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Via email: jjannarone@highlands-ny.gov and hand delivered

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

Re: Appeal of Deborah Kopald of Tonnesons' Certificate of Occupancy 11-1-1.52

Dear Chairperson and Board Members:

With regard to the previous appeal of Deborah Kopald, the appeal could not encompass the certificate of occupancy ("CO"), because the CO was not granted until June 15, 2020. NY

Town Law § 267-a(5)(b) states the following:

(b) An appeal shall be taken within sixty days *after the filing of any order, requirement, decision, interpretation or determination of the administrative official*, by filing with such administrative official and with the board of appeals a notice of appeal, specifying the grounds thereof and the relief sought. The administrative official from whom the appeal is taken shall forthwith transmit to the board of appeals all the papers constituting the record upon which the action appealed from was taken. (Emphasis added).

McKinney's commentary on Town Law § 267-a(5)(b) (emphasis added) states as follows:

Town Law § 267-a(5)(a) provides that each decision or order of the building inspector or other official charged with enforcement of the zoning law "shall be filed in the office of such administrative official, within five business days from the day it is rendered...." Town Law § 267-a(5)(b) relates that *an appeal may be taken to the zoning board of appeals within 60 days after the filing of such decision or order.* The decision in *Corrales v. Zoning Bd. of Appeals of Vill. of Dobbs Ferry*, 164 A.D.3d

582, 83 N.Y.S.3d 265 (2d Dept. 2018), confirms that the foregoing procedures must be followed or the time within which to appeal to a zoning board of appeals will not begin to run.

Ms. Kopald had previously taken her appeal of the building permits in 2019 and the last day given by this Board to revise her initial submission was on June 8, 2019. This means that the last appeal could only cover the building permits being appealed and a new one is necessary for the CO. The appeal of the Certificate of Occupancy (“CO”) could not occur before the filing of the CO, which needed to have occurred by June 20, 2020.

The submittal of this appeal to this board is necessitated in part by the New York Supreme Court decisions of the Hon. Robert A. Onofry, J.S.C.¹ 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.”² 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.”³

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. She did ask prospectively then for a stay of a CO. Inasmuch as that ruling is still *the law of the case*, the Court demands that any challenge of the Building Inspector and all issues related to same be brought before this ZBA. If this Board did not have jurisdiction over these claims the court would have either addressed the

¹ *Kopald v. Town of Highlands, et al.*, Index Nos. 7757-19 & 818-20 (Sup. Ct., Orange Co., 2020), annexed to the accompanying Kopald affidavit dated June 8, 2020, as Exhibit “A.”

² *Id.* (7757-19) at 11.

³ *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.

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 Board⁴.

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.⁵ 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.

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 certificate of occupancy ("CO"),⁶ to Ms. Kopald's neighbors – David and Deborah Tonneson & Jaidin Paisley-Tonneson (hereinafter collectively referred to as "Tonnesons") for the house on Sec/Block/Lot 11-1-1.52 – 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

⁴ This appeal incorporates all arguments and statements of the previous appeal on the Building Permits on the property. For convenience, Exhibit J attached to Ms. Kopald's affidavit of August 9, 2020 is a copy of her Petition in her Appeal of the amended building permit.

⁵ *Id.* (7757-19) at 9.

⁶ The two building permits that led to the granting of the CO are annexed to the accompanying Kopald affidavit dated June 8, 2020, as Exhibit "B."

by the Tonnesons⁷ (when only the excavation therefor was allowable⁸) 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 Chapter 164),⁹ and the failure of the Tonnesons' driveway to conform to State Fire Code requirements and State Septic Code requirements.¹⁰

The fatal errors in the issuance of the CO are that the CO cannot be issued when the building permits are illegal, as evidenced by (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 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 proper building permit,¹¹ (iii) the Tonnesons constructed a driveway with a slope that violates the State Fire Code,¹² and constructed a septic system that violates state septic and soil law⁹, (iv) the Tonnesons failed to obtain the required Town Law § 280-a variance. Ultimately, a CO cannot be granted pursuant to Town Code § 210-52(B) (emphasis added):

Compliance. No certificate of occupancy shall be issued for any building, structure, premises, lot or land unless the erection, construction, reconstruction, structural alteration, restoration, repair or moving of such building or structure, or part thereof,

⁷ Finkbeiner affidavit dated Jan. 24, 2020, annexed to the accompanying affidavit of Kopald affidavit dated June 8, 2020, as Exhibit "C," ¶ 14.

