**ZONING BOARD OF APPEALS**

**TOWN OF LEWISBORO**

**MINUTES**

Minutes of the Meeting held by the Zoning Board of Appeals on Wednesday, October 26, 2016 at 7:30 P.M., at the Town of Lewisboro Offices at Orchard Square, Cross River, New York 10518.

Board Members: Present: Robin Price, Jr. Chairman

 Jason Krellenstein

 Todd Rendo Carolyn Mandelker

 Thomas Casper

Also Present: Anthony Molé, Town Attorney

 Peter Barrett, Building Inspector

 Aimee Hodges, ZBA Secretary

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The Meeting was called to order at 7:30 P.M. Chairman Price introduced the members of the Board and noted the emergency exits. He announced that the next ZBA meeting is scheduled for Wednesday, December 7, 2016 with a site walk scheduled for Saturday, December 3rd.

**I. Review and adoption of the Minutes of September 28, 2016**

Mr. Krellenstein moved to adopt the minutes of September 28, 2016. The motion was seconded by Mrs. Mandelker; In Favor: Mr. Krellenstein, Chairman Price, Mr. Rendo and Mrs. Mandelker and Mr. Casper

**II. PUBLIC HEARINGS**

* **OLD BUSINESS**

# CAL. NO. 23-16-BZ

**Application of Michael F. Sirignano, Esq., 892 Route 35, Cross River, NY 10518 [Owner of record: The McCaffrey Family Partnership, P. O. Box 232, Waccabuc, New York 10597] for a variance of [1] Article IV, §220-23D (11) of the Zoning Ordinance in the matter of the proposed construction of an accessory building that exceeds 600 square feet (originally proposed 3812 square feet; now proposed 1497 square feet) in an R-2A, Two-Acre Residential District**

**The property is located on the north side of (#22) Perch Bay Road, designated on the Tax Map as Sheet 25A, Block 10813, Lot 2, in an R-2A, Two-Acre Residential District consisting of approximately 3.722 acres.**

Adam Wekstein, Esq., Hocherman Tortorella & Wekstein, LLP and Patrick Croke, RA were present representing the property owner.

There were no objections to the notice of public hearing as published in the newspaper.

Mr. Wekstein advised that the application before the Board presently is for a 1500 square foot single story accessory apartment located in an accessory building. The applicant has reduced the building size down from 3800 square feet. The Board must a balance the benefit to the applicant versus the detriment to the community. He listed a number of factors that supported his belief that there was no detriment to the community: the proposed building complies with the setback requirements, the topography and the existing vegetation on the property screens the proposed building from the adjacent properties. The proposed building is 41 feet from the western property line adjacent to the Waccabuc Country Club and between this proposed building and the existing building on the country club property is a berm. It was his understanding that there were discussions with the country club who had no objections but requested that there be additional screening should this building be visible. The distance between the property line to the east (Gullen) is 160 feet and the distance to Perch Bay Road is 234 feet. The distance to Lake Waccabuc is 260 feet. He displayed an aerial photograph and again noted that the topography and vegetation screened the proposed building from all of the neighboring properties. This 3.77 acre lot is almost double the minimum lot size requirement and the maximum building coverage for this zoning district is 9% and the applicant is proposing 3.15%.

Mr. Casper noted that the applicant is proposing to construct a third building on the lot, which is more than double the size of a permitted accessory building.

In response to a question as to the size of the cabana building, Mr. Croke advised that including the decking it is 16’ x 20’.

Mr. Wekstein noted that the benefit to Mr. McCaffrey who is quite ill is that this proposed building will house the full time caregivers and their children.

Mr. Croke reviewed the two alternatives that had been explored. He stated that it would not be feasible to expand the main residence and noted that a substantial portion of the existing residence is located within the 100 foot wetland buffer and the entire structure is located within the Town’s 150 feet wetland buffer. He noted that a section of the main residence is located within the easterly side yard setback. In addition, the only accessible entrance to the house would be eliminated if an addition were to be constructed on this side of the residence. Any addition to the front or western side of the residence would eliminate the existing garage. In response to a question of Mrs. Mandelker, Mr. Croke advised that the total square footage of the main residence is approximately 4500 square feet.

Mr. Rendo advised that it had been previously stated that the main residence was approximately 5000 square feet.

In numerical numbers, Mr. Wekstein described the variance being requested as significant. He advised that the courts say that the substantiality isn’t to be judged strictly mathematically, and only becomes significant if it can be shown that extra space being requested impacts the character, and the physical and environmental conditions of the neighborhood.

David Migden, 29 Perch Bay Road advised that he looked at this house as a potential renter and believed that the square footage of this house was closer to 6000 square feet. He advised that there were three rooms on the lower level with full access and did not understand why a family of four could not reside in the lower level rather than constructing a second residence on 3.77 acres in a beautiful rustic area. This will deter from the neighborhood and did not understand why this was being requested when there is a full lower level in the main residence with plenty of living area. He encouraged the Board to look at the interior of the main residence.

