COMMONWEALTH OF MASSACHUSETTS
HOUSING APPEALS COMMITTEE

In the Matter of	)	
BOURNE ZONING BOARD OF APPEALS	)	
and	)	No. 2008-11
CHASE DEVELOPERS, INC.	)	

RULING ON MOTION TO QUASH SUBPOENA DUCES TECUM TO ATTORNEY DEBORAH GODDARD

I. Introduction and Background

This case is an interlocutory appeal pursuant to 760 CMR 56.00, the revised Comprehensive Permit regulations promulgated effective February 22, 2008. Under 760 CMR 56.03(8)(a), a board seeking to rely on one of several enumerated safe harbors precluding appeals by developers of adverse decisions under G.L. c. 40B now must notify the developer within 15 days of the submission of the comprehensive permit application to the board. See 760 CMR 56.03. If the developer wishes to challenge the board's assertion of one of these statutory protections, it must appeal to the Department of Housing and Community Development (DHCD), within 30 days.[1] Thereupon, both the board and the developer may submit materials to DHCD for its review and decision.[2] Either party may file an interlocutory appeal of an adverse decision from DHCD to the Housing Appeals Committee, but must do so

1. Under the former regulations, municipal zoning boards raised the applicability of a safe harbor as an affirmative defense during the appeal in the ordinary course. See 760 CMR 31.06(5), 31.07(1) and (1)(d). Also see *West Wrentham Village, LLC v. Wrentham,* No. 05-04, slip op. at 2 (Mass. Housing Appeals Committee July 13, 20005 Ruling on Motion to Dismiss), *aff'd* 451 Mass. 511 (2008).

2. See 760 CMR 56.03(8)(a) which states, "[t]he Department shall thereupon review the materials provided by both parties and issue a decision within 30 days of its receipt of all materials."

within 20 days of receipt of DHCD's decision. The interlocutory appeal to DHCD is conducted on an expedited basis, as the proceeding before the board is stayed 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, after Chase Developers, Inc. (Chase) filed its application for a comprehensive permit with the Bourne Zoning Board of Appeals (Board), the Board notified Chase that it invoked 760 CMR 56.03(1)(b), the Housing Production Plan safe harbor. Chase appealed to DHCD, which through its Chief Counsel, Deborah J. Goddard, rendered a decision from which the Board appealed to the Committee.

The presiding officer scheduled a hearing and conducted one day of testimony on October 16, 2008. The Board stated it sought the testimony of DHCD Chief Counsel Goddard. After the Board reported that Ms. Goddard would not appear voluntarily, the presiding officer suspended the hearing to allow the Board to seek a subpoena. The parties have agreed that other than potential evidence through Ms. Goddard, the evidentiary record of this interlocutory appeal is complete.

The Board filed a Motion for the Issuance of a Subpoena Duces Tecum compelling Ms. Goddard to appear as a witness and to produce certain documents in this matter. Chase filed an opposition to the motion. Although Ms. Goddard was given notice of the motion, she did not submit any materials to the Committee in response.

The presiding officer granted the Board's motion and issued the subpoena pursuant to G.L. c. 30A, § 12(3). However, she specifically stated in her ruling that "[b]oth 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." *Matter of Bourne and Chase Developers, Inc.,* No. 08-11, slip op. at 3 (Mass. Housing Appeals Committee Mar. 6, 2009 Ruling). The ruling further provided that if Ms. Goddard moved to quash the subpoena, the hearing would be suspended pending a determination on the motion. She granted the Board and Chase 10 days from the filing of the motion to quash to submit a response. On March 23, 2009, Ms. Goddard filed a motion to quash and an accompanying memorandum. On April 7, 2009, after the 10 days had expired, the Board filed an opposition.

II. Discussion

The motion to quash seeks a ruling on a procedural matter. As such it is well within the authority of the presiding officer to determine. "The presiding officer shall have all those powers conferred upon the Committee for the conduct of a hearing, except that he or she shall not be empowered to make any decisions that would finally determine the proceeding," with certain exceptions not here relevant. 760 CMR 56.06(7)(e)2. However, since this presents the first interlocutory appeal of a safe harbor invocation, and since the motion seeks to compel the testimony of an administrative trier of fact, we believe it is important for us as a Committee to consider and issue the ruling to clarify for future proceedings the reasons why it would be improper to compel Ms. Goddard's testimony under the circumstances presented here. Nonetheless, pursuant to 760 CMR 56.06(e)(2), the presiding officer has full authority to render such a ruling independently.[3]

Our review of the motion to quash is informed by the state Administrative Procedures Act, G.L. c. 30A, which sets out the standard for considering a request to quash a subpoena to appear before an administrative agency:

> (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.

G.L. c. 30A, § 12(4).

The issue to be decided in this appeal is whether DHCD had certified the Town of Bourne's compliance with the goals of its approved Housing Production Plan under 760 CMR 56.03(1)(b) at the relevant time in relation to Chase's application for a comprehensive permit under G.L. c. 40B. The Board has subpoenaed 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." Ms. Goddard seeks to quash the subpoena to

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3. It certainly would have been sufficient for the presiding officer to issue this ruling on her own, and generally if such an issue arises in future proceedings, the presiding officer should address the issue as a matter of course.