TOWN OF HIGHLANDS
CONSOLIDATED ZONING BOARD OF APPEALS
COUNTY OF ORANGE, STATE OF NEW YORK

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In the Matter of the Application of
Deborah Kopald

INTERPRETATION OF RELEVANT TOWN OF HIGHLANDS CODE TO PROPERTY IDENTIFIED ON THE TOWN OF HIGHLANDS TAX MAP AS Section 11, Block 1, Lot 1.52

for an interpretation of the Town of Highlands Code as applied to a building permit issued to property identified on the Town Tax Map as SBL 11-1-1.52.

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APPLICATION FOR AN INTERPRETATION OF WHETHER THE BUILDING PERMITS AND CERTIFICATE OF OCCUPANCY ISSUED TO PROPERTY IDENTIFIED ON THE TOWN OF HIGHLANDS TAX MAP AS SECTION 11, BLOCK 1, LOT 1.52 WERE ISSUED IN ERROR

The appeal. By application to the Town of Highlands Consolidated Zoning Board of Appeals (the "Board") dated November 4, 2019, Deborah Kopald ("Kopald") appealed the issuance of a building permit to install a foundation, dated September 5, 2019, amended on September 30, 2019 to construct a single family home on property identified on the Town Tax Map as SBL 11-1-1.52 (the "Property"), owned by David Tonneson, Deborah Tonneson and Jaidin Paisley-Tonneson (together, "Tonneson"). Included in her submission is a preemptive appeal of the Certificate of Occupancy ("CO") if and when it is issued.[1] Kopald alleges that the Building Inspector failed to apply specific sections of the Town of Highlands Town Code (the "Town Code") to the Tonneson application and seeks an interpretation from this Board to that effect. She asserts the following errors: 1) failure to obtain Planning Board site plan approval pursuant to the Zoning Code; (2) failure to obtain an erosion control permit required by Town Code Chapter 101,

[1] *See,* Kopald Appeal, November 4, 2019 ("Kopald Appeal); Kopald Amended Appeal, June 8, 2020, pages 3 (FN 5 and 6), 11, 14, 15, 18 and 19 (Kopald Supplemental Appeal); Kopald supplemental submission in support of her appeal, dated June 29, 2020, pages 13, 16, 18 and 20; email exchange Golden-Terhune, dated August 3, 2020.

Erosion Control before installing the foundation;[2] 2) failure to adhere to the "greater restrictions" provision contained in § 210-48 of the Town Zoning Law; and 3) failure to obtain subdivision approval. Appellant submitted voluminous materials to the Board in support of these allegations. The materials submitted to the Zoning Board appear to be substantially the same as filed with the Orange County Supreme Court in support of an Article 78 proceeding against the Town of Highlands and the owners of the property at issue here.

The Amended Appeal. After engaging counsel, Richard B. Golden, Kopald filed an amended appeal on June 8, 2020. She seeks rescission of the building permits and, when issued, the CO. Specifically, Kopald's amended appeal alleges that the permits (and CO) were unlawfully issued in the absence of Planning Board approval of (1) an erosion control pursuant to Chapter 101, (2) stormwater pollution prevention plan ("SWPPP") pursuant to Chapter 164, (3) installing a septic tank in violation of Chapter 146, (4) constructing a driveway on a slope that exceeds State Fire Code, and (5) failure to obtain a 280-a variance. She specifically withdrew her claim that Tonneson needed site plan approval from the Planning Board.[3] Her amended appeal is also silent as to her previous claim of the requirement to obtain subdivision approval. Section 210-48, "Conflicts of Legislation," is also mentioned briefly.

Background. The Tonneson property at issue is 13.926 acres of forested land, a portion of which abuts Kopald's property. On May 23, 2019, Tonneson purchased the subject parcel from Susan Kopald (Deborah Kopald's mother) and Ned Kopald (her uncle).[4] On or about July 12, 2019, the Building Inspector for the Town of Highlands, Bruce Terwilliger, issued a building permit to Tonneson to drill a well for a future single family home. On or about September 5, 2019, the Building Inspector issued Tonneson a building permit to install a foundation system according to drawing by Talcott Engineering. The September 5, 2019 building permit was amended on September 30, 2019, to construct a single family home.

Prior to filing her appeal to this Board, Kopald commenced an Article 78 Special Proceeding in County Supreme Court challenging the issuance of the building permits (and,

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[2] The construction of a single family home is exempt from planning board review pursuant to Town Zoning Law 210-21. Apparently, Appellant alleges that amending the foundation permit to include the house was improper and merely an attempt to circumvent applicable law.
[3] Kopald Supplemental Appeal, pg. 12, par.2.
[4] Honan Letter, January 15, 2020, Exhibit A, Deed.

presumptively, the CO), naming the Town of Highlands and Tonneson alleging for the most part the same allegations as presented here. On February 3, 2020, the Hon. Judge Onofry, S.C.J. dismissed the case without prejudice for failure to exhaust administrative remedies.

Kopald's allegations of harm. Kopald asserts that the Building Inspector's decision to issue building permits (and a CO when issued) to build a single-family modular home on her neighbor's property has injured her in the following ways:

1. The Town failed to provide her "proper notice and the ability to weigh in to defend [her] interests and ensure the development of the property in a manner that would mitigate the impacts to [her], as the Town procedures provide," which resulted in a home being placed "particularly close" to her property, thus contravening the purpose of the Town's zoning law "which seeks to promote orderly growth, protect the established character and the social and economic well-being of private property such as my property, and to prevent overcrowding of land or buildings (when other options were available on a 13.926 acre parcel."[5]

2. The Tonneson house is "visibly intrusive from the vantage point of [her] property" because of a "huge gash in the tree line from the end of my yard." She claims that an "excessive number of trees [were] removed during a consecutive 12-month period [which] greatly exceeded more than three erect perennial trees with a definitely formed crown of foliage, diameter at breast height ("DBH") of at least 10 inches, and a total height of well over 13 feet from the ground."[6]

3. The Tonneson house "has marred the visual and physical integrity of the surrounding forest, including that portion of the forest on [her] property, as well as [her] privacy. Kopald states that the Tonneson house "is very visible from [the] deck off [her] bedroom" which would not have been visible from her house if Tonneson had received Planning Board review. In support, Kopald submits a photograph, allegedly taken from the aforementioned deck.[7]

4. Her property has lost value because the Tonneson house "created discontinuity in the landscape and disrupted the integrity of the neighborhood generally, and [her] property in particular," as a result, again, of the "huge gash in the mountain" for a "house irregularly placed" on the Tonneson's property. Kopald states that all of the houses in the neighborhood, including

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[5] Kopald Affidavit, dated June 8, 2020, par. 3, referencing Town Code §§ 210-2(A), (B), and (E). This figure is incorrect. According to Orange County Parcel information, SBL 11-1-1.52 is 15.2 acres, 662,112 square feet in size.
[6] Kopald Affidavit, par.3.
[7] Kopald Supplemental Affidavit, dated June 17, 2020, par. 1.

her house, which "comprises the upper part of the mountain," were "ensconced in trees" which ensconcement was damaged by the "huge gash" in the forest.[8]

5. The destruction of trees has "caused more light to shine on [her] property," causing an "increase in heat" and more expensive cooling bills in the summer.[9]