Bill Bosshart, 63 Post Office Road advised that the rear of his property fronted on Perch Bay Road directly across the street from the applicant’s driveway. With reference to the character of the neighborhood, Mr. Bosshart advised that historically this property had been rented out. He expressed concern as to what type of rental would this property be with this addition, the fairly substantial cabana and the six bedroom main residence. He questioned whether this is appropriate character for the neighborhood. He questioned whether the property could be subdivided. At this time, the applicant is proposing a one level structure and questioned whether another level could be added further down the road.

Mr. Casper noted that during the site walk, Mr. Sirignano indicated that this cottage could be for either the caregivers or for family members. He was not aware that the main residence had been rented previously. With this in mind, it was not beyond the realm of possibility that this proposed accessory apartment could also be rented. He noted that he had a general concern with the number of structures, the size and the number of people that could reside there. The point of having larger parcels was not to fill them up, but to have homes on larger undeveloped parcels. If the gentleman needed 24 hour care, he believed that he would need someone living in the same structure.

Mr. Migden believed that the new Bed and Breakfast ordinance would allow this residence to be used in that manner.

Mr. Krellenstein advised that the code permitted that only one structure be rented at a time. The code does contemplate that the accessory apartment can be utilized by a rental, family members or for domestic help.

In response to some of the commentary, Mr. Wekstein pointed out that two residences are permitted on parcels one half acre and larger. The applicant could go in tomorrow and pull a building permit for the accessory apartment. The accessory apartment no longer requires a special permit from this Board. The question for the Board is the size of the proposed building. The size of the parcel is relevant and the area of coverage is relevant. In addition, there was discussion relative to precedent. For this Board to be bound with respect to other properties, the facts on a future application would have to be essentially the same as this application. Even if that is the case, this Board could explain away deviations or if this Board changed their minds or believed a mistake had been made so long as it is in their decision. This is the appropriate case.

Chairman Price still believed that the practical alternative would be to add on to the main residence. It would be easier to grant a variance for the incursion into the setback.

Mrs. Mandelker stated that she had concerns with three potential structures on this 3.78 acre parcel. The accessory apartment proposed is in excess of 1400 square feet, which is two and one half times what the code permits. She noted that she was still looking at whether there is an alternative and questioned why there could not be an apartment created on the ground level of the main residence rather than build a second house on the property. Whatever is decided will have an impact in the future.

Mr. Migden noted that a property management company would be involved should this property turn into a Bed and Breakfast and was advised by Mr. Krellenstein that the property owner is required to reside on the property.

Mr. Wekstein advised that a Bed and Breakfast required a special permit.

Mr. Casper moved to deny the application as presented for the following reasons:

* If the proposed building was 600 square feet a variance would not be required.
* The proposed building requires a 120-140% variance.
* It is the third building proposed on the property.
* The proposed building is a full sized residence.

The motion was seconded by Mrs. Mandelker. To Deny: Mr. Krellenstein, Mr. Rendo, Chairman Price, Mrs. Mandelker and Mr. Casper.

* **NEW BUSINESS**

# CAL. NO. 27-16-BZ

Application of Crissy & Salvatore Colangelo, 8 Park Avenue, Apt. 1, Goldens Bridge, New York for a variance of Article III, Section 220-12E (1) of the Zoning Ordinance in the matter of the proposed 8 foot high fence where 4 feet is allowed along the side property lines adjacent to lands owned by the Town of Lewisboro [Block 11112, Lot 2] and a 6 foot high fence where 4 feet is allowed along a section of the front property line located on Park Avenue and Meadow Street.

**The property is located on the intersection of (#8) Park Avenue, Meadow Street and Old Bedford Road, designated on the Tax Map as Sheet 4A, Block 11112, Lot 4 in an** **SCR-2F, Residential Two Family Special Character District consisting of approximately 0.520 acres.**

There were no objections to the notice of public hearing as published.

The applicant was not present.

Chairman Price advised that the members of the Board walked the site on Saturday. The Board walked the property on the other side of the Town owned property, the former Park and Recreation building and now the home of the Katonah Art Center earlier this year and granted the same variance for an eight foot fence to the Rogers, 69 Old Bedford Road. He further noted that there is an eight foot and ten foot fence along the rear of this property that has been in existence for many years. There is a six to eight foot chain link fence between the Colangelo property and the Town property. The applicant is looking to install a fence for privacy and to block out the lights in the evening.

Mr. Krellenstein advised that this Board granted the exact same variance earlier in the year for the property owner on the other side. This applicant is entitled to the same variance. It will improve the character of the neighborhood and the quality of life for this applicant.

