

*Appeal for the Interpretation of the Zoning Code and for issuance of Building Permit, for
issuance of amendment of Building Permit and for issuance of Certificate of Occupancy re:
Section 11, Block 1, Lot 1.52
a/k/a the Poplar Street Prop, T/O Highlands
by Aggrieved Neighbor Deborah Kopald*

I. Introduction: What is Being Challenged

Pursuant to my cover letter, I am appealing the issuance of a Building Permit, dated 9/5/2019 and amended on 9/30/2019 to “David, Deborah and Jaidin Tonneson”, on information and belief legally identified as David Tonneson, Deborah Tonneson and Jaidin Paisely-Tonneson. The Application number is 2019-107 and the Permit Number is 2019-107. The Permit expires on 9/5/2020. The Location of Work reads “Poplar St Prop, T/O Highlands”. The Description of Work section reads:

INSTALL A FOUNDATION SYSTEM ACCORDING TO DRAWINGS BY TALCOTT ENGINEERING DESIGN, PLLC

** AMENDED 9/20/2019
CONSTRUCT SINGLE FAMILY HOME

I am appealing the issuance of the permit to begin with and the amending of the permit. **See**

Exhibit 1 Pursuant to NY TOWN § 267-a(6), this stays further construction on the property.

I am also appealing the issuance of a Certificate of Occupancy (CO). Pursuant to NY TOWN § 267-a(6), this stays the Certificate of Occupancy, also.

Pursuant to 2 N.Y. Zoning Law & Prac. § 28:04,

Where the by-laws of a zoning board of appeals provide that an appeal shall be perfected by the filing of official forms furnished by the board, an appeal filed on unofficial forms is nevertheless adequate where it informs the board of all matters that invoke its jurisdiction.

(Emphasis Added)

I assert that this should be deemed as one appeal. Case law that combines inextricably linked questions into a motion is also apposite to the point of considering this one appeal; See esp.

Sears, Roebuck & Co. v 9 Ave-31 Street Corporation, 274 N.Y. 388, 9 N.E.2d 20 (1937: Court of Appeals). Where the relief requested (rescission of the issuance of Building Permit 2019-107, Rescission of the amendment to Building Permit 2019-107, Rescission of the issuance of a Certificate of Occupancy) ultimately deemed to be 2 or 3 appeals, I ask that this brief be considered with each separate appeal. (I am also asking that monies paid in excess of one appeal as well as all escrow, which should not be levied for any appeal, let alone one of an aggrieved neighbor, be returned to me forthwith in the interest of justice). I am assuming the CO was issued because I see lights on at night, but maybe it wasn't. I cannot get this information right now, so I would ask the ZBA to check; and also, if people are illegally living there to ask the Building Inspector to stop it. The automatic stay issued by this appeal pursuant to § 267-a(6), also should result in an order for the occupants to be removed from the premises while this appeal is ongoing.

II. Jurisdiction

The Zoning Board of Appeals' jurisdiction is invoked via NY TOWN LAW § 267-a(4), (5)(b) and NY GEN CONSTR LAW § 25-a(1) and via the Town Zoning Code (A, B).

III. Argument in Brief

I assert that there are three major sets of issues in question regarding interpretation of the zoning code that apply to varying degrees to the three requests for rescission of a building department determination: *first*, the Erosion Control Section of the Town Code (§101-7) is specific in containing no exceptions to Planning Board Review. It was grossly violated to be able to even physically start to build something on the site. As such, I assert my property rights were violated, because the extreme violations of the erosion control provisions of the code did a number of negative things, including, but not limited to creating a needless blight at the end of

my yard, destroying the integrity of an old, sturdy and ecologically significant forest, which forces more (unwanted) light onto my property, and makes it noisier over here as the trees absorbed sound and thus reduced the value of my property and moving sprawl near my property line, reducing privacy and violating the Town's Resolution on Global Warming and needless releasing of more carbon into the atmosphere by improperly removing Carbon sinks, which are the cornerstone of the fight against Global Warming. (Exhibit 2)

It was an abuse of discretion for the Town Building Inspector to issue a house on a site that was improperly disturbed (as well as an abuse to do so when no Engineer signed off on a survey as required (a surveyor did instead in violation of §101-9 and when the plans failed to identify the locations of the perc and deep tests which is necessary to ascertain whether the septic will actually work properly. None of the plans submitted had details about the original topography submitted, which is easily available in the New York State high precision topographical mapping of Orange County. The Building Inspector didn't even bother to do a simple analysis to see how slope was disturbed, as my surveyor Michael W. Finkbeiner did with this County resource. So he is either incompetent or turned a blind eye, but either way, the site should have been referred to the Planning Board for proper erosion control.

By the Tonnesons not going to the Planning Board as required for Erosion Control and getting variances, I was deprived of notice and the right to weigh in on activity that wound up devaluing my property in ways that are generally recognized as well as being unique to me. This is a violation of my property rights and my first Amendment right to speech. These are serious, not trivial violations of my federal, Constitutional rights. As such I assert the Permits should be rescinded as they are fruit of a poisonous tree and improperly obtained; at a minimum, erosion control and proper Planning Board review should occur before permits are granted; however

given the number and nature of the violations, including the wholesale disregard of the climate change resolution, which is a major policy national policy issue that the Town took the initiative to implement, I request that the permits in question here should be permanently rescinded.

