
**TOWN OF FALMOUTH
OFFICE OF TOWN COUNSEL
MEMORANDUM**

TO: JULIAN SUSO, TOWN MANAGER
FROM: FRANK K. DUFFY, JR., TOWN COUNSEL
PATRICIA A. HARRIS, ASSOCIATE TOWN COUNSEL
SUBJECT: LITIGATION REPORT
DATE: 11/10/2015
CC: TOWN DEPARTMENTS AS NOTED

The following is the Legal Department's periodic report of pending cases and cases resolved since the previous report. Following the name of the case/action is the name of the Court or Agency involved, the nature of the case and the present status of the case. Special Counsel is noted where appropriate.

BOARD OF APPEALS

CASE: Graham Allison & Elizabeth Allison v. ZBA
PROPERTY: Cape Codder Road
COURT: Land Court
DATE OF ENTRY: October, 2014
ISSUE: Appealing decision of ZBA denying them a enforcement order
STATUS: Land Court dismissed appeal because it was filed "too late to be timely".
Plaintiffs' have appealed to the Appeals Court. Pending.

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CASE: American Towers, LLC v. ZBA
PROPERTY: East Falmouth Highway
COURT: Barnstable Superior Court
DATE OF ENTRY: December, 2014
ISSUE: Appealing decision of ZBA denying them a special permit (wireless tower)
STATUS: Settled by agreement of the parties.

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CASE: Neil and Elizabeth Andersen v. ZBA, Building Comm'er & Falmouth
PROPERTY: Wind Turbine I
COURT: Barnstable Superior Court
DATE OF ENTRY: March 2011
ISSUE: Appealing decision of ZBA that a special permit was not needed to
construct the wind turbine at the WWTF
STATUS: Judgment for defendant. Appeals Court reversed judgment of Superior
Court. Board of Selectmen have authorized an application for further
appellate review by Supreme Judicial Court. Petition for further appellate
review was denied 6/5/15.

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CASE (I): Richard Cottrel, et al v. Appeals Board, Building Commission and R.
Gilbert Allenby
PROPERTY: 996 East Falmouth Highway
COURT: Barnstable Superior Court
DATE OF ENTRY: 12/2009
ISSUE: Appeal from decision upholding Building Commissioners decision to
refuse request for enforcement
STATUS: Case moved to Land Court.

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CASE (II): Richard Cottrel, et al v. Appeals Board, Building Commission and R.
Gilbert Allenby, All Cape Recycling, Inc. and R & H Construction, Inc.
PROPERTY: 996 East Falmouth Highway
COURT: Land Court
DATE OF ENTRY: 3/2011
ISSUE: Appeal from decision of Board to modify an existing special permit.
STATUS: Pending

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CASE: Frances M. Coutinho, Trustee of Coutinho Realty Trust
v. Neal Dunn and Rene Russo, Trustees of Neal Dunn 2012 Revocable
Trust and ZBA
PROPERTY: 25 Moses Road, North Falmouth
COURT: Barnstable Superior Court
DATE OF ENTRY: April, 2014
ISSUE: Appealing decision of ZBA granting a special permit to Defendant
Dunn/Russo to raze and re-construct a single-family residence.
STATUS: Pending

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CASE: Richard and Kerry Dipietro, Individually and as Trustees of 8 Riverway Realty Trust v. ZBA
PROPERTY: 8 Riverway, North Falmouth
COURT: Barnstable Superior Court
DATE OF ENTRY: August, 2014
ISSUE: Appealing decision of ZBA denying plaintiffs a special permit to add a farmers porch and to construct an outside stairway.
STATUS: Pending

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CASE: Todd Drummey, Mark Cool, Brian Elder, Barry Funfar, Lawrence Worthington and Robert Laird v. Town of Falmouth and ZBA
PROPERTY: Wind Turbine I
COURT: Barnstable Superior Court
DATE OF ENTRY: March 2011
ISSUE: Appealing decision of ZBA that a special permit was not needed to construct the winder turbine at the WWTF
STATUS: Judgment for defendant, ZBA decision upheld. Appealed to Appeals Court. Appeals Court reversed judgment of Superior Court. Board of Selectmen authorized application for further appellate review by Supreme Judicial Court. Application for further appellate review has been denied.

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CASE: Carol Duclos, Trustee of the 315 School Street Nominee Trust
PROPERTY: 198 Thomas B. Landers Road, East Falmouth, MA
COURT: Barnstable Superior Court
DATE OF ENTRY: August 2013
ISSUE: Appealing decision of ZBA denying request for modification of use variance and alternation of nonconforming use.
STATUS: Remanded to ZBA.

