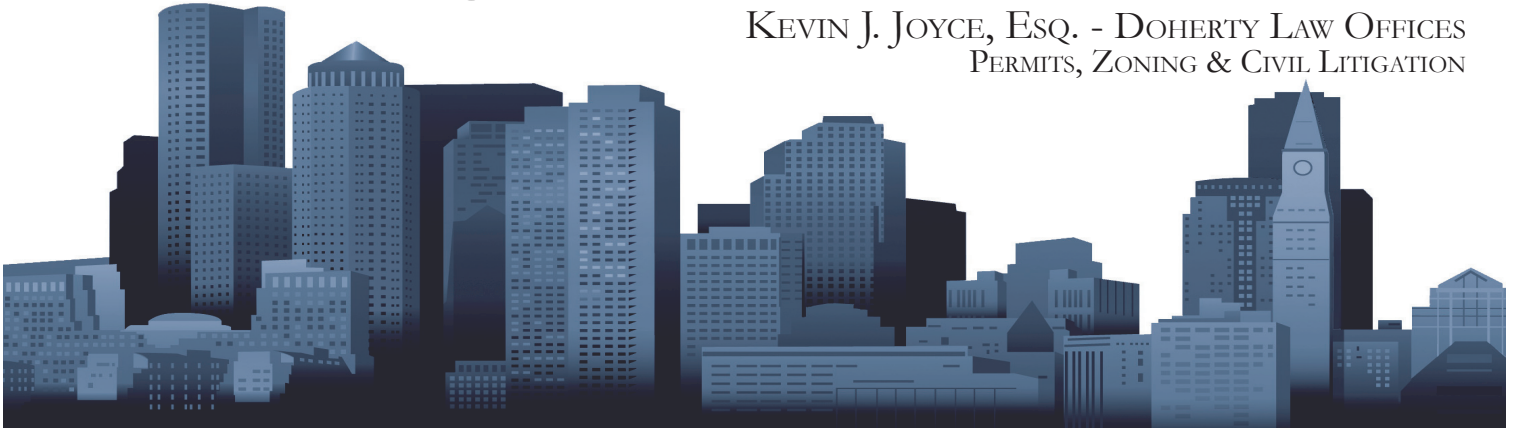


# 3 Minutes on Permits<sup>©</sup>

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PERMITS, ZONING & CIVIL LITIGATION



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## Wind Energy Facilities Are The Winds of Change For New Boston Zoning Code Article

Boston Zoning Commission Adopts New Article 88

Boston has once again demonstrated its national “green” leadership with the adoption of a new amendment to the Boston Zoning Code, identified as Article 88 and titled “Wind Energy Facilities.” Wind energy is growing with rapid acceptability. A wind turbine now even sits on Boston City Hall, providing approximately 12 percent of Boston City Hall’s power. Wind turbines, such as the one at Boston City Hall, and other wind energy facilities will now be subject to regulation by Article 88. The Zoning Commission voted to adopt this new zoning amendment on February 25, 2009 at the public hearing required before adopting a new zoning amendment; with the signature of Mayor Menino the following day, the provisions of Article 88 are now in full force and effect in Boston. Real estate professionals planning to build a wind energy facility should review the requirements of Article 88 carefully, especially if planning to include a facility as part of the LEED credits needed to comply with another recently adopted amendment to the Boston Zoning Code, now known as Article 36 “Green Building.”

Article 88 was drafted to address the growing use of wind energy and the issues that come with the installation of wind energy facilities. Article 88 will now regulate the approval, location, design, operation and decommissioning of turbines and other wind energy facilities. Following the Boston Redevelopment Authority’s initial presentation of

the proposed Article 88 to the Zoning Commission in November 2008, the BRA revised the proposed regulations in accordance with the Zoning Commission’s recommendations. When I participated in the development of what is now Article 86, “Wireless Communications Equipment,” similar issues with regard to location, height, and design were raised. Article 88 for wind energy facilities follows a similar template to Article 86 with regard to its flow and the issues addressed. Article 88—like Article 86 does for wireless equipment—provides standards for the placement, design, and monitoring of the wind turbines to ensure that the wind turbines have a minimal impact on the city’s scenic, natural, and historic resources. Article 88 also sets forth decommissioning requirements for wind facilities.

