

Zoning Board of Adjustment

Meeting Minutes March 13, 2023



These minutes were produced first by Office 365's voice-to-text transcription of an audio recording of the meeting. Then, ZBA software was used to drive [Open AI's GPT 3.5](#) model to convert the transcription into grammatical sentences and paragraphs. Words actually spoken are enclosed in quotes.

Mensh Appeal of Administrative Decision

Summary of Proceedings

- The meeting is opened and attendees are listed
- Board approves last meeting minutes
- Board motion to continue using recording of minutes on a trial basis
- Next meeting date moved to March 27th, election of officers postponed until April meeting
- Reminder of nature of administrative decision appeal
- Discussion of jurisdiction and contract law in regards to alleged violation of LUO 503.1 and contract with Select Board
- Legal counsel strongly advises against the Board accepting jurisdiction
- The discussion is about whether or not the ZBA has jurisdiction over a case regarding LUO 503.1
- Swiniarski argues that the case is subject to administrative law, not contract law, and that the certificate of compliance cannot be given out by contract
- Florence disagrees and refers to the agreement signed by the Mensh's, which supersedes everything else
- They discuss whether or not to solicit input from the public on the issue of jurisdiction only
- The public gives their opinion that there is jurisdiction for the ZBA to take the case
- Hatch notes that the agreement between the town and the Mensh's emphasizes its role as primary
- Florence prepared a motion regarding LUO 503.1 and the September 29th agreement violation
- The motion states that the Board does not have jurisdiction to hear the appeal and it should be dismissed
- Carney seconded the motion and all in attendance were in favor
- Swiniarski asked about the decision timeline and DeFosse said within 5 business days
- The meeting was adjourned at 7:28 pm

Detailed Minutes

- Carney** "The meeting is now open at 7:01pm. Board members present are: Gary Carney as chair, Linda Marshall, Andrew Hatch, Mark Florence and recording Secretary Deborah DeFosse. Visitors present attorney Chris Swiniarski, Ali Mensh, Thomas Marshall, and Donald Revane."
- Carney** "Has the Board had a chance to look at last meeting's minutes and, if so, are there any amendments?"
- Florence** "I move to approve the minutes."
- Hatch** "Seconded"
- Carney** "All those in favor?"
- All** "Aye"

Carney "I make a motion that we continue using the recording of minutes and to see how it fares out. Let Debbie make some decisions on which transcription she wants to use. I thought it was a good deal, but again, I'm not doing the transcription on it, so a lot has to do with what Deb thinks of it. So, I make a motion to keep using it for a while, at least on a trial basis."

Hatch "Seconded."

Carney "All those in favor?"

All "Aye"

Carney "Because of a scheduling conflict, the next meeting was supposed to be March 29th at 7:00 PM. Again, because of a scheduling conflict, we're going to have it or I would like to have it March 27th. That is Monday at 7:00 PM. We will have a quorum for that and that's the important thing. Any discussion on that?"

Carney "OK, I make a motion that we have the meeting next time Monday, March 27th. 7 PM 2nd floor"

Marshall "Seconded."

Carney "All those in favor?"

All "Aye"

Carney "Remember, at the next meeting we must elect a chairman and a vice chairman. We must do something according to our Rules of Procedure."

Florence "We will not be able to do that on the 27th."

Carney OK, we cannot do that on because we will not have Andrew here. So, are we saying to push that to the following month?

Florence "I think we could, although the Rules of Procedure say we do it every March, I think we could. I think we could motion that because we can't do it on that date, that we delay it until April."

Carney "OK, so I make a motion that we'll have the election of officers or the chairman on whatever the last, whatever the April meeting is, I don't know exactly what it is. I have a second on that?"

Florence "Seconded."

Carney "All those in favor?"

All "Aye"

Florence I just want to sort out the date of April 26. If we do it ahead of the hearing, it would have exactly the same effect as if we had done it in March. In other words, the conduct of the meeting would be under the new chair. It's just a thought, right? Then the actual effect of delaying it would be as if there were no delay.

Carney "That sounds good. Anything for old business? No, OK. New business?"

Marshall "Tonight, I would like to recuse myself from this appeal."

Carney Okay Before we start, I have a brief statement from the ZBA here. As there are many members of the public present, the Board thought it would be a good idea to briefly explain the nature of this evening's proceedings. If you've attended a ZBA meeting before, or perhaps even sat here as a prior board member, you've most likely observed a variance hearing. That's a hearing where an applicant can petition ZBA for relief from certain provisions of an LUO by meeting all the

requirements of five well-defined criteria. Tonight's hearing is a different, less common function of the ZBA called an appeal from an administrative decision. It occurs when a claim is made, in this case by Mr. and Mrs. Mensh through their attorney, that an administrative officer, in this case the Board of Selectmen, has misinterpreted or misapplied the provisions of an LUO, in this case, LUO 503.1. In an appeal like this, unlike for a variance, the Board does not have latitude to waive or interpret the provisions of the LUO. It must apply the strict letter of the law deferring to its plain English meaning and to any terms it explicitly defines.

