COMMONWEALTH OF MASSACHUSETTS

BARNSTABLE, ss | **SUPERIOR COURT**
CIVIL ACTION
NO. BACV2013-00281

TOWN OF FALMOUTH

vs.

TOWN OF FALMOUTH ZONING BOARD OF APPEALS & others[1]

MEMORANDUM OF DECISION AND ORDER ON DEFENDANTS' MOTION FOR PRELIMINARY INJUNCTION

On November 7, 2013, the court held a hearing on the Andersen's motion for a preliminary injunction to partially or completely shut down the operation of two wind turbines owned by the Town of Falmouth. At that hearing, with representatives of all parties present, their counsel engaged in negotiations to resolve the issue by agreement. After a suspension of hearing experienced counsel indicated to the court that the Town would "immediately" restrict turbine operation to the hours in place at the time of the ZBA's finding of a nuisance, 7am to 7pm, and start the proposed mitigation efforts described in Building Commissioner Eladio Gore's affidavit.[2] Selectwoman Moffitt and counsel indicated that these terms were not only appropriate, but that they were going to recommend a global settlement on the issue. In the face of this promise to the court, the Town has refused to reduce the turbine operation hours from sixteen per day to the promised twelve. Therefore, the Town's actions, (or inactions), require

[1] Matthew McNamara, Patricia Johnson, Kenneth Forman, Edwin Zylinski, David Haddad, Patricia Favulli as Members of the Falmouth Zoning Board of Appeals; and Neil Andersen, Elizabeth Andersen, Barry Funfar, Diane Funfar, John J. Ford, Day Mount, Linda Ohkagawa, J. Malcolm Donald, Kathie Mount, Kathryn T. Elder, Brian Elder and Todd A. Drummey.

[2] A Transcript of the hearing is attached.

this court to employ its discretion in ruling upon the Andersens' motion; the court's conclusions and order are as follows.

In determining whether a preliminary injunction should be granted, the court engages in a balancing test. See *Packaging Indus. Group, Inc.* v. *Cheney*, 380 Mass. 609, 617 (1980). The Supreme Judicial Court set forth the prevailing standard as follows:

> "[W]hen asked to grant a preliminary injunction, the judge initially evaluates in combination the moving party's claim of injury and chance of success on the merits. If the judge is convinced that failure to issue the injunction would subject the moving party to a substantial risk of irreparable harm, the judge must then balance this risk against any similar risk of irreparable harm which granting the injunction would create for the opposing party . . . . Only where the balance between these risks cuts in favor of the moving party may a preliminary injunction properly issue."

GTE Products Corp. v. *Stewart*, 414 Mass. 721, 722-723 (1993) (quoting *Packaging Indus. Group*, 380 Mass. at 617); see also *LeClair* v. *Town of Norwell*, 430 Mass. 328, 331 (1999) and *Boston Police Patrolmen's Assn*. v. *Police Dept. of Boston,* 446 Mass. 46, 49-50 (2006) ("When a private party seeks a preliminary injunction, the moving party is required to show that an irreparable injury would occur without immediate injunctive relief.").

As previously articulated in this court's Interim Order of Decision, the Andersens have a substantial likelihood of success on the merits of their position that the ZBA's decision that both turbines created a nuisance prohibited by Code of Falmouth §240-110 at the property in question, and its direction that the "Building Commissioner take all necessary steps to eliminate the nuisance caused by the operation of the wind turbines", was based on a legally reasonable ground that was sufficiently supported by facts contained within the record. See *MacGibbon* v. *Board of Appeals of Duxbury*, 356 Mass. 635, 639 (1970) (a ZBA decision "cannot be disturbed unless it is based on a legally untenable ground, or is unreasonable, whimsical, capricious or

arbitrary.") The Town of Falmouth, by and through its ZBA, has spoken, and found that the turbines create a nuisance at the Andersen's residence. This court shall not undercut that finding where it has made an initial determination that the ZBA's decision was legally tenable. Thus, the court now undertakes the task of examining the parties' claims of irreparable harm and balancing the risks of granting or failing to grant the requested injunction.

