

## FALMOUTH ZONING BOARD OF APPEALS

### FINDINGS AND DECISION

**APPEAL NUMBER:** 69-15

**APPELLANTS:** BRIAN ELDER, 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 Granted

### PROCEDURAL HISTORY

1. This appeal follows ruling of the Massachusetts Appeals Court in the case of *Drumme v. Falmouth*, 87 Mass. App. Ct. 127 (2015) (“*Drumme*”). 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 *Drumme*.
2. The Supreme Judicial Court denied the Town’s Application for Further Appellate Review.
3. By correspondence dated June 8, 2015, the Appellants’ Attorney, Christopher G. Senie, requested zoning enforcement from Building Commissioner Eladio R. Gore (the “Commissioner”), with regard to “Wind I,” the Town’s wind turbine located at the Waste Water Treatment Facility. Specifically, Attorney Senie requested the immediate issuance of a cease and desist order (the “Enforcement Request”).
4. By correspondence dated July 10, 2015, the Commissioner denied the Enforcement Request. As grounds therefor, the Commissioner cited the Town’s pending special permit application, which, if granted, would bring Wind I into compliance with the pertinent Falmouth Zoning By-laws.
5. By correspondence dated July 17, 2015, the Commissioner supplemented his reasons for the determination of July 10, 2015. The Commissioner made reference to the Order of the Barnstable Superior Court dated November 21, 2013, in which Judge Muse placed certain limitations on the operation of Wind I. The Commissioner declined to enforce because it was his opinion “that any deviation from those parameters will constitute a violation of the Court Order.”

(Together, the July 10<sup>th</sup> and July 17<sup>th</sup> decisions of the Commissioner will be referred to as the "Denial")

6. On June 28, 2015, Attorney Senie filed an appeal of the Commissioner's Denial 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.
7. 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.
8. A duly advertised public hearing was opened on September 17, 2015. The ZBA was represented by Special Town Counsel, Mark Bobrowski, of Blatman, Bobrowski, Mead & Talermin, LLC, of Concord, Massachusetts.
9. The Town was represented by Attorney Diane Tillotson, of Hemenway & Barnes, Boston, Massachusetts, and Town Counsel Frank K. Duffy, Jr.
10. The public hearing was closed after all parties, and the public in attendance, were offered an opportunity to testify on the record. Counsel for the Town and the Appellants stated on the record that they had no objection to the close of the public hearing.
11. The voting members of the ZBA consisted of Chairman Bielan, Vice Chairman Kenneth Foreman, Clerk Hurrie, and Members Paul Murphy and Ed Van Keuren, 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.
12. After the close of the duly posted and advertised public hearing and deliberation, on September 17, 2015, the ZBA voted 4-1 (with Member Bielan in opposition) to grant the appeal and to issue, pursuant to G.L. c. 40A, s. 14, a cease and desist order to the Town, ordering the immediate cessation of the operation of Wind I.
13. The ZBA 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. G.L. c. 40A, s. 14 states, in pertinent part:

Section 14. A board of appeals shall have the following powers:—

(1) To hear and decide appeals in accordance with section eight ....

In exercising the powers granted by this section, a board of appeals may, in conformity with the provisions of this chapter, make orders or decisions, reverse or affirm in whole or in part, or modify any order or decision, and to that end shall have all the powers of the officer from whom the appeal is taken and may issue or direct the issuance of a permit.

2. It is uncontroverted that the Commissioner has the authority to issue a cease and desist order in appropriate circumstances. See the Falmouth Zoning By-Law at Sections 240-179 and 240-180.
3. It is uncontroverted that the ruling of the Massachusetts Appeals Court in *Drumme* established that the Town's construction, operation, and maintenance of "Wind I" required a special permit. The Supreme Judicial Court denied the Town's Application for Further Appellate Review.
4. It is uncontroverted that, at the time of this decision, Wind I does not have the required special permit. A special permit application is pending, but the hearing has not yet been opened for the taking of evidence.
5. The ZBA acknowledges that it has the authority to stay enforcement against the unlawful operation of Wind I until such time as the special permit application is decided. *Building Inspector of Falmouth v. Haddad*, 369 Mass. 452, 459 (1976); *Schey v. Bd. of Appeals of Marblehead, et al*, 66 Mass. App. Ct. 1112 (Jun. 16, 2006); *Delprete v. Zoning Bd. Of Appeals of Rockland*, 87 Mass. App. Ct. 1104 (2015).
6. However, the ZBA declines to exercise this authority in the instant matter for the following reasons.
  - a. The ZBA balanced the equities of enforcement by carefully considering the harm that would accrue to both the Town and the Appellants. The Town's principal claim of injury was associated with the economic harm that would result from a cease and desist order. On the other hand, the Appellants, through counsel and individually, testified that Wind I causes significant disruption of their daily lives, primarily due to shadow, flicker, and noise. The ZBA finds that the harm to the Appellants from a denial of the Enforcement Request outweighs the harm to the Town if the Enforcement Request is granted.
  - b. On two (2) previous occasions, the ZBA decided that Wind I was a "nuisance" as that term is used in Section 240-110. These cases were ZBA files #2-13 and #69-13, which involved the same issues as the instant matter.
  - c. Wind I has now operated for more than five (5) years without the required special permit.
  - d. The special permit application for Wind I will certainly take months to decide as the

evidentiary portion of the hearing has not yet commenced.

- e. A cease and desist order by the ZBA would not conflict with the Order of the Superior Court dated November 21, 2013.
- f. This case differed from ZBA file #54-15. In that case, the appeal of the Commissioner's denial of an enforcement request was denied. However, as noted by special counsel to the Town in her correspondence to the ZBA dated July 17, 2015, the Commissioner "did not address the request for a cease and desist order" in his denial. In the instant matter, that issue was squarely addressed.
- g. The Town has a remedy if it appeals this decision and seeks a stay of enforcement from the trial court.

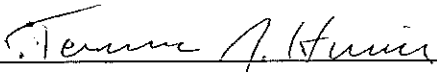
### **NOW THEREFORE**

Member Foreman made a motion to overturn the Building Commissioner's (Eladio Gore) determination and grant the appeal of the Appellants in its entirety. Member Van Keuren seconded the motion.

The ZBA thereafter voted 4 to 1 to grant the appeal of the Appellants as set forth above and to issue a cease and desist order effective immediately. Member Bielan voted in opposition to the motion.

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

**Vote:** ZBA voted 4 to 1 to overturn the Building Commissioner's (Eladio Gore) determination and grant the appeal of the Appellants and to issue a cease and desist order effective immediately.



Terrence J. Hurrie, Clerk of the Board

**RECEIVED**

SEP 23 2015

8:54 AM

FALMOUTH TOWN CLERK

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.