6. The "gash in the forest" will increase the noise from the Tonneson house and "drown out the prevalent natural animal sounds [she] otherwise heard on the property before the Tonnesons development of their property." She also claims she can now hear trains, rush hour traffic on Route 9W, and Tonneson's "loud leaf blowing equipment."[10]

7. Fewer animals traverse the area "since the forest has been decimated" and, as a result, she hasn't seen any animals during the spring season. "[The animals] are completely gone," which she attributes to the "excess destruction of the nearby forest." Finally, there are "many more mosquitoes on [her] property right now than before."[11]

8. Kopald alleges "sensitivity to electromagnetic radiation," which "drop[s] with the square of distance." Kopald states that the Tonneson house is 282 feet from her house,[12] but because of the tree-cutting "wireless transmission signal[s] that did not exist in [her] home previously now literally and negatively affects [her] in [her] home" as "confirmed independently with an Acoustimeter radiation measurement devise." Therefore, she has been "forced to install expensive radiation blocking shielding on [her] windows," which has not eliminated the problem. "More expensive remediation is necessary to fix some of the rooms, including stapling materials to the exterior of [her] house."[13]

Standing, legal standard. The first issue this Board must decide is whether Kopald has a right to appeal the Building Inspector's decision. This concept is known as the "standing doctrine" and it is the price of admission to a court of law, and, likewise, to a zoning board of appeals, which is a quasi-judicial agency of local government.

The legal standard to demonstrate standing is well established. Access to this Board, like a court, is predicated on a person showing that he or she has been injured by a decision of the

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[8] Kopald Affidavit, par. 3.
[9] Id., par. 4.
[10] Id., par. 5.
[11] Id., par. 6.
[12] Id., par. 1.
[13] Kopald Affidavit, par. 7.

building inspector or zoning enforcement officer. The alleged injury cannot be a general harm as may be inflicted on the community at large, but one that affects the individual asserting the claim.[14] In addition, the individual must show that the injury could have been avoided altogether or at least mitigated had the law been properly enforced. Put another way, protection from the alleged harm was within the "zone of interest" of the statute or statutes purportedly violated.[15] Although each prong of judicial standing must be satisfied, in the administrative context, as here, "zone of interest" is the primary inquiry.[16]

Although Kopald's status as an adjoining neighbor infers individualized injury,[17] proximity alone is not enough to establish standing.[18] Nor are perfunctory, speculative, unsubstantiated and self-serving allegations sufficient to open the door to this Board.[19] Kopald must demonstrate individualized injury that is different in kind or degree from the public at large and within the zone of interest sought to be protected by the statutes allegedly violated. Proof of standing is her burden, and if she cannot meet that burden then her appeal fails at the outset.[20]

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[14] "Aggrievement warranting judicial review requires a threshold showing that a person has been adversely affected by the activities of defendants (or respondents), or -- put another way -- that it has sustained special damage, different in kind and degree from the community generally." *Sun-Brite Car Wash, Inc. v Bd. of Zoning & Appeals*, 69 NY2d 406, 413 [1987].

[15] "[S]tanding to challenge an administrative action turns on a showing that the action will have a harmful effect on the challenger and that the interest to be asserted is within the zone of interest to be protected by the statute." *Gernatt Asphalt Prods. v Town of Sardinia*, 87 NY2d 668, 687 [1996].

[16] "Indeed, the 'zone of interest' test has developed into the primary test for standing in the administrative context, focusing on whether the interest sought to be protected is within the concerns the Legislature sought to advance or protect by a statutory enactment *(see, Society of Plastics Indus. v County of Suffolk,* 77 NY2d 761, 773-774)." *E. Thirteenth St. Community Assn. v NY State Urban Dev. Corp.*, 84 NY2d 287, 295-296 [1994].

[17] "A nearby property owner may have standing to challenge a proposed zoning change because aggrievement may be inferred from proximity." *Gernatt Asphalt Prods. v Town of Sardinia,* 87 NY2d 668, 687 [1996].

[18] "The status of neighbor does not, however, automatically provide the entitlement, or admission ticket, to judicial review in every instance." *Sun-Brite Car Wash, Inc. v Bd. of Zoning & Appeals*, 69 NY2d 406, 414 [1987].

[19] "[S]peculative and unsubstantiated claims of potential harm alleged in the petition failed to make the requisite showing that the petitioners would suffer any direct injury-in-fact different in kind or degree from that experienced by the public at large, and therefore failed to satisfy the petitioners' burden of establishing that they had standing to commence this proceeding/action." *Matter of Vasser v City of New Rochelle*, 180 AD3d 691, 692 [2d Dept 2020].

[20] *See, Matter of Mental Hygiene Legal Serv. v Daniels*, 33 NY3d 44, 50-51 [2019] (a party challenging governmental action must meet the threshold burden of establishing standing); *see also, Matter of CPD NY Energy Corp. v Town of Poughkeepsie Planning Bd.*, 139 AD3d 942, 943 [2d Dept 2016], quoting *Matter*

Here, Kopald argues that her alleged injuries are specific to her and that they result from the Tonneson's failure to obtain an erosion control permit,[21] necessary to clear the land; a stormwater water pollution prevention plan ("SWPPP") approval because Tonneson cleared more than one acre of land,[22] that the septic tank was installed prior to the issuance of a permit,[23] that the Tonneson's driveway violates the State Fire Code because of the slope,[24] and failure to obtain a Town Law § 280-a variance from the Zoning Board of Appeals because the Tonneson's property lacks access to a Town road.

This Board must decide whether Kopald has provided any evidence to support her professed injuries and, if so, whether they are within the zone of interest of the laws she claims were violated. If both cannot be credibly demonstrated then she does not have standing to seek relief from the Consolidated Zoning Board of Appeals.

Therefore, the first task is to review, in detail, the evidence that supports or refutes Kopald's alleged injuries.

TOWN OF HIGHLANDS CONSOLIDATED ZONING BOARD OF APPEALS FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foundation for most of Kopald's asserted injuries flow from her argument that Tonneson was required to obtain erosion control and SWPPP approval from the Planning Board before the building permits were issued. Had he done so, she claims, the Planning Board would have heard her objections and required him to site the house further from hers, he would not have cleared so many trees, and her injuries would have been lessened or eliminated.

Erosion control. The Town of Highlands does not require an erosion control permit to excavate basements and footings for single-family homes or excavations for septic tank systems, wells or swimming pools attendant to a single-family home. Town Code § 107-7(B)[3]. Therefore, because a foundation is an integral component of a house (as Kopald admits), as is

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of Association for a Better Long Is., Inc. v New York State Dept. of Envtl. Conservation, 23 NY3d at 6 ("[p]etitioner has the burden of establishing both an injury-in-fact and that the asserted injury is within the zone of interests sought to be protected by the statute alleged to have been violated).

[21] Alleged violation of Town Code Chapter 101.

[22] Alleged violation of Town Code Chapter 164.

[23] Finkbeiner Affidavit, par. 14. Alleged violation of Town Code Chapter 146.

[24] Kopald Supplemental Appeal, pg. 4, par. 1.

excavation for a septic tank, Kopald's claim that Tonneson required an erosion control permit is wrong as a matter of law. In addition, it seems apparent that the Town Board had these exclusions in mind when they prohibited only the unnecessary destruction of trees. Town Code § 107-7(A)[2].

