



KOPELMAN AND PAIGE, P.C.
Attorneys at Law

101 Arch Street
Boston, MA 02110
T: 617.556.0007
F: 617.654.1735
www.k-plaw.com

September 17, 2008

Judith C. Cutler
jcutler@k-plaw.com

BY HAND

Clerk,
Land Court
226 Causeway Street
Boston, MA 02114


Re: Michael Matchett, et al v. Karim Raad, et al
(Boxborough Zoning Board of Appeals) and Arthur J. Gutierrez, et al
Land Court Misc. No. 381437-KCL

Dear Clerk of Court:

Enclosed please find the Defendant Boxborough Zoning Board of Appeals' Motion for a Protective Order, together with a Certification of Compliance with Land Court Rule 7. Kindly file same and bring it to the attention of Judge Long's clerk. I understand that a hearing on all such discovery motions in this action has been scheduled for 9:15 AM on Monday, September 29, 2008.

Thank you for your attention to this matter.

Very truly yours,


Judith C. Cutler

JCC/sjm

Enc.

cc: Board of Selectmen
Zoning Board of Appeals
Daniel C. Hill, Esq.
Diane C. Tillotson, Esq.

356013/BOXB/0140

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, SS.

LAND COURT
MISC No. 381437 - KCL

MICHAEL MATCHETT and CHUN SHI,

Plaintiffs

v.

KARIM RAAD, LONNIE WEIL, THOMAS GORMAN, CHRISTIAN HABERSAAT, and MICHAEL TOUPS, as they comprise the BOXBOROUGH ZONING BOARD OF APPEALS, and ARTHUR J. GUTIERREZ, WILLIAM J. EISEN, and JOHN A. CATALDO, Trustee of the NEW BLUE HILLS SAUGUS REALTY TRUST,

Defendants

DEFENDANT BOXBOROUGH
ZONING BOARD OF APPEALS'
MOTION FOR A PROTECTIVE
ORDER

INTRODUCTION

In this action, abutters have appealed under G.L. c. 40B, §23 and G.L. c. 40A, §17, from the defendant Zoning Board of Appeals' April 18, 2008 decision granting a comprehensive permit to co-defendants Arthur J. Gutierrez, William J. Eisen, and John A. Cataldo, as trustees of the New Blue Hills Saugus Realty Trust. On August 28, 2008, plaintiffs' counsel served notices of the taking of depositions, on September 22, 2008, of four of the individual members of the defendant Board, Karim Raad, Lonnie Weil, Thomas Gorman, and Michael Toups. The Board and its members hereby move this Court to issue a protective order to prevent the taking of the noticed depositions.

As discussed below, the Board's Motion for a Protective Order should be allowed because: (1) the plaintiffs have not obtained prior leave of court as required by Mass. R. Civ. P.

Rule 30(a)(ii); (2) this Court will review the matter *de novo*, so that neither the reasoning of the Board, nor any other information concerning the Board's own review and consideration of the comprehensive permit application, are relevant to the proceedings before the Court; (3) inquiring into the mental deliberations of quasi-judicial board members is not permissible; and (4) subjecting the individual Board members to depositions would place an unnecessary and undue burden on volunteer, public officials.

ARGUMENT

1. The Plaintiffs Have Failed to Obtain Prior Leave of Court.

Pursuant to Mass. R. Civ. P. Rule 30(a)(ii), depositions may not be taken without prior leave of court in actions where "there is no reasonable likelihood that recovery will exceed \$5,000 if the plaintiff prevails...." The plaintiffs' complaint is simply an appeal under G.L. c. 40B, §23 and G.L. c. 40A, §17 from the grant of a comprehensive permit, and contains no claim for monetary damages. Nor is there statutory provision for award of damages in such a case.

Since no monetary damages are sought, and no monetary damages are available to the plaintiffs in this action, plaintiffs were required to obtain leave of court before seeking to depose any of the defendants. Because plaintiffs have failed to obtain such leave, the Court should issue an order that the noticed depositions may not be taken. Further, for the reasons discussed below, the Court should, in any event, refuse to grant leave for the depositions.

