

**ZONING BOARD OF APPEALS  
TOWN OF LEWISBORO  
MINUTES**

Minutes of the Meeting held by the Zoning Board of Appeals on Wednesday, October 24, 2018 at 7:30 P.M., at the Town of Lewisboro Offices, 79 Bouton Road, South Salem, New York.

Board Members:

Present: Robin Price, Jr. Chairman  
Thomas Casper  
Todd Rendo  
Jason Krellenstein  
Carolyn Mandelker

Also Present:

Ciorsdan Conran,  
Substitute Secretary  
Joseph Angiello,  
Building Inspector

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The Meeting was called to order at 7:33 P.M. Chairman Price introduced the members of the Board and noted the emergency exits. (The next ZBA meeting is scheduled for Wednesday, November 28, 2018 with a site walk scheduled for Saturday, November 17th.)

**I. Review and adoption of the Minutes of September 26, 2018**

Mr. Krellenstein moved to adopt the minutes of September 26, 2018. The motion was seconded by Mr. Todd Rendo; To approve: All in favor.

Agenda was taken out of order due to applicants not yet being present.

**II. PUBLIC HEARINGS**

**CAL. NO. 20-18-BZ**

**Application of Mark & Nicole Kirby, 233 Elmwood Road, South Salem, New York, for a variance of the Zoning Ordinance in the matter of a proposed fire pit that will have a side yard setback of 29'4" whereas 40' is required per Article IV, Section 220-23E of the Town of Lewisboro Code and a proposed gas grill that will have a side yard setback of 38' whereas 40' is required per Article IV, Section 220-23E of the Town of Lewisboro Code in an SCR-2A, Special Character Two Acre Residential District.**

**The property is located on the easterly side of (#233) Elmwood Road, designated on the Tax Map as Sheet 49C, Block 9834, Lot 131, in an SCR-2A, Special Character Two Acre Residential District consisting of approximately 2.038 acres.**

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

The Chairman identified the applicant Mr. Kirby as being present and asked if the Board had seen the site; all stated they had. Mr. Kirby was asked for background on the situation, with the Chairman explaining that he understood the fire pit and grill were already built but that the notice said the project was proposed. Mr. Kirby explained that he went to the architectural review board and had been trying to do the project on a budget; he was advised to get an engineer, who then went through all the steps to the approval process with Jan Johannessen. He explained that the engineer assumed that the proposed paver layout that was approved by Mr. Johannessen, so it would allow him to do what he was proposing. When Paraco Gas arrived at the site and sought permission to connect the pool heater, Mr. Kirby advised them to call the Building Inspector, Joe Angiello, as the work order was for a grill, firepit as well as the pool heater. Mr. Angiello advised he did not see the remainder on the engineering drawings. Mr. Kirby stated he did not realize that putting in the permanent structure was not a permitted structure and therefore was in violation of the Town Code. Mr. Kirby then said he agreed to stop the project, to go through proper procedure and follow Mr. Angiello's instructions, which brought him to where he is now.

Mr. Krellenstein asked whether Mr. Kirby had spoken to his neighbors about the project. Mr. Kirby advised he had spoken to Mr. Krellenstein, referring to Board member Krellenstein's father and Mr. Kirby's neighbor. Mr. Kirby advised that the senior Mr. Krellenstein expressed he was happy for Mr. Kirby, who was at the house only once or twice a month; he advised he had a good relationship the senior Mr. Krellenstein, who he said expressed hoped Mr. Kirby could come to the house more. Board member Krellenstein asked whether Mr. Kirby had spoken to the senior Mr. Krellenstein about the fire pit and gas grill. Mr. Kirby said he had not specifically talked about the pool or anything. Board member Krellenstein clarified his question by asking whether Mr. Kirby had asked his neighbors specifically about the setback encroachment or putting the firepit near the property line. Mr. Kirby replied that no, he had not.

