

**Town of Forestburgh
Zoning Board of Appeals
Minutes
May 23, 2022**

The meeting was called to order at 6:32pm by Chairman Carl Amaditz at the Town Hall, 332 King Road, Forestburgh, New York.

Members Present: Carl Amaditz, Chairman
David Griffin
Hilda Lehr
Edward Pajak
James Steinberg

Attorney: Javid Afzali

Recording Secretary: Billie Jean McGinnis

Notice of this meeting has been provided to the public by posting at the Forestburgh Town Hall, Forestburgh Firehouse, Forestburgh General Store and the Town of Forestburgh website. It has also been published in the Sullivan County Democrat.

Approval of Minutes

Minutes from the April meeting were reviewed.

Motion made by J. Steinberg to approve the minutes. Seconded by Hilda Lehr.
Vote: All in favor.

Lost Lake Holdings, LLC

Chairman Amaditz opened the evidentiary hearing for Lost Lake Holdings, LLC and Rose Improvement. "The purpose of this meeting, tonight's meeting is going to be an evidentiary hearing and a meeting that concerns the appeal for denials of building permit applications. The appeal is by Lost Lake Holdings LLC and Rose Improvement concerning those denials made by Town of Forestburgh Building Inspector. "Mr. Barshov, are you prepared to continue with the evidentiary hearing?"

Steven Barshov of Sive, Paget & Riesel P.C. presented on behalf of the applicant. "I don't know. Nobody has answered my letter of May the 12th. So I have no idea what's going on. I don't know who's going to be here. I don't know what witnesses are going to be produced. I don't know what records have been produced. I haven't been contacted by anybody representing the Town Building Department. So, since my powers, Mr. Chairman, of clairvoyance are not what is supposed to be brought to bear here, but my functioning as an attorney, I would love to be able to function as an attorney and not have to divine what's supposed to happen. I have no idea why it is that I and my clients have been treated so rudely by everybody. Not to get an answer to it, even if you want to tell me to stick it. Just turn around at least and say something. Now I don't know who's behind this, although I suspect I know who is behind it, but it just doesn't matter because my clients are being denied the opportunity to a fair hearing. So, what I've done yet again, since this seems to be my lot in life these days, this time I'll read it into the record. This is the latest letter that I have to issue because of what has not happened."

Chairman Amaditz: "Is this different from the letter that you issued earlier?"

Mr. Barshov: "Yes, Sir, it is."

Chairman Amaditz: "Okay"

Mr. Barshov: "So this memoranda, which is dated today, and I'm hand delivering it to B.J. when I'm finished, memorializes that fact that as of May 23, 2022, the day of the evidentiary hearing before the Forestburgh Zoning Board of Appeals on the Appeal by Lost Lake Holdings LLC and Rose Improvement. I have not received any response to my five-page memorandum of May 12, 2022; no acknowledgement of receipt by any of the sixteen addressees, no records necessary for the Appeal, and no confirmation that the Town will produce any witnesses at the Hearing. The Town's conduct is unconscionable and grossly prejudicial to the Appellants.

"The May 12th memorandum made three points, all of which are critical to a fair hearing and non of which, to this day, have been addressed by the Town.

"The May 12th memorandum explained in great detail how the Appellants had attempted to obtain records necessary to try the Appeal, including requests under the New York State Freedom of Information Law, a request that the ZBA issue subpoenas for the production of necessary records and at the ZBA's recommendation, a request for records from the Town Attorney, Troy Johnstone. As of May 12th, the Town had not provided any of the requested records. I set a deadline of May 17th for the Town to produce records in order to give the Appellants a few days to prepare for the Hearing. The Town did not produce any records by May 17th and still have not as of May 23rd.

"The May 12th memorandum highlighted the Town's musical chairs regarding which attorneys represented which Town body, including what role Javid Afzali would be playing at the Hearing given that he not only is a fact witness but also has at various times represented both the Building Department and the ZBA. Last I heard, Mr. Afzali no longer represented the Building Department. That was indeed confirmed in a letter issued by the ZBA to Mr. Johnstone saying to him, as counsel for the Building Department, he was to provide materials to the Board and the only thing that was submitted was these materials provided by Mr. Gabbard. Yet in an email to a New York Supreme Court justice in a related matter, Mr. Afzali represented that he would be appearing at the Hearing. It is fundamentally unfair to the Appellants and in violation of the professional and ethical responsibilities of the Town's numerous attorneys to obscure who is representing which Town body.

