan is attached as Exhibit V.

103. The Planning Board never required any follow-up testing, as recommended by its own consultant. Without any further investigation, the Board failed

to fulfill its responsibility to analyze whether the Resort's water usage would affect neighboring wells.

104. The public hearing continued at the October 17, 2017 meeting, with many residents continuing to comment.

105. Attorney David Gordon appeared for the group Friends of Gardiner, including Petitioners. Gordon presented expert reports from Greenplan and Hudsonia.

106. The Greenplan report reviewed the many sensitivities of the Subject Property, citing multiple government reports documenting the health and sensitivity of the Shawangunk Kill. Exhibit H.

107. The Hudsonia report raised the likelihood of wetlands on the site. It also catalogued the many rare plants and animals that live along the Shawangunk Kill and likely on the site. It drew attention to the likelihood of soil erosion and siltation from construction near the river. Exhibit N.

108. The Planning Board closed the public hearing in October 2017 despite the fact that the applicant was still producing data related to environmental impacts.

109. On October 27, 2017, Petitioners' attorney submitted a letter to the Planning Board urging the Board to issue a positive declaration and prepare an environmental impact statement. He cited the technical reports as well as neighbors' concerns about noise and other nuisance impacts. The letter is attached as Exhibit W.

110. The Planning Board held a workshop discussion on November 15, 2017. The minutes are attached as Exhibit X. The purpose of the workshop was to review the environmental impacts of the Project.

111. The workshop included a discussion of wildlife habitat impacts, and it reflected two important misunderstandings about protection of the Shawangunk Kill.

112. First, the Planning Board seemed to believe that the recommendation of protecting a 535-foot buffer 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.” Exhibit X.

113. Contrary to Mr. Wiegand’s statement and apparent confusion, the Open Space Plan, which recommends a 535-foot buffer, was duly adopted by the Town Board. Exhibit I. 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.

114. Specifically, 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.” Exhibit I at 46.

115. 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 as proof that the river corridor was adequately protected.

116. According to the November 15, 2017 meeting minutes, the Planning Board relied on the conclusion that “the Hudsonia recommendation is far in excess of NYS DEC Part 666 standards for the Kill.” Exhibit X.

117. The New York State Wild, Scenic and Recreational River program provides varied protections to designated rivers, with the least stringent protection afforded to Recreational Rivers. ECL § 15-2707; 6 NYCRR Part 666. The Shawangunk Kill is designated a Recreational River.

118. As New York State Department of Environmental Conservation Deputy Regional Permit Administration Scott Ballard explained in an October 29, 2018 letter, NYS DEC's implementation of the Part 666 regulations focuses on enhancing recreational use of designated Recreational Rivers, including increasing "public access and education of the protected resource." Ballard's letter is attached as Exhibit Y.

119. 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 wildlife habitat and water quality that the Open Space Plan sought to protect, nor that there will not be a significant adverse environmental impact.

120. This is particularly true where, as here, a respected expert researcher has identified numerous potential impacts and areas of sensitivity.

121. Operating under these misunderstandings, the Planning Board failed to recognize its responsibility to fully analyze the ecological impacts of placing cabins within the streamside forest.

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

123. Petitioners' attorney submitted another letter on December 18, 2017, reiterating that the Project would damage the streamside forest. The applicant had made representations that modifications to the project layout had moved the cabins off the slope down to the river, but petitioners' attorney advised the Board that the cabins were still located at the top of the slope and within the streamside forest. He advised the Board that they had not adequately analyzed habitat, wetlands and other environmental impacts. Gordon's letter is attached as Exhibit Z.

124. Gordon also advised the Planning Board that based on recent Town discussions indicating that there was no Town law in effect creating the Planning Board, the Board was without authority to take any action. Exhibit Z.

125. Over the next months, after the public hearings were closed, the Developer produced some additional information.

126. One item was a noise study. Exhibit K. As described above, the noise study had three significant flaws: (1) There was no actual measurement of baseline evening noise levels. (2) The study evaluated noise impacts only at two property boundaries, both of which had high levels of baseline noise, rather than impacts on neighboring properties. (3) It failed to evaluate the volume or range of noise from human activity in the forest and river, separate from the noise of amplified music.

