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## **The "devil is in the details"- Wind turbine without permit**

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As most attorneys and their clients know, the "devil is in the details," and those details often become the subject of litigation. Case in point is the recent Massachusetts Appeals Court ruling in Todd Drummey et al. v. Town of Falmouth et al., which considered whether the Town should have obtained a special permit from the Zoning Board of Appeals (ZBA) prior to placing one of its two wind turbines at its wastewater treatment plant (WWTP), back in 2009. The power generated by the turbines is used to operate the WWTP and the remainder is sold to the utility company serving the area.

Neighbors to the turbine site appealed an earlier Superior Court ruling that affirmed the Town's right to place the turbine (known as "Wind 1") on Town-owned land without a special permit. The neighbors have alleged significant distress from noise and disturbance to their quality of life and potential health hazards.

The Town building commissioner and the ZBA both agreed that a special permit was not required because Wind 1 was to be for a "municipal purpose" that fell within the Town's by-law definition of "community service" uses. However, the Appeals Court Judge found that interpretation to be an error, since the Town also maintains a specific Wind Turbine Siting By-Law and such use was not specifically referenced as a "community service use." Call it a failure to properly draft the by-law and connect it to other existing provisions, or as the Court called it, "a "...canon of construction inclusio unius est exclusion alterius...statutory expression of one thing is an implied exclusion of other things omitted from the statute;" the devil is in the details.

Although the case has been remanded back to the Superior Court to make a new ruling based on the Appeals Court decision, the Town has chosen to appeal the decision to the Massachusetts Supreme Judicial Court. We await the result of the next case.

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