"Finally, the May 12th memorandum identified six Town officials, staff, and consultants retained by the Town that needed to be produced as witnesses and give testimony at the Hearing. I set a deadline of May 17th for the Town to confirm the availability of these witnesses at the Hearing. The Town did not by May 17th provide any confirmation or other statement regarding the availability of witnesses and still has not as of May 23rd

"As I have received no response to the May 12th Memorandum, I reiterate that the Town's willful withholding of records and lack of transparency regarding the Appeal process has deprived Appellants of a fundamentally fair Hearing. The Town, including the recipients of this submission, are intentionally creating ambiguity and confusion as part of a strategy calculated to diminish the Appellant's ability to prepare for this hearing and to receive a just adjudication of this appeal. Although Appellants will appear, and here I am, at the Hearing and present arguments and evidence, despite being materially

hamstrung by the Town's unethical and unlawful conduct, and Appellants reserve their rights to challenge the denial of due process they have experienced and continue to experience." Now what I am prepared to do, is I am prepared to examine Mr. Gabbard. Mr. Gabbard issued the denial. Mr. Gabbard is the one who needs to be examined and that's the person that I need to examine first. Is here going to be here? Yes or No??"

J. Afzali: "First of all to Mr. Barshov's letter, just so the Board is aware. Mr. Barshov made multiple requests under FOIL. He's received a plethora of documents, there are a handful of emails and other intra-agency materials or privileged materials that he's seeking that he's not otherwise entitled to under FOIL. Those issues are under litigation with the Court. So to the extent that he's seeking those specific documents that are otherwise not available because of those privileges or those exemptions because of FOIL those matters are before the Court and will be dealt with accordingly. Mr. Barshov hasn't identified exactly why he needs these materials to bring forth his case. He's not prejudiced. His client is not prejudiced. The entire record is before the ZBA. It's publicly available on the website. We have not, Mr. Barshov has not provided who he will be presenting as a witness. If you look back at the rules, petitioner needs to have their witnesses go first. That's pretty much where we are."

Mr. Barshov: "My first witness is Mr. Gabbard as I indicated in my submission. Where is he?"

J. Afzali: "That would be a Town's witness. That's not....witness."

Mr. Barshov: "No, no that's my witness. I get to call him as a witness because he has material information and knowledge about this. There's no exclusion in the rules as to who it is that I can call. I named him. I want him here to testify."

J. Afzali: "He has no authority to call Mr. Gabbard. If Mr. Gabbard is called, he has the right to cross examine him. "

Mr. Barshov: "Absolutely not true. I have no restriction whatsoever on the individuals that I can call as a witness. What rule is it that says I cannot call Mr. Gabbard? What legal authority is that?"

Chairman Amaditz: "Well that is something I'm going to have to defer..."

Mr. Barshov: "I'm asking Mr. Afzali. Let Mr. Afzali speak to it."

J. Afzali: "The legal authority is in the Board's rule, it's when a witness presents a pre-filed testimony, which in this case, nobody has."

Mr. Barshov: "Mr. Gabbard did."

J. Afzali: "He has put in an affidavit. He has not pre-filed it yet."

Mr. Barshov: "Yes he did. Mr. Gabbard put in testimony. He put in two documents."

J. Afzali: "He put in his affidavit."

Mr. Barshov: "He put in his statement, a statement along with is affidavit."

J. Afzali: "Right. That would subject him to cross examination."

Mr. Barshov: "And that's what I want to do."

J. Afzali: "So if Mr. Barshov wants to close his case in chief and rest, then the Town can then present witnesses."

Mr. Barshov: "No. I get to put on my case in chief and that includes Mr. Gabbard as a witness. This is the kind...this is the"

J. Afzali: "Mr. Gabbard may be available for cross examination to Mr. Barshov but that would be a cross examination. He doesn't get to call Mr. Gabbard as his witness."

