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Via Email
Ann Moreau-Kensek
Zoning Administrator
62 Quaker Street
Lincoln, Vermont 05443

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64 Court Street
Middlebury, VT 05753

RE: Untimely Appeal of Permit Issued to Bicknell Trust

Dear Ms. Moreau-Kensek, Mr. Carroll, and Members of the ZBA:

As you are aware, this Firm represents the Bicknell Trust and Norm Bicknell (collectively, "Bicknell") in connection with the permitted cabin located off Elder Hill Road. In accordance with the Board's instructions at the end of the August 10, 2022 hearing, enclosed please find a sketch of the proposed house showing the roof's pitch of approximately 8/12, as well as the structure's approximate height, which as previously represented will be approximately 20 feet high, give or take a foot or so, measured from the top of the foundation. Under the Lincoln Zoning Regulations, "building height" is defined as "The vertical distance to the highest point of the roof, measured from the average finished grade at the foundation of the building." Given that the top of the foundation is approximately 3-5 feet above grade, the overall "building height" of the structure will be approximately 23-25 feet. Under Section 334 of the Regulations, the maximum building height for a single family home in the Outlying District is 35 feet, and the "building height" of the proposed house will be below this threshold. Please note that the sketch is very roughly drawn, is not to scale, and the measurements are approximate. The very limited purpose of the sketch is to respond to the Board's questions about building height and approximate roof pitch. Again, the structure will comply with the maximum height requirement set forth in the Regulations.

As the Board enters deliberation on this matter, Bicknell reiterates the following facts and argument. All facts were the subject of testimony and/or contained within the written record, in particular Norm Bicknell's testimony and the packet handed out at the June 20, 2022 hearing marked as Exhibit Bicknell #3.

Untimely Appeal

Neighbors seek to challenge a zoning permit (the "Permit") issued to Bicknell by the Town's Zoning Administrator on June 1, 2021, now over twelve (12) months ago. Neighbors do not dispute the untimeliness of their appeal, but contend that they should nonetheless be allowed to challenge the Permit because it was not posted in view of a public right of way. This argument fails for at least three reasons.

First, Bicknell's property does not abut a public right of way and so posting of the Permit in view of a public right of way was not possible. Bicknell posted the Permit in accordance with the explicit, written instructions from the Zoning Administrator, who directed him to post it "on site." *See Moreau-Kensek Letter Accompanying Permit dated June 2, 2021* ("Here is the paper copy of your approved permit application and the "Z" for you to post *on site*." (emphasis added)). Bicknell followed these instructions.

Second, Neighbors were entitled only to inquiry or constructive notice that the Permit had issued. They were not entitled to actual notice. This is an important distinction. Under 24 V.S.A. § 4464(b)(3), participants in a matter before a municipal panel are entitled to actual notice of the panel's decision. This section is not appliable here. In this case, the Permit was issued to Bicknell not by a municipal panel but by the administrative officer. Notice of administrative permits is not governed by § 4464(b)(3), but rather by 24 V.S.A. § 4449(b). No party is entitled to actual notice of administrative permits issued under § 4449. Instead, they are entitled to constructive or inquiry notice only. In this case, all of the Neighbors had constructive/inquiry notice as a result of: (i) the Permit was properly posted at a public place, i.e., the Town Office, i.e., *constructive notice to all Neighbors*; (ii) in certain instances Neighbors were expressly told the Permit had been issued by the Zoning Administrator; (iii) in certain instances Neighbors learned about the Permit by talking to their neighbors; (iv) in certain instances Neighbors witnessed the building materials transported to or lying upon the "ball field" along Elder Hill Road and/or witnessed the several large trucks transporting said materials to the site (the materials had prominent labels stating "Log Cabin" on them); (v) in certain instances Neighbors ventured upon Bicknell's property (without permission) and personally observed the materials and the ongoing construction; and/or, (vi) in certain instances Neighbors called or spoke with Tommie Thompson, chair of the Board, who knew the Permit had issued at least by early September, 2021, and who in written emails confirmed that the "neighbors…alerted me once activity started in last week" (9/7/2021), "I have been contacted all summer about activities up there" (9/7/2021), and "the watchful neighbors called me assuming he [Bicknell] was starting construction without a permit" (9/7/2021). Despite having constructive or inquiry—if not actual—notice of the Permit, Neighbors took no action for months, allowing Bicknell to continue construction of the house in continued reliance on the finality of the Permit. Equity precludes reopening a final permit when Neighbors delayed so long in taking action.