Second, a conflict between legislation provision in the zoning code, § 210-48, further reinforces that regulations imposing a greater restriction should govern; the restrictions on erosion control, development of plats and roads, requiring Planning Board approval must control. Certainly, the failure to meet these restrictions obviate the granting of an ill-gotten certificate of occupancy. I will argue that they also apply to approval of any building on the lot as well.

Third, the lot has a complex history which involves pieces being removed or added (Exhibit 3) since the subdivision code change made in 1967. At this juncture, Chapter 173, Subdivision of the Land” <https://ecode360.com/12022374> reads:

[Subdivision of land regulations for the Town of Highlands, adopted in 1967, are currently under review by the Town Board. Said provisions will be included here as Chapter 173, Subdivision of Land, upon completion of said review.]

If the law has not changed, then the law has to be posted. I don't know what the law says since it is being withheld from the website, and it is possible that given that four houses have now come out of the original tranche, some with changes in 1973 and 1996, the areas in question is part of a larger subdivision that *de facto* requires Planning Board approval. What we do know is the Planning Board absolutely needed to be involved pursuant to §27-2(B)1,2 which involve approving plats (this one was never so approved as can be confirmed by the Orange County Clerk) and approving new streets (and that meet state fire code) Furthermore, according to the Town Zoning Map (Exhibit 4), the lot in question straddles four zones: R-1, R-4, R-5 and no zone. As a three-zoned parcel *that allows apartments*, and where an improper road has been made (“Poplar proposed” never got Planning Board approval, nor did the illegal extension of it

out of the Tonneson's driveway on Hemlock Street) and the plat was never properly approved for building as required by the Planning Board, Planning Board review on any comprehensive plan is justified especially pursuant to § 210-50.

There are a number of provision that relate to the site plans

IV. The Building Permit for Construction of a Foundation Initially Issued is a Nullity; the amended Building Permit (where the amendment was grafted onto the original permit) is also a nullity as an amended permit should have had a new date, new signature, etc.

§ 210-21 of the Town of Highlands Zoning Code states

No building permit or certificate of occupancy shall be issued for other than a one-family residence, a two-family detached residence or for structures accessory thereto until a site development plan has been approved by the Planning Board in accordance with this section.

There is simply no such thing permissible as the Permit issued on 9/5/19 to "Install a Foundation System". Such a permit would automatically have to go to the Planning Board. The only thing conceivably permissible under § 210-21 that can avoid the Planning Board are a one-family residence, a two-family detached residence or structures accessory thereto. An accessory structure is detached from the main house, like a well. A foundation is not an "accessory structure"; rather it is integral to the house.

On September 30th, the day I went to Court (and told parties I was going to court on an Article 78), the Building Inspector apparently amended this Permit to add ** AMENDED 9/20/2019 CONSTRUCT SINGLE FAMILY HOME. An amended document is a new document. This was an *ex post facto* attempt to make the foundation legal to give a helping hand to the Tonnesons to make the original permit cosmetically kosher (which it was not). An

amended document is a new document with a new date. The doctored document contains the original date of 9/5/2019. One cannot doctor the old document and treat the amendment as backdated. So there is not a new permit issued on the actual date to construct a single family home that was ever issued. There is an improper amendment to the original permit; the Building Inspector should have issued a new permit dated September 30, 2019 that said amended permit.

§ 210-52 (B) Certificates of Occupancy states.

Compliance. No certificate of occupancy shall be issued for any building, structure, premises, lot or land *unless the erection, construction, reconstruction, structural alteration, restoration, repair or moving of such building or structure, or part thereof, and the intended use thereof are in conformity in all respects with the provision of this article.*

(Emphasis Added)

Elsewhere in the article, namely in §210-48 (2) Conflicts in Legislation, it states,

Wherever the provisions of any other law or ordinance or regulations impose a greater restriction than this article, the provisions of such other law or ordinance or regulation shall control.

There are greater restrictions imposed by other aspects of the code, that I will flesh out in subsequent sections. These include, §101-7, §101-9, §27-2(B)1,2. (erosion control, need to have plan certified by engineer or architect (no site plan was certified by any engineer, just by a surveyor), and the need to have the plat approved and a new road approved by the Planning Board.) No certificate of occupancy should have been issued and one issued must be stayed both because the building permit(s) is(are) illegal on their face, and because there are other ordinances which imposed greater restrictions on the erection and construction of the building than the article in question, Article VIII. In subsequent points, I will explain how even if the building permit(s) is/(are) deemed cosmetically kosher in regard to §210-21 in isolation, that they too

were issued as fruit of a poisonous tree and in an abuse of discretion, because §210-48 as drafted intends greater restrictions than the entire chapter, not just the article to control. Also, §210-50 A,B,E, F apply and should have prevented the Building Inspector from issuing anything:

A. Compliance with building code. All procedure with respect to applications for and issuance of building permits shall be in conformity with the provisions of the New York State Uniform Fire Prevention and Building Code. All such applications shall be accompanied by such other information as may be necessary to determine and provide for the enforcement of this chapter.