Unlawful felling of trees. Because this conclusion is unassailable, Kopald rests her claim on the assertion that an erosion control permit was required because Tonneson cleared more than three (3) trees greater than 10 inches DBH as measured 4.5 feet from the ground, which requires an erosion control permit pursuant to § 107-7(A)[11]. She complains of "unlawful" and "excessive" tree removal resulting in a "huge gash in the tree line from the end of my yard," which, according to her, resulted in Tonneson's house and yard being "visibly intrusive" to her.[25] She implies that an erosion control permit procedure would have shielded her from the site of her neighbor's house and yard.[26]

In support, Kopald offers the affidavit and accompanying exhibits of Michael W. Finkbeiner, a professional land surveyor, who was hired by Kopald to surveil the Tonneson property via drone on September 28, 2019, September 30, 2019, October 14, 2019 and January 6, 2020. Finkbeiner states that photogrammertry shadow analysis of the 2016 New York State aerial photographic survey compared to his September 2019 drone surveillance demonstrates that Tonneson removed 42 trees over 10 inches DBH.[27] However, for the reasons established below, the Board finds and determines that the evidence submitted by Kopald does not support her claim.

First, the Board finds Finkbeiner's "shadow analysis" unconvincing. Trees could have fallen for any number of reasons between 2016 and 2019, including high winds, disease, Gypsy Moth infestation, decay, infestation in mature trees and so forth, as noted by a local tree service.[28] Nor is there any proof that the trees shown in 2016 were healthy and alive and not dead or dying in 2019. Finally, evidence submitted during the public hearing includes a photograph of Mr. Tonneson on the site during the winter before construction showing that the site was relatively devoid of trees, that several trees had fallen, some appeared to be dead or dying and one large tree

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[25] Kopald Affidavit, par. 3.
[26] Section 101-7(A)(11) requires an erosion control permit if more than three trees of 10 inches DBH or over are removed during any period of 12 consecutive months.
[27] Kopald Affidavit, Exhibit C, Finkbeiner Affidavit, par. 44.
[28] Statement, Mel Jennings Tree Service, dated March 12, 2020.

with its bark pulling away. Another photograph shows a hollowed-out tree stump.[29] In order to violate Chapter 101, culled trees must not only be of a certain size, but also healthy.

Moreover, Chairman Jannarone, an astronautical engineer, studied the Finkbeiner Affidavit in detail and based on scientific analysis concluded that it did not prove what it was offered to prove. His conclusions are set forth in the analysis attached hereto and read into the Minutes of the August 19, 2020 meeting. Jannarone Analysis, **Exhibit A**. Therefore, the Board finds and determines that even if single-family home construction was not exempt under the regulations, which it is, Tonneson's construction did not trigger the erosion control permit requirement.

This Board is also concerned about some of Kopald's photographs claiming to show the stumps of trees felled by Tonneson. In order to violate § 101-7(A)(11), the culled trees must be healthy and must measure 10 inches DBH at a height of 4.5 feet from the ground.[30] The tree stumps in Kopald's photographs are not 4.5 feet tall, therefore, it is not possible, with certainty, to know whether an erosion control permit was needed. More disturbing is that one or more of Kopald's photographs may not show the Tonneson property.[31] When compared to photographs of the nearby McCarthy property construction site,[32] discussed in detail, *infra*, it appears that at least one of the Kopald photographs was not taken on the Tonneson property at all. Instead it was likely taken in an area where trees were culled in contemplation of an Orange & Rockland utility line to service the McCarthy property.

Finally, even if single-family homes were not exempt from the erosion control regulations, which they are, the Board finds the testimony of Jonathan N. Millen, Tonneson's surveyor, credible and convincing. Millen stated that his "comprehensive topographic survey" resulted in a total "disturbed, or graded, area of 17,250 square feet,"[33] below the 20,000 square feet implicated in the erosion control regulations.

Light and heat, noise, visual annoyance, decreased property value, and insect loss. Kopald also claims that because of the "huge gash in the forest" "right up to the end of [her] yard," more

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[29] Public hearing documents, Tonneson submission http://highlands-ny.gov/Portals/0/PublicHearings/Kopald%20-%201/Trees%20(ordinance%20of%20TOH).pdf
[30] Town Code §101-6.
[31] Kopald Addendum to November 4, 2019 Appeal, Addendum to Brief, December 18, 2019, Exhibit 18.
[32] Jannerone, Attachments to Exhibit D, Orange County Parcel Image-Mate website.
[33] Millen Affidavit, pars. 3-4.

light shines on her house, which increases her cooling bill. She adds that she can not only hear construction and the Tonnesons "loud leaf-blowing" noise, she can, apparently for the first time, hear rail trains and rush hour traffic on Route 9W. Kopald offers absolutely no substantiation whatsoever for any of these claims. In fact, simple examination of the drone images submitted by her experts and her own photographs disprove this claim.[34] Not only is there no "huge gash" right up to her yard, scientific analysis proves that no additional light will shine on her property. Chairman Jannarone, an astronautical engineer who worked with NASA on the space shuttle, thoroughly debunks that claim. Jannarone Analysis, **Exhibit B**.

As for construction and leaf-blowing noise, one can expect temporary noise from construction. And, since the Tonneson house was not completed or occupied when Kopald filed her appeal, it is not unreasonable to assume that any leaf-blowing noise came from a different neighbor. Kopald is so intent on Tonneson that she neglects to mention that her other neighbor at 80 Forest Hill Road (SBL 20-2-7.1), McCarthy, was constructing a stick house at approximately the same time as Tonneson.[35] Therefore, perhaps some of the injuries alleged by Kopald could be attributed to McCarthy clearing a similar size area and constructing a house. In fact, it is likely that the construction of McCarthy's stick house (built on-site) would have been noisier than the placement of Tonneson's modular home (built off-site and assembled on-site) on his land.

Her other noise allegations are equally implausible. Since her house is located 1000 feet from Route 9W and 3000 feet from the railroad, it is unlikely that the addition of one house on 14

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[34] Members of the Board stated that they could not see the Tonneson house from Forest Hill Road address of the Kopald house, except for perhaps, maybe, a glint of light from a window. It is also noteworthy that the photograph taken by Kopald on April 11, 2020, submitted as Exhibit 1 to her June 17, 2020 Affidavit, does not appear to prove the truth of what it is being offered for. She claims that the photograph was taken from the deck off her bedroom and is offered as evidence of the alleged visual intrusion. First, it does not appear that the photograph is taken from a distance of 282 feet, which is, by Kopald's own testimony, the distance between her house and the Tonneson house (unless her deck extends a couple of hundred feet off her bedroom). It appears to have been taken at a much closer distance or with a zoom lens. Second, the Kopald house is at a higher elevation than the Tonneson house. This picture is taken straight-on. Finally, and most importantly, there are clearly trees and forest between the location of the camera and the Tonneson house.

[35] A simple Orange County Parcel search revealed aerial photographs of the McCarthy and Tonneson properties in conjunction with Kopald and establishes that the land was cleared and the houses constructed at about the same time.

acres has increased that noise, especially given that many neighborhoods are located between the Kopald property, Route 9W and the railroad.[36]

Moreover, the Board finds that Kopald's claim that the animals and the fireflies are "completely gone" and "many more mosquitos" are on her property because Tonneson "decimated" the forest is simply preposterous. While animals may temporarily avoid a construction site, there is simply no basis to assume they will flee a 13.926-acre densely forested parcel of land because one house is built on it. Photographs submitted by Tonneson establish that animals remain on the property and Kopald's own photographs show that the land remains densely forested. Kopald simply ignores the obvious fact that a portion of the forest must have been cleared to build her own house and the houses of her other neighbors, and yet the animals she now enjoys so much did not abandon the area.

