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June 29, 2020

Via email: [jjannarone@highlands-ny.gov](mailto:jjannarone@highlands-ny.gov)

Mr. Jack Jannarone, Chairperson  
Consolidated Zoning Board of Appeals  
254 Main Street  
Highland Falls, New York 10928

Re: Appeal of Deborah Kopald  
Post-Hearing Submission

Dear Chairperson Jannarone and Board Members:

Consistent with the proceedings had before this Board on June 17, 2020, following is a post-hearing memorandum submitted on behalf of Deborah Kopald in further support of her pending appeal.

**PRELIMINARY STATEMENT**

Deborah Kopald has appealed to the Consolidated Zoning Board of Appeals of the Town of Highlands and the Village of Highland Falls ("ZBA") to reverse the issuance of certain building permits issued to her neighbors – David and Deborah Tonneson and Jaidin Paisley-Tonneson (hereinafter collectively referred to as "Tonnesons") – and, to the extent issued, the related certificate of occupancy. Although the opportunity for the public to weigh in on Ms. Kopald's appeal has now ended with the closing of the ZBA public hearing on June 17, 2020, the ZBA has allowed both Ms. Kopald's attorney and the attorney for the Tonnesons (as necessary parties to this proceeding) to supplement the record with a post-hearing submission on the topic of

jurisdiction, *i.e.*, the power of the ZBA to hear this appeal. This post-hearing memorandum is respectfully submitted on behalf of Ms. Kopald to further address the power of the ZBA to hear Ms. Kopald's appeal, and supplements the arguments set forth in Ms. Kopald's June 8, 2020 submission and statements made on her behalf at the public hearing.

In addition to the Supreme Court determination that the ZBA has jurisdiction over the issues in this appeal as addressed below, in order to fully appreciate and understand the ZBA's general power to hear this appeal, it is necessary to address in context the two components of its power. First, the general power of the ZBA to hear appeals of this nature or category. Second, the ZBA's power to hear the particularized claims of Ms. Kopald, which, of course, includes consideration of her status as an aggrieved person to be able to assert these particularized claims, premised upon her stated injuries of the visual, light/heat, electromagnetic radiation, and noise impacts owing to illegal tree cutting and otherwise. We address both elements of this ZBA's power below.<sup>1</sup>

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<sup>1</sup> I address here briefly the Tonnesons' misguided argument that the power of the ZBA to review and consider Ms. Kopald's claims is barred by laches. Appeals to the ZBA have a specific limitations period which was timely met by Ms. Kopald. The further delays of which the Tonnesons complain have nothing to do with the filing of claims, but are largely related to adjournments in the ZBA hearings owing to (i) Ms. Kopald obtaining new counsel to assist her in the presentation of the claims, (ii) the ZBA cancelling the January 2020 hearing, (iii) the global pandemic and federal and State declarations of emergency (and State restrictions on the holding of public hearings), and (iv) her attorney's COVID-19 hospitalization and post-discharge recovery. All of these extensions of the period to hear Ms. Kopald's appeal were consented to by the ZBA. The Tonnesons' citation to *Stockdale v. Hughes*, 189 A.D.2d 1065 (3d Dept. 1993) and *Vanderwouds v. Post/Rockland Assoc.*, 192 A.D.2d 702 (2d Dept. 1993) are inapposite. The doctrine of laches was utilized in those cases to prevent the late filing of claims to be addressed. Here, Ms. Kopald's claims were timely filed. The apparent claim by the Tonnesons is that the ZBA has wrongfully consented to adjournments of the public hearing and resubmission of claims. However, during this time the Tonnesons suffered no injury or prejudice, as they continued with their construction under the auspices of their illegally issued building permits. Also, Ms. Kopald had requested an injunction from the courts to halt construction, which was denied. Laches is an irrelevant concept under these circumstances. Ms. Kopald's circumstances more closely resemble those presented to the same court cited by the Tonnesons, but 25 years later. In *Micklas v. Town of Halfmoon Planning Board*, 170 A.D.3d 1483 (3d Dept. 2019) (citations omitted) the Third Department appeals court held: "[W]e reject respondents' threshold contention that it is either moot or barred by laches. The fact that Fairways has substantially completed the brewpub does not render the appeal moot, as the addition could still be razed or the brewing operations within it enjoined. Petitioners promptly challenged the approvals issued . . . and moved for preliminary injunctive relief after Fairways obtained a building permit and began construction work. \* \* \* [These] circumstances further fail to reflect a prejudicial 'neglect in promptly asserting a claim' by petitioners that would warrant applying the doctrine of laches." *Id.* at 1485 (internal citations omitted).

## THE ZBA'S JURISDICTION TO HEAR MS. KOPALD'S APPEAL

### A. THE SUPREME COURT DECISION MANDATES ZBA'S JURISDICTION.

As the ZBA is well aware, the issues addressed in Ms. Kopald's pending ZBA appeal were also part of related CPLR Article 78 litigation in the Supreme Court, Orange County.<sup>2</sup> The Supreme Court decisions, among other things, held and agreed with the attorneys for the Town that "all of the issues raised by [Ms. Kopald] should be addressed in the first instance by the Consolidated Zoning Board of Appeals of the Town of Highlands and the Village of Highland Falls."<sup>3</sup> The basis for this holding is that Ms. Kopald must "exhaust [her] available administrative remedies before being permitted to litigate in a court of law."<sup>4</sup> To my knowledge, the Town has neither appealed this holding nor cross-appealed upon Ms. Kopald's appeal of such decision. The Town had a right to appeal the Supreme Court decisions and seek injunctive relief to prevent the application of this categorical holding – that "all" of Ms. Kopald's issues must be addressed by the ZBA in this administrative appeal. It apparently did not. Thus, this decision and holding by the Supreme Court that all of Ms. Kopald's claims must be addressed by the ZBA is binding on the Town and ZBA. The ZBA has jurisdiction of Ms. Kopald's appeal by order of the Supreme Court. Full stop. Nothing further needs to be considered for jurisdictional purposes.

However, although I believe that the ZBA's jurisdiction over Ms. Kopald's appeal to be the self-evident, based upon the Supreme Court's decision and the substance of the determination being challenged, the ZBA has nonetheless requested additional argument on the issue of

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<sup>2</sup> See Petition in *Kopald v. Town of Highlands, et al.*, Index No. EF000818-2020 [Doc. No.1], which is annexed as Exhibit "1" hereto.

<sup>3</sup> See court decisions in *Kopald v. Town of Highlands, et al.*, Index Nos. 7757-19 & 818-20 at 11 (Sup. Ct. Orange Co. Feb. 7, 2020), included in Exhibit "A" annexed to Ms. Kopald's June 8, 2020 submission to the ZBA. The Tonnesons' attorney, to try and distract the ZBA from its jurisdictional duty, now tries to evade this clear holding by taking phrases out of context. The opinion, its language and the breadth of the holding is clear: "all" of the issues raised by Ms. Kopald in the litigation now must be addressed by the ZBA. Consequently, each claim that is being set forth in the revised submission of June 8, 2020 are now ripe for adjudication by this ZBA.

<sup>4</sup> *Id.* at 10.

jurisdiction. Therefore, I felt compelled to provide the following extensive treatment of the jurisdictional issue regarding the ZBA's obligation to hear Ms. Kopald's appeal.

B. AN APPEAL CHALLENGING A DETERMINATION TO ISSUE BUILDING PERMITS IS FOUNDED UPON THE BUILDING INSPECTOR'S POWERS UNDER HIGHLANDS TOWN CODE CHAPTER 210 (ZONING), AND THEREBY INVOKES THE ZBA'S ZONING JURISDICTION.

In addition to the Supreme Court determination that the ZBA has jurisdiction to hear Ms. Kopald's appeal, an understanding of the true nature of Ms. Kopald's appeal is instructive to understand the ZBA's unavoidable jurisdiction in this matter on alternative grounds. Ms. Kopald's appeal challenges on various grounds the determination of the Building Inspector/Code Enforcement Officer to issue building permits to the Tonnesons. It is that act that the ZBA has been asked to review – the determination to issue the permits (and any related certificate of occupancy) pursuant to the zoning powers and duties bestowed upon the Building Inspector/Code Enforcement Officer by Highlands Town Code, Chapter 210 (Zoning), Article VIII (Administration and Enforcement). Clearly, the ZBA has the power and duty to exercise jurisdiction over appeals challenging the propriety of a determination of the Building Inspector/Code Enforcement Officer to issue building permits pursuant to the Highlands Town Code, Chapter 210.

C. THE ZBA HAS JURISDICTION BECAUSE THE BUILDING INSPECTOR/CODE ENFORCEMENT OFFICER NOT ONLY HAS THE DUTY TO ENFORCE AND ADMINISTER THE PROVISIONS OF HIGHLANDS TOWN CODE CHAPTER 210 (ZONING), HE HAS THE DUTY TO ENFORCE AND ADMINISTER ALL LAWS, ORDINANCES AND REGULATIONS THROUGHOUT THE HIGHLANDS TOWN CODE IF APPLICABLE TO THE CONSTRUCTION OR LOCATION OF BUILDINGS AND STRUCTURES. THIS DUTY INCLUDES THE ENFORCEMENT AND ADMINISTRATION OF HIGHLANDS TOWN CODE CHAPTERS 101 (EROSION CONTROL), 146 (SEWERS) AND 164 (STORMWATER MANAGEMENT).

In addition to all of the above and below reasons establishing that the ZBA has the jurisdiction to hear Ms. Kopald's appeal, each and every aspect of Ms. Kopald's appeal involves issues that the Building Inspector/Code Enforcement Officer has the duty to enforce and administer

under Highlands Town Code Chapter 210 (Zoning), including, but not limited to, the erosion control issues in Chapter 101, the stormwater issues in Chapter 164, and the septic installation issues in Chapter 146.<sup>5</sup>

Highlands Town Code Chapter 210 (Zoning) clearly, and unequivocally, provides:

“In addition to his powers and duties to administer and enforce this chapter [210 (Zoning)], the Building Inspector and/or Code Enforcement Officer shall have all of the powers and duties relating to the administration and enforcement of . . . all other laws, ordinances and regulations applicable to the construction . . . of building and structures and . . . the location, use, [and] occupancy . . . thereof.” Highlands Town Code § 210-49(E)(emphasis added).

By this clear directive to the Building Inspector/Code Enforcement Officer, which places the duty to administer and enforce all laws, ordinances and regulations applicable to the construction and location of building and structures, even those that are outside of his obligations under the Zoning Chapter, he had and continues to have the duty to enforce Chapters 101 (Erosion Control), 146 (Sewers) and 164 (Stormwater Management) of the Highlands Town Code as set forth in more detail below. Having the duty to administer and enforce these provisions of the Highlands Town Code, the Building Inspector/Code Enforcement Officer had the obligation to ensure that the Tonnesons complied with these provisions before he issued the building permits to them. *See, e.g.,* Highlands Town Code §210-50(B). Because the Building Inspector/Code Enforcement Officer failed in this Chapter 210 (Zoning) duty to administer and enforce Chapters 101, 146 and 164 before issuing the building permits to the Tonnesons, the ZBA has jurisdiction to hear Ms. Kopald’s appeal challenging his defective determination to issue such permits.

As provided and quoted above, Highlands Town Code § 210-49(E) obligates the Building Inspector/Code Enforcement Officer to administer and enforce any law, ordinance or regulation,

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<sup>5</sup> As provided below, the N.Y. Town Law § 280-a variance issue and the illegal driveway slope issue both spring directly from Highlands Town Code Chapter 210 (Zoning) obligations. *See* footnotes “10” and “16” below and their related text discussions.

even outside of Chapter 210 (Zoning), if such other laws, ordinances and regulations relate to the construction and location of buildings and structures. Of course, this is a rational and sensible approach, to give the Building Inspector/Code Enforcement Officer broad duties of administration and enforcement so that he can ensure that all aspects of the construction and location of buildings and structures come under his jurisdiction and control. Otherwise, as happened here, people like the Tonnesons can try and avoid regulations in the Highlands Town Code relating to the construction and location of their home and septic simply by arguing that these Highlands Town Code regulations are technically located outside Chapter 210 (Zoning). The Tonnesons' argument that the ZBA cannot look outside of Chapter 210 (Zoning) to ascertain the jurisdiction of the Building Inspector/Code Enforcement Officer and the ZBA ignores the fact that Chapter 210, Article VIII (Administration and Enforcement of the Zoning Chapter) itself specifically mandates that reference to provisions outside of Chapter 210 is required and, in addition, that the provisions of such non-Chapter 210 requirements will take precedence if those provisions "impose a greater restriction than this [Article VIII of Chapter 210]"<sup>6</sup>

Highlands Town Code Chapter 101 (Erosion Control) is particularly apt in the circumstances complained of by Ms. Kopald in this appeal. Highlands Town Code § 101-4 (Jurisdiction) provides that "all . . . construction activities requiring a permit under this chapter [101] shall be in conformance with the provisions set forth herein."<sup>7</sup> Section 101-10(R) relatedly provides that in making determinations on the extent of tree removal to be allowed under an erosion control permit, the Planning Board must take into account "whether the [tree] removal will have

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<sup>6</sup> Highlands Town Code § 210-48(A)(2). *See also* Highlands Town Code § 101-5 ("Where this chapter [Chapter 101 Erosion Control] imposes greater restrictions than are imposed by the provisions of any law, ordinance, regulation ... this chapter shall control.").