As stated in the Affidavit of Michael W. Finkbeiner,

The driveway slope greater than 20% exceeds Fire Truck Access Standards, with a 20% slope maximum. See: Section 18.2 of NFPA 1, Fire Code, 2015 edition.

(NFPA is the National Fire Code Association) and may have been adopted by the State of New York.

B.

Compliance. No building permit shall be issued for the erection, construction, reconstruction, structural alteration, restoration, repair or moving of any building or structure or part thereof, unless the plans and intended use indicate that such building or structure is designed and intended to conform in all respects to the provisions of this article.

E.

Any building permit issued under false pretenses by the applicant or in violation of the provisions of this chapter shall be subject to a stop-work order or an order to remedy violation issued by the Building Inspector and/or Code Enforcement Officer. Any work undertaken or use which is not in conformity with this chapter shall be unlawful and discontinued until brought into compliance with this section. Whenever the Building Inspector and/or Code Enforcement Officer otherwise has reasonable grounds to believe that any work is being prosecuted in violation of this chapter, or regulations or other sections of the Town Code, or the New York State Uniform Fire Prevention and Building Code, or in an unsafe and dangerous manner, the Building Inspector and/or Code Enforcement Officer or his designee may issue a stop-work order or order to remedy. Service of process of a stop-work order or order to remedy violation shall be effective if served personally on the applicant, owner or agent at the work site or if sent to the

applicant or owner by certified mail, return receipt requested, as well as by regular mail, or if sent by fax, provided that the fax number is printed on the letterhead of the addressee, applicant or owner in the ordinary course of its business.

[Added 5-22-2006 by L.L. No. 3-2006]

(Emphasis Added)

The false pretenses are that the plans were not signed off by an engineer when the permit was issued and the perc and deep tests did not specify location, and special tests are needed in disturbed soil, which is what occurred from the sloping that took place on the site

F.

No building permit shall be issued for the construction or alteration of any building upon a lot without access to a street or highway as stipulated in § 280-a of the Town Law.

[Added 5-22-2006 by L.L. No. 3-2006]

§ 280-a of the Town Law states the following:

§ 280-a. Permits for buildings not on improved mapped streets

1. No permit for the erection of any building shall be issued unless a street or highway giving access to such proposed structure has been duly placed on the official map or plan, or if there be no official map or plan, unless such street or highway is (a) an existing state, county or town highway, or (b) a street shown upon a plat approved by the planning board as provided in sections two hundred seventy-six and two hundred seventy-seven of this article, as in effect at the time such plat was approved, or (c) a street on a plat duly filed and recorded in the office of the county clerk or register prior to the appointment of such planning board and the grant to such board of the power to approve plats.
2. Before such permit shall be issued such street or highway shall have been suitably improved to the satisfaction of the town board or planning board, if empowered by the town board in accordance with standards and specifications approved by the town board, as adequate in respect to the public health, safety and general welfare for the special circumstances of the particular street or highway.

The plat was never approved by the Town Planning Board and was never recorded by the county clerk and the street is not an existing state, county or town highway. Therefore NO PERMIT whatsoever should have been issued for a dwelling on this land.

Also the following sections may apply:

G.

No building permit shall be issued for a lot in a subdivision requiring approval by the Planning Board unless the subdivision map has been properly filed in the office of the County Clerk.

Chapter 173, which is currently hidden from the Zoning Code may show that this applies.

I.

No building permit shall be issued for any building where the site plan of such building is subject to approval by the Planning Board, except in conformity with the plans approved by said Board.

[Added 5-22-2006 by L.L. No. 3-2006]

The site plan of the building is subject to approval by the Planning Board when there are erosion control issues, e.g. §101-9, and a plat and street require approval e.g. §27-2(B)1,2.

V. There are No Exceptions to the Erosion Control Section of the Code or to Getting a Plat approved prior to development and to Getting a Road Approved Before a House Can Go on It. Erosion Control must be a continuous process over the Course of Construction and is under the Aegis of the Planning Board. (ERGO, Building Inspector could not go issue a permit for a house in the absence of these aspects of the code being complied with).

