

SUPREME COURT OF THE STATE OF NEW YORK
ULSTER COUNTY

FRIENDS OF THE SHAWANGUNKS

Petitioner,

VERIFIED PETITION

Index No. _____

Date filed _____

-against-

TOWN OF GARDINER PLANNING BOARD
and JOHN ALEXANDER

Respondents.

Petitioner, Friends of the Shawangunks, by their undersigned attorneys, for their verified petition in this CPLR Article 78 Proceeding against the Respondents, respectfully allege and state:

PRELIMINARY STATEMENT

1. This Article 78 Special Proceeding under N.Y.C.P.L.R § 7801 *et seq.* challenges Town of Gardiner Planning Board (“Planning Board”) regarding its approval of the 793 North Mountain Road 93.1-1.25.1 Special Use Permit for the Alexander Parcel (“Alexander Parcel”).
2. Although as of the filing of this Petition, an executed resolution has not been made available to the public, the Planning Board resolved to approve the Special Use Permit for the Alexander Parcel on May 24th, 2022. A draft resolution was published on May 24th, 2022, granting approval for the Special Use Permit in plain violation of the Town Code § 220-16, which conditions approval of the Permit upon the proposed Project being

at “the lowest feasible elevation on the property.” *See* Draft Resolution, annexed hereto as Exhibit A. In approving the Special Use Permit, the Planning Board found that the project is in the lowest feasible elevation in SP-2 District, rather than the *property as a whole*.

3. In addition, the Planning Board approved the Special Use Permit while the driveway length exceeds the clear requirement set forth in § 220-16(F)(4)(g)(7). The Planning Board found that an excess of 500 feet was necessary to ensure feasibility when accessing the buildable site but based this on the incorrect assumption that building in the SP-2 District is “necessary”.
4. Further, the Planning Board relied on a Negative Declaration to approve the Special Use Permit, but that Negative Declaration did not comply with SEQR. It failed to identify the pertinent areas of environmental concern, take a hard look at them, and advance a reasoned elaboration of the grounds for its determination. In particular, the impact the 1,700-foot driveway will have on the land due to the need to cut down 150+ trees.
5. On its face, the application is contrary to the ordinances set forth in Gardiner Town Code, and Planning Board does not have the authority to circumvent these requirements to approve projects that do not meet these standards.
6. Planning Board’s approval in light of the statutory text is arbitrary, capricious, and contrary to law and must be vacated.

JURISDICTION AND VENUE

7. This court has jurisdiction pursuant to CPLR § 7806 which gives the Court authority to grant the relief sought by petitioner. Therefore, Jurisdiction and Venue are proper to

review the arbitrary and capricious approval of the Special Use Permit for the Alexander Parcel, which is contrary to law, without sound basis in reason and without regard to the facts.

8. This Court is the proper venue for the proceeding pursuant to CPLR § 506(b) as “proceeding against a body or officer shall be commenced in any county within the judicial district where the respondent made the determination complained of.” Respondent, Town of Gardiner Planning Board, operates its offices within Ulster County, New York, and made such determinations while operating in Ulster County.

PARTIES

9. Petitioner, Friends of the Shawangunks (“Friends”), has standing in its own right and on behalf of its members. Friends, along with its land trust, is dedicated to protecting the Shawangunk Mountains of New York from adverse environmental impacts. As an organization that supports, conserves, and protects open spaces of the Shawangunk Mountains, it represents its members’ interests by challenging this petition. *See* Affidavit of John Hayes, annexed hereto as Exhibit B, ¶ 3.
10. Respondent, Town of Gardiner Planning Board (“Planning Board”), operates out of Town Hall, located at 2340 Rte. 44/55 in Gardiner, New York. Here, the Planning Board conducted a review of the Project under the State Environmental Quality Review Act (SEQRA) and issued a Negative Declaration and approved the application for a Special Use Permit that gives rise to this Article 78 Special Proceeding.
11. Respondent, John Alexander, submitted the application to the Town of Gardiner Planning Board for a proposed Project located at 793/795 North Mountain Rd, Gardiner, NY

12525, within the Shawangunk Ridge Protection District of Ulster County. Mr. Alexander is seeking approval for a Special Use Permit to begin constructing a single-family dwelling within the SP-2 District on his parcel.