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CASE: Carol Duclos, Trustee of the 315 School Street Nominee Trust
PROPERTY: 198 Thomas B. Landers Road, East Falmouth, MA
COURT: Barnstable Superior Court
DATE OF ENTRY: July 2015
ISSUE: Appealing decision of ZBA after remand denying request for modification of use variance and alteration of nonconforming use.
STATUS: Pending.

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CASE: Domenic and Monica Esposito v. Montuori Realty Trust, Kenneth and Lorrain Monturi, Trustees of New Stearman Realty Trust, ZBA and Building Commissioner
PROPERTY: Lot 7-H Pine Bank Road, North Falmouth, MA
COURT: Land Court
DATE OF ENTRY: 3/2009
ISSUE: Appealing decision of ZBA granting a special permit to Montuori Realty Company for the construction of a single-family residence on an undersized lot.
STATUS: Decision of Board affirmed by Land Court. Plaintiff sought further appellate review. Appeals Court affirmed decision of Board and Land Court.

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CASE: Falmouth Auto Center, Inc. & Joann Souza, Trustee of the Reine Children Trust No. 1. v. Zoning Board of Appeals
PROPERTY: Falmouth Auto Center, Inc.
COURT: Land Court
DATE OF ENTRY: 3/2011
ISSUE: Appealing Board's decision to deny a special permit for auto business
STATUS: Land Court affirmed decision of Board of Appeals denying owner a special permit for auto service center at 657 East Falmouth Highway. Plaintiffs have appealed to Appeals Court. Appeal dismissed by agreement of parties.

* * *

CASE: Susan Gallagher v. ZBA
PROPERTY: 17 Green Cove Lane, East Falmouth MA
COURT: Land Court
DATE OF ENTRY: July 2013
ISSUE: Appealing decision of ZBA that an under sized lot merged with adjacent lot.
STATUS: Judgment for the Defendant, Zoning Board of Appeals. Plaintiff appealed to Appeals Court.

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CASE: GSTVS, LLC, Gary S. Tavares and Francisco Tavares, Inc. v. ZBA
PROPERTY: 25 Crocker Road, East Falmouth
COURT: Land Court
DATE OF ENTRY: April 2015
ISSUE: Appeal of the Board's decision affirming Building Commissioner's cease and desist order.
STATUS: Pending

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CASE: Industrial Tower and Wireless, LLC v. ZBA
PROPERTY: 284 Old Meeting House Road, East Falmouth
COURT: United States District Court
DATE OF ENTRY: August, 2014
ISSUE: A complaint filed under Section 704 of the Telecommunications Act of 1996, as codified at 47 USC § 332(c)(7) for expedited hearing and relief, for declaratory judgment and for injunctive relief concerning denial by ZBA of plaintiff's application to site a 150-foot monopole telecommunications tower and facility.
STATUS: Special Permit issue as directed by the U.S. District Court

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CASE: Robert Laird v. Town of Falmouth and ZBA
PROPERTY: Wind Turbine I
COURT: Barnstable Superior Court
DATE OF ENTRY: September 2015
ISSUE: Appealing decision of ZBA affirming an order of the Building Commissioner that the former sec. 240-166 of the zoning bylaw applies to Wind 1.
STATUS: Pending

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CASE: Linda Ohkagawa v. Town of Falmouth and ZBA
PROPERTY: Wind Turbine 2 – 821 West Falmouth Hwy.
COURT: Barnstable Superior Court
DATE OF ENTRY: 12/2013
ISSUE: Appealing decision of ZBA denying wind turbines are a nuisance to her property.
STATUS: Scheduled for trial Dec. 21, 2015.
SPECIAL COUNSEL: Michelle O'Brien, Esquire

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CASE: John C. Powers and David C. Warner, Trustees of the Collins Irrevocable Property Trust v. Zoning Board of Appeals and Johnson Homes, Inc.
PROPERTY: 107 County Road and 0 County Road, North Falmouth
COURT: Land Court
DATE OF ENTRY: June/2012
ISSUE: Appeal from Board decision granting a special permit to Johnson Homes, Inc. for a multifamily residential development located on land zoned "Business District 3".
STATUS: Judgment upholding ZBA decision. Plaintiffs' have appealed to Appeals Court. Appeals Court affirmed Land Court's decision upholding the ZBA decision.