Mr. Krellenstein moved to approve the application as presented for the following reasons:

* There is no undesirable change to the character of the neighborhood or detriment to nearby properties; the application will bring about a desirable change.
* There is no practical alternative to the variance requested.
* Although the area variance may seem substantial according to the code, there is an existing 6-8’ chain link fence, therefore there is no impact.
* There will not be an adverse effect or impact on the physical or environmental condition of the neighborhood.
* The difficulty was not self-created.

The motion was seconded by Mr. Rendo. To Approve: Mr. Krellenstein, Mr. Rendo and Chairman Price. To Abstain: Mrs. Mandelker and Mr. Casper.

Stephen Rogers, 69 Old Bedford Road stated that he believed that the code required that when a commercial business abuts residential property that the commercial business is responsible to screen the residential properties. It was his belief that the business should pay for the screening, not the private resident.

**CAL NO. 28-16-BZ**

**Application of Adam R. Rose, 161 North Salem Road, Cross River, NY 10518 [Owner of Record: Jocelyn Hayes, P. O. Box 267, Cross River, NY 10518] pursuant to New York State Town Law §267-a (5)(b) and the Town of Lewisboro Zoning Ordinance §220-74E(4) in the matter of an appeal from the decision of the Building Inspector.**

**The property is located on the westerly side of (#124) North Salem Road, designated on the Tax Map of the Town of Lewisboro as Sheet 15, Block 10533, Lot 9, in an R4A, Four Acre Residential District.**

Adam Rose was present. Taylor M. Palmer, Esq., Cuddy & Feder, LLP was present representing the property owner.

When asked whether there were any objections to the notice of public hearing, Mr. Palmer stated that he had been advised that additional materials had been submitted to the Board after the notice was provided. He further indicated that they would certainly listen to the additional submissions that were made after the notice had been sent out. He further stated that it was his belief that this matter should be dismissed outright.

Mr. Rose reviewed his October 26, 2016 eight page bound correspondence addressed to the Board with attached exhibits. Mr. Rose stated that he was going to demonstrate to the Board what he described as a local property owner who has ignored local law for decades even though they were stopped, fined and received notices several times. He stated that this property owner intentionally filed misleading documents and made fraudulent statements to several Town departments and nothing has been done about it. Through a review of the Town’s documents Mr. Rose stated that he had found crystal clear evidence of successful efforts to avoid filing for building permits, certificate of occupancies and ultimately paying the correct property taxes.

Mr. Rose displayed an aerial photograph of lots 29/56 and 9 [Block 10533] showing what he described as five dwelling units four of which are rented out. He referred to the Town’s accessory apartment law which states that the units could only be rented if the property owner resided in one of the units.

Mr. Rose continued to read his correspondence to the Board highlighting that it was his belief that the property owner’s representative denied in a submission to the Planning Board that there were multiple dwelling units on the property while that representative was living in one of them. After the Planning Board approved the subdivision application, Mr. Rose stated that he then made a presentation to the Town Board who voted to issue an administrative search warrant to inspect the property. It was Mr. Rose’s belief that the result of that inspection on August 23, 2016 by the Building Inspector Peter Barrett was wrong and the reasoning for his appearance before this Board this evening as this Board is the only body that could overrule the decision of the Building Inspector.

Mr. Rendo stated that it was not clear to him what Mr. Rose was looking for this Board to do.

Mr. Rose noted that Mr. Barrett’s handwritten notes from the visit were submitted to this Board. Mr. Barrett found a minor violation regarding a pool fence, made some comments about smoke and CO detectors but believed that Mr. Barrett ignored huge violations.

Chairman Price questioned whether Mr. Rose attended the search and was advised that he had not, and further inquired as to how Mr. Rose knew about all of these violations that he was representing existed.

Mr. Rose advised that through FOIL requests he reviewed the public records on file.

Mr. Krellenstein advised that he had three basic problems with this appeal; Mr. Rose is asking that this Board reverse a non-determination and did not believe that this Board had the authority to do this. The application is bereft of significant facts, it is not clear what Mr. Rose is asking this Board to do. He further stated that a determination by the building inspector on this matter occurred more than 60 days ago.

Mr. Rose referred to the bound book of exhibits received by the Zoning Board office on October 7, 2016 and directed the Board’s attention to the large building on the left and stated that this building was one of three things, a pre-existing non-conforming building, an accessory apartment under the Town’s accessory apartment law or completely illegal. Mr. Rose displayed an aerial photo labeled 1947 Mr. Sirignano provided the Building Department proving that this building existed in that time period. Mr. Rose took issue with this photograph and referred to what was represented as the building in question and the main residence as blurry blobs.

