

October 5, 2017

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BY FACSIMILE – (413) 736-3300 and
BY FIRST CLASS MAIL

Richard T. Jordan, Esq.
Kotfila & Jordan
One Monarch Place, Suite 1340
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Re: Cotton Tree Service, Inc., et al. v. Planning Board of the Town of Westhampton, et al.
Hampshire Superior Court C.A. No. 1580CV00112

Dear Mr. Jordan:

In accordance with Superior Court Rule 9A, enclosed please find a copy of the Town's Motion for a Protective Order. Kindly send me your opposition, if any, within the time afforded under Rule 9A.

Thank you for your attention to this matter.

Very truly yours,



Katherine D. Laughman

KDL/eon

Enc.

cc: Select Board
Patrick J. Melnick, Sr.
Julie L. Datres, Esq.

593733/WHAM/0041

COMMONWEALTH OF MASSACHUSETTS

HAMPSHIRE, SS.

SUPERIOR COURT
C.A. NO. 1780CV00105

TIMOTHY R. FONDAKOWSKI,

Plaintiff

v.

PLANNING BOARD OF THE TOWN OF
WESTHAMPTON THROUGH ITS
MEMBERS MARK SCHWALLIE, THOMAS
HATHAWAY, ROBERT TURNER, ROBERT
DRAGON, JR., COTTON TREE SERVICE,
INC., DODGE MAPLE GROVE FARM, LLC,
and HAMPSHIRE SUPERIOR COURT,

Defendants

DEFENDANTS PLANNING BOARD OF
THE TOWN OF WESTHAMPTON AND
ITS MEMBERS' MOTION FOR A
PROTECTIVE ORDER

Now come the Defendants, Town of Westhampton Planning Board, through its members (the "Planning Board"), and hereby seek a protective order quashing the depositions noticed for October 10-16, 2017, for each of the three members of the Board of Selectmen and the five members of the Planning Board of the Town of Westhampton. As grounds therefor, the Planning Board states that any inquiry into the Board's litigation strategy and deliberations is protected by the quasi-judicial privilege, attorney-client privilege and executive session privilege. In further support of this Motion the Board relies on the Memorandum of Law in support thereof, which is attached hereto.

WHEREFORE, the Board requests that this Court allow its Motion for a Protective Order and quash the deposition notices issued to all of the members of the Westhampton Board of Selectmen and Planning Board.

DEFENDANT,

TOWN OF WESTHAMPTON PLANNING
BOARD,

By its attorneys,



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Date: October 5, 2017

589557/WHAM/0041

COMMONWEALTH OF MASSACHUSETTS

HAMPSHIRE, SS.

SUPERIOR COURT
C.A. NO. 1780CV00105

TIMOTHY R. FONDAKOWSKI,

Plaintiff

v.

PLANNING BOARD OF THE TOWN OF
WESTHAMPTON THROUGH ITS
MEMBERS MARK SCHWALLIE, THOMAS
HATHAWAY, ROBERT TURNER, ROBERT
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INC., DODGE MAPLE GROVE FARM, LLC,
and HAMPSHIRE SUPERIOR COURT,

Defendants

MEMORANDUM OF LAW IN SUPPORT
OF DEFENDANTS PLANNING BOARD
OF THE TOWN OF WESTHAMPTON
AND ITS MEMBERS' MOTION FOR A
PROTECTIVE ORDER

I. INTRODUCTION

By this action, the plaintiff, Timothy Fondakowski (the "plaintiff"), seeks judicial review pursuant to G.L. c. 40A, §17 of the Special Permit issued by the defendant, Hampshire Superior Court to the co-defendant, Cotton Tree Service, Inc. ("Cotton Tree") pursuant to an Agreement for Judgment executed in the previously filed matter *Cotton Tree Service, Inc., et al. v. Planning Board of the Town of Westhampton, et al.* (Hampshire Superior Court Docket No. 1580CV00112) ("Cotton Tree I").

The plaintiff has sent a Notice of Taking Deposition to all three members of the Board of Selectmen and all five members of the Planning Board of the Town of Westhampton (collectively, the "Town"), for depositions scheduled to occur from October 10th through October 16th, 2017. The Planning Board (the only named municipal entity in this matter) opposes these requests for depositions and seeks a Protective Order, pursuant to Mass. R. Civ. P.

26(c) on behalf of its members and the members of the Board of Selectmen. For the reasons set forth below, the Planning Board requests that this Court allow its Motion for a Protective Order.

