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**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

Dear Chairperson and Board Members:

Following is a revised appeal submittal on behalf of Deborah Kopald, previously allowed by this Board and necessitated in part by the New York Supreme Court decisions of the Hon. Robert A. Onofry, J.S.C.<sup>1</sup> The decisions of Justice Onofry, among other things, held that “all of the issues raised by [Deborah 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>2</sup> The basis for this holding is that Justice Onofry found that Ms. Kopald must “exhaust [her] available administrative remedies before being permitted to litigate in a court of law.”<sup>3</sup>

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<sup>1</sup> *Kopald v. Town of Highlands, et al.*, Index Nos. 7757-19 & 818-20 (Sup. Ct., Orange Co., 2020), annexed hereto as Exhibit “A.”

<sup>2</sup> *Id.* (7757-19) at 11.

<sup>3</sup> *Id.* (7757-19) at 10. Although Ms. Kopald argued to the contrary in court, Justice Onofry’s holding is, at the present time, the law that controls.

These court decisions, binding on this Board, are necessarily predicated on a finding that this Board has jurisdiction to hear, as the Court characterized it, “all of the issues” raised by Ms. Kopald in the litigation then pending before Justice Onofry. If this Board did not have jurisdiction over these claims the court would have either addressed the issues not within this Board’s jurisdiction, or dismissed them outright, rather than finding there was a need to first exhaust her administrative remedies before this Board.

More pointedly, the Court noted that it was the Town’s counsel that argued Ms. Kopald must first exhaust her administrative remedies before this Board before continuing in a court action.<sup>4</sup> Certainly, the Town, through this Board, cannot now be heard to posit the exact opposite, that this Board has no jurisdiction. The Town’s position is clearly stated in verified pleadings in court – Ms. Kopald must first have her claims substantively addressed by this Board before she can attempt to address them in court. Thus, her claims are properly before this Board, both jurisdictionally and otherwise.

As a preliminary matter, the record needs to be made clear that at no time did I or Ms. Kopald ever “withdraw” the Kopald ZBA application, contrary to the misrepresentation of the Tonneson attorney Mr. Honan in his letter to this Board of March 10, 2020. The ZBA appeal has simply been revised and supplemented, with the express permission of this Board, to try and streamline and better organize the appeal issues before this Board. All of the exhibits previously submitted to this Board by Ms. Kopald, in addition to the exhibits referenced in this letter and attached to the accompanying June 8<sup>th</sup> affidavit of Ms. Kopald, are all part of the record on this appeal.

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<sup>4</sup> *Id.* (7757-19) at 9.

I personally want to thank the Board for its patience in allowing me additional time to file this revised submission, owing to the health issue I encountered, which prevented me from submitting it sooner.

**PRELIMINARY STATEMENT & SUMMARY OF APPEAL ISSUES**

The issues in this appeal are straightforward. Unadorned, this appeal seeks only to have this Board determine to (1) rescind the building permits and, if issued, a related certificate of occupancy,<sup>5</sup> to Ms. Kopald's neighbors – David and Deborah Tonneson & Jaidin Paisley-Tonneson (hereinafter collectively referred to as "Tonnesons") – as they were issued in error by the Code Enforcement Officer Bruce Terwilliger (as described below), and (2) enforce various Code provisions previously raised by Ms. Kopald in her appeal, including the prohibition of all but permitted tree cutting by the Tonnesons, as provided in Town Code Chapter 101, which the Building Inspector/Code Enforcement Officer failed to do, the installation of the septic tank by the Tonnesons<sup>6</sup> (when only the excavation therefor was allowable<sup>7</sup>) without prior plans being submitted and an approval secured in accordance with Town Code § 146-2 (as well as the failure otherwise to comply with Chapters 146 and 164),<sup>8</sup> and the failure of the Tonnesons driveway to conform to State fire code requirements.<sup>9</sup>

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<sup>5</sup> The two building permits are annexed here as Exhibit "B." It is unknown if a certificate of occupancy has been issued. If a certificate of occupancy has not been issued, then the relief requested is to restrain the issuance of it unless and until all conditions precedent as discussed below have been accomplished.

<sup>6</sup> Finkbeiner affidavit dated Jan. 24, 2020, annexed to the accompanying affidavit of Ms. Kopald as Exhibit "C," ¶ 14.