Florence "Mr. Swiniarski is that how you say your name? Thank you for being here."

Swiniarski "Thank you."

Florence "Before you present your case, there's something that we'd like to run by you. But before I even say that I want to point out that prior to this meeting, the Board had a consultation with independent legal counsel and that was counsel that we retained separate from the Town Attorney just to advise us on this matter so anything that we say in this discussion that implies a collective action by the Board should be understood as something that arose out of those discussions prior to this meeting."

Swiniarski "Thank you."

Florence What we'd like to run by you is a procedural issue. Rather than the application of LUO 503.1, the alleged violation of the September 29th, 2022 agreement is what is central to this appeal and that the latter is a matter of contract law rather than a subject of the of land use compliance. Because of that, we suggest that we might not have the jurisdiction to hear your appeal. We'd like to get your thoughts on that. We've got some arguments and a little bit of case law to back up that, but we'd like to hear your reaction to it before you present your case.

Swiniarski I think you very much do have jurisdiction because this administrative decision is alleging a violation of a certificate of compliance, but that's the allegation of the order issued by the Board of Selectmen and that jurisdiction squarely with the ZBA. There's nobody else who has that jurisdiction. Now, if it's true what you're saying, that the fine that the Board of Selectmen trying to impose arises under that contract and that is a separate issue that you have these two issues here that are combined, but whether or not there is a violation is squarely within the jurisdiction of the ZBA. The fine on the other hand, maybe not so much, but the determination of whether or not there's a violation can render the imposition of a fine moot. If there's no violation, there's no fine.

Florence What do you think about paragraph three of the agreement? It says in part:

Quote "The parties hereto acknowledge that this agreement constitutes the full, final and complete understanding of the parties and is the sole and entire agreement between them with respect to the subject matter."

Florence It says other things, but that's how it starts. So it's saying that the agreement, that contract that you signed with the Select Board is all that is in front of us. Was it violated? Was it not violated? That has to be determined, but that contract is central to this.

Swiniarski The contract is central to it for sure, I agree with you there. However, interpreting that contract is a matter of your zoning ordinance, because the alleged violation is whether or not dwelling occurred and dwelling is something that is controlled by your zoning ordinance. That is a use under the zoning.

- Florence** I've got some more thoughts, but does anybody else on the Board want to talk a bit more about the issue of dwelling?
- Carney** Are you using it as a noun? Or a verb? And if you're using it as a noun, that's talking about a structure. If you're using it as a verb, you're talking about living in a place.
- Swiniarski** Actually the word when you use it as a verb just means using the noun right. It's occupying a dwelling you're dwelling in.
- Carney** It means you're dwelling in a dwelling?
- Swiniarski** Yes, the dictionary definition of dwelling is to live in or at a certain place, right?
- Florence** I still want to pick on the issue of jurisdiction rather than the merits.
- Florence** As a thought experiment, let's think it through here. What would happen, as a straw man, if the Board accepted jurisdiction? Something by the way that we have been strongly advised by our legal counsel to absolutely not do.
- Swiniarski** I wish you had told me. It would have saved me the drive in the snowstorm. But that's OK.
- Florence** Well the only forum we have for telling you that is this public hearing, right? That's the only forum. The only way that we can talk about whether LUO 503.1 has been correctly applied. We look at the plain meaning the term "well founded," it's not defined in the LUO so we can look at it's plain English meaning. The term "complaint" is not qualified in any way, so we can just look at its plain English meaning. But we can't do anything until the alleged violation has been proven or not proven. So, it's a contract, right? It's a contract between the Mensh's and the Select Board. As such, it's subject to contract law, not administrative law. There are shelves probably of RSAs dealing with contract law and hundreds of years of case law behind it, none of which this ZBA is competent to apply. We're only responsible for looking at tiny sliver of administrative law.
- Swiniarski** But the certificate of compliance is referenced in the agreement, right? It's subordinate to the agreement.
- Florence** Well, understood. So we must look at the agreement first because it's subordinate to the agreement.
- Swiniarski** I don't know that the agreement is actually relevant to this case. Again, other than for how the Board of Selectmen calculated the fines that they purport to assess here you, the agreement that was made was for a certificate of compliance. And that is not a contract thing. Their certificate of compliance cannot be given out by contract in this town or any other town. It can only be given out pursuant to the ordinance.
- Florence** You say in section five of your appeal, in the very last paragraph, you say the claims of the Board of Selectmen arise under the agreement only. I mean, that's your words and we believe them. That sure, the certificate of compliance is referenced in the agreement, but that makes it subordinate to the agreement.
- Swiniarski** I would not agree that it's subordinate. The claims are a violation of the agreement and what they've purported to do is revoke a certificate of compliance. So, if there was no agreement, no agreement at all, the Board of Selectmen are acting as essentially a building inspector or code enforcement

officer. If they take the agreement out, some unnamed people reported some sort of violation, and they revoked a certificate of compliance.