Third, the Board should not establish a precedent that every permit ever issued—and every permit to be issued in the future—will never be final and shall always be open to challenge. If a permittee has not documented and recorded evidence of the posting of a notice, or if the zoning

administrator cannot demonstrate the posting of notice in a public place, any party always will be able to contend that a permit is subject to challenge. Ms. Moreau-Kensek testified that she regularly removes notice postings after several months. If a challenge is brought after the notice is taken down, will the Town be able to demonstrate compliance with the posting requirement? If she can remember, Ms. Moreau-Kensek may be able to testify as to the steps she took; however, if she were to leave her position (which indeed has happened), and/or move away, no one presumably would be able to confirm proper posting, and the permit presumably would be subject to challenge. At some point, a permittee must be able to rely on an issued permit. The law is very clear on this point. *See, e.g., Town of Pawlet v. Banyai*, 2022 VT 4, ¶¶ 14-15 (Vt. Jan. 14, 2022) ("Failure to appeal the decision or act renders it final and precludes all interested persons from contesting, either directly or indirectly, the decision or act."); *see also Levy v. Town of St. Albans Zoning Bd. of Adjustment*, 152 Vt. 139, 143, 564 A.2d 1361, 1364 (1989) (explaining that even ultra vires or mistaken actions by the zoning administrator must be treated as binding under § 4472(d) because "[t]o hold otherwise would severely undermine the orderly governance of development and would upset reasonable reliance on the process"). Neighbors' purported appeal of the Permit should be denied as untimely.

Standing

Even if the appeal is deemed timely, opponents do not qualify as interested persons under 24 V.S.A. § 4465 with standing to appeal the Permit. While certain opponents alleged that they live within the immediate neighborhood of the Bicknell property, opponents failed to submit documentary evidence demonstrating that to be the case. In his letter, Mr. Dumont concedes (at p.1) that Ms. Laird was the only person who even contended that she did not have actual notice of construction activities well before the appeal was filed, but he insists that the appeal still can go forward because, as he states, "As you know, only one appellant is needed for a timely appeal." However, Ms. Laird did not present evidence of where her property is in relation to Mr. Bicknell's property. In her affidavit (at ¶ 2), Ms. Laird states that the Bicknell property is "uphill from and *not distant* from my property." (Emphasis added.) Opponents bear the burden of proof of standing under § 4465. Merely stating that her property is "not distant" from Bicknell's property is insufficient to establish being in the immediate neighborhood. *In re Desimone & Moisis Family Trust*, No. 247-12-09 Vtec Decision on Motion (Envtl. Div., April 27, 2010) (Wright, J.) (individual living 'approximately a half mile' from project not within 'immediate neighborhood').

Opponents also failed to demonstrate that they would suffer a physical or environmental impact by construction of Bicknell's home. In her affidavit (at ¶ 2), Ms. Laird—again, the only Neighbor contending no actual notice of construction—concedes that she "cannot see the Bicknell Trust property from my land, but I see it daily as I drive or walk to and from my land and around Lincoln." Further, Mr. Dumont concedes (at p.1) that his clients brought the appeal because: "They sought to represent the interests of the town of Lincoln as expressed in the town plan." One cannot establish standing merely by raising generalized concerns on behalf of the general public. *In re Diverging Diamond Interchange SW Permit*, 2019 VT 57 (party failed to demonstrate particularized interest or to explain "how it might have a particularized interest different from the general public"). The appeal should be dismissed due to opponents' lack of standing.