PETITIONER'S STANDING

12. Friends, along with their land trust The Shawangunk Conservancy, is dedicated to protecting the Shawangunk Mountains from adverse environmental impacts. *See* Exhibit B, ¶ 3.
13. The Project is situated in the Shawangunk Mountains, specifically in the Shawangunk Ridge Protection District.¹ The Town of Gardiner has set forth additional protections for the Ridge in its Town Code due to the “unique scenic character, water resources, and fragile ecology . . . whose conservation enriches and benefits residents and visitors. The ecological resources of this area are of national and international significance, considered by the state of New York and major conservation organizations as one of the most important sites for biodiversity conservation in the northeastern United States.”²
14. John Hayes is the President of Friends and resides on Rock Hill Road, High Falls, NY 12440, nearby the Ridge. He has been connected to this area for 66 years. He and his family were summer residents from the time Mr. Hayes was born to when he moved there permanently with his wife in 1995, and has permanently resided ever since. Due to the longevity of the connection that Mr. Hayes holds with the Ridge, the development will negatively affect him on an emotional level. He has grown up hiking in the area and has

¹ Gardiner Code § 220-16

² Gardiner Code § 220-16(A)(2)

- developed a relationship over the years for the beauty and fragility that the ecosystem possesses. Mr. Hayes referred to the beauty of the undeveloped area as a cathedral. Development will be an encroachment on his recreational and aesthetic enjoyment, as well as the specific species that are unique to the area. *See* Exhibit B, ¶ 3, 4, 7, 8, 9.
15. His most prominent concern regarding Mr. Alexander's proposed Project is the dangerous precedent that will arise from it and the slippery slope that will follow. Proper interpretation of the Ordinance going forward is vital to protecting the Ridge. *See* Exhibit B, ¶ 18.
16. Along with Mr. Hayes, Friends members such as Patty Lee Parmalee, who resides in Wallkill, suffer similar injuries that result from the degradation of the Ridge. Ms. Parmalee has a long history of involvement with the Shawangunk Mountains that dates back 20 years. In 2002, she founded Save the Ridge, which was an interest group to help stop a huge development of 350 houses from being constructed along the hillside. After the fight against the development was won and Save the Ridge dissolved, she joined Friends as a member and later became Secretary. *See* Affidavit of Patty Lee Parmalee, annexed hereto as Exhibit C, ¶ 5, 7.
17. In addition to her work with Friends, she is involved with NY/NJ Trail Conference to oversee all volunteers in charge of maintaining the hiking trails with The Shawangunk Mountains and serves on the Environmental Management Council in Shawangunk. *See* Exhibit C, ¶ 8.
18. She is not only involved with the Ridge professionally, but personally as well. Ms. Parmalee's house is located at the bottom of the Ridge, roughly $\frac{3}{4}$ of a mile from the entrance to the Lake Awosting trail. Her proximity to the Ridge allows her to enjoy it

every other day, recreationally and aesthetically, by hiking or walking her dogs through the beautiful trails. *See* Exhibit C, ¶ 9.

19. Her most prominent concern is preserving large tracts of undeveloped land at higher elevations for the animals that reside in the area. The higher in elevation, the wilder the land should be due to how fragile it is, and development should not be encroaching that. *See* Exhibit C, ¶ 10.

20. Ms. Parmalee is frustrated that the Planning Board approved Mr. Alexander's application for a Special Use Permit and is not enforcing the zoning laws that were specially created to mitigate situations like Mr. Alexander's proposed Project. *See* Exhibit C, ¶ 11.

21. Resolution of this Petition, vacating approval of the Special Use Permit, would remedy all of Mr. Hayes' and Ms. Parmalee's injuries by preventing development so high up on the Ridge.

STATEMENT OF THE FACTS

22. The Shawangunk Ridge Special Protection District ("SP District") exists to protect the resource values of the Shawangunk Ridge area and to establish clear guidelines for its future protection and sensitive development. The SP District is divided into three zoning subdistricts, SP-1, SP-2, and SP-3, which are designated by "a graduated system of regulation that is least restrictive at the bottom of the slope (SP-1), more restrictive on the middle portion of the slope (SP-2), and most restrictive at the higher elevations (SP-3)."³

³ Gardiner Code § 220-16(C)

