

Town of Coventry

Wind Turbines

Topics

1. Permitting – Was It Valid?
2. Settlement Agreement
3. Are Remedies Available?

Present Owners of Land and Turbines

<u>LOCATION</u>	<u>SITE NAME</u>	<u># OF TURBINES</u>	<u>PROPERTY OWNER</u>	<u>TURBINE OWNER</u>		
0 VICTORY HWY	WED COVENTRY 6	1	KEVIN BREENE & CHARLENE RANDALL	GREEN DEVELOPMENT		
0 VICTORY HWY	WED COVENTRY 5	1	KEVIN BREENE	GREEN DEVELOPMENT		
VICTORY HWY	WED COVENTRY 6	1	DIANNE & STEVEN MORTON	GREEN DEVELOPMENT		
0 VICTORY HWY	WED COVENTRY 2	2	KEVIN BREENE	TOWN OF WEST WARWICK (2)		
0 WEST LOG BRIDGE RD	WED COVENTRY 6	1	BEAUDOIN LLC	GREEN DEVELOPMENT		
212 PIGGY LN	WED COVENTRY 1	2	TOWN OF COVENTRY	NARRAGANSETT BAY COMMISSION (1)		
212 PIGGY LN	WED COVENTRY 2	2	TOWN OF COVENTRY	TOWN OF WEST WARWICK (1)		
0 FLATRIVER RD	WED COVENTRY 3	1	DIANE CAPWELL (TRUST)	NARRAGANSETT BAY COMMISSION		
0 FLAT RIVER RD	WED COVENTRY 4	1	MONIQUE CAPWELL (TRUST)	NARRAGANSETT BAY COMMISSION		

Permitting Process – Was It Valid?

R.I. Gen. Laws 1956 § 45-24-47.

- The Wind Turbines Not Subdivisions Of Land.
- Required Only Special Use Permit From The Zoning Board.

Permitting Process – Was It Valid?

- “Special Use [is] a regulated use which is permitted pursuant to the special-use permit issued by the Coventry Zoning Board of Review [Zoning Board].” Art. 2, § 210(113).
- The Zoning Board shall hold a public hearing before granting a special use permit. Article 4, § 433

Permitting Process – Was It Valid?

Board requires evidence of:

- Screening and buffering (see Article 17);
- General compatibility with lots in the same or abutting zoning districts;
- Industrial Performance Standards in Article 7;
- Compatibility With **Coventry Comprehensive Plan**; and
- **Not Hurt Public Health, Safety, Welfare**. Art. 4, § 432.

Permitting Process – Was It Valid?

- Zoning Board “may apply such special conditions that may, in the opinion of the Board, be required to promote the intent and purposes of the Coventry Comp. Plan and this Ordinance.” Art. 4, § 460.
- Zoning Board held required public hearings and made required findings, per Art. 4, § 432, for the wind turbines to issue a Special Use Permit.

Applicant	Owner	Location	Zoning District	Decision Date	Special Use Findings	Special Conditions, if any
WED Coventry Six, LLC	Beaudoin, LLC	AP 310 Lot 018 / Perry Hill Road	RR-5	7/2/2014	All findings except for F (re signs and exterior lighting) made - Art. 4, § 432 A, B, C, D, E, G, H, I, J, K	(i) no home, currently in existence, may experience over 30 hours per year of "flicker" (ii) owner/developer needs to reach agreement with the fire department about costs of emergency training and response for the turbines, if any
WED Coventry Two, LLC (2 turbines)	Kevin A. Breene	AP 304, Lot 011 / Victory Highway	RR-5	6/4/2014	All findings except for F (re signs and exterior lighting) made - Art. 4, § 432 A, B, C, D, E, G, H, I, J, K	no home, currently in existence, may experience over 30 hours per year of "flicker"
WED Coventry 3, LLC	n/a	AP 315, Lot 61 / Flat River Road	RR-5	4/2/2014	All findings except for F (re signs and exterior lighting) made - Art. 4, § 432 A, B, C, D, E, G, H, I, J, K	owner/developer needs to reach agreement with the fire department about costs of emergency training and response for the turbines, if any
WED Coventry 4, LLC	n/a	AP 315, Lot 88 / Vacant	RR-5	4/2/2014	All findings except for F (re signs and exterior lighting) made - Art. 4, § 432 A, B, C, D, E, G, H, I, J, K	owner/developer needs to reach agreement with the fire department about costs of emergency training and response for the turbines, if any
WED Coventry 5, LLC	Kevin A. Breene	AP 304, Lot 002 / Victory Highway	RR-5	6/4/2014	All findings except for F (re signs and exterior lighting) made - Art. 4, § 432 A, B, C, D, E, G, H, I, J, K	no home, currently in existence, may experience over 30 hours per year of "flicker"
WED Coventry Six, LLC	Kevin A. Breene	AP 303 Lot 003 / Victory Highway	RR-5	7/2/2014	All findings except for F (re signs and exterior lighting) made - Art. 4, § 432 A, B, C, D, E, G, H, I, J, K	(i) no home, currently in existence, may experience over 30 hours per year of "flicker" (ii) owner/developer needs to reach agreement with the fire department about costs of emergency training and response for the turbines, if any
WED Coventry Six, LLC	Dianne & Steven H. Morton	AP 304 Lot 003 / Victory Highway	RR-5	7/2/2014	All findings except for F (re signs and exterior lighting) made - Art. 4, § 432 A, B, C, D, E, G, H, I, J, K	(i) no home, currently in existence, may experience over 30 hours per year of "flicker" (ii) owner/developer needs to reach agreement with the fire department about costs of emergency training and response for the turbines, if any