127. With out considering these factors, there was no way for the Planning Board to analyze the full impacts of the Resort's noise on neighbors.

128. A reliable noise study would have been easily accomplished by setting up a demonstration with amplified music and noise measurements at appropriate locations.

“This is a common practice in cases like this and is an efficient and cost effective means to assess noise impacts.” Fink Aff. ¶ 18.

129. In addition to the inherent flaws of the Developer’s noise study, it also did not, and could not, address the frequency of loud events at the site. The Ulster County Planning Board had recommended event frequency be analyzed and limited. Exhibit L.

130. Further, the Planning Board refused to consider the cumulative impact of adding the noise of the Resort to the noise impacts that have already been introduced by the Yogi Bear Jellystone campground, 0.75 mile away, and the Tuthilltown Distillery event venue on the adjacent property to the east. Neighbors already experience occasional noise from these facilities, and the Resort will add significantly to that noise burden.

131. SEQRA requires consideration of cumulative impacts of separate proposals that affect the same resource. 6 NYCRR 617.7(c)(3); *see Save the Pine Bush, Inc. v. Albany*, 70 N.Y.2d 193, 206 (1987).

132. Petitioner Hilary Adler asked for cumulative impacts to be considered and was refused by the Planning Board. Adler Aff. ¶ 22, 23.

133. At its May 15, 2018 meeting, the Planning Board voted to issue a Negative Declaration, certifying that the Project would have no significant impacts on the environment.

134. That determination was arbitrary and capricious in light of the significant evidence that there would be one or more significant environmental impacts. SEQRA requires a positive declaration of significance if “the action *may* include the potential for

at least one significant adverse environmental impact.” 6 NYCRR §617.7(a)(1). That threshold was clearly met here.<sup>1</sup>

135. In contrast, a negative declaration requires an affirmative determination that there would be no adverse environmental impacts, or that the impacts would be insignificant. 6 NYCRR §617.7(a)(2). Uncertainty or lack of information must be resolved in favor of a positive declaration and further investigation through an Environmental Impact Statement. *See, Matter of S.P.A.C.E. v. Hurley*, 291 AD2d 563, 564 (2nd Dep’t 2002); *Matter of UPROSE v Power Auth. of State of N.Y.*, 285 AD2d 603, 608 (2nd Dep’t 2001).

136. As the foregoing account demonstrates, the Planning Board’s SEQRA review reflected a clear failure to “thoroughly analyze the identified relevant areas of environmental concern to determine if the action may have a significant adverse impact on the environment” as required by SEQRA. 6 NYCRR § 617.7(b)(3). As a result, the Negative Declaration was arbitrary and capricious and should be annulled.

#### Site Plan and Special Permit Review

137. Public hearings on the Site Plan and Special Permit applications were held at the August and September 2018 Planning Board meetings. Again the public hearing was only noticed for the Site Plan and Special Permit applications, not the Lot Line Revision. A public hearing notice is attached as Exhibit AA.

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<sup>1</sup>Petitioner Hilary Adler attended the meeting and heard two of the Board’s consultants misstate the standard of the SEQRA review to be whether the Project would have significantly greater impact than a permitted use. Adler Aff. at 19. This misunderstanding could have affected the Board’s decisions.

138. Numerous residents spoke about violations of the Town Code. An excerpt from the minutes of the August 21, 2018 public hearing is attached as Exhibit BB.

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

140. In October 2018, Petitioner Hilary Adler sent a letter to the Planning Board on behalf of Friends of Gardiner. It explained clearly that the Resort proposal is an obtrusive commercial operation proposed for a residential/agricultural district, and to qualify for a special permit, it would need to meet conditions it could not meet. Adler Aff. ¶ 26.

141. Friends' letter explained that to qualify for a special permit, the Project must have no greater impact than uses allowed by right. It suggested common-sense limitations that could mitigate some of the impacts, including limiting the frequency of amplified events, restricting the restaurant to guests only, and establishing greater setbacks to minimize impacts on neighbors and the environment. Adler Aff. ¶ 26.