2. Testimony of the Board Members is Unwarranted and Unnecessary in this *De Novo* Appeal.

The hearings on the subject comprehensive permit application were held in public. All documents received by the Board relative to the subject application are available to the plaintiffs

as public records. The Board members do not have independent knowledge concerning the subject comprehensive permit project. Therefore, there is no justifiable reason to require the individual members of the Board to testify as to any factual matters concerning the comprehensive permit plan or the project locus. Nor is it appropriate to inquire into the Board's reasons for its comprehensive permit decision by questioning the individual Board members, since the Board's decision speaks for itself, and is the result of the *collective* deliberations of the Board as a single, governmental, quasi-judicial body.

An appeal of the grant of a comprehensive permit is governed by the procedures of G.L. c. 40A, §17. G.L. c. 40B, §23. As such, the court will hear the matter *de novo*, make its own findings of fact upon the evidence presented, and determine from *those facts* whether or not the Board exceeded its authority, without reference to or reliance on the Board's own conclusions or deliberations. See, e.g., Fairbairn v. Planning Board of Barnstable, 5 Mass. App. Ct. 171 (1977); see also, Crittendon Hastings House v. Board of Appeals of Boston, 25 Mass. App. Ct. 704 (1988) (trial court's findings in *de novo* review are based upon evidence before it and not what was before the Board). The Board's findings and decision are not evidentiary in this *de novo* appeal other than to indicate the result reached and whether the decision is valid on its face. Josephs v. Board of Appeals of Brookline, 362 Mass. 290 (1972).

Thus, any deposition testimony which the plaintiffs may seek to elicit from the individual Board members in regard to the Board's decision is utterly irrelevant to this Court's *de novo* inquiry and cannot properly justify requiring these individuals to be deposed. It would be inadmissible hearsay in any event. Therefore, the Defendants' Motion should be allowed and this Court should issue a protective order preventing the plaintiffs from taking the individual Board members' depositions.

3. Examination of the Board Members as to Their Individual Mental Processes Is Impermissible.

“Members of judicial and quasi-judicial bodies are disqualified by common the law from testifying as to their deliberations.” In re: Roache, 381 Mass. 624, 634, n. 12 (1980) (citing W.B. Leach and P.J. Liacos, Massachusetts Evidence, 145 (4th Ed. 1967)); also see Philips v. Town of Marblehead, 148 Mass. 326, 330 (1889). The authority exercised by a local agency is quasi-judicial in nature if that local agency is required to exercise sound judgment in the proceedings before it, and if the decisions of the local agency may be examined by judicial review. Coleman v. Board of Appeal of Boston, 281 Mass. 112, 115 (1932). In particular, proceedings of zoning board of appeals and planning boards to determine the rights of applicants with respect to use of land are judicial or quasi-judicial in nature. See McElderry v. Planning Board of Nantucket, 431 Mass 722, 726-727 (2000). Similarly, zoning boards of appeal, acting under G.L. c. 40B, §21, exercise the powers of all local land use permit granting boards, and as such, are acting as quasi-judicial bodies when they consider and decide upon comprehensive permit applications. See Milton Commons Associates v. Board of Appeals of Milton, 14 Mass. App. Ct. 111, 114, 117 (1982) (G.L. C. 40B, §21 proceedings analogous to zoning proceedings). Therefore, investigation into the reasoning behind each individual Board member’s vote to grant the comprehensive permit is beyond the scope of permissible inquiry, and the Court should issue an order to prevent the plaintiffs from taking of the depositions of the defendant Board members.

Further, the Court should reject any argument by plaintiffs that they are entitled to examine the Board members as to their individual reasons in voting to grant the comprehensive permit, in order to show, as alleged in the plaintiffs’ complaint, that the Board: “abused its discretion and exceeded its authority,” and that the Board’s decision was “arbitrary and an abuse

of its discretion". Plaintiff's claims that the Board exceeded its authority and abused its discretion all relate to the Board's alleged failure to agree with the *plaintiff's* interpretations of law, and the Board's failure to exercise its discretion and authority in a manner which the *plaintiffs* would find desirable. Whether or not the Board misapprehended the applicable law, or otherwise erred in its decision, is a matter for the Court to decide. Each individual Board member's personal understanding of, or consideration of, the applicable law at the time of the decision is not relevant to the Court's de novo inquiry. See Josephs v. Board of Appeals of Brookline, supra. Therefore, where there is no reasonable basis for deposing the individual Board members, the Court should grant the within Motion for a Protective Order.