23. Friends works to conserve and protect the sensitive Ridge from adverse environmental impacts, such as impermissible construction in zoning districts that are environmentally sensitive.
24. On August 10th, 2021, Mr. Alexander submitted an application in the form of two lot subdivision sketch maps, an EAF short form, a Minor Subdivision Application and Checklist, a Conservation Analysis and other related documents setting forth his intent to subdivide a 108-acre parcel of land situated on the westerly side of North Mountain Road. The proposed subdivision of Lot #1 is a 5-acre parcel that contains a single-family dwelling with accessory structures, and Lot #2 contains the remaining 103-acre parcel. Lot #2 retains a Right of Way over Lot #1 for driveway access following an existing path.⁴
25. The Property contains land in zoning districts SP-1, SP-2, and SP-3.
26. The Conservation Analysis, conducted by the applicant himself, singles out a plateau that was “badly logged in the early 1980s and many of the mature trees were damaged or killed by gypsy moths in the late 1980s” causing the forest to be less dense than the surrounding land, making it the appropriate choice for a homestead.⁵
27. The proposed building site is situated in the SP-2 District, so it requires a Special Use Permit.⁶
28. On April 26th, 2022, the Planning Board issued a Negative Declaration for the parcel and held a public hearing in which six people spoke in favor of the application being

⁴ 2021.08.10 Application

⁵ Conservation Analysis

⁶ Gardiner Code § 220-16(I)

approved and five people spoke against the project being approved. *See* Negative Declaration, annexed hereto as Exhibit D, ¶ 13.

29. On May 24th, 2022, the Planning Board published an unsigned draft resolution decision granting preliminary Subdivision approval and conditional Final subdivision approval and Special Use Permit approval.
30. At a public board meeting on that same date, the Planning Board approved the Special Use Permit for the Alexander Parcel, though as of the filing of this Petition, the executed resolution has not yet been made available to the public.

Statutory Intent & Legislative History

31. The Statutory purpose set out in the Town Code § 220-16 unambiguously states that the values of the district are to be protected, while allowing for *sensitive* development: “The purpose of the Shawangunk Ridge Protection District is (hereafter the “SP District) to protect the resource values of the Shawangunk Ridge area as described in the Comprehensive Plan and to establish clear guidelines for its future protection and sensitive development.”⁷
32. The very nature of the Shawangunk Ridge is evidence of the Town of Gardiner’s vested intent to protect it: “The Town of Gardiner finds that the unique scenic character, water resources, and fragile ecology of the Shawangunk Ridge, escarpment, and foothills are critical features of the Town whose conservation enriches and benefits residents and visitors.”⁸

⁷ Gardiner Code § 220-16(B)

⁸ Gardiner Code § 220-16(A)(1)

33. The Shawangunk Ridge is home to many plant and animal species and, “The ecological resources of this entire area...are of national and international significance, considered by the State of New York and major conservation organizations as one of the most important sites for biodiversity conservation in the northeastern United States. Because this area includes a set of closely related ecosystems, whatever occurs on one portion of it can have a significant effect on other resources. This area includes visually prominent and geologically significant cliffs and talus slopes and five globally rare plant communities, including the world's best example of the dwarf pine ridge community.”⁹

Tiered Approach

34. The tiered approach was instituted to provide for flexibility for landowners who are fortunate enough to own land in the Ridge, and to afford protections for the intricately connected ecosystems that have existed for centuries, stating “any development within the Town at the higher elevations or on the steeper slopes of the Ridge can significantly affect the ecological integrity of this entire area. At higher elevations and on steeper slopes, the visual and ecological impacts tend to be more significant.”¹⁰
35. To achieve the goal of protecting the visual and environmental quality of this sensitive area, “the Town finds that planning and zoning should direct development to areas of lower elevation by strictly regulating development at higher elevations and providing incentives for development to occur in the least sensitive locations. The Town finds that a ‘tiered’ approach, in which land use is regulated less stringently at lower elevations and

⁹ Gardiner Code § 220-16(A)(2)

¹⁰ Gardiner Code § 220-16(A)(3)

more stringently at higher elevations, is an appropriate tool to accomplish this goal, particularly with respect to protection of the steepest slopes and the large blocks of unfragmented forest.”¹¹

36. The Town, in writing and passing this code, built in allowances for landowners to build in the lowest feasible elevation in the Special Protection District for the aforementioned reasons. As such, they integrated specific regulations for the SP district to ensure that the Town’s natural resources are shielded from abuse. This tiered system, and the zoning tables, strictly regulate construction in the SP-2 and SP-3 zones, requiring special permits, and that the construction must occur at the lowest feasible elevation on the property.