⁸ 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.

⁹ Without withdrawing or waiving any right to the enforcement relief issues including those previously requested by Ms. Kopald in her prior appeal, 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.

¹⁰ *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 and *See also* 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.

¹¹ *See* Finkbeiner affidavit (Jan. 24, 2020), ¶ 14, annexed to the accompanying June 8, 2020 affidavit of Ms. Kopald as Exhibit "C."

¹² *See* Finkbeiner affidavit (Dec. 18, 2019), ¶ 8, annexed to the accompanying June 8, 2020 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.

and the intended use thereof are in conformity in all respects with the provisions of this article.

The “erection, construction” of “such building or structure” and “the intended use thereof” was not in conformity in all respects with the provision of Article 210. The erection and construction of the building was done in serial violation of the Article. Until these errors are fixed, a CO cannot be granted. These include the following:

§210-49(E)

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

§210-48(A)(2)

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

§210-50(A)

All such [permit] applications shall be accompanied by such other information as may be necessary to determine and provide for the enforcement of this chapter. (not included with the application)

§210-50(B)

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

§210-50(E)

Any building permit issued under false pretenses by the applicant or *in violation of the provisions of this chapter shall be subject to a stop-work order or an order to remedy violation issued by the Building Inspector and/or Code Enforcement Officer. Any work undertaken or use which is not in conformity with this chapter shall be unlawful and discontinued until brought into compliance with this section.* Whenever the Building Inspector and/or Code Enforcement Officer otherwise has

reasonable grounds to believe that any work is being prosecuted in violation of this chapter, or regulations or other sections of the Town Code, or the New York State Uniform Fire Prevention and Building Code, or in an unsafe and dangerous manner, the Building Inspector and/or Code Enforcement Officer or his designee may issue a stop-work order or order to remedy....”

§210-50(F)

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

Case Law reinforces that Building Inspectors MUST comply with requirements of statutes or municipal ordinances before issuing permits. Otherwise, they cannot be issued. *See Filmways Commc'ns of Syracuse, Inc. v. Douglas*, 106 A.D.2d 185, *aff'd*, 65 N.Y.2d 878 (4th Dep't: 1985) (emphasis added), which speaks to the exact fact pattern in Ms. Kopald's appeal:

Here, the act of the building inspector in granting or denying the building permit is ministerial; it does not involve exercise of discretion. There is no provision in the building code that gives the building inspector a latitude of choice. In determining whether to grant or deny a building permit, he must adhere to the definite standards of the code and if the applicant meets these standards, he must issue the permit. If he erroneously refuses, mandamus will lie to compel the performance of his mandatory duty. Conversely, if the applicant fails to meet the standards, the building inspector must deny the permit.

A Building Inspector must deny a building permit, and the concomitant certificate of occupancy for failure to meet its conditions precedent. *See also, People ex rel. Namm v. Carlin*, 182 A.D. 626, 169 N.Y.S. 295 (2nd Dep't. 1918):

While the duty of the proper officer to issue a building permit, where the requirements of the statutes or municipal ordinances have been complied with, has been held to be ministerial, so that mandamus will issue to enforce it....

See also, Beneke v. Bd. of Appeals, Town of Manlius, 51 Misc. 2d 20, 25, 273 N.Y.S.2d 121 (Sup. Ct. 1966) (emphasis added):

The issuing of permits is an administrative or ministerial act (Black v. Board of Appeals of Village of East Hills, 203 N.Y.S.2d 6 (Sup.Ct. Nassau Co.1960)) and

the official charged with the duty of issuing permits is bound by the provision of the ordinance pursuant to which he purports to act (*Matter of Larkin Co. v. Schwab*, 242 N.Y. 330, 151 N.E. 637 (1926); *Plander v. Koehler*, 150 N.Y.S.2d 879 (Sup.Ct.Nassau Co. 1956)). To issue a permit not provided for in the Zoning Ordinance is beyond the power of the building inspector.

