

**COMMONWEALTH OF MASSACHUSETTS
HOUSING APPEALS COMMITTEE**

**In the Matter of
BOURNE ZONING BOARD OF APPEALS
and
CHASE DEVELOPERS, INC.**

No. 2008-11

**DECISION ON INTERLOCUTORY APPEAL
REGARDING APPLICABILITY OF SAFE HARBOR**

June 8, 2009

TABLE OF CONTENTS

| | |
|--|---|
| I. INTRODUCTION AND PROCEDURAL BACKGROUND..... | 1 |
| II. FACTS | 2 |
| III. DISCUSSION..... | 5 |
| IV. CONCLUSION AND ORDER | 9 |

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Chase's Witness

Thomas C. Pappas, President of Chase Developers, Inc.

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I. INTRODUCTION AND PROCEDURAL BACKGROUND

This case is an interlocutory appeal brought by the Bourne Zoning Board of Appeals (Board) 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 opening of the Board's hearing on the comprehensive permit application. If the developer wishes to challenge the board's assertion of one of these statutory and regulatory protections, it must provide written notice to the Department of Housing and Community Development (DHCD), within 15 days.¹ DHCD "shall thereupon review the materials provided by both parties and issue a decision within 30 days of its receipt of all materials." *Id.* Either party may file an interlocutory appeal of an adverse decision by DHCD to the Housing Appeals Committee, but must do so within 20 days of receipt of DHCD's decision. The interlocutory appeal to DHCD

1. Under the former regulations, municipal zoning boards raised the applicability of a safe harbor as an affirmative defense during the appeal to the Committee in the ordinary course. See 760 CMR 31.06(5), 31.07(1), 31.07(1)(d) and 31.07(1)(i). Also see *West Wrentham Village, LLC v. Wrentham*, No. 05-04, slip op. at 2 (Mass. Housing Appeals Committee July 13, 2005 Ruling on Motion to Dismiss), *aff'd* 451 Mass. 511 (2008).

is conducted on an expedited basis, as the proceeding before the board is stayed pending the Committee's determination. 760 CMR 56.03(8)(c). The Committee's hearing on the issue, like all of its proceedings, is *de novo*. G.L. c. 40B, § 22. Section 56.03(8)(a) provides that the Board has "the burden of proving satisfaction of the grounds for asserting [the safe harbor]."²

In accordance with this regulatory scheme, after Chase Developers, Inc. (Chase) filed its application for a comprehensive permit with the Board, the Board notified Chase that it invoked the calendar year housing production safe harbor. Chase notified the Board and DHCD of its objection to the Board's assertion. DHCD, through its chief counsel, rendered a decision from which the Board appealed to the Committee.

The presiding officer scheduled a hearing and conducted one day of oral testimony on October 16, 2008. The hearing was then suspended to permit the Board to seek the testimony of DHCD's chief counsel. Ultimately, a subpoena was issued and subsequently quashed by the Committee. *Matter of Bourne and Chase Developers, Inc.*, No. 08-11 (Mass. Housing Appeals Committee Apr. 13, 2009 Ruling on Motion to Quash Subpoena....). The presiding officer then set a schedule for post-hearing briefs, which the parties have filed.

II. FACTS

On April 28, 2008, a comprehensive permit decision approving 300 dwelling units was filed with the Bourne town clerk in the matter of Canalside Comprehensive Housing, LLC for a project at the Bourne Rotary. Joint Stipulation, ¶ 1; Exh. 1. The Board's approval of that permit designated 75 units as affordable. Tr. I, 17; Exh. 1.

On June 3, 2008, Chase filed an application for a comprehensive permit for a development called "230 Sandwich Road" with the Bourne town clerk. Joint Stipulation, ¶ 2; Exh. 7. The Town's Housing Needs Assessment and Action Plan (Plan) had been approved by DHCD on January 18, 2006. Exh. 8. As of June 3, 2008, the Town of Bourne had not yet requested certification of compliance with its Plan for the time period applicable to the Chase comprehensive permit application. See Exh. 8.

On July 2, 2008, the Board opened a public hearing on Chase's application. Joint Stipulation, ¶ 3. According to testimony by the Board's chairman in this matter, at the initial

2. The Board argues that this assignment of a burden to the Board violates G.L. c. 40B, §§ 20-23. Since we find that the Board is entitled to rely on a safe harbor here, we need not address this contention.

hearing the Board discussed whether to notify Chase that the Town intended to invoke the safe harbor protection. Tr. I, 18. He stated:

We determined basically that we had met the – all of the requirements in the sense that basically what it is is the Town of Bourne has 7,787 year-round units according to the last census and .5 percent of that comes out to 38 and change, so we needed 38 or 39 units within a 12-month period in order to have the Safe Harbor protection.

April 28th is the date we filed the decision with Canalside and this comes to us in June so we thought we had within the 12-month period from April 28th forward.

Tr. I, 18-19. By letter dated June 27, 2008 addressed to DHCD, the Town requested that DHCD certify the Town's compliance with its Plan based on the Canalside permit approval.

Exh. 8. Thereafter, by letter dated July 7, 2008, and consistent with 760 CMR 56.03(8)(a), the Board notified Chase, with a copy to DHCD, that the Board "considers a denial of the permit or the imposition of conditions or requirements would be consistent with local needs." Exh. 2; Joint Stipulation, ¶ 4.

By letter dated July 8, 2008, DHCD issued to Bourne a certification of compliance with the Town's Plan. Exh. 9. That letter stated that DHCD:

... certifies that the Town of Bourne is in compliance with its Affordable Housing Plan (AHP) in accordance with 760 CMR 31.07(1)(i)5. This certification is effective for a one-year period beginning on June 27, 2008 and ending June 26, 2009.

This Certification of Municipal Compliance is based on the following findings:

1. Bourne has provided evidence that the required number of units described in its June 27, 2008 request is eligible to be counted towards certification.
2. The 75 Subsidized Housing Inventory (SHI) eligible units in this project (Canal Side Commons SHI ID # 8984) meet the number necessary to satisfy a one year certification threshold of 0.75% (58 units) of total year-round housing units specified in 760 CMR 31.07(1)[.]
3. The housing development is consistent with the production goals outlined in the Bourne Affordable Housing Plan.

Exh. 9.³

3. The certification letter issued by DHCD applied the former comprehensive permit regulation, 760 CMR 31.07(1), which contains a more stringent standard than that of the current regulation: under 760 CMR 56.03(4)(c)2., the calendar-year threshold is at least 0.50% of a municipality's total units, or 39 units in Bourne's case, rather than .75% (or 58 units) under the former regulation. Pursuant to the transition rules of 760 CMR 56.08(3)(b), the revised regulation, 760 CMR 56.00, applies to the