SUBPAR SUBPOENA CLAUSES: WHY STATES NEED TO LEGISLATIVELY AMEND THEIR ZONING SUBPOENA LAWS

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I. INTRODUCTION

Land in New Jersey is at a premium.[1] Whether the land is being preserved for environmental reasons,[2] or recognized as suitable for development,[3] the public and private fight over land in New Jersey requires laws that are able to withstand the battle. In addition, this conflict is being played out across the country as developers push to develop land faster than states can preserve it.[4] New Jersey presents an interesting case study of this battle over land because it is a microcosm of our society at large.[5]

Many state constitutions and statutes provide the state with the ability to regulate land development as a police power.[6] New Jersey's power to regulate land is also well-established by constitutional and statutory provisions. Article III of the New Jersey Constitution provides the Legislature with the authority to regulate land use.[7] The State's

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[1] New Jersey's "persons per square mile" in 2000 was 1,134.5 versus 79.6 for the rest of the United States. U.S. Census Bureau, State and County Quick Facts: New Jersey, http://quickfacts.census.gov/qfd/states/34000.html (last visited Sept. 8, 2009).

[2] *See, e.g.*, N.J. STAT. ANN. §§ 13:20-1 to -35 (2008); N.J. STAT. ANN. §§ 13:18A-1 to -58, (West 1979).

[3] *See, e.g.*, N.J. STAT. ANN. § 40:55D-28 (2008); N.J. STAT. ANN. § 40:55D-32 (2008); N.J. STAT. ANN. § 40:55D-62 (2008).

[4] *See, e.g.*, Ryan Schlehuber, *Developer Offers City Rights To Waterfront Land*, ST. IGNACE NEWS, Oct. 30, 2008, at 3; Carolyn Jones, *Corona Heights, Neighbors fight to keep city plots undeveloped*, SAN FRANCISCO CHRONICLE, Mar. 25, 2005, at F1; John McElhenny, *'Mansionization' tied to loss of open spaces*, BOSTON GLOBE, Nov. 10, 2003, at A1; Glenn Frankel and Stephen C. Fehr, *As the Economy Grows, the Trees Fall*, WASHINGTON POST, Mar. 23, 1997, at A01; Anthony DePalma, *As Suburbs Sprawl, Open Space Shrinks*, N.Y. TIMES, July 31, 1988, §10, at 1.

[5] New Jersey's census data presents a very similar picture when compared against the rest of the United States, especially when analyzing family and household numbers. U.S. Census Bureau, *supra* note 1.

[6] *See, e.g.*, GA. CONST. art. IX, § II, para. 1; GA. CODE ANN. § 36-66-2 to 66-6 (LEXIS through 2009 Sess.); IL. CONST. art. VII, § 6; 65 ILL. COMP. STAT. 5/11-13-1 to 26 (LexisNexis, LEXIS through 2009 Sess.); MI. CONST. art. VII, §17; MICH. COMP. LAWS SERV. § 125.3101-3103 (LexisNexis, LEXIS through 2009 Sess.); MO. CONST. art. VI, § 19(a); MO. REV. STAT. § 89.010-144 (LEXIS through 2008 Sess.). *See generally* S.C. CONST. art. VIII, § 7; S.C. CODE ANN. § 6-29-310 to 380 (LEXIS through 2008 Sess.); VT. CONST. chap. I arts. II and IX, chap. II, § 6; VT. STAT. ANN. tit. 24, § 4411-4427 (LEXIS through 2009 Sess.). This list is not exhaustive, but it does show that states from different parts of the United States that vary by size and population embrace similar zoning schemes. Thus, the problems highlighted by the New Jersey scenarios that follow are equally applicable to any state.

[7] N.J. CONST. art. III, ¶ 1; *see* WILLIAM M. COX & DONALD M. ROSS, NEW JERSEY ZONING AND LAND USE ADMINISTRATION § 1-1 (Gann Law Books 2008).

Constitution also authorizes the Legislature to grant zoning power to municipalities, and the Legislature used that authority to enact the Municipal Land Use Law of 1975 ("MLUL").[8] Under the MLUL, townships have the exclusive powers to enforce the law,[9] as well as to adopt and enforce zoning ordinances.[10]

New Jersey is a home rule state,[11] which permits land use decisions to be made by local land use boards that are imbued with particular knowledge of the needs and developments of a community.[12] These boards are composed of local community members[13] who are typically assisted by an attorney, planner, and engineer.[14] However, what

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[8] N.J. CONST. art. IV, § VI, ¶ 2; *see also* N.J. State League of Municipalities v. Dep't of Cmty. Affairs, 708 A.2d 708, 710 (N.J. Super. Ct. App. Div. 1998); *see generally* N.J. STAT. ANN. §§ 40:55D-1 to -106 (2008).

[9] *See* N.J. STAT. ANN. § 40:55D-18.

[10] *See* N.J. STAT. ANN. § 40:55D-62.

[11] N.J. CONST. art. IV, § VII, ¶ 11. However, some authorities have questioned whether home rule even exists any longer in New Jersey, other than as a theory. John E. Trafford, *Home Rule in the '90s: Is it Alive or Dead?*, NEW JERSEY STATE LEAGUE OF MUNICIPALITIES, http://www.celdf.org/HomeRule/DoesmyStatehaveHomeRule/HomeRuleinNewJersey/tabid/162/Default.aspx (last visited Nov. 20, 2009). The legislature has chipped away at municipal authority through legislation enacted under the State's police power, and the courts have repeatedly upheld these encroachments. *Id.* Other states have also adopted the home rule concept. *See, e.g.*, GA. CONST. art. IX, § 2; IL. CONST. art. VII, § 6(a); MI. CONST. art. VII, § 2. However, some states, for example Oregon, regulate zoning and land use on a regional or state-wide basis. OR. REV. STAT. § 197.005 (LEXIS through 2007 Sess.). This idea has been discussed for possible adoption in New Jersey. Andrew R. Davis, *The Fix for a Broken Land-Use System: Go Regional*, 197 N.J.L.J. 639, Aug. 24, 2009.

[12] *See* Charlie Brown of Chatham v. Bd. of Adj., 495 A.2d 119, 123 (N.J. Super. Ct. App. Div. 1985) (citing Kramer v. Bd. of Adj., Sea Girt, 212 A.2d 153 (N.J. 1965)).

[13] N.J. STAT. ANN. § 40:55D-23 (establishing the membership of the planning board); N.J. STAT. ANN. § 40:55D-69 (establishing the membership of the zoning board of adjustment). *See also* 65 ILL. COMP. STAT. 5/11-13-3(b) (LexisNexis, LEXIS through 2009 Sess.); MICH. COMP. LAWS SERV. § 125.3601-3607 (LexisNexis, LEXIS through 2006 Sess.); MO. REV. STAT. § 89.080 (LEXIS through 2008 Sess.); S.C. CODE ANN. § 6-29-350 (LEXIS through 2008 Sess.). Some states establish minimum guidelines at the state level which permit the municipalities to flesh out its code to meet its needs. GA. CODE ANN. 36-66-2 to 66 (LEXIS through 2009 Sess.); FAYETTE COUNTY, GA., ZONING BOARD OF APPEALS, art. IX, *available at* http://fayettecountyga.gov/planning_and_zoning/pdf/FVERSART.009.pdf.

[14] N.J. STAT. ANN. § 40:55D-24 (2008) (permitting planning board to employ an attorney and other necessary professionals); N.J. STAT. ANN. § 40:55D-71 (2008) (permitting zoning board of adjustment to employ an attorney and other necessary professionals). *See also* MICH. COMP. LAWS SERV. § 125.3825 (LexisNexis, LEXIS through 2008 Sess.); S.C. CODE ANN. § 6-29-360.

happens when any party and the board disagree on the proper course of action at a hearing, and the only "law" on the matter uses vague and broad language? This is the issue that many planning and zoning boards face when an applicant, objector, or other party requests the issuance of a subpoena to compel a witness's attendance or documents at a hearing. These boards are often guided by their respective state statutes,[15] and may rely on treatises, similar to William M. Cox's "New Jersey Zoning and Land Use Administration,"[16] for clarification when both statutory and case law are unclear on a novel point. But what happens when neither adequately discusses nor explains how to handle a subpoena request?[17]

This Article is not intended to be an extensive fifty state survey of subpoena laws, but instead seeks to show that the current state of the subpoena power under many state zoning statutes needs a linguistic make-over. Although states have subpoena clauses[18] and issues[19] similar to those in New Jersey, no court has tackled the matter in an "approved for publication"[20] opinion. The current statutory language fails to establish which parties are entitled to the issuance of a subpoena as a matter of due process, or to the contrary, what process is due. This Article aims to demonstrate the evidentiary considerations that should guide a board's decision to grant or deny a subpoena request.