The Project is Impermissibly Sited by Not Abiding by Lowest Feasible Elevation on the
Property Requirement

37. Town Code § 220-16 is unambiguous regarding statutory intent, and language, and as such—must be abided by and enforced by the Planning Board, which is without authority to bypass it. The title of § 220-16 reads “Shawangunk Ridge Special Protection District”, plainly stating that the following requirements apply to the entirety of the SP District.
38. Subsections A and C of § 220-16(F)(1) specifically apply to those projects requiring *special permits*, stating in part:
- a. **Subsection A:** “All development requiring a special permit within the SP District that requires review by the Planning Board, Town Board, or Zoning Board of Appeals shall comply with the standards in this Subsection F.” (emphasis added).

¹¹ Gardiner Code § 220-16(A)(6)

- b. **Subsection C**: “As part of any application for a subdivision, special permit, or Site Plan approval in the SP District, the applicant shall prepare a conservation analysis as described in § 220-20A, except in the case of a minor subdivision located entirely within the SP-1 Subdistrict.” (emphasis added).
39. In contrast, **Subsection B** states: “The Planning Board shall insert conditions on any approval, or deny approval, as necessary to satisfy the requirements of this Subsection F or any other part of this § 220-16. Such conditions shall include the requirement that permitted construction occur at the *lowest feasible elevation on the property*.” (emphasis added). Subsection B expressly applies to “any” approval or denial and is unambiguously not limited to special permits or any particular tier of the SP District.
40. The absence of any specification of Subsection B applying to special permits, and the title pertaining to the *entire* SP District, plainly evidences that Subsection B applies to the entirety of the SP District. Cannons of construction show that the deliberate absence of “special permits” in Subsection B points to it applying to any construction in the SP District.
41. Thus, projects applying for a special permit, and those without, must comply with the specified requirements of Subsection B, which set forth that the permitted construction occur at the lowest feasible elevation on the *property*. This would require Mr. Alexander to build in SP-1, as there are other *feasible* building sites situated in the SP-1 District.
42. Further, the firm language conveyed through the text, (“**shall include the requirement**”) shows that this is not a negotiable point, but rather a firm, unmovable obligation for the Planning Board to enforce.

43. Respondent has used the reasoning in the Young / Sommer LLC memo to hold an incorrect interpretation of this unambiguous requirement set forth in the Town Code to fit his building project. Respondent contends that, contrary to its express terms, Section B does not apply to construction in the SP-1 District. As explained above, this interpretation is contrary to the express, unambiguous language of the Town Code.
44. That said, even *if* it could be argued that the code is ambiguous and that § 220-16 (F)(1)(b) only applies to the SP-2 and SP-3 zoning districts, that does not change the result. The construction proposed in the Site Plan is undisputedly in SP-2, which requires a Special Use Permit. As such, Subsections A, B, C, and all other sections in Section F(1) are triggered.
45. Subsection B expressly and unambiguously requires Mr. Alexander to construct at the “lowest feasible elevation on the property.” The Alexander Parcel includes “property” in the SP-1 District at lower elevations than currently proposed for the home, so the Planning Board was required by the Town Code to reject the Site Plan because the proposed construction is unequivocally *not* at the lowest feasible elevation on the property. Since there are feasible alternatives situated at a lower elevation on the *property*, the Planning Board must comply with the plain code, and deny approval of the Special Use Permit unless this is remedied.
46. Making this approval even more arbitrary, capricious, and contrary to law is the fact that it resulted in needing a driveway that also violates Town Code. Section 220-16(F)(4)(g)(7) states that “in order to minimize land disturbance, driveways shall be no longer than necessary to provide access to a buildable homesite on a lot. Driveways shall not exceed 1,200 linear feet in length, unless the Planning Board finds that a longer

driveway is necessary to make access feasible.” The Planning Board stated that they found the 1,700-foot driveway was necessary to access Mr. Alexander’s proposed Project in the SP-2 District. However, it is not “necessary” to construct a driveway leading to the higher elevations because of the aforementioned reasons. If Mr. Alexander were to abide by the Town Code and build in the SP-1 District, the length of the driveway could potentially be shorter and meet the 1,200-foot requirement set forth within § 220-16(F)(4)(g)(7). Even *if* the driveway did not meet the requirement when building in the SP-1 District, this could be considered “necessary” to make access feasible to Mr. Alexander’s buildable site since it is located in the lowest feasible location on the property and abiding by the Town Code.

47. There are two alternative sites that Mr. Alexander could use to construct his Project that he did not include in the Site Plan. The lowest site would require almost no driveway and the site that is slightly above that would require a driveway half the size of the one the Planning Board approved.¹² Having alternative sites further proves that building within the SP-2 District and constructing a 1,700-foot driveway is not “necessary”. Therefore, the Planning Board’s approval of the Special Use Permit while violating Town Code § 220-16(F)(4)(g)(7) is arbitrary, capricious, and contrary to law.