Permitting Process – Was It Valid?

- The Appropriate Property Owners Were Provided Notice (200')
- Few Appeared.



In short:

Permitting Process Valid

Can The ZB Decision Be Appealed?

- “An aggrieved party may appeal a decision of the zoning board of review to the superior court ... by filing a complaint stating the reasons of appeal within 20 days after the decision has been recorded and posted”) See R.I. Gen. Laws §45-24-69.
- No record of appeal.
- No aggrieved party claims that they filed an appeal.

Other Appeals

- Building permits for the turbines issued.
- An appeal from building permit may be taken by an aggrieved party. *See* § 255-3110.
- There is no record of an appeal.
- No aggrieved party has stepped forward to indicate that they had filed an appeal.

Legal Attack Blocked (Administrative Finality)

- If an appeal is not filed, the decision of an administrative body is **not subject to attack based on its incorrectness or purported failure to follow the proper process**. See *Sprague v. Zoning Board of Charleston*, 2004 WL 2813763.



In short:

- Time For Challenge Has Passed
- Broad Prohibition On Legal Attack

Settlement Agreement

WED Settlement With Town –
Background and Terms

Background – The WED Lawsuits

KC-2018-0567; SU-2019-0422 –“Solar Appeal”

- Master Plan Approval To Erect a 5.22MW solar farm in Coventry denied by Planning Commission.

KC-2019-1267 –“Solar Enforcement Action”

- The Town Sued - Solar Enforcement Action - WED Entity installing solar farm without approvals.

KC-2019-0307 –“Flicker Appeal”

- Special Use Permits issued to WED Entities - ambiguous and poorly-drafted language around 30-hour limit.
- Town issued (“NOVs”) in June 2018 -imposed \$200.00/day each day Sullivan Home had excessive flicker
- One time fine of \$500.00.

Background – The WED Lawsuits

KC-2019-1263 – “Flicker Enforcement”

- Town Enforce NOV's Against The WED Entities For Excessive Flicker And Fines
- Existence Of Excessive Flicker Presented A Substantial Hurdle.

KC-2018-1418 – “Container Appeal”

- In June, 2018, The Town Issued A NOV To Diane Capwell (“Ms. Capwell”) For The Storage Of Approximately 31 Conex Containers And Chassis Trailers On Her Property In Violation Of The Town Zoning Ordinance.
- Green/Wed Appealed The Nov To The Zoning Board And Superior Court.

Background – The WED Lawsuits

KC-2020-0533 – The “Abuse of Process Action”

- WED Entities Filed A Civil Action Against The Town Claiming Damages In Excess Of **\$85 Million**.
- The Assistant Town Planner And The Finance Director Alleged Individually Liable For Engaging In Purported Unconstitutional Action And Selectively Enforcing Regulations Against The WED Entities.
- The Town Filed A Counterclaim For Abuse Of Process Against DePasquale And The WED Entities.