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 the CO and issue a stop work order for any additional work, which has been going on since the issuance of the CO. Even if the work has supposedly "stopped", it is unlawful and still not subject to a CO. The Tonnesons had neither the legal right to construct their home nor 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.

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,¹³ 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.

¹³ See *Kopald v. Town of Highlands, et al.*, Index Nos. 7757-19 at 9, 10-11 (Sup. Ct., Orange Co., February 7, 2020), annexed to the accompanying Kopald affidavit dated June 8, 2020, as Exhibit "A."

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 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.”¹⁴

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

¹⁴ N.Y. Town Law § 267-b(1).

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 the certificate of occupancy, in fact springs from violations and failures under the Town's Zoning Code. The jurisdiction for this appeal is well founded.

The ZBA's jurisdiction to hear this appeal is further explained by fundamental land use principles. It is axiomatic that a building permit cannot issue unless and until the applicant obtains all required permits and approvals. In this regard, the issuance of building permits is a ministerial task, but it is only ministerial when the applicant has complied with all applicable municipal code requirements. *See again, e.g., People ex rel. Namm v. Carlin, supra* ("the duty of the proper officer to issue a building permit, where the requirements of the statutes or municipal ordinances have been complied with, has been held to be ministerial..."). Stated differently, applicants, including the Tonnesons, are not entitled to a building permit – or a certificate of occupancy – until they have complied with all applicable Town Code provisions, and obtained all requisite permits and approvals.

While the bases why the Tonnesons' permits should not have been issued include the failure to comply with land use regulations that are not set forth in the Town's zoning law chapter

(Chapter 210), the determination appealed from is the issuance of the permits under the Town's zoning law. This challenge is not one brought under Chapters 101, 146 or 164 of the Highlands Town Code, and the ZBA is not being asked to issue the various approvals required therein and thereby, or make a determination as to whether such permits and approvals ought to be granted (conditionally or otherwise) or denied. Rather, the scope of the ZBA's review is whether the CO was improperly issued because the Building permit application was not accompanied by all necessary information, and conditions precedent; namely they were lacking all requisite approvals including those mandated under Chapters 101, 146 and 164.

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.

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)¹⁵.

¹⁵ 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 affidavits 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. If the driveway were constructed legally, there would not have been as much tree cutting. If the erosion control permits were properly obtained ahead of time, it is unlikely the Planning Board would have permitted the Tonnesons to illegally chop down a forest. Likewise, getting a stormwater permit would have provided another opportunity for Ms. Kopald to weigh in at the Planning Board to prevent damage to her; Ms. Kopald has a particularized injury for the location of the house and the removal of trees, both of which are issues relevant to the approval of a SWPPP by the Planning Board as set out in Chapter 164.

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 to her house (substantiated by photographs and by affidavits of Michael W. Finkbeiner showing trees cut in between both structures), 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. She had already previously stated that radiation levels had increased after the trees were cut. The issue then is not what had not yet been turned on at the Tonneson's house (as the Affidavit of Matthew W. Waletzke posited), trees

directly in front of Ms. Kopald's house would buffer all radiation coming from that direction, which would include a cell tower across the river that a Court can take notice of via AntennaSearch.com. This is not an injury suffered by the public at large, because the public at large is not located directly behind the gaping hole in the forest that the Tonnesons created, and the public at large was not surrounded and ensconced in trees as Ms. Kopald was. She also spoke to the increase in ambient noise. All of these impacts and others are not in common with, and not experienced or shared by, the public at large. Some of Ms. Kopald's injuries are unique, but they need not be so. They only need to be different than that suffered by the public at large. *See, e.g., Sierra Club v. Village of Painted Post*, 26 N.Y.3d 30 (2015). Injuries suffered by the public at large would be things like the loss of a carbon sink and the consequent global warming created by the illegal destruction of the forest.