Kopald also claims that the Tonneson house has devalued her property. There is simply no proof of any kind for this claim, and she offers nothing but her unsupported opinion. The Board finds this allegation unreasonable, far-fetched, and self-serving.

Incredibly, another Kopald claim is that the Tonneson house contravenes the zoning law because it was built too close to her house,[37] overcrowds the land, and, in her opinion, could have been placed elsewhere on the 13.926-acre parcel. This allegation is not grounded in fact or law. The Tonneson parcel is located in the Residential-1 and Residential-5 zoning districts (the property is bifurcated), which each permit single-family homes as-of-right. The lot and the house conform to all bulk requirements and cannot, in any measure, be said to contravene the zoning law. It is located 282 feet away from the Kopald house. And, contrary to her claims, Kopald's photographs show that there is undisturbed forest between her house and the Tonneson house. Kopald may not like the placement of the house, but her preference for an unrestricted view of a wholly undisturbed forest that was once in her family is not evidence of poor planning.

The unavoidable conclusion is that Kopald wants this Board to reverse the issuance of building permits and a CO because she finds the sight of Tonneson's house "annoying and intrusive visually" and claims that it threatens her privacy, although she does not indicate how. If

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[36] Jannerone, Attachments to Exhibit D, Google Maps.

[37] Kopald's claims appear to be based on the fact that she can see the Tonnesons' house from her bedroom deck, a distance of 285 feet. She fails to note that at 228 feet, her neighbor at 93 Forest Hill Road is closer to her house than Tonneson.

everyone is allowed to challenge a neighbor's right to build a house that conforms to zoning just because they don't want to see it or they don't like the neighbor or for any other wholly subjective reason, zoning boards of appeal and courts would be overrun. The cost of defending your right to lawfully use your land would become prohibitive if just one neighbor with the financial means to challenge you wants to do so merely to protect their view or, more disturbingly, for spite.

Finally, contrary to Kopald's suggestion, wholly without proof, that the Planning Board would have required the Tonneson house to be placed farther away from her house is nothing more than wishful thinking, especially since the house conforms to all required setbacks and is located on a relatively flat section of the lot. Nor would she have been assured of input to the process, as she insists. The decision to hold a public hearing for an erosion control permit is entirely within the discretion of the Planning Board. There is no public notice requirement. Town Code § 101-8E. Moreover, in general, single-family home construction does not trigger such a hearing. *See,* Chapter 101, Erosion Control.

The purpose of the zoning law is orderly development, not to shield you from the sight or sound of your neighbor. And, the concept of property rights is integral to the law and protected under the United States Constitution and the Constitution of New York State. Those rights should not be abused by disgruntled neighbors or anyone else.

Electromagnetic radiation. Similarly, the Board does not attribute the alleged increase in electromagnetic radiation levels in the Kopald house to Tonneson, a bald claim substantiated by nothing. As a threshold matter, at the time of this appeal, the house was unoccupied. Therefore, it is difficult to draw even an inference that any increase in electromagnetic radiation levels anywhere could have been caused by Tonneson. In fact, if there was an increase, it would more reasonably be connected to one or more of Kopald's closer neighbors or other factors. For example, her neighbor's house at 93 Forest Hill Road is 57 feet closer to her house than the Tonnesons' house – 225 feet versus 282 feet.[38] Moreover, unlike the Tonneson property, there is a road between 93 Forest and Kopald, not 182 feet of undisturbed forest. Certainly an open road would better facilitate the transmission of electromagnetic radiation than space attenuated by trees. Finally, the Board finds Kopald's electromagnetic claims especially disingenuous given that she

[38] Jannarone, Attachments to Exhibit D., Google Maps.

authorized prolonged drone surveillance of the Tonneson house and property.[39] Drones are controlled by electromagnetic radio frequency signals.

Finally, the ZBA Chairman addressed in detail Kopald's claim of increased electromagnetic radiation levels. He analyzes her claim and the supporting Affidavits of Matthew Waletzke and Ms. Barras, and discredits each. First, he correctly states that while Kopald alleges sensitivity to electromagnetic radiation, she offers no proof of such a condition or, frankly, medical evidence that such a condition exists. However, taking her at her word, the Chairman nevertheless exposes the flaws with the Waletzke Affidavit and refutes Kopald's claim that the Tonneson house is the cause of the alleged increase in electromagnetic radiation. Jannarone Analysis, **Exhibit C**. The Chairman rightly concludes, and the Board agrees, that Kopald has not demonstrated that she is an aggrieved neighbor because of electromagnetic radiation.

Zone of interest. Kopald attributes all of the aforementioned injuries to failure to obtain and erosion control permit. But, even if an erosion control permit had been required, the failure to obtain one would not have implicated the type of injury necessary to support standing. Kopald does not allege the type of damage to people and property meant to be addressed by the local law, which is: 1) increased runoff, erosion and sediment, 2) increased threat to life and property from flooding or storm waters; 3) increased slope instability and hazards from landslides and slumping; and modifications of the groundwater regime that adversely affect wells and surface water levels.[40] Town Code § 107-1B. Kopald fails to claim such injury because, by her own admission, her property is upslope from Tonneson. Since stormwater runoff, flood water and landslides do not surge uphill, it is impossible that she would have suffered the type of injury regulated by the erosion control provisions.

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[39] Finkbeiner Affidavit, dated January 24, 2020, par. 10, attesting to having been hired by Kopald to analyze drone photography taken on September 28, 2019, September 30, 2019, October 14, 2019 and January 6, 2020.

[40] The Town's erosion control chapter seeks to protect: 1) the quality of the natural environment, 2) to protect people and properties, 3) the Town from liability for and other governmental bodies from having to undertake, at public expense, programs of repairing roads and other public facilities, of providing flood protection facilities and of compensating private property owners for the destruction of properties arising from the adverse effects of site preparation and construction, and 4) ensure that site preparation and construction are consistent with the Comprehensive Plan of the Town of Highlands. Town Code § 101-1A.

Therefore, by vote duly recorded during the August 19, 2020 meeting, the Board finds and determines that Kopald has not factually substantiated her claim that Tonneson was required to obtain an erosion control permit. The Board also finds and determines that Tonneson was not required to obtain an erosion control permit as a matter of law.

Standing as a matter of law. Each and every alleged injury was thoroughly discussed and rejected by the Board as reflected herein and as discussed in the minutes. An outline of Kopald's allegations was prepared by the Chairman for use during the discussion along with the relevant questions requiring a vote, a copy of which is attached hereto as **Exhibit D**. The Board finds and determines that Kopald's alleged injuries are nothing more than "speculative and unsubstantiated claims of potential harm"[41] that have more to do with hyperbole than fact. Kopald has not met her burden to establish standing as it relates to the erosion control permit. Nevertheless, the Board decided to reach the merits of her additional claims notwithstanding her lack of standing.