<sup>7</sup> Without such prior approval for the actual installation of the septic system, only an excavation therefor is allowed. See, e.g., Town Code §§ 101-7(B)(3), 101-8.

<sup>8</sup> Without withdrawing or waiving any right to the enforcement relief issues including those previously requested by Ms. Kopald in her appeal herein, and specifically requesting a substantive decision thereon, this letter brief will focus its attention on the building permit and certificate of occupancy relief issue, as they are dispositive of the issues involved.

<sup>9</sup> See, e.g., 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.

The fatal errors in the issuance of the building permits (and certificate of occupancy, if issued), are: (i) the Tonnesons failed to include in their applications for those building permits and certificate of occupancy the information that, prior to any entitlement to such permits or certificates, Planning Board approvals were required for an erosion control permit and stormwater pollution prevention plan, rendering the issuance of the permits and certificate improper, (ii) the Tonnesons installed their septic system prior to a finding or determination that it complied with the requirements of Town Code Chapter 146, as it was installed prior to receiving a permit,<sup>10</sup> (iii) the Tonnesons constructed a driveway with a slope that violates the State Fire Code,<sup>11</sup> and (iv) the Tonnesons failed to obtain the required Town Law § 280-a variance.

Whether the Code Enforcement Officer's haste to issue these permits and certificate without the necessary prior approvals or compliance with law, or the failure to enforce the illegal tree cutting, etc., were born of favoritism toward Tonneson, animus toward Ms. Kopald, or otherwise, is of no moment presently. Conditions precedent to the issuance of these permits and certificate were not accomplished by the Tonnesons, requiring this Board, acting in the place and stead of the Building Inspector/Code Enforcement Officer, to annul these building permits and certificates of occupancy and issue a stop work order for any additional work. The Tonnesons had no legal right to construct their home or to occupy it without securing the necessary approvals therefor. To allow them to do it was and is wrong and it is incumbent upon this Board, acting in conformance with its legal duty, to right this wrong.

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<sup>10</sup> See Finkbeiner affidavit (Jan. 24, 2020), ¶ 14, annexed to the accompanying affidavit of Ms. Kopald as Exhibit "C."

<sup>11</sup> See Finkbeiner affidavit (Dec. 18, 2019), ¶ 8, annexed to the accompanying affidavit of Ms. Kopald as Exhibit "D." See also 2020 N.Y. Fire Code Appendix D, Section D103.2 and Section 511.2.2. Both before and after the 2020 N.Y. Fire Code amendments the Tonnesons' driveway failed to conform to State regulations.

**POINT I**

**THE ZBA HAS THE JURISDICTION/AUTHORITY TO GRANT THE RELIEF REQUESTED**

The Town's legal position in court filings arguing for the need for Ms. Kopald to exhaust her administrative remedies before this Board on her claims, and the judicial recognition thereof,<sup>12</sup> perforce establishes this Board's jurisdiction to hear Ms. Kopald's appeal issues. Nothing more is needed is to establish with clarity and conviction the jurisdiction and authority of this Board to address Ms. Kopald's claims. This Board cannot avoid this legal and binding charge. However, there is additional support for Ms. Kopald's appeal being jurisdictionally proper.

As recognized by Justice Onofry's judicial holding, State statutory law – N.Y. Town Law § 267-b(1) grants to this Board various powers, in addition to the standard area and use variances, and powers of interpretation of the Zoning Code. Indeed, your own Town Code § 210-44(B) specifically mandates that this 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, the Town Law of the State of New York . . .” (Emphasis added). *See also* Town Code § 210-44(A).

It is this combination of State statutory law and the Town of Highlands Code that provides the additional authority for Ms. Kopald's specific right to an appeal when, as here, the appeal is from any determination by the Building Inspector. State law provides that when reviewing a determination by the Building Inspector this Board has the same scope and breadth of powers as possessed by the Building Inspector/Code Enforcement Officer, and this Board may reverse or modify those determinations as necessary:

“The board of appeals may reverse or affirm, wholly or partly, or may modify the order, requirement, decision, interpretation or determination appealed from and

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<sup>12</sup> *See Kopald v. Town of Highlands, et al.*, Index Nos. 7757-19 at 9, 10-11 (Sup. Ct., Orange Co., February 7, 2020), annexed hereto as Exhibit “A.”