The Settlement Agreement

- Legal Fees Mounting – Over \$100,000
- After A Mediation Session On September 15, 2020, The Town Entered Into A Settlement Agreement With The WED Entities.
- The Settlement Agreement Was Approved By A Majority Of The Town Council.

The Settlement Agreement – Benefits to the Town

- An immediate payment of \$146,000 to the Town and a total eventual payment of \$802,000.
- Release of liability Town and individual defendants.
- A written conservation easement (limited outzones)– open space site plan filed in the land evidence records.
- Visual buffers - solar array not seen from the road.
- **30 hours aggregate** – no ambiguity
- Data Recording Mechanism To Address Legal Proof.
- Three Water Cisterns.

The Settlement Agreement

- Administrative Process Used - Solar Array Standards Applied By Town Planner.
- Tax Stabilization Agreement - Turbines Taxed At \$5/kw Of Capacity For 20 Years.
- \$5/kw Reflects The Maximum Rate Allowed By State Law.
 - The Office Of Energy Resources Issued Regulations Effective 1/1/2017 Set Tangible Rate For Renewable Energy Facilities At \$5/kw.

Settlement Agreement



In short:

- **Agreement Deemed In Best Interest of Town Residents Generally**

Other Possible Remedies – Decommission for Non-Generation

- 10 turbines have been generating electricity
- Even if not, because turbines permitted in 2014, Zoning Regulations in Art. 20, adopted in December 2015, do not apply. *See Cigarrilha v. City of Providence*, A.3d 1208, 1212–1213 (R.I. 2013) (noting that properties that do not currently conform to zoning restrictions may still be protected uses if the use “existed lawfully before the effective date of the enactment of the [new] zoning restrictions and has continued unabated since then.”) (quoting *RICO Corp. v. Town of Exeter*, 787 A.2d 1136, 1144 (R.I. 2001)).
- Court would not force a wind turbine operator operating a permitted use and paying taxes to remove a turbine is very low.
- Reliance and Other Legal Defenses

Other Possible Remedies – Nuisance Suit

- Town can only bring an action to abate a public nuisance – not a private one.
- Noise and flicker are primarily from abutting neighbors who allege that the turbines cause an interference in the enjoyment of their neighboring land.
- This is **private nuisance** which could not be brought by the Town. *See Hawkins v. Town of Foster*, 708 A.2d 178 (R.I. 1998).
- Will not bring down turbines – only mitigate to some extent.

Remedies Flicker – Enforcing Ordinances And Settlement Agreement

- Non-compliance With The Special Use Permits Zoning Enforcement Officer Issue NOV, However There Must Be Competent Evidence To Establish There Is A Violation. Art. 3, § 3100.
- Settlement Agreement Was Designed To Resolve The Issue Of Legal Proof Acceptable By A Court – 30 hours; Epsilon.
- Epsilon Associates Or Another Similar Third-party Should Be Performing That Function Now.

Other Possible Remedies – Noise

- No Special Use Condition For Noise.
- Ordinances Regulate Noise - Residential Districts (Where Turbines Located, Rr-5) - Noise Limit Is 65 Dba At The Property Line. Town Ordinances § 169-7.
- Pure Tone Limit Is 60 Dba - "Any Sound Which Can Be Distinctly Heard As A Single Pitch Or Set Of Single Pitches." § 169-4
- Penalties Exist For Violating The Noise Ordinances. § 169-9.
- Need Data To Show Turbines Violate Ordinance.

Remedies

- Residents May Attempt Private Action
- Residents Monitor Noise
- Town Review Information from Independent Engineer



In short:

- **Administrative Finality Blocks Most If Not All Legal Avenues**
- **No Remedy to Remove Turbines**

SUMMARY – THE PATH FORWARD

- Coventry Followed Its Ordinances For Notification Of Abutters, Hearings, And Permitting.
- No Case Law Or Ordinance Allowing Town To Take Down Turbines.
- Private Citizens May Pursue A Nuisance Complaint Against The Owners.
- Private Citizens Should Be Vigilant In Reporting Noise Issues.
- Private Citizens May Request A Review Of The Monitoring Used For Flicker To Determine Its Accuracy In Reporting.

Presenters

Stephen J. Macgillivray
smacgillivray@pierceatwood.com

One Financial Plaza
26th Floor
Providence, RI 02903

PH / 401-490-3430
CELL / 401-965-7406