Stormwater. A stormwater pollution prevention plan (SWPPP) is required only where subdivision or site plan approval is required and where greater than one acre of land is to be disturbed. Town Code §§ 164-4A, C-F; 164-5C. Since no subdivision of the lot was proposed and, as Kopald concedes, no site plan approval was required under the zoning law, only the question of area of disturbance remains.[42]

Kopald claims that Tonneson cleared more than an acre of land for his house. She again offers the affidavit and accompanying exhibits of Michael W. Finkbeiner, who surveilled the Tonneson property via drone four times between September 2019 and January 2020. By comparing the drone surveillance (aerial mapping and photography) to a 2017 New York State topographic map of Orange County and 2016 New York State aerial survey, he concludes, among other things, that Tonneson cleared 52,228 square feet (1.20 acres) of area.[43]

In contrast, the Affidavit of Jonathan N. Millen, Tonneson's licensed surveyor, dated June 12, 2020, and his stamped field survey dated, May 28, 2020, attest to 17,250 square feet of graded perimeter disturbed during construction of the foundation, septic leach field, and fire apparatus

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[41] *Matter of Vasser v City of New Rochelle*, 180 AD3d 691, 692 [2d Dept 2020].
[42] A SWPPP is required by the NYS Department of Environmental Conservation as a precursor to the issuance of a State Pollutant Discharge Elimination System (SPDES) General Permit for Stormwater Discharges from Construction Activity.
[43] Kopald Affidavit, Exhibit C, Finkbeiner Affidavit, par. 36.

turn around. He measured another 19,250 square feet for the 50-foot Right-of-Way. Millen concludes that a total of 36,500 square feet were disturbed, or .838 acres.[44] Disturbance of less than one acre would not trigger the need for a SWPPP.

The Zoning Board of Appeals may decide which expert to believe based upon its discretion and commonsense judgement.[45] Millen conducted an on-the-ground field survey. Finkbeiner did not, instead relying on drone surveillance and deed descriptions. Although there is conflicting expert testimony, the Board considers the field survey provided by Millen more credible than the drone surveillance analysis provided by Finkbeiner. Therefore, by vote duly recorded during its August 19, 2020 meeting, the Board finds and determines that Kopald has not factually substantiated her claim that Tonneson was required to obtain SWPPP approval.

Zone of interest. The primary purpose of Chapter 164 is to protect the health and welfare of the general public by ensuring that the Town complies with the minimum requirements for control of construction site and post-construction runoff of the New York State SPDES General Permit for Stormwater Discharges from Municipal Separate Stormwater Sewer Systems (MS4s), Permit No. GP-02-02. Chapter 164 also protects property owners who might be damaged by stormwater flowing from a development site. So, even if Tonneson had been required to develop a SWPPP, which he was not, Kopald fails to allege the type of injuries protected by the Town's stormwater management regulations; indeed, such allegations would defy logic since, by her own evidence, her property is located at a higher elevation than the Tonneson property and stormwater does not flow uphill.[46] Obviously, then, she cannot and does not claim that her property has suffered increased flooding, stormwater damage, soil erosion, or loss of vegetation.

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[44] Millen submission, June 12, 2020.

[45] "[E]xpert opinion regarding traffic patterns, when presented, may not be disregarded in favor of generalized community opposition (citations omitted). However, where there are other grounds in the record on which to base denial, such as contrary expert opinion regarding traffic conditions, deference must be given to the discretion and commonsense judgments of the board." Retail Prop. Trust v Bd. of Zoning Appeals, 98 NY2d 190, 196 [2002]. See also, Matter of White Castle Sys., Inc. v Bd. of Zoning Appeals of Town of Hempstead, 93 AD3d 731, 732 [2d Dept 2012]("Where there is conflicting expert testimony, deference must be given to the discretion and commonsense judgments of the zoning board.")

[46] Finkbeiner Affidavit, dated January 24, 2020, par. 34. There is "a natural swale in the topography that captures stormwater runoff from the Kopald house and southerly yard area at 88 Forest Hill Rd, crossing by gravity onto the impacting parcel to the south."

Because Kopald does not claim any injuries whatsoever, and cannot claim injuries within or even related to the zone of interest protected by Chapter 164, she has not established standing to raise this issue before this Board.

Fire code. Further, Kopald claims that the Tonneson driveway does not conform to 2015 International Fire Code ("IFC") because the driveway slope "exceeds 20% in some places" and "does not meet [the] specifications for turn-outs or turn-arounds."[47] But, as her expert admits, driveways at a slope greater than 10% can be approved by the fire chief.[48] Also, by letters dated September 6, 2019 and June 11, 2020 (and photographs submitted by Tonneson), the Fort Montgomery Fire District Fire Chief states unequivocally that there will be no problem gaining access to the Tonneson house and property should an emergency situation arise. In fact, he and one of his officers visited the Tonneson property with one of the district's "biggest apparatuses" and confirmed that the angle of approach and the turn-around area was more than sufficient for emergency response.[49]

Here, again, Kopald cites no specific injury other than a general complaint that the IFC was violated. None of her professed injuries relate to a threat of inadequate emergency service to the Tonneson property, which, arguably could impact her if there was a fire.[50] A fire at the Tonnesons, or for that matter, at Kopald's house or any other house in the neighborhood would be a potential threat to the area. By vote duly recorded during its August 19, 2020 meeting, the Board finds and determines that Kopald has not factually substantiated her claim that Tonneson violated the IFC. The Board also finds and determines that not only has Kopald failed to factually substantiate this claim, her complete failure to allege any injury related to this claim defeats standing.

Septic tank. Although this Board cannot fathom why Kopald is upset by the placement of the Tonneson septic tank, because she cites no injury specific to that claim, she argues that Tonneson violated Chapter 146 of Town Code by installing the septic system before the building permit was issued on September 5, 2019. In support, she references the Plot Plan prepared by Talcott Engineering Design, dated August 27, 2019, which appears to locate an "existing" septic

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[47] Finkbeiner Affidavit dated December 18, 2019, par. 8.
[48] Id.
[49] Letter to Town of Highlands building department from Fort Montgomery Fire District, dated June 11, 2020, with attached pictures of the fire truck on the Tonnesons' drive and the turn-around. Tonneson public hearing submission.
[50] *See* Kopald Affidavits, dated June 8, 2020 and June 17, 2020.

tank on the drawing. However, "Note 2" of the Plot Plan's "Septic System General Notes," states "septic tank *to be located* a minimum distance of 10 feet from any building or preoptic line and 50′ from the well" (emphasis added), which indicates future tense. Therefore, there appears to be a conflict in the evidence presented by Kopald in support of her claim.

In considering this claim, even absent any allegations of harm, the Board discussed at length the evidence of bedrock in the area and determined that it would have been reasonable for Tonneson, after he received his well permit, to excavate the area where he intended to place the septic tank in order to insure that he could position it at least 50 feet from his well and determine the best position the house in relation to the septic and the well.

Moreover, there is no requirement in Chapter 146 to obtain a permit prior to installing a septic tank.[51] Instead, the process requires an application to be filed showing the intended location of the septic tank.[52] The application must be reviewed by the Town of Highlands Sanitary Inspector, who is directed to "promptly investigate, before and after installation, any proposed disposal devices indicated in said applications." If approved, a "Certificate of Approval" is issued. Only then can the entire septic system, including the tank and leach field, be used. Town Law § 146-4.