Zoning Boards of Appeals are not bound by strict rules of evidence. *See e.g., Von Kohorn v Morrell*, 9 N.Y.2d 27, 32 (1961); *Stein v Bd. of Appeals of Town of Islip*, 100 A.D.2d 590, 590 (2d Dep't 1973); *Kenyon v Quinones*, 43 A.D.2d 125, 128-129 (4th Dep't 1973). *See also People ex rel. Fordham Manor Reformed Church v. Walsh*, 244 N.Y. 280, 287 (1927):

The statements of the witnesses do not have to comply with the technical requirements applicable to testimony in court. They are not even under oath. It is enough that reasonable men could view them as entitled to probative effect.

This ZBA, as Courts do, can take judicial notice of law (NY CPLR § 4511) and judicial notice of certain facts, such as those derived from official government websites pursuant to *Kingsbrook Jewish Med. Ctr. v. Allstate Ins. Co.*, 61 A.D.3d 13 (2d Dep't 2009) such as the ones in footnote 24 of Ms. Kopald's June 29, 2020 brief¹⁶. Courts can also take judicial notice of facts at any stage

¹⁶ The U.S. Department of Transportation Federal Highway Administration attests to the generally known fact that trees are deployed as noise barriers in their publication "The Audible Landscape: A Manual for Highway Noise and Land Use", Paragraph 5 of section 4, "Physical Techniques to Reduce Noise Impacts" of this USDOT report reads:

Noise barriers can be erected between noise sources and noise-sensitive areas. Barrier types include berms made of sloping mounds of earth, walls and fences constructed of a variety of materials, thick plantings of trees and shrubs, and combinations of these materials.

(Emphasis added)

https://www.fhwa.dot.gov/ENVIRONMENT/noise/noise_compatible_planning/federal_approach/audible_landscape/al04.cfm.

Another Federal Cabinet level Agency, the United States Department of Agriculture issued Guidelines 6.4 Buffers for Noise Control:

Buffers can reduce noise from roads and other sources to levels that allow normal outdoor activities to occur. A 100-foot wide planted buffer will reduce noise by 5 to 8 decibels (dBA). Using a barrier in the buffer such as a landform can significantly increase buffer effectiveness (10 to 15 dBA reduction per 100-foot wide buffer with 12-foot high landform).

https://www.fs.usda.gov/nac/buffers/guidelines/6_aesthetics/4.html

This report also states the obvious fact that landforms increase buffer effectiveness, but since Tonneson illegally developed the land without a permit, that benefit is gone. This Guideline goes on to make the following recommendations:

- Create a dense buffer with trees and shrubs to prevent gaps.
- Consider topography and use existing landforms as noise barriers where possible.

Tonnesons removed the dense buffer which they still need permits to do, which they have not sought and which as argued they need before they can have a legitimate certificate of occupancy. The United States Environmental Protection Agency has a Section on its Website, "Using Trees and Vegetation to Reduce Heat Islands" that speaks to the various known benefits of trees including their role in reducing noise and aesthetics, which is also a Ms. Kopald repeatedly brought up.

Benefits and Costs

- *Reduced energy use:* Trees and vegetation that directly shade buildings decrease demand for air conditioning.
- *Improved air quality and lower greenhouse gas emissions:* By reducing energy demand, trees and vegetation decrease the production of associated air pollution and greenhouse gas emissions. They also remove air pollutants and store and sequester carbon dioxide.
- *Enhanced stormwater management and water quality:* Vegetation reduces runoff and improves water quality by absorbing and filtering rainwater.
- *Improved quality of life:* Trees and vegetation provide aesthetic value, habitat for many species, and can reduce noise.

(Emphasis Added)

<https://www.epa.gov/heat-islands/using-trees-and-vegetation-reduce-heat-islands>

Besides being exposed to persistent second-hand noise because of the tree destruction, she also made the same above allegations in my petition that my air conditioning bills would go up because of the removal of this barrier, that habitat was destroyed, that aesthetics were destroyed and that trees minimize stormwater problems.

