

**COMMONWEALTH OF MASSACHUSETTS
HOUSING APPEALS COMMITTEE**

In the Matter of)

BOURNE ZONING BOARD OF)
APPEALS)

and)

CHASE DEVELOPERS, INC.)

No. 2008-11

**RULING ON MOTION (APPLICATION) REQUESTING
PRESIDING OFFICER TO ISSUE SUBPOENA DUCES TECUM
TO ATTORNEY DEBORAH GODDARD**

The Bourne Zoning Board of Appeals (Board) has filed a Motion for the Issuance of a Subpoena Duces Tecum compelling Deborah Goddard, Chief Counsel of the Department of Housing and Community Development (DHCD), to appear as a witness and to produce certain documents in this matter. Specifically, the Board requests Ms. Goddard’s testimony as to her “knowledge in the above entitled action” and production of all documents “that contain evidence in [her] possession relating to the above entitled action.” The Board requests that the motion be regarded as the “application” under G.L. c. 30A, § 12(3). Chase Developers, Inc. has submitted an opposition to the motion on the ground that Ms. Goddard’s testimony and the requested documents are irrelevant to the issue to be decided, namely, whether the DHCD had certified the Town of Bourne’s compliance with the goals of its approved Housing Production under 760 CMR 56.03(1)(b) at the time relevant to its application for a comprehensive permit pursuant to G.L. c. 40B.

I. BACKGROUND

This case presents the first evidentiary proceeding involving the new interlocutory appeal procedure under the new Comprehensive Permit regulations, 760 CMR 56.00.

Previously municipal zoning boards raised the applicability of a safe harbor precluding appeals by developers of adverse decisions under G.L. c. 40B as affirmative defenses during the appeal in the ordinary course. See 760 CMR 31.06(5), 31.07(1) and (1)(d). Under 760 CMR 56.03(8)(a), a board seeking to rely on one of several enumerated safe harbors now must notify the developer within 15 days of the submission of the comprehensive permit application to the board. If the developer wishes to challenge the board's assertion of one of these statutory protections, it must appeal to DHCD within 30 days. Both parties have the opportunity to submit materials to DHCD for its review and decision. Either party may appeal an adverse decision from DHCD to the full Housing Appeals Committee, but must do so within 30 days of DHCD's decision. The interlocutory appeal to DHCD is conducted on an expedited basis, as the proceeding before the Board is suspended pending the Committee's determination. The Committee's hearing on the issue, like all of its proceedings, is *de novo*.

In accordance with this regulatory scheme, the Board notified Chase that it invoked 760 CMR 56.03(1)(b), the Housing Production Plan safe harbor. Chase appealed to DHCD and Ms. Goddard, acting for DHCD, rendered a decision from which the Board appealed to the Committee.

II. DISCUSSION

The Board relies upon 760 CMR 56.06(8)(d) and G.L. c. 30A, § 12(3) in support of its request for a subpoena. Section 56.06(8)(d) refers specifically to c. 30A, § 12. It acknowledges the power of the presiding officer "to issue subpoenas "requiring the attendance and testimony of witnesses and the production of any evidence relating to any matter in question in the proceeding," and that "parties shall similarly be entitled to the issuance of subpoenas by a notary public or justice of the peace." *Id.* Sections 12(3) and 12(4) of chapter 30A, provide:

(3) Any party to an adjudicatory proceeding shall be entitled as of right to the issue of subpoenas in the name of the agency conducting the proceeding. The party may have such subpoenas issued by a notary public or justice of the peace, or he may make written application to the agency, which shall forthwith issue the subpoenas requested. However issued, the subpoena shall show on its face the name and address of the party at whose request the subpoena was issued. Unless otherwise provided by any law, the agency need not pay fees for attendance and travel to witnesses summoned by a party.

(4) Any witness summoned may petition the agency to vacate or modify a subpoena issued in its name. The agency shall give prompt notice to the party, if any, who requested issuance of the subpoena. After such investigation as the agency considers appropriate it may grant the petition in whole or part upon a finding that the testimony, or the evidence whose production is required, does not relate with reasonable directness to any matter in question, or that a subpoena for the attendance of a witness or the production of evidence is unreasonable or oppressive, or has not been issued a reasonable period in advance of the time when the evidence is requested.

Although an agency may have discretion to deny a subpoena under § 12(3) in certain circumstances, see *Box Pond Association v. Energy Facilities Siting Bd.*, 435 Mass. 408, 415 and n.10 (2001), *Dwyer v. Commissioner of Insurance*, 375 Mass. 227, 235-36 (1978), such subpoenas are generally granted as a matter of course and challenged by motion to quash. For this reason, and to ensure that any question of Ms. Goddard's opposition to the subpoena can be clarified, it is appropriate in this instance to grant the Board's request and issue the subpoena to Ms. Goddard. In this proceeding, the Board ascertained that Ms. Goddard would not agree to testify voluntarily, and it consequently requested the issuance of a subpoena. Chase filed an opposition to the Board's motion. Although notice of the motion was given to Ms. Goddard, she submitted no response to it. However, she is entitled to pursue the recourse set forth in § (12)(4) for a summoned witness to challenge a subpoena.

Accordingly, should Ms. Goddard wish to oppose the subpoena, she may move to quash the subpoena by filing and serving the motion no later than two business days before the scheduled date for her appearance. In that event, the hearing will be postponed to permit the Board and the Chase to file responses within 10 days of the filing of the motion to quash. Alternatively, Ms. Goddard may file and serve such a motion at the hearing to which she is summoned. In either event, the motion will be ruled upon before the commencement of any testimony.

Both the order granting the issuance of the subpoena and the issuance of the subpoena do not constitute a substantive ruling on the questions regarding the relevance or admissibility of Ms. Goddard's testimony or any of the documents sought by the Board.

III. CONCLUSION

For the reasons set forth above, the Board's Motion (Application) Requesting Presiding Officer to Issue Subpoena Duces Tecum to Attorney Deborah Goddard is hereby granted, without prejudice to any arguments of Chase and, potentially, Ms. Goddard, concerning the relevance and admissibility of the information sought.

Housing Appeals Committee

Date: March 6, 2009



Shelagh A. Ellman-Pearl
Presiding Officer