Section II will provide the history of the MLUL, similar state

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[15] N.J. STAT. ANN. § 40:55D-1 (2008).

[16] *See generally* COX & ROSS, *supra* note 7.

[17] *See, e.g.*, N.J. STAT. ANN. § 40:55D-10(c) (2008); COX & ROSS, *supra note* 7, at §§ 2-7.5, 27-5 (failing to address or provide guidance on subpoena requests at land use hearings).

[18] *See, e.g.*, MICH. COMP. LAWS. SERV. § 24.273 (LexisNexis 1970). Several states permit their counties to establish the rules governing their zoning board of adjustment. *See, e.g.*, FAYETTE COUNTY, GA., ZONING BOARD OF APPEALS, *supra* note 13; GEORGETOWN COUNTY, S.C., ZONING BOARD OF APPEALS, art. XIII, § 1304.4, *available at* http://www.georgetowncountysc.org/zoning/ordinances.html (follow "Zoning Board of Appeals" hyperlink) (last visited Nov. 20, 2009). Additionally, some states permit individual municipalities to establish the rules governing their zoning boards of adjustment. *See generally* ANCHORAGE, AK., BOARDS, COMMISSIONS, AND MUNICIPAL ADMINISTRATION, tit. 21, ch. 21.02.060, *available at* http://library5.municode.com/default-now/home.htm?infobase=12717&docaction=whatsnew (follow "TITLE 21 LAND USE PLANNING" hyperlink) (last visited Nov. 20, 2009).

[19] *See, e.g.*, Nw. Univ. v. City of Evanston, 383 N.E.2d 964, 967 (Ill. 1978) (discussing the University's refusal to attend a hearing after subpoena's were issued at objector's request).

[20] *See* N.J. CT. R. 1:36-2.

statutes, and the development of the subpoena power. Section III will present several New Jersey scenarios and cases, which will be used to further the subpoena power discussion in the later sections of the Article. Although the scenarios occurred in New Jersey, they could have occurred in any state with a subpoena clause in its zoning procedures. Section IV will discuss the opinion issued in *Colligan v. Zoning Bd. of Adj. of Howell*,[21] which presented an extended discussion of how subpoena requests should be handled by planning and zoning boards in New Jersey. Again, although this a New Jersey case, it has national significance because the subpoena authority developed from shared common law and federal sources, and would be interpreted against similar statutes. Section V will discuss the potential improvements that can be made to the statutory language to provide significantly enhanced guidance to boards, applicants, objectors, and other interested parties.

II. THE DEVELOPMENT OF ZONING AND SUBPOENA LAWS

A. Zoning Law History

In 1924, the New Jersey Legislature successfully passed a zoning enabling statute that withstood judicial scrutiny.[22] Two years later, the United States Supreme Court, in *Village of Euclid v. Amber Realty*, upheld municipal zoning authority.[23] The first New Jersey statute was superseded by title 40, section 55D-70 of the New Jersey Statutes Annotated's historical predecessor, section 55-39.[24] This statute provided the chairman of the board of adjustment, or the acting chairman, with the ability to "issue subpoenas for the attendance of witnesses and the production of records" related to applications before

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[21] No. MON-L-365-08 (N.J. Sup. Ct. Law Div. 2008); McAllan v. Howell Twp. Zoning Bd. of Adj., No. MON-L-1309-08 (N.J. Sup. Ct. Law Div. 2008). The cases were consolidated under the Colligan docket number on June 10, 2008, and will only be cited under the Colligan docket number for the remainder of the article.

[22] 1924 N.J. Laws 324-31; *see* Andrews v. Bd. of Adj. of Ocean Twp., 152 A.2d 580, 585 (N.J. 1959) (Hall, J., dissenting) (discussing the historical progression of New Jersey zoning laws).

[23] 272 U.S. 365 (1926).

[24] 1928 N.J. Laws 699; Commercial Realty & Res. Corp. v. First Atl. Properties Co., 585 A.2d 928, 932 (N.J. 1991).

the board.[25] Although the New Jersey Legislature amended section 55-39 several times, no change has been made to the board's subpoena authority.[26]

The MLUL, like other zoning and planning statutes from across the United States, is a comprehensive statutory scheme which sets forth, *inter alia*, the powers of the planning board[27] and the board of adjustment,[28] the contents of a master plan,[29] the components of the official map,[30] and the subdivision and site plan review process.[31]

Although the MLUL and its predecessor contained similar language,[32] there was only one major procedural modification in the recent law; boards of adjustment were now able to grant use variances without the approval of the governing body.[33] Planning boards were now authorized to approve certain variances for lot area, lot dimensions, setback, and yard requirements.[34] These changes merely focused on the issue of when and what types of variances could be granted,[35] and any

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[25] 1928 N.J. Laws 699.

[26] *Compare* 1928 N.J. Laws 699, *with* 1953 N.J. Laws 1825-26, and 1975 N.J. Laws 1121, and N.J. STAT. ANN. § 40:55D-10(c) (2008).

[27] N.J. STAT. ANN. § 40:55D-25 (2008). *See also* MICH. COMP. LAW SERV. §§ 125.3811-3825 (LexisNexis, LEXIS through 2008 Sess.); N.C. GEN. STAT. § 160A-361 (LEXIS through 2008 Sess.); S.C. CODE ANN. § 6-29-340 (LEXIS through 2008 Sess.); VT. STAT. ANN. tit. 24, § 4325 (LEXIS through 2009 Sess.).

[28] N.J. STAT. ANN. § 40:55D-69 (2008). *See also* MICH. COMP. LAW SERV. § 125.3603 (LEXIS through 2006 Sess.); S.C. CODE ANN. § 6-29-800 (LEXIS through 2008 Sess.); VT. STAT. ANN. tit. 24, § 4461 (LEXIS through 2009 Sess.).

[29] N.J. STAT. ANN. § 40:55D-28 (2008). *See also* MICH. COMP. LAW SERV. § 125.3831 (LexisNexis, LEXIS through 2008 Sess.); VT. STAT. ANN. tit. 24, § 4325(1).

[30] N.J. STAT. ANN. § 40:55D-32 (2008). *See also* S.C. CODE ANN. § 6-29-340(B)(2)(c) (LEXIS through 2008 Sess.); VT. STAT. ANN. tit. 24, § 4421 (LEXIS through 2009 Sess.).

[31] N.J. STAT. ANN. § 40:55D-37 (2008). *See also* MICH. COMP. LAW SERV. § 125.3871 (LexisNexis, LEXIS through 2008 Sess.); N.C. GEN. STAT. § 160A-371 (LEXIS through 2008 Sess.); VT. STAT. ANN. tit. 24, § 4418 (LEXIS through 2009 Sess.).

[32] *Compare* N.J. STAT. ANN. § 40:55-39 (2008), *with* N.J. STAT. ANN. § 40:55D-70 (2008).

[33] *Compare* 1975 N.J. Laws 1168, *with* 1924 N.J. Laws 324-31.

[34] 1975 N.J. Laws 1133.

[35] *See* Commercial Realty & Res. Corp. v. First Atl. Properties Co., 585 A.2d 928, 932 (N.J. 1991) (citing DeSimone v. Greater Englewood Hous. Corp. No. 1, 267 A.2d 31 (N.J. 1970) (sustaining use variance under subsection d, and height, side-yard, and parking variances under subsection c); Gougeon v. Bd. of Adj. of Stone Harbor, 245 A.2d 7 (N.J. 1968) (reviewing and remanding denial of variances for lot area and side-yard under subsection c); Harrington Glen, Inc. v. Municipal Bd. of Adj. of Leonia, 243 A.2d 233 (N.J. 1968) (reviewing and remanding denial of variances for lot area, frontage, and sideyards under subsection c); Place v. Bd. of Adj. of Saddle River, 200 A.2d 601 (N.J. 1964)

potential procedural issues like the issuance of subpoenas were largely ignored.