These are the consistent findings of the U.S. government on its official websites.

of the proceeding. See *Matter of Albano v Kirby*, 36 NY2d 526, 532 (1975). *Hunter v. New York, O. & W. Ry. Co.*, 116 N.Y. 615 (1889) states

judicial notice may be taken of facts which are a part of the general knowledge of the country, and which are generally known, and have been duly authenticated in repositories of facts, open to all; and especially so of facts of official, scientific, or historical character.

See again footnote 14. Also, courts can take notice of public records again at any stage of an Article 78 proceeding including at the Appellate level: *Mtr. of Persing v. Coughlin*, 214 AD.2d 145 (4th Dep't 1995). See also: *Amalgamated Warbasse Houses, Inc. v Tweedy*, 33 A.D.3d 794, 796 (2d Dep't 2006):

We note that although the resolution is de hors the record, it may be considered on appeal as it is a matter of public record, and its existence and accuracy are not disputed (see *Brandes Meat Corp. v. Cromer*, 146 A.D.2d 666, 667).

The government record on government websites, which a court can take judicial notice of reflects the general knowledge of the country, that trees are obvious noise barriers as well as privacy and light barriers.

Any Court may take judicial notice of law pursuant to NY CPLR § 4511 that case law in New York and other jurisdictions is replete with findings that the removal of a tree barrier created a noise problem and the diminution of the value of a person's home: *Lexjac, LLC v. Inc. Vill. of Muttontown*, No. 07-CV-4614 JS, 2011 WL 1059122 (E.D.N.Y. Mar. 18, 2011) (emphasis added) reports a substantially similar complaint to the one Ms. Kopald made:

Here, Bonnie O'Connell, president of the Pond's Edge Civic Association from 2002 to December 2006, had made complaints to several Muttontown officials.... The vines, groundcover, and natural trees uprooted by Entel had functioned as a noise and light buffer and promoted privacy

Save Pine Bush, Inc. v. City of Albany, 70 N.Y.2d 193 (1987) at footnote 2 cites to the local zoning ordinance (of which any Court can also take Judicial Notice) which states:

The criteria, contained in section 5 of the new article 7-A of the zoning ordinance, are as follows:

'8 Type and arrangement of trees, shrubs, fencing and any other improvements proposed as a visual and/or noise buffer between the subject parcel and adjoining lots. (Emphasis added)

See Kauffman v. State, 43 A.D.2d 1004, 1005 (1974), *aff'd*, 36 N.Y.2d 745 (1975):

The removal of the 'buffer zone,' the trees and the shrubs, change claimants' location from one of peace and quiet to one adjacent to a highly traveled highway, in plain view of the traffic with the noise, smell and constant intrusion that speeding vehicles produce each hour of the day and night. (Emphasis added).

See also People v. New York Trap Rock Corp., 57 N.Y.2d 371, 374-375 (1982)

In more recent times, a tract north of the defendant's land was developed into a quarter-acre residential subdivision. Thereafter, to minimize whatever noise is produced in the regular course of the quarrying, as well as to provide a visual block, the corporation, at great expense, separated itself from the residential area by erecting a large sound-absorbing berm in the form of a 3,900 foot earthen wall, whose base ranges from 100 to 150 feet in width and whose 30-foot height is topped by a stand of trees; acting as additional buffers are a 250-foot strip of land and an adjacent area occupied by a power line easement. (Emphasis added)

See also Valicenti v. State, 35 A.D.2d 610 (1970) which states:

The Court of Claims found that 'there was consequential damage to the remainder since the noise has increased to a large degree and the privacy has been lessened, and the property has lost the enhancement value of the trees and landscaping.'

Also relevant is the Town of Highlands Code 101-12 (c) which reads:

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

Ms. Kopald served written notice and her harm is ongoing.

Also, two January 24, 2020 affidavits of Michael W. Finkbeiner, annexed to the accompanying June 8, 2020 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,¹⁷ and that more than one acre of the Tonnesons' property has been disturbed.¹⁸ 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.¹⁹ Furthermore, the Finkbeiner Timber Trespass Affidavit, Exhibit E, clearly shows that the aerial shadow analysis mathematical technique yielded the same calculation as the on the ground stump analysis in an adjacent lot where Tonneson is alleged to have caused trees to be illegally cut.