Florence "I don't think we can accept the hypothetical 'if there is no agreement' because there stone cold is an agreement."

Swiniarski "I'm saying I'm doing that to illustrate the fact that the certificate of compliance and the purported revocation of that is the core issue here. And that's not part of the contract. This compliance can't be issued contractually. It's not something anyone can bargain with the Board of Selectmen. Only can be issued after following the ordinance and application procedure. I will wait for you. This is very strange and the way this was set up was done to create the problem we have now. You basically have two forms of law. You have administrative law and contract law. Agreed 100%. I don't agree that one supersedes the other. I think you have both here. Both have to be addressed."

Florence I think our position is again in paragraph three of the agreement that the agreement that your client signed does say it supersedes everything else. It explicitly says that.

Swiniarski No one can sign an agreement that eliminates the law, right? You, and I can't agree that I'm allowed to murder you. You can't give me that permission. It doesn't make it legal.

Florence We're not competent to judge on that. We're not lawyers. We're going to defer to the plain text of that agreement that says that it is a full final and complete understanding between the parties, and supersedes everything else. I think we just have to defer to those words.

Swiniarski "I appreciate you asking for my input. That is my input."

Florence It is the Board's pleasure and decision to do so. Mr. Chair, we've heard from Atty. Swiniarski about his position. We asked him. We heard it. It's a public hearing. We have the public here. Should we also ask the public for their input on this? My reservation is that the only issue before us is jurisdiction. What does the Board think?

Carney "I think we should give them the chance to speak."

Swiniarski "But there is a trick that I would tell you to be careful of. I don't know if you talked to your counsel, but if you cross that line, you're accepting a jurisdiction."

Florence We do not want to discuss the merits of the case here. We just want to see whether any member of the public also has an opinion on jurisdiction.

Swiniarski "OK. Well, I think if you limit it as such."

Florence When once we cross that line, well, obviously we're in trouble. And although we haven't yet voted, once we vote, if we do to reject jurisdiction, then it's game over. We're done then. Over to you, Mr. Chair, if you want to solicit any input, if there is any. Is there any input?

Revane "I'm all set. Probably just here as an observer."

Ali Mensh "I was just trying to understand what you're asking for the public's opinion on again."

Florence "To accept the Jurisdiction only."

Swiniarski "Oh, to accept your input on voting."

- Carney** "Is it your opinion that we had to vote before we solicited the input or vote to accept jurisdiction?"
- Swiniarski** "I hadn't considered that specifically. I don't think you have to vote because you don't have a matter that you're voting on, because you haven't accepted jurisdiction of the case. So right now you are having a discussion at the ZBA level, not on any particular case. I think I don't know. It's a little bit odd."
- Carney** "What is?"
- Swiniarski** "The idea of not yet determining whether or not you will take the case and then taking some input on whether or not you will take the case."
- Florence** Well, we took your input and we took our input. Would a member of the public be qualified to talk about the legality of the jurisdiction?
- Carney** "I'm thinking we should take a vote."
- Florence** "Yes, I'm OK with doing that."
- Carney** "I cannot imagine it would hurt to take a vote."
- Florence** "No, I agree. I just want to make sure what we were voting on, that's all. So it's a good idea."
- Defosse** It's the chairman's jurisdiction. One way or the other, I think you would have to vote.
- Florence** We're open to the public now. So, I make a motion that we should ask any members of the public if they have any input on the issue of jurisdiction, but not merits of the case? We can't talk about that, but whether or not any member of the public feels that we do or do not have jurisdiction.
- Carney** "Seconded. All those in favor in favor?"
- All** "Aye"
- Ali Mensh** Oh, sure. And so, I think that there is jurisdiction. Apologize in advance. As I probably got the words wrong, but I think there is jurisdiction, for you to take the case.
- Carney** "Okay thank you."
- Ali Mensh** I understand that there's contract law and there's administrative law, but they're both laws that do need to be sorted at this point.
- Carney** "Thank you. All right. So given that. Is there any more discussion that we want to have?"
- Hatch** I'd like to note for the record that my colleague has made reference to Section 3 of the statement. Our current discussion, I contend, is further supported by the factual background provided in Section 2 of the same statement. This section outlines an agreement between the town of Washington and Eric and Wendy Mensh, which emphasizes the role of the agreement as primary.
- In my opinion, this interpretation is in line with our current conversation and I am supportive of it.
- Florence** "So with all that in mind, subsequent to our consultation with our attorney and anticipating the point that we're at now, I prepared a draft motion. With permission from the chair, I'll read that."

Carney "OK"

Florence "I move that because the application of LUO 503.1 is a consequence of the alleged violation of the September 29th, 2022, agreement, and because the latter is a contractual dispute not subject to administrative action, then the Board does not have jurisdiction to hear the appeal before us, and it is dismissed."

Carney "I second that. All in favor?"

All "Aye"

Swiniarski "When could I expect that decision?"

DeFosse "Within 5 business days."

Swiniarski "Perfect."

Carney "Meeting adjourned at 7:28 pm"