The process established by the MLUL and other zoning laws is fairly basic. The Legislature has mandated certain uniform policies for New Jersey municipalities to follow which foster fair and impartial land use decisions at the municipal level.[36] Pursuant to the MLUL, the Legislature required that "hearings be held on each application for development" in order to protect the interests of the applicant and the objectors.[37] In order to protect the integrity of such hearings, all applications and documents must be filed at least ten days in advance, and must be available for public review.[38] Hearing testimony must be taken under oath, and cross examination of witnesses is permitted.[39] In

(affirming denial of side-yard variance for fallout shelter under subsection c, and holding subsection d inapplicable because use was permitted); Russell v. Bd. of Adj. of Tenafly, 155 A.2d 83 (N.J. 1959) (reviewing and affirming grant of setback and area variances under subsection c); Ardolino v. Bd. of Adj. of Florham Park, 130 A.2d 847 (N.J. 1957) (reviewing and reversing denial of frontage variance under subsection c); Branagan v. Schettino, 242 A.2d 853 (N.J. Super. Ct. App. Div. 1968) (reviewing and reversing grant of area and frontage variances under subsection c); Bove v. Bd. of Adj. of Emerson, 241 A.2d 252 (N.J. Super. Ct. App. Div. 1968) (reviewing and affirming denial of frontage variance under subsection c); Toutphoeus v. Joy, 196 A.2d 250 (App. Div. 1963) (reviewing and remanding grant of frontage variance under subsection c); Holman v. Bd. of Adj. of Norwood, 187 A.2d 605 (N.J. Super. Ct. App. Div. 1963) (reviewing and reversing grant of undersized-lot variance under subsection c); Smith v. Paquin, 185 A.2d 673 (N.J. Super. Ct. App. Div. 1962) (reviewing and remanding denial of area, frontage, and side-yard variances under subsection c); Betts v. Bd. of Adj. of Linden, 178 A.2d 209 (N.J. Super. Ct. App. Div. 1962) (reviewing and affirming denial of frontage and area variances under subsection c); Miller v. Bd. of Adj. of Boonton, 171 A.2d 8 (N.J. Super. Ct. App. Div. 1961) (holding that because bathhouse was prohibited use in residential zone, variance relief could be granted only under subsection d and not c, and affirming denial of variance); Bierce v. Gross, 135 A.2d 561 (N.J. Super. Ct. App. Div. 1957) (reviewing and reversing grant of depth and area variances under subsection c); Deer-Glen Estates v. Bd. of Adj. of Fort Lee, 121 A.2d 26 (N.J. Super. Ct. App. Div. 1956) (holding that variance for residential-side-yard violation must be reviewed under subsection c rather than d, and reversing Law Division's grant of variance); Mischiara v. Bd. of Adj. of Piscataway, 186 A.2d 141 (N.J. Super. Ct. Law Div. 1962) (reviewing and reversing denial of frontage and area variances under subsection c)).

[36] N.J. CONST. art. IV, § 6, ¶ 2 (granting municipalities the ability to "adopt zoning ordinances limiting and restricting to specified districts and regulating therein, buildings and structures, according to their construction, and the nature and extent of their use, and the nature and extent of the uses of land . . ."); *see generally* N.J. STAT. ANN. §§ 40:55D-1 to -106 (2008) (establishing the zoning and planning scheme for the State of New Jersey).

[37] N.J. STAT. ANN. § 40:55D-10.

[38] N.J. STAT. ANN. § 40:55D-10(b). *See also* N.C. GEN. STAT. 63-33(c)(3) (LEXIS through 2008 Sess.).

[39] N.J. STAT. ANN. § 40:55D-10(d). *See also* N.C. GEN. STAT. 63-33(c)(3); VT. STAT. ANN. tit. 24, § 4462 (LEXIS through 2009 Sess.).

rendering a decision, the board shall "include findings of fact and conclusions . . . and shall reduce the decision to writing."[40] Lastly, the written decision is to be forwarded to the parties, and "a synopsis published in the newspaper."[41] The municipality must record and preserve the testimony at the hearing.[42]

B. The Subpoena Clause

1. History of Subpoena Authority

a. Origins of Subpoena Authority in England

The power to subpoena originated in England as part of the transition from an inquisitional to an adversarial trial procedure. By the sixteenth century, jurors realized that their personal knowledge was insufficient to decide cases,[43] although courts relied on that process since the late medieval period.[44] Thus, courts began to seek oral testimony from outside witnesses, which made sense "due to the firmness with which the common law adhered to the view that the jury were as much witnesses as judges of fact."[45]

Chancery began utilizing the subpoena process as early as the fourteenth century.[46] The subpoena became the preferred instrument of the Council and the Chancery, as both were "outside the sphere of common law" and allowed witnesses to give oral evidence.[47] However, Parliament rejected the subpoena as "repugnant to the common law."[48]

Increased activity in the Chancery likely encouraged the introduction of compulsory process for witnesses in the common law

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[40] N.J. STAT. ANN. § 40:55D-10(g). *See also* VT. STAT. ANN. tit. 24, § 4464(b)(1) (LEXIS through 2009 Sess.).

[41] Albanian Associated Fund v. Twp. of Wayne Planning Bd., No. 06-cv-3217 (D.N.J. Nov. 29, 2007), http://www.njeminentdomain.com/26-7-9057%20ALBANIAN%20ASSOCIATED%20FUND%20%20ET%20AL.%20V.%20TWP.%20OF%20WAYNE%20%20ET%20AL..pdf; § 40:55D-10(h). *See also* VT. STAT. ANN. tit. 24, § 4464(b)(3).

[42] N.J. STAT. ANN. § 40:55D-10(f). *See also* VT. STAT. ANN. tit. 24, § 4464(b)(3).

[43] 9 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 131 (3d ed., 1944).

[44] Peter Western, *The Compulsory Process Clause*, 73 MICH. L. REV. 71, 78 (1974).

[45] 9 W. HOLDSWORTH, *supra* note 43, at 131.

[46] *Id.* at 184.

[47] *Id.* at 131.

[48] SELECT CASES BEFORE THE KING'S COUNCIL, 1243-1482, 36 (I.S. Leadam & J.F. Baldwin eds., Harvard University Press 1918).

courts.[49] The process was officially enacted under the Statute of Elizabeth, which subjected "a person to a penalty who, if summoned as a witness with a tender of a reasonable sum for his costs and charges as with regard to distance was necessary, did not appear."[50] It is often said that "[t]his statute did for testimony at common law what the subpoena had done for testimony . . . more than one hundred years before,"[51] by formally implementing the use of subpoenas in common law courts. Although the statute originally applied only to civil cases, by 1679 judges began to grant accused criminals compulsory process by special order.[52] Statutes slowly began to guarantee an accused this right between 1695 and 1701.[53]

2. Progression of the Federal Subpoena Authority in the United States

Subpoena power was first introduced into American society through colonial courts in 1712.[54] However, it was not until the passage of the first Judiciary Act in 1789 that the mode of examination of witnesses and the duty of such witnesses to appear and testify was recognized.[55] Specifically, the "all writs" provision of section 14 of the Judiciary Act of 1789 provided "the authority to issue subpoena *duces tecum*, for 'the right to resort to means competent to compel the

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[49] 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2190, 66-67 (McNaughton rev. 1940).

[50] Chamberlain v. Stoneham, (1890) 29 Eng. Rep. 115-16 (Q.B.D.). The Statute states:

> [I]f any [Person] or [Persons] upon whom any [Process] out of any of the Courts of Record within this realm of Wales [shall] be [served] to [testify] or [depose] concerning any [Cause] or Matter depending in any of the [same] Courts, and having tendered unto him or them, according to his or their Countenance or Calling, [such reasonable Sums] of money for his or their [Costs] and [Charges] as having Regard to the [Distance] of the Places is [necessary] to be allowed in that Behalf, do not appear according to the Tenor of the [said Process], having not a lawful and a reasonable Let or Impediment to the contrary; that then the Party making Default, to [lose] and forfeit for every [such] [Offense] ten Pounds, and to yield [such] further [Recompense] to the Party grieved . . . .

Statute of Eliz., 5 Eliz. I, c. 9, § 12 (1562-63) (Eng.).

[51] 8 WIGMORE, *supra* note 49, at 65.

[52] *See id.* at 67.