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CASE: Town of Falmouth v. Andersen and ZBA
COURT: Barnstable Superior Court
DATE OF ENTRY: 8/2013
ISSUE: Appealing decision of ZBA finding wind turbines are a nuisance.
STATUS: Scheduled for trial April, 2016.
SPECIAL COUNSEL: Michelle O'Brien, Esquire

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CASE: Town of Falmouth v. ZBA, Elders, Laird, Drummey, Ohkagawa, Funfars
and Andersens
COURT: Land Court
DATE OF ENTRY: 10/2015
ISSUE: Appealing decision of ZBA order the Town of Falmouth to cease and
desist all operation of the Wind Turbine know as Wind 1.
STATUS: Case dismissed by Plaintiff.
SPECIAL COUNSEL: Diane Tilotson, Esquire

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CASE: Town of Falmouth v. Funfar and ZBA
COURT: Barnstable Superior Court
DATE OF ENTRY: 8/2013
ISSUE: Appealing decision of ZBA finding wind turbines are a nuisance.
STATUS: Pending
SPECIAL COUNSEL: Michelle O'Brien, Esquire

BOARD OF ASSESSORS

NONE

BOARD OF SELECTMEN

CASE: Ballymeade v. Board of Selectmen, et al
PROPERTY: Ballymeade
COURT: Barnstable Superior Court
DATE OF ENTRY: 4/2015
ISSUE: Plaintiffs filed an application for preliminary injunction to prevent town
from billing them for costs associated with connecting Ballymeade to
town water.
STATUS: Pending by agreement – no injunction.

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CASE: Michael and Cynthia Sirard. v. Board of Selectmen
PROPERTY: 59 Old Menauhant Road, Falmouth
COURT: Land Court
DATE OF ENTRY: April, 2014
ISSUE: Appeal from Board of Selectmen decision denying application to
construct a pier, ramp and float for their private recreational use in the
waters of Bournes Pond.
STATUS: Settlement between parties.

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BUILDING DEPARTMENT

NONE

CONSERVATION COMMISSION

CASE: John Billings v. Conservation Commission (Case I)
PROPERTY: 57 Gunning Point Road
COURT: Barnstable Superior Court
DATE OF ENTRY: 3/2014
ISSUE: Appealing the decision of the ConCom denying application to construct a
single-family dwelling and appurtenances.
STATUS: Case dismissed May 8, 2015.

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CASE: John Billings v. Conservation Commission (CASE 2)
PROPERTY: 57 Gunning Point Road
COURT: Barnstable Superior Court
DATE OF ENTRY: 6/2014
ISSUE: Appealing the decision of the ConCom denying application to construct a
single-family dwelling and appurtenances.
STATUS: Case dismissed May 8, 2015.

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CASE: Eugene Caruso, Executor of the Estate of Angeline M. Caruso v.
Conservation Commission and Town of Falmouth
PROPERTY: 191 Edgewater Drive West, East Falmouth
COURT: Barnstable Superior Court
DATE OF ENTRY: 9/2013
ISSUE: Appeal from Commission decision denying variance to construct a single family residence within wetland resource areas. Compliant includes a Regulatory Taking claim against Town of Falmouth.
STATUS: Judgment for Defendants. ConCom decision upheld. Regulatory Taking claim pending.

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CASE: David and Martha Casiles v. Conservation Commission
PROPERTY: Ferry Road, Falmouth
COURT: Barnstable Superior Court
DATE OF ENTRY: March, 2015
ISSUE: Appeal from Commission decision denying an application to construct a dock.
STATUS: Pending

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CASE: Francis Eaton, et al v. Conservation Commission
PROPERTY: Teaticket Path
COURT: Barnstable Superior Court
DATE OF ENTRY: 2/2010
ISSUE: Appealing Conservation's denial of an order of conditions to construct rip rap along an eroding coastal bank.
STATUS: Pending in Superior Court.

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CASE: Francis Eaton, et al v. Conservation Commission
PROPERTY: Teaticket Path
COURT: Barnstable Superior Court
DATE OF ENTRY: 2/2011
ISSUE: Request for declaratory relief
STATUS: Pending in Superior Court.

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CASE: Janice Smyth v. Conservation Commission and Town of Falmouth
PROPERTY: 250 Alder Lane, North Falmouth
COURT: Barnstable Superior Court
DATE OF ENTRY: 2/2013
ISSUE: Appeal from Commission decision denying variance to construct a single family residence within wetland resource areas. Complaint includes a Regulatory Taking against the Town of Falmouth.
STATUS: Superior Court affirmed ConCom's decision 2/7/14. Regulatory taking claim pending.
SPECIAL COUNSEL: Michelle O'Brien, Esquire (for Regulatory Taking claim)

FALMOUTH FIRE RESCUE DEPARTMENT

CASE: Falmouth v. Patrick Bonzagni
COURT: Falmouth District Court
DATE OF ENTRY: 11/2015
ISSUE: Town filed small claim in order to recoup unpaid fees for firefighter/EMT detail.
STATUS: Pending

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CASE: Falmouth v. Ronald Mason
COURT: Falmouth District Court
DATE OF ENTRY: 2015
ISSUE: Town filed small claim in order to recoup unpaid fees for firefighter/EMT detail.
STATUS: Judgement for Town. Constable collected debt.