<sup>7</sup> The detailed listing of the triggering events caused by the Tonnesons that subject them to the requirements of Highlands Town Code Chapter 101 were set out in Ms. Kopald's June 8, 2020 submission to the ZBA (*see pp. 15-17*) and need not be repeated herein.

significant adverse impact on other properties . . .” (Emphasis added). Additionally, and, relevant to the Building Inspector/Code Enforcement Officer’s duty to enforce and administer Highland Town Code provisions outside of Chapter 210 (Zoning) provided they are “applicable to the construction . . . of building and structures and . . . the location . . . thereof” (*see* Highlands Town Code § 210-49(E)), Section 101-10(R) provides:

“The Planning Board may require proposed buildings or structures to be relocated on a plan or reduced in size in order to save a tree or trees which the Planning Board determines to be important or whose removal will have significant adverse impact.” (Emphasis added).

At a minimum, the Planning Board’s determinations under Highlands Town Code § 101-10(R) concerning tree removal – and the ability to require buildings to be relocated or reduced in size – apply to the construction and location of the Tonnesons’ house. It was, therefore, the duty and obligation of the Building Inspector/Code Enforcement Officer under Highlands Town Code § 210-49(E) to “administer and enforce” that the Tonnesons obtain the necessary erosion control permit required by Highlands Town Code Chapter 101, because Highlands Town Code § 210-49(E) mandates that these home construction and location issues under Highlands Town Code § 101-10(R) are part of the duties and administration of the Building Inspector/Code Enforcement Officer, and thus within the jurisdiction of the ZBA to review.<sup>8</sup>

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<sup>8</sup> Curiously, the Tonnesons’ attorney argued at the ZBA hearing that Chapter 101 was outside of the jurisdiction of the ZBA because the Town’s cited authority for enacting Chapter 101 is based upon N.Y. Town Law Article 9 (Ordinances and Licenses), and not N.Y. Town Law Article 16 (Zoning and Planning). To be clear, all that Article 9 provides is that, in relation to certain enumerated powers of the Town, a permit and permitting processes may be authorized; it does not exclude those permitting powers from being applied to zoning and planning functions. *See* N.Y. Town Law § 130. Indeed, many of the enumerated powers specified in N.Y. Town Law § 130 to which such permitting may apply (and to which Chapter 101 applies) relate to zoning and planning matters (including the “construction, alteration, removal and inspection of buildings and structures of every nature and description erected or proposed to be erected in said town.”). Also, N.Y. Town Law § 130 provides that additional purposes, not specifically enumerated, are also proper subjects of permitting “as contemplated by the provisions of [Chapter 62, *i.e.*, N.Y. Town Law],” which, perforce, includes N.Y. Town Law Article 16. Thus, the only meaning that can be attributed to Chapter 101’s “Authority” (§ 101-2) is that the Town is exercising its right to provide for a permitting process in Chapter 101 for, among other purposes, N.Y. Town Law Article 16 (Zoning and Planning). Also, another baseless objection to the ZBA’s jurisdiction over Chapter 101 issues is that Chapter 101 is restricted in its application only to subdivisions. Although Chapter 101 does specifically apply to subdivision site preparations, as well special use permit

In a similar vein, it was the duty and obligation of the Building Inspector/Code Enforcement Officer under Highlands Town Code § 210-49(E) to “administer and enforce” the provisions in Highlands Town Code Chapter 146 (Sewers) that are applicable to the construction and location of buildings and structures. Specifically, Section 146-2 provides:

“No installation of any septic tank . . . nor the construction or erection of any structure intended for human occupancy shall be commenced until . . . [it is] approved in the manner . . . prescribed [in Chapter 146].”

The Tonnesons did not secure any such prior approvals for its septic system, and the Building Inspector/Code Enforcement improperly issued the building permits to the Tonnesons without the Tonnesons complying with Chapter 146.

It was also the duty and obligation of the Building Inspector/Code Enforcement Officer under Highlands Town Code § 210-49(E) to “administer and enforce” the provisions in Highlands Town Code Chapter 164 (Stormwater Management) provisions applicable to the construction and location of buildings and structures.<sup>9</sup> Specifically, Highlands Town Code Chapter 164 applies to all “land development activities” (§§ 164-4(C), (G)), and “land development” is defined as “[c]onstruction activity . . . that results in disturbance of one or more acres of land . . . .” (§ 164-

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site preparations, it also applies clearly to other site preparations, including grading, excavation, filling and removal of trees without any linkage to subdivisions. See Highlands Town Code § 101-7(A)(1)-(11).

<sup>9</sup> The applicability of Highlands Town Code Chapter 164 to Tonnesons’ activities was set out in Ms. Kopald’s June 8, 2020 submission to the ZBA (see pp. 17-18) and need not be repeated herein. The Tonnesons objection that the application of Chapter 164 (Stormwater Management) obligations is a newly raised claim by Ms. Kopald is unfounded. Ms. Kopald raised the failure of the Tonnesons and the Building Inspector/Code Enforcement Officer regarding stormwater in her original November 4, 2019 submission to the ZBA and in her court filings. Also, the Tonneson attorney misrepresented to the ZBA that Highlands Town Code § 164-7(C) exempts single family residences from the Chapter 164 SWPPP requirements. It does not. Highlands Town Code § 164-7(C) only exempts single family homes from providing certain additional information (postconstruction stormwater runoff controls) in the mandated SWPPP; it does not excuse the requirement for a SWPPP. Beyond curiosity is the objection posed that Highlands Town Code Chapter 164 is somehow limited to subdivision review. There simply is no authority for this assertion. Highlands Town Code § 164-4 makes clear that Chapter 164 applies to “all land development activities,” broadly defined under Highlands Town Code § 164-6 to include “construction activity” and never limited its scope or context to only construction activity related to subdivision applications.

6). It was the Building Inspector/Code Enforcement Officer's duty to administer and enforce the Chapter 164 requirements before issuing the Tonnesons' building permits.

To the same extent that the Building Inspector/Code Enforcement Officer is required to ensure that an applicant for a building permit has secured the requisite subdivision, site plan, and special permit approvals required under the Highlands Town Code before they are entitled to a building permit in connection therewith, he was obligated to ensure that the Tonnesons had complied with the provisions in Chapters 101 (Erosion Control), 146 (Sewers) and 164 (Stormwater Management) applicable to the construction and location of buildings and structures. It was the duty and obligation of the Building Inspector/Code Enforcement Officer to do so pursuant to Highlands Town Code Zoning Chapter, § 210-49(E), and it is the duty of this ZBA to hear any appeal of a determination by the Building Inspector/Code Enforcement Officer that fails to do so. The ZBA therefore has jurisdiction to hear Ms. Kopald's appeal that challenges the permits on this basis.

D. ALL REGULATIONS IN THE HIGHLANDS TOWN CODE AFFECTING REAL PROPERTY DEVELOPMENT RIGHTS SPRING FROM THE ZONING POWERS OF THE TOWN; N.Y. TOWN LAW ARTICLE 16 AND HIGHLANDS TOWN CODE § 210-44 SUPPLY THE BASIS FOR THE ZBA'S JURISDICTION.

It is also necessary to address another of the objections to the ZBA's jurisdiction over Ms. Kopald's appeal, *i.e.*, that the ZBA can only address "zoning" issues, that "zoning" issues are only present in Highlands Town Code Chapter 210 (Zoning) and, therefore, the ZBA has no jurisdiction over issues, duties or responsibilities outside of Chapter 210, such as Highlands Town Code Chapter 101 (Erosion Control), Chapter 146 (Sewers), and Chapter 164 (Stormwater Management) that are part of Ms. Kopald's ZBA appeal. The objection argues this is so even if such non-Chapter

210 issues, duties or responsibilities are conditions precedent to building permits issued pursuant to Chapter 210.<sup>10</sup> This objection is misplaced and must be rejected in its entirety.

“Zoning” is a much larger and broader concept under the law than that posited by this objection; it is not limited in its extensive reach to a determination by the Town Board when adopting local laws to locate a particular law in Chapter 210 of the Highlands Town Code, rather than in a different chapter of the Highlands Town Code. Whether or not a local code provision is a zoning law depends upon the substance of its regulation, not its location in a local code book.

Prior to the implementation of zoning laws at the beginning of the 20<sup>th</sup> century, property owners could generally utilize their property however they desired, limited only to the extent that they could not create a nuisance thereby. There was no governmental interference or regulation of their right to do so. These broad common law rights enjoyed by property owners have their origins dating back 400 years. When governments decided to restrict these firmly entrenched and virtually unfettered common law real property rights by legislating regulations regarding the permitted uses and other limitations of development (such as set-backs and other bulk requirements, and administrative approvals and permits) they were quickly challenged on the basis that they were an unconstitutional infringement on vested common law real property rights.

The courts ultimately decided to allow such governmental restrictions on common law real property rights, grouping these restrictions under the rubric of zoning regulations. Courts uniformly held that municipal regulation and limitations on common law real property rights were permissible under the broad common law “police power” vested in each State; essentially the

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<sup>10</sup> Of course, this objection fails to rebut (and therefore confirms) the jurisdiction of the ZBA to address Ms. Kopald’s other ZBA appeal issues clearly within the specific language of Chapter 210 (Zoning), such as (1) the failure of the Tonnesons to obtain a N.Y. Town Law § 280-a variance prior to the issuance of their building permits, per Highlands Town Code 210-50(F); and (2) the Tonnesons’ driveway violates the New York State Uniform Fire Prevention and Building Code (*see* Finkbeiner affidavit ¶ 8 [Dec. 18, 2019] and 2020 N.Y. Fire Code Appendix D. Section D103.2 and Section 511.2.2), which the Building Inspector/Code Enforcement Officer has the duty to administer and enforce, per Highlands Town Code 210-49(E).

power to provide for the health, safety, and welfare of its inhabitants.<sup>11</sup> However, because these government zoning restrictions acted in derogation of common law real property rights, they had to be strictly construed; any ambiguity in their application to supplant common law real property rights had to be interpreted against the municipality and in favor of the property owners' common law real property rights.<sup>12</sup> Eventually, New York State formalized the delegation of its zoning police power to towns, villages and cities by various enabling laws, allowing the imposition of zoning limitations on common law real property rights.<sup>13</sup> The delegation of such rights to towns is contained in N.Y. Town Law Article 16, which, among many other powers addressed, addresses the powers and jurisdiction of zoning boards of appeals.<sup>14</sup>

Thus, the right of the Town of Highlands to restrict the common law property rights of properties within its political boundaries is only legally justified by the use of its zoning police powers to authorize such limitations on the otherwise virtually unfettered exercise of common law real property rights. The State's delegated zoning police power is the only mechanism that the Town of Highlands has to restrict common law real property rights in the zoning context. The Town's "zoning" regulations are thus not only those conveniently placed under its Town Code Zoning Chapter, but any regulation, including the substance and procedure required to obtain permits and other board approvals, that may be required throughout the Highlands Town Code, including the restrictions on the common law real property rights contained in Highlands Town

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<sup>11</sup> See, e.g., *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); *Lincoln Trust Co. v. Williams Bldg. Corp.*, 229 N.Y. 313 (1920); *Zahn v. Board of Public Works of Los Angeles*, 195 Cal. 497 (1925), *aff'd*, 274 U.S. 325 (1927).

<sup>12</sup> See, e.g., *Ortenberg v. Bales*, 224 A.D. 87 (2d Dept. 1928), *aff'd*, 250 N.Y. 598 (1929); *440 East 102<sup>nd</sup> Street Corp. v. Murdock*, 285 N.Y. 298, 304 (1941) ("Zoning laws which curtail and limit uses of property confer no privilege upon the property owners. Even though in case of necessity such laws are properly within the exercise of the police power, the whole and each and every of the parts must be given a strict construction since they are in derogation of common-law rights. The provisions of the [zoning] resolution may not be extended by implication.").

<sup>13</sup> See N.Y. Town Law § 261, N.Y. Village Law § 7-700, and N.Y. General City Law §§ 20(24), (25) and 81.

