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BY E-MAIL AND REGULAR MAIL

Timothy R. Carroll, Executive Secretary
Town of Chilmark
401 Middle Road, P.O. Box 119
Chilmark, MA 02535-0119

Re: Wind Turbines on Agricultural Land

Dear Mr. Carroll:

You have made several inquiries relating to wind turbines being proposed on two farms in Chilmark.

Specifically, you have informed us that the building inspector recently issued building permits for two wind turbines, both of which would fall below the 150 foot threshold for referral to the MVC as a Development of Regional Impact ("DRI"). In these circumstances, you have inquired as to which, if any, of the following three events might trigger the suspension or revocation of the building permits.

a. An appeal to the Zoning Board of Appeals ("ZBA") of the issuance of the building permit pursuant to M.G.L. Chapter 40A, § 8 by a person with standing to pursue such an appeal;

b. Assuming such an appeal were filed, the sending by the ZBA of a "discretionary referral" to the MVC; and

c. During the pendency of an appeal under Chapter 40A, § 8, if the Board of Selectmen were to make a discretionary referral to the MVC under St. 1977, Chapter 831, § 14(e)[1].

However, in all these cases, and even if the MVC accepts a discretionary referral, the landowner can continue with construction of the wind turbine unless and until the MVC denies DRI approval. The landowner, however, would be proceeding at its own risk and might have to remove any construction which was completed prior to an adverse MVC decision.

Please note that the "agricultural exemption" appearing in Chapter 40A, § 3 provides that a zoning bylaw may not, "prohibit, unreasonably regulate or require a special permit for the use, expansion, reconstruction or construction of structures thereon[2] for the primary purpose of commercial agriculture....". One question for the ZBA in the event an appeal is filed is whether the proposed wind turbines are for the primary purpose of commercial agriculture, or whether they will primarily provide electricity for residential use. Although I have found no case directly on point involving wind turbines, the Massachusetts Appeals Court has previously had occasion to analyze the application of Chapter 40A's "agricultural exemption" in relation to a fossil fuel supply for a greenhouse. Town of Tisbury v. Martha's Vineyard Commission, 27 Mass. Ap. Ct. 1204 (1989). In that case, the landowner sought to operate a large greenhouse to grow fruits and vegetables on a year round basis. The town's zoning bylaw prohibited underground storage tanks with an oil storage capacity greater than 500 gallons. The applicant sought to install a 4,000 gallon fuel tank and the MVC approved that size tank notwithstanding the 500 gallon limitation in zoning. Because the landowner made a factual showing that a 4,000 gallon tank was necessary for the conduct of his greenhouse operation and that the application of the 500 gallon limit as a practical matter prohibited the greenhouse use, the trial court approved the MVC's waiver of that limitation and the Appeals Court upheld that ruling on appeal. Because the courts found that the larger fuel tank was "an essential component of the Moskows' planned agricultural use of their property" and because the zoning bylaws' tank size limitation effectively prohibited the agricultural use, the court found that the agricultural exemption applied.

In the event of an appeal to the ZBA, the ZBA may choose to apply this test to the proposed wind turbines, namely, will the wind turbines be primarily used to support the landowners' agricultural use of their property[3]. If not, would subjecting the wind turbines to the

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1 As amended by St. 1992, Chapter 97, § 3. (Setting out the procedure for discretionary referrals.) As amended, § 14(e) permits discretionary referral by any board or commission in the town where the development located, by the selectmen of any other town or by the county commissioners.

2 Land used for the primary purpose of commercial agriculture. Chapter 40A, § 3 first paragraph.

3 In the Tisbury case, there was no suggestion that the super-sized oil tank was going to provide fuel for residential heating.

special permit review called for in § 4.2A(4) of the Zoning Bylaw, effectively prohibit the agricultural use.

Because I am not familiar with the facts pertaining to the two proposed wind turbines, I cannot definitively determine what facts may be critical to deciding whether the turbines are "for the primary purpose of commercial agriculture....". However, the ZBA may wish to consider the following points:

1. Of the total projected output of a turbine, how much is to be used for agricultural purposes and how much (if any) for residential purposes[4]. The distinction between agricultural and residential use is also found in M.G.L. c. 61A, the Agricultural Tax Classification Act. See, e.g., c. 61A, § 15 (where dwellings are to be valued and taxed under M.G.L. c. 59, rather than under the more favorable provisions of c. 61A). Similarly, c. 61A, § 4 requires that 5 acres of land be "actively devoted" to agriculture to qualify under c. 61A.

2. As a procedural matter, if an abutter files an appeal with the ZBA, that does not initiate a special permit proceeding, but challenges the propriety of the issuance of a building permit without a special permit. If the ZBA finds that the building inspector was correct in ruling that the wind turbines were exempt as agricultural uses, there is no need for a special permit. If the ZBA finds that the building inspector erred, then it would revoke the building permit and the landowners would have the option of seeking a special permit.

3. As noted above, absent a revocation of the building permits by the ZBA, the landowners may proceed with construction at their own risk.