The Andersens have submitted affidavits and medical records supporting their claim that the nuisance produced by the turbines has resulted in substantial and continuous insomnia, headaches, psychological disturbances, dental injuries, and other forms of malaise. The court finds the Andersens' claims that they did not experience such symptoms prior to the construction and operation of the turbines, and that each day of operation produces further injury, to be credible. Taking this evidence of irreparable harm in conjunction with the moving parties' substantial likelihood on the merits of their claim to uphold the ZBA's finding of an ongoing nuisance created by daily 7am to 7pm turbine operation, the court finds there is a substantial risk that the Andersens will suffer irreparable physical and psychological harm if the injunction is not granted. See *Packaging Indus. Group*, 380 Mass. at 617.[3]

This risk therefore must be balanced against any similar risk of irreparable harm granting the injunction would create for the Town. *Id.* The court notes that the ZBA's decision ordered the Building Commissioner to "eliminate the nuisance", but did not specify how he was to accomplish that objective. The court credits and adopts in its entirety Building Commissioner Gore's detailed recommendation of a plan to investigate the sound and pressure generated by the turbines and identify mitigating measures to eliminate the nuisance. Ultimately, measures such

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[3]This reasoning and finding applies as well to the other named defendants and impacted abutters.

as sound-proofing or plantings may prove to be sufficient to eliminate the nuisance without eliminating the operation of the turbines themselves. However, the investigatory and mitigation process outlined by the Commissioner will necessarily take time, likely several months, while the Andersens continue to experience irreparable physical harm from turbines that are now operating sixteen hours per day, a further 33% increase over the operating schedule in place at the time the ZBA ordered that the nuisance be eliminated. Thus, the court must consider further injunctive relief that would have meaningful effect in the immediate future, in the absence of mitigation measures that may ultimately prove successful.

The court considered both the affidavit of Town Manager Julian Suso and Hearing Exhibits 2 and 3, which detail the terms of the various financing agreements the Town undertook to construct the turbines and the opinions of related state and federal agencies. The court concludes that there is a strong risk that a complete turbine shut down could trigger at least two irreparable failures of the long-term financing used by the Town to construct the turbines (i.e. a default on the terms of an approximately five million dollar loan/grant from the Massachusetts Water Pollution Abatement Trust, and a repayment with interest of an approximately one million dollar prepayment by the Clean Energy Center for Renewable Energy Certificates expected to be delivered in fiscal year 2015).[4] Thus, a total shut down poses a substantial risk of irreparable financial harm that threatens the very existence of the municipality's complex funding structure for the turbines.[5] See *Hull Municipal Lighting Plant* v. *Massachusetts Municipal Wholesale*

[4]While the Town has claimed that other financing agreements would be in jeopardy without the revenue generated by the sale of excess energy from the turbines back into the grid, the court finds it sufficient to focus on the risk of these two potential financing failures because the agreements contain terms that may well be interpreted as a matter of law to require at least some operation of the turbines or production of energy therefrom.

[5]Regardless of whether there would be any financial impact on the Town from a preliminary injunction, the source of the Town's eventual payments to satisfy its financial obligations are irrelevant and do not warrant close analysis by this court.

Electric Co., 399 Mass. 640, 643-644 (1987). While the Andersens' have demonstrated both physical injury and a substantial likelihood of success on the merits, the quantum of irreparable harm that is strongly at risk if the turbine funding agreements permanently fail outweighs the former in the balancing of harms analysis of a total shut down. See *Packaging Indus. Group*, 380 Mass. at 617.