[53] *See id.*

[54] *See id.* at 67 n.25. The earliest American colonial compulsory statute was probably that of South Carolina in 1712. *Id.*

[55] *Id.* at 34 (quoting Blair v. United States, 250 U.S. 273, 280-81 (1919)).

production of written, as well as oral, testimony . . . ."'[56] United States case law subsequently extended compulsory process not only to having witnesses subpoenaed to testify, but also to the production of documents.[57] Thus, Chief Justice Marshall soon recognized that the only difference between different subpoenas is what they require the witness to supply.[58]

The subpoena authority further expanded in the United States during the late nineteenth and twentieth centuries. Subpoenas were recognized during that time as instruments "issued for the preliminary examination, grand jury proceedings, deposition, and the trial."[59] One court went so far as to state that "[t]he process of subpoena is always at the command of the United States District Attorney without the authorization of this court."[60] An advisory committee drafted the Federal Rules of Criminal Procedure in the 1940s,[61] which included Rule 19,[62] addressing the subpoena power in the federal courts.[63]

3. The Development of the New Jersey Subpoena Authority

The power to subpoena was available in New Jersey at least as early as the nineteenth century.[64] New Jersey has never elevated the subpoena power to a constitutional right,[65] and has instead maintained it as a creature of statutory construction.[66] Additionally, the power may be

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[56] *Id.* at 42 (citing *In re* Storror, 63 F. 564, 565 (N.D. Cal. 1894)).

[57] *See, e.g.*, Winn v. Patterson, 34 U.S. 663, 676 (1835) (noting the common practice to produce deeds by a subpoena *duces tecum*); Dringer v. Jewett, 13 A. 664 (N.J. Eq. 1887) (highlighting the fact that documents were not produced until after a party was served with a subpoena *duces tecum*).

[58] United States v. Burr, 25 F. Cas. 30, 35 (C.C.D. Va. 1807 (No. 14,692d)) (stating "[a] subpoena *duces tecum* varies from an ordinary subpoena only in this: that a witness is summoned for the purpose of bringing with him a paper in his custody").

[59] Orfield, *supra* note 55, at 36 (citing Hale v. Henkel, 201 U.S. 43 (1906); Crumpton v. United States, 138 U.S. 361 (1891); United States v. Hofmann, 24 F. Supp. 847, 848 (S.D.N.Y. 1938); United States v. Beavers, 125 F. 778, 779 (S.D.N.Y 1903)).

[60] *Id.* at 37 (citing United States v. Barefield, 23 F. 136, 137 (E.D. Tex. 1885)).

[61] Mark Kadish, *Behind the Locked Door of an American Grand Jury: Its History, Its Secrecy, and Its Process*, 24 FLA. ST. U. L. REV. 1, 23 n.155 (1996).

[62] Currently FED. R. CRIM. P. 17.

[63] *Id.*

[64] R. S. 547. Rev. 1877, p. 2; 1834 N.J Laws 88 (Josiah Harrison. ed.).

[65] *Compare* N.J. CONST. (1776), *with* N.J. CONST. (1844) and N.J. CONST. (1947).

[66] Traino v. McCoy, 455 A.2d 602, 609 (N.J. Super. Ct. Law Div. 1982) (quoting Newark v. Benjamin, 364 A.2d 563 (N.J. Super. Ct. Law Div. 1976), *aff'd* 365 A.2d 945 (N.J. Super. Ct. App. Div. 1976), *aff'd* 381 A.2d 793 (N.J. 1977)) (stating "[e]very instance

conferred upon a legislative body that has been granted the power to conduct investigations.[67]

Currently, New Jersey counties and municipalities may be granted statutory authority to issue subpoenas under the County and Municipal Investigations Law, first enacted in 1953.[68] However, New Jersey's courts have found that the Act does not grant the power to issue subpoenas on its own accord.[69] Rather, it must be inserted into a statute or be extended to a board or governing body by "the four corners of a statute."[70] This provision is often inserted into other statutory schemes,[71] including the MLUL.[72] Although the subpoena power has been discussed in the criminal,[73] administrative,[74] and legislative[75] settings, no New Jersey court has issued a published opinion on the topic, much like courts from across the United States.

III. CASE LAW

Several cases highlight the trouble caused to applicants, the boards, attorneys, and courts by New Jersey's vague subpoena language. Although cases can come from different municipalities, with different factual situations, they present similar "wastes of time" based on unclear statutory language and a lack of supporting or clarifying legislative history.

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in which subpoenas may be issued in this State is one in which the basic authority comes from a statute"); Prunetti v. Mercer Cty. Bd. Of Freeholders, 794 A.2d 278, 303 (N.J. Super. Ct. Law Div. 2001) (quoting *In re* Shain, 457 A.2d 828, 832 (1983)) (stating "'[n]o specific statutory grant is necessary to vest a legislative body with subpoena power,' but instead could be implied from the legislative scheme").

[67] *See* McGrain v. Daugherty, 273 U.S. 135, 180 (1927); *Shain*, 457 A.2d at 832 (N.J. 1983); *see generally Prunetti*, 794 A.2d 278.

[68] N.J. STAT. ANN. § 2A:67A-1 (2008). The Act states: "[w]henever a municipal or county governing body . . . is authorized or required to conduct any hearing or investigation, take testimony or make any determination affecting the rights, property, or obligations of any person, it may proceed in accordance with this act." *Id.*

[69] *Prunetti* 794 A.2d at 300.

[70] *Shain*, 457 A.2d at 832.

[71] *See* N.J. STAT. ANN. § 40:48-25 (2008).

[72] N.J. STAT. ANN. § 40:55D-10(c) (2008).

[73] *See* State v. Garcia, 949 A.2d 208 (N.J. 2008); State v. Smith, 169 A.2d 482 (N.J. Super. Ct. App. Div. 1961).

[74] *See* State v. Misik, 569 A.2d 894 (N.J. Super. Ct. App. Div. 1989); *see, e.g.*, Benafield v. Indus. Comm'n of Arizona, 975 P.2d 121, 129 (Ariz. Ct. App. 1998) (finding that subpoenas must be issued in writing before a hearing in order to be considered timely).

[75] *See* McGrain v. Daugherty, 273 U.S. 135, 165 (1927); *Shain*, 457 A.2d.

A. Freehold House of Worship Case

The applicant, Paul Sweda, sought an interpretation from the Freehold Township Board of Adjustment that the use of certain residential property as a house of worship violated the Freehold Township Zoning Ordinance.[76] Specifically, houses of worship are considered a conditional use.[77] Mr. Sweda testified that fifty to sixty people attended religious services at a rabbi's house nine or ten times a year, and he had videotape to support this claim.[78] Gerald Marks appeared on behalf of Rabbi Bernstein, who owned the property at issue, and requested that the Board subpoena the former Mayor of Freehold Township, Dorothy Avallone, to testify as to the number of people and visits per year because they differed from the applicant's numbers.[79] Mr. Marks later requested additional subpoenas because he was not prepared to move forward with his case.[80]

Mr. Galvin, the Board's attorney, attempted to provide guidance to the Board of Adjustment on the issuance of subpoenas.[81] He referred to the Cox treatise, and noted that a board has the authority to issue subpoenas when it believes that a party has relevant information for a case, but is unwilling to appear.[82] The Board members discussed whether it was necessary to subpoena anyone, as well as whether the information could be obtained through alternative means.[83] One Board member wondered whether it was necessary to bring in someone as important as the mayor, and whether the necessary information could be obtained through an Open Public Records Act request.[84] The final determination of the Board at the hearing was that the subpoenas were not necessary when other options were available, but the Board would

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[76] *Freehold Township Zoning Board of Adjustment: Minutes* (Jan. 24, 2008), *available at* http://www.twp.freehold.nj.us/__minutes__/zbminutes012408.pdf; *Freehold Township Zoning Board of Adjustment: Minutes* (Feb. 28, 2008), at 4, *available at* http://www.twp.freehold.nj.us/__minutes__/zbminutes022808.pdf.

[77] *Freehold Township Zoning Board of Adjustment: Minutes* (Feb. 28, 2008), *supra* note 77, at 4.

[78] *Id.* at 3.

[79] *Id.* at 4.

[80] *Id.* at 12.

[81] *Id.* at 10.

[82] *Id.*

[83] *Id.* at 11.

