

## Zoning Board of Appeals Decisions Decisions for: 08-20-2015

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FALMOUTH ZONING BOARD OF APPEALS

FINDINGS AND DECISION

APPEAL NUMBER: 54-15

APPELLANTS: TODD A. DRUMMEY, ET AL of W. Falmouth, MA

SUBJECT PROPERTY: 154 Blacksmith Shop Road, West Falmouth, MA

DEED/CERTIFICATE: Certificate 81906 – Lots 12 & 16 – Plan 31976-D (sheets 1 & 3)

Assessor's Map: Map 23, Section 03, Parcel 014, Lot 012

SUMMARY: Administrative Appeal Denied

PROCEDURAL HISTORY

1. This appeal follows ruling of the Massachusetts Appeals Court in the case of Drummey v. Falmouth, 87 Mass. App. Ct. 127 (2015) ("Drummey"). The Appeals Court decided that the Town's construction, operation, and maintenance at its Waste Water Treatment Facility ("WWTF") of the turbine known as "Wind 1" required a special permit. The Town originally initiated construction, operation, and maintenance of Wind 1 with only a building permit. Consequently, the Appeals Court remanded the matter to the Superior Court. The Superior Court ordered both the Town and the Zoning Board of Appeals ("ZBA") to take action consistent with the Appeals Court's ruling in Drummey.
2. The Supreme Judicial Court denied the Town's Application for Further Appellate Review.
3. On June 11, 2015, Eladio R. Gore, the Town's Building Commissioner (the "Commissioner") issued an Order setting forth his interpretation of the proper procedures to be followed consistent with the ruling of the Appeals Court and the Superior Court (the "Order").
4. On June 16, 2015, the Appellant's attorney, Christopher G. Senie, filed an appeal of the Order with the Falmouth Town Clerk pursuant to Section 240-202 of the Code of Falmouth and G.L. 40A, ss. 8 and 15 (the "Appeal") regarding certain of its aspects. The appeal was joined by Attorney James Alexander Watt on behalf of his clients, Neil and Elizabeth Anderson of 211 Blacksmith Shop Road.
5. The Appellants specifically appealed the following rulings in the Order:
  - a. The Commissioner concluded that the zoning applicable in any application for a special permit for Wind 1 was that in effect at the time the original building permit to construct Wind 1 was issued. An amendment was passed by Town Meeting in 2013 to Section 240-166 of the Zoning By-Law (the "2013 Amendment") that (i) changed the Special Permit Granting Authority ("SPGA") from the ZBA to the Planning Board and (ii) reduced the allowable size of a wind turbine to that smaller than the size of Wind 1;
  - b. The Commissioner reached this conclusion because the Town filed an Approval Not Required Plan ("ANR") pursuant to G.L. c. 41, s. 81P prior to the date of Town Meeting action on the 2013 Amendment;
  - c. The Commissioner declined to issue a cease and desist order with regard to operation and maintenance of Wind 1 while the Town prosecuted its post-remand application for a special permit.
6. Notice was duly given as required by G.L. c. 40A, s. 11, as well as notices sent to all persons deemed to be affected thereby as they appear on the tax list, and at which hearing, at the ZBA's discretion, relevant and appropriate testimony was heard.

7. A duly advertised public hearing was opened on July 23, 2015. The ZBA was represented by Special Town Counsel, Mark Bobrowski, of Blatman, Bobrowski, Mead & Talerman, LLC, of Concord, Massachusetts.
8. The Town was represented by Attorney Diane Tillotson, of Hemenway & Barnes, Boston, Massachusetts, and Town Counsel Frank K. Duffy, Jr.
9. The public hearing was continued to August 20, 2015 and terminated on that date. The voting members of the ZBA consisted of Chairman Kimberly Bielan, Clerk Terrence Hurrie, Member Ed Van Keuren, Member Paul Murphy and Associate John Sutherland, all of whom were present for the entirety of the public hearing. Minutes from the hearing are on file in the office of the ZBA.
10. On August 20, 2015, at the duly posted open meeting of the ZBA, the Board voted 5-0 to deny all aspects of the appeal.
11. The Board received documents and information prior to and during the public hearing that are on file in the office of the Board of Appeals at Town Hall.