How the new Article 88 will impact your wind energy project depends on what type of wind energy facility you are proposing. First, despite Article 88 becoming effective on February 26, 2009, Article 88 will actually apply to wind energy facilities proposed before that date, including the replacement of existing facilities. The only wind energy projects exempt from the provisions of Article 88 will be those proposed in an application for a building permit or zoning relief filed prior to the publication date of the first hearing notice for the Zoning Commission hearing scheduled to consider Article 88.

For those projects subject to its provisions, Article 88, as adopted, sets out three categories of wind energy facilities, “Building Integrated Wind Energy Facility,” “Small Wind Energy Facility,” and “Large Wind Energy Facility.” Article 88 also defines a “Utility-scale Wind Facility” as a commercial facility generating power that is sold on the wholesale market. The “Building Integrated Wind Energy Facility” category applies to an on-site facility that is permanently “integrated” or connected to a building, such as the turbine at Boston City Hall. The “Building Integrated Wind Energy Facility” does not expressly limit the facility’s power generation rating. The “Small Wind Energy Facility” is another

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### Special Points Of Interest In This Issue

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### Generating your own power on-site?

Don’t forget to read the p.3 article, “Got Power? Then Get Your Massachusetts DTE Approvals Too!” regarding other regulatory responsibilities for on-site power generation, such as wind turbines.



WIND TURBINES SUCH AS THESE WILL NOW BE SUBJECT TO ARTICLE 88

# New “Oceans Act” To Develop First in the Nation Plan Regarding Development in and Along State Waters

Draft Plan from The Commonwealth Due Out This Summer

Future waterfront development projects along the 1,500 miles of Massachusetts coastline, and in the state waters that border it, will now be subject to a new comprehensive management effort with the passage of the Massachusetts Oceans Act of 2008 (“the Act”). With the Act being signed into law last year, Massachusetts became the first state in the Union to undertake development of a comprehensive ocean management plan to manage the use, development and preservation of its state waters and near ocean resources. The plan must be completed by December 31, 2009; it will cover a number of issues and disciplines from biodiversity to real estate projects.

For those in the real estate community and familiar with working under the “public trust doctrine,” G.L. c. 91 licenses and other waterway regulations, the Act will have familiar parts, in that it builds upon the existing framework applicable to waterway and waterfront development. In fact, when the final comprehensive plan is complete, it will be incorporated into the existing coastal zone management plan and enforced through the Massachusetts Environmental Policy Act (MEPA) and G.L. c. 91, both parts of the state’s existing regulatory and permitting processes for waterway and waterfront development projects.

At the outset, it is important to highlight that the Act expressly provides that the comprehensive plan, when complete at the end of this year, is to be read consistently with and will not supersede any existing special or general law, nor does it confer any additional rights and remedies. The plan’s objective will be to balance “natural resource preservation with traditional and new uses, including renewable energy.” The territory that will be subject to regulation

under the comprehensive plan, called the “Ocean Management Planning Area,” (“OMPA”) is outlined in the Act as any “waters and submerged lands” (including their subsoils and seabeds) situated between the “seaward boundary of the Commonwealth” as defined by federal law, and the “Nearshore Boundary of the Ocean Management Planning Area,” as laid out in the Office of Coastal Zone Management’s plan dated January 31, 2006. The plan will also outline municipal and other boundaries in the OMPA.

The Act also amends existing statutes to define the comprehensive plan’s scope and role while also further defining the Commonwealth’s regulatory authority over its state waters and coastline; the Act also accounts

for the growth in renewable energy projects, among other issues. Notable points of interest in the Act for the real estate community, in particular, include an “Ocean Development Mitigation Fee” applicable to permits or licenses issued for development projects in the OMPA. The fee shall be paid into the Ocean Resources and Waterways Trust Fund established pursuant to section 35HH of chapter 10. The Act also eases the limitations applicable to Ocean Sanctuaries for certain renewable energy

projects and preserves the involvement of regional planning bodies in the oversight of such projects. The full impacts of the Act on development in and along our state waters can be reviewed upon the publication of a draft of the comprehensive plan this summer.