<sup>14</sup> See, e.g., N.Y. Town Law §§ 261, 267, 267-a, 267-b.

Code Chapter 101 (Erosion Control), Chapter 146 (Sewers), and Chapter 164 (Stormwater Management) that are involved in Ms. Kopald's ZBA appeal. If these restrictions were not zoning laws, the restrictions would be illegal and unenforceable.

The ZBA's general power to hear this appeal is found in N.Y. Town Law §§ 267-a, 267-b(1) and Highlands Town Code § 210-44(A)). Primarily, the ZBA's jurisdiction over Ms. Kopald's appeal is based on its appellate authority granted under New York Town Law. N.Y. Town Law § 267-a(4)(emphasis added) provides:

"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 [N.Y. Town Law Article 16, Zoning and Planning]. Such appeal may be taken by any person aggrieved, or by an officer, department, board or bureau of the town."

*See also* N.Y. Town Law § 267-b(1):

"Orders, requirements, decisions, interpretations, determinations. The board of appeals may reverse or affirm, wholly or partly, or may modify the order, requirement, decision, interpretation or determination appealed from and shall make such order, requirement, decision, interpretation or determination as in its opinion ought to have been made in the matter by the administrative official charged with the enforcement of such ordinance or local law and to that end shall have all the powers of the administrative official from whose order, requirement, decision, interpretation or determination the appeal is taken."

The Highlands Town Code specifically recognizes that the ZBA's jurisdiction encompasses those matters appealed to it in accordance with New York State Town Law.

Specifically, Highlands Town Code § 210-44 ("Jurisdiction") provides, in relevant part:

"A. The Board shall have jurisdiction over those matters properly brought for determination to a Zoning Board of Appeals concerning property within the Town of Highlands and Village of Highland Falls and to make a determination thereof in accordance with their respective zoning codes, New York State law and the provisions of the Intermunicipal Cooperation Agreement.

"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....” (Emphasis added).

Thus, the Highlands Town Code expressly recognizes the ZBA’s jurisdiction over, and power to hear, all matters submitted in accordance with N.Y. Town Law § 267-a(4), which again includes “appeals from . . . any . . . determination made by the administrative official charged with the enforcement of any ordinance or local law adopted pursuant to [Article 16 of N.Y. Town Law – Zoning and Planning].”

In this appeal Ms. Kopald challenges the Tonnesons’ building permits (and, if issued, the related certificate of occupancy) that were issued under the Town’s zoning law, which was adopted pursuant to Article 16 of the Town Law.<sup>15</sup> The permits were issued by Bruce Terwilliger, the Town’s Code Enforcement Officer, who is “the administrative official charged with the enforcement of any ordinance or local law adopted pursuant to [Article 16 of the Town Law].” N.Y. Town Law § 267-a(4). *See* Town Code § 210-49(A) (“It shall be the duty of the Code Enforcement Officer to administer and enforce the provisions of [Article 210 of the Town Code].”). This is the nature of Ms. Kopald’s appeal. It is an appeal from the issuance of building permits (and any related certificate of occupancy) under the zoning law by the administrative official charged with enforcing the zoning law. This fits squarely within the ZBA’s jurisdiction as defined in N.Y. Town Law § 267-a.

The ZBA’s jurisdiction to hear this appeal is further explained, as noted above, by fundamental land use principles. It is axiomatic that a building permit cannot issue unless and until the applicant obtains all required permits and approvals. In this regard, the issuance of building

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<sup>15</sup> Building permits are issued pursuant to Highlands Town Code §§ 210-49, 210-50, and 210-50.1. To the extent a certificate of occupancy has been issued, that too would have been issued under the Town’s zoning law. *See* Town Code § 210-52.

permits is a ministerial task, but it is only ministerial when the applicant has complied with all applicable municipal code requirements. *See, e.g., People ex rel. Namm v. Carlin*, 182 A.D. 626, 629 (2d Dept. 1918) (“the duty of the proper officer to issue a building permit, where the requirements of the statutes or municipal ordinances have been complied with, has been held to be ministerial...”). Stated differently, applicants, including the Tonnesons, are not entitled to a building permit – or a certificate of occupancy – until they have complied with all applicable Town Code provisions, and obtained all requisite permits and approvals.

While the bases why the Tonnesons’ permits should not have been issued include the failure to comply with land use regulations that are not set forth in the Town’s zoning law chapter (Chapter 210), the determination appealed from is the issuance of the permits under the Town’s zoning law. This challenge is not one brought under Chapters 101, 146 or 164 of the Highlands Town Code, and the ZBA is not being asked to issue the various approvals required therein and thereby, or make a determination as to whether such permits and approvals ought to be granted (conditionally or otherwise) or denied. Rather, the scope of the ZBA’s review is whether the building permits were improperly issued because they were not accompanied by all necessary information, and conditions precedent; namely they were lacking all requisite approvals including those mandated under Chapters 101, 146 and 164.<sup>16</sup>

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<sup>16</sup> With respect to Ms. Kopald’s appeal of the building permits on the basis that such were issued in violation of Town Law § 280-a, it is clear that this challenge is within the ZBA’s jurisdiction, even under an unduly restrictive application of the law that purports to limit the ZBA’s jurisdiction to appeals involving no provision outside of Highlands Town Code Chapter 210. Highlands Town Code § 210-50(F), which requires compliance with Town Law § 280-a before a building permit may be issued, is contained in the Town’s zoning law, *i.e.*, Chapter 210 of the Highlands Town Code. *See* Highlands Town Code § 210-50(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.”). In a similar fashion, the Tonnesons’ driveway slope grade violated the New York State Uniform Fire Prevention and Building Code, which the Building Inspector/Code Enforcement Officer has the duty to administer and enforce per Highlands Town Code 210-49(E), and the building permits ought not have been issued, or if issued should have been revoked and a stop work order, or order to remedy, should have been issued, if the driveway was constructed, as it was, in violation of the International/State Fire Code, including turnaround regulations that cannot be waived even if the local Fire Chief attempted to give them a pass.

E. THE ZBA HAS JURISDICTION BECAUSE IT IS AN APPEAL OF A DETERMINATION TO ISSUE BUILDING PERMITS, NOTWITHSTANDING THE TONNESONS' FAILURE AND/OR REFUSAL TO PROVIDE THE "INFORMATION AS MAY BE NECESSARY TO DETERMINE AND PROVIDE FOR THE ENFORCEMENT" OF CHAPTER 210 (ZONING).

In addition to common law and common sense, the Town's zoning law contemplates that a building permit will not be issued until the applicant has met all applicable requirements. In this regard, Highlands Town Code § 210-50(A) provides:

"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 [Chapter 210]." (Emphasis added).

*See also* Highlands Town Code § 210-50(B):

"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."

With regard to the enforcement of Chapter 210, the Town's zoning law requires enforcement via stop work orders or orders to remedy when building permits are issued in violation of Chapter 210 and allows for such enforcement mechanisms when work is being done in violation of other sections of the Highlands Town Code. *See* Highlands Town Code § 210-50(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...." (Emphasis added).

While the issuance of a building permit and certificate of occupancy are governed by the Town's Zoning Chapter (Chapter 210), not all permits and approvals that are required before a building permit or certificate of occupancy can be issued are similarly set forth in the Chapter 210. The fact remains that the nature of Ms. Kopald's present appeal – challenging building permits and any related certificate of occupancy issued by the Town's Code Enforcement Officer – is properly made to the ZBA.

Indeed, challenges to the wrongful issuance of building permits are not only routinely adjudicated before zoning boards of appeals, they are under certain circumstances required under the law to start in that forum. *See, e.g., Svatovic v. Town of Southold*, 156 A.D.3d 893, 894 (2d Dept. 2017); *Lucas v. Vill. of Mamaroneck*, 57 A.D.3d 786, 787 (2d Dept. 2008); *Letourneau v. Town of Berne*, 56 A.D.3d 880, 881–82 (2d Dept. 2008). However, in a conservative approach to protect her legal rights, Ms. Kopald appealed to both the ZBA and Supreme Court<sup>17</sup> to challenge the building permits at issue. In her CPLR Article 78 court proceeding Ms. Kopald challenged the building permits on the same grounds as her ZBA appeal. Specifically, she sought to annul the building permits issued to the Tonnesons based upon their failure to, *inter alia*:

- (i) obtain an erosion control permit as required under Town Code Chapter 101;
- (ii) obtain approval of a stormwater pollution prevention plan as required under Town Code Chapter 164;
- (iii) obtain approval to install the septic tank as required under Town Code Chapter 146;
- (iv) comply with N.Y. Town Law § 280-a; and
- (v) construct a driveway that complied with International/State Fire Code.<sup>18</sup>

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<sup>17</sup> *See* Petition in *Kopald v. Town of Highlands, et al.*, Index No. EF000818-2020 [Doc. No. 1], which is annexed as Exhibit “1” hereto.

<sup>18</sup> *Id.* at ¶¶ 10-14; 17-19.

On February 7, 2020, the Hon. Robert A. Onofry of the Supreme Court of the State of New York, Orange County, as noted above held that “all of the issues raised by [Ms. Kopald] should be addressed in the first instance by the [ZBA].”<sup>19</sup> Judge Onofry dismissed Ms. Kopald’s Article 78 Petitions for failure to exhaust administrative remedies “without prejudice to [Ms. Kopald] seeking relief before the [ZBA].”<sup>20</sup> The Tonnesons’ argument that Ms. Kopald was only directed to exhaust her remedies as to certain issues to the ZBA is belied by the specific language of the Court’s directive, which in no uncertain terms applied to “all issues raised” by Ms. Kopald and thus included the very issues involved in this appeal that had been raised in her Article 78 Petitions. Judge Onofry essentially remanded Ms. Kopald’s challenge to the ZBA by requiring her to first exhaust her administrative appeal before the ZBA prior to seeking judicial review. To refuse to entertain this appeal is to ignore both the spirit and the letter of Judge Onofry’s ruling and would be an improper repudiation of the ZBA’s jurisdictional mandate in N.Y. Town Law § 267-a.

F. THE ZBA JURISDICTION OR POWER TO HEAR MS. KOPALD’S APPEAL INCLUDES THE POWER TO HEAR PARTICULARIZED APPEALS ONLY FROM AGGRIEVED PERSONS.

The ZBA’s jurisdiction or power to hear appeals of the type presently before you under New York Town Law is limited to hearing appeals of aggrieved persons or certain town officials. Specifically, N.Y. Town Law § 267-a(4) provides:

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).

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<sup>19</sup> See *Kopald v. Town of Highlands, et al.*, Index No. EF000818-2020 (Sup. Ct. Orange County Feb. 7, 2020), which was annexed to 6-8-20 Kopald Affidavit as Exhibit “A,” at p. 11. (Emphasis added).

<sup>20</sup> *Id.*

Ms. Kopald's status as an aggrieved party for purposes of this appeal is based not only on her close proximity to the Tonnesons' construction activities, with her home located only 282 feet from the Tonnesons' home and only 180 feet from the Tonnesons' nearest land clearing,<sup>21</sup> but upon her own distinct injuries that resulted from the unlawful building permits. Ms. Kopald is aggrieved for purposes of the particularized claims in this appeal – *i.e.*, the issuance of building permits and any related certificate of occupancy without all necessary land use approvals, including those required under Town Code Chapters 101, 146 and 164, N.Y. Town Law § 280-a, and the State Building and Fire Code regarding driveways.

As set forth in the prior June 8, 2020 submission and here, Ms. Kopald has suffered and continues to suffer particularized injuries from the Tonnesons' construction proceeding without proper permits and approvals in place, including the previously identified visual, light/heat, electromagnetic radiation and noise impacts, many of which are related to the impacts from the removal of trees that were not properly authorized by way of the required Highlands Town Code Chapter 101 permit, all of which are injuries are within the zone of interests of the Town's zoning laws.<sup>22</sup> Ms. Kopald was therefore aggrieved by, and thus the ZBA has jurisdiction to hear her appeal of, the issuance of the building permits to the Tonnesons.<sup>23</sup>

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<sup>21</sup> Landowners or residents within 500 feet of a challenged project are “are ‘presumptively harmed’ in a manner different than the public at large.” *See Save the Pine Bush, Inc. v. Common Council of City of Albany*, 13 N.Y.3d 297, 309 (2009) (Pigott, J., concurring) (collecting cases).

<sup>22</sup> *See* N.Y. Town Law § 261 and Highlands Town Code § 210-2 and the zone of interests intended to be protected under the general and purpose provisions of Highlands Town Code Chapters 210, 101, 146 and 164. *See also McGrath v. Town Bd. of Town of N. Greenbush*, 254 A.D.2d 614, 616 (3d Dept. 1998) (allegations of “harm from ‘increased noise’, ‘increased vehicle and truck traffic’, and ‘degradation in the character of the neighborhood and style of life’ are concerns within the zone of interest protected by the Town's zoning laws”). *Cf. Sun-Brite Car Wash, Inc. v. Bd. of Zoning & Appeals of Town of N. Hempstead*, 69 N.Y.2d 406, 410 (1987) (“threat of increased business competition” is “not within the ‘zone of interest’ protected by the zoning laws”).