The Erosion Control Section of the code makes it clear that there were certain activities, grading, stripping, clearing of an area over half an acre and cutting of trees over a certain diameter for which the Poplar Respondents were supposed to go to the Planning Board with first (there is no exception- it clearly says “none of the following activities shall be commenced until a permit has been issued from the Planning Board”):

§ 101-7 Activities requiring a permit.
[Amended 5-22-2006 by L.L. No. 2-2006]

A. None of the following activities shall be commenced until a permit has been issued from the Planning Board under the provisions of this chapter:

- (1) Site preparation in the subdivision of land into two or more parcels.*
- (2) Site preparation within waterlands.*
- (3) Site preparation on slopes which exceed 1 1/2 feet of vertical rise to 10 feet of horizontal distance.*
- (4) Site preparation within the one-hundred-year floodplain of any watercourse.*

- (5) Excavation which affects more than 200 cubic yards of material within any parcel or any contiguous area.*
- (6) Stripping which affects more than 20,000 square feet of ground surface within any parcel or any contiguous area.*
- (7) Grading which affects more than 20,000 square feet of ground surface within any parcel or any contiguous area.*
- (8) Filling which exceeds a total of 100 cubic yards of material within any parcel or any contiguous area.*
- (9) Site preparation pursuant to a special exception permit issued by the Town Planning Board or the Town Board.*
- (10) Site preparation affecting or contiguous to the shoreline of the Hudson River.*
- (11) On all properties, the removal or destruction of more than three trees 10 inches DBH or over during any period of 12 consecutive months or any one tree 30 DBH inches or over.*

Emphasis Added

In regard to the erosion control provision in §101-7 which I assert control § 101-9 states

§ 101-9 Permit application materials.

A.

Maps and plans accompanying the application shall be prepared by a licensed architect or engineer or by any other person approved by the Town Planning Board.

B.

Operations map(s) at a scale no smaller than one inch equals 200 feet, which *present a complete erosion and sediment control plan* and which indicate:

(Emphasis added)

No site plan certified by an engineer was ever presented to the Planning Board or the Building Inspector (I will get to that in the next section- it was an engineer's "plot" and Respondents pulled a bait and switch by having a surveyor, who is only licensed to put in a survey, certify a "site plan", something that is not done in New York State). Section B of § 101-9 talks about a complete erosion and sediment control plan. Complete means complete- the surveyor has some information about silt fencing but it was not a complete erosion control plan and it is invalid because the surveyor is not empowered to do this anyway. The important thing is that an "erosion and sediment control plan" is, on information and belief, understood to be part of an engineer's site plan. The engineer never provided any site plan (just a "plot") and did not provide erosion and sediment control. In any case, it is clear from this section as well as conflict of laws (§ 210-48), that this needed to go to the Planning Board *first*. The code is crystal clear in (§ 101-10 C) that "*The control of erosion and sediment shall be a continuous process undertaken as necessary prior to, during and after site preparation and construction*" This passage makes it clear that erosion control is a continuous process that occurs during construction as well as before when the site is being prepared and *ipso facto* must go to the Planning Board which must retain control throughout the construction process. §101-10 has other erosion control provisions which were absolutely ignored in this project; in particular section C is explicit that erosion control "*shall be a continuous process undertaken as necessary prior to, during and after site preparation and construction.*" Again, §101-7 says, "*None of the following activities shall be commenced until a permit has been issued from the Planning Board under the provisions of this chapter*", which means no exceptions and that reliance on §210-21 in isolation is misplaced.

Again § 101-9 mandates a “*complete erosion and sediment control plan*” which was utterly lacking: there was only information about silt fencing, nothing about improper fencing and NO SITE PLAN WAS SUBMITTED AND APPROVED BY AN ARCHITECT OR ENGINEER AS REQUIRED (a bait and switch was pulled by having a surveyor improperly sign off on a site plan). Control of the erosion and sedimentation process has not been going on during this process as required by § 101-10(C) below:

§ 101-10 Standards.

In granting a permit under this chapter, the standards and considerations taken into account include but shall not be limited to the following:

- A.** Excavation, filling, grading and stripping shall be permitted to be undertaken only in such locations and in such a manner as to minimize the potential of erosion and sediment and the threat to the health, safety and welfare of neighboring property owners and the general public.
- B.** Site preparation and construction shall be fitted to the vegetation, topography and other natural features of the site and shall preserve as many of these features as feasible.
- C.** *The control of erosion and sediment shall be a continuous process undertaken as necessary prior to, during and after site preparation and construction.*
- D.** The smallest practical area of land shall be exposed by site preparation at any given time.
- E.** The exposure of areas by site preparation shall be kept to the shortest practical period of time prior to the construction of structures or improvements or the restoration of the exposed areas to an attractive natural condition.
- F.** Mulching or temporary vegetation suitable to the site shall be used where necessary to protect areas exposed by site preparation and permanent vegetation which is well adapted to the site shall be installed as soon as practical.
- G.** Where slopes are to be revegetated in areas exposed by site preparation, the slopes shall not be of such steepness that vegetation cannot be readily established or that problems of erosion or sediment may result.

H. Site preparation and construction shall not adversely affect the free flow of water by encroaching on, blocking or restricting watercourses.

I. All fill material shall be of a composition suitable for the ultimate use of the fill, free of rubbish and carefully restricted in its contents of brush, stumps, tree debris, rocks, frozen material and soft or easily compressible material.

J. Fill material shall be compacted sufficiently to prevent problems of erosion and where the material is to support structures, it shall be compacted to a minimum of 90% of standard proctor with proper moisture control.

K. All topsoil which is excavated from a site shall be stockpiled and used for the restoration of the site and such stockpiles where necessary, shall be seeded or otherwise treated to minimize the effects of erosion.