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.”<sup>13</sup>

Essentially, this Board stands in the place and stead of the Building Inspector/Code Enforcement Officer, with all of his powers, to make a new decision. *See Sand Land Corp. v. Zoning Bd. of Appeals of Town of Southampton*, 137 A.D.3d 1289, 1293 (2d Dept. 2016).

It is important to note that when acting on an appeal of a determination made by the Building Inspector/Code Enforcement Officer it is not the role of this Board to only reverse or modify the determinations of the Building Inspector/Code Enforcement Officer if it finds them arbitrary or capricious, an abuse of discretion, or in error of law. This Board is mandated to make a *de novo* determination of Ms. Kopald’s claims and decide them “as in its opinion ought to have been made” in the first instance. N.Y. Town Law § 267-b(1).

Further, this grant of jurisdiction to hear an appeal from a determination of the Building Inspector is not limited to his determinations made in the context only in relation to the Zoning Code. There is no such limitation set forth in the State statute, which references the determinations of the Building Inspector without any limitation, and none can be reasonably inferred from its language. Even so, as will be demonstrated below, the wrongful issuance of building permits, and any issuance of a certificate of occupancy, in fact spring from violations and failures under the Town’s Zoning Code. The jurisdiction for this appeal is well founded.

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<sup>13</sup> N.Y. Town Law § 267-b(1).

## POINT II

### **MS. KOPALD IS AN AGGRIEVED PERSON WITH STANDING TO BRING THIS APPEAL**

In order to bring her appeal to this Board Ms. Kopald must be an “aggrieved” person. N.Y. Town Law § 267-a(4). Although what constitutes as an “aggrieved” person is not specifically defined, the same wording is used to establish the threshold to challenge a decision of this Board in court (N.Y. Town Law § 267-c(1)) and that standard is deemed to be the equivalent to legal standing in the courts. *See, e.g., McCabe v. Minicozzi*, 227 A.D.2d 487 (2d Dept. 1996). As a result, recourse to court cases addressing standing in zoning matters is appropriate.

“Whether a person seeking relief is a proper party to request an adjudication is an aspect of justiciability which, when challenged, must be considered at the outset of any litigation.” *Society of Plastics Indus., Inc. v. Cty. of Suffolk*, 77 N.Y.2d 761, 769 (1991). “It is well settled that a court may act only when the rights of the party requesting relief are affected.” *Brighton Residents Against Violence to Children v. MW Props.*, 304 A.D.2d 53, 56 (4th Dept. 2003). *See also Society of Plastics Indus., supra*, 77 N.Y.2d at 769. Standing is a threshold decision, which requires a petitioner to “show an injury-in-fact – an actual legal stake in the matter being adjudicated – and that the interest or injury asserted falls within the zone of interest to be protected by the statute or constitutional guarantee.” *Lasalle Ambulance v. New York State Dept. of Health*, 245 A.D.2d 724, 724 (3d Dept. 1997). *See also, Dairylea Coop. v. Walkley*, 38 N.Y.2d 6 (1975).

Particularly relevant here concerning land use permits, “[i]n land use matters especially, [the Court of Appeals has] long imposed the limitation that the plaintiff, for standing purposes, must show that it would suffer direct harm, injury that is in some way different from that of the public at large.” *Society of Plastics Indus., supra*, 77 N.Y.2d at 774.

As with many longstanding legal principles, the special injury-in-fact requirement is not without exceptions. Rather, as here, with Ms. Kopald being an adjacent neighbor to the illegal activity of the Tonnesons, “[a]n injury in fact may be inferred from a showing of close proximity of the petitioner’s property to the proposed development.” *Tuxedo Land Trust, Inc. v. Town Bd. of Town of Tuxedo*, 112 A.D.3d 726, 728 (2d Dept. 2013). More specifically, as recognized by New York’s highest court, this Board may infer an injury where the person claiming to be aggrieved resides within 500 feet of the challenged activity. *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).