[84] *Freehold Township Zoning Board of Adjustment: Minutes* (Feb. 28, 2008), *supra* note 77, at 12.

keep the subpoena option available if the information could not otherwise be obtained.[85]

B. *Pristine Properties, Inc. Interpretation Application*

Pristine Properties proposed to build a car wash and lube service in Franklin Township's business zone.[86] Pristine sought an interpretation from the Board asking whether the proposed use was a permitted use in the zone based on an interpretation of the ordinance.[87] The original ordinance read "automobile sales and showroom", but was subsequently changed to "automobile salos and showroom" before finally reading "automobile salons and showrooms."[88] Pristine sought to subpoena two former zoning officers and the municipal planner who was involved with the last master plan review.[89]

The Board's attorney explained the subpoena process to the Board, and determined that the subpoena was unnecessary.[90] He noted that the current Board is not bound by the decisions of prior zoning officers, or even the current zoning officers.[91] Further, he explained that the planner's testimony would be extraneous because the planner issued a report of his findings and conclusions which were a public record.[92]

C. *Colligan Interpretation and Variance Application and Lawsuit*

The defendant in *Colligan*, Mr. Pagano, purchased the subject property from Mr. Puglisi, which contained a warehouse type facility, to operate his watermelon distribution business.[93] He initially received all

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[85] *Id.*

[86] *Township of Franklin Zoning Board of Adjustment County of Somerset, New Jersey: Regular Meeting* (Aug. 4, 2005), at 2, *available at* http://www.franklintwpnj.org/zone_minutes_08-04-05.pdf.

[87] *Id.* The applicant was still being heard two years later. *Township of Franklin Zoning Board of Adjustment County of Somerset, New Jersey: Regular Meeting* (Mar. 1, 2007), at 6, *available at* http://www.franklintwpnj.org/ zone_minutes_03-01-07.pdf.

[88] *Township of Franklin Zoning Board of Adjustment County of Somerset, New Jersey: Regular Meeting* (Aug. 4, 2005), at 2.

[89] *Id.* at 3.

[90] *Id.*

[91] *Id.*

[92] *Id.*

[93] Colligan v. Zoning Bd. of Adj. of Howell, No. MON-L-365-08, slip op. at 3-4 (N.J. Sup. Ct. Law Div. 2008).

the permits and licenses necessary to operate his company at the facility, but was later cited by a zoning officer for certain violations related to the business's operations.[94] Pagano filed an appeal to the zoning board and sought an interpretation that the business was operating as the continuation of a pre-existing non-conforming use.[95] Several neighbors appeared as objectors to the application, claiming that the use had been abandoned by the previous owner, or that the use was an unlawful expansion of the prior use.[96]

The Board conducted seven public hearings over a three-year period.[97] Several witnesses testified at the early hearings before some of the objectors became involved.[98] Plaintiffs McAllan and Gorsky, neighboring property owners, sought to compel the attendance of Mr. Puglisi who they had not had the opportunity to cross-examine.[99] However, the Board concluded that Mr. Puglisi was already cross-examined at the first meeting by the objectors, the Colligans, who were attorneys.[100] McAllan and Gorsky additionally sought to subpoena a past representative of Eiffel, a former commercial tenant of the property, to determine the extent of the property's prior use, and electrical records to prove that the electrical service to the property had been discontinued as proof of abandonment.[101] The Board determined that the plaintiff's attempt to cross-examine Mr. Puglisi's testimony would have been repetitive because he had already been extensively cross-examined at the first hearing by the Colligans.[102] The Board further noted that both of the Colligans were attorneys, well practiced in cross-examination techniques, and purchased the property next to Pagano when Mr. Puglisi owned it.[103]

The Board additionally found that any electrical records and any testimony from Eiffel's representative would be irrelevant to plaintiff's

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[94] *Id.* at 4.

[95] *Id.*

[96] *Id.* at 8-9.

[97] *Id.* at 4. The hearings were conducted on September 27, 2004, November 1, 2004, November 29, 2004, March 27, 2006, April 9, 2007, September 10, 2007, December 10, 2007. *Id.*

[98] *Colligan*, MON-L-365-08, slip op. at 5-8.

[99] *Id.* at 21.

[100] *Id.*

[101] *Id,* at 21-22.

[102] *Id.* at 21.

[103] *Id.*

abandonment argument.[104] Plaintiffs argued that the electrical records would prove that Mr. Puglisi discontinued electrical service to the property, but the Board noted that, under case law discussing abandonment, the proposed evidence would be insufficient "to prove abandonment, and would therefore be irrelevant evidence."[105] The Board also found it would be impossible to subpoena Eiffel, a Canadian company, because of jurisdictional issues.[106]

The Plaintiffs filed an action in lieu of prerogative writs which challenged the Board's Resolution which approved Pagano's application.[107] The plaintiffs specifically argued that "the Board erroneously denied requests for the issuance of subpoenas, that any previously permitted commercial use was abandoned, the positive and negative criteria for granting a use variance was not established, and a site visit by Board members tainted the proceedings."[108] Pagano and the Board countered:

> that subpoenas are issued at the discretion of the board, issuing subpoenas was unnecessary because the requested information was irrelevant and immaterial, sufficient evidence was presented to establish the commercial use was never abandoned, and therefore, a use variance was not necessary, and no quorum existed for a Board meeting during the site visit.[109]

The court found that the party seeking the subpoena "has the burden of proving the materiality of the information, and that it cannot be obtained without the party being compelled by subpoena."[110] The court also relied on the Board's earlier ruling that the evidence and testimony sought was repetitive, and also that the testimony regarding abandonment was irrelevant.[111] Additionally, McAllan and Gorsky conceded at trial that "they had made no attempt to contact Mr. Puglisi to determine whether he would be willing to testify."[112] Thus, the court held that "even if the plaintiffs had the right to request a subpoena, the

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[104] *Colligan*, MON-L-365-08, slip op. at 21.

[105] *Id.* at 22.

[106] *Id.*

[107] *Id.* at 2.

[108] *Id.* at 2-3.

[109] *Id.* at 3.

[110] *Colligan*, MON-L-365-08, slip op. at 22 (citing State v. Misik, 569 A.2d 894, 903-04 (N.J. Super. Ct. App. Div. 1990)).

[111] *Id.*

[112] *Id.*

Board correctly found Plaintiffs failed to meet their burden on materiality in order for a subpoena to be issued."[113]

IV. THE COLLIGAN *HOLDING*

The *Colligan* court faced a novel issue because of the dearth of case law and academic discussion on subpoenas in the land use setting. The court sought to determine what due process, if any, is owed under title 40, section 55D-10(c) of the New Jersey Statutes Annotated.[114] The court also scrutinized this section "to determine which parties the legislature intended the subpoena power to benefit, when the subpoena power could be invoked, what evidence or testimony a party may request, and which party had the burden of proving the necessity of the information requested."[115] The court considered a broad cross-section of New Jersey's subpoena and evidence statutes, as well as cases from the criminal, civil, and administrative courts to determine proper guidelines.[116]

A. Due Process Requirements in the Land Use Setting

The *Colligan* court began with an analysis of case law and statutes from administrative law to determine if common factors of due process could be isolated to create a test for future cases.[117] The court established a four-part test to protect local adjustment board's discretion over subpoena requests while concurrently ensuring that future subpoenas would satisfy due process.[118] Specifically, the court found that the request must be timely, the information sought must be material and necessary, the information need not be cumulative, and the burden is on the party requesting the subpoena to prove the above listed elements.[119]

The initial due process question the court sought to answer was whether the party seeking the subpoena had been identified as one

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[113] *Id.*

[114] *Id.* at 14.

[115] *Id.*

[116] *Colligan*, MON-L-365-08, slip op. at 14-15.

[117] *Id.*

[118] *Id.*

[119] *Id.* (citing N.J. STAT. ANN. § 40:55D-10 (2008); N.J. R. EVID. 403; State v. Smith, 169 A.2d 482, 483 (N.J. Super. Ct. App. Div. 1961); State v. Misik, 569 A.2d 894, 903-04 (N.J. Super. Ct. App. Div. 1990)).

authorized to request the subpoena.[120] In particular, would a board be required to issue a subpoena under title 40, section 55D-10(c) of the New Jersey Statutes Annotated when a request is received from an objector?[121] The language at issue here states:

> The officer presiding at a hearing or such person as he may designate shall have power to administer oaths and issue subpoenas to compel the attendance of witnesses and the production of relevant evidence, including witnesses and documents presented by the parties, and the provisions of the "County and Municipal Investigations Law," P.L. 1953, c. 38 (C. 2A:67A-1 et seq.) shall apply.[122]

The court implemented common rules of statutory construction at the outset of its analysis.[123] The court determined that it "should interpret statutory language 'as a whole, and the particular meaning to be attached to any word or phrase is usually to be ascribed from the context, [and] the nature of the subject matter . . . .'"[124] Additionally, the court adhered to a rule of statutory construction in stating that it "should rely on the plain meaning of a word when determining the legislature's intent."[125] The court found the plain language of the statute enumerated two officials with the authority to issue subpoenas—the presiding officer or his designee.[126] The court explained that the power permits the official to compel both live testimony and documents.[127] In explaining the limits of the authority, the court noted that the officer must apply to the courts under title 2A, section 67A-1 *et. seq.* for an order to compel the requested information.[128]

The court found the statute's language to be ambiguous, and that it failed to expressly state which parties may seek a subpoena.[129] However, the court, after a thorough analysis of the statute's language within the context of the entire MLUL, found that both the presiding

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[120] *Id.* at 15.