<sup>23</sup> The Tonnesons' argument that Ms. Kopald' injuries are not unique and are conclusory fails on several levels. First, it is well established that her claims need not be unique, only that they are different in kind or degree than that experienced by the public at large. *See, e.g., Sierra Club v. Village of Painted Post*, 26 N.Y.3d 30, 311 (2015) (“The harm that is alleged must be specific to the individuals who allege it, and must be ‘different in kind or degree from the public at large,’ but it need not be unique. Here, petitioner Marvin is not alleging an indirect, collateral effect from the increased train noise that will be experienced by the public at large, but rather a particularized harm that may also be

Contrary to the Tonnesons' argument, Ms. Kopald's statements are not conclusory but are supported by her sworn statements and are more than sufficient to establish her injuries.<sup>24</sup> Also, there is no requirement, as argued by the Tonnesons' attorney, that Ms. Kopald must prove with specificity and differentiation among various noise sources to establish her aggrieved party status on that injury to merit the ZBA's power to hear her appeal. The allegations in her affidavit (with supporting affidavits and proof) are clearly sufficient. *See Sierra Club v. Village of Painted Post*, 26 N.Y.3d 301, 311 (2015) ("Thus, [Petitioner's] allegation about train noise caused by the increased train traffic keeping him awake at night, even without any express differentiation between the train noise running along the tracks and the noise from the transloading facility, would be sufficient to confer standing."). With respect to noise, the Tonnesons' attempt to shift responsibility for the noise impacts to construction on another property fails to recognize that Ms. Kopald's injury is not simply premised on the increased noise during construction but includes ongoing noise impacts, including increased train noises, as well as ongoing leaf blower noise, that resulted from the Tonnesons' removal of trees without proper permits. In addition to her sworn statements, Ms. Kopald's objection to the noise has been documented by her complaints to the police.<sup>25</sup> But for the improper removal of trees these injuries would have been eliminated or mitigated.

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inflicted upon others in the community who live near the tracks."). Ms. Kopald's claims are not "conclusory," as her allegations are supported by her sworn statements and evidentiary support submitted from experts. *See also* footnote "21" *supra*.

<sup>24</sup> *See, e.g., Massiello v. Town Bd. of Town of Lake George*, 257 A.D.2d 962, 963-64 (3d Dept. 1999) (relying on affidavits of adjacent property owners who asserted injuries from odors, insects and noise from challenged project to establish standing). *See also* U.S. Department of Transportation Federal Highway Administration: "The Audible Landscape: A Manual for Highway Noise and Land Use:

[https://www.fhwa.dot.gov/ENVIRONMENT/noise/noise\\_compatible\\_planning/federal\\_approach/audible\\_landscape/al04.cfm](https://www.fhwa.dot.gov/ENVIRONMENT/noise/noise_compatible_planning/federal_approach/audible_landscape/al04.cfm)  
United States Environmental Protection Agency, Using Trees and Vegetation to Reduce Heat Islands. <https://www.epa.gov/heat-islands/using-trees-and-vegetation-reduce-heat-islands>; and U.S. Department of Agriculture, Guidelines 6.4 Buffers for Noise Control: [https://www.fs.usda.gov/nac/buffers/guidelines/6\\_aesthetics/4.html](https://www.fs.usda.gov/nac/buffers/guidelines/6_aesthetics/4.html)

<sup>25</sup> *See* Police Incident Report 4/14/2020.

Furthermore, Ms. Kopald has demonstrated by a photograph taken on April 11, 2020 that the Tonnesons' home is visible from her deck,<sup>26</sup> which is corroborated by Mr. Tonneson's affidavit in which he asserts that on the same day he was able to see Ms. Kopald exit her house and proceed to her deck.<sup>27</sup> Again, this would not have been possible but for the Tonnesons' illegal tree removal.

The record before the ZBA, including Ms. Kopald's affidavits, clearly and sufficiently demonstrates that she is an aggrieved party and therefore the ZBA has jurisdiction over her particularized claims raised in this appeal. Also, as recognized by this State's highest court, an overarching legal principle is the liberal nature of the application of aggrieved party status:

"This Court recognize[s] . . . that standing rules should not be 'heavy-handed,' and [has] declared that we are 'reluctant to apply [standing] principles in an overly restrictive manner where the result would be to completely shield a particular action from judicial review. \* \* \* That result would effectively insulate the [municipality's] actions from any review and thereby run afoul of our pronouncement that the standing rule should not be so restrictive as to avoid judicial review." *Sierra Club, supra*, 26 N.Y.3d at 311.

Ms. Kopald has exceeded all legal thresholds necessary to establish her aggrieved party status.

### CONCLUSION

For the reasons set forth herein and in the prior June 8, 2020 submission on behalf of Ms. Kopald, and in all the papers and proceedings in the record of this appeal, Ms. Kopald respectfully requests that the ZBA exercise its rightful jurisdiction and rescind the Tonnesons' building permits, restrain the issuance of any related certificate of occupancy (or, if already issued, rescind such certificate of occupancy), issue the stop work orders and/or orders to remedy that are required to enforce the applicable regulations, and mandate that the Tonnesons comply with the law, including the applicable requirements in Town Code Chapters 101, 146, 164 and 210, N. Y. Town

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<sup>26</sup> See Kopald affidavit of June 17, 2020 and Exhibit "1" thereto. See also Exhibit "C" to Kopald affidavit of June 8, 2020, and the Tree Cutting Analysis annexed thereto as MWF Exhibit 2, including the Tree Cutting Analysis 2016 Aerial Shadows. See also Kopald affidavit of June 8, 2020 at p. 4.

<sup>27</sup> See Tonneson affidavit at ¶ 19 contained in Exhibit "3" to the Tonnesons' June 16, 2020 submission.

Law § 280-a, and the State Fire Code. As noted in Highlands Town Code § 210-49(D) when, as here, a building permit violates the provisions of Chapter 210, Article VIII (Administration and Enforcement), “that building permit shall be invalid.”

Thank you for your careful consideration of this appeal.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Richard B. Golden', written over a horizontal line.

RICHARD B. GOLDEN

cc: Alyse Terhune, Esq. (via email)

# **EXHIBIT 1**

SUPREME COURT OF THE STATE OF NEW YORK  
ORANGE COUNTY

Index No: \_\_\_\_\_

-----X  
In the Matter of the Application of Deborah Kopald,  
Petitioner

For a Judgment pursuant to CPLR Article 78  
And for an Action for Damages

PETITION

-against-

The Town of Highlands New York,  
David Tonneson, Deborah Tonneson,  
Jaidin Paisley-Tonneson,

Respondents

-----X

I, Deborah Kopald, the Petitioner, respectfully alleges to be true upon my own knowledge or upon information and belief as demonstrated by my verification and exhibits submitted with my Order to Show Cause affidavit herewith as follows:

PRELIMINARY STATEMENT

1. I had brought a special proceeding brought in Orange County Supreme Court (Index No. 2019/007757) pursuant to Articles 78 of the Civil Practice Law and Rules (CPLR) upon a petition dated September 30, 2019 to annul, vacate and void the September 5<sup>th</sup> 2019 Building Permit (to erect a foundation) issued by the Town of Highlands (“ToH”) Building Inspector (“BI”) and any subsequent Building Permits that have been issued since. In that petition, I sought remediation of the land, sought to stay and rescind the permit as well as all other permits subsequently issued for the property, asked for the Building Inspector to be stopped from permitting work and issuing new permits on the Respondent Tonnesons and Paisley-Tonneson’s property on 11-1-1.52, for Respondents to be stopped from permitting work on the property including bringing in a modular home on the premises and asked for the tear-down of any man-made structure for which a permit was improperly issued.

2. Since that time, I learned that the Town had issued an amended permit on September 30<sup>th</sup> (the day I went to court and gave them notice of same) to include a house as well as a foundation. I put in a Zoning Board of Appeals (“ZBA”) application in November to review both permits<sup>1</sup> (The permits are Exhibit 1). This proceeding is ongoing, and I note for the record that my ZBA attorney, Richard B. Golden, Esq. and I believe as pursuant to NY Town Law § 267-b that the ZBA must step into the shoes of the Building Inspector to see if he should have done something else:

Orders, requirements, decisions, interpretations, determinations. The board of appeals may reverse or affirm, wholly or partly, or may modify the order, requirement, decision, interpretation or determination appealed from *and shall make such order, requirement, decision, interpretation or determination as in its opinion ought to have been made in the matter by the administrative official charged with the enforcement of such ordinance or local law and to that end shall have all the powers of the administrative official from whose order, requirement, decision, interpretation or determination the appeal is taken.*

In other words, the ZBA stands in the shoes of the Building Inspector, and we assert things that he ought to have done include making the Respondents get erosion control, stormwater and septic permits prior to issuing a building permit. Not having done so was a violation of procedure<sup>2</sup>. The alternative is if the ZBA *does not have jurisdiction* over these erosion

<sup>1</sup> I assert the court initially had jurisdiction before the ZBA had ruled pursuant to *Matter of Bennefield v Annucci*, 995 N.Y.S.2d 435 (4<sup>th</sup> Dep’t 2014) and *Matter of Santiago v Boll*, 14 N.Y.S.3d 568, (3<sup>rd</sup> Dep’t 2015). There was obvious irreparable harm because I assert the Respondent should have gone to the Planning Board to get permits (which would have allowed me to weigh in) and prevented wanton tree destruction; I had to go to Court before the modular home was quickly put up to preserve my rights and try to stay the destruction. The jurisdiction of the ZBA is appellate only: *See: Brenner v. Sniado*, 156 A.D.2d 559, 549 N.Y.S.2d 68 (2<sup>nd</sup> Dept. 1989) and cannot stay construction.

<sup>2</sup> Local code also specifies that the ZBA must adhere to NY Town Law (§ 210-44 B) which asks the ZBA via NY Town Law § 267 B to look at what the Building Inspector ought to have done and to New York State Law (§ 210-44 A). The Building Inspector is not limited to enforcing the zoning code; he is also the Code Enforcement Officer for the Town which means he must enforce the Town’s code.

A.

The Board shall have jurisdiction over those matters properly brought for determination to a Zoning Board of Appeals concerning property within the Town of Highlands and Village of Highland Falls and to make a determination thereof in accordance with their respective zoning codes, *New York State law* and the provisions of the Intermunicipal Cooperation Agreement.

provisions, then the question of whether the Building Inspector should have adhered to them must be put directly to this court. Erosion control provisions are clear that no construction can be done when a permit under §101 is required. The same is true of the stormwater and septic provisions. There are also issues with regard to other laws and issues that the ZBA may not have jurisdiction of, including, but not limited to decisions that are arbitrary and capricious and an abuse of discretion and certain state laws. Regardless, it is appropriate to go to court before exhausting administrative remedies in certain instances- where permanent harm could be done. In this case, the permanent harm includes ongoing erosion control problems from proceeding without erosion control permits which became further manifest from analysis of January 6<sup>th</sup> 2020 drone footage taken with leaves off the trees, more stripping and putting in a stormwater system that is going to dump water directly on the road used to access the site. I also asked the Town to enforce the penalty provisions of §101 and served notice upon the other Respondents. There is no interest by the Town in enforcing the law and given that every day after notice is a new violation, it is necessary to ask the Court to intervene<sup>3</sup>.

#### THE PARTIES

3. I, Deborah Kopald, a taxpayer and resident of Fort Montgomery, N.Y. in the Town of Highlands who lives in, works out of and owns the home on the adjoining lot (20-2-5) which has been my primary residence since 2/20/74 and having challenged the Permit issued on 9/5/19 by the ToH BI to the Poplar Street Respondents, am challenging the amendment to this Permit made

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**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.

(Emphasis added)

<sup>3</sup> Furthermore, I am making this procedural step because the Principle Court Attorney Michael O'Brien had written to say that I was directed not to file motions, etc. and because of statements made in the transcript by his Honor. (Exhibit 14)

on 9/30/19 and all subsequent permits issued by the ToH BI to the Poplar Street Respondents including but not limited to a certificate of occupancy. I had requested a stay of house construction via a preliminary injunction in my Order to Show Cause of 9/30/19 and that the ToH BI be enjoined from issuing further permits.