Mr. Barshov: "Absolutely ridiculous. This is just ridiculous. Just sit back and look into your own ears. This is silly. This is just baloney. Okay, Mr. Gabbard issued the denial. To turn around and tell me that I don't have the opportunity to ask him a single question about the materials that he put in is absolute nonsense and I don't care what lawyer stands up in front of you and says it. It's the most non-sensical thing I've ever heard. And what it is intended to do, is prevent me from asking Mr. Gabbard questions which is what has been wanted here all along. That's why I haven't gotten any documents. Documents are not being litigated in FOIL because of attorney-client privilege. They're not being provided because nobody wants me to see them. That's why they're not being provided. "

Chairman Amaditz: "So with regard to this hearing tonight, evidentiary hearing, do you want to adjourn this until you get the documents under FOIL regardless of how long that might take?"

Mr. Barshov: "I want, I want Mr. Gabbard here. I don't know what documents at the end of the day, Mr. Chairman, I'm gonna need until I examine him. I'm gonna tell you why."

Chairman Amaditz: "What are you looking for in these documents?"

Mr. Barshov: "Sure. Here we go. I'm going to tell you. I'm happy to tell you. I've already said it in my papers, but I'm happy to say it again. So there is an affidavit from Mr. Zalman Stein. Mr. Stein says "Mr. Gabbard threw up his hands. He said this isn't my decision. It's the attorney's decision. Well, I want to ask Mr. Gabbard about that. I want to ask him about what communications he had. He has a whole narrative in his documents about who he spoke to, and what he did and what his thought process. Well there are various documents I want to ask him about. Some of them, I have. Some of them I don't have. I don't have any emails between anybody. Forget the attorney for just a moment. What about emails between Mr. Gabbard and others, the consultant, Mr. Voss. It's not privileged. It's not. There's all kinds of, and if for no other reason, simply to show who said what to whom and when and forget about who said what. How about there were just communications. And whether those communications end up matching with Mr. Gabbard's story. Now I don't have to go on and on and on. There's plenty of reasons why I have a legitimate basis for speaking to him. I also have a legitimate basis for speaking to him to go into what exactly was it that he did in terms of his conclusion when he made the decision that this was an affordable housing project. How did he come up with that. What were the basis for that? What did he look into? None of that is in the materials. I have a right to ask him that question. I have a right to ask him fifteen more questions that deal with multiple other subject areas. Some of them implicate documents, but I'll tell you what, I'm willing to take him without the documents then we'll see what documents I need. Maybe he'll tell the truth and he'll actually reveal the things that happened and I

won't need to ask him to refresh his recollection by using other documents. We'll see. But until he's here, and I get to ask him, he is the core of my case. The core of my case is the guy who issued the denial. To turn around and tell me that I can't call him as a witness? I can't ask him questions about why he did what he did? Please, that's just absolute errant nonsense and the only reason you're being given this advice is because somebody wants to deprive me and my clients of cross examining the guy who denied the permits."

J. Afzali: "Again, he's available for cross examination, not for Mr. Barshov's ..."

Mr. Barshov: "It is my initial case to prove what happened is what Mr. Gabbard said and what he did. "

Chairman Amaditz: "We are going round and round."

Mr. Barshov: "Yes. And I would like the Board to ..."

Chairman Amaditz: "We're not going to get anywhere. If you want to, like I said, and turn this in, until you get certain documents, we can..."

Mr. Barshov: "I don't have anybody else to talk to Mr. Chairman. Where is...this is not the Town's attorney. This is the ZBA's attorney. Where is the Town attorney? Where is the contact with the Building Department? Who am I supposed to talk to about who is to be produced? Am I supposed to talk to the thin air? What kind of a nonsense, this is nonsense. What kind of baloney is this? I mean really. I'm sitting here. I am not wasting my time."

J. Afzali: "You're allowed to remind him of decorum and civility. "

Mr. Barshov: "I'll remind you of decorum and civility when I get treated with decorum and civility. I'm getting stonewalled and this is nonsense. How many times do I have to write letters? How many times do I have to say the same thing? Imagine you were sitting in my position please. You guys know what is fair."

Chairman Amaditz: "You have all the evidence that's been put into the record thus far. "

Mr. Barshov: "You've got the evidence..."