Permit Correctly Issued Under the Lincoln Zoning Regulations

Even if the appeal is deemed timely and even if opponents are found to have standing, the Permit was correctly issued. A single family dwelling is a permitted use in the Outlying District. The home complies with the technical standards set forth in Sections 330-335. Although the Viewshed Overlay Area sets forth certain "best practice" guidance for construction, the guidance set forth in the Viewshed Overlay Area is not mandatory, and therefore unenforceable. *Zoning Regulations at § 411(1)* ("None of the criteria below are meant to be applied as mandatory requirements on an individual basis.").

Even if the Viewshed Overlay guidance was enforceable, as evidenced by testimony and information submitted to the record, Bicknell has complied with the "best practices" set forth in Section 412:

1. Siting:
    a. The home will be sited approximately 122 feet back from the edge of the ridge to blend in with the landscape as much as practicable given site conditions.
    b. Neither the structure nor the driveway will be located in an open field. The home will be sited approximately 122 feet back from the edge of the ridge as near the existing, rear wood line as is practical giving consideration to existing topography, soil conditions, and increased elevation concerns. The existing drive runs through the woods, not through open fields.
    c. Utilities will be located at the rear of the structure.
    d. The home is made of wood logs, will feature earth tones with natural wood finish and forest-green roofing. While the Zoning Regulations allow for a 35-foot-tall structure, the structure will be approximately 23-25 feet in height (with variation due to existing topography) and will blend into the rising landscape behind it. No portion of the structure will be highlighted against the sky when viewed from roads or neighboring properties.
2. Clearing:
    a. The structure is sited in a location that required no clearing of trees on-site, nor ridgeline disturbance, to accommodate it. Only low growth shrubs within the house footprint have been cleared.
    b. Applicant does not intend to perform any clearing of trees on-site, and any cutting will be done selectively of smaller trees and branches. Only low growth shrubland within the house footprint has been cleared.
    c. There has been no clearing of trees on the site. Only low growth shrubland within the house footprint has been cleared.
3. Lighting and Reflectiveness:
    a. The home will feature no exterior lighting, or at most dark sky compliant outdoor lighting which will be motion activated solely for the purpose of safety and/or security.