[121] *Id.*

[122] N.J. STAT. ANN. § 40:55D-10(c).

[123] *Colligan*, MON-L-365-08, slip op. at 15.

[124] *Id.* (citing 2A NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 46:05 at 167-68 (66th ed. 2000)).

[125] *Id.* (citing Med. Soc'y of New Jersey v. New Jersey Dep't of Law & Pub. Safety, 575 A.2d 1348, 1353 (N.J. 1990)).

[126] *Id.* at 15-16.

[127] *Id.* at 16.

[128] *Id.*

[129] *Colligan*, MON-L-365-08, slip op. at 16.

officer, acting either *sua sponte* or at the request of a party, and the applicant were the intended recipients of the subpoena power.[130]

The court equated the presiding officer to a judge because of the fact-finding and decision-making nature of the role.[131] The opinion noted how the State's jurisprudence has identified planning and zoning boards as quasi-judicial bodies, and that their conclusions are afforded a presumption of validity.[132] Moreover, the court recognized the similarities between the discretion New Jersey courts and agencies have in determining whether evidence is relevant for admission to the hearing.[133] Ultimately, a reasonable inference could be drawn that "the board's presiding officer shares the same discretionary authority as the trial court to measure the relevance and admissibility of testimony."[134] The court identified the applicant as the second potential requestor.[135] This would include the party who filed the application because they bear the evidentiary burden under title 40, section 55D-10(b) of the New Jersey Statutes Annotated.[136]

The court then examined whether an objector had a due process right.[137] A statutory question existed as to what rights an objector has if

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[130] *Id.* at 19.

[131] *Id.* at 16.

[132] *Id.* (citing Paruszewski v. Twp. of Elsinboro, 711 A.2d 273, 278-79 (N.J. 1998); Griggs v. Zoning Bd. of Adj., 183 A.2d 444, 448 (N.J. Super. Ct. App. Div. 1962); Gayatriji v. Borough of Seaside Heights Planning Bd., 857 A.2d 659, 661 (N.J. Super. Ct. Law Div. 2004)).

[133] *Id.* at 16-17 (citing Verdicchio v. Ricca, 843 A.2d 1042, 1063 (N.J. 2005); Stoelting v. Hauck, 159 A.2d 385, 393 (N.J. 1960); Miller v. Trans Oil Co., 109 A.2d 427, 430 (N.J. Super. Ct. App. Div. 1954)).

[134] *Id.* at 17. The court underwent a section by section analysis, stating that:

> This interpretation gains strength from the language of the statute. The legislature displayed its intent to extend a compulsory grant of subpoena authority to boards under [N.J. STAT. ANN.] 40:55D-10(c) with the phrase "shall have power," while providing discretion in using the subpoena authority by adopting the phrase "production of *relevant* evidence." (Emphasis added). Additionally, section d provides the presiding officer the ability to limit the number of witnesses and length of testimony to be provided at the hearing. Finally, section "e" authorizes the exclusion of "irrelevant, immaterial or unduly repetitious evidence." Therefore, relevance and admissibility is a discretionary matter left to the presiding officer. However, the question remains about who may request the issuance of a subpoena. *Id.*

[135] *Colligan*, MON-L-365-08, slip op. at 18.

[136] *Id.*

[137] *Id.*

they could not subpoena witnesses.[138] This was answered by applying the definition of an interested party to the hearing sections of the MLUL in the context of the entire statutory scheme.[139] The court observed that the language in title 40, section 55D-10(d) limited "'interested parties' to cross-examining the testimony of witnesses related to the application before the board."[140]

The court concluded that due process was satisfied under the MLUL's statutory scheme by limiting the right to seek a subpoena to the presiding officer and the applicant when the requested information was relevant to the hearing, and that "interested parties" would be limited to cross-examining witnesses regarding their testimony.[141]

B. Subpoena Request Requirements

1. Timeliness

The next decision the court faced was what procedure should be implemented to ensure that boards were properly exercising their discretion. Looking to case law, the court concluded that subpoena requests were only proper when they were timely made.[142] Citing *State v. Smith*,[143] the *Colligan* court noted that the defendant in *Smith* "requested subpoenas to compel testimony from witnesses on the final morning of trial."[144] The defendant's attorney failed to subpoena a

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[138] *Id.*

[139] *Id.* at 18. An "interested party" is defined as:

> (a) in a criminal or quasi-criminal proceeding, any citizen of the State of New Jersey; and (b) in the case of a civil proceeding in any court or in an administrative proceeding before a municipal agency, any person, whether residing within or without the municipality, whose right to use, acquire, or enjoy property is or may be affected by any action taken under this act, or whose rights to use, acquire, or enjoy property under this act, or under any other law of this State or of the United States have been denied, violated or infringed by an action or a failure to act under this act.

N.J. STAT. ANN. § 40:55D-4 (2008).

[140] *Colligan*, MON-L-365-08, slip op. at 18.

[141] *Id.* at 19.

[142] *Id.* at 19-20. *See* State v. Smith, 169 A.2d 482, 483 (N.J. Super. Ct. App. Div. 1961) (holding a subpoena request made at fourth and final hearing was untimely); State v. Garcia, 949 A.2d 208, 217 (N.J. 2008) (relying on Smith, 169 A.2d, to distinguish timely subpoena requests); Benafield v. Indus. Comm'n of Ariz., 975 P.2d 121, 129 (Ariz. Ct. App. 1998) (finding subpoenas must be issued in writing before hearing to be timely).

[143] *Smith*, 169 A.2d at 483.

[144] *Colligan*, MON-L-365-08, slip op. at 19 (citing Smith, 169 A.2d at 483).

witness even though he had known about him for months.[145] The court then looked to *State v. Garcia*,[146] where the request was timely made, but the court failed to follow through on the request.[147]

In *Colligan*, both the Board and the court rejected the plaintiffs' subpoena requests because Mr. Puglisi had already been cross-examined at a previous point in the hearing, and due process did not entitle every party to have subsequent opportunities to cross-examine the witness.[148] Moreover, the court concluded that the plaintiffs' request was not timely.[149] However, timeliness and redundancy did not end the court's analysis because a subpoena would be improper if the evidence would be irrelevant and immaterial.[150]

2. Relevancy Requirement

As previously noted, title 40, section 55D-10(c) of the New Jersey Statutes Annotated permits the presiding officer to issue subpoenas for relevant witnesses and testimony, while section (e) gives the authority to exclude evidence or testimony deemed irrelevant, immaterial, and repetitive.[151] Relevancy is not included in the MLUL's definitions,[152] but can be found in the New Jersey Rules of Evidence ("NJRE") as "evidence having a tendency in reason to prove or disprove any fact of consequence to the determination of the action."[153] The court found that a board's discretion is similar to that of a court, and that the board may exclude evidence that would breed confusion or waste time.[154] Moreover, it discussed how the NJRE provided guidance for its analysis because the NJRE and MLUL were based on common language.[155]

The court in *Colligan* found the Board's reasoning on the relevancy issues to be valid and well-supported.[156] The Board noted that the testimony sought by plaintiffs would have been irrelevant and

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145 *Smith*, 169 A.2d at 483.
146 *Garcia*, 949 A.2d at 208.
147 *Id.* at 214-15.
148 *Colligan*, MON-L-365-08, slip op. at 20.
149 *Id.*
150 *Id.*
151 N.J. STAT. ANN. § 40:55D-10(c), (e) (2008).
152 *See* N.J. STAT. ANN. § 40:55D-6 (2008)
153 N.J. R. EVID. 401.
154 N.J. R. EVID. 403; *Colligan*, MON-L-365-08.
155 *See Colligan*, MON-L-365-08, slip op. at 20-21.
156 *Id.* at 21-22.

repetitive because the requested witness had already testified and the electrical records and testimony from Eiffel's representative would be irrelevant to plaintiff's abandonment argument.[157] Additionally, the Board believed jurisdictional issues would be raised by issuing a subpoena to a Canadian company.[158] Thus, the court held that the plaintiffs' would not be denied due process by the Board's refusal to issue the requested subpoenas.[159]