48. In addition, the approval of the Special Use Permit was based in part on the Negative Declaration, but that Negative Declaration did not comply with SEQR. The Planning Board concluded that “the impact on the use or intensity of use of land as a result of this Project is small given the overall size of the parcel as compared to the size of the Project including its footprint.” *See* Negative Declaration, Exhibit D. However, the Negative

¹² Environmental Conservation Commission Memo

Declaration failed to identify the pertinent areas of environmental concern, take a hard look at them, and advance a reasoned elaboration of the grounds for its determination.

49. More specifically, the Negative Declaration entirely ignored the adverse environmental effects the 1,700-foot driveway and destruction of at least 150 trees will have on the Ridge. Out of the total tree removal, 72 of these trees have a DBH of greater than 15 inches and some are 110-130+ years old. Therefore, the concerns surrounding the Proposed driveway must be addressed more in-depth, and the Planning Board approving the Special Use Permit in reliance to this Negative Declaration was arbitrary, capricious, and contrary to law.

AS AND FOR A FIRST CAUSE OF ACTION (ARTICLE 78)

50. Article 78 of New York's Civil Practice Law and Rules provides a device for challenging the actions of New York State or political subdivisions thereof, including the Planning Board.
51. Planning Board's approval of the Special Use Permit in light of the above reasons was arbitrary, capricious, and contrary to law.
52. The body of evidence before the Planning Board and the plain text of the code required denial of the Special Use Permit for the following three reasons: it did not purpose building at the "lowest feasible elevation on the property", it did not abide by the driveway length requirement, and it inaccurately relied on a Negative Declaration that did not comply with SEQR.
53. Planning Board has exceeded its statutory authority to approve the Special Use Permit, "In the event that, even with the imposition of conditions, the resource protection

objectives of this section cannot be satisfied, the Planning Board **shall** deny an application for a special permit.” (emphasis added).¹³

54. The requirements above are stated in mandatory terms (“shall”), and the zoning code does not allow the Planning Board to waive or vary these firm, unambiguous requirements.

55. Because the proposed site of construction is not at the “lowest feasible elevation” on the property, approval of a Special Use Permit was arbitrary, capricious, and contrary to law, and must be vacated.

56. Further, because the driveway exceeded the 1,200-foot requirement and the additional 500 feet is not found to be “necessary” since development in the SP-1 District is not only feasible but required, the approval of the Special Use Permit was arbitrary, capricious, and contrary to law and must be vacated.

57. Lastly, because the Planning Board relied on the Negative Declaration, but it failed to take a hard look at what environmental impacts the driveway and loss of 150+ trees may have on the land, the approval of the Special Use Permit was arbitrary, capricious, and contrary to law.

WHEREFORE, Petitioner demand judgment and injunctive relief as follows:

A) A judgment that Planning Board’s approval of the Special Use Permit was arbitrary, capricious, and contrary to law.

B) A judgment that enjoins Respondent John Alexander from any physical alterations on the property until a Site Plan consistent with the Town Code is submitted and approved.

¹³ Gardiner Code § 220-16(D)(6)

C) Granting Petitioner such further relief as the Court may deem proper.

Dated: June 23, 2022

White Plains, NY

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Todd D. Ommen", is written over a horizontal line.

Todd D. Ommen
Pace Environmental Litigation Clinic,
Inc. 78 North Broadway
White Plains, NY 10603
(914) 422-4343
tommen@law.pace.edu

SUPREME COURT OF THE STATE OF NEW YORK
ULSTER COUNTY

FRIENDS OF THE SHAWANGUNKS

Petitioner,

-against-

VERIFIED PETITION

Index No. _____

RJI No. _____

TOWN OF GARDINER PLANNING BOARD
and JOHN ALEXANDER

Respondents.

STATE OF NEW YORK)
) SS:
ULSTER COUNTY)

John Hayes, being duly sworn, deposes and says that he is a citizen of the State of New York, and a member of Petitioner, Friends of the Shawangunks, whose domicile is in the state of New York, and hereby states that he has read and annexed Petition, knows the contents thereof, and the same is true to his knowledge, except those matters therein which are stated to be alleged on information and belief, and as to those matters he believes them to be true. His belief to those matters therein not stated upon knowledge and belief is based upon the files he maintains.

JOHN J HAYES

Sworn to me before this
_____ day of June, 2022

NOTARY PUBLIC

My Commission expires: _____

