



Grayson 3-Lot Subdivision

ENTRY ORDER

Title: Motion to Quash Subpoena (Motion # 5)
Filer: David Rugh, Esq., Attorney for the Town of Waterbury and the Edward Farrar Utility District
Filed Date: July 27, 2022

In the present matter, Appellant Glenn Andersen (“Appellant”) appeals a decision of the Town of Waterbury Development Review Board (“DRB”) approving an application for a three-lot residential subdivision filed by Appellant’s neighbor, Charles T. Grayson (“Applicant”). This matter is scheduled for trial this coming Tuesday, August 2, 2022. Appellant Glenn Andersen has ostensibly subpoenaed Skip Flanders, whom we understand is a member of the Board of Commissioners of the Edward Farrar Utility District (“EFUD”). From the parties’ filings we understand that the Village of Waterbury formed EFUD to manage the former Village’s sewer and water utilities after the Village merged with the Town of Waterbury. EFUD is not a party to this matter, although the Town of Waterbury is.

The Town and EFUD (together “Movants”) have moved to quash the subpoena directed to Mr. Flanders. Movants argue chiefly that the request is unduly burdensome because Mr. Flanders does not have knowledge relative to the sole matter under consideration before the Court—Mr. Grayson’s proposed subdivision—and that Mr. Andersen seeks to inject issues from a separate civil matter that are not relevant to this appeal. They argue that this application is for subdivision of land only, and that even assuming it is successful, any further development, including construction of houses, water wells or a community septic system will require its own permit application and review process. They therefore claim that no impacts to surface water are possible through the project that is the subject of this application. Moreover, even were such impacts possible, they argue that that EFUD’s infrastructure could not be part of the chain of causation between activities on Mr. Grayson’s land and Mr. Andersen’s land, given the topography and hydrology of the area. Finally, they offer that even were there the potential that EFUD’s activities are implicated, Mr. Flanders, who serves in a directorial position and does not have daily contact with or detailed knowledge of the EFUD infrastructure would not be the person in the organization most likely to possess that information. They instead suggest that Mr. Bill Woodruff, who currently serves as Public Works Director for the Town of Waterbury, would be the person who is best positioned to answer such questions.

Pursuant to Vermont Rules of Civil Procedure Rule 45(d), on a timely motion, “the court for which a subpoena was issued *shall* quash or modify the subpoena if it . . . subjects a person to undue burden.” Rule 45 is to be read in *pari materia* with the Rules governing discovery. *See Wright & Miller*

9A Fed. Prac. & Proc. Civ. § 2452 (3d ed.) (“The federal courts, in a great multitude of cases, announced that the discovery rules constituted an integrated mechanism and that they must be read in pari materia.”). Rule 26 also uses the phrase “undue burden” when it comes to protective orders the Court may issue. In the test for whether a discovery request imposes an undue burden under V.R.C.P. 26, our court “considers a variety of factors, including the needs of the case and the importance of the issue at stake in the litigation, as well as the burden the discovery would impose.” Weatherly v. Gravel and Shea, P.C., No. 97-79-11 Cncv, 2013 WL 12231876, at *2 (Vt. Super. Ct. July 31, 2013) (citations omitted). We consider those factors here.

No information has been provided suggesting that Mr. Flanders possesses any information relevant to the issues at stake in this appeal. To the extent that we can follow the logic in Mr. Andersen’s letter in support of his request for subpoenas, it appears that he wishes to question EFUD representatives about a wholly separate matter that EFUD has filed against him in the civil division of the Superior Courts, concerning alleged deeded access rights to a well on Mr. Andersen’s property. This is not an appropriate use of a subpoena.

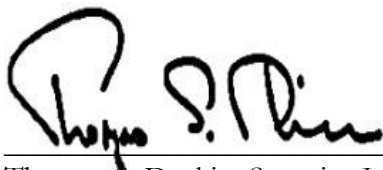
The application before us is for subdivision of land only. EFUD is not involved in approving of that subdivision. Even if the subdivision application is approved, any construction or further significant clearing on the parcels will require further permits. Moreover, the individual water supply wells and community wastewater system that the subdivision application indicates will serve the resulting parcels each require their own state permits. During the applications for those permits, impacts to the local aquifer and surface waters will be considered.

The value of Mr. Flanders’s testimony to this case therefore appears negligible. Given the likely time and expense involved in preparing for and appearing at trial, we consider this subpoena request to represent an undue burden on Mr. Flanders. The motion to quash that subpoena is therefore **GRANTED**. However, we accept movants’ offer to make Mr. Woodruff available to testify at trial as a substitute with the best knowledge of municipal water infrastructure in this area and direct the Town to do so.

As the Court was preparing this Entry Order, Mr. Anderson e-mailed Court staff to suggest that he will be presenting a further response to this motion. To the extent that Mr. Anderson’s e-mail represents a request for an extension to file a response, the Court **DENIES** that request. This trial is scheduled for next Tuesday and we encourage the parties to use the remaining twelve or so business hours to prepare for trial.

So Ordered.

Electronically signed on July 29, 2022, at Burlington, Vermont pursuant to V.R.E.F. 9(d).

A handwritten signature in black ink, appearing to read "Thomas S. Durkin", written over a horizontal line.

Thomas S. Durkin, Superior Judge
Environmental Division