Ms. Mandelker queried about Mr. Kirby's statement that he halted construction on the grill and firepit but the visit showed her that they were already built. Mr. Kirby advised that the countertop was not yet installed, and the gas is not connected to the site itself; the firepit only has glue and bricks on site. Ms. Mandelker asked whether the engineer or anyone else looked at the site plan to figure out that either of the structures was too close to the side yard setback. Mr. Kirby asked the engineer, who he paid for new drawings, if this was known to the Town because of the pictures he had presented, that is, the fire pit and grill were there, why it was not on the first drawing that was submitted. Mr. Kirby said the engineer said that it was very rare to put a firepit and grill on a proposed plan that was already approved, particularly in light of the process they had gone through with Mr. Johannessen to get the approval. Mr. Kirby said his engineer had not worked in Lewisboro before so maybe that is why he didn't know.

Mr. Krellenstein asked if the plans that were approved do not show the firepit or the grill. Mr. Kirby said that was correct.

Mr. Casper asked if there was a structure, aside from the pool, that was an actual structure. Mr. Angiello responded that the pool was a structure; the pavers are not. He continued that a concrete structure poured in place is a structure that needs to be in the setback; anything sitting on top that is permanent, like the gas grill and firepit, are structures that need to be in the setback. Other municipalities might have a different setback for accessory structures, but Lewisboro does not. Mr. Casper asked if it's a two-foot variance. Mr. Krellenstein read the definition of structure; he pointed out

that the definition does not require anything to be fixed to the ground. Mr. Angiello said that historically speaking there are two exceptions: for example, a patio with stone pavers in stone dust is not a structure; he said you could argue that it was a structure but that's the way it's always been and Lewisboro continues to let people do that. Also, underground LP tanks are allowed closer than the setbacks, historically, because it allows people to put a tank where they otherwise don't have room; these are not held to the Zoning requirement but they still have to maintain the NFPA clearance of 10 feet, which is a State Code issue.

Mr. Krellenstein said that in viewing the pool it defies common sense to say the pool is not a structure because it is not pinned down, but the definition seems to suggest it is a structure. Also troubling to him is that they are still talking about an approximate location of the property line as per survey. While there is a two-foot variance for a gas grill, it is premised on the idea that the location is based on some modicum of accuracy; Mr. Krellenstein queried how approximate it is. Mr. Kirby said it's more than 40 feet, which he knew because he measured it. Mr. Krellenstein asked whether Mr. Kirby knew where his property line was, to which Mr. Kirby responded he did. Mr. Krellenstein asked why Mr. Kirby's engineer did not know where the property line is. Mr. Price asked whether a survey from a licensed surveyor is required. Mr. Angiello stated that what is taken in the beginning is the engineer stating what it is; and in the end, they'll have to prove it, with an as-built survey showing the variance was met. He added that updated survey is not required to apply for the variance; what is required is that an accurate dimension be given that will be proven by the as-built survey. Mr. Angiello advised that he did not start the application; the permit was issued by the former Assistant Building Inspector. He said that the pool was always considered a structure and is within the setback; the patio is the question.

Mr. Krellenstein stated that he had been advised by counsel that because his parents are the applicants' neighbors and because he'd be inclined to vote no, he should not vote because that would not be fair to the applicant. Mr. Krellenstein then noted that as a citizen, it was incumbent upon him to make some points. He stated he is not a fan of as-builts. Mr. Kirby stated he did not try to hide anything and can prove he gave beforehand what the plans were. Mr. Krellenstein said he was not suggesting that Mr. Kirby did anything devious, but said that he thought Mr. Kirby said that the initial plans that were submitted don't show the two additional structures on them. Mr. Kirby said he did not question what was on the proposal because he had submitted additional pictures. Mr. Angiello stated that something was submitted, but it was not submitted properly; he advised that with pools, he receives a lot of sloppy submissions. He looked through the file and saw a colored rendering but nothing that was part of the engineer's stamp: the drawing was separate, did not say where it was going or include dimensions, and there were no specs on the equipment, so the design professional didn't provide adequate plans. Mr. Krellenstein said he was not saying Mr. Kirby purposely submitted incomplete plans but his professional should have done what he was supposed to do. Mr. Krellenstein noted the initial plans were inadequate but now we have as-built. Mr. Krellenstein continued that the firepit could have been swung out to the south and not impacted the property line at all; it is not an inert structure, as it is a firepit. He continued that Mr. Kirby had alternatives in placement but now the Board is confronted with a structure built too close to the property line, based on an approximate survey, and the applicant does not want to be told to rip it out. Mr. Krellenstein advised that homework should've been done upfront and that the applicants had rational alternatives on placement, which would not impact the neighbors, who aren't happy about it. While Mr. Krellenstein cannot vote, he feels the application should not be approved with respect to the firepit but he will not quibble with the other variance. But Mr. Krellenstein feels the deck is a structure because of the substrate it sits on. The common-sense definition is that it's a structure.