L. Prior to, during and after site preparation and construction, an integrated drainage system shall be provided which at all times minimizes erosion, sediment, hazards of slope instability and adverse effects on neighboring property owners.

M. The natural drainage system shall generally be preserved in preference to modifications of this system, excepting where such modifications are necessary to reduce levels of erosion and sediment and adverse effects on neighboring property owners.

N. All drainage systems shall be designed to handle adequately anticipated flows both within the site and from the entire upstream drainage basin.

O. Sufficient grades and drainage facilities shall be provided to prevent the ponding of water, unless such ponding is proposed within site plans, in which event there shall be sufficient water flow to maintain proposed water levels and to avoid stagnation.

P. There shall be provided where necessary to minimize erosion and sediment such measures as benches, berms, terraces, diversions and sediment, debris and retention of basins.

Q. Drainage systems, plantings and other erosions or sediment control devices shall be maintained as frequently as necessary to provide adequate protection against erosion and sediment and to ensure that the free flow of water is not obstructed by the accumulation of silt, debris or other material or by structural damage.

(Emphasis added)

§ 27-2 B is clear that the Planning Board Must have jurisdiction over approving plats (the plat was never approved as can be verified with the Orange County Clerk) and to approve changes in the lines of streets.

The Consolidated Planning Board shall hear and determine all matters submitted to it in accordance with the law applicable to the property which is the subject of the application, and in particular, Article 16 of the Town Law of the State of New York and Article 7 of the Village Law of the State of New York, the village code and the Town Code, and in particular as to the following matters:

(1)

To approve or disapprove plats showing lots, blocks or sites, with or without streets or highways; and to approve the development of plats already filed in the office of the Orange County Clerk if such plats are entirely or partially undeveloped.

(2)

To approve or disapprove changes in the lines of existing streets, highways or public areas shown on subdivision plats or maps filed in the office of the Orange County Clerk.

The Tonnesons appear to have taken § 210-21 as some kind of exemption to all of these rules.

However, the Building Inspector doesn't get to approve *any* house, just a house, and one that must conform to regulations; he doesn't have power to waive exemptions from other aspects of the code including those violated to get the house up.

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- VI. *Affidavits by a forester and a surveyor/aerial photogrammetrist suggests that the tree cutting ordinance was violated, that wetlands may have been disturbed, that there was an oil leak that should have been investigated, that the silt fencing was broken and discontinuous, leading to further erosion, that an Army Corps of Engineers provision should have been adhered to, that more trees were cut on September 30th from September 28th when a first drone flyover occurred and some mapping was done, and that this evidence seen on September 30th appears to have been removed by October 14th, that the driveway is illegal, that the perc tests and deep tests are incomplete, and that sloping and grading among other things violated the erosion control provisions. The incomplete information on septic suggests that the state code was violated and still, there does not appear to be any septic permit granted. Besides the fact that the engineer and surveyor's reports are generally faulty and incomplete, the parcel is part of a larger parcel that has already been subdivided and already has multiple houses on it, so the history needs to be ascertained to see if this is part of a development (the Town has conveniently***

yanked that portion of the code from the site for “review”).

The attached affidavit of Starling W. Childs (Exhibit 5) was the first confirmation of the likelihood that serious violations including zoning code violations have occurred at the site. Mapping from the September 28th drone flyover of the property (pictures taken by DronePix LLC) shows the proportional area of the mountainside disrupted by superimposing the disturbed land on top of the Google Map of the area that was taken prior to construction via DroneDeploy software. It does not include the full carve-out of the mountain on the other side of the road (Exhibit 6). The September 30th flyover which showed more destruction on the East side of the paved road on the property (Exhibit 7) further attests to the in appropriate clearcutting that occurred. October 14th photos suggests that some of the trees that could be seen in Exhibit C (the carve out on the East side of the paved road) of Mr. Child’s affidavit that had been cut down appear to have been removed from the site (there is a shadow as this photo was taken at midday but some of the tree logs are missing- what appears and can be seen when the photo is digitally enlarged is some lumber has been put there- lumber being machined rectangular pieces as opposed to the tree logs with bark that were there before.) (Exhibit 8)

The October 14, 2019 flyover shows activities indicate that a septic field (note striations on the ground) is being put in the location that Mr. Childs indicated involves wetland activity (and also note- the oil spill Mr. Childs had noted is still visible in this photo) (Exhibit 9) and which is an unsightly blight from my yard, my deck and even my driveway (also in Exhibit 9 behind the overhead photo of the septic trenches) that I assert I would have been spared of if the Tonnesons had properly gone before the Planning Board to get approval and where I could have weighed in to make sure code was followed. They also would have been ordered to get a variance which would have given me notice. When the Respondents had 15 acres to build on, their septic should

not be backed up to my property. Mr. Childs told me that a wetlands soil scientist is needed to examine what has occurred and also examine the septic field, and I have asked the Court to allow one onto the premises as well as a forester and aerial photogrammetrist.