However, a more than cursory review of the financial documents provided by the Town does not indicate that there is any provision requiring 24/7 operation, nor any other specific operational schedule.[6] [7] [8] [9] The Town did not provide detailed information specifying the

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[6]The Mass. Water Pollution Abatement Trust grant/loan of approximately five million dollars that financed the construction of Wind 2 may well be found to require that the turbines remain operational, but definitely does not expressly dictate hours of operation or electricity production minimums. The Mass. DEP Commissioner has opined that either a complete shut down or operation of the turbines "only for a very limited period of time each day" would result in a violation of the American Recovery and Reinvestment Act of 2009's requirement that the turbines be operated as an "energy efficiency" project, as defined by the U.S. EPA Office of Water. See Exhibit D3; EPA Memorandum March 2, 2009, *Award of Capitalization Grants with Funds Appropriated by P.L. 111-5, the "American Recovery and Reinvestment Act of 2009"*, Appendix 7, p. 43 ("Energy efficiency is the use of improved technologies and practices to reduce the energy consumption of water quality projects, including projects to reduce energy consumption or produce clean energy used by a treatment works . . . Producing clean power for . . . treatment works on site [such as] wind [power]"). There is a substantial risk that the DEP's opinion that operation of the turbines for only few minutes per day, as a pretext to evade a prohibition on total shut down, would not constitute an energy efficiency project as described in the EPA Memorandum, will prevail in any future contract enforcement action. However, the court concludes that there is little risk that turbines operating on a non-pretextual reduced schedule would be found to ***not*** constitute an energy efficiency project for the purposes of the ARRA as the turbines currently produce substantially more electricity than is required to power the WWTF. Even on a reduced schedule the turbines would likely supply most, if not all, of the WWTF's power needs. The terms of the loan/grant and the EPA guideline referenced in the DEP's opinion letter both concern the use of clean energy ***for water quality projects***. The reasonable conclusion is that a determination of 'efficiency' is tied ***solely*** to the WTTF's energy needs, not the wider potential for clean energy production by the turbines themselves that the Town may have expected. Thus, the record does not support a likelihood of default and acceleration of the five million dollar Trust loan/grant due to a ***reduced*** operating schedule.

[7]The approximately five million dollars in municipal bonds that financed the construction of Wind 1 do not contain any provisions requiring operation of the turbines, although the Town clearly anticipated that the payments on the bonds would be covered by excess electricity generation revenue. Thus, a reduction in operating hours may require the Town to locate alternate sources of funds to make a portion of the bond payments, but a change in operational schedule, by and in itself, is not likely to trigger a bond failure.

[8]The CVEC agreement dictates that all of the RECs produced by Wind 1 during the first five years of operation are to be sold to CVEC, and requires the Town to notify it of a shut-down in the event of "inoperability" that "exceeds seventy-two hours in duration". While the agreement contains an expected production target of 3624 RECs per year, a review of the default and termination provisions does not reveal any explicit terms requiring that the target be met. This leads the court to conclude that a reduced operating schedule that does not result in a shut-down exceeding

financial impact of any partial shut-down schedules; nothing in the pleadings directs the court to specific irreparable harm by operational hour reduction. In their pleadings and at the hearing, the parties indicated that the turbines' operational hours had been reduced in the past for a significant period of months, supporting the inference that such action, by and of itself, would not constitute a default on any of the financing agreements submitted to the court. Additionally, Building Commissioner Gore's affidavit stated that he would change turbine operational hours if necessary to eliminate the nuisance. Thus, an order by the court reducing turbine operational hours would simply achieve what the Selectmen, ZBA, and Building Commissioner have done or would do, but in a *consistent* fashion so that the injured parties can plan their lives accordingly, and thereby experience a reduction in harm from the nuisance.

Therefore, the court must exercise its discretion to determine what reduction in operating schedule most appropriately balances the risk of irreparable harm between the parties. The ZBA heard evidence and made its finding that the wind turbines were a nuisance at the Andersens' property during an extended period in which the turbines were only operated twelve hours per day. The clear import of the ZBA's decision is that the turbines were a nuisance when operating on this schedule. Certainly, the Selectmen's subsequent vote and action to *increase* the turbines' operations to sixteen hours per day, in the absence of any other remedial actions by the Town, is wholy antithetical to the ZBA's order to eliminate the nuisance. It also stands to reason that if a

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seventy-two consecutive hours has a low risk of leading to a termination by the buyer requiring payment by the Town of the full value of expected REC production. See Exhibit B, ¶¶4.1, 4.4.