4. The proceedings with respect to an appeal under Chapter 40A, § 8 are governed by the provisions of Chapter 40A, § 15. The appeal must be taken within 30 days from the date of the building permits. The contents of the notice of appeal, the place of filing and subsequent notifications are all defined in § 15. The ZBA must hold a hearing on the appeal within 65 days after receiving notice of the filing of the appeal. The concurring vote of four members of a five member board is

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4 I will assume that some of the turbines' power may be sold to the local utility under the "net metering" provisions of the recent "Green Communities Act". Nonetheless, it would appear reasonable to compare the total electrical consumption with the total electrical production to see how much of the production will be used on the farm and of that total, how much is used for residential and how much for commercial agricultural purposes.

required to reverse the building inspector's decision and the hearing procedure is also prescribed by § 15. Please note that the board's decision must be made within 100 days after the filing of the appeal (not the date the ZBA receives notice thereof). A failure of the ZBA to act within that time limit will result in the constructive grant of the appeal, here, revocation of the building permits. The other procedural details prescribed by § 15 must also be observed.

5. I'm not aware of any statutory requirement in Chapter 831 requiring the ZBA, or any other entity authorized to make a discretionary referral to the MVC, to do so only after holding a public hearing. Thus, it is a matter for the prudential discretion of any board which wishes to make such a referral whether it wishes to do so at a public meeting or after a public hearing. Note: It is not certain that the MVC would accept a discretionary referral at this time. In general, c. 831 provides that referrals should be made before a permit issues. Section 14(e) of c. 831 authorizes discretionary and "cross-town" referrals, but does not explicitly address the timing issue. Logic suggests that this timing issue should not be a bar to such referrals, but no case has yet decided that.

I realize that this is a novel issue for the town and the ZBA and that there is a lack of precedent and statutory guidance to which one might turn. However, the Tisbury case noted above gives some indication of how the courts may treat the issue, and the facts which the ZBA might find in the event of an appeal would also tend to affect the outcome.

Very truly yours,

Eric W. Wodlinger

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Enclosure – Tisbury v. MVC

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TOWN OF TISBURY *v.* MARTHA'S VINEYARD COMM., 27 Mass. App. Ct. 1204 (1989)

544 N.E.2d 230

TOWN OF TISBURY & others[fn1] *vs.* MARTHA'S VINEYARD COMMISSION; BENCION MOSKOW & another[fn2], interveners.

No. 88-P-925.

Appeals Court of Massachusetts.

October 6, 1989.

[fn1] The building and zoning inspector and the planning board of Tisbury.

[fn2] Patricia Duff Moskow.

Zoning, Agriculture. *Farm.*

Carmen L. Durso, Town Counsel, for the plaintiffs.

Richard A. Johnston for the interveners.

Michael R. Halley for Martha's Vineyard Commission.

Jacob C. Diemert & Dianne R. Phillips for Massachusetts Farm Bureau, amicus curiae, submitted a brief.

Bencion and Patricia Duff Moskow (the Moskows) applied for a permit from the town of Tisbury (town) to erect a greenhouse with a 4,000 gallon fuel tank for the year-round growing of hydroponic fruits and vegetables on their jointly owned, forty-seven acre farm. The building inspector of the town referred the application to the Martha's Vineyard Commission (Commission) because he believed that the proposed development was one of regional impact. See *Woods Hole, Martha's Vineyard & Nantucket S.S. Authy.* v. *Martha's Vineyard Commn.,* **380 Mass. 785**, **790** (1980). After two public hearings, the Commission issued a decision approving the application subject to various conditions. Although the Moskows agreed to comply with those conditions, the building inspector refused to issue the permit. Both the planning board and the building inspector (plaintiffs) brought an action in the Superior Court claiming that the Commission's action was arbitrary, in excess of its statutory authority, and in violation of the town's zoning by-law. In regard to the latter claim, the complaint alleged that the approval by the Commission of the construction of the 4,000 gallon oil tank conflicted with the local zoning by-law limiting such tanks to 500 gallons.[fn3]

The Commission filed an answer. The Moskows then intervened in the action as defendants and counterclaimed for an order that the town issue a building permit for the construction of the

greenhouse. Later, they moved for summary judgment on the questions of the propriety of the Commission's decision and the issuance of the permit. In connection with their motion the Moskows submitted three affidavits. The town submitted none. The Moskows argued that, because their farm and the proposed greenhouse with its fuel tanks were agricultural uses under G.L.c. **40A, § 3**, the by-law restricting the size of fuel storage tanks was not applicable. A Superior Court judge, after a hearing, issued a memorandum of decision and order
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affirming the Commission's decision and directed that partial summary judgment be entered on counts one and two of the Moskows' answer and counterclaim.**[fn4]**

In his memorandum of decision the judge ruled that the construction of the greenhouse and the appurtenant fuel storage facility constituted an agricultural use; that the Commission properly concluded that the proposed fuel tank was reasonable for its intended farm use; and that, in regard to this particular matter, the by-law limiting the size of the fuel storage tanks would constitute an unreasonable regulation of agriculture in violation of G.L.c. **40A, § 3**. The judge concluded that the town was obligated to issue the permit since its only objection to the issuance rested on the fuel storage tank by-law which was not applicable to this situation. There was no error.