Surveyor/aerial photogrammetrist, Michael W. Finkbeiner, also a graduate of the Yale School of Forestry, has preliminarily looked at some of the evidence. Pursuant to Michael W. Finkbeiner's affidavit, the Engineer's submission to the town is called a "plot", sheet 1 of 1 contains a proposal for development of a septic system that contains a pre-installed septic tank and is being built on a disturbed site in violation of 101-7 of the town erosion control code. The surveyor put in a "site plan", but it doesn't have anything close to complete erosion control- it just shows silt fencing. The engineer is supposed to put in a site plan, not the surveyor, who is only empowered to put in a survey. The Tonnesons disturbed the land in advance of having a survey and an engineered design. Instead, the surveyor filed a plan three days later; this includes the engineering elements, but does not address the missing required parts including stormwater controls and drainage. There is no sedimentation and erosion control plan; there is only some erosion control around the septic reserve- not around the entire disturbed site, and in any case this should have been put in an engineering report. Most significantly, *no engineer signed off as required on any plan for the site, the building or anything else.* The so-called site plan is being used as a development plan; the engineer is supposed to design and regulate the compliance with the code, and in any event the surveyor's plan does not remediate these elements, which are missing on the engineer's plan. The engineer assumed the existence of the ill-gotten clearcut and grading and driveway construction (some of which I assert occurred after his plot was submitted) and designed a well, house and septic system around it. It also appears that this engineer works for the modular housing company that made the house put on the site. He is a structural engineer

and not a civil engineer, but again either way, has certified *no plan* as of the information provided to me in the September FOIL.

The *location* of the perc tests and deep tests were not shown on any plan. There are some numbers, but they don't say *where the tests were taken*. Perc test number one notes a rate of 6 minutes per inch. We don't know where this was done, and at this juncture it would appear that grading and filling took place after this test. In any case, the test needed to have been taken 10 feet from the location of the trenches (which were only recently dug in October- the deep test was taken on August 1st and the perc test was taken on August 21st) and there is no proof of where the tests were taken. Perc test number two shows a rate of one minute per inch which is the bare minimum under the state code. The deep tests quite unusually show the same level, and this is especially unusual for an area with disturbed soil put therein. The actual location of the septic trenches is now in an area with disturbed soil and grading. It is further inexplicable that the numbers in the deep test are the same, given that the septic field has been installed on ground that was originally cross-sloped at 6 feet. I believe on the 1st August that sloping and grading was not done- which would mean that these depths cannot be related to the present soil.

Septic fields generally do not go in disturbed soil, but rather in certified fill, which is a particularly dark color. On information and belief, special tests are required and none appear to be done. Aerial photography shows the soil is uniform in color and shows no evidence of certified fill having been trucked in. Again the photographs suggest the trenches were dug into graded site material as opposed to certified fill. The fill used appears to have been dug out from another part of the site; it is common knowledge that once soil is disturbed it loses its percolation

properties- it changes its moisture retention property. Because we do not know where the tests¹ were taken and what the elevation of the soil was at that time, we only know that the site has continually changed since then, we do not know what soil is under the trenches. The original

¹ https://www.health.ny.gov/environmental/water/drinking/docs/appendix_75a.pdf
75-A.4 Soil and Site Appraisal.

(a) Site Investigation.

(1) Areas lower than the 10 year flood level are unacceptable for on-site systems. Slopes greater than 15% are also unacceptable.

My comment: The slope graphing proves that there was over 20% slope and concomitant disturbance which occurred without a permit.

(2) There must be at least four feet of useable soil available above rock, unsuitable soil, and high seasonal groundwater for the installation of a conventional absorption field system (75-A.8(b)).

(3) Soils with very rapid percolation rates (faster than one minute per inch) are not suitable for subsurface absorption systems unless the site is modified by blending with a less permeable soil to reduce the infiltration rate throughout the area to be used.

My comment: The State Code suggests that specific tests should have been used given the highly disturbed nature of the site:

(c) Soil Investigation. The highest groundwater level shall be determined and shall include the depth to the seasonal high groundwater level and the type of water table - perched, apparent, or artesian.

6

(2) If a subsurface treatment unit such as an absorption field is planned, at least four feet of useable soil shall be available over impermeable deposits (i.e., clay or bedrock). Highest groundwater level shall be at least two feet below the proposed trench bottom. Where systems are to be installed above drinking water aquifers, a greater separation distance to bedrock may be required by the local health department having jurisdiction. At least one test hole at least six feet deep shall be dug within or immediately adjacent to the proposed leaching area to insure that uniform soil and site conditions prevail. If observations reveal differing soil profiles, additional holes shall be dug and tested. These additional holes shall be spaced to indicate whether there is a sufficient area of useable soil to install the system. Treatment systems shall be designed to reflect the most severe conditions encountered. If the percolation tests results are inconsistent with field determined soil conditions, additional percolation tests must be conducted and the more restrictive tests must be the factor used for the system design.