II. BACKGROUND

Defendant, Cotton Tree Service, Inc. (“Cotton Tree”) initially filed its application for the underlying Special Permit to operate a sawmill on its property on December 13, 2013. The Planning Board held its initial public hearing on Cotton Tree’s application on February 4, 2014. The Board held extensive public hearings on the application over the course of the next 18 months, eventually resulting in a vote to deny the Special Permit on April 21, 2015. The Planning Board filed its written decision with the Town Clerk on May 28, 2015.

Cotton Tree filed a Notice of Constructive Grant of the Special Permit with the Town Clerk on April 24, 2015 and a Complaint in this Court on June 6, 2016 seeking to perfect its Constructive Approval of the Special Permit. (“Cotton Tree I”). Cotton Tree additionally appealed the substance of the Board’s denial of the Special Permit. After denial of Cotton Tree’s Motion for partial Summary Judgment on or about March 6, 2017, the Planning Board and Cotton Tree reached a settlement agreement which was memorialized by an Agreement for Judgment filed with the Court on April 3, 2017. The Agreement for Judgment provided that the application would be remanded to the Planning Board for reconsideration. However, the agreement also included a clause that provided if the Planning Board failed to hold a public hearing and affirmatively vote to approve the Special Permit within 60 days, the Court would enter a final judgment issuing a Special Permit in the form agreed to by the parties. The Planning Board held a remand hearing, but did not obtain the supermajority of votes required to affirmatively vote approval of the Special Permit. Accordingly, by motion of Cotton Tree, which was unopposed by the Planning Board, the Court issued a final judgment on May 31,

2017, issuing Cotton Tree a Special Permit in the form agreed to by the parties. The Plaintiff, who purports to be an abutter to the property and thus aggrieved by this negotiated decision filed the appeal in the instant matter pursuant to G.L. c. 40A, §17, of the Special Permit agreed to by the parties to Cotton Tree I and entered as a final judgment of the Court on May 31, 2017. A true copy of the Court's Final Judgment is attached hereto as Exhibit A.

III. ARGUMENT

A. Depositions of Board Members Are Unwarranted and Unnecessary in a De Novo Zoning Appeal of the Grant of a Special Permit.

Although the special permit decision in this matter was entered by the Superior Court pursuant to an Agreement for Judgment, the abutter challenge to that decision was filed in accordance with the review procedures under G.L. c. 40A, §17, which provides that:

“the court shall hear all evidence pertinent to the authority of the Board . . . and determine the facts, and, upon the facts as so determined, annul such decision if found to exceed the authority of such Board . . . or make such other decree as justice and equity may require.”

By the terms of the statute, the plaintiff, as a complaining abutter asserting a claim of grievement, has the right to petition this Court for a de novo review of the decision agreed upon by the Parties. If the plaintiff is found to have standing as an aggrieved abutter, the Court may undertake de novo review and make its own findings of fact, independent of any factual findings entered into the agreement by the Parties. See e.g. Roberts v. Southwestern Bell Mobile Sys., Inc., 429 Mass. 478, 485-486 (1999); Bicknell Realty Co. v. Board of Appeal of Boston, 330 Mass. 676, 679 (1953). In so doing, the Court is not restricted to the evidence that was introduced before the board and is not required to assign any particular evidentiary weight to the findings in the agreed-upon decision. Pendergast v. Board of Appeals of Barnstable 331 Mass. 555, 558-559 (1954); Dion v. Board of Appeals of Waltham, 344 Mass. 547, 555 (1962);

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).

In light of the Court's de novo review of this appeal, testimony by the Board as to the evidence that was before it, or its decision to enter into an agreement to settle the prior appeal, is irrelevant to the Court's inquiry as to the validity of the current Decision that is the subject of the Court's review. Pursuant to G.L. c.40A, §17, the Court must make its own findings of fact and then decide, based on those facts, if the decision is legally valid. The ultimate determination as to the validity of the Decision is a question of law for the Court, and the reasoning of the individual Board members is not relevant to the Court's deliberation. Moreover, all evidence submitted to the Board in the prior Cotton Tree I proceedings, which informed the decision to settle this matter in the first instance, is a matter of public record, and there is no reason to believe that the deposition of individual Board members will lead to the discovery of admissible evidence.

Thus, because the plaintiff cannot show any proper or relevant reason for conducting these depositions, the requested depositions are an improper use of discovery under Mass. R. Civ. P. 26(b)(1) and should be quashed.