142. On December 14, 2018, the undersigned attorney submitted a letter to the Planning Board. The letter alerted the Board to numerous outstanding violations in the proposed Project. The letter is attached as Exhibit CC.

143. With regard to the Site Plan application, the letter explained that, among other things, (1) the restaurant use was not allowed under the Town Code, (2) the project exceeded the nonresidential square footage allowed under the Town Code, and (3) the Board had not considered the town's required stream buffer. Exhibit CC.

144. The letter also cautioned the Board that before it could consider awarding a Special Permit, it would need to make specific findings. Importantly, the Board would have to consider a finding 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). To make this finding, it would need to carefully analyze the impacts of as-of-right development of the property. The Board would also need to determine that “such use does not interfere with or diminish the value of adjoining property.” Town Code § 220-63. Exhibit CC.

*Replacement of Open Space with Intensive Agricultural Use*

145. A significant change emerged at the end of the review. Throughout the project review, the applicant repeatedly promised to place the portions of the property that the Resort would not utilize into conservation easements. These sections would include ecologically sensitive areas and an area set aside for low intensity agricultural uses.

146. In 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 drafts of proposed easement language for the agricultural parcel.

147. The proposed 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. It would allow uses like agritourism activities and events. The agricultural easement language is attached as Exhibit DD.

148. This intensive use would mean more buildings, more people, and more activity on the site.

149. These uses would clearly increase the Resort's environmental impacts on the community and related nuisances, including noise, odor, dust, runoff, water use, traffic and visual blight.

150. At all times during the Planning Board's SEQRA review, the project was considered limited to the Resort activities, with the remainder of the subject property preserved as open space. Accordingly the Board's SEQRA review only considered the impacts of the Resort facilities, and 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.

151. 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 C at 3. This "preserved open space" was relied upon to mitigate negative environmental impacts.

152. When the agricultural easement language revealed that the agricultural parcel would not in fact be open space but rather an intensive secondary use on the Subject Property, Petitioners requested the opportunity to comment. They were not allowed to do so.

153. Petitioner Hilary Adler sent an email to the Planning Board on November 20, 2018 expressing alarm that the Board was allowing this significant change, preventing the public from commenting, and ignoring the fact that the agribusiness was completely inconsistent with the Negative Declaration. Adler Aff. ¶ 27.

154. Having already executed its bait-and-switch with proposed intensive use of the conservation parcel after the close of the public hearing, the Developer's attorney, Michael Moriello declared at the December Planning Board meeting that the applicant would not consider any comments on its expanded proposal. The December 18, 2018 Planning Board minutes are attached as Exhibit KK.

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

Approval

156. Even as the Project was sailing toward approval, many of its serious impacts remained unaddressed.

157. Board Member Carol Richman wrote a memo to the Board on December 14, 2018, in which she laid out the ecological reasons for protecting the streamside forest and requiring the cabins to be relocated into the cleared area of the site. She also cited the recommendations of the Town's Open Space plan to preserve a 535-foot buffer from the Shawangunk Kill. Ms. Richman's letter is attached as Exhibit EE.

158. Concerns about noise persisted until the final stage of the review as well. Planning Board Alternate Member Marc Moran wrote a memo to the Board on December 17, 2018 in which he recommended "more stringent restrictions on noise." He suggested that outdoor amplified sound should be prohibited entirely. Mr. Moran's letter is attached as Exhibit FF.

159. On January 15, 2019, despite multiple unmitigated environmental impacts and code violations, the Planning Board adopted the Approval Resolution, granting Site Plan Approval, Special Use Permit and Lot Line Revision.

160. The serious flaws in those approvals require this court to annul the approvals.

### **SPECIAL PERMIT NONCOMPLIANCE WITH THE CODE**

161. In its haste to approve the Project, the Planning Board utterly ignored its duty to determine whether the Project qualified for a special permit. It did not.