The Board finds that the important factor is whether the entire system was approved by the Sanitary Inspector, not whether the tank was in the ground ten days before the first building permit was issued. Therefore, by vote duly recorded during its August 19, 2020 meeting, the Board finds and determines that Kopald has not factually substantiated her claim that Tonneson required a permit to install a septic tank or that she has proven by compelling evidence that he installed the tank before the first building permit was issued. The Board also finds and determines that not only has Kopald failed to factually substantiate this claim, her complete failure to allege any injury related to it defeats standing.

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[51] Likewise, no permit is required to excavate for a septic tank under the erosion control regulations.
[52] Town Code § 146-2: "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 the Town Clerk's office and approved in the manner hereinafter prescribed, with such structure, shall have been filed in."

Section 280-a variance. Similarly, Kopald asserts that Tonneson needed a Town Law § 280-a variance pursuant to Town Code § 210-50(F) because his property does not front a Town road. First, she claimed that Hemlock is not a Town Road. However, documentary evidence to the contrary was submitted proving that on July 19, 1968, the Town Board accepted the Offer of Dedication for Hemlock Street and Cherry Street upon consent of the New York State Department of Transportation.[53]

When it became apparent that her first argument failed, Kopald next claimed that Hemlock is not a Town Road because there is a 3-foot gap where Hemlock intersects Poplar. This, too, is refuted by documentary evidence and testimony. Although Finkbeiner and Millen agree that Poplar Street is owned in fee by Tonneson, Finkbeiner claims that there is a 3-foot gap at the aforementioned intersect. However, Finkbeiner's own maps fail to show any gap whatsoever. In fact, one of his submissions maps an overlap of Hemlock and Poplar. Millen's field survey does not show any gap. The Board finds Millen's field survey more credible than Finkbeiner's aerial survey and deed analysis.

Furthermore, the Town of Highlands Highway Superintendent from 1997 to 2013, Anthony Squicciarini, testified on the issue at the January 15, 2020 public hearing:

> Hemlock Street was surveyed and laid out in 2005. In 2006, we had every street in Water District #2 surveyed before we installed water lines. The Highway Department has a survey map as prepared by AFR, of Monroe, that clearly shows the meets and boundaries of Hemlock as described in the deed.
>
> Hemlock Street terminates, on paper, at Forest Hill Road. Hemlock Street, on paper, runs from Route 9W to Forest Hill Road'
>
> [Hemlock Street runs] across Tonneson's property [Poplar Street], on paper. When it was laid out originally way back when, that is how it was laid out. When the Town took ownership of it, they took ownership of it to the point where it terminates with Poplar Street.

Mr. Squicciarini again addressed the Board during the June 17, 2020 public hearing:

> 1998, I believe, was the last time that Hemlock Street was surveyed for installation of municipal water. The metes and bounds were thoroughly investigated, and the Town also surveyed Poplar Street

[53] Honan Letter, dated January 15, 2020, Exhibit B.

> because the water line was going to be laid in it. At that time, obviously, because we did not own Poplar Street, we had to get an easement to install the water line. I am quite sure, again at that time, if there was a three-foot gap that had been noticed, that's two surveyors that have looked at it, and haven't come up with that. There was never a question raised about an additional easement needed for a three-foot piece. I am sure at that time we would have done whatever we needed to do to secure that three-foot piece as part of the Town road. Obviously, it would not do any good to leave it.

The survey and the testimony of the prior Highway Superintendent and ample evidence in the Record prove that Hemlock is a Town road. Even if evidence were lacking, which it is not, Hemlock has been used by the public and maintained by the Town for decades making it a road by use.[54]

By vote duly recorded during its August 19, 2020 meeting, the Board finds and determines that Kopald has not factually substantiated her claim that Hemlock is not a Town road. In the same way that her other claims fail to establish standing, so too this allegation must fail. There is simply no correlation between Kopald's claim and a specific injury to her, unless her aim is simply to prevent the lawful use of the Tonneson property.

Finally, Kopald alleges, without any evidence whatsoever, that Tonneson was allowed to short-circuit the law because of the Building Inspector's "favoritism toward Tonneson" and "animus toward Ms. Kopald."[55] No specific instance of either favoritism or animus is cited and the Board finds no reason to give any credit whatsoever to this duplicitous and delusory claim.

Jurisdiction. Even if a court should disagree with the Consolidated Zoning Board of Appeal's conclusion that Kopald does not have standing to challenge the Building Inspector, there remains the threshold issue of whether the Zoning Board has jurisdiction to hear and decide all of the issues on appeal.

Kopald urges the Zoning Board of Appeals to broaden its jurisdictional scope beyond the Town of Highlands Zoning Code. First, she argues that the Board's jurisdiction was expanded by judicial fiat, citing Judge Onofry's decision dismissing her Article 78 for failure to exhaust

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[54] Highway Law § 186.
[55] Amended Application, dated June 8, 2020, pg. 3.

administrative remedies. Kopald translates this as an Order to this Zoning Board to hear and decide "all" of her claims, whether related to the zoning law or not. Kopald cites no case law in support of this leap of legal logic and this Board finds none.

It is hornbook law that a zoning board of appeals is created and enabled by legislative action, which proscribes its jurisdiction to only that which is enabled by state law and local code. There is no question that New York State's enabling statute limits this Board's jurisdiction to zoning law, since a zoning board of appeals must be appointed only if zoning laws are enacted.[56] If a town enacts zoning law and, therefore, establishes a zoning board of appeals, then it may expand the zoning board's jurisdiction, but only by local law.[57]

The courts have long recognized the fundamental principal that zoning boards act a necessary "safety" valve for relief from zoning law.

> The creation of a board of appeals with discretionary powers to meet specific cases of hardship or specific instances of improper classification is not to destroy zoning as a policy, but to save it...Through the wise action of a proper board of appeals, exercising broad powers and possessed of expert knowledge as to the general plan and purpose of the zoning ordinance of a city, the inequalities and injustices resulting from a strict enforcement of a general zoning ordinance will in most instances be avoided; the board in this respect acts with something of the ancient powers of a court of equity in a field where the law by reason of its generality works an injustice.[58]
>
> A writer upon the subject of the constitutionality of zoning says what I think is here pertinent: "In the early days of zoning a board of appeals was considered a device merely for rounding off the sharp corners of the zoning requirements. Such a board is now considered absolutely necessary to the safe operation of a zoning ordinance. It is the safety valve of the zoning plan. A zoning ordinance, like a

[56] Town Law § 267-2, which reads in relevant part: "Each town board which adopts a local law or ordinance and any amendments thereto pursuant to the powers granted by this article [Article 16, Planning and Zoning] shall appoint a board of appeals...". (Emphasis added.)
[57] Except where the local legislative board grants original jurisdiction, such as the authority to issue special permits, or appellate jurisdiction, as the Town of Highlands did when it granted authority to this Board to hear appeals from Chapters 114 and 130.
[58] *People ex rel. St. Basil's Church v Kerner,* 125 Misc 526, 533-534 [Sup Ct, Oneida County 1925].

> steam boiler, will sooner or later blow up if there is no safety valve."[59]

This basic tenant remains a mainstay of New York case law on the subject of zoning board jurisdiction. "Zoning Boards of Appeals were created 'to interpret, to perfect, and to insure the validity of zoning' through the exercise of administrative discretion (2 Salkin, New York Zoning Law and Practice § 27:08, at 27-14--27-15 [4th ed]). Often regarded as a 'safety valve,' Zoning Boards of Appeals are invested with the power to vary zoning regulations in specific cases in order to avoid unnecessary hardship or practical difficulties arising from a literal application of the zoning law." *Tall Trees Constr. Corp. v Zoning Bd. of Appeals*, 97 NY2d 86, 90 [2001].