However, while “[a]n allegation of close proximity may give rise to an inference of damage or injury that enables a nearby property owner to challenge a land use decision without proof of actual injury..., this does not entitle the property owner to judicial review in every instance.” *CPD N.Y. Energy Corp. v. Town of Poughkeepsie Planning Bd.*, 139 A.D.3d 942, 943–44 (2d Dept. 2016). Instead, “in addition to establishing that the effect of the [challenged activity or permitting] is different from that suffered by the public generally, the petitioner must establish that the interest asserted is arguably within the zone of interests the statute protects.” *Id.* at 944. *See also, Dairylea Cooperative, Inc. v. Walkley*, 38 N.Y.2d 6 (1975). This means that “even where petitioner’s premises are physically close to the subject property, an ad hoc determination may be required as to whether a particular petitioner itself has a legally protectable interest so as to confer standing.” *Id.* (quoting *Sun-Brite Car Wash, Inc. v. Bd. of Zoning & Appeals of Town of N. Hempstead*, 69 N.Y.2d 406, 414 (1987)).

Recently, the appellate court, whose decisions dictate the standing requirements for this Board, addressed again the issue of standing for someone that resides in close proximity to the

land use activity and permitting that is being challenged in a local administrative body such as this Board. *See 159-MP Corp. v. CAB Bedford, LLC*, 181 A.D.3d 758 (2d Dept. 2020). In *159-MP* a grocery store operator who was challenging the permitting of the construction of a Whole Foods Store by the New York City Department of Buildings. The new construction would be 450 feet from the existing grocery store. The grocery store claimed to be impacted/injured by the wrongful permitting of the Whole Foods Store as an alteration of an existing building, rather than the new building it actually was - the Whole Foods store claimed it was only making internal modifications, but eventually demolished the perimeter walls. Specifically, with the construction being characterized and permitted by the Department of Buildings as an alteration, rather than a new building, it allowed the Whole Foods Store to operate with a lower on-site parking space requirement, resulting in a reduced availability of customer parking in the area for other businesses, such as the grocery store. *See 159-MP v. CAB Bedford, LLC*, 55 Misc. 3d 1213(A) (unreported disposition), 58 N.Y.S.3d 874 (Sup. Ct., Kings Co., 2017). On appeal the court held that this reduced parking availability injury was insufficient to grant standing to the grocery store, even with its close proximity to the new construction and the concomitant inference of an injury in fact, because the grocery store “failed to allege any harm distinct from that of the community at large.” *159-MP Corp., supra*, 181 A.D.3d at 761. The reduced parking in the area impacted not only the grocery store, but every other business in the area, resulting in no individualized damage to the grocery as required for standing purposes. Here, Ms. Kopald suffers from no such legal infirmity of a lack of unique injuries.

As noted in more detail below and in the accompanying affidavit of Ms. Kopald, identifiable injuries specific to Ms. Kopald have resulted because of the Tonnesons’ failure to obtain the necessary erosion control permit from the Planning Board, failure to obtain approval

from the Planning Board for a stormwater pollution prevention plan, failure to construct a driveway in accordance with the Fire Code, and failure to obtain a Town Law § 280-a variance from the ZBA for the lack of the property's access to a Town road. Ms. Kopald has demonstrated her injuries, including the visually intrusive nature of the Tonnesons' development as to her property and her interests. The zoning interest injuries include, but are not limited to, the tree cutting visual impact (substantiated by photographs), which carries with it the light/heat impact, and noise impacts, described in her affidavit, all owing to unlawful tree cutting without the requisite Planning Board approval. Her injuries also include the electromagnetic radiation impacts that could also have been addressed via adequate buffers during the Planning Board process on the Chapter 101 permit review. All of these impacts and others are not in common with, and not experienced or shared by, the public at large.

Also, two January 24, 2020 affidavits of Michael W. Finkbeiner, annexed to the accompanying affidavit of Ms. Kopald as Exhibits "C" and "E," demonstrate that through his detailed analysis there were 42 trees greater than 10" dbh that were removed from the Tonnesons' property,<sup>14</sup> and that more than one acre of the Tonnesons' property has been disturbed.<sup>15</sup> Such land development by the Tonnesons thus met several of the criteria mandating the requirement for Planning Board review of approval of an erosion control permit (Town Code Chapter 101) and stormwater pollution prevention plan (Town Code Chapter 164), later discussed in more detail, prior to the granting of any building permits or certificate of occupancy, issues impacting Ms. Kopald in a unique manner.<sup>16</sup>

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<sup>14</sup> Finkbeiner affidavit dated Jan. 24, 2020, annexed to the accompanying affidavit of Ms. Kopald as Exhibit "C," ¶ 44; Finkbeiner affidavit dated Jan. 24, 2020, annexed to the accompanying affidavit of Ms. Kopald as Exhibit "E," ¶ 1.