4. Deposing the Board Members Would Place A Significant and Undue Burden On Members Of A Volunteer Municipal Board, And Would Be Contrary To Public Policy.

The plaintiffs have already served interrogatories upon each of the four Board members they seek to depose. Responses to those interrogatories, which are due September 19, will be timely served. Additionally subjecting the four Board members to depositions is unnecessary and unduly burdensome, particularly where the four individuals are named as defendants only in their capacity as members of a municipal board. As part-time, volunteer public officials, the members of local, municipal boards devote a substantial amount of time to public affairs at the expense of their own personal and professional activities. To subject volunteer, municipal board members to depositions every time one of that board's decisions is appealed or called into question by a disgruntled applicant or abutter, would interfere both with the time available to each board member to carry out his or her official duties and with his or her individual, personal livelihood. This would, in turn, discourage voluntary participation on municipal boards and would be contrary to public policy, therefore. As Justice Learned Hand has observed, to submit

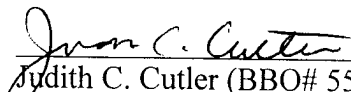
all officials to the burden of a trial on a claim of damages allegedly caused by an erroneous decision “would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties.” Gregoire v Biddle, 177 F.2d 579 (2d. Cir. 1949). Therefore, we ask that the Court grant the within motion and issue a protective order preventing the plaintiffs from deposing the defendant Board members.

CONCLUSION

As established above, the plaintiffs did not obtain the prerequisite leave of court prior to serving deposition notices on the individual Board members. Moreover, plaintiffs cannot establish a proper basis for deposing the individual Board members and, therefore, leave should not be granted for such depositions in any event. Accordingly, for all the reasons discussed herein, the instant Motion should be allowed, and the Court should issue a protective order preventing plaintiffs from deposing the defendant Board members.

DEFENDANT
BOXBOROUGH ZONING
BOARD OF APPEALS
AND ITS MEMBERS

By their attorney,



Judith C. Cutler (BBO# 554552)
Kopelman and Paige, P.C.
Town Counsel
101 Arch Street
12th Floor
Boston, MA 02110-1109
(617) 556-0007

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MIDDLESEX, SS.

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BOXBOROUGH ZONING BOARD OF
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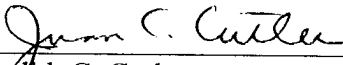
Defendants

CERTIFICATE OF COMPLIANCE WITH LAND COURT RULE 7

I, Judith C. Cutler, hereby certify that a conference on the issues raised in the accompanying Defendant Boxborough Zoning Board of Appeals Motion for a Protective Order has been conducted in accordance with Land Court Rule 7 in a good faith effort to narrow areas of disagreement to the fullest possible extent, but that the issues involved were not resolved. Said conference was conducted between the Plaintiffs' counsel, Daniel C. Hill, Esq., and the Defendant Board's counsel, Judith C. Cutler, Esq., on Wednesday, September 17, 2008 at approximately 12:30 PM.

Dated: September 17, 2008

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Judith C. Cutler

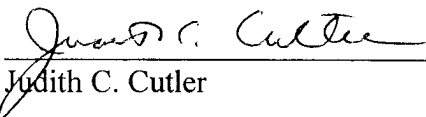
CERTIFICATE OF SERVICE

I, Judith C. Cutler, hereby certify that on the below date I caused copies of Defendant Boxborough Zoning Board of Appeals' Motion for a Protective Order and a Certificate of Compliance with Land Court Rule 7 to be served by first class mail, postage prepaid, upon the following counsel of record:

Daniel C. Hill, Esq.
Law Offices of Daniel C. Hill
8 Winchester Place, Suite 301
Winchester, MA 01890

Diane Tillotson, Esq.
Hemenway & Barnes, LLP
60 State Street
Boston, MA 02109-1899

Dated: September 17, 2008



Judith C. Cutler

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