There is no requirement, as argued by the Tonnesons' attorney, that Ms. Kopald must prove with specificity and differentiation among various noise sources to establish her aggrieved party status on that injury to merit the ZBA's power to hear her appeal. The allegations in her affidavit (with supporting affidavits and proof) are clearly sufficient. *See Sierra Club v. Village of Painted Post*, 26 N.Y.3d 301, 311 (2015) ("Thus, [Petitioner's] allegation about train noise caused by the increased train traffic keeping him awake at night, even without any express differentiation between the train noise running along the tracks and the noise from the transloading facility, would be sufficient to confer standing."). With respect to noise, the Tonnesons' attempt to shift responsibility for the noise impacts to construction on another property fails to recognize that Ms. Kopald's injury is not simply premised on the increased noise during construction but includes ongoing noise impacts, including increased train noises, as well as ongoing leaf blower noise, that

¹⁷ Finkbeiner affidavit dated Jan. 24, 2020, annexed to the accompanying June 8, 2020 affidavit of Ms. Kopald as Exhibit "C," ¶ 44; Finkbeiner affidavit dated Jan. 24, 2020, annexed to the accompanying June 8, 2020 affidavit of Ms. Kopald as Exhibit "E," ¶ 1.

¹⁸ Finkbeiner affidavit dated Jan. 24, 2020, annexed to the accompanying June 8, 2020 affidavit of Ms. Kopald as Exhibit "C," ¶¶ 35, 36.

¹⁹ *See, e.g.*, Exhibit "H" (Drone & Ground Photos) annexed to the accompanying June 8, 2020 affidavit of Ms. Kopald, especially the "September and October 2019 Photos from My Yard."

resulted from the Tonnesons' removal of trees without proper permits. In addition to her sworn statements, Ms. Kopald's objection to the noise has been documented by her complaints to the police.²⁰ But for the improper removal of trees these injuries would have been eliminated or mitigated.

Furthermore, Ms. Kopald had demonstrated by a photograph taken on April 11, 2020 that the Tonnesons' home is visible from her deck,²¹ which is corroborated by Mr. Tonneson's affidavit in which he asserts that on the same day he was able to see Ms. Kopald exit her house and proceed to her deck.²² Again, this would not have been possible but for the Tonnesons' illegal tree removal. Ms. Kopald's original moving affidavit showed pictures taken before she went to Court in September when it was still summer, and the blight at the end of her deck could be seen then; the visual appearance of break in the tree line is not just for the over half the year when the leaves are off the trees but even when the leaves are on the trees as demonstrated in her original moving affidavit.

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

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

²⁰ See Police Incident Report 4/14/2020.

²¹ See Kopald affidavit of June 17, 2020 and Exhibit "1" thereto. See also Exhibit "C" to Kopald affidavit of June 8, 2020, and the Tree Cutting Analysis annexed thereto as MWF Exhibit 2, including the Tree Cutting Analysis 2016 Aerial Shadows. See also Kopald affidavit of June 8, 2020 at p. 4.

²² See Tonneson affidavit at ¶ 19 contained in Exhibit "3" to the Tonnesons' June 16, 2020 submission.

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

It is likely that eventually the permits, approvals and variance needed by the Tonnesons can be secured by them, allowing them to have a 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 being 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), all obviating any right to a certificate of occupancy. 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).

It is likely to be argued by the Tonnesons 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), and that erosion control and stormwater controls are the same as site development plan approvals. These positions are 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 which is a specific type of approval described in NY Town Law § 274-a and not the same as an approval for an erosion control permit.

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

A. No building permit or certificate of occupancy shall be issued for 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.²³

[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.²⁴ 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.*

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 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.

²³ 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.

²⁴ 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.

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 or how to facilitate compliance with State Septic Code.