162. 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 damage the adjacent community.

163. A special permit can only be considered after the Board analyzes the facility's impact on adjacent properties. The Code provisions governing special permits specifically mandate this review and protection. Town Code § 200-63.

164. Of crucial importance, a special permit can only be awarded if a 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) (emphasis added).

165. The Board must “make specific written findings” documenting that a project meets this condition. Town Code § 200-63(B).

166. 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.

167. The Planning Board never analyzed what type of development would be allowed as of right, nor what the impacts of that development would be.

168. 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. For example, vacationers at the Resort would be active on the property throughout the day, unlike typical residents. Also, 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.

169. Moreover, this Resort also presents much higher density of use than the as-of-right subdivision. It would have 80 buildings hosting up to 225 people per day (plus employees), far more than would likely live in a low-density subdivision.

170. A comparison of the impacts of different uses can be readily accomplished. "Comparing project alternatives with a proposed project is a routine analysis carried on by planning boards everywhere. There are standard factors, rules of thumb, and specific thresholds available. . ." Fink Aff. ¶ 50

171. Certified Planner J. Theodore Fink demonstrated a basic review in his accompanying affidavit. He applied the zoning code's minimum lot size of 5 acres for an as-of-right subdivision to the 141 acres, resulting in a maximum of 28 homes.<sup>2</sup> Fink Aff. ¶ 51.

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<sup>2</sup> More homes could only be allowed through the "open space development" provision in the Town Code. Town Code § 220-19(B). However, while this would allow for more

172. Applying standard factors used by engineers and planners, he calculated that the traffic volume generated by the Resort would be four times that of a 28-lot residential neighborhood. Water use would be 26% higher for the Resort compared with a subdivision. Fink Aff. ¶ 52, Attachment K.

173. In addition, Dr. Erik Kiviat noted the Project would “have substantially greater impacts on biodiversity than an ordinary residential subdivision as allowed by Town zoning.” KiviatAff. ¶ 38.

174. Mr. Fink’s calculations show that the Planning Board could have completed the required analysis. It also shows that if they had done the math, the Resort’s impacts would almost certainly have exceeded those of an as-of-right use.

175. In contrast, the Approval Resolution reflects no attempt to predict what size subdivision would be allowed, and no explication of the comparative impacts, let alone any quantitative comparison.

176. 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

177. There was also no analysis of how the noise of the Resort would compare with the noise from a subdivision.

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density, it would result in less impact on the environment and the neighborhood than a conventional subdivision.

178. 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.

179. 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.

180. In order to qualify for a special permit, the correct limit should have been the noise that an as-of-right subdivision would have produced. Noise from an as-of-right subdivision was never modeled or calculated.

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

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

183. Planning Board Alternate Marc Moran's December 17, 2018 memo clearly articulated that issue:

Under the permit conditions currently contemplated, Heartwood would be allowed to hold an unlimited number of outdoor events, all with amplified sound at levels (at the source) similar to heavy equipment operating or a jet taking off nearby. This does not seem particularly protective, and is very different than what we'd expect from even the full development of the property with single family homes (the "use permitted by right"), where amplified music would be the exception, not a regular occurrence.

Moran memo, Exhibit FF.<sup>3</sup>

184. The Planning Board never calculated the level of noise, nor the frequency of noisy events, that could be expected from an as-of-right subdivision. Absent this

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<sup>3</sup> Mr. Moran is a former regional administrator of the state Department of Environmental Conservation.

analysis, they could not make a finding that the Project will have “no greater overall off-site impact” than development by right.

Property values

185. Another requirement to obtain a special permit is that the proposed use will not diminish the value of adjoining property: “such use does not interfere with or diminish the value of adjoining property.” Town Code § 220-63.

186. As detailed above, Petitioners have informed the Board of numerous impacts to their enjoyment of their property caused by amplified noise from events, transient visitors congregating in the forest and near the creek and likely trespassing on private property, and other nuisances. These nuisances will directly affect their property values.