4. The first Respondent is the Town of Highlands (“ToH”) whose Building Inspector (“BI”) issued the 9/5/19 permit and issued an amended permit on 9/30/19. The Second Set of Respondents comprise David Tonneson, Deborah Tonneson and Jaidin Paisley-Tonneson (“Poplar Street *proposed* Respondents”) who received the amended permit to bring in a modular home and may be imminently about to receive a certificate of occupancy for the lot on 11-1-1.52.

#### JURISDICTION

5. The Court has subject matter jurisdiction over this matter and may exercise personal jurisdiction over the respondents. Pursuant to CPLR 506(b), venue is proper because the challenged determinations were made in Orange County, and all parties and properties are located therein. The initial petition was filed to attempt to get a stay of construction; I went immediately as I understood a modular house was about to be trucked in. (See again footnote 1) Stays of construction are not available from Zoning Boards of Appeals. I have since put in a ZBA application to rescind the permits and as stated, the ZBA may decide it does not have jurisdiction over provisions of the code outside local zoning code 210. (Again, my attorney Richard B. Golden and I are asserting that the ZBA has jurisdiction to enforce NY Town Law, which states that they should review what the Building Inspector, who must enforce all local codes “ought to have done”. Even if we are ultimately deemed to be legally incorrect about the ZBA’s authority over erosion control since it lies outside the zoning code, this Court would have jurisdiction over this question.

#### STATEMENT OF FACTS

6. I live adjacent to the construction going on Poplar Street in Fort Montgomery New York. On information and belief, this parcel is numbered 11-1-1.52. The parcel is owned by David Tonneson, Deborah Tonneson and Jaidin Paisley-Tonneson (“Poplar Street *proposed* Respondents”).

7. Initially, I had not been able to get too close to it during daylight hours from construction noise from heavy machinery which on information and belief emits low frequency sound, and was at any rate highly irritating and extremely debilitating (and in fact forcing me to keep far away from my home) but surmised that too many trees had been cut based on light streaming in and a gap in the tree line and that other violations may have occurred. In addition, on a 13.926 acre parcel, it was odd that construction was occurring within 200 feet of my bedroom and home office and less from my lot line; in fact I later found out that gash at the end of my yard which could also be seen from my driveway was to be the septic field for the home. I commissioned a drone to be flown and later had photography analyzed by an aerial photogrammetrist who is also a surveyor. I also could only surmise what the problems were remotely and in the absence of on the ground discovery had to rely on drone footage and then more drone footage and analysis more recently after the leaves were off the trees. It took a while to analyze the drone footage that I had. More recently, with the leaves off the trees and using a special attachment to the drone, the aerial photogrammetrist was able to assess with specificity, the amount of grading, filling and excavation. In addition, more stripping had taken place.

8. The building site on section/block/lot 11-1-1.52 was formerly covered with trees before construction commenced. Traffic from 9W, which is pretty far away can now be heard at my house since the Poplar Respondents cut a hole in the mountain and needlessly and illegally cut too many large trees over 10 DBH. This also has reduced the value of my home both

objectively and especially to me. The destruction of the forest which violates the Town's Climate Smart Resolution<sup>4</sup> (See: Exhibit 7), common sense, respect for the code's letter and spirit and respect for nature is an absolute nuisance. I could never hear the traffic before; now the noise is persistent. I can also hear the trains (commuter and commercial on two tracks) go by multiple times a day right down to the rumble on the tracks and never could hear it before in over 40 years other than an occasional faint whistle once in a while- again I have lived on and off in this house for over four decades.)

9. I assert the blight is clearly devaluing my property and home. The houses including mine going up the hill above the site in question are ensconced in trees in a deciduous forest; it is clearly an animal habitat<sup>5</sup>. (There is also a view of Bear Mountain itself from my yard and the neighborhood is in keeping with way houses are nestled among trees in Bear Mountain State Park. Now, right below my house, there is a gash in the mountainside that I assert occurred without proper permits and without review by the Town Planning Board as required by the code. This construction is not in keeping with the landscape of the rest of the mountain. Analysis of drone aerial photography has proven that the Respondents failed to get required erosion control permits for stripping, excavation, sloping, tree cutting, filling, grading and stripping. I also allege that they needed erosion control permits for the fact that the site was within waterlands and within the one hundred year floodplain of any watercourse. By not going before the Planning Board, the Tonnesons (and the Town by not enforcing the regulation), deprived me of weighing in to make sure my rights were protected and that the letter and spirit of the erosion control provisions were followed. Of the Poplar Street *proposed* Respondents, Dave Tonneson is a life-

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<sup>4</sup> It is common knowledge that carbon sinks (which trees are) is the main way to combat global warming.

<sup>5</sup> I have seen the following animals go through my property: they include, but are not limited to, foxes, coyotes, bears, bobcats, possums, raccoons, owls, black snakes, chipmunks, squirrels, 5-lined skinks, red salamanders, earthworms, frogs, fireflies, hawks, an array of other colorful birds including green headed grackles, cardinals, blue jays.

long resident of the Town of Highlands and has apparently done other work in this town. I am aware that he developed a project on Beattie Pond Road where the houses are more in harmony with the landscape. I assert that Mr. Tonneson is perfectly well aware of the Town's rules and regulations. He is on the record at a Town meeting<sup>6</sup> from the Monday before I filed the first article 78 petition saying he has been engaged in this type of work for decades and has generated \$16m in revenue in doing so: <https://www.youtube.com/watch?v=IJJWVF-T2J0> (15:30-15.50 time stamps). There were many other local, state and possibly federal laws broken as well.

***I. EROSION CONTROL, STORMWATER PERMITS AND SEPTIC PERMITS***

10. Section §101-7 subsection A of the Town Code states: Activities requiring a permit:

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.*

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<sup>6</sup> The subject of discussion was the institution of a noise ordinance of which there was none in the Town of Highlands, which on information and belief is an unusual situation. At least one former town councilperson told me that a noise ordinance had been suggested around 2003 and that the Board decided not to anger Respondent Mr. Tonneson who did not want any noise ordinance to be implemented. Regardless of the fact that this is being reported by me as hearsay and as an impression of a former Councilperson, what this video also shows is that the Respondent was well aware of the lack of a certain rule and wanted to lobby for *de-minimus* rules; I assert this suggests that he makes it his business to keep apprised of rules and regulation affecting a business that he says has generated \$16m in revenue. .

The first version of the ordinance allowed noise at night in a country town that exceeded industrial levels in major cities; later, after a hearing <https://www.youtube.com/watch?v=4x5J9OFFTYo&t=1091s> that featured Mr. Tonneson demanding the right to work at midnight without having the police called on him and various people on his payroll and others demanding I move to Montana, was "unneighborly" for calling the police (both for noise and for harassment by phone by Debbie and David Tonneson) and being obliquely referred to as someone who observes "other Sabbaths", and then having another neighbor, Jack McCarthy, walk up to the Supervisor on camera to demand to know if I was "violent" with the Supervisor then sticking his finger in his mouth), the Town passed an ordinance that would allow Mr. Tonneson to do construction until 9 p.m. at night, something that is not permitted in a noise ordinance in any other jurisdiction. . (When I asked Mr. McCarthy if Mr. Tonneson had told him that, he looked embarrassed and proceeded to niceties like "Hey, we are going to be neighbors!"). Previously, the police were enforcing the building permit recommendations of 6 p.m. so the noise ordinance functions to legally enable harassment whereas construction was not permitted at night before.

- (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 Exhibit 2, my aerial photogrammetrist shows that he was able to prove the following:

- With regard to 3 (sloping), more than 75% of site preparation was done on areas in 11-1-1.52 that had a slope greater than 15%, necessitating a permit.
- With regard to 5 (excavation), 2,910 cubic yards were excavated on 11-1-1.52 (maximum allowable without a permit was 200 cubic yards within a parcel or contiguous area).
- With regard to 6 (stripping), with aerial photography after leaves were off the trees, the total area stripped on 11-1-1.52 was revealed to be 52,228 square feet or 1.2 acres (maximum allowable without a permit was 20,000).
- With regard to 7 (grading), 48,412 square feet or 1.11 acres were graded on 11-1-1.52 (maximum allowable without a permit is 20,000 square feet).
- With regard to 8 (filling), 1,625 cubic yards were filled on 11-1-1.52 (maximum allowable without a permit was 100 cubic yards).
- With regard to 11 (removal or destruction of trees), at least 39 trees greater than 10 DBH were cut, (maximum allowable without a permit was 3).

Exhibit 3 is a copy of the certified letter I sent to the Respondents and the Town, having previously emailed the Town to request that they act. In fact, 42 old growth trees in excess of 10 DBH were cut prior to September 30<sup>th</sup> 2019 and that most were outside of the building envelope. Exhibit 4 is a copy of the Affidavit of Susan Kopald, already before the Court that no trees were cut on the property prior to sale or at any time between the time the 2016 google earth layer used by the Aerial Photogrammetrist as comparison to the current photographs of the destruction wrought by the Tonnesons. Furthermore, the clearing, stripping, grading tree cutting *preceded*

the granting of the initial permit to put in a foundation. This was wrong as the code is clear; again 101-7 (A) states:

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

Again, there was no permit issued to begin construction on the home; these erosion control provisions of the code governed. Local code §101-5 in fact states

**Conflict with Existing Regulations**

Where this chapter imposes greater restrictions than are imposed by the provision of any law, ordinance, regulation or private agreement, this chapter shall control. Where greater restrictions are imposed by law, ordinance, regulation or private agreement than are imposed by this chapter, such greater restrictions shall control.

The greater regulation was the need to get erosion control permits FIRST before any construction permits. As stated above, §101-7 states

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

Subsequently Respondents proceeded to engage in more site clearing after the modular home was erected, even going so far as to direct the cutting of 11 large trees without permission on lot 20-2-6, a lot owned by Canterbury Forest Corporation, which I am permitted to traverse and owned by relatives, and which is not slated for development to protect my property values and privacy. (Exhibit 8) This lot is adjacent to my parcel 20-2-5 and the subject parcel (11-1-1.52)<sup>7</sup>. On information and belief, Respondent Tonneson told Orange and Rockland Utilities, Inc., that he owned the land and/or had a right of way over the land (O&R was about to install poles on 20-2-6) as well as telling this to the police and to this court with an erroneous survey that is not

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<sup>7</sup> On information and belief, Deborah and David Tonneson and Jaidin Paisley-Tonneson will be served soon with a lawsuit from Canterbury Forest Corporation alleging larceny, treble damages, slander and clouding of title, trespass, etc. by disposing of most if not all of these trees via McCarthy tree service. (I was flushed out of my house by the noise and when I heard and saw what was going on, I called the police. Respondent David Tonneson apparently showed Officer Hill a deed, claiming it was his; however, the police did not follow up; I assert it was like the scene in the movie *Training Day*, where Denzel Washington's character knocks on someone's door, waves a Chinese menu masquerading as a warrant, and asserts he had the right to enter, then takes something from the house). The movie version was literally an Oscar-winning performance by Mr. Washington.

backed up by any deed recorded in Orange County that he had the right to enter that lot, cut trees and take them. This rendered the house on the next lot owned by Jack McCarthy visible from my yard, whereas it had not been before and disturbed the overall character of the neighborhood- as when one drives, around the bend, one can see this clearcut by Tonneson and the stripped area. This occurred while motions to protect the site were pending in the previous case (still pending at this writing) and demonstrates what I have been saying that in the absence of Court intervention, laws will continue to be broken by Tonneson and blessed by the Town. After presumably studying the matter, O&R recently emailed the Canterbury Forest Corporation's attorney, Gerald Jacobowitz and myself to say that they would not enter 20-2-6 and would not put up a pole and would not be transmitting electricity to 11-1-.52 via 20-2-6. On information and belief, their legal department appears to have come to the same conclusion as Canterbury Forest Corporation's counsel and my surveyor.

11. Furthermore, even with all of these allegations, including previous affidavits submitted to the Court in the previous Article 78, showing that the tree and stripping and erosion control provisions were clearly violated, the Town has refused to enforce its own code:

**§ 101-12 Enforcement; penalties for offenses.**

**B.**

Any person, firm, partnership, corporation or other party who violates any provision of this chapter shall, upon conviction thereof, pay a fine a fine not to exceed \$250 or be imprisoned not to exceed 15 days, or both. The imposition of any such penalty for the violation of this chapter shall not excuse such violation nor permit the continuance thereof. The application of the above penalty or penalties for a violation of the provisions of this chapter shall not be held to prevent the removal of conditions prohibited by this chapter by such legal means as may be proper.

[Amended 3-10-1998 by L.L. No. 1-1998]

**C.**

Every day that a violation of any of the provisions of this chapter continues after written notice shall have been served upon the owner or his agent, either personally or by certified mail addressed to such person at his last known address, shall constitute a separate violation.