Mr. Casper stated that there is an exception for what's been done for a long time, which is the deck is put on stone so that it is not considered a structure because it has a permeable section. Mr. Krellenstein said the Code doesn't say that; Mr. Casper said but the Code doesn't say it is. Mr. Casper said Mr. Krellenstein's definition of a structure is laying stones on the ground, but that is not Mr. Casper's. Mr. Casper explained that the Board has previously agreed that stones on the ground that are not cemented are not a structure; building inspectors have agreed. Mr. Casper said that the Board has approved such decks before. He continued that the applicant had professionals who did the plans. Mr. Casper said the Building Inspector said the survey has to back things up once it's done, as as-builts are very common. The Building Inspector explained that what the applicant gets back is only the approved plans; the firepit and cooking area were not on the plans, so the contractor should have questioned it. Regarding what is in the Code book, Mr. Angiello said that in the three municipalities, he worked, it's the same.

Mr. Krellenstein is not disputing whether or not the applicant is entitled to have the pool where it is but is asking if the contractor erred, whose burden is it, and, if it had not been built, it could have suggested where to put it, but now that it is built and will cost money to rip it out, that is not the Board's burden. Per Mr. Krellenstein, the Code says if there are reasonable alternatives, they should be considered, and alternatives are present.

Mr. Angiello said the deal at the beginning was that Mr. Kirby was to place gas lines and leave them capped off but it would be at Mr. Kirby's risk. No construction was to be done until a variance for the firepit was granted. Mr. Angiello stated it was an attempt to help out the homeowner. Mr. Krellenstein said that a variance is needed to do the work. Mr. Angiello said that the applicant already had approval to complete the pool deck and was laying it; now they wanted to put in the fire pit and gas grill but they didn't comply. Mr. Angiello continued that the applicant wanted to finish the pool deck and advised Mr. Angiello that the gas company was present on site. Mr. Angiello said that he told the applicant that, at the applicant's own risk, he could put the gas lines underground and cap them until the variance is approved. Mr. Casper asked if gas lines were a structure; Mr. Angiello said no.

Ms. Mandelker stated that the Building Inspector told the applicant to get a variance but went ahead and built it anyway. Mr. Kirby disagreed with Mr. Angiello by stating that Mr. Angiello explained the risk, but that he was led to believe, and it was his interpretation, that by putting the lines to the locations, he was being given approval. Mr. Angiello disagreed. Mr. Angiello said that Mr. Kirby called and said he was ready to hook up the gas lines, and Mr. Angiello told him he could not. Mr. Casper questioned why Mr. Johannessen was involved; Mr. Angiello responded that it was for the site work because there was a lot of excavation because a pool was being built. Mr. Casper thought it was for wetlands.

Ms. Mandelker said approximate site lines concerned her because the measurements might be inaccurate. Mr. Casper said it needed to be accurate when finished; when constructed, they are often not put in the correct place. He continued that this is the same situation near the country club, where the applicant was made to tear up the project. Mr. Casper stated the applicant has to comply with what he asked for.

Mr. Angiello tried to remedy this situation but he needs an exact dimension. Mr. Angiello reviewed the plan and it states 29'4" and 38 feet, for the grill and firepit, respectively, which is not an estimate.