Mr. Rose continued to review the bound book of exhibits and directed the Board’s attention to three site plan drawings from the Planning Board’s application. He took issue with several notes on the plans, and took special note that the description of the accessory building referred to a singular apartment. The third plan highlighted that the total gross floor area of a 2-bedroom accessory apartment is 1478 s.f. Mr. Rose highlighted page three of the December 10, 2015 correspondence from Cuddy & Feder to the Planning Board wherein it stated “the Applicants previously provided the Planning Board with a copy of the Certificate of Occupancy #4-40, for “Garage and Help Quarters”, dated November 6, 1940” and stated that again this only referred to one apartment. Mr. Rose then directed the Board’s attention to the inspection report of Mr. Barrett dated August 23, 2016 wherein it refers to two apartments on lot 9. It was his belief that not only were these apartments illegal, but the entire building is illegal as well.

Mr. Rendo was of the opinion that based on what had been presented that there was nothing that this Board could do.

Leonard Spielberg, stated that he is Mr. Rose’s personal attorney and had kept current on this scenario. The point made by Mr. Rendo was insightful, but he was not sure it was valid. This Board is the last bastion of enforcement. This Board was here to address issues that were put on their plate. He suggested that this Board had an ethical prerogative to look into something that was not right and at minimum look further into this.

Mr. Rose believed that the genesis of this building could easily be found in the records of the Town’s Assessor. Mr. Rose directed the Board’s attention to the Assessor’s card labeled Lot 9 from the 1960’s and noted the three separate small structures labeled chickens, and kennels with no mention of an apartment or any Board of Health approved septic system. He questioned how there could have been a garage and help quarters building in the 1940’s as represented, it did not make sense. He displayed the Assessor’s property card for Lot 9 labeled 1972, which now shows these three small buildings had mysteriously change into a large “L” shaped building with one bedroom and bathroom. It was his belief and opinion that this building was not pre-existing non-conforming, but was constructed sometime between 1960 and 1972 and is illegal.

Mr. Krellenstein questioned why an appeal was not filed after the Building Inspector’s determination of August 20, 2015 that this was an existing nonconforming use and Mr. Rose advised that he was not aware of this determination. Mr. Rose further stated that he was unaware that Mr. Sirignano and Mr. Palmer would show the Planning Board a CO for the other lot, Lot 29. As proof that the applicant was aware for the need of building permits and certificate of occupancies, Mr. Rose directed the Board’s attention to the building permit and certificate of occupancy applications filed for the swimming pool on lot 9 in 1963. He then referred to the Building permit and certificate of occupancy for garage and help quarters in 1940 on Lot 29.

Mr. Krellenstein questioned whether the petitioner had an obligation to file an appeal within 62 days of the determination and Mr. Spielberg stated that the 62 day period of limitation did not apply to what occurred in August 2015 because there is a question whether a non-action is something that can be appealed. What is put before this Board is a cry for help, it is not a statutory action.

Given Mr. Rose’s intimate involvement with this project, Mr. Krellenstein could not accept the argument that Mr. Rose did not know within 62 days that the August, 2015 determination of the Building Inspector occurred. Further, the Code only allows the Zoning Board of Appeals to take an action on a determination, not a non-action.

Mr. Rose advised that this was months of research, multiple FOIL requests, hundreds of pages of documents with a continual refinement of what he found. The documentation was not found in the Planning Board files, but was found in the Assessor’s records. He noted that he had asked Peter DeLucia for the Health Department records, but he never received them. The Building Inspector was snowed by the property owner. The Planning Board included Mr. Barrett’s memo into their resolution and referred to the Certificate of Occupancy from 1940 for Lot 29. Mr. Rose noted that the Town’s Planning Consultant asked the same questions he did in 2010 and referred to the Kellard Sessions memo dated May 21, 2010.

Referring to the page labeled 2016 LexisNexis, Mr. Rose advised that Taylor Palmer, the attorney representing the property owner and who represented that there was only one apartment in the building lived in this very building most of his life.

Mr. Rose referred to a photograph of Lot 29 depicting the main residence and a second building, the building he believed to be the garage and help quarters reflected on the Certificate of Occupancy issued in 1940.

Mr. Rose referred to the 1961 Town of Lewisboro Zoning Ordinance restricting the use of help quarters and prohibiting them from being rented. Nowhere does the Town Code allow anyone to rent out both the main residence and the accessory structure at the same time. Since both of these buildings on Lot 29 have been rented out for years, Mr. Rose believed this would be considered a change of use, requiring this matter to be heard by the Zoning Board of Appeals. The Building Inspector found all of this and did nothing. He also believed that it was highly unlikely that the help would have been given a four bedroom, two bath residence in the 1940’s. He believed that Mr. Barrett should have issued a violation for the change of use of the four bedroom accessory building on Lot 29, and a violation for the renting of the main house on Lot 29. In addition, he found two apartments in a building which had been referred to as having one apartment. He believed that this was inappropriate and everyone that follows the rules rely on the Town to enforce the rules.