**E.**

In addition to the penalties set forth in Subsection **B**, any person violating any provision of this chapter pertaining to tree removal or destruction shall be subject to a civil penalty enforceable and collectible by the Town in the amount of \$250 each day the violation continues for every tree until tree replacement has been completed and approved by the authorized official.

[Added 5-22-2006 by L.L. No. 2-2006]

12. I provided written notice (See again: Exhibit 3). The Tonnesons have not sought Erosion control permits to date and the Town has not made them do so. Therefore, I ask the Court to enforce these provisions and make the Town fine the Tonnesons after a hearing to assess how many days the illegal tree removal and failure to replace has occurred (if going from the time the trees were cut, the fines would be well over \$1 million). I also ask the Court to order remediation of the land with an independent third party, since the Town has proven feckless and inept and to have fully grown trees (whether pine or the original type) to be replaced for each tree illegally cut). I also ask the Court to enforce the other provisions that were violated and to order remediation for them as well. Again, the destruction is so extensive, it requires third party competent oversight. Erosion control is supposed to be an ongoing process pursuant to 101-10(c)

**C.**

The control of erosion and sediment shall be a continuous process undertaken as necessary prior to, during and after site preparation and construction.

The other provisions of 101-10 were ignored because the permits required were not sought<sup>8</sup>; again these issues should be dealt with in the context of getting permits from the Planning Board.

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<sup>8</sup> § 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.

13. Fundamentally, Respondents engaged in activities that required erosion control permits *prior* to putting in an application and receiving permits to construct. This violated 101-7a. The issue here is that even though there are exceptions for the excavation and footings of

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**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.

**R.** Tree removal or destruction shall be permitted if the presence of trees would cause hardship preventing the reasonable use of the property for approved or permitted purposes, which hardship is not self-created and is unique to the property; or endanger the public or the person or property of the owner or neighbors; or the trees are on property to be occupied by buildings, structures or related improvements and within a distance of 10 feet around the perimeter of such building or structure; or block an important viewshed and the removal of the trees is performed in a selective manner. Other considerations may include the likelihood of the survival of the tree, economical considerations of land use, the general welfare and the overall environment of the area, whether the removal will have significant adverse impact on ecological systems, including erosion potential and wildlife habitat, and whether the removal will have significant adverse impact on other properties or roadways, including impacts on drainage. The Planning Board may require proposed buildings or structures to be relocated on a plan or reduced in size in order to save a tree or trees which the Planning Board determines to be important or whose removal will have significant adverse impact.

[Added 5-22-2006 by L.L. No. 2-2006]

**S.** During site preparation activities, the property owner or developer shall protect all trees on the approved subdivision plat, site plan and/or permit map, as the case may be, designated to be preserved by the Planning Board.

[Added 5-22-2006 by L.L. No. 2-2006]

homes and septic, the stripping and site preparation on a slope greater than 15% and grading, filling, excavation and tree destruction, was done well in excess of what would be necessary for the excavation and footings of a home. An illegal driveway was constructed (I will get to that in a moment), which resulted in even more stripping. The problem with any argument the Respondents would have that all of this destruction was done for basements and footings and septic of the home is that by their logic, they could have cut every tree down on the 13.926 acre parcel and they could have said this was for the excavation, footings and septic. What was done far exceeded that. The idea is that there is an exception for just for these things, not to clear excess for a future yard or extra parking or to build a road up a hill to lead up to the site. Secondly, they started to prepare a 13.926 acre site on a steep slope before applying for any building permit. They needed erosion control permits before engaging in activity that necessitated permits under section 101. They were engaging in this land disturbance and did most if not all of the tree cutting *before* even applying for a permit. The same issue goes for stormwater prevention and septic; these permits needed to have been obtained first. Again, I re-emphasize that the activity necessitating erosion control permits took place before a permit for construction was sought (on August 30<sup>th</sup>) and obtained (on September 5<sup>th</sup> for the foundation with an amended permit on September 30<sup>th</sup> for the modular home). The construction permit wasn't even applied for until the 30<sup>th</sup> of August.

14. Other permits that needed to be sought and approved prior to getting any construction permit were stormwater control and septic permits. On information and belief, this did not occur: Section §164-7 has to do with stormwater pollution prevention plans- none were made in regard to the roof of the home or for the fact that a stream runs across the mountain because the Town diverted rainwater across my yard that flows into the area where he Tonnesons have put their septic. There were no provisions made for stormwater on the plans submitted, so the

Building Inspector was at a minimum acting arbitrarily and capriciously by approving plans without them; however as more than an acre has been stripped, it was necessary to require permits for them. Furthermore, recent drone footage demonstrates that the Respondents have engaged in further stripping to put in a catch basin, trenching, and drainage piping in new trenches but the surveyor/aerial photogrammetrist Michael Finkbeiner asserts that it will “dump water onto Hemlock Street without drainage controls including engineered detention, curbing or other improvements made to Hemlock Street”. This further underscores the need to get permits *before* the building permit. The code § 164-7 reads:

**A.** Stormwater pollution prevention plan requirement. No application for approval of a land development activity shall receive approval until the appropriate board has received a stormwater pollution prevention plan (SWPPP) prepared in accordance with the specifications in this chapter.

Similarly, the septic permit was necessary before a construction permit was issued. I had requested discovery in the first special proceeding because the forester Star Childs indicated that there were watercourses on site. (See: Exhibit 11; this affidavit is already before the court in a discovery motion in 2019/007757) I assert these provisions necessitated planning board approval first:

**§ 146-2 Application.**

No installation of any septic tank or outside privy nor the construction or erection of any structure intended for human occupancy shall be commenced until an application duly filled out, in triplicate, on forms supplied by the Town Clerk, and drawings showing the intended location of the septic tank proposed to be used in connection with such structure, shall have been filed in the Town Clerk's office and approved in the manner hereinafter prescribed.

**§ 146-6 Distances.**

No septic tank or outside privy shall be installed unless every part of such installation shall be more than 50 feet from any lake, reservoir, stream or watercourse not protected by rules enacted by the State Commissioner of Health; nor shall any such installation be located on the direct line of drainage to not less than 50 feet in a horizontal direction from any well, spring or any source of water supply. If the minimum distance specified cannot be complied with due to the limits of the property, the Sanitary Inspector may allow an

installation at a distance less than the minimum specified, provided that such installation does not or will not create a dangerous, unhealthful condition.

The plans show that septic was put in the ground before a permit was given for construction. Discovery is still necessary to prove issues related to wetlands and watercourses. I ask the Court to take Judicial Notice of all local code provisions at E-Code. <https://ecode360.com/HI1566> (Last viewed: January 26, 2020).

***II. Given all of the violations going on described in this petition, the Building Inspector should have ordered erosion control prior to issuing an amended permit to bring in a modular home.***

15. Notwithstanding these provisions, a permit issued on 9/5 which I challenged in the initial petition on the aforementioned basis (being issued in violation of lawful procedure which required other permits to be obtained ahead of time) as well as being inherently unlawful as it was outside the building inspector's authority to issue as it constituted neither a house nor an accessory structure to a house pursuant to local code 210-21:

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

It is not a permit to build a house. The local code reads:

**§ 210-21 Building permits; site plan procedure and standards.**

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.

The Building Inspector exceeded his authority and proceeded in excess of jurisdiction. § 210-21 does not allow something that is not a one family house or two-family detached residence or accessory structure thereto to ever be erected without Planning Board approval. A permit "to install a Foundation System" is not a permit to build a house and it should have gone before the Planning Board where there should have been SEQRA determination. An accessory structure,

for which the Building Inspector does have the right to issue a permit is not a foundation, which is a structure integral to a home. The amendment should not have been made to the permit since there was already a need for erosion control permits and septic and stormwater permits, and these could only be issued after the proper permits for tree cutting and other erosion control had taken place. Other violations that appear took place before a modular home was trucked in included ongoing improper installation of septic, an oil spill on the property that was not cleaned up, violations of Army Corps of Engineers regulations on wetlands and general violations. As I will explain, there were a number of extant problems before the amended permit was issued, which means the Building Inspector should not have issued it.

16. My property rights were violated; the Respondents needed to get other permits, and still should be made to get other permits (not continue construction, potential evidence destruction and cut more trees without a permit (which is what occurred since the filing of the initial petition). The Town should have stopped them for a number of other reasons:

***III. Town Law 280-a claim: ZBA is hearing this claim and may be entertaining jurisdiction over it; however it may not be entertaining jurisdiction over violation of Fire Code issues and driveway***

17. § 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.

When I called the Highway Department, the person answering the phone admitted what the 2019 tax map shows that Hemlock was not wholly approved by the Town and is merely a “proposed” street. (Exhibit 5, Affidavit of Finkbeiner) First it should be noted that the parcel is on 4 zones, R1, R4, R5 and no zone; the driveway constructed itself goes through R1, R4, and R5. Since it is cutting through zones that are supposed to be for apartment buildings, it should have been considered for review. Also since the house represents the 5<sup>th</sup> house being built on the original parcel, subdivision regulations for a road should apply. Also some of these parcels are contained within the conveyance of 11-1-1.52. It appears that no street giving access to such proposed structure has been duly placed on the official map or plan. Poplar is proposed and so I assert are Hemlock and Cherry; they are not public roads in the portions adjacent to Poplar Street. Poplar and I assert the portion of Hemlock reaching to the property was not approved

- by the town,
- by the county or state,
- by the Planning Board, and
- is not on a plat approved by the Planning Board,
- is not on a plat filed and recorded in office of the County Clerk before the Planning Board had the power to approve plats.

So you cannot get a permit to put up a building on an unapproved road according to NY-Town Law § 280-a. The only way to access the parcel is to go through other peoples’ driveways to then exit the property to Poplar Street to eventually get to Hemlock Street. While Respondents contend that Hemlock is public, the fact of the matter is the metes and bounds do not connect Hemlock to Poplar (or Cherry to Poplar) due to a gore or gap (that was ignored by the Tonneson’s surveyor who improperly connected Hemlock to Proper Street – this surveyor improperly drew a right of way through the aforementioned Canterbury Forest Corp. property- (again an issue that on information and belief will be litigated before the Court in the near future) and any so-called offer of extension is a nullity because the second offer was of the portion of the

road that had been previously offered and accepted, not the whole tranche. See Exhibit 6

Affidavit of Finkebeiner). I assert that the entire street has not been maintained in such a manner for the time requisite to become a Town road by implication.

18. Besides the fact that I assert Hemlock is not a public road, McKinney's Commentary on Town Law 280-a authorizes a town to require a property owner to improve the street or means of access as a prerequisite to issuing a building permit. This never happened:

Town Law § 280-a authorizes a town to require a property owner to improve the street or means of access off site as a prerequisite to issuance of a building permit. *See Pearson Kent Corp. v. Bear*, 35 A.D.2d 211, 212, 315 N.Y.S.2d 226, 228 (2d Dept. 1970), *rev'd on other grounds*, 28 N.Y.2d 396, 322 N.Y.S.2d 235, 271 N.E.2d 218 (1971); *Peckham Industries v. Ross*, 61 Misc.2d 616, 306 N.Y.S.2d 1006 (Sup. Ct. Orange Co.), *aff'd*, 34 A.D.2d 826, 312 N.Y.S.2d 627 (2d Dept.), *appeal denied*, 27 N.Y.2d 485, 315 N.Y.S.2d 1027, 263 N.E.2d 565 (1970); *Medine v. Burns*, 29 Misc.2d 890, 892, 208 N.Y.S.2d 12, 14 (Sup. Ct. Suffolk Co. 1960).

Town Law 280-a reflects a legislative judgment that the building up of unimproved and undeveloped areas should be accompanied by the provision of roads and streets to meet the basic needs of the new residents of the area. *See Truesdale Lake Property Owners' Ass'n v. Collin*, 22 Misc.2d 27, 28-29, 189 N.Y.S.2d 709, 711 (Sup. Ct. Westchester Co. 1959).

Given evidence of putting in a catch basin system that will dump water on Hemlock street, this underscores the need to improve the road in this previously undeveloped area.

If a street meets the requirements of 280-a the permit may be denied if the road is not suitably improved (driveways coming out of driveways is an overburdening of the easement on the original Deborah and David Tonneson lot to use the McCutcheon driveway):

...even if a street satisfies the requirements of Town Law § 280-a(1) regarding the nature of the road, a permit may be denied, for example, if the road is not "suitably improved," is in a state of disrepair or lacks drainage or other essential facilities. *See Avgush v. Town of Yorktown Building Inspector*, 291 A.D.2d 556, 737 N.Y.S.2d 648 (2d Dept. 2002); *Fink v. Jagger*, 211 N.Y.S.2d 51 (Sup. Ct. Suffolk Co. 1960); *Green Acres Building Corp.*, *supra*. It was determined in *Zimmer v. Town Board of the Town of Locke*, 226 A.D.2d 1117, 642 N.Y.S.2d 130 (4th Dept. 1996), that a building permit properly was denied where the stretch of road where a dwelling was proposed to be located was designated as a seasonal use road. It was inaccessible to emergency vehicles, especially during the winter, narrow and unimproved, had sharp curves and steep grades of up to 22%. However, if a qualifying street is sufficiently improved to permit safe access by

emergency vehicles and by those who depend on such road for ingress and egress, a building permit may not be denied.