B. Discovery as to the Mental Processes of Individual Board Members is Impermissible.

To the extent the plaintiff seeks to obtain testimony concerning the reasoning behind the Board's decision to settle this litigation and enter an Agreement for Judgment that resulted in the issuance of a special permit, such inquiry is both irrelevant to this action and beyond the scope of permissible evidence at trial. The Planning Board's decision to settle and execute an Agreement for Judgment in Cotton Tree I is the product of litigation strategy discussions with the Board of

Selectmen and Town Counsel in executive session. All communications between the Planning Board and Town Counsel and the Board of Selectmen in executive session are privileged and not discoverable. See Marchand v. Town of Hamilton, 2010 U.S. Dist. LEXIS 32728 (D. Mass. March. 25, 2010); citing Suffolk Const. Co., Inc. v. Division of Capital Asset Management, 449 Mass. 444, 450 (2007). Further, the executive session privilege extends as long as the litigation which underlies the need for the executive session is still pending. See Marchand, 2010 U.S. Dist. LEXIS at *8; citing G.L. c. 39, §23B (holding that executive session meeting minutes must be kept secret as long as their disclosure would defeat the purpose of the executive session). Here, the executive session was held to discuss litigation strategy and disclosure of the contents of that privileged discussion would defeat the purpose of the executive session as the litigation is ongoing. Accordingly, the executive session communications of between the Planning Board, Board of Selectmen, and Town Counsel are privileged.

A local board is considered a quasi-judicial body when, in acting upon an individual application, it must make a determination that has a direct effect on particular persons, their business or property. Mullin v. Planning Board of Brewster, 17 Mass. App. Ct. 139, 143 (1983). The authority exercised by a local agency is quasi-judicial in nature if that agency is required to exercise sound judgment in the proceedings before it, and if its decision may be examined by judicial review. Coleman v. Board of Appeals of Boston, 281 Mass. 112, 115 (1932).

The Supreme Judicial Court has held that “[n]othing could be more general in its applicability than a rule that requires all persons to testify . . . in the absence of a constitutional, statutory, or common law privilege.” In re Roche, 381 Mass. 624, 634 (1980). The Court further recognized that “members of judicial or quasi-judicial bodies are disqualified by the common law from testifying as to their deliberations.” Id. at 634, n.12, citing W.B. Leach and

P.J. Liacos, Massachusetts Evidence, 145 (4th ed. 1967) (see now P.J. Liacos, Massachusetts Evidence, §13.7 (7th ed. 1999)). Accordingly, deliberations of a local Board member acting in a “quasi-judicial” capacity are privileged, and the “examination of the mental processes of administrative decision makers at an administrative hearing is inappropriate.” New England Medical Center, Inc. v. Rate Setting Comm’n, 384 Mass. 46, 56 (1981) (emphasis supplied); see also Philips v. Town of Marblehead, 148 Mass. 326, 330 (1889) (public policy compels the deliberations of judicial or quasi-judicial bodies to be private); United States v. Morgan, 313 U.S. 409, 422 (1941) (inquiry into the mental processes of administrative decision makers is usually to be avoided).¹ As such material is privileged, it is not subject to discovery. Mass. R. Civ. P. 26(b)(1).

Any inquiry into the Board’s decision-making process and litigation strategy in Cotton Tree I is completely irrelevant for purposes of the Court’s de novo review in this matter. Further, because the Board was acting in a quasi-judicial capacity when it rendered the Special Permit Decision and executed the Agreement for Judgment, the Board’s deliberations and mental processes are subject to a quasi-judicial privilege, and may not be subject to examination at a deposition, or at trial. For these reasons, the Board requests that a protective order issue precluding the plaintiff from seeking the deposition testimony of either the members of the Board of Selectmen or the Planning Board.

¹ The Town notes that the Board of Selectmen is not named as a party to this matter and the plaintiff noticing the Selectmen’s depositions is wholly inappropriate. Any communications between the Selectmen and the Planning Board relative to settlement of Cotton Tree I were conducted in executive session and are therefore privileged. Accordingly, the Selectmen have no relevant information which could be procured through a deposition.

C. Information Sought by the Plaintiff Is Readily Obtainable from Public Records and Should Not Be the Subject of Depositions of the Members of Volunteer Boards.