187. Petitioner Hilary Adler estimates a reduction in her property’s value of 30% or more, based on the reduced value of properties adjacent to similar commercial establishments like the Jellystone campground. Adler Aff. ¶ 10.

188. 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.

189. 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.

190. This purported “finding” is directly counter to residents’ statements and simple common sense. Without any analysis, there is no basis for the conclusion that property values would not be reduced.

## **SITE PLAN VIOLATIONS OF THE TOWN CODE**

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

192. As described above, the Rural Agricultural zoning district is designed for low-density residential uses, agricultural, and similar low-intensity uses. In its determination to force an inappropriately intensive project into this location, the Developer has broken several specific rules in the Town Code.

193. The Planning Board has no authority to interpret or vary the Town Code, a power vested only in the Zoning Board of Appeals. NYS Town L. § 267-b; *Matter of Catskill Heritage Alliance, Inc. v Crossroads Ventures, LLC*, 161 AD3d 1413, 1415 (3d Dep't 2018).

194. There were no variances issued in connection with the Project.

195. Based on any or all of the following violations, the Site Plan should have been rejected for noncompliance with the Code.

### Scale of the resort

196. The total scale of the Resort's buildings far exceeds the limits for the district.

197. The Resort proposes 80 nonresidential buildings totaling 48,123 square feet. Exhibit J.

198. 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.

199. 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. *Id.* at footnote 10.

200. The code further specifies that the limitation on building size constrains not just individual buildings, but the total nonresidential footprint project 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.* (emphasis added).

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

202. The central buildings, housing the administration, spa, restaurant, event center, laundry and other uses, total 13,553 square feet under a single roof. The buildings are separated only by exterior walls designed to keep individual structures under 6,000 square feet. Exhibit J.

203. Accordingly, even the central facilities total more than twice the allowed footprint, without counting the 70 cabin units and outbuildings.

204. 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.

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

206. 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.

207. 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.” Exhibit R.

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

209. The Planning Board had a responsibility to apply the 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 . . .”

210. The Planning Board erred in approving a Site Plan that grouped multiple commercial buildings to greatly exceed the permitted scale.

*Restaurant prohibited*

211. The restaurant included in the Resort is explicitly prohibited by the Town Code for this zoning district.

212. The zoning code strictly restricts restaurant uses in the Rural Agricultural 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.

213. The Resort is a lodging facility, not an agricultural use. The restaurant is not proposed in an existing building; there are no existing buildings on the site.

214. In response to neighbors' comments that the restaurant is not permitted, the Planning Board's environmental consultant Sterling Environmental Engineering issued a memo on November 6, 2018 opining that "a restaurant associated with a lodging facility is allowed by Special Use Permit." The Sterling memo is attached as Exhibit GG.

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

216. 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. NYS Town L. § 267-b; *Catskill Heritage Alliance, supra*.

#### *Cabins violate stream setback*

217. A third code violation concerns the placement of cabins directly at the top of the slope near the Shawangunk Kill, within the sensitive streamside forest.

218. 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. Town Code § 220-35(D).

219. 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.

220. Some of the cabins within the forest are within 100 feet of the top of the streambank as defined in the Town Code.

221. 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.

Town Code § 220-74 (emphasis added) (“Town-Defined Streambank”).

222. The Site Plan does not show the Town-Defined Streambank. Exhibit D.

223. Instead, it shows a 150 setback from the water’s edge and a boundary line for the “top of 15% slope.” Exhibit D at A1.01. Both these parameters are regulated in the New York State Recreational River regulations. 6 NYCRR 666.13. They do not match the town’s Wetlands and Watercourse regulations.

224. 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.

225. This was demonstrated in the undersigned attorney’s December 14, 2018 memo to the Planning Board, which included diagrams of the slopes. Exhibit CC.

226. In the areas of steep streambank, the top of the 25% slope (Town-Defined Streambank) would be roughly equivalent to the “top of 15% slope” line. Cabins are proposed just beyond that mark.

227. The cabins that are within 100 feet of the top of the Town-Defined Streambank 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.

228. In response to Petitioners' complaint about this issue, 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." The Sterling memo is attached as Exhibit HH.