Taylor Palmer noted that his firm, Cuddy & Feder, LLP, representing Jocelyn Hayes, submitted correspondence dated October 25, 2016 regarding an incomplete application submitted to this Board in response to a non-determination filed by Mr. Rose. He indicated that this correspondence went through the various arguments and case law as to why a non-determination cannot be challenged. He further advised that this matter is time barred as there had been a determination made by the Building Inspector on August 31, 2015 specific to this issue. Mr. Palmer briefly reviewed the subdivision process that the applicant had undergone through the Planning Board. At the direction of the Planning Board, the applicant’s attorneys obtained a copy of the Certificate of Occupancy for the garage and help quarters from the Building Inspector, Peter Barrett as well as his August, 2015 written determination advising that this was an existing non-conforming use and was included in their submission to the Planning Board. Mr. Palmer advised that Mr. Rose’s attorney had copies of this determination. When asked by Mr. Rendo whether there was some confusion as to which lot this Certificate of Occupancy belonged to, Mr. Palmer advised that Building Inspector’s determination was for all of the lots that were the subject of the Planning Board application which was ultimately approved and challenged by Mr. Rose. Mr. Rose never challenged this determination in his Article 78 filed against the Planning Board’s approving resolution.

Mr. Palmer reviewed the legal issues as to the authority of this Board. While the application filed to this Board was incomplete, it does not go to the issue that this Board has the authority to review. Mr. Rose presented a series of images and documents all of which were presented to the Planning Board during the subdivision review. The Planning Board held the public hearing open for several months in order to address all comments and concerns. He advised that the Planning Board instructed the applicant to provide information from the Building Inspector with respect to the pre-existing non-conforming uses as described in Mr. Johannessen’ s memo dated May 21, 2010. Ultimately, the Planning Board made their decision based on of all the facts presented, including the presentation made this evening.

In response to a question of Mr. Rendo, Mr. Rose advised that he had added to the original presentation made to the Planning Board because it had never occurred to him to FOIL the records from Lot 29. In those records he found the building permit and certificate of occupancy for the garage and help quarters that had nothing to do with Lot 9.

Mr. Palmer noted that multiple copies of the Certificate of Occupancy Mr. Rose referenced were in fact submitted several times during the Planning Board review. He noted that his October 25th correspondence submitted for this hearing listed the dates these documents were provided as well as the Building Inspector’s determination. These documents were even referenced by Mr. Rose’s counsel in their response letters. Mr. Rose stated that he was unaware of these documents, but he was represented by counsel during these proceedings and he was most certainly aware of those comments during the public hearing.

With respect to this Board’s jurisdiction to hear this matter, Mr. Palmer noted that the application submitted to this Board by Mr. Rose did not satisfy the requirements in Section 220-74E(1) of the Town’s Zoning Ordinance. In addition, Mr. Rose’s appeal does not challenge Mr. Barrett’s issuance of the Violation Notice, or the determination made in August 2015 he is challenging the report as the result of an inspection warrant issued by the Town Board. Mr. Palmer believed that the only reason why Mr. Rose sought this inspection warrant from the Town Board was that he knew or was advised by his counsel that this matter was time barred and that he failed to exhaust his administrative remedies in 2015. He sought the administrative warrant from the Town Board to find additional mechanisms to try to bring up an old claim. He then filed an Article 78 petition against the Hayes subdivision approval, which was dismissed by the Court including these arguments. The only determination made by Mr. Barrett during the August 23, 2016 warrant inspection was for a pool fence that was not up to code, which has since been fixed. The application is seeking to make a determination that the Building Inspector did not make or extend a statute of limitations because he was previously time barred from the Building Inspector’s prior determination. The applicant is seeking that the ZBA make a determination on the absence of a Building Inspector’s determination following his inspection as a result of an administrative warrant not an actual determination. As an appellate body the Zoning Board of Appeals can only review actual determinations that have been made and referred to cases cited in his October 25, 2016 correspondence to the Board.

Mr. Krellenstein observed that it was Mr. Rose’s contention that the time bar is suspect because it is based on fraudulent documents. He then stated that it is still time barred because he had 60 days to act on this.

Mr. Spielberg asked the Board for additional time to make a submission if they were going to solely consider the time bar. He added that he had thought that this Board had the prerogative to take this issue up.

Mr. Krellenstein asked for clarification as to who filed the appeal and what determination was being appealed. He further questioned why Mr. Rose or his counselors did not think to address the time bar given that it is the center piece of Mr. Palmer’s argument.

John Phelan, Esq. of Harris Beach advised that they are still within the time limit to appeal the Article 78, and they would be appealing it. The resolution is not without a further appeal, they clearly made arguments as to why the subdivision should not have been approved. The paperwork submitted by Cuddy & Feder was only received yesterday and he believed that they should have time to address the issues brought up.