Mr. Price stated he saw an approximate location, but there should be a survey with an exact location and the property should've been staked before started. He continued that the pool is exactly or a few inches within setback, not over the setback line. This should be known before construction is done. The

Board does not have a plan showing that it is correct; they do not have a survey. Mr. Kirby said he handed in many surveys. Mr. Price said no survey was done for the new pool; the Board will need it. Mr. Angiello said that if something is close to the line, the applicant would be asked for a survey before framing is started. Mr. Price said they would let the survey and location of the pool slide for now, but it will be needed and applicant knows that. He continued that as for firepit and gas grill, it is apparent that the applicant knew he needed a variance before it was built. Applicant denied this. Mr. Price doesn't know why the contractor wasn't present saying it was their mistake, but if the applicant directed them to put it in anyhow, it is the applicant's problem. Regardless, stated Mr. Price, the applicant had ample opportunity to put the firepit and grill outside setbacks; for the Board to give the applicant a variance is out of the question with all the alternatives applicant had in order to stay outside the setback. Mr. Price said the pool is not in the right place as it's on the property line.

Mr. Kirby said the septic was a problem, but Mr. Price stated the septic was a long way away. Mr. Kirby said the pool is where Mr. Johannessen wanted it to be. Mr. Casper suggested adjourning so that the contractor could be present to give more details. Mr. Casper feels that he is the only one who would approve the variance, and said that the Board has approved many more significant structures that have been standing for years. Mr. Casper feels that Mr. Kirby's professionals need to be present and accountable; he suggests putting it off rather than voting and getting a denial. Ms. Mandelker said the applicant did get a warning from the Building Inspector that he would take a risk doing anything more than what he said but that Mr. Kirby went ahead and built without approval, so he's not totally blameless. Mr. Kirby said it was his interpretation, and he had put in a privacy fence intending the site not to be seen and put in landscape to the best of his ability.

Mr. Rendo said he bases a lot of decision making on neighbors and sees that the applicant installed the privacy fence. He stated that if the applicant does not have a vote tonight, he suggests talking to his neighbors so that everyone is in support. Applicant stated he was surprised as he had talked to a neighbor.

Ms. Mandelker asked about the house that could see the pool. Mr. Kirby thought it was Mary Grogan, and described her as a lovely lady that he doesn't think would object. Mr. Casper suggested the best thing to bring is letters from neighbors. Mr. Krellenstein said he spoke to his father yesterday who did not know anything about the project and is troubled by it. Mr. Krellenstein walked the road and didn't see landscaping or a privacy fence; he could see instead what was happening on the property. Mr. Kirby said Mr. Krellenstein's father did not mention anything to him and had always been mensch to him. Mr. Krellenstein agreed and continued; Mr. Casper stated that he did not believe Mr. Krellenstein should be participating, as while it's good when he stands up for a neighbor, the neighbor to the project is Mr. Krellenstein's father, which puts Mr. Krellenstein in a conflict. Mr. Krellenstein denied being in a conflict. Mr. Casper expressed disappointment in Mr. Krellenstein.

Mr. Casper left the meeting at 8:09 p.m

Mr. Price stated he is not inclined to approve the application for the firepit. He would entertain the grill that is only two feet over. Mr. Price stated that he wanted to make a motion but questioned the number of votes needed, as there were only three members now present. Ms. Conran stated that the Board had to decide whether Mr. Krellenstein was recusing himself, as he had been participating to this point; the answer from the Board was yes, Mr. Krellenstein was recusing himself. Ms. Conran stated she would seek the advice of counsel in regard to the recusal and participation; Mr. Krellenstein stated he was not going to vote but was allowed to give his opinion, in the stead of his father. Mr. Kirby stated he

had a dialogue with Mr. Krellenstein's father; Mr. Krellenstein stated that it was interesting that Mr. Kirby did not discuss the issue with his father. Mr. Kirby stated he bought trees to screen his property; he stated he's been respectful to his neighbor and isn't building a gigantic structure, as it is only 18" high. Mr. Kirby apologized if he had done something wrong but he felt the because the plans went to Mr. Johannessen, then to the engineer, then to the Building Department, he thought the plans were approved and didn't think this was a structure at 18" high. Mr. Kirby stated you cannot see his home due to the landscaping.

