

Superior Court Upholds ZBA's Order that the Town of Falmouth Cease and Desist the Operation of Two Wind Turbines

October 6, 2017

In Town of Falmouth v. Falmouth Zoning Board of Appeals, C.A. No. 2014-00003 (Mass. Super. Ct. June 20, 2017), the Town of Falmouth ("Town") appealed a Falmouth Zoning Board of Appeals ("ZBA") decision that found that two wind turbines owned and operated by the Town created a nuisance and ordered the Town to eliminate the nuisance.

Background

The Town installed two power-generating wind turbines on Town property, the first becoming operational in March 2010 ("Wind 1") and the second in February 2012 ("Wind 2"). Barry and Diane Funfar live approximately 1660 feet from Wind 1 and 1560 feet from Wind 2. In March 2013, the Funfars filed a complaint with the Falmouth Building Commissioner ("Commissioner"), seeking to compel the Town to stop operating the turbines based on the allegation that the turbines constituted a nuisance under the Town's Zoning Bylaw ("Bylaw") because of the noise that their operation created. The Commissioner denied the Funfars' request. The Funfars appealed the denial to the ZBA, which found in their favor in December 2013, and ordered the Town to take any steps necessary to eliminate the nuisance. The Town appealed the ZBA's decision to the Superior Court. Meanwhile, the Funfars and some of their neighbors won a separate appeal before the Massachusetts Court of Appeals, which held in 2015 that Wind 1 required a special permit to operate. The ZBA then denied the special permit for Wind 1, which subsequently ceased operation.

The Decision

The Court upheld the ZBA's finding that the turbines constituted a nuisance, and ordered the Town to cease operating the turbines. The Court found, based on multiple studies that were presented as evidence, that the noise created by the turbines exceeded the allowable ambient noise levels under the Town Bylaw. The Court further found that the ZBA could apply the Town Bylaw regarding noise as adopted in 2013, even though the turbines were already operating at the time the Bylaw was adopted. Moreover, the Court held that the turbines constituted a nuisance regardless of whether they violated the noise Bylaw. The Court held that the noise generated by the turbines negatively affected the health and well-being of the Funfars, by, among other things, causing Mr. Funfar stress, anxiety, insomnia, and nausea. The Court also noted that other residents had registered similar complaints, lending further support to its order to shut down the turbines.

The Takeaway

The operation of a development or structure that complies with the zoning laws may still potentially be subject to a nuisance claim. The potential impacts of wind turbines differ from more typical commercial or residential developments, but it is important to consider nuisance law, especially when developing projects that may create unique impacts. Additionally, the multiple lawsuits concerning the turbines demonstrate that a committed opposition may have various avenues to challenge a development.

If you have a real estate litigation question or business concern, we invite you to reach out directly to any member of our [Real Estate Litigation Group](#).

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