A draft of the comprehensive plan must be made



**MASSACHUSETTS SHORELINE SUCH AS BOSTON’S WATERFRONT HERE WILL SOON BE SUBJECT TO A NEW COMPREHENSIVE OCEAN MANAGEMENT PLAN.**

available to the public at least six months before the December 31, 2009 deadline; a series of public meetings in coastal regions is required after the draft plan is published. The public comment period will also remain open for a period of 60 days after the last public meeting. State officials have already held a separate series of meetings statewide to hear comment on the Act, and the public’s ideas for the plan. As with other developing regulatory issues, we will keep you informed of progress on this issue. ■

## One Minute on Green Building

Carefully Choose Contract Language When Involved With Building Green

Green Building concepts and renewable energy are bound to become more prevalent in various development projects as efforts in Washington to stimulate the economy, look to this new industry for growth. Given this economic climate more builders and developers may seek to take advantage of funding opportunities, tax credits and general long-term savings associated with incorporating green building concepts into a project. Project owners, contractors and design professionals should spend some time carefully considering the contractual language applicable to their obligations and representations where the brave new world of “Green Building” is involved. Are you building to plans and specifications? Do you have a right of indemnification for damage claims when plans and specifications do not result in a completed project or a project not completed to expectations? Are you representing that a project will be designed or built to certain performance standards regarding efficiency, or the cri-

teria upon which certain LEED credits have been awarded?

A party’s actions that result in a loss of LEED credits, tax benefits, grants or other funding that result in a project’s increased cost, its demise or the increased costs to operate the project, if and once accepted by the owner, could create a strong claim for damages against the unsuspecting party. One party’s claim then often triggers claims by another party for indemnity, contribution or breach of contract that may involve legal costs just trying to determine if relevant language covers issues arising from non-compliance with ‘green’ issues.

A slow and careful review of such agreements that tread upon “Green Building” concepts should be undertaken with legal and technical professionals to insulate yourself during these difficult economic times in which the new “Green Building” industry is also taking shape, and with it the interpretation of contract language and case law applicable to

such issues. Legal issues, such as the exceptions to the economic loss doctrine where negligent misrepresentation claims are involved, provide additional reasons why careful considerations must be paid to emerging “Green Building” obligations. “Green Building” concepts could also create circumstances, if not carefully considered during contract negotiation, where, under the warranty provisions inherent to most owner-contractor agreements, the contractor is forever returning to complete its ‘warranty work’ obligations or an owner is without coverage comprehensive enough to cover the “Green Building” results expected. So use this one minute on Green Building as a reason to spend time down the road carefully crafting plans and agreements for future projects that incorporate “Green Building” concepts, especially as more municipalities, such as Boston through its Zoning Code Article 36, mandate “Green Building” compliance. ■

## Got Power? Then Get Your Massachusetts DTE Approvals Too!

If you are proposing to provide on-site power generation resources for your project, such as the wind energy facilities described in the companion article about the new Article 88 to the Boston Zoning Code, then in addition to obtaining zoning approval for such facilities you must also submit to the review process set out in the Tariff on file with the Department of Telecommunications & Energy (“DTE”).

Through the Massachusetts Distributed Generation Interconnection program, a party may now seek approval to tap into the area’s power grid when incorporating wind, solar and conventional sources of power for use on-site or distribution off-site. The process is set forth in the Interconnection Tariff established by a Utility Cluster for a geographic area, for example NSTAR for those in Boston, and approved for use by DTE. The Tariff cannot create technical or economic barriers through the approval process or otherwise. The Tariff sets out a process for connecting to the area power network as a self generating power source. The Tariff sets out three levels of review, Simplified, Expedited and Standard. Proponents of generation facilities with a power rating of 10 kW or less using certain types of networks qualify for the “Simplified” Review, which is the fastest and least costly interconnection path. The Expedited Review is the next category and may involve a supplemental review by the utility company with

whom the proponent seeks to connect; the supplemental review is to determine modifications that may be needed for the project proponent to join the network. A project proponent shall be subject to the Standard Review if the review cannot be completed or modifications made through the supplemental reviews in the Expedited Review process. The Standard Review has the highest costs and the longest time period for review and approval of connection. Once a review is complete and approved, an executable agreement will be issued to the project proponent and must be executed within a certain timetable or else the review process will start anew.

Compliance with the DTE’s regulations and the applicable Tariff is an important consideration in project planning, but a great opportunity when embarking on any renewable energy or other generation project for your property. The review process authorizes a party generating its own power, rather than relying upon power from a utility company, to participate in Distributed Generation Interconnection program, enabled by G.L. c. 164 and applicable DTE regulations. The Massachusetts Legislature just last year amended some of the definitions applicable in G.L. c. 164. Distributed Generation Interconnection is a complex process that should not be undertaken without the assistance of knowledgeable professionals. ■

“A party may now seek approval to tap into the area’s power grid when incorporating wind, solar and conventional sources power for use on site or distribution off-site.”