<sup>15</sup> Finkbeiner affidavit dated Jan. 24, 2020, annexed to the accompanying affidavit of Ms. Kopald as Exhibit "C," ¶¶ 35, 36.

<sup>16</sup> *See, e.g.*, Exhibit "H" (Drone & Ground Photos) annexed to the accompanying affidavit of Ms. Kopald, especially the "September and October 2019 Photos from My Yard."

It is likely that eventually the permits, approvals and variance needed by the Tonnesons can be secured by them, allowing them to have their home on their property. However, the process of obtaining such permits, approvals and variance involves the respective reviewing boards and officials ensuring that the location of the home and the associated septic system, as well as the grading, tree cutting, stormwater control, driveway slope and overall suitability of improvement, are only accomplished in a way consistent with the standards of the Town Code and State law, so as to mitigate the general impacts/injuries to the surrounding properties, as well as the specific impacts/injuries to Ms. Kopald. Importantly, during this process Ms. Kopald will have an opportunity to inform the reviewing boards and officials of her particularized concerns regarding the placement of the improvements, extent of grading and tree removal/replacement, preservation of important buffers, and stormwater controls. Informed of these concerns will result in a better and more environmentally friendly project with mitigated impacts to Ms. Kopald, and a project that actually conforms to the Town Code. To proceed otherwise is nothing short of reckless, in addition to illegal.

### **POINT III**

#### **THE ZBA SHOULD GRANT THE REQUESTED RELIEF BECAUSE BOTH THE LAW AND THE FACTS DICTATE THIS RESULT**

As noted in more detail in Point I above, this Board stands in the place and stead of the Building Inspector/Code Enforcement Officer, with all of his powers, to make a new decision on the issuance of the Tonnesons' building permits and certificate of occupancy. *See Sand Land Corp. v. Zoning Bd. of Appeals of Town of Southampton*, 137 A.D.3d 1289, 1293 (2d Dept. 2016).

Further, as noted in more detail below, the determination of the Building Inspector/Code Enforcement Officer should be reversed, and a stop work order issued or mandated because, *inter alia*, the Tonnesons failed to obtain Planning Board approval for an erosion control permit and a

stormwater pollution prevention plan, thereby violating the Zoning Code by failing to include in their building permit application the necessary information that they had either secured, or needed to secure such approvals, as required by Town Code § 210-50(A). This violation of the Zoning Code mandated that the Building Inspector/Code Enforcement Officer either not issue the building permits or, if issued, to issue a stop work order or an order to remedy for this “unlawful” action by Tonneson. *See* Town Code § 210-50(E).

I understand that it has been argued in opposition to Ms. Kopald’s appeal that no Planning Board approvals were required (such as the Town Code Chapter 101 erosion control permit, and the Town Code Chapter 164 stormwater pollution prevention plan), owing to Town Code § 210-21(A). This position is disingenuous and frivolous. Town Code § 210-21(A) provides no such safe harbor for the Tonnesons. By its express and exclusive terms Town Code § 210-21(A) only provides that a single-family home is not required to obtain a Planning Board site plan approval:

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

A. No building permit or certificate of occupancy shall be issued for other other than a one-family residence . . . until a site development plan has been approved by the Planning Board in accordance with this section. (Emphasis added).