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, pursuant to Town Code Chapter 101 (ii) obtain approval of a stormwater pollution prevention plan from the Planning Board, pursuant to Town Code Chapter 164 (iii) conform their

driveway to the International State Fire Code and the septic and soil with State Septic Code, (iv) comply with N.Y. Town Law § 280-a (v) obtain approval to install the septic tank as required under Town Code Chapter 146 and (vi) 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 was necessarily wrongly issued. 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). Again, work was going on long after the CO was issued. Even if work is deemed to have been stopped, no CO can be issued.

The ZBA should not be distracted by the anticipated Tonneson’s straw man argument to this Board that Ms. Kopald is asking this Board to interpret Town Chapters 101, 146 or 164. Ms. Kopald previously challenged the Building Inspector’s determination to issue building permits and, now, she appeals the issuance of a CO to the Tonnesons. Hers is not a request for “interpretation” of the zoning or any other code; rather it is one for *application* of the Zoning Code within its role of a ZBA. These permits and certificate of occupancy should not have been issued by the Building Inspector unless and until the Tonnesons obtained all necessary approvals (including the erosion control permit and SWPPP from the Planning Board) that were required to be obtained before they were entitled to the building permits and certificate of occupancy. Because the Building Inspector issued the permits and certificate of occupancy in error, it is now the State statutory obligation of the ZBA to stand in the shoes of the Building Inspector and correct that

error by “revers[ing] . . . the . . . determination [to issue the permits and certificate] appealed from and . . . make such . . . determination as in its opinion ought to have been made in the matter by the [Building Inspector].” N.Y. Town Law Section 27-b(1).”

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 June 8, 2020 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 ¶ 23²⁵ (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 6.²⁶
- 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 ¶ 49²⁷ (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).

²⁵ Exhibit “C” to accompanying Kopald affidavit.

²⁶ Exhibit “F” to accompanying Kopald affidavit.

²⁷ Exhibit “C” to accompanying Kopald affidavit.

- 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 ¶ 36²⁸ (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 ¶ 50²⁹ (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 ¶ 49³⁰ (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 over. *See, e.g.*, Finkbeiner Affidavit ¶ 44.³¹ 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.

Highlands Town Code Chapter 101 (Erosion Control) is particularly apt in the circumstances complained of by Ms. Kopald in this appeal. Highlands Town Code § 101-4 (Jurisdiction) provides that "all . . . construction activities requiring a permit under this chapter [101] shall be in conformance with the provisions set forth herein."³² Section 101-10(R) relatedly provides that in making determinations on the extent of tree removal to be allowed under an erosion control permit, the Planning Board must take into account "whether the [tree] removal will have significant adverse impact on other properties" (Emphasis added). Additionally, and, relevant to the

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* *See also* Finkbeiner affidavit dated January 24, 2020 annexed to the accompanying Kopald affidavit as Exhibit "E."

³² The detailed listing of the triggering events caused by the Tonnesons that subject them to the requirements of Highlands Town Code Chapter 101 were set out in Ms. Kopald's June 8, 2020 submission to the ZBA (*see* pp. 15-17) as well as in this brief.

Building Inspector/Code Enforcement Officer's duty to enforce and administer Highland Town Code provisions outside of Chapter 210 (Zoning) provided they are "applicable to the construction . . . of building and structures and . . . the location . . . thereof" (*see* Highlands Town Code § 210-49(E)), Section 101-10(R) provides:

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

At a minimum, the Planning Board's determinations under Highlands Town Code § 101-10(R) concerning tree removal – and the ability to require buildings to be relocated or reduced in size – apply to the construction and location of the Tonnesons' house. It was, therefore, the duty and obligation of the Building Inspector/Code Enforcement Officer under Highlands Town Code § 210-49(E) to "administer and enforce" that the Tonnesons obtain the necessary erosion control permit required by Highlands Town Code Chapter 101, because Highlands Town Code § 210-49(E) mandates that these home construction and location issues under Highlands Town Code § 101-10(R) are part of the duties and administration of the Building Inspector/Code Enforcement Officer, and thus within the jurisdiction of the ZBA to review.³³