229. This belief was not substantiated with any diagrams or measurements.

230. Moreover, at the December 18, 2018 Planning Board meeting, the consultant engineer misstated the Town's streambank definition, stating that it is 45 degrees. A 25% slope is a gradient of 1:4, or 14 degrees. Exhibit KK.

231. 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. Exhibit B at 27.

232. As explained 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.

233. In any case, compliance with Part 666 does not excuse or replace compliance with Town Code.

234. 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.

235. 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

236. The noise issues discussed at length herein reflect an additional violation of the Town Code.

237. 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).

238. The sound of amplified music from unlimited weddings and parties is clearly a type and frequency that will disturb neighbors.

239. Noise of this type is patently in disharmony with the character of a quiet, rural neighborhood.

240. The Planning Board's analysis only considered the decibel level of the amplified music, not the type or frequency of the noise from parties, which is completely out of character with the area.

241. It also did not consider the daily noise of vacationers in the forest and at the river.

242. Neighbors have made it clear that the multiple elements of noise from the Resort will be disruptive to their enjoyment of their homes, decks and yards, as well as to their work, for those who work from their property.

### **APPROVALS NOT AUTHORIZED BY SEQRA REVIEW**

243. As detailed above, the SEQRA review failed to properly analyze multiple significant environmental impacts of the Project, including noise, ecological impacts, and groundwater depletion.

244. In addition, there was no SEQRA review of the agribusiness component of the Project in any way, as it was introduced after SEQRA review was completed.

245. The introduction of the agribusiness use in place of some of the promised open space negated several of the conclusions of the Negative Declaration that relied on open space as mitigation. For example:

- “Animal habitats will be preserved by the inclusion of 54 acres of preserved open space.” Negative Declaration 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.” Negative Declaration 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.” Negative Declaration at 9.

246. As a result of these omissions, the Negative Declaration does not reflect a hard look at the entire Project and could not support the issuance of the Site Plan Approval, Special Permit or Lot Line Revision.

247. The proper remedy for inadequate SEQRA review is to annul the approvals that were based upon the faulty review. *Chinese Staff & Workers Ass'n v New York*, 68 N.Y.2d 359, 369 (1986).

#### **FAILURE TO HOLD REQUIRED PUBLIC HEARINGS**

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

249. The agricultural easement was introduced in October 2018 after all hearings were closed. The agricultural use significantly changed the scope of the Project. As a result, the public never had a chance to comment on a complete application.

250. State law also 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). The Project includes a lot line revision, which is a subdivision for purposes of state law. Authority for the Town’s review of a lot line revision is within the subdivision authority in Town Law Sections 276, 277.

251. The Planning Board never posted a public hearing notice for a subdivision or lot line revision. Exhibits T and AA.

252. The agricultural easement was introduced after all public hearings had ended. The easement specifically related to the Lot Line Revision as the purpose of the Lot Line Revision was to create an agricultural parcel.

253. The public had no opportunity to comment on the intensive use contemplated in the agricultural easement, which would have led many to oppose the Lot Line Revision.

254. Failure to hold the required public hearings renders the Special Permit and the Lot Line Revision contrary to law.

#### **LACK OF PLANNING BOARD AUTHORITY**

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

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

257. 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.” The minutes of the December 5, 2017 Town Board meeting are attached as Exhibit II.

258. Petitioners admonished the Planning Board not to take action as it lacked authority. Exhibit Z.

259. 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.

260. As a result, the Negative Declaration must be nullified.

### **CONCLUSION**

261. The review process of the proposed Resort was marred by inadequate environmental review, failure to make the required findings for a special permit, and failure to identify blatant code violations in the Site Plan, among other errors.

262. For the foregoing reasons, Petitioners ask this Court to annul and vacate the Negative Declaration, Site Plan Approval, Special Permit and Lot Line Revision, to declare the Site Plan unlawful, and to provide such other relief as the Court deems appropriate.

Dated: Poughkeepsie, NY  
February 18, 2019

Respectfully submitted



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Emily B. Svenson