If a lot does not front on a public street, a subdivision map must be filed:

Town Law § 280-a sets forth two prerequisites for the issuance of a building permit. First, the street or highway must be of the character specified in Town Law § 280-a(1). Second, it must be suitably improved or such improvements must be bonded. *See* Town Law 280-a(2).

In order to satisfy the first requirement, the street or highway providing access to a proposed structure must have been placed on the town's official map. In the alternative, if no official map has been adopted, the street or highway must be an existing state, county or town highway; or a street shown on a subdivision plat approved by a town's planning board pursuant to Town Law §§ 276 and 277; or a street on a plat filed in the county clerk's office prior to the appointment of a planning board with authorization to review and approve subdivision plats. Satisfaction of any of the foregoing circumstances is sufficient. *The filing of a subdivision map is not necessary to satisfy Town Law § 280-a unless a lot does not front on a public street, or on a street shown or designated on an official map. See Jack Homes, Inc. v. Baldwin, 39 Misc.2d 693, 241 N.Y.S.2d 487 (Sup. Ct. Nassau Co. 1963).*

(Emphasis added)

Planning Board approval for subdivision may be required in any event because there are multiple interior parcels in the lot. Local code 210-20 states that

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]

**IV. The Driveway is illegal because it violates the State Fire Regulations which adopted the International Fire Code (IFC)**

19. New York State has adopted the 2015 International Fire Code ("IFC") as well as the 2017 Uniform Code Supplement pursuant to regulations established by the New York Department of State. See esp: 19 NYCRR 1228.17 and 19 NYCRR 1225.1 The driveway exceeds slope requirements, has no turnouts and no existing proper turnaround. See again Exhibit 5, Affidavit of Michael W. Finkbeiner. The sloping requirements of Appendix D Section

D<sup>9</sup> 103.2 were violated. (Slopes are well in excess of 20% let alone the 10% requirement- as shown in Sub-exhibit 1 of Exhibit 11, the December 4<sup>th</sup> 2019 Affidavit of Michael W. Finkbeiner.) The driveway and turnout sections in Appendix D Section D as well as Section 511.2 of the Uniform Code Supplement<sup>10</sup> were violated and where the house on this parcel is understood as part of a 5 house subdivision, Section 503<sup>11</sup> of the International Fire Code regarding subdivisions was violated as well; they were never adhered to or considered. (Turnouts are supposed to be 20 feet wide and 50 feet long spaced not more than 500 feet from each other and there does not appear to be a turnaround constructed.) The Fire Chief never explains why he is giving blanket exemptions; just that he said the driveway was safe. He doesn't explain how a doubling of slope allowance will allow firetrucks can get through; i.e. is the sloping "gradual"? For this exemption to be taken seriously, he would have needed to say that the fire apparatus that the Fire Department has can navigate the driveway and that the Department is not going to purchase any apparatus in the foreseeable future that cannot get up the road. He did not so state. He never mentions the 2015 International Fire Code. The Fire Chief does not have the right to give exemptions for turnouts and turnarounds. This is enough for the driveway to have been deemed unworkable, for the Fire Department letter to have been disregarded and for building permits not to have been approved. Section 511.2.6 of the 2017 Uniform Code Supplement also has regulations for fire apparatus access roads where 4 buildings use the road; these buildings do not necessarily have to be houses; there are garages on the existing houses using the road. Sheds also count as buildings. The McCutcheons use the road and the Deborah and David Tonneson use the road for their old house. With garages, sheds and

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<sup>9</sup> International Fire Code Appendix D

<https://codes.iccsafe.org/content/IFC2015NY/appendix-d-fire-apparatus-access-roads>

<sup>10</sup> 2017 Uniform Code Supplement, New York Department of State:

<https://www.dos.ny.gov/dcea/pdf/2017%20Uniform%20Code%20Supplement-10-2017.pdf>

<sup>11</sup> International Fire Code Section 503:

[https://codes.iccsafe.org/content/IFC2015NY/chapter-5-fire-service-features#IFC2015\\_Pt03\\_Ch05\\_Sec503](https://codes.iccsafe.org/content/IFC2015NY/chapter-5-fire-service-features#IFC2015_Pt03_Ch05_Sec503)

houses, there are at least four structures using the road. Such a scenario would necessitate following Section 503 of the IFC. In any case, the Tonnesons are open and notorious about subdividing the property which would add even more buildings onto the driveway out of driveway out of Hemlock proposed scenario. While this has been ongoing, Mr. Tonneson approach Justin Rider for a “lot line change” to the parcel which also speaks to an upcoming subdivision. (Exhibit 9) I ask the Court to take Judicial Notice of the International Fire Code and the N.Y. Department of State Uniform Code Supplement.

20. At a minimum it was arbitrary and capricious and an abuse of discretion for the Building Inspector to issue any construction permits by taking the Fire Department Letter without analyzing it critically (why was a waiver given when the slope was over 20% and noticing there were other violations of the International Fire Code that would make the road not legal). It was a violation of lawful procedure to give any permits for construction before the driveway that was needed to do construction was legal.

21. Local code 210-50.1 (A), Additional requirements for building permits was also violated:

A. It is necessary that all permittees of all building permits issued within the Town of Highlands provide to the site of the construction proper and safe access for both construction vehicles and equipment, as well as emergency vehicles. To ensure this condition, the applicant/developer shall maintain access which will, at minimum, consist of a firm and unyielding gravel base to the site of the construction, capable of providing access to such vehicles as referenced herein.

If the driveway fails sloping requirements and the Fire Chief gave no reason for the exception (I note that David Tonneson is a long-standing member of the Department), then it is not safe for construction. The failure to comply with other provisions of the IFC underscores the lack of safety of the road. It also appears that provisions of 210-50.1(B,C,D) were violated as well, compartment with certain street specifications of the Town and escrow.

V. **This Un-Platted Lot Required Approval Before a Road Could be Built on It and Before It could be Developed**

22. Furthermore, the lot is un-platted and designated as rural, not residential (See: Exhibit 10 2019 final tax roll for the parcel) so the Poplar Street *proposed* Respondents at most had authority to have some horse grazing and rural activities of the like there; as an un-platted lot, it was not permissible to develop anything on it. The un-platted, rural parcel on non-residentially approved land in question is also on a 4-zone lot, part of which is un-zoned, part of which is zoned for apartments and part of which is zoned for residential development. Pursuant to Local Code §27-2(B)(1)(2)(3):

B. 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 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.
- (3) To approve or disapprove the laying out, closing off or abandoning of the streets, highways or public areas shown on subdivision plats or maps filed in the office of the Orange County Clerk.

The plat in question has multiple lots, blocks or sites within its boundaries; the plat shows “lots, blocks or sites with or without streets” pursuant to §27-2(B)(1). None of this was ever done with regard to this section, block and lot. (The site plan doesn’t identify the zone or the fact that the parcel is un-platted or that there is no approved road). The publicly available County Clerk Map File does not list it as a platted lot. In any event, Town Law 280-a requires filing of a subdivision map if the property does not front on a publicly approved road. There were multiple pieces carved out of the parcel, but because it was un-platted, the Planning Board has failed to

oversee orderly subdivision development of the parcel; the absurdity in regard to the driveway out of driveway situation speaks to this, as well as the failure of the Building Inspector to require the property owner to improve access to Hemlock street prior to issuing a Building Permit.

VI. **Other Provisions of the Code That Were Violated Include Portions of the Zoning Code that are in contention as to meaning, and also include provisions of the Code that are outside the Zoning Code.**

23. The Building Inspector acted arbitrarily and capriciously and in an abuse of discretion pursuant to Section § 210-2 (A-L)<sup>12</sup>, including and especially promoting orderly growth, protecting character and economic well-being of private (mine) and public (Palisades Park) property, safety from fire, overcrowding of land and buildings, enhance the value of the land, conserve and protect natural scenic beauty of the Town. The Tonnesons and Ms.Paisley-Tonneson have wantonly destroyed a 100-year old forest and failed to get erosion control permits for doing so; they should not have been issued a further permit to put up a house with this condition ongoing and the fact that more area had been stripped than acknowledged in the plans at that point. I believe they interfered with wetlands and watercourses, had an oil spill on the property and then after the house was put up, continued to strip the land towards 20-2-6 for no valid purpose and towards what is called Hemlock Street on what was already an illegal driveway, widening the road and putting in “drainage” that is set to dump water directly onto Hemlock Street.

<sup>12</sup> **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)

24. The Building Inspector had also been given plans that lacked any meaningful erosion control (and again were presented after the violations were a *fait accompli*. The Plans provided failed to disclose the location of the perc and deep tests (how would one know if they were even taken on the site or in the building envelope? They strangely had the same numbers for the deep tests in disturbed fill that had been cut, graded, etc. (With disturbance, there should be more variation in these numbers). Also, there is supposed to be a 2% pitch from the pipe leaving the house until it gets to the trenches; the existing plans do not specify what elevation exists. The Plans provided showed less of a footprint (stripping, etc.) that was to be made than was actually made by September 28, 2019, which exceeded the 20,000 maximum with 36,698 square feet visible even with leaves still on the trees, obscuring portions of the site; the so-called “borrow” area that Surveyor/Aerial photogrammetrist Finkbeiner refers to on the East side of the Road where drone photography shows that some of the excavation for filling and grading took place were not presented on the plans. No stormwater controls were presented on the plan. Most egregiously, as the Affidavit of Michael W. Finkbeiner clearly demonstrates, no plan was ever signed off by an engineer or architect. Surveyors are not empowered to sign off on site plans. Since the engineer would not, David and Deborah Tonneson and Jaidin Paisley-Tonneson pulled a bait and switch:

Surveyors are not empowered under the Town of Highlands Code to prepare a site development plan; only engineers and architects are. In the State of New York only engineers are authorized to design catch basins, stormwater piping, stormwater detention or retention systems, and erosion and sedimentation control systems. The Engineer’s so-called Plot Plan contained none of these systems. Surveyors cannot practice any aspect of civil engineering in the State of New York.

The surveyor did not provide topographic contours, analysis of pre-development slopes, trees, wetlands, watercourses and installed drainage features in the pre-existing roadways (Poplar St. proposed and Hemlock), all of which are within the purview of what a surveyor should submit. The surveyor’s role is to provide the design engineer with a map of existing conditions and site parameters prior to development and design. There was a 2005 filed plan for drainage improvements and easements

(Orange County Map # 2005-333) that was not documented in the survey, which ignored the issue of drainage. Instead, the Engineer called an incomplete engineering plan a "Plot Plan" instead of a "Site Plan", while the Surveyor called his incomplete survey lacking topography, wetlands, drainage features and slope analysis a "Site Plan" instead of a "Plot Plan."

Sheet 2 of 2 in the drawing set is called a "Survey Site Plan." The Surveyor, who ordinarily is supposed to produce an existing conditions topographical survey and a title survey has produced a "site plan" lacking all physical details of the site at 60 scale that incorporates the site design elements from the Engineer's Plot plan at 40 scale. (Septic plans are typically done at 20 scale on an Engineer's Site Plan.)

The existing drives are not shown on the Surveyor's title survey. There are no details for driveway access into the parcel from Hemlock St., being an extension of a curb cut for shared residential drives servicing the houses of McCutcheon on lot 11-1-7 and Tonneson on Lot 11-1-5.2 (as distinguished from 11-1-1.52), which lots are already developed. The Engineer's Plot Plan depicts a proposed drive but he does not delineate what elements are existing versus what are proposed as of the date of the Plot Plan.

Additionally, the Title Survey notes and depicts a 50-foot-wide extension of Hemlock St. from Poplar St. to Forest Hill Rd, crossing through Lot 20-2-6 of Canterbury Forest. No such easement or right-of-way is supported by deed conveyance to Tonneson.

The engineer would not sign off on the plans (it is required under the Erosion Control provisions as well as State Law for an engineer or architect to sign off on plans absent some explained and granted exception. So the surveyor comped for the engineer. Engineers are supposed to submit site plans and surveyors can submit a survey and a plot plan, not the other way around. Again, it was an abuse of discretion and arbitrary and capricious to grant an amended permit given these realities. (The Building Inspector also had granted a permit to drill a well *before* title had changed on the parcel; this was an example of his unwillingness and/or inability to do basic due diligence).