Further, a close reading of Judge Onofry's decision does not support Kopald's conclusion. His Honor cites to Town Law § 267-a[4], [5][b], limiting this Board's jurisdiction to local laws enacted pursuant to Town Law, Article 16, Zoning and Planning, to be exercised pursuant to procedures established therein; and Town of Highlands Code § 210-43 through § 210-46 contained in the Town of Highlands Zoning Law. In support of his decision that "all of the issues raised" by Kopald should first be addressed to this Board, Judge Onofry cites four cases, all of which relate to failure to seek relief from the zoning law before a zoning board of appeals.[60]

Finally, Judge Onofry dismissed Kopald's Petition *without prejudice*, opening the door to further judicial review, but providing the court with the benefit of the zoning board's expertise and judgment on review. *Fisher v. Levine,* 36 N.Y.2d 146, 150, 325 N.E.2d 151, 154 [1975](administrative board has the right and responsibility to exercise its expertise and judgment when deciding an issue), see also *Watergate II Apts. v Buffalo Sewer Auth.,* 46 NY2d 52, 57

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[59] *Van Auken v Kimmey*, 141 Misc 105, 115-116 [Sup Ct, Onondaga County 1930].

[60] *Watergate II Apts. v Buffalo Sewer Auth.,* 46 NY2d 52, 56-57 [1978]("one who objects to the act of an administrative agency must exhaust available administrative remedies before being permitted to litigate in a court of law... relieving the courts of the burden of deciding questions entrusted to an agency... preventing premature judicial interference...and affording the agency the opportunity, in advance of possible judicial review"). Here, Kopald ran to court rather than providing this Board with the opportunity to decide questions entrusted to it under its statutory authority, thus winnowing down the questions that could be decided by the courts. *Matter of Svatovic v Town of Southold,* 156 AD3d 893, 894 [2d Dept 2017](petition properly dismissed on the ground that the petitioner failed to exhaust his administrative remedies pursuant to Town of Southhold Zoning Law, § 280-146A). *Matter of Carnelian Farms, LLC v Vil. of Muttontown Bldg. Dept.,* 151 AD3d 845, 846-847 [2d Dept 2017)(petitioners failed to exhaust all available administrative remedies under the Village of Muttontown Zoning Code § 190-37 (A)). (*Matter of Aliano v Oliva,* 72 AD3d 944, 944 [2d Dept 2010)(petition properly dismissed because the owner failed to exhaust his administrative remedies by seeking an area variance).

[1978](exhaustion of administrative remedies provides the reviewing court a record reflective of the administrative board's expertise and judgment. Providing the court with the benefit of this Board's Record is likely what the Judge had in mind, given his recitation of Kopald's use of the judicial process.[61]

Second, Kopald supplements her misplaced reliance on Judge Onofry's decision by claiming that all decisions of the Building Inspector related to the "construction or location of buildings and structures" are appealable to the Zoning Board, not just those decisions related to zoning. [62] She claims that § 210-49(E) makes this so. Kopald misrepresents § 210-49(E). It must be read in conjunction with § 210-49(A), which directs the Code Enforcement Officer to "administer and enforce the provisions of this article," i.e., Article VIII of the Zoning Law, and § 210-49(B), which authorizes the Code Enforcement Officer to appeal to the Board of Appeals to if he or she is "in doubt as to the meaning or intent of any provision of this article, or as to the location of any district boundary line on the Zoning Map, or as to the propriety of issuing a building permit or a certificate of occupancy in a particular case related to the provisions of this article (emphasis added)." Kopald ignores the directives contained in A and B, instead focusing only on E, which relates specifically to enforcement of the Uniform Code, which can only be appealed to the Department of State Division of Building Standards and Codes.63 Moreover, Kopald's recital of subsection E is misleading. First, she fails to acknowledge that it is specific to enforcement of the Uniform Code. Second, she selectively omits portions of the text that, if included, would expand her proposition even further – to "the construction, alteration, repair, removal and

[61] Onofry Decision and Order, February 3, 2020, pages 11-13.

[62] "The ZBA has jurisdiction because the building inspector/code enforcement officer not only has the duty to enforce and administer the provisions of the Town 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." Kopald supplemental submission in support of her appeal, dated June 29, 2020, page 4, subheading C.

[63] § 210-49(E): "In addition to his powers and duties to administer and enforce this chapter, the Building Inspector and/or Code Enforcement Officer shall have all of the powers and duties relating to the administration and enforcement of the New York State Uniform Fire Prevention and Building Code pursuant to Article 18 of the Executive Law of the State of New York, as the same may be amended from time to time, together with such rules and regulations as may be promulgated by the New York State Secretary of State pursuant thereto and all the provisions of all other laws, ordinances and regulations applicable to the construction, alteration, repair, removal and demolition of building and structures and the installation and use of materials and equipment therein and the location, use, occupancy and maintenance thereof.

demolition of building and structures and the installation and use of materials and equipment therein and the location, use, occupancy and maintenance thereof."

When read in its entirety, rather than the truncated version presented by Kopald, it is apparent that subsection E relates to the enforcement of the Uniform Building Code and not to "all" laws, or at least those laws convenient to her appeal, as discussed *infra*.[64]

Third, Kopald proclaims that the concept of zoning is so broad that it subsumes all laws and ordinances related to property.[65] Accordingly, because all regulation of property is a *de fact* zoning law, all building inspector decisions must be appealable to the Zoning Board. If this were not the case, Kopald contends, all such code would be "illegal and unenforceable."[66]

In support of this jurisdictional grab, Kopald offers Town Law § 267-a(4).[67] However, the plain meaning of that provision limits a zoning board's appellate jurisdiction to decisions related to ordinances and local laws adopted pursuant to Article 16, Planning and Zoning. Erosion control, on the other hand, was adopted pursuant to Town Law Article 9, which authorizes towns to enact ordinances and codes related to building, plumbing, electric, fire prevention, housing, sidewalks and so forth.[68] Nothing in there about land use or zoning with the exception of slaughtering houses and rendering works.

Next, Kopald narrowly cites to Town Law § 267-b(1) for the same proposition, specifically this Board's authority to "reverse or affirm" any order made by the administrative official charged with the enforcement of "such ordinance or local law." Because no limiting language appears in that particular provision, she claims that the Board's authority extends to any "ordinance or local law" in Town Law or Town of Highlands Code. However, this ignores the limitation to Article 16 found in Town Law § 267-a(4) and the remainder of § 267-b, which defines exactly what zoning

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[64] Kopald supplemental submission in support of her appeal, dated June 29, 2020, pages 4-9.
[65] Id., page 10.
[66] Id., pages 11-12.
[67] Town Law § 267-a(4): Hearing appeals. Unless otherwise provided by local law or ordinance, the jurisdiction of the board of appeals shall be appellate only and shall be limited to hearing and deciding appeals from and reviewing any order, requirement, decision, interpretation, or determination made by the administrative official charged with the enforcement of any ordinance or local law adopted pursuant to this article. Such appeal may be taken by any person aggrieved, or by an officer, department, board or bureau of the town (emphasis added)," i.e., Town Law, Article 16, Planning and Zoning.
[68] Town Law § 130.

board actions are "permitted" under State Law: use variances and area variances, which, by their nature, grant relief from zoning law, i.e., any ordinance or law enacted pursuant to Article 16.