Chairman Amaditz: "You're not willing to move forward? You're not willing to say that the record is complete?"

Mr. Barshov: "The record is not complete. First of all the record is not complete because, Mr. Chairman, because "

Chairman Amaditz: " The evidentiary hearing..."

Mr. Barshov: "Mr. Chairman, see this? I submitted this on the first day. All the documents that are in here are not even in the record. Okay? This is my binder. The affidavit of Zalman Stein. Not listed in the record. The affidavit of Yehuda Miller, not listed in the record. This was in the binder that was submitted. Okay? What do you want me to do? I don't have anybody to talk to. I don't have the Town attorney to talk to. He doesn't even give the dignity of this process to show up. And Mr. Gabbard, knew

he was supposed to be here. You got the Town Supervisor here. Oh, he can be here but Mr. Gabbard who did this can't be here? What kind of baloney is this? What kind of absolute baloney is this? No I'm ready to proceed when the Town produces Mr. Gabbard and he gets to be examined as part of my case. Then I'm ready to proceed. The Town wants to turn around and hold him back, then fine. I'll end up going to court to compel his testimony but I am not moving forward if Mr. Gabbard, if you're gonna tell me that he'll never appear and he's never gonna come into this? Well then I'm not gonna have it be that I turn around and put everything else on and then they decide if they want to call him or not. He's my witness. I want to call him and there's nothing in the rules that says otherwise. Mr. Afzali can quote you chapter and verse, I'd love to hear it. I've read them before tonight and there's nothing in there. Now I haven't had the opportunity to speak with the Town's attorney once. I called Mr. Johnstone. You asked me to. I called him. You saw what he wrote? Okay, what kind of nonsense is that? We'll send somebody there if it's necessary. What the heck does that mean? "

Chairman Amaditz: "I can't speak for Mr. Johnstone."

Mr. Barshov: "I'm gonna tell you that, Mr. Chairman, you have, you shake your head like you don't know what to do. I'm gonna tell you something. You have much more power than you think you have."

Chairman Amaditz: "I really don't need the direction from you. That's why I have the ZBA Attorney..."

Mr. Barshov: "No you have..."

J. Afzali: "To clarify the record, you made a misstatement. The affidavits of Mr. Stein and Mr. Miller are absolutely part of the record. They are on the website and publicly available."

Mr. Barshov: "They are not listed in the..."

J. Afzali: "I'm not gonna let him stand here and lie to you about it."

Mr. Barshov: "in the draft of the documents...There was a table of contents that was sent to me. They're not included in that table of contents that I saw. Okay?"

Chairman Amaditz: "Is there any reason that anything in Mr. Barshov's initial submission should not be in the record?"

J. Afzali: "There's no objection. He can submit whatever he wants to submit and it's all in the record. Absolutely. You can go through..."

Mr. Barshov: "So find..."

Chairman Amaditz: "Mr. Barshov, can you find out what is missing? And we'll put it in the record."

J. Afzali: "It's in there. It's already in there."

Mr. Barshov: "Mr. Chairman, we're talking about, we're talking about Mr. Gabbard."

Chairman Amaditz: "Yes"

Mr. Barshov: "That's what I'm talking about. Okay? That's what I'm talking about. When the Town"

J. Afzali: "I'm not going to let him lie to you that the affidavits are not in the record. They are. That's all."

Mr. Barshov: "Please. Okay? When is Mr. Gabbard gonna appear? You have the power, please, to subpoena him. To bring him in here. If he's not going to appear voluntarily, if the Town is not going to produce him, then I want him subpoenaed. So we can get this darn thing going. I want him subpoenaed. I want him to show up. I want to ask him questions. I want. Maybe he'll turn around and say things that are so amazing that you'll decided that my client is full of baloney and the appeal should be affirmed. Who knows? But all I know is that I have a right to ask him questions. And I want him subpoenaed. And if the Town isn't going to produce him, let's go. You can look right here. He ain't gonna tell you whether to subpoena somebody. That's not a legal discretion. That's your discretion to decide whether you want to subpoena someone. So how about you look me in the eye, and turn around and tell me whether it should be done or not."

Chairman Amaditz: "okay."