Mr. Krellenstein stated that whatever Mr. Kirby says about his father being a lovely man, his father doesn't appreciate it, as he does not want the firepit; Mr. Krellenstein stated his father has the right to object, so Mr. Krellenstein is there doing so on his father's behalf, but is not voting. He is raising objections as he's familiar with the Code.

Ms. Mandelker stated that if Mr. Krellenstein's father does object, the Board needs to see a letter, and she does not believe it has one. Also, Ms. Mandelker stated she visited the site and it is magnificently landscaped and one cannot see the firepit; but in looking at what has occurred, the grill, at a measure of 2 feet, she is not opposed to; she is also not opposed to the firepit as it's low. Ms. Mandelker's problem is that Mr. Kirby was told that he was taking a risk because it was not approved but it was put in anyway. She does not feel it has an environmental or visual impact or impact on the neighbors. But she stated there is a principle involved; she also stated that she would maybe approve half.

Mr. Rendo would like to have the neighbors included so he would want the two closest neighbors contacted. Mr. Rendo said that he tries to support the applicant but the context for him is always about the neighbors. It does not make a difference that it is Mr. Krellenstein's father; what makes a difference is taking the time to explain to the neighbors. He also noted that the plantings are too close together so Mr. Kirby will have to remove some in a few years.

Ms. Mandelker added that Mr. Kirby could invite the neighbors to come see the property to see if they do or don't object.

Mr. Price kept the public hearing open and carried it over one month. Mr. Kirby asked if he could get authorization from the Board to install the countertop; Mr. Price said no. Mr. Kirby asked what if a surveyor finds it's within the 40' setback. Mr. Price said that if it's outside the setback, it would be fine but it's still not on the plans, so the plan needs to be amended. Mr. Price reiterated that part of the project and the firepit is within the 40' setback, and to get relief from that, Mr. Kirby will need to get a variance, as Mr. Kirby knows. Mr. Price said the variance is to be sought before you start. Mr. Price stated that the size of the structure is irrelevant; it is a structure that doesn't meet the Code. Mr. Price's opinion is to take the fire pit out and maybe get by with the grill. He asked Mr. Kirby to think about that, talk to his neighbors and come back next month.

Ms. Mandelker asked Mr. Kirby to encourage the neighbors to take a look at the site, and the neighbors need to communicate to the Board how they feel.

**CAL. NO. 19-18-SP**

**Application of Frank and Elizabeth Cunniffe, 77 Elmwood Road, South Salem, NY 10590 for a renewal of a Special Permit pursuant to Article IV §220-23(A)(6) of the Zoning Ordinance in the matter of the continued operation of a horse training academy [Whipstick Farm].**

**The property is located on the east side of Elmwood Road, designated on the Tax Map as Sheet 44, Block 10057, Lots 3, 4, 98 and 99 in an R-4A, Four-Acre Residential District.**

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

Mr. Price turned the application over to Ms. Mandelker, as Mr. Price had to recuse himself.

Ms. Mandelker asked if the Building Inspector went to the site to see if there were changes; Mr. Angelillo stated he had and that there were no changes to the operation of the property.

No discussion. Mr. Krellenstein moved that the application be approved; Mr. Rendo seconded. Ms. Mandelker, Mr. Rendo and Mr. Krellenstein voted in favor of approving the application; Mr. Price abstained. Mr. Casper was absent.

Mr. Krellenstein moved to adjourn the meeting at 8:23 p.m. The motion was seconded by Mr. Rendo; and the motion was carried.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Mary Hafter". The signature is fluid and cursive, with the first name "Mary" and last name "Hafter" clearly distinguishable.

Mary Hafter  
Substitute Secretary, Zoning Board of Appeals