HARBORMASTER

CASE: Falmouth v. William Penney
COURT: Falmouth District Court
DATE OF ENTRY: 2015
ISSUE: Town filed small claim in order to recoup unpaid dock fees.
STATUS: Judgement for Town. Defendant cannot be found.

HEALTH DEPARTMENT

NONE

HISTORIC DISTRICTS COMMISSION

CASE: James M. Clark and Ruth Clark, Woods Hole Community Association, Woods Hole Historic Collection and Museum v. Falmouth Historic Districts Commission and Elizabeth G. and Michael G. Nametz, Trustees of Nametz Family Living Trust
PROPERTY: 46 School Street, WH
COURT: Barnstable Superior Court
DATE OF ENTRY: 12/2014
ISSUE: Plaintiff appealing decision granting Nametz's request on remand for certificate of appropriateness to construct two car garage.
STATUS: Pending

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CASE: Elizabeth G. and Michael G. Nametz, Trustees of Nametz Family Living Trust v. Falmouth Historic Districts Commission
PROPERTY: 46 School Street, WH
COURT: Barnstable Superior Court
DATE OF ENTRY: 7/2013
ISSUE: Commission denied request for certificate of appropriateness to construct two car garage.
STATUS: Superior Court remanded to Historic District Commission. On remand, Historic District Commission issued certificate of appropriateness.

PLANNING BOARD

CASE: GSTVS, LLC v. Planning Board
PROPERTY: 25 Crocker Road, East Falmouth
COURT: Land Court
DATE OF ENTRY: 10/2014
ISSUE: Appealing decision of Planning Board denying applicant special permit.
STATUS: Trial scheduled for December 3, 2015.

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CASE: Matthew R. Gould, Davien B. Gould, Pierre Tillier and Gisella Tillier v. Planning Board, Falmouth Hospitality LLC, John J. Fay, III, Trustee, Robert A. Fay, Trustee of Fay's Realty Trust
PROPERTY: Lantern Lane
COURT: Land Court
DATE OF ENTRY: 7/2014
ISSUE: Appeal of Planning Board approval of request for subdivision modification.
STATUS: Trial held in Land Court October, 2015. Under advisement by court.

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CASE: Nathan Ellis Highway, LLC (Cavossa) v. Planning Board
PROPERTY: 210 Nathan S. Ellis Highway, East Falmouth
COURT: Barnstable Superior Court
DATE OF ENTRY: July 2015
ISSUE: Appealing decision of Planning Board approving in part, denying in part,
request for special permit for waste disposal contractor use.
STATUS: Pending.

POLICE DEPARTMENT

CASE: Stephen Fish v. Falmouth Police Department
COURT: Barnstable District Court
DATE OF ENTRY: 10/2015
ISSUE: Plaintiff's license to carry was suspended he is appealing that decision.
STATUS: Hearing held scheduled for December 11, 2015.

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CASE: Brian and Kimberly Hunt v. David Massi, James Porter and Town of
Falmouth
COURT: United States District Court
DATE OF ENTRY: 3/22/2013
ISSUE: § 1983 civil rights police misconduct case
STATUS: Federal court allowed Motion to Dismiss (filed by Defendants) and
dismissed all remaining claims. There is still a state tort of malicious
prosecution pending. (case being handled by insurance counsel)

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CASE: Kyle Melanson v. Barnstable County Sheriff's Office and Falmouth
Police Department
COURT: Barnstable Superior Court
DATE OF ENTRY: 2012
ISSUE: Claiming negligence with K-9
STATUS: Judgment for Defendants 4/2015. (case being handled by insurance
counsel)

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CASE: Robert Jude Wilber v. Officers Robert Curtis, Brian Kinsella, Michael
Rogers and Michael Simoneau
COURT: Barnstable Superior Court
DATE OF ENTRY: 1/2015
ISSUE: Claiming MGL c. 12, § 11I and 42 USC §1983 (civil rights violations
and common law torts regarding false arrest and other related claims).
STATUS: Pending (case being handled by insurance counsel).

