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**ZONING - MASSACHUSETTS**

## Drummey v. Town of Falmouth Zoning Bd. of Appeals

**Superior Court of Massachusetts, Barnstable County - June 18, 2013 - Not Reported in N.E.2d - 2013 WL 3205142**

The Town of Falmouth constructed a wind turbine, known as Wind I, at the waste water treatment facility which it owns and operates. The building permit for Wind I was issued by the town's building commissioner on June 30, 2009 after he determined that a special permit was unnecessary. Wind I became operational in March of 2010. Thereafter, on October 4, 2010, the plaintiffs appealed to the Falmouth Zoning Board of Appeals (ZBA) which, on March 3, 2011, affirmed the issuance of a building permit for Wind I without a special permit.

Plaintiffs appealed the ZBA's decision, seeking an order that the Town cease operation of Wind I until a special permit was applied for and issued.

The court found that it was not irrational for the Town to conclude that in most cases a windmill is a use with such potential to impact neighbors so as to require special permission, but in the case of a municipal windmill, the benefits of the use justify allowance as of right. Accordingly, the Court could not conclude that the Building Commissioner erred in issuing a building permit under § 240–30B without a special permit.

The plaintiffs also contended that the Town was required to obtain a special permit under § 240–33G(5) of the Bylaw, which requires a special permit for enumerated accessory uses in a Public Use District, including windmills. However, the Court agreed with the Town that where a municipal purpose use is allowed as of a right in a particular district, it is permitted regardless of whether it is a primary or accessory use. It would make little sense to authorize the Town to construct a windmill as the primary use on the site as of right while requiring it to obtain a special permit for a windmill constructed as a less intensive accessory use.

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