3. Which party bears the burden of proving materiality?

The last area that the court examined required identifying the party that bore the burden of proving that the requested information was material, as well as determining that no other means existed to obtain the information except by subpoena.[160] The court held that the party seeking the subpoena bore the burden.[161] For the reasons previously discussed, the court found that even if the plaintiffs' had the right to request a subpoena, they had failed to meet their materiality burden.[162] Additionally, the court noted that plaintiffs had made no attempt to secure the information before making their subpoena request.[163]

C. The Trial Court's Conclusion

"The great weight of the statutory law, case law, and evidence" compelled the court to conclude that the Board's refusal to issue the requested subpoenas did not violate any of the parties' due process rights.[164] The court further concluded that "[i]ssuing subpoenas is a discretionary choice of the Board's presiding officer[165] . . . [and that] presiding officers should determine if the request was timely made, whether the evidence is relevant, material, and not repetitious."[166] The court upheld the decision of the Board as not being arbitrary, capricious,

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[157] *Id.*
[158] *Id.* at 22.
[159] *Id.* at 23.
[160] *Id.* at 22.
[161] *Colligan*, MON-L-365-08, slip op. at 22 (citing State v. Misik, 569 A.2d 894, 903-04 (N.J. Super. Ct. Law Div. 1989)).
[162] *Id.*
[163] *Id.*
[164] *Id.* at 23.
[165] *Id.*
[166] *Id.*

or unreasonable, and affirmed the decision of the Board.[167]

V. THE SOLUTION

Legislatures should more clearly define which parties are entitled to request a subpoena, and what criteria the boards should rely on when considering the request. If a state is going to utilize its police power to control land use decisions, then it should aim to clearly define those powers when it grants them to a municipality.[168]

The purpose behind the subpoena power can be gleaned from the standards that both the board and applicant must meet when an application is being presented. First, applicants bear the burden of establishing sufficient proofs to support the subpoena request.[169] Second, as boards have been admonished for providing a bare recantation of the statutory language without supporting facts,[170] decisions must now be in writing and based on sufficient proofs.[171] The two requirements work in unison to ensure that the board makes an informed decision, while also providing the applicant with a record that can be used to appeal an adverse decision of the board.

Two courses of action exist for legislatures which would provide better guidance to boards and subpoena applicants involved in the application process. The legislature could command governing bodies to establish, by ordinance, a procedure that the planning and zoning board must follow whenever a subpoena is requested.[172] This method is consistent with the "home rule" mentality, but could create problems for attorneys who often serve as legal counsel for multiple boards, as well as the attorneys who represent private parties before the boards.

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[167] *Colligan*, MON-L-365-08, slip op. at 23.

[168] *See generally* Roger A. Cunningham, *Control of Land Use in New Jersey under the 1953 Planning Statutes*, 15 RUTGERS L. REV. 1, 8 (1960-1961).

[169] Burbridge v. Mine Hill, 568 A.2d 527, 538-39 (N.J. 1990); *see generally* Medici v. BPR Co., 526 A.2d 109, 121 (N.J. 1987); Grasso v. Borough of Spring Lake Heights, 866 A.2d 988, 992 (N.J. Sup. Ct. App. Div. 1994). *See also* COX & ROSS, *supra* note 7, at § 7-4.1 (stating that the applicant bears the burden of proof in a d variance hearing).

[170] *Medici*, 526 A.2d at 121.

[171] *See, e.g.*, S.C. CODE. ANN. § 6-29-800(F) (LEXIS through 2008 Sess.); VT. STAT. ANN. tit. 24, § 4464(b)(1) (LEXIS through 2009 Sess.); *Burbridge*, 568 A.2d at 538-39; *Medici*, 526 A.2d at 121.

[172] An argument exists that the legislature has already provided boards with the power to establish a subpoena procedure based on the broad grant of authority which commands a "municipal agency [to] make the rules governing" the hearings before the agency. N.J. STAT. ANN. § 40:55D-10(b) (2008).

Specifically, the attorneys must continually stay up-to-date on the "local rules" of each board.[173] Moreover, this would require courts to decide applications on a case-by-case basis in light of each specific ordinance. This would create inconsistencies within each state's land use jurisprudence that would hinder the development of any common guidance on the matter.

The second, and more favorable, method would be for state legislatures to adopt a clarifying amendment to their zoning procedures to clarify any preexisting subpoena clauses. This would create a unified course of action throughout a state whenever a subpoena is requested, and produce efficiency throughout the application process. I propose the following subpoena clause with the highlighted explanatory sentences to remedy the confusion under the MLUL:

> "The officer presiding at the hearing or such person as he may designate shall have power to administer oaths and issue subpoenas to compel the attendance of witnesses and the production of relevant evidence, including witnesses and documents presented by the parties, and the provisions of the "County and Municipal Investigations Law," P.L. 1953, c. 38 (C. 2A:67A-1 et seq.) shall apply.[174] *Subpoenas to compel the attendance of witnesses or the production of relevant evidence may be requested by board members, the applicant, and the property owner of the property at issue in an interpretation application. The requesting party must first make an attempt to request the attendance of the witness or the production of documents without the board's assistance. Once proof of the failed request has been presented to the board, the requesting party must make a timely request, and must explain on the record that the evidence is relevant and necessary, is not repetitive, and that the attendance of the witness or documents cannot otherwise be achieved.*"[175]

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[173] As an example, New Jersey, which is a relatively small state area-wise, has 566 municipalities. Paul Mulshine, Editorial, *Bill leaves out those with the urge to merge*, THE STAR LEDGER (Newark, N.J.), Feb. 10, 2009, at 11. The clear import of passing such a law is that an attorney under this method would need to follow 566 sets of rules. Larger states would create an even more difficult situation with a larger number of potential laws.

[174] N.J. STAT. ANN. § 40:55D-10(c).

[175] The italicized language is the proposed amendment to N.J. STAT. ANN. § 40:55D-10c. The language would be equally applicable in other states. For example, Vermont's statute simply states that boards have the authority to "[i]ssue subpoenas to compel the attendance of witnesses at any investigation or hearing." VT. STAT. ANN. tit. 26, § 1792(b)(2) (LEXIS through 2009 Sess.). Michigan has similar language which states the "chairman, or in his absence, the vice-chairman, may administer oaths or affirmations and issue subpoenas to

The proposal addresses several subpoena issues. First, the proposed amendment simplifies, by enumeration, that, in interpretation cases, only the board, the applicant, or the property owner may request a subpoena. These are the only parties with the burden to establish an evidentiary basis to support their claim.[176] This protects the applicant from financial loss if the application is unnecessarily extended, and the property owner who has a monetary interest in the value of his property. Other states have also enacted provisions similar to those in the MLUL for automatic approval on certain applications when a board fails to act within a specified period of time.[177] New Jersey's courts and the Legislature have also recognized the important policy considerations behind having time decisions made on applications.[178]

The proposed statute also recognizes that objectors and other interested parties'[179] rights are already protected by their ability to refute a witness's testimony through cross-examination.[180] The concept of

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compel the attendance of witnesses." MICH. COMP. LAWS SERV. § 259.458 (LexisNexis 1950).

[176] Burbridge v. Mine Hill, 568 A.2d 527, 538-39 (N.J. 1990) (stating that the applicant's proofs and board's findings must be reconciled for the grant of a variance); *Medici*, 526 A.2d at 121 (refusing to grant a variance because the applicant failed to develop a sufficient record); Grasso v. Borough of Spring Lake Heights, 866 A.2d 988, 992 (N.J. Sup. Ct. App. Div. 1994) (stating that "the applicant must prove that the variance can be granted 'without substantial detriment to the public good and will not substantially impair the intent and the purpose of the zone plan and zoning ordinance . . . '"); Colligan v. Zoning Bd. of Adj. of Howell, MON-L-365-08, slip op. at 22 (N.J. Sup. Ct. Law Div. 2008). *See also* COX & ROSS, *supra* note 7, at § 7-4.1 (stating that the applicant bears the burden of proof in a variance hearing).

[177] N.J. STAT. ANN. § 40:55D-10.4 (2008). Amerada Hess Corp. v. Burlington County Planning Bd., 951 A.2d 970 (N.J. 2008). Other states have adopted a similar approach which stresses the importance of fairly immediate action by a board. *See, e.g.*, VT. STAT. ANN. tit. 24, § 4464(b)(1) (LEXIS through 2009 Sess.) (permitting forty-five days for a hearing to be scheduled before being deemed automatically adopted); MICH. COMP. LAWS SERV. § 125.3604(4) (LexisNexis, LEXIS through 2006) (requiring a hearing to be scheduled with a "reasonable time").