Ms. Kopald is not arguing that the Tonnesons needed site plan approval from the Planning Board; the Tonnesons only needed approval from the Planning Board for the separate and discretely mandated erosion control permit and stormwater pollution prevention plan (neither of which are mandated for a pending or otherwise required site plan approval). Town Code § 210-21(A) is not some talisman allowing a single-family home to avoid all approvals from the Planning Board or otherwise, it is a narrow and very typical municipal code provision simply allowing the Tonnesons’

single-family home approvals to proceed without also getting a site plan approval from the Planning Board. This purported defense of Ms. Kopald's appeal is a red herring.<sup>17</sup>

Ms. Kopald is entitled to prosecute her appeal and request that this Board make a decision to reverse the issuance of the building permits and certificate of occupancy in accordance with the provisions of Zoning Chapter 210 of the Town Code. She is also entitled to have a stop work order issued to the Tonnesons effective until they comply with Town Code § 210-50(A) by providing the "other information" in their building permit application mandated by § 210-50(A) that is "necessary to determine and provide for the enforcement of this [Zoning] chapter," *i.e.*, the required Planning Board erosion control permit and stormwater pollution prevention plan, and a driveway plan conforming to the State Fire Code, to satisfy the conditions precedent to the issuance of building permits and certificate of occupancy. *See also*, Town Code § 210-50(B).

[A]ny building permit issued . . . in violation of the provisions of this [Zoning] chapter [*see* § 210-50(A)] 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 [any] use which is not in conformity with this chapter shall be unlawful until brought into compliance with this section. Town Code § 210-50(E). (Emphasis added).

There is no discretion here; the Code directive is mandatory.<sup>18</sup> Further, the Zoning Code requires:

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, . . . the Building Inspector and/or Code Enforcement Officer . . . may issue a stop-work order or order to remedy. (Emphasis added). *Id.*

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<sup>17</sup> In addition, the more specific provisions of Planning Board approvals required for the erosion control permit and stormwater pollution prevention plan of Chapters 101 and 164 respectively would, in any event, control over the more general language of Town Code § 210-21(A). *See* Town Code §§ 210-48(A); 101-5.

<sup>18</sup> Also mandatory is that prior to a Chapter 101 permit being approved, no site preparation work could have been commenced (*See* Town Code § 101-8); another violation by the Tonnesons.

Also, pursuant to Town Code § 210-52(B), “[n]o certificate of occupancy shall be issued . . . unless [the Tonnesons development of their property is] in conformity in all respects with the provisions of [Article VIII of the Town Code],” which Article VIII includes Town Code § 210-50(A) mandating that the Tonnesons provide in their building permit application to the Building Inspector/Code Enforcement Officer that all prior required approvals were obtained. They could not have done so (as they were not obtained) and, consequently, have no entitlement to a certificate of occupancy, whether or not one has been issued to date.

Neither in this instance, nor in any other matter, does the Building Inspector/Code Enforcement Officer possess the power to issue building permits or a certificate of occupancy if there is no entitlement thereto, such as when there is a failure of an applicant to secure any and all required underlying Planning Board ZBA, or other Town approvals.

As but one example, the Building Inspector/Code Enforcement Officer has no authority to issue building permits or certificate of occupancy to homes or commercial structures if they had not first obtained any required site plan approvals (governed by the Chapter 210 – the Zoning Code) or subdivision approvals (Chapter 173 - not governed by the Zoning Code), or variances, if so required under the Town Code. Ms. Kopald’s appeal involves nothing different. No building permit or certificate of occupancy ought to have been granted to the Tonnesons, as they failed to supply the information in their building permit application that they had first secured the required Planning Board approvals for an erosion control permit and stormwater pollution prevention plan, conform their driveway to the State Fire Code, or install their septic system only after it had been reviewed and approved.

To be clear, in her appeal Ms. Kopald is not asking this Board to step into the role of the Planning Board and analyze whether and under what conditions an erosion control permit should

be granted, or what form and conditions ought to comprise a stormwater pollution prevention plan, or how to reconcile the State Fire Code driveway slope requirements with their intended driveway plan.

Ms. Kopald is narrowly and simply asking this Board to recognize the patent mandates of the Code and find that the Tonnesons were required to (i) obtain an erosion control permit, from the Planning Board, (ii) obtain approval of a stormwater pollution prevention plan from the Planning Board, (iii) conform their driveway to the State Fire Code, and (iv) provide such information and approvals in their building permit application so as to comply with the requirement of Zoning Code § 210-50(A). Nothing more, nothing less. For if any one of such findings are made by this Board, then the building permits issued were “unlawful” and must be “discontinued until [the Tonnesons are] brought into compliance . . . .” (Town Code § 210-50(E)), and the certificate of occupancy, if issued, was necessarily wrongly issued, and if not yet issued should not be issued (Town Code § 210-50(E)). Upon any such finding this Board must either issue to the Tonnesons, or remand the matter to the Building Inspector/Code Enforcement Officer to issue to the Tonnesons, a stop work order or order to remedy as mandated by Town Code § 210-50(E).