## FINDINGS

The ZBA, after carefully considering all of the facts and evidence submitted at the hearing, makes the following findings.

1. The 2013 Amendment does not apply to the Town's Wind 1 turbine at the WWTF. Although the Commissioner opined in his Order that the ANR Plan submitted before the 2013 Amendment provided a "freeze" of the zoning in effect at the time, the ZBA disagrees with this ruling. An ANR Plan provides a freeze only for "the use of the land" shown on the ANR Plan. The key aspects of the 2013 Amendment in play here - a change in the SPGA, and a reduction in the allowable size of a turbine - do not affect "the use of the land" for a turbine - See *Bellows Farms v. Building Inspector of Acton*, 364 Mass. 253 (1973). Consequently, the endorsement of the ANR Plan does not protect the Town.
2. However, at the public hearing, Attorney Tillotson argued that G.L. c. 40A, s. 6, para.1, provided an alternative reason to find that the zoning in effect at the time of the issuance of the building permit controlled. The statute states, in pertinent part, that "a zoning ordinance or by-law shall not apply ... to a building or special permit issued before the first publication of notice of the public hearing of such ordinance or by-law required by section five." It is uncontroverted that (i) Wind 1 has a building permit; and (ii) the building permit was issued before the first publication of notice of the 2013 Amendment.
3. The ZBA reviewed the legislative history of this provision as set forth in "The Report of the Department of Community Affairs Relative to Proposed Changes and Additions to the Zoning Enabling Act, H.R. Rep. No. 5009 (1972)," a key document in the 1976 reform of the Zoning Act.
4. The ZBA was unable to conclude that the Legislature intended to distinguish "lawfully" issued building permits from "unlawfully" issued building permits in G.L. c. 40A, s. 6, para. 1.
5. The ZBA found that because the issuance of the building permit occurred prior to the first publication of notice of the 2013 Amendment, the 2013 Amendment "shall not apply."
6. Accordingly, the ZBA found that, as set forth in Section 240-202 of the Code of Falmouth in effect at the time of the issuance of the building permit for Wind 1, the SPGA for the Town's special permit application is the ZBA, and the reductions in turbine size set forth in the 2013 Amendment do not apply.
7. The ZBA also found that the Commissioner's decision to decline to issue a cease and desist with regard to operation and maintenance of Wind 1 while the Town prosecuted its post-remand application for a special permit was consistent with case law. The Supreme Judicial Court has ruled, in *Building Inspector of Falmouth v. Haddad*, 369 Mass. 452, 459 (1976), that in such circumstances the owner should be provided a reasonable opportunity to attempt to obtain any permit necessary to adapt and devote some part or all of the structure to a use or uses permitted under the zoning by-law as of right or under a special permit, and to perform the work or changes authorized by any such permit.

See also - Schey v. Bd. of Appeals of Marblehead, et al, Mass. Appeals Ct. Case No. 04-P-1619, 66 Mass. App. Ct. 1112 (Jun. 16, 2006), in which the Appeals Court stayed enforcement while the owner pursued a special permit to salvage the violative building.

NOW THEREFORE

Member Van Keuren made a motion to uphold Mr. Gore's determination and deny the appeal of the Appellants in its entirety. Member Murphy seconded the motion.

The ZBA thereafter voted 5-0 to deny the appeal of the Appellants as set forth above.

Action: The Board of Appeals, by the signature below, being present, certifies the vote of the Board as follows for the above referenced:

Vote: Board voted 5 to 0 to uphold Mr. Gore's determination and deny the appeal of the Appellants in its entirety.

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Terrence J. Hurrie, Clerk of the Board

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Date Filed With Town Clerk

Notice is hereby given that any appeal from this Decision shall be made pursuant to Section 17 of Massachusetts General Laws, Chapter 40A, and shall be filed within twenty (20) days after the date of filing of this Decision in the office of the Falmouth Town Clerk.

**Notes:**

54-15 / Appeal of ZEO - Filed w/ Town Clerk 9/11/15