25. Section §210-50 E indicates that the first foundation permit was issued under false pretenses (the scope of work done well exceeded the plans even by September 28, 209, before the amended petition was issued). Work done since the house was quickly imported in should

not have been allowed as there as a need for erosion control permits that are outside the house building envelope (as well as what I assert was the need to get erosion control permits before applying for a permit to construct anything since what was done far exceeded anything needed for footings, basements and septic and went far outside the proposed building envelope. And again, an erosion control permit was need to slope, grade and build the road to get to the house site. This was never sought prior to work being done. Of particular note is the middle section of 210-50 E which contemplates that other provisions of the Town code are followed:

**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.

(Emphasis added)

The fact that more work took place before the amendment to the permit/ amended permit was issued suggests that the application was made under false pretenses. Certainly the earlier requirement in the sentence before that “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*” meant that an amended permit should not have been issued because the foundation permit was unlawful to begin with, because the building inspector should have been addressing the fact that more work was done than contemplated in the plans, that erosion control permits, septic and stormwater permits were needed first, that erosion control was needed to address fact

that a borrow pit had been created and a road had been and was continuing to be dug- something that is outside the scope of excavation for basements, footings and septic, that the driveway being constructed violated the NYCRR (19 NYCRR 1228.17 and 19 NYCRR 1225.1 ) and the International Fire Code and hence had to be immediately addressed before further construction. Furthermore 210-48(A)(2) makes it clear that greater restrictions in other laws take precedence over requirements in the article:

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.

33 CFR 320-332 (Army Corps of Engineers wetland regulations) and NYCRR 10 Ch. II, Subch. I, Pt. 75, App. 75-A) N.Y. Comp. Codes R. & Regs. 10 Ch. II, Subch. I, Pt. 75, App. 75-A, including A.4 should have taken precedence and prevented a building permit from being issued. If something is unlawful, ipso facto, an amended permit should not be issued. At a minimum, it is arbitrary and capricious and an abuse of discretion to issue a permit for MORE work when a reasonable person should conclude that the first permit shouldn't have been issued or that more work was done than put in the plans since the first permit was issued.

26. Army Corps of Engineers Regulations regarding wetlands and streams (there was a stream on site and likely wetlands)- including 33 CFR 320-332 pursuant to "Corps of Engineers Wetlands Delineation Manual," Technical Report Y-87-1, and the "Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Northcentral and Northeast Region. I sought discovery in regard to the foundation permit to get onsite proof of same.

27. N.Y. Public Health Law: New York Title 10, Chapter II, Part 75, Appendix 75-A Wastewater Treatment Standards (NYCRR 10 Ch. II, Subch. I, Pt. 75, App. 75-A) N.Y. Comp. Codes R. & Regs. 10 Ch. II, Subch. I, Pt. 75, App. 75-A, including A.4 was violated). The same issues previously stated about the Building Inspector ignoring the evidence on site as well as

deficiencies in plans apply to this provision. The Building Inspector needed to comply with State Code, and the failure to do so meant he acted in violation of lawful procedure and outside his jurisdiction as well as arbitrarily and capriciously and in an abuse of discretion. Again, the plans fail to state location of perc and deep tests; how do we know they were even taken on site? This is a basic requirement of plans. Furthermore, the two deep tests recorded the same measurement which is highly unusual in disturbed fill where you would expect to see different numbers; special tests are required in disturbed fill; it is obvious from Affidavit of Michael W. Finkbeiner- that the fill was taken from the excavated portion- they did not use certified fill<sup>13</sup>.

<sup>13</sup> [https://www.health.ny.gov/environmental/water/drinking/docs/appendix\\_75a.pdf](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 by Michael W. Finkbeiner, Surveyor and Aerial Photogrammatrist 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. The Engineer's "Plot Plan" does not say where these tests were done or how they were used:***

(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.

(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

28. §210-50 (B) was violated:

**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.

The plans could not conform because by the time the Amendment to the permit was issued, more land was stripped that could have been envisaged. The False pretenses section of 210-50 (E) is triggered, because the work done was already in excess of what was submitted on the plans (Exhibit 12) (stripping that was discernible was already over 36,000 square feet). §210-50 G and I are triggered, because as I have argued this parcel with interior lots which needs to be platted requires subdivision approval. Furthermore, the site plan of the building has to be approved for these reasons and also because stormwater and erosion control permits were necessary ahead of time; the granting of those permits would constitute implicit Planning Board approval for the site plans submitted. Failure to get permits would mean the site plans would need some work.

**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.

**I.**

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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.

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]

29. § 210-48 (A)(1) should be construed as applying to the whole chapter, not just the article:

§ 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)

Section § 210-48 (A)(1) refers to the converse of A(2), when greater restrictions are imposed by this article, it supercedes other rules. 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. Both provisions suggest that a Certificate of Occupancy must be stayed.

30. §210-52 (B): No Certificate of Occupancy can be issued because construction, etc. is not in conformity with the article (or the chapter).

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 provisions of this article.

I have addressed the issues of violations of other statutes and codes. There are ongoing violations and the need to obtain erosion control permits based on what has occurred since the first permit was issued, with the Respondents continuing to expand the area of stripping far outside the building envelope- from 36,698 square feet to 52,228 square feet with as well as the need to get permits before work was started. 210-50 (E) contemplates a cessation of work until violations are remedied. The issuance of an amended permit is not contemplated when there are open and obvious violations of work and for all the aforementioned reasons, it should not have been granted. Exhibit 13 constitutes drone photos. Exhibit 14 constitutes the letter of Court Clerk Michael O'Brien and the court transcript. Exhibit 15 constitutes subdivision regulations.

#### FIRST CAUSE OF ACTION

1. The ToH BI had proceeded in excess of jurisdiction in violation of CPLR §7803(2) by issuing a permit to lay a foundation when the code only allows him to issue a permit for a house. The request to build a foundation should have been issued to the Planning Board. He has also proceeded in excess of jurisdiction in violation of CPLR §7803(2) because the foundation permit was illegal and he could not amend the permit to put a house atop an illegal foundation; he should have issued a new permit to put in a house which also encompasses a foundation. (The foundation was in place at that point). The amended permit/amendment to a permit should not have been issued when there were clear and obvious legal violations as documented in this petition and in the previous case 2019/007757 including orders to show cause before the Court. He also proceeded in excess of jurisdiction by amending the original permit instead of issuing a new permit; there was a substantial change to the original permit. The permits were also issued under false pretenses; the amount of land contemplated to be cleared in the plans is not what had been cleared and as such the Building Inspector had not jurisdiction to

issue an amended permit when the first one should not have been issued. He had no jurisdiction to proceed when the Respondents needed erosion control, stormwater control and septic permits, a variance under Town Law 280-a as conditions precedent as well as an application to the Army Corps of Engineers and proper compliance with subdivision regulations and State code and regulations including the International Fire Code and Department of State Uniform Supplement and compliance with State regulations on soil disturbance and septic.

#### SECOND CAUSE OF ACTION

2. The ToH BI's determination to issue an amended permit for construction was made in violation of §7803(3) as it was a violation of lawful procedure, arbitrary and capricious and an abuse of discretion and was affected by an error of law inasmuch as the property owners needed other permits pursuant to Town Law 280-a and the erosion control provisions in §101, the stormwater control provision §164-7 and septic permits under § 146-2 and § 146-6 before construction permits were issued; and also the lot and lots within 11-1-1.52 had to be platted pursuant to §27-2(B)(1)(2)(3), which triggered subdivision regulations; and also, the conflict of laws provisions in §210-48 and §101-5 also suggested other permits needed to be issued as conditions precedent to issuing a building permit; and also the improper site plan was not approved by an architect or engineer pursuant to requirements of §101 (and should not have been accepted by the building inspector even if the building inspector is deemed authorized to ignore 101); and also, work had been done well in excess of what the site plan contemplated before the amended permit was issued which means another permit or an amendment to a permit should not have been issued, and also, the construction of the road should not have been exempted by the Fire Chief before a permit was issued or amended due to failure to comply with the International Fire Code as required by State Regulations and the N.Y. Department of State Uniform Code Supplement; and also, failure to demarcate issues relating to septic (perc and deep tests)

concomitant with work having been done in excess of what was contemplated on the plans means the permit should not have been amended/ a new permit issued , and also, because the property owners did not comply with State regulations on Septic, including soil and did not comply with Army Corps of Engineers federal regulations and did not comply with other provisions of the local code mentioned in this petition, including but not limited to submitting documents to the Building Inspector under false pretenses (doing more work than stated in plans, etc.).

WHEREFORE, I as Petitioner respectfully request that this Court enter judgment against Respondents pursuant to CPLR §§ 7803(2), CPLR §§ 7803(3), CPLR §§ 7805 and CPLR §§ 7806 as follows:

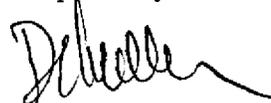
- The Court will Join these claims with the initial petition (2019/007757)
- The Court will order the land to be remediated (including trucking in fully grown pine trees or equivalent trees for each tree illegally cut).
- The Court will order that Local Code 101 will be enforced via the mechanisms in 101-12 including fines and the replacement of trees and proper remediation of the land. Furthermore the Court will order this to be overseen by an independent third party that I agree to.
- The permit issued on 9/5/19 for this property is stayed and rescinded.
- The amended permit issued on 9/30/19 is stayed and rescinded.
- The amendment to the permit made on 9/30/19 is stayed and rescinded
- The amended permit/ amendment to the original permit issued on 9/30/19 shall be deemed a new permit *nunc pro tunc*.
- All other permits subsequently issued for this property are stayed and rescinded (including a certificate of occupancy)
- The Building Inspector is enjoined from permitting and/or otherwise authorizing work on Respondents' property under construction- on information and belief parcel number 11-1-1.52 until proper permits are issued and the Planning Board, Zoning Board and any other applicable board hears the issues described herein that should have been dealt with in the code prior to any construction.
- The Building Inspector is enjoined from issuing any new permits or amendments to permits (including a certificate of occupancy) on Respondents' property under construction - on information and belief, parcel number 11-1-1.52 until the Planning Board or appropriate Board, including the Zoning Board hears the issues described herein that should

have been dealt with in the code prior to any construction and until the Respondents reapply for construction permits

- The Respondents David Tonneson, Deborah Tonneson and Jaidin Paisley-Tonneson are enjoined from allowing any site construction activity, including, but not limited to disturbance of the land until such time as they receive proper permits that they should have applied for prior to engaging in any construction and they receive clearance from the Army Corps of Engineers and until such time as they re-apply and get permits for construction.
- The Building Inspector or a third party at the Town's expense is ordered to visit the site daily to make sure that no construction or site disturbance is taking place until such time as proper permits are issued.
- The court will order the tear-down of any man-made structure for which a permit was improperly issued.
- The Court will order my surveyor/aerial photogrammetrist Michael W. Finkbeiner and his team (or new ones I choose if he becomes incapacitated) and my forrester (Starling W. Childs) (or another if I chose if he becomes incapacitated)
- The Court will issue such other relief as is just and proper.

Dated: January 29, 2020

Respectfully submitted,



Deborah Kopald, Petitioner  
P.O. Box 998  
Fort Montgomery, NY 10922  
(845) 446-3768

SUPREME COURT OF THE STATE OF NEW YORK,  
ORANGE COUNTY

-----  
In the Matter of the Application of Deborah Kopald,  
Petitioner

For a Judgment Pursuant to Article 78

**VERIFICATION**

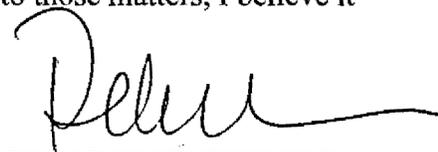
- against -

The Town of Highlands New York,  
David Tonneson, Deborah Tonneson, Jaidin Paisley-  
Tonneson,

Respondents

-----  
STATE OF NEW YORK )  
) SS:  
COUNTY OF ORANGE )

I, Deborah Kopald, being duly sworn deposes and states that I am the  
Petitioner in this Special Proceeding, and that I drafted, read and signed the foregoing  
Petition and the allegations contained therein are true to my knowledge, except as to  
matters therein stated to be on information and belief, and as to those matters, I believe it  
to be true.



Deborah Kopald  
P.O. Box 998  
Fort Montgomery, NY 10922  
(845) 446-3768

Sworn to before me this 29<sup>th</sup> day of January, 2020



Notary Public

To: Town of Highlands  
Town Clerk  
254 Main Street  
Highland Falls, NY 10928

David and Deborah Tonneson, Jaidin Paisley Tonneson  
vis Stephen Honan, Esq.  
96 S. Broadway  
South Nyack, NY 10960



EILEEN BRISCHOUX  
Notary Public, State Of New York  
Qualified In Orange County  
Reg. #01BR5043474  
Commission Expires May 8, 2023