Nor does she find support in Town Code § 210-44, which confers jurisdiction on the Zoning Board "in accordance with their respective zoning code" and "New York State Law." Kopald interprets the reference to New York State Law as a reference to § 267-a(4), which, as this Board has determined, is specific to Article 16, Planning and Zoning, and does not even implicate erosion control, stormwater management or sewer regulation, as Kopald insists. In fact, her submission is confusing in that it repeatedly cites to Article 16 as the basis of zoning board appellate authority, but then ignores it. If the Legislature had intended to confer appellate authority on a local zoning board, it would have done so directly and not through veiled allusions to "all" laws enacted by the State of New York.

Furthermore, Kopald only cites the Chapters she believes apply to her alleged grievances, Chapter 101 (Erosion Control), Chapter 146 (Sewers) and 164 (Stormwater Management), but conveniently fails to include other state and local laws that relate to "construction or location of buildings and structures" and, as noted *supra*, omits portions of § 210-49(E), including, alteration, repair, removal and demolition, installation and use of materials and equipment therein, and use, occupancy and maintenance thereof. She cannot have it both ways.

If, as she contends, the Board can hear appeals from "all" laws related to property and enforced by the Building Inspector, this Board would be subject to hearing appeals from, at a minimum, the following Chapters of Town Code:

> Chapter 82, Building Construction and Fire Prevention (i.e, enforcement of the NYS Uniform Fire Prevention and Building Code, which can only be appealed to the Department of State Division of Building Standards and Codes,)[69]
>
> Chapter 88, Buildings, Unsafe (e.g., structures deemed unsafe by the BI; owner permitted hearing before the Town Board unless deemed an emergency).
>
> Chapter 173, Subdivision of Land (appealable only to County Supreme Court).[70]

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[69] *See also, Portion Props., Inc. v De Luca,* 126 AD2d 650, 652 [2d Dept 1987]("The Zoning Board of Appeals of the Town of Riverhead did not have jurisdiction under the Town Zoning Code to hear and determine an appeal from the respondent's determination on these Building Code issues.")

[70] Kopald Appeal, November 4, 2019, "Addendum to Brief," submitted December 18, 2009, Exhibit 17.

Chapter 114, Flood Damage Prevention (the ZBA is specifically authorized to hear appeals § 114-21).

Chapter 141, Property Maintenance (hearing before the Town Board § 141-7C).

Chapter 130, Mobile Homes (the ZBA is specifically authorized to hear appeals § 130-13).

Chapter 94, Dumpsters, Garage, Clothing Bin Containers and Storage Structures (location of structures determined by the Building Inspector, no appeal procedure).

Chapter 106, Explosives and Blasting (e.g., blasting related to construction of structures; appeals heard by the Town Board § 106-7C).

Finally, Kopald's position, if taken to its logical extreme, effectively renders every permit issued by the Building Inspector in the Town of Highlands (and Village of Highland Falls)[71] appealable to the Zoning Board of Appeals. Her position, if accepted by this Board, would be untenable and, frankly, unsafe. Nor does this Board believe that is what the Town Board or the NYS Legislature intended. The Town Board specifically authorized the Zoning Board to hear appeals from Building Inspector decisions pursuant to Chapter 114, Flood Damage Prevention and Chapter 130, Mobile Homes. They did not do the same for erosion control, stormwater management and sewer.

By vote duly recorded during its August 19, 2020 meeting, the Board finds and determines that its authority to hear the Kopald appeal is limited to an appeal of the Town of Highland Zoning Code as a matter of law.

Town Law § 280-a. The Board also finds, however, that it does have jurisdiction to hear Kopald's § 280-a allegation as such authority is vested in Town Zoning Code. However, for the reasons already enumerated and discussed herein, by vote duly recorded during its August 19, 2020 meeting, the Board finds and determines that Kopald has not factually substantiated her claim that Tonneson required a § 280-a variance and concludes that, even if she had, she has no standing to bring the appeal in the first instance because she fails to allege any injury specific to that issue.

[71] The Town of Village consolidated the Building Department, Planning Board and Zoning Board of Appeals.

Finally, for all the reasons herein stated, the Board finds and determines that the "greater restriction" language contained in § 210-48(A)[2][72] is not intended to broaden the scope of Board of Appeals jurisdiction. The provision is not contained in Article VII, "Board of Appeals," but is contained in Article VIII, "Administration and Enforcement." Article VIII pertains to land use guidance applicable to the Planning Board during its review of site plan and special permit applications,[73] and to the issuance of building permits and CO's.[74] Nothing in Article VIII pertains to the Zoning Board except authorizing the Building Inspector, when in doubt, to seek the Zoning Board's guidance as to the interpretation of the Zoning Code.[75]

PROCEDURAL COMPLIANCE

General Municipal Law § 239-m. An application for an interpretation is not subject to referral to the Orange County Planning Department pursuant to General Municipal Law, § 239-m.

Public Hearing. A duly noticed public hearing was convened on December 18, 2019, January 15, 2020 and June 17, 2020. After hearing from the Applicant and all those wishing to speak on the matter and accepting all written public comments, the Zoning Board of Appeals closed the public hearing on June 17, 2020. Additional written submissions on the issue of jurisdiction were accepted until June 29, 2020, from Richard B. Golden, Kopald's attorney, and from Stephen M. Honan, Tonneson's attorney.

State Environmental Quality Review Act (SEQRA). The Zoning Board of Appeals determines that pursuant to the 6 NYCRR 617.5(c)(37), the Regulations implementing SEQRA, the interpretation of an existing code, rule or regulation is a Type II Action. No further SEQRA action is necessary.

DECISION

NOW, THEREFORE, BE IT RESOLVED, that the Town of Highlands Consolidated Zoning Board of Appeals hereby upholds the decision of the Town of Highlands Building

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[72] "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."

[73] Town Code §§ 210-47, 210-53.1.
[74] Town Code §§ 210-49, 210-50, 210-50.1, 210-52, 210-53.
[75] Town Code § 210-49(B).

Inspector to issue building permits to allow the construction of a modular house on the property identified on the Town Tax Map as Section 11, Block 1, Lot 1.52. This Decision was approved by the following vote:

	Yes	No
Jack Jannarone, Chairman	[√]	[ ]
Ray Devereaux, Deputy Chairman	[√]	[ ]
Daniel Zint, Member	[√]	[ ]
Joseph Murphy, Member	[√]	[ ]
Joe McCormick, Member	[√]	[ ]

Although Kopald preemptively challenged the Certificate of Occupancy, a second appeal separately challenging the CO was submitted to the Board on August 10, 2020. In order to eliminate any basis for a procedural challenge, the Board determined that it would hear and decide the second appeal separately.

Dated: August 19, 2020

TOWN OF HIGHLANDS CONSOLIDATED
ZONING BOARD OF APPEALS

BY: JACK JANNARONE, CHAIRMAN

June Patterson, Town Clerk for the Town of Highlands, does hereby certify that the foregoing Decision of the Town of Highlands Consolidated Zoning Board of Appeals was filed in my office on the following date:

8/25/20

Signature and Date