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June 29, 2020

Town of Highlands
Consolidated Zoning Board of Appeals
254 Main Street
Highland, New York 10925

Re: ZBA Application of D. Kopald (Interpretation)

Dear Chairman Jannarone:

This letter is submitted for the limited purpose of addressing certain legal issues to the Consolidated Zoning Board of Appeals (ZBA) concerning the legal jurisdiction of this Board. At the outset of the Public Hearing of the Kopald Application on June 17, 2020 at 7 p.m., I was compelled to address the jurisdictional issue due to the statement of Ms. Kopald's attorney, Mr. Golden, urging this Board to determine all of the issues raised by his client. The Board has requested that legal authority for my position be submitted in letter form to the Board no later than Monday, June 29, 2020. As you are aware, I represent the Tonneson Family in this matter and since the Town has not appeared before the Board in defense of the Building Inspector's issuance of the Building Permit, I must provide this letter.

This ZBA's limited jurisdiction is found in Town Law Section 267-a (4):

4. Hearing appeals. Unless otherwise provided by local law or ordinance, the jurisdiction of the board of appeals shall be appellate only and shall be limited to hearing and deciding appeals from and reviewing any order, requirement, decision, interpretation, or determination made by the administrative official charged with the enforcement of *any ordinance or local law adopted pursuant to this*

article. Such appeal may be taken by any person aggrieved, or by an officer, department, board or bureau of the town.

(*emphasis added*). The statute's indication of "this article" is a specific reference to Article 16 of the NYS Town Law. This Board's jurisdiction is also provided by local law as set forth in the Town of Highlands' Zoning Code at Chapter 210. The applicable Town Zoning Code provision concerning jurisdiction is found at Section 210-44(B)(2), which states:

B. The Consolidated Zoning Board of Appeals 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, the Town Law of the State of New York and Village Law of the State of New York, the Village Zoning Code and this chapter. The matters submitted to the Consolidated Zoning Board of Appeals include:

....
(2) To hear and determine any matter in which it is alleged that the Code Enforcement Officer of the respective municipality was in error in refusing to issue a building permit or certificate of occupancy as a result of misinterpreting the *meaning, intent or application of any section or portion of the zoning ordinance of the municipality* in which the property is located.

(*emphasis added*). Although the local code anticipates appeals to the ZBA by applicants who are denied a building permit, here Ms. Kopald as a neighbor is objecting to the issuance of the building permit by the Building Inspector (BI) to the Tonneson Family.

The duties of a BI or a Code Enforcement Officer (CEO) are wide and varied and only some of those responsibilities relate to the interpretation and enforcement of the Town's zoning code. For example, the BI's office enforces the Town's property maintenance code (and tree removals), the building code, fire code, electrical code, erosion control, stormwater sewers, sanitary sewers, etc., all of which are code provisions outside of the Town's Zoning Code. The BI's enforcement of these provisions is not reviewable by the ZBA because these code provisions are simply not zoning determinations. Portion Properties, Inc. v. DeLuca, 126 A.D.2d 650, (2nd Dept. 1987) (the ZBA has no power or authority to hear appeals on a BI's interpretation of a New York State Building Code or similar codes which are not "zoning determinations"); Matter of Shank v. Town of Dryden, 195 A.D.2d 858 (3rd Dept 1993) (The ZBA improperly granted a variance from the town's Mobile Home Park Ordinance (hereinafter MHPO) which permitted the expansion of an existing mobile home park. The Court determined that the ZBA had no authority to grant the variance, "because the MHPO was not a zoning ordinance, the ZBA was wholly without jurisdiction to alter the requirements of the local statute (*authorities omitted*)."); Matter of Coco v. City of Rochester ZBA, 236 A.D.2d 826 (3rd Dept 1997) (The ZBA is not authorized to review or provide relief from the fire or building codes). See also, Matter of RSM W. Lake Rd. LLC v. Town of Canandaigua ZBA, 12 N.Y.3d 843

(2009), whereby the ZBA was authorized to review a zoning officer's determination of a local law which was enacted pursuant to Article 16 of the NYS Town Law.

Ms. Kopald's application essentially is requesting the ZBA to interpret the Town's "Erosion Control" local law found at Chapter 101. The ZBA has no jurisdictional authority in this regard. The local law concerning "Erosion Control" is not a part of or in any way related to the Town's Zoning Code. Likewise, the Town's "Erosion Control" code was not enacted pursuant to NYS Town Law Article 16 which, under certain circumstances, could provide for local ZBA jurisdiction. Rather the Town enacted this local law pursuant to Article 9 of the Town Law, not Article 16, as indicated:

Section 101-2 Authority.

In accordance with Article 9 of the Town Law of the State of New York, the Town of Highlands has the authority to enact local laws for the purpose of promoting the health, safety or general welfare of the Town of Highlands, including the protection and preservation of the property of its inhabitants. By the same authority the Town of Highlands may include in any such chapter provision for the appointment of any municipal officers or employees to effectuate and administer such ordinance.

Therefore, the "Erosion Control" law is a local municipal law which the ZBA has no jurisdiction to interpret or provide an applicant relief from its provisions. Even if this Board had jurisdiction over this chapter, as the ZBA only has appellate jurisdiction the applicant would need to show that the BI interpreted the local "Erosion Control" law, which he did not.

The same reasoning is applicable to defeat the applicant's claims pursuant to alleged violations of the Town Highlands Code Chapters 146 (Sewers), 164 (Stormwater Management) and tree cutting under Chapter 141 (Property Maintenance). These provisions are not part of and within the Town's Zoning Code and were not enacted by the Town pursuant to NYS Town Law Article 16. The BI made no determination regarding these provisions of local law. Likewise, the ZBA has no jurisdictional authority to review the applicant's claims regarding these provisions.

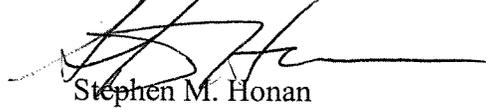
This ZBA has no jurisdiction to review the claim for relief of Ms. Kopald that the Tonneson modular home is visible from her property during the winter months. The applicant does not rely upon any zoning code provision that a buffer or visual screening is required. Both the Tonneson's property (lot 1.52) and Ms. Kopald's property on Forrest Hill Road (lot 5) are improved with single family homes and both are within the same residential zoning district. There is no buffer or screening requirements for like uses within the same residential zoning district under the Town's zoning code. Contrary to Ms. Kopald's statements at the ZBA hearing, she does not have a right to have her neighbor's homes screened from her view under the zoning

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code. Of course, Ms. Kopald is free to plant additional trees on her own property to shield her view of her neighbors' properties.

It is respectfully submitted that Ms. Kopald has not carried her burden of proof with respect to her application. It is clear that the BI properly issued a building permit to Mr. Tonneson for a single-family home. Ms. Kopald has not identified a particular zoning code provision that was allegedly violated by the Building Inspector. Accordingly, her appeal in all respects should be denied by this Zoning Board of Appeals.

Respectfully submitted,



Stephen M. Honan

SMH/drd