**A. THE TONNESONS WERE REQUIRED TO OBTAIN AN EROSION CONTROL PERMIT FROM THE PLANNING BOARD**

The provisions of Chapter 101 (Erosion Control) are clear. Eleven activities are listed as requiring an erosion control permit from the Planning Board (regardless of whether or not any site plan, subdivision, special permit or other Planning Board vehicle are required or pending). The Tonnesons’ project triggers at least seven criteria, any one of which is sufficient to require Planning Board review and issuance of an erosion control permit. *See* Town Code §§ 101-7(3), (4), (5), (6), (7), (8) and (11).

In the January 24, 2020 Finkbeiner affidavits, and the October 12, 2019 Childs affidavit, annexed to the accompanying affidavit of Ms. Kopald as Exhibits “C,” “E,” and “F” respectively, and the exhibits attached thereto, it is established that the Tonnesons’ project met or exceeded each of the following seven criteria of Town Code §§ 101-7, triggering and mandating Planning Board review and the requirement for an erosion control permit:

- Town Code § 101-7(3): Site preparation on slopes which exceed 1 ½ feet of vertical rise to 10 feet of horizontal distance. *See, e.g.,* Finkbeiner Affidavit ¶ 23<sup>19</sup> (demonstrating more than 75% of site preparation was done on areas in 11-1-1.52 that had a slope greater than 15%).
- Town Code § 101-7(4): Site preparation within the one-hundred-year floodplain of any watercourse. *See* Childs Affidavit ¶¶ 5 and 6.<sup>20</sup>
- Town Code § 101-7(5): Excavation which affects more than 200 cubic yards of material within any parcel or any contiguous area. *See, e.g.,* Finkbeiner Affidavit ¶ 49<sup>21</sup> (demonstrating that 2,910 cubic yards were excavated on 11-1-1.52 when the maximum allowable without a permit was 200 cubic yards within a parcel).
- Town Code § 101-7(6): Stripping which affects more than 20,000 square feet of ground surface within any parcel or any contiguous area. *See, e.g.,* Finkbeiner Affidavit ¶ 36<sup>22</sup> (demonstrates that 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)).
- Town Code § 101-7(7): Grading which affects more than 20,000 square feet of ground surface within any parcel or any contiguous area. *See, e.g.,* Finkbeiner Affidavit ¶ 50<sup>23</sup> (demonstrates that 48,412 square feet or 1.11 acres were graded on 11-1-1.52 when maximum allowable without a permit is 20,000 square feet).
- Town Code § 101-7(8): Filling which exceeds a total of 100 cubic yards of material within any parcel or any contiguous area. *See, e.g.,* Finkbeiner Affidavit ¶ 49<sup>24</sup> (demonstrates that 1,625 cubic yards were filled on 11-1-1.52 when the maximum allowable without a permit was 100 cubic yards).
- Town Code § 101-7(11): The removal or destruction of more than 3 trees, 10 inches DBH or over, during any period of 12 consecutive months or any one tree 30 DBH inches or

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<sup>19</sup> Exhibit “C” to accompanying Kopald affidavit.

<sup>20</sup> Exhibit “F” to accompanying Kopald affidavit.

<sup>21</sup> Exhibit “C” to accompanying Kopald affidavit.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

over. *See, e.g.*, Finkbeiner Affidavit ¶ 44.<sup>25</sup> The purported Town Code § 101-7(B)(7)(a) exception to this requirement proffered by the Tonnesons' attorney is inapposite; this provision only exempts tree cutting done after an "existing" home has been constructed, which clearly does not apply to the tree cutting done by Tonnesons prior to the house being constructed (indeed prior to their application for a permit), and 31 of the trees cut were outside of the otherwise applicable 40-foot perimeter of an existing home.