J. Steinberg: "We've already turned around and said that we're not gonna subpoena anybody."

Mr. Barshov: "you did and you said, you told me to go to Troy Johnstone to get the information I want and to talk to him about it. I did that and I got nowhere. Like I said I would. I told you if I got something I'd go out and buy lottery tickets because I thought it was that unlikely. And that's exactly what it turned out. So I'm telling you now, the facts have changed. I did what you asked. I went and I got it. I turned around and spoke to Mr. Johnstone in good faith...."

J. Steinberg: "we appreciate it."

Mr. Barshov: "Now you do your job. You bring those witnesses in here that need to be in here starting with Mr. Gabbard so we can have a fair hearing."

J. Afzali: "He doesn't get to tell you what to do."

J. Steinberg: "Calm down, let's not get your blood pressure up here."

Mr. Barshov: "My blood pressure is way up because I'm turning around and I see what's going on here. My blood pressure gets up when I have good reason to be angry. You've seen me multiple times. I've been polite in this place multiple times, time in and time out. But this is where I draw the line. I draw the line at my client not being able to cross examine the witness that turned around and denied the approvals. That is baloney. "

J. Afzali: "Again, he keeps saying that he's not able to cross examine, that's just false."

Mr. Barshov: "I get to produce him as part of my case. That's where I begin. That's my right. I have every right to call him as a witness and I want him subpoenaed please."

Chairman Amaditz: "I am not going to order him to be subpoenaed."

Mr. Barshov: "Okay, and what would be the reason for that, sir?"

Chairman Amaditz: "Reason for that?"

Mr. Barshov: "Yeah"

Chairman Amaditz: "The reason for him not being subpoenaed is..."

Mr. Barshov: "Yeah"

Chairman Amaditz: "is because I rely on our"

Mr. Barshov: "He didn't tell you you can't do it. He didn't tell you you can't do it. You can do it. "

Chairman Amaditz: "we don't need to."

Mr. Barshov: "What's the reason? Why? Because I'm not allowed to cross examine him?"

Chairman Amaditz: "Sure you can cross examine him."

Mr. Barshov: "Yeah, as part of my case, why can't I put his answers as part of my case? That's where this whole thing begins. What else do you want me to do? Who else am I going to examine? I'll go and examine someone who's up in the clouds somewhere? How are they gonna know what Mr. Gabbard did? You put me in a position where I have to shut down my case before I get to ask Mr. Gabbard a question. What kind of nonsense is that? He's the key witness and you haven't got a good reason. All you're doing is saying no for the sake of saying no. No. That's all. I haven't heard a reason. You turn around and said no last time. Now you'll say no this time. That's it? That's it? That's it? When you decide that you'll subpoena Mr. Gabbard or he decides to show up, and I can put him in my direct case then we will move forward. You don't want to do it on that basis and you're gonna stonewall me this way ,then the only thing I've got to do is go to court and that's what I will do. Alright? We're done?"

J. Steinberg: "Have a good night."

Mr. Barshov: "right."

J. Steinberg: "I'm not going to sit here and let him talk to us that way."

Mr. Barshov: "You've got something that you want from me sir?"

J. Steinberg: "No."

Mr. Barshov: "Okay. Anything else?"

Chairman Amaditz: "Nope."

Mr. Barshov: "I want to go through with this as soon as Mr. Gabbard shows up. He'll see me like the politest, most gentile lawyer on the planet. "

Chairman Amaditz: "And if he doesn't then you take it to court...."

Mr. Barshov: "Yeah, I have to"

Chairman Amaditz: "that is your right."

Mr. Barshov: "Thank you. I appreciate my rights. I'm waiting for you to adjourn."

Chairman Amaditz: "Is there any other thing that needs to come before the ZBA at this time? Can I hear a motion to adjourn? "

J. Steinberg: "I'll motion to adjourn. "

Chairman Amaditz: "Jim Steinberg. Second?"

E. Pajak: "Second"

Chairman Amaditz: "Ed Pajak. The meeting is adjourned."

Adjournment

Motion made by J. Steinberg to adjourn the meeting at 6:55pm. Seconded by E. Pajak.

Vote: All in favor.

DRAFT