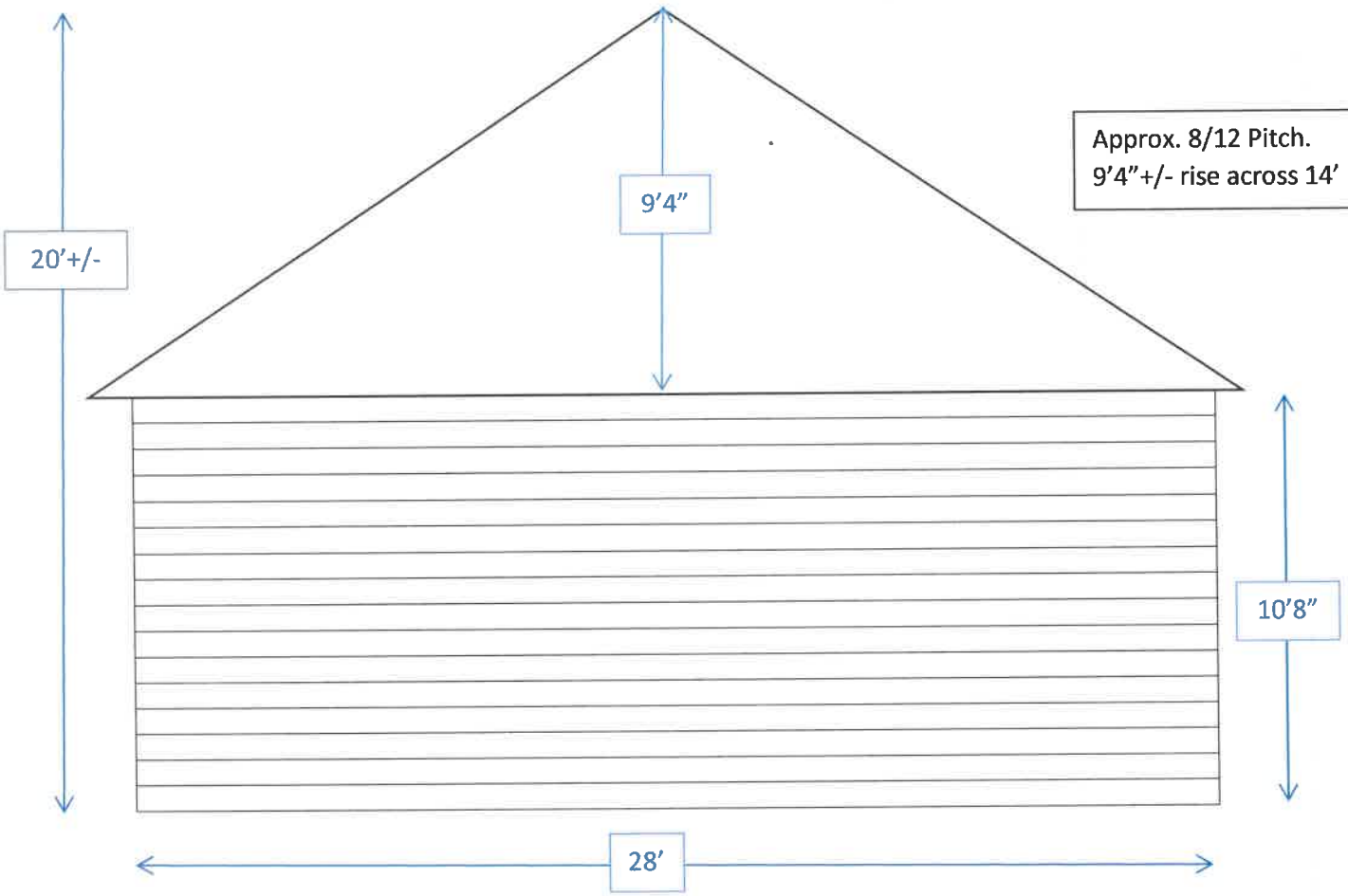
b. The home will feature no exterior lighting, except dark-sky compliant outdoor lighting which will be motion-activated for safety and/or security. The home will have no illuminated signs.
c. The home will not have any pole lights.
d. The home will not have a commercial sign.
e. The home will feature no exterior lighting, except dark-sky compliant outdoor lighting which will be motion-activated for safety and/or security.
f. The home will not have wall pack lights.
g. The home is not a commercial or business use. The home will feature no exterior lighting, except dark-sky compliant outdoor lighting which will be motion-activated for safety and/or security.
h. The home will feature no exterior lighting, except dark-sky compliant outdoor lighting which will be motion-activated for safety and/or security. Interior lighting will use lightbulbs with wattage customary for residential use, i.e., likely between 40-75 watts.
i. The home will feature no exterior lighting, except dark-sky compliant outdoor lighting which will be motion-activated for safety and/or security.
j. The home will be a traditionally-styled log cabin that will blend in with the surrounding landscape. Neither the forest-green roof nor natural wood siding are expected to be reflective.
k. The home will be a traditionally-styled log cabin appropriate for rural Vermont. Excessive windows will be limited.

Even if the appeal is deemed to be timely and allowed to move forward and even if the guidance set forth in Section 412 is deemed enforceable, the single family home project complies with that guidance, and the Permit should be affirmed and/or issued to Bicknell.

Sincerely yours,

Andrew T. Lechner

Encl.
Cc: Norm Bicknell
James A. Dumont, Esq. (via email)



Approx. 8/12 Pitch.
9'4"+/- rise across 14'

Height of Walls: 16 courses of logs, each approx. 8" high = 10'8"+/-

NOTE: All measurements are approximate. **NOT TO SCALE**