**B. THE TONNESONS WERE REQUIRED TO OBTAIN APPROVAL FROM THE PLANNING BOARD FOR A STORMWATER POLLUTION PREVENTION PLAN**

Chapter 164 applies to "all land development activities as defined in § 164-6 of this Chapter." (§ 164-4(A)). Section 164-6 defines "land development" as "Construction activity, including but not limited to clearing, grading, excavating, blasting, soil disturbance or placement of fill, that results in disturbance of one or more acres of land . . . ." As with the erosion control permit regulations above, there is no requirement in Chapter 164 that the "land development" necessitating compliance with Chapter 164 be part of a subdivision, site plan, special permit or other approval otherwise subject to Planning Board review. Indeed, although §§ 164-4(D), (E), and (F) specifically obligate applicants for subdivision and site plan reviews to prepare stormwater pollution prevention plans, § 164-4(G) specifically notes that "no land development activity [not otherwise reviewable before an applicable municipal board] shall be commenced unless and until the Town Planning Board has approved a stormwater pollution prevention plan ," providing that the Planning Board is the default approval board for any qualifying land development activity.

Further, of the noted 6 construction activities, each of which trigger Chapter 164 compliance if it "results in disturbance of one or more acres of land," the Tonnesons' activities on their property satisfy 5. *See generally*, Finkbeiner Affidavit annexed to the accompanying affidavit of Ms. Kopald as Exhibit "C." Mr. Finkbeiner also found that 1.2 acres had been disturbed as a result of

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<sup>25</sup> *Id.* *See also* Finkbeiner affidavit dated January 24, 2020 annexed to the accompanying Kopald affidavit as Exhibit "E."

the Tonnesons' construction activities, thus establishing that the Tonnesons were subject to compliance with Chapter 164. *See* Finkbeiner Affidavit ¶ 36, annexed to the accompanying affidavit of Ms. Kopald as Exhibit "C."

Having established that the Tonnesons were subject to the requirements of Chapter 164 generally, Section 164-7 mandates that the Tonnesons prepare and have approved by the Planning Board a stormwater pollution prevention plan. They failed to do so, and thus were not entitled to a building permit or certificate of occupancy.

**C. THE TONNESONS WERE REQUIRED TO OBTAIN A TOWN LAW § 280-A VARIANCE**

New York State Town Law § 280-a(1) provides:

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.

The purpose of this provision is to ensure that there be suitably improved access to an officially mapped or Town road. As demonstrated by the December 18, 2019 Finkbeiner affidavit, ¶¶ 2-7, and the January 29, 2020 Finkbeiner affidavit, annexed to the accompanying affidavit of Ms. Kopald as Exhibits "D" and "G" respectively, and their accompanying exhibits, the Tonnesons' property access does not satisfy the criteria in Town Law § 280-a(1). Such failing mandated that he was not entitled to a "permit for the erection of any building" without receiving a variance by this Board. *Id.*

Similarly, Highlands Town Code § 210-50(F) provides: “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.”

Consequently, Tonnesons, not having obtained any § 280-a relief, has failed to satisfy yet another condition precedent to the issuance of the building permits he wrongfully possesses. This Board, acting on this appeal should decide to reverse the determination of the Code Enforcement Officer’s issuance of the building permits to the Tonnesons and declare them to be null and void unless and until Tonnesons obtain a Town Law § 280-a variance.

#### CONCLUSION

For each and all of the above reasons, this Board should reverse the prior determinations of the Building Inspector/Code Enforcement Officer as to the permitting of the construction activities on the property of David, Deborah & Jaidin Tonneson and rescind the building permits (and, if issued, a certificate of occupancy) issued to the Tonnesons, as they were issued in error by the Code Enforcement Officer Bruce Terwilliger. The bases for the error, among others, is that the Tonnesons failed to obtain an erosion control permit and an approved stormwater pollution prevention plan from the Planning Board and failed to secure a Town Law § 280-a variance from this Board.

Ms. Kopald has clearly established that this Board has jurisdiction over this matter and that she is an aggrieved person with the proper legal standing to challenge the issuance of the permits and certificate.

Thank you for your careful consideration of this appeal.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'R. B. Golden', written in a cursive style.

RICHARD B. GOLDEN

cc: Alyse Terhune, Esq. (via email)