Mr. Krellenstein questioned Mr. Rose’s counsel whether it was really their position that the time bar never occurred them.

Mr. Phelan stated that clearly there are two different Certificate of Occupancies that are being discussed. They are asking the opportunity to address this. There are clearly non-conforming properties since potentially the 1970’s and there are property taxes that should have been correctly paid on them. This Board is setting a precedent for rubber stamping something they do have knowledge about that is incorrect and not being disputed by instead being argued about as being time barred. This is here on the basis of an appeal of an administrative warrant.

Mr. Rose believed that it was within the purview of the ZBA to overrule the results of the Building Inspector’s findings on the administrative warrant. He stated that Mr. Palmer has never once said why the Planning Board’s papers referred to one apartment when there were two. It was his opinion that the architects were intentionally misleading. He believed that once the Building Inspector went on an administrative search warrant that this would be the end of the Hayes family illegal housing units and the Town would take action. What the Building Inspector found was minor violations and never noticed that there were five dwelling units on two lots without the proper Certificate of Occupancies without proper septic approvals. The Building Inspector never noticed that the main house was rented as well as the accessory dwelling and never noticed the change of use from garage and help quarters to massive rental building.

Chairman Price advised that what was stated was not the way it is. These residences were non-conforming and built in the late 1930’s or 1940. The Certificate of Occupancy states help quarters and does not specify the number of bedrooms or apartments. This has been this way for 70 years. Neither the Town Board nor this Board are going tell the Building Inspector to find things wrong. He further stated that they could not impose today’s codes on something that was built in the 70 years ago.

Mr. Rose insisted that the building was constructed sometime between 1960 and 1970 and believed that the Town’s Assessor records proved his point. The chicken coop in the 1960 records turned into a giant building by the 1970’s.

Mr. Barrett advised that the only question he was asked prior to making a determination was whether or not the garage with help quarters constituted an accessory apartment. The accessory apartment law went into effect in 1982 and these buildings were built way before that. It was his opinion that it was not an accessory apartment, but an existing non-conforming use.

In response to a question of Mr. Krellenstein, Mr. Rose agreed that the there was no question that the accessory building on Lot 29 was a non-conforming, pre-existing use.

Mr. Casper questioned whether what Mr. Barrett was referring to was on Lot 9 or 29.

Mr. Barrett explained that this is where the confusion is. There are four Certificate of Occupancies; two residences on Lot 29 have their own C.O’s. No one has challenged this. There are two other C.O.’s, one for the main residence and one for the garage and help quarters, these both said Lot 29. In checking with the Assessor it is their belief that was in error, those buildings were never on Lot 29, but they are on Lot 9. The determination in 2015 was based on the question whether this use constitutes an accessory apartment and his response was no, it pre-dated the accessory apartment law, was an existing, non-conforming use on Lot 9.

Mr. Rose’s position was that the two C.O.’s Mr. Barrett attributed to Lot 9 were in fact for Lot 29 and that there had been a change of use because the in the 1960’s code the garage and help quarters had a specific intent, to be utilized by family and employees and could not be rented out. The current code does not permit both units to be rented. If the inspector is saying that this is existing non-conforming, Mr. Rose conceded he lost that argument on Lot 29.

Mr. Casper questioned whether the Assessor should attend a meeting. In addition, there is a question of whether the use can exist and asked the Board whether they believed they should adjourn the meeting this evening. Mr. Palmer suggested that since he had provided the case law indicating that it was outside of this Board’s purview to consider a non-determination that it would be a waste of the Town’s time and resources.

Mr. Rose advised that this is the first time that he had heard that Mr. Barrett believed that the C.O. incorrectly identified the garage and help quarters as being located on Lot 29.

Mr. Molé noted that the Board clearly identified several times that there were two preliminary questions; was this matter time barred and secondary, if it is not, whether it is within this Board’s purview to review a non-action by the Building Inspector. It appears that this Board is being asked to determine whether there were existing violations on this property that were not issued by the Building Inspector. Under the law there are other avenues for someone when they feel that there are violations that are not being addressed by the Town, it is not for this Board.

Mr. Price made a motion to deny the application on the grounds that all of these buildings were existing non-conforming. He further stated that this Board would not make a determination that the Building Inspector did not find something wrong, when this Board does not know what is there.

Mr. Casper stated that the only problem is that there are C.O.’s and believed that if they voted that they were all existing non-conforming this Board may impact the C.O.’s. Procedurally this is not the right time to be in front of this Board.

Mr. Krellenstein questioned whether it was the applicant’s contention that the determination was based on the wrong Certificate of Occupancy, and was told this was correct. And questioned why the applicant did not find this out within 60 days.

Mr. Rose stated that he did not know because it never occurred to them to file a FOIL request for Lot 29.