(3) Test holes for seepage pits shall extend to at least mid-depth and full depth of the proposed pit bottom. At least three feet of useable soil shall exist between the pit bottom and rock or other impermeable soil layer and the highest groundwater level. This shall be confirmed by extending at least one deep test hole three feet below the deepest proposed pit.

(4) A local health department may accept or require other soil tests in lieu of the percolation test when such tests are conducted or observed by local health department personnel.

(d) Soil Percolation Test.

(1) At least two percolation tests shall be made at the site of each proposed sewage treatment system.

(2) For seepage pits, one test shall be conducted at the bottom depth, and the other at half the pit depth. If different soil layers are encountered when digging the test pit, a percolation test shall be performed in each layer with the overall percolation rate being the weighted average of each test based upon the depth of each layer. The local health department having jurisdiction may adopt an alternative procedure for determining the permeability of soil for the installation of seepage pits.

(3) A percolation test is only an indicator of soil permeability and must be consistent with the soil classification of the site as determined from the test holes.

topographic maps show that the high side of the mountain was cut down 3 feet- the low side was raised 3 feet to make it level pursuant to the engineer's "plot" (he refers to topographic lines of 334 and 336- for an average of 335, when the original topographic map of the area from the New York State high precision topographical mapping of Orange County varied from 332 to 338.) If the trenches are in cut area, they could be deeper than is represented on the deep test, which is a problem because we don't know what is underneath there and whether it will be absorb the effluent (e.g. if groundwater or rock, which would both be unacceptable) -- If the trenches are in the filled area, the effluent will not percolate properly because it is disturbed soil and not proper certified fill. The plans raise the question- why was a septic tank already in the ground on August 27th? When was the approval granted for this tank? It did not appear in either of my September FOILs. Also, there is supposed to be a 2% pitch from the pipe leaving the house until it gets to the trenches; the existing septic tanks do not specify what elevation exists. There is no way this septic plan could have and should have been approved by the Building Inspector and the plan should be sent to the County Health Department. (I called the County Health Department on October 25, 2019, but was told that they don't get involved until after a septic was built, but that they called the Town's engineer that day to ask them to "check it out"). Again, we know that the Respondents then had a surveyor improperly submit a site plan and after the site had been improperly graded, sloped and stripped. There also needed to be a permit for driveway because of erosion control- more than half an acre was clear cut and there is now an asphalted driveway on an improper slope that got no clearance from the Planning Board and comes out of another person's driveway.

In his tree cutting exhibit, Mr. Finkbeiner shows that in the area that was cut, 42 trees above a diameter of 10 inches used to be in the location. Only a maximum of 3 can be cut without

Planning Board approval. His sloping analysis shows that grading and filling were done over 20% in violation of erosion control requirements. Also, the total area cut was well more than 20,000 square feet allowed- it was 36,698 square feet or .842 of an acre.

VII. Other Requirements particular to this Parcel

There are questions about the lot in question- there has been piecemeal development of the lower section of it. See Exhibit 10, Affidavit of Michael W. Finkbeiner

The impacting parcel 11-1-1.52 appears to have been divided from its original configuration in 1967. The new house on the impacting parcel is the third residence to have come out of the original parcel. The Section 173 Subdivision Regulations are withdrawn for review by the Planning Board.

In this case, the Poplar Street project should be seen as part of a larger site development. This is why I have asked Supreme Court for the Town to freeze computer records on the history of the zoning code and to produce “Chapter 173, Subdivision of the Land”

<https://ecode360.com/12022374> and to produce documentation as to when this section of the on-line code was changed to read:

[Subdivision of land regulations for the Town of Highlands, adopted in 1967, are currently under review by the Town Board. Said provisions will be included here as Chapter 173, Subdivision of Land, upon completion of said review.]

The Town of Highlands NY tax rolls includes five developed house sites on with a Poplar St address. House numbers 2,4,8, 3 and 7 are on the developed portion of Poplar accessed from Cherry St. Numbers 3 and 7 are west of Poplar and were developed from the original property with 15.2 acres prior to the building of #3 Poplar post-1998. The subdivision rules may show that the new house on “Poplar proposed” is part of a subdivision and also subject to specific Planning Board review. This concomitant with fact that parcel is in 4 zones (R-1, R-4, R-5 and no zone) and could contain apartments suggest another handle for automatic Planning Board

review. Again, there needed to be approval of the plat, which never happened (it is not recorded with the Orange County Clerk) and no approval for the road, which has now been extended illegally from the Tonneson's driveway and in violation of the New York Fire Association's guidelines (can't be at greater than 20% slope). See again § 280-a of NY Town Law and Town Code § 210-50(F). This project never should have been approved by the Building Inspector. And again, approval of streets, which this one should not get (the street coming out of the Tonneson's driveway) should have gone to the Planning Board for approval; the Fire Department sent a letter to the Building Inspector saying it wasn't a fire hazard. This letter contradicts the New York Fire Association guidance and in any case is not a substitute for proper procedure for this illegal road (illegal because it wasn't approved and illegal because the slope is in excess of 20%). Respondent David Tonneson is a long-standing member of the Fire Department

In regard to Chapter 210, the purpose section makes it clear that the code is to further key activities including section E, preventing "overcrowding of land or buildings", which is what has occurred here, and H "to enhance the value of the land throughout the Town" and L "to conserve and reasonably protect the natural scenic beauty of the Town and its environs".