At bottom, this action is a zoning appeal pursuant to G.L. c.40A, sec. 17 of a decision to issue a special permit for a sawmill use. All relevant discovery concerning this matter is readily obtainable from a review of public records and does not require testimony from the members of the Board of Selectmen or Planning Board. In particular, the Plaintiff has access to the Board's notice of public meeting and the minutes from the public hearing, and all documents submitted to the Planning Board during the course of the lengthy public hearing, which are on file with the Town Clerk. All documents filed with the Court in connection with Cotton Tree I are also publicly available at the Hampshire Superior Court. Thus, to the extent the Plaintiff is seeking to obtain information concerning this matter that can be derived from review of public records concerning the public hearings before the Planning Board and the Court process in Cotton Tree I, the Plaintiff should not be permitted to seek such discovery through the more onerous and disruptive means of subjecting eight volunteer Town officials and Board members to depositions.

Further, to the extent the plaintiff has appealed this matter on the grounds that the Superior Court acted improperly in entering an Agreement for Judgment and endorsing a Special Permit as an Order of the Court pursuant to said agreement, that matter is a legal issue for this Court to address. All settlement documents and actions taken by the Superior Court in entering the Agreement for Judgment and ordering the issuance of the Special Permit pursuant thereto are part of the Court's public record in the Cotton Tree I case. The testimony of the individual Planning Board members or the non-party members of the Board of Selectmen would have absolutely no bearing on this Court's evaluation of the propriety of the settlement entered. The Planning Board raised no objection to the manner in which the Special Permit was issued by the

Court and filed no opposition to Cotton Tree's Motion to invoke the provision in the Agreement for Judgment that allowed the Court to take the action in issuing the Special Permit. Thus, there can be no valid basis for seeking the testimony of individual Board members in this regard. There is no individual testimony from these individuals that should have any bearing on the evaluation of actions taken by the Superior Court in entering an Agreement for Judgment.

D. Requiring the Members of the Board of Selectmen and Planning Board to Testify at a Deposition Would Place a Significant Burden on Members of Volunteer Boards and Would Be Contrary to Public Policy.

As part-time, volunteer public officials, the members of local boards devote a substantial amount of time to public affairs at the expense of their own personal and professional activities. After 18-months of public hearings on the Cotton Tree application, and two-years of litigation with respect to the permit denial, and having agreed to the settlement of this litigation and the issuance of a special permit to Cotton Tree, this matter has now become a matter of dispute between an abutting property owner and Cotton Tree, for which the Planning Board retains no interest. Cotton Tree, as the recipient of the special permit, is the true party in interest in this litigation. To subject members of Town boards to compulsory attendance and testimony at a deposition or trial every time one of that board's decisions is appealed or called into question by an applicant or abutter would interfere both with the time available to board members to carry out their official duties and with their individual, personal obligations and livelihood. This is particularly the case here, where the Planning Board has already expended substantial resources and settled this matter, has raised no objection to the issuance of the special permit to Cotton Tree in accordance with the Agreement for Judgment and does not intend to take an active role in defending the grant of the special permit pursuant to the Superior Court's final order. To require attendance of volunteer Board members at depositions, who are already subject to a

quasi-judicial and executive session privileges, would without a doubt, discourage voluntary participation on municipal boards, particularly in a small community such as Westhampton where volunteer positions of this type are often difficult to fill. Thus, for this additional reason, the plaintiff should be precluded from seeking to depose the members of the Board of Selectmen and Planning Board, or any other Town Official.

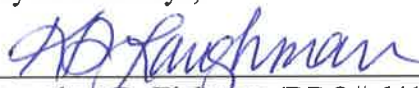
IV. CONCLUSION

For the reasons stated herein, the defendant Town of Westhampton Planning Board respectfully requests that this Court allow its Motion for Protective Order and quash the plaintiff's Notice of Taking Deposition of all of the members of the Board of Selectmen and Planning Board.

DEFENDANT,

TOWN OF WESTHAMPTON PLANNING BOARD,

By its attorneys,



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Date: October __, 2017

589559/WHAM/0041

CERTIFICATE OF SERVICE

I, Katherine D. Laughman, hereby certify that on the below date, I served a copy of the foregoing Defendants Planning Board of the Town of Westhampton and its Members' Motion for Protective Order, Memorandum in Support of Defendants Planning Board of the Town of Westhampton and its Members' Motion for Protective Order, and Rule 9C Certificate by first class mail, postage prepaid, to the following counsel of record:

Richard T. Jordan, Esq.
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Dated: 10/5/2017


Katherine D. Laughman