Mr. Palmer did not believe that this was a valid argument because one of the issues Mr. Rose had with the subdivision approval was that Lots 29 and 56 should have been included in the subdivision. He reiterated that his counsel was aware of the Building Inspector’s determination, it was readily available in the Planning Board’s files and was referenced in his petition to the Supreme Court in December.

Mr. Casper noted that it appeared that there is a question regarding whether the C.O. was issued with the right lot number. He was not sure whether this matter is time barred, but believed that there were other facts to be decided probably by a court and believed this application is not properly before this Board.

Mr. Molé stated that the appeal before the Board this evening was not about the Building Inspector’s 2015 determination, but rather about the recent action or non-action of the Building Inspector in 2016.

Addressing Chairman Price’s statement that they did not really know what existed on the property, Mr. Rose stated that the Town Board approved the administrative search warrant because he had maintained that the Planning Board’s decision was based on fictitious and misrepresented documentation. The search was done and the Town now has six pages of notes from Mr. Barrett who found no violations. Therefore, they were within the 60 day period and are appealing his decision.

Mr. Krellenstein questioned whether it was true that the ZBA could not overturn a non-violation?

Mr. Spielberg stated that the Building Inspector did do something. He performed an inspection and issued a minor violation. This is what is being appealed, the applicant is saying what the Building Inspector did was wrong. It was right, but he should have done more. Mr. Spielberg stated that it is not a non-action, he did something.

In response to a question of Mr. Casper as to whether neighbors could appeal the fact that a Building Inspector did not violate a building with clear violations, Mr. Molé, stated that they could, but not to the ZBA. He further advised that the courts were very clear that the Zoning Board of Appeals, Planning Board and Town Board are not the enforcement arm of the Town. The only action this Board can take action on is an affirmative statement of the Building Inspector.

Mr. Phelan stated that their position was that the building does not have a Certificate of Occupancy and it didn’t and the Building Inspector did not violate the whole property.

Mr. Krellenstein stated that it seemed to be the applicant’s position that this Board should be ordering this Building Inspector to take an action, which is beyond this Board’s purview. There was some action, the Building Inspector inspected the property and made some determinations, but it appears that the applicant is saying that he should be directed to issue violations; that’s the Supreme Court, a mandamus, not this Board. Mr. Krellenstein further stated that Mr. Palmer cites the cases, and that he read them, that is what they say. The applicant has not cited any cases. In response to Mr. Phelan’s contention that they only received Mr. Palmer’s correspondence the day before, Mr. Krellenstein advised that everybody was given the documentation and everyone in the room who is counsel is aware of what this case is about. Although not unsympathetic to the argument, this Board does not have the authority to tell the Building Inspector to go back out and count the bedrooms again. He stated that he had a different view on the statute of limitations grounds, but the applicant has said that this was about the last determination and on that basis alone he would have to deny the application.

Mr. Krellenstein moved to deny the appeal based on the fact that the ZBA does not have the authority to direct the Building Inspector to find a violation and that the Building Inspector made a determination that is not within the ZBA’s purview to overturn. The motion was seconded by Mr. Rendo. To Deny: Mr. Krellenstein, Mr. Rendo, Chairman Price, Mrs. Mandelker and Mr. Casper.

# CAL. NO. 29-16-BZ

## **Application of James Herzog, 18 Woodway, South Salem, New York (Peter & Annette McGuinness, 17 Schoolhouse Road, Waccabuc, New York, owners of record) for a [1] a variance of Article IV § 220-23E and [2] Article IV § 220-23D(11) of the Zoning Ordinance in the matter of the as-built demolition and reconstruction of an accessory building that is closer to the side property line (16’ existing where 50’ is required) and that is over 600 square feet in total floor area (949 square feet existing) in an R-4A, Four Acre Residential District.**

## **The property is located on the north side of (#17) Schoolhouse Road, designated on the Tax Map as Sheet 22, Block 10802, Lot 35, in an R-4A, Four-Acre Residential District.**

Annette McGuinness was present with Michael Sirignano, Esq.

When asked whether there were any objections to the notice of public hearing, Mr. Sirignano advised that the applicant was amending the application and did not need relief from Section 220-23D(11) as the garage that was rebuilt on the foundation of the previous garage was under 600 s.f. in floor area. The applicant was lowering the ceiling on the second floor below seven feet. The second story would be used for storage only.

Chairman Price advised that the two buildings are now attached and therefore the building would be over 600 s.f.

Mr. Sirignano stated that although the two buildings abut, they are separate structures.

Chairman Price advised that the Building Department did not share that opinion.

Mr. Sirignano advised that the shed predated the old garage by about 25 years and had a separate foundation. Adding the two together would take them to 732 s.f. He stated that he would like to stay with 471 s.f. for the garage, which is the exact duplication of what is there based on a prior side yard setback variance, but if the Building Inspector determines that the shed is part of this structure then they would come back.