This project which is on a 15 acre parcel is less than 200 feet from my house and I can see the septic field and the house from my driveway and yard. On a 15 acre parcel, there was no reason to do this, especially given all the other violations which I will get to. It also suggests that the site is being developed to put in even more homes:

§ 210-2 Declaration of purpose.

This chapter is adopted for the purpose of promoting the health, safety, morals or the general welfare of the community, and in furtherance of the following related and more specific objectives:

A. To guide and regulate the *orderly growth*, development and redevelopment of the Town in accordance with a comprehensive plan and with long-term objectives, principles and standards deemed beneficial to the interests and welfare of the people.

B. *To protect the established character and the social and economic well-being of both private and public property.*

C. *To promote, in the public interest, the utilization of land for the purposes for which it is most appropriate.*

D. *To secure safety from fire, panic and other dangers, and to provide adequate light, air and convenience of access.*

E. *To prevent overcrowding of land or buildings and to avoid undue concentration of population.*

F. To lessen and, where possible, to prevent traffic congestion on public streets and highways.

G. To eliminate nonconforming uses gradually.

H. To conserve the value of buildings *and to enhance the value of land throughout the Town.*

I. *To conserve and reasonably protect the natural scenic beauty of the Town and its environs.*

(Emphasis Added on violated portions)

The point is that the Building Inspector, who is not empowered to automatically issue a permit for *any* house, should be taking these things under advisement and had the discretion to do so.

He did not have the discretion to overlook things that were done improperly and that should have gone to the Planning Board first.

VIII. Conflict of Legislation §210-48 Governs Throughout

As previously explained, § 210-48 (A)(2) suggests that “Whenever the provisions of any other law or ordinance or regulations impose a greater restriction than this article, they shall control. A certificate of occupancy cannot be granted without the restrictions of the other ordinances and

regulations controlling- i.e. erosion control, requirements for the plat and street to be approved first and § 280-a of the Town Law of New York, which forbids any construction before the road has been approved (and local code §210-50 (F)). Since this law forbids the building from going up, then there cannot be a certificate of occupancy for an illegal building.

§ 210-48 Conflicts Between Legislation

A.

Other laws.

(1) Nothing contained in this article shall be taken to repeal, abrogate, annul or in any way impair or interfere with the New York State Uniform Fire Prevention and Building Code or any rules or regulations adopted or issued thereunder, or any other provisions of law, ordinance or regulations, existing or as may be adopted in the future, when not in conflict with any of the provisions of this article. Nor is it intended by this article to interfere with or abrogate or annul any easements, covenants or other agreements between parties; provided, however, that *when this article imposes a greater restriction upon the use of buildings, structures, premises, lots or land, or upon the height of buildings or structures, or requires larger lots, yards, courts or other open spaces than imposed or required by such other provisions of law, ordinance or regulations, or by such easements, covenants or agreements, the provisions of this article shall control.*

(2) *Wherever the provisions of any other law or ordinance or regulations impose a greater restriction than this article, the provisions of such other law or ordinance or regulation shall control.*

(Emphasis Added)

Furthermore, section § 210-48 (A)(1) refers to the converse, when greater restrictions are imposed by this article, the converse applies. However, the language refers to restrictions such as height of buildings and courts that are not in the article, but rather in the chapter and it should be assumed that the drafters intended to mean chapter, referring to the entirety of § 210, the zoning code, which means other laws and regulations need to apply before building permits are approved. Again, since the restrictions are greater than that of the certificate of occupancy

section, no building can be occupied without getting proper permits for erosion control, plats, roads, etc., so that the owners should not benefit from foot of a poisonous tree. Furthermore, it is clear the drafters would not have intended for things to be built by violating other provisions if they could not be occupied by violating other provisions.

IX. Conclusion

For all the aforementioned reasons, the building permit (which was amended *ex post facto*) must be rescinded, the amendment to the building department permit must be rescinded and the certificate of occupancy must be rescinded.

Post Script

There is an Orwellian odor of a good-ole boy ethos that pervades the Town that has enabled the parcel owners' flagrant disregard for the law and the serial violation of my fundamental rights. I have stood firm for law and order and in defense of my own rights. I respectfully request that this Board uphold the town code and respect for same, and not continue *ex post facto* this lawlessness by rewarding it. The parcel owners have been poor stewards of the property and the environment, including the lovely forest on this lot through their serial illegalities. There needs to be remediation, consequence and a deterrent to this ever happening again. A deterrent would come in the form of not blessing the misdeeds *ex post facto*. It was night impossible to assume that someone would violate many provisions of the law and that the Town wasn't doing its job. It took a lot of effort for me to prove this since I could not be on the property. The law has to mean something, otherwise it isn't worth the paper it is printed on.

Fort Montgomery, NY.
November 3, 2019



Deborah Kopald