[178] Amerada Hess Corp., 951 A.2d at 978. As the *Amerada* case points out, a board's failure to act led to the denial of an application. *Id.* The Legislature remedied this situation with the passage of the MLUL because applicants were figuratively strong-armed into granting extensions that only increased the delays and costs of the hearing. *Id.* (stating that "the spectre of denial resulted in developers essentially having no choice but to grant extension after extension with concomitant delays and costs).

[179] N.J. STAT. ANN. § 40:55D-4 (2008).

[180] N.J. STAT. ANN. § 40:55D-10(d). It should be noted that New Jersey boards often permit objectors to provide expert testimony to refute an applicant's experts. This advice is also provided to Vermont land use boards by Vermont's Secretary of State. Deborah L. Markowitz, Esq., VERMONT MUNICIPAL GUIDE TO LAND USE REGULATION, at 100-01,

standing should only be broadened when a party would otherwise be restricted from participating in the action.[181] However, when a statutory right of participation is created, then standing to participate should be limited to the enumerated rights.[182] Here, the MLUL has already created a process to permit objectors and other interested parties to become fully engaged in the hearing process by cross-examining witnesses and placing their own sworn testimony on the record during the public portion of the hearing. A board may rely on this testimony to create a factual basis to accept or reject an application, providing that the board places its reasoning in its adopted resolution.[183] This established process provides objectors and interested parties with a tool to present testimony to the board, which could derail an application from being granted, and also develop a record for appeal. Thus, the need for the statutory right to subpoena witnesses and evidence is eliminated.

An additional advantage to the proposed language is that it creates a definite procedure for the parties to follow before approaching the board to request a subpoena. This procedure will remove discussions during board hearings which needlessly extend board hearings,[184] cost the applicant extra attorneys' fees,[185] add costs to parties for lengthier

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available at http://www.sec.state.vt.us/municipal/pubs/landuse/municipal_guide.PDF (last visited September 8, 2009).

[181] Paramus Multiplex Corp. v. Hartz Mountain Indus., 564 A.2d 146, 148 (N.J. Sup. Ct. Law Div. 1987).

[182] *Id.*

[183] N.J. STAT. ANN. § 40:55D-10(d); DeMaria v. JEB Brook, LLC, 855 A.2d 628, 633 (N.J. Sup. Ct. Law Div. 2003).

[184] In one of the seven transcripts from the *Colligan* hearing, over four pages are devoted to the discussion of the subpoena request. *Township of Howell Zoning Board: Regular Meeting* (Mar. 27, 2006), *available at* http://www.twp.howell.nj.us/filestorage/6927/164/1517/1917/ZBMeeting_03_27_2006.pdf. Additionally, the Board Chairman notes that he read letters from the party requesting the subpoena. *Id.* This indicates that additional time was spent outside of the hearing considering whether a subpoena should be issued when the matter could easily be fixed by the legislature with the amendment proposed by this Article. Alaska does permit the zoning board members to request that a subpoena be issued, but the request must be submitted to the clerk at least five (5) business days before the hearing. ANCHORAGE, AK., BOARDS, COMMISSIONS, AND MUNICIPAL ADMINISTRATION, tit. 21, ch. 21.02.060, *supra* note 18. This language is unclear though as to whether an applicant or objector could make a request to the board, but it is clear that the final decision to make the request to the clerk lies with the board.

[185] Altman Weil, Inc. conducted a national survey of law firm billing rates which revealed:

transcripts from hearings, and tax judicial resources when a court reviews lengthier transcripts as part of litigation. Once a party has failed to appear, or refuses to appear, then the board should consider whether the request was timely and made to obtain necessary information.

The proposed amendment would further establish that timeliness should be based on the facts and circumstances surrounding the application hearing. Whether a request is timely is initially left to the board's discretion, but a well-counseled board will place sufficient findings on the record to support their decision if the issue is appealed. The record should expressly include when the testimony was presented, the basis for the subpoena request, if the requestor is seeking to provide new information or simply seeks to cross-examine prior testimony, whether the issue may be raised again in the future, and the board's determination of the materiality of the request. As the *Colligan* case demonstrated, a request will be untimely if the board has determined that the witness is no longer necessary to the proceedings because the witness's testimony concluded at a prior hearing.[186]

The proposed amendment uses language that is commonly understood throughout the legal community to simplify the necessity requirement. The rules of evidence provide guidance on how to determine what information can be considered necessary.[187] The NJRE define "relevant evidence" as "evidence having a tendency in reason to prove or disprove any fact of consequence to the determination of the

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> Nationwide, the median hourly billing rate for equity partners in law firms was $305/hour in 2006, and $200/hour for associate lawyers. Washington DC lawyers reported the highest median rates at $455/hour for partners and $295/hour for associates. Billing rates vary significantly by firm size. Equity partners in firms with over 150 lawyers charge a median $375/hour, ranging up to $535/hour for the top ten percent of firms in that size category. In comparison, in firms with 9-20 lawyers, the median hourly rate falls to $250/hour.

Altman Weil, Inc., New Survey Provides Snapshot of Law Firm Economics Across U.S. (Aug. 2, 2007), http://www.altmanweil.com/index.cfm/fa/r.resource_detail/oid/87716caa-56df-4ad9-b375-9e9366ba6d60/resource/New_Survey_Provides_Snapshot_of_Law_Firm_Economics_Across_US.cfm. Using the median hourly rate of $250 per hour, if one hour of an application is spent arguing over subpoena requests, then an application may cost an extra $750 based on the applicant's, objector's, and board's attorney fees.

[186] Colligan v. Zoning Bd. of Adj. of Howell, MON-L-365-08, slip op. at 22 (N.J. Sup. Ct. Law Div. 2008).

[187] N.J. R. EVID. 401, 403.

action."[188] Vermont and Michigan both define relevant evidence as that "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."[189] Any evidence that the permitted parties can provide either by testimony or documentary evidence which might tend to support any element of the application would provide a good baseline for the board to assess the necessity of the information. Additionally, the rules of evidence provide that the information should be prohibited if "its probative value is substantially outweighed by the risk of undue prejudice, confusion of issues, or [it would be] misleading or [would cause] undue delay, waste of time, or needless presentation of cumulative evidence."[190] The board should look to issue a well-supported decision on the record after the permitted party has made its argument. This will help the board avoid being reversed on appeal, and will also assist attorneys in understanding what type of information a board is seeking when deciding whether to grant a subpoena request. Moreover, as attorneys and applicants become more familiar with pertinent information, hearings should become more efficient. This efficiency should lead to a savings of time, money, and conflict.

VI. CONCLUSION

An applicant appearing before a planning or zoning board has an evidentiary burden similar to that of a litigant in a criminal or civil case. The permitted parties must meet every element for the requested relief. In a civil case for a breach of contract claim, the injured party must show that the other party's failure to perform resulted in damages.[191] In the land use setting, a permitted party requesting a variance under the applicable statutes must satisfy the criteria required by that locale; whether it be showing that the variance will not substantially affect the surrounding area, or have a substantial impact on the master plan and zoning ordinance, or some other standard.[192] Thus, any information that would support the variance request would be proper for a subpoena

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[188] N.J. R. EVID. 401.

[189] MI. R. EVID. 401; VT. R. EVID. 401.

[190] N.J. R. EVID. 403; *see* MI. R. EVID. 403; VT. R. EVID. 401.

[191] *See, e.g.*, Donovan v. Bachstadt, 453 A.2d 160 (N.J. 1982).

[192] Burbridge v. Mine Hill, 568 A.2d 527, 532-33 (N.J. 1990).

request if it is made by a permitted party, was timely, and the subpoena was the only means by which the party could secure the information.

As the United States approaches eighty-five years of recognizing the municipal authority to enact zoning legislation, it is time for state governments to provide a subpoena clause that stands up to the rigors of the modern board hearing and our litigious society. Current statutory schemes do not provide any clear guidance on when a subpoena request should be granted by a land use board. The legislatures' failures to provide any guidance on this question has led to wasted money and time by applicants, objectors, boards, and the attorneys who represent all three. Adopting the proposed statutory language would create a streamlined system to reduce confusion over whether a party has standing to request a subpoena from a board, whether the board properly exercised its discretion in determining if the requested information is necessary, and would replace the subpar clauses with a superb procedural scheme.