General Laws c. **40A, § 3**, as amended by St. 1982, c. 40, provides in pertinent part: "[N]or shall any [zoning] ordinance or by-law prohibit, unreasonably regulate or require a special permit for the use of land for the primary purpose of agriculture, horticulture, floriculture, or viticulture; nor prohibit or unreasonably regulate the expansion or reconstruction of existing structures thereon for the primary purpose of agriculture, horticulture, floriculture, or viticulture. . . ." This "agricultural use" exemption has been interpreted broadly by the appellate courts. See *Lincoln* v. *Murphy*, **314 Mass. 16, 18-20** (1943). As a result the courts have allowed many activities to be conducted on land which is being used primarily for agricultural purposes despite conflicting provisions of local zoning by-laws. See *Building Inspector of Mansfield* v. *Curvin*, **22 Mass. App. Ct. 401** (1986) (ruling that c. **40A, § 3**, allows the operation of a piggery otherwise prohibited by town by-law); *Steege* v. *Board of Appeals of Stow*, **26 Mass. App. Ct. 970** (1988) (ruling that c. **40A, § 3**, allows the operation of a stable and riding school otherwise prohibited by town by-law).

Here, the proposed greenhouse falls squarely within the protection of c. **40A, § 3**. General Laws c. **61A, § 2**, as appearing in St. 1975, c. 794, § 1, provides that "[l]and . . . used in raising . . . greenhouse products" is deemed to be in horticultural use. See also *Needham* v. *Winslow Nurseries, Inc.*, **330 Mass. 95, 100** (1953) (defining "greenhouse" as "a building principally constructed of glass wherein plants, flowers, and sometimes vegetables are raised for purposes of sale"). Therefore, as a structure furthering an agricultural use, the proposed greenhouse cannot be prohibited or unreasonably regulated.

It is undisputed that the 4,000 gallon fuel tank is an

essential component of the Moskows' planned agricultural use of their property. They plan to
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grow fruits and vegetables on a year-round basis. Without heat from the tank in the winter months, the produce being grown within the greenhouse will perish. See *Jackson* v. *Building Inspector of Brockton*, **351 Mass. 472**, **476-477** (1966), where the court held that the operation of a manure and fodder drying machine, which was prohibited by a local zoning by-law, was permitted when such machine "has reasonably direct relation to farming operations of its owner."

The judge did not commit error when he concluded that, in the circumstances, the portion of the zoning by-law limiting the size of fuel storage tanks could not be applied to the proposed greenhouse because it would constitute an unreasonable regulation of land used for agricultural purposes in violation of G.L.c. **40A, § 3**.**[fn5]** While the 500 gallon limitation, applicable to single family dwellings, does not explicitly prohibit the construction of a greenhouse, given the climate in New England and the nature of the agricultural use, its practical effect is a prohibition.**[fn6]** See *Cumberland Farms of Conn., Inc.* v. *Zoning Board of Appeal of No. Attleborough*, **359 Mass. 68**, **74** (1971) ("[d]e facto prohibition of the expansion of agricultural use of land may not be accomplished by unreasonable regulation"). Further, the record established the dangers and difficulties attending the frequent refilling of a 500 gallon tank during severe winter weather, and, therefore, a larger tank would be safer. Any other concerns of the town about safety as a result of the size of the tank have been met by the judge's order that the permit should be issued subject to the conditions imposed by the Commission. Six of those conditions concerned the size, design and maintenance of the fuel tank.

The plaintiffs' argument that the defendants still must apply to the town's zoning board for a variance lacks merit. There is no question that the Moskows are using their land for agricultural purposes. There is no necessity for a zoning board even to consider a variance for a use that falls within the protective scope of the exemption provided in G.L.c. **40A, § 3**.

Judgment affirmed.

[fn3] Section 4.5.10 of the town's zoning by-law provides that for lots, such as the Moskows' located in residential districts, "[n]o fuel storage tank or container shall have a capacity greater than 500 gallons. . . ."

[fn4] On June 22, 1988, the Moskows, with the assent of the town and the Commission, moved for entry of final judgment inasmuch as there was no just reason to delay the entry of final judgment as to the decided issues. The judge entered an order for entry of final judgment.

[fn5] The judge's ruling that the by-law was an unreasonable regulation was made independent of the Commission's decision. We therefore do not address the issue raised by the town that the Commission lacked authority to determine whether the Moskows'

application was exempt from the zoning by-law.

[fn6] We emphasize that the judge below did not invalidate the by-law. His decision, as did the Commission's, exempts the Moskows' agricultural use from the effect of the by-law. In all other respects, the by-law remains fully effective in regard to house lots in the relevant town residential district.

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