Chairman Price advised that he had spoken with the Building Inspector but did not get it in writing.

Mr. Sirignano reviewed the prior variance which stated that there was no impact and that the proposed site was the only practical place to construct the garage. He asked that they proceed with the application as amended for the 471 s.f. garage.

Mr. Casper stated that if the Chairman states that this is the Building Inspector’s determination, then it must be. You don’t need to walk between two buildings to make it one building. If these are attached and one building, it didn’t matter but he would like to know what this Board is approving.

Mr. Sirignano stated that he was working in the dark because he has nothing in writing from the Building Inspector that these are considered one building.

Should they determine that it is one building, Mr. Sirignano stated that the amended application should be 724 s.f. Mr. Sirignano stated that the drawings clearly show that they are two separate buildings.

Chairman Price advised that is not how they are built; they are attached. The Board should approve as one building so that the applicant would not have to come back.

It was determined that the amended size of the building is 732 s.f.

Barry Mishkin, 11 Schoolhouse Road was present and advised that the rebuilt barn was in keeping with the Town’s character. The October 19, 2016 letter of support signed by Barry L. Mishkin and Mary Pat Mishkin is a part of the record.

The location of the garage that was replaced by this new structure was previously granted a variance in 1989.

On a motion made by Mr. Casper the application now amended for a 732 square foot accessory building sixteen feet from the property line was approved for the following reasons:

* There is no undesirable change to the character of the neighborhood or detriment to nearby properties.
* There is no practical alternative to the variance requested.
* Although the area variance may seem substantial according to the code, the ZBA previously granted a variance allowing the garage to be constructed 16 feet from the side property line.
* There will not be an adverse effect or impact on the physical or environmental condition of the neighborhood.
* The difficulty was not self-created.

The motion was seconded by Mr. Rendo. To Approve: Mr. Rendo, Chairman Price and Mr. Casper. To Deny: None. Abstain: Mr. Krellenstein & Mrs. Mandelker.

**Cal. No. 30-16-BZ**

**Application Laurel Ridge Development, Inc. [Smith Ridge Housing, LLC, 450 Oakridge Drive, South Salem, NY, owner of record] seeking a variance of Article IV, Section 220-26B (1) in the matter of the proposed increase of density increasing the number of bedrooms from two to three in the remaining 18 units not yet under construction in Phases Two & Three. The Planning Board site plan approval granted 23 Density Units and the applicant is now proposing 26 Density Units.**

**The Property is located within the Oakridge Complex and designated on Tax Map of the Town of Lewisboro as Sheet 49L, Block 9830, Lots 307-314 and Sheet 49M, Block 9830, Lots 315-324 in an RMF Residential Multi-Family District.**

Phil Pine was present with Michael Sirignano, Esq.

There were no objections to the notice of public as published in the local newspaper.

The site plan depicting the units that have been built and to be built was displayed. Mr. Sirignano advised that Buildings 5 through 11 are the affected units where they are looking to convert from two to three bedroom units.

Mr. Pine explained that they are looking to build [2] three-bedroom model units, unit 298 in Building 5 and unit 305 in Building 6. Units 309 and 310 in Building 7 would remain two bedroom units. The remaining sixteen units in Building 7 through 11 would be three bedroom units. The square footage will not be changed. The only change will be the egress windows.

Mr. Sirignano advised that this same site was approved as Phase IV of the Oakridge complex for 106 units in 1987; this recent approval approved 46 units. There were 45 density units in the original approval.

Mr. Sirignano noted that this request would still need the approval of the Planning Board should this Board grant them the relief requested who have requested the sign off from the water and sewer district. The practical difficulty is that the pre-construction sales have slowed down because potential purchasers are looking for three-bedroom units. They do not anticipate any real impact to the schools or traffic. Most of the prospective purchasers are down-sizing from their larger homes but still want the extra space for guests. They believe that this project is critical to the economic wellbeing of the area.

Mr. Casper moved to approve the application as presented for the following reasons:

* There is no undesirable change to the character of the neighborhood or detriment to nearby properties.
* There is no practical alternative to the variance requested.
* The variance being requested is not substantial.
* There will not be an adverse effect or impact on the physical or environmental condition of the neighborhood.
* The difficulty was not self-created.

The motion was seconded by Mr. Rendo. To Approve: Mr. Rendo, Chairman Price, Mrs. Mandelker and Mr. Casper. To Deny: None. Abstain: Mr. Krellenstein.

Mr. Krellenstein moved to adjourn the meeting at 10:12 P.M. The motion was seconded by Mrs. Mandelker; In Favor: Mr. Krellenstein, Mr. Rendo, Chairman Price, Mrs. Mandelker and Mr. Casper.

Respectfully submitted,

Aimee M. Hodges

Secretary, Zoning Board of Appeals