[9] In contrast, the CEC agreement contains express production terms for Wind 2 RECs, the violation of which would risk the imposition of penalties or, more importantly, the risk of a default and triggered repayment of approximately 1.5 million dollars in prepaid RECs with interest. Specifically, the agreement expects 3,262 RECs to be produced during 2015, and defines default as either the failure of the turbine to produce power for twelve consecutive months or a REC output below 70% of expected (i.e. 2,254 during 2015). Article V§ 6.01(i). The Town has submitted no evidence that a reduced hour schedule has in the past or would in the future result in REC production below the 70% threshold, constituting default and triggering repayment.

nuisance existed on a 7am to 7pm schedule, elimination of that nuisance, in the absence of long-term measures such as plantings or sound-proofing, would require a *further* reduction below twelve hours per day.

The court next considers the relative injurious impact of the turbines during their daily operation. The nature of use and enjoyment of one's home is personal to each homeowner, but as a general proposition, there are certain periods of each day that are ordinarily devoted to activities outside of the home. On weekdays, the hours of 7am to 7pm are typically devoted to out-of-home activities including employment, commuting, and errands. Similarly, the same hours on Saturdays are customarily filled up with out-of-home chores, recreation, social events, etc. These periods are generally considered to be a reasonable amount of time for a person to spend outside his or her home without significant negative impact, and are the hours in which the background environmental noise is higher. In contrast, Sundays are typically a secular day of rest spent in the privacy of one's home, the interference with which poses a substantial burden on the homeowner.

Thus, a turbine schedule of 7am to 7pm, Monday through Saturday, would provide seventy-two operational hours per week and provide substantial mitigation of the proven (at this point) harm, with no irreparable harm to the Town. While the Town may suffer some financial penalties for reduced REC production and a decrease in expected revenue generation, the risk of major default on various financing agreements or damage to the equipment from prolonged shut down is likely avoided. While the Andersens may still be unable to enjoy the nuisance-free use of their home during customary hours of out-of-home activity, they will experience sufficient periods of time to sleep and relax in their home, with a commensurate increase in the use and

enjoyment of their impacted property.

However, the court also recognizes the Andersens' desire to use and enjoy their home during the impending holiday season. Therefore in these circumstances only, as reasonably requested and not otherwise unduly burdensome to the Town, the above-detailed turbine schedule shall be altered to cease any operation during the following days: November 27, 2013 (Thanksgiving); December 25, 2013 (Christmas Day); January 1, 2014 (New Year's Day).

Thus, after hearing and review of the parties' submissions, employing the "balancing" test enunciated in *Packaging Indus. Group*, and considering the Andersens' likelihood of success on the merits, the risk of irreparable harm to the Andersens and the potential for irreparable harm to be suffered by the Town if an injunction is issued, this Court concludes that the scales tip in favor of the Andersens regarding the specific injunctive relief set out herein. See 380 Mass. at 617. For the above stated reasons, the defendants' Motion for Preliminary Injunction is respectfully **ALLOWED.**

ORDER

By order of the court, preliminary injunction shall issue until further order of the court.

1. The Town of Falmouth, its Selectmen, agents and persons acting in concert shall be restrained from operating the Wind Turbines located at the Waste Water Treatment Facility except during the hours of 7am to 7pm, every day of the week except Sunday. This schedule shall commence on November 22, 2013. Additionally, the same parties shall be restrained from operating said turbines in any fashion on the following limited dates: November 27, 2013; December 25, 2013; and January 1, 2014.
2. The mitigation plan proposed in Building Commissioner Gore's affidavit shall be implemented forthwith.
3. The Defendant Abutters shall be allowed to submit to the Building Commissioner written proposals for sound and pressure mitigation.
4. The parties shall submit a written status update on mitigation efforts seventy-five days from this Order.

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Christopher J. Muse
Justice of the Superior Court

Dated: November 21, 2013