³³ Curiously, the Tonnesons' attorney has argued that Chapter 101 was outside of the jurisdiction of the ZBA because the Town's cited authority for enacting Chapter 101 is based upon N.Y. Town Law Article 9 (Ordinances and Licenses), and not N.Y. Town Law Article 16 (Zoning and Planning). To be clear, all that Article 9 provides is that, in relation to certain enumerated powers of the Town, a permit and permitting processes may be authorized; it does not exclude those permitting powers from being applied to zoning and planning functions. *See* N.Y. Town Law § 130. Indeed, many of the enumerated powers specified in N.Y. Town Law § 130 to which such permitting may apply (and to which Chapter 101 applies) relate to zoning and planning matters (including the "construction, alteration, removal and inspection of buildings and structures of every nature and description erected or proposed to be erected in said town."). Also, N.Y. Town Law § 130 provides that additional purposes, not specifically enumerated, are also proper subjects of permitting "as contemplated by the provisions of [Chapter 62, *i.e.*, N.Y. Town Law]," which, perforce, includes N.Y. Town Law Article 16. Thus, the only meaning that can be attributed to Chapter 101's "Authority" (§ 101-2) is that the Town is exercising its right to provide for a permitting process in Chapter 101 for, among other purposes, N.Y. Town Law Article 16 (Zoning and Planning). Also, another baseless objection previously raised to the ZBA's jurisdiction over Chapter 101 issues is that Chapter 101 is restricted in its application only to subdivisions. Although Chapter 101 does specifically apply to subdivision site preparations, as well special use permit site preparations, it also applies clearly to other site preparations, including grading, excavation, filling and removal of trees without any linkage to subdivisions. *See* Highlands Town Code § 101-7(A)(1)-(11).

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 June 8, 2020 affidavit of Ms. Kopald as Exhibit “C.” Mr. Finkbeiner also found that 1.2 acres had been disturbed as a result of the Tonnesons’ construction activities, thus establishing that the Tonnesons were subject to compliance with Chapter 164. *See* Finkbeiner Affidavit ¶ 36, annexed to the accompanying June 8, 200 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 plan³⁴. 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 June 8, 2020 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.*

³⁴ The applicability of Highlands Town Code Chapter 164 to Tonnesons’ activities was set out in Ms. Kopald’s June 8, 2020 prior appeal submission to the ZBA (*see* pp. 17-18) which is incorporated herein.

Also, the Tonneson attorney has previously misrepresented to the ZBA that Highlands Town Code § 164-7(C) exempts single family residences from the Chapter 164 SWPPP requirements. It does not. Highlands Town Code § 164-7(C) only exempts single family homes from providing certain additional information (postconstruction stormwater runoff controls) in the mandated SWPPP; it does not excuse the requirement for a SWPPP. Beyond curiosity is the objection posed that Highlands Town Code Chapter 164 is somehow limited to subdivision review. There simply is no authority for this assertion. Highlands Town Code § 164-4 makes clear that Chapter 164 applies to “all land development activities,” broadly defined under Highlands Town Code § 164-6 to include “construction activity” and never limited its scope or context to only construction activity related to subdivision applications.

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 Paisley-Tonneson and rescind the building permits and 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, are 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. Although there exist overlapping issues between this appeal (regarding the issued certificate of occupancy) and Ms. Kopald’s pending appeal (regarding the issued building permits), this appeal is discrete from the pending appeal, with additional facts and arguments regarding standing and otherwise, and must be decided on its own merits. There is no *res judicata* equivalent allowing this ZBA to short-cut its analysis and decision-making as to this appeal based upon its decision in Ms. Kopald’s pending appeal.

Ms. Kopald has clearly established that this Board has jurisdiction over this matter and that

she is an aggrieved person with proper legal standing to challenge the wrongful issuance of the June 15, 2020 certificate of occupancy to the Tonnesons.

Thank you for your careful consideration of this appeal.

Respectfully Submitted,

A handwritten signature in cursive script that reads "Richard B. Golden Esq." with a stylized flourish at the end.

RICHARD B. GOLDEN

RBG:la
Enclosures

cc: Alyse Terhune, Esq. (via email)