RECREATION DEPARTMENT

CASE: Angeline Cummings v. Town of Falmouth and Helen Kennedy
Recreation Department Director
COURT: MCAD
DATE OF ENTRY: 8/2015
ISSUE: Claiming unlawful discrimination and termination
STATUS: Pending (case being handled by insurance counsel)

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SCHOOL DEPARTMENT
(also see Town of Falmouth)

CASE: Earnest Kuruppu v. Falmouth Public Schools
COURT: MCAD
DATE OF ENTRY: 3/2012
ISSUE: Claiming discrimination/retaliation in promotion practices.
STATUS: No probable cause found 4/2015 (insurance counsel)

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CASE: Phyllis Pina v. Falmouth Public Schools
COURT: MCAD
DATE OF ENTRY: 3/2011
ISSUE: Claiming discrimination related to health issue
STATUS: Pending (insurance counsel)

TOWN OF FALMOUTH

CASE: Neil Andersen and Elizabeth Andersen v. Town of Falmouth
COURT: Barnstable Superior Court
DATE OF ENTRY: September 24, 2012
ISSUE: Claiming private nuisance, taking, emotional distress as a result of the
release of public records related to wind turbines
STATUS: Pending (Insurance counsel)

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CASE: Brian Elder, et al v. Town of Falmouth
PROPERTY: Blacksmith Shop Road
COURT: Barnstable Superior Court
DATE OF ENTRY: 3/21/2013
ISSUE: Claiming loss of property value and personal injuries related to wind
turbines.
STATUS: Pending (insurance counsel)

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CASE: Tariesa Gomes v. Town of Falmouth
COURT: MCAD
DATE OF ENTRY: 1/2013
ISSUE: Alleging suspension w/o pay was discriminatory
STATUS: MCAD found no probable cause (Insurance Counsel)

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CASE: Suzanne Hobart and Edward Hobart v. Town of Falmouth (Case 2)
COURT: Barnstable Superior Court
DATE OF ENTRY: February, 2013
ISSUE: Claiming negligence in granting permit for Webb turbine.
STATUS: Plaintiffs withdrew (Insurance counsel)

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CASE: Susan M. Nagine v. Town of Falmouth
COURT: Hampden Superior Court
DATE OF ENTRY: May 4, 2015
ISSUE: Personal injury claim (sidewalk next to Memorial Lane, Main Street)
STATUS: Stipulation of Dismissal filed with the Court. (Insurance counsel)

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CASE: Linda Ohkagawa v. Town of Falmouth
PROPERTY: 154 Blacksmith Shop Road, East Falmouth
COURT: Barnstable Superior Court
DATE OF ENTRY: 2/2015
ISSUE: Claiming Wind 2 at the WWTF constitutes a nuisance and a trespass onto the property of the plaintiff.
STATUS: Pending (Insurance counsel)

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CASE: Carol S. Petit, Trustee of Beach House Realty Trust v. Town of Falmouth
COURT: Land Court
DATE OF ENTRY: August 2013
ISSUE: Land Court registration case – Megansett.
STATUS: Pending

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CASE: Suzanne M. Sullivan v. Town of Falmouth
COURT: Land Court
DATE OF ENTRY: November, 2013

ISSUE: Land Court registration case – Megansett.
STATUS: Pending

TAX COLLECTOR/TREASURER

This office is now handling all Tax Taking cases.

WATER DEPARTMENT

None

SPECIAL COUNSEL

FY2015

LABOR COUNSEL	WIND TURBINE	CONSERVATION COMMISSION	MISCELLANEOUS
Collins, Loughran and Peloquin, PC	Pierce Atwood, LLP	Pierce Atwood, LLP	
\$166,716.25	\$103,074.54	\$42,704.31	\$33,708.00
Mirick O'Connell			
\$67,031.11			
Arbitration			
\$820.11			
<u>\$234,567.47</u>	<u>\$103,074.54</u>	<u>\$42,704.31</u>	<u>\$33,708.00</u>

FY2016 (to date)

Collins, Loughran and Peloquin, PC	Hemenway & Barnes, LLC	Pierce Atwood, LLP	
\$23,992.56	\$26,297.10	\$6,167.01	-0-
Mirick O'Connell	Blatman, Brobrowski & Mead, LLC		
\$9,808.65	\$6,525.00		
Arbitration	Pierce Atwood, LLP		
\$800.00	\$15,897.85		
<u>\$134,601.15</u>	<u>\$48,719.95</u>	<u>\$6,167.01</u>	<u>-0-</u>