## Wind Continued...

CONTINUED FROM PAGE 1

on-site facility category with one or more turbines detached from the buildings or structures, but with a maximum power rating capacity of 100 kW/0.1 MW. For example, the familiar facility at the International Brotherhood of Electrical Workers Local 103, observable from Route 93 in Dorchester, would most likely be an example of a “Small Wind Energy Facility.” The “Large Wind Energy Facility” is defined as a facility capable of generating more than 100 kW/0.1MW of electricity.

Where you may locate a wind facility and the process for obtaining the approvals for such a facility, depend on the facility’s category and its proposed location. The “Building Integrated Wind Energy Facility” category is generally designated as a “conditional use” in many zoning districts, including districts designated for residential and commercial uses; however, these facilities are “allowed” uses in limited areas, for example in general industrial, and some waterfront and maritime districts. The “Large Wind Energy Facility” and “Small Wind Energy Facility” categories are more limited in terms of location in that they are either “allowed” or “conditional” uses,” generally in in-

dustrial, institutional, and maritime designated zoning districts as well as open space and the Boston Harbor Island designated districts.

If a facility is planned for a zoning district where a wind facility is deemed, by Article 88, to be a “conditional” use, then the project proponent must obtain a “conditional use permit” by applying to the Boston Zoning Board of Appeal. While conditional uses are generally regulated by Article 6 in the Boston Zoning Code, Article 88 places additional requirements for the granting a conditional use permit to build a wind energy facility, including a mandated review of the design and plan to build the facility by the Boston Redevelopment Authority and a 25 year time limit period on the facility, unless extended or renewed through additional zoning relief that is both timely and proper. The project proponent would file for a “conditional use permit” with the Zoning Board of Appeal after the proposed facility receives its required design review approval from the BRA. Applicants should note that an application for direct review by the Zoning Board of Appeal can be filed at the Boston Inspectional Services Department. As a source of power generation, plans to connect a wind facility to the region’s power grid must also obtain the approvals for such connection prior to obtaining any building permit for a wind energy facility.

Article 88 also outlines a number of other important issues regarding wind energy facilities and their operation, as it was crafted with input from various constituencies to ensure the effectiveness in its application. We will continue to keep you updated on this issue. I encourage you to contact me if you have any questions regarding this latest zoning amendment. ■

## New Stormwater Regulations Create A Flood of Questions

Large property owners with parking lots and other “impervious surfaces” are now subject to a proposed set of regulations regarding how the stormwater from those impervious surfaces is discharged. The comment period regarding the proposed regulations is scheduled to close on March 11, 2009. If you are an institutional, commercial or other large property owner using “impervious surfaces” these regulations will create new obligations as to how you maintain these surfaces and discharge stormwater collected from them.

The new regulations, proposed as 314 Code of Mass. Regulations 21.00 and known as the proposed Impervious Surface Stormwater Management Regulations, will establish a statewide general permit program aimed at controlling stormwater that collects from your property. The Massachusetts Department of Environmental Protection (“DEP”) is putting these regulations forth to abate the significant accumulation of pollutants in the Commonwealth’s waterways from stormwater runoff flowing from privately owned properties with large impervious surfaces. Impervious surfaces, unlike non-impervious surfaces, such as soil, do not filter stormwater discharge.

The proposed regulations promote worthy and obviously needed goals, but the process

CONTINUED “STORM WATER” PAGE 4



THE WIND TURBINE ON CITY HALL IS A LIKELY EXAMPLE OF A “BUILDING INTEGRATED” WIND ENERGY FACILITY

## Developer's Case Law Update

### Subdivision Plan, Access

A subdivision plan laid out a street using land from one zoning district. The street created from this land led to a use in a separate zoning district. The use in the second zoning district was a forbidden use in the first zoning district. The alleged street also did not meet the definition of such under the municipal zoning ordinance applicable to the appurtenant property.

**RULING:** Use of land as a 'street' in one zoning district that will lead to a use in another zoning district where that use is not allowed in the zoning district of the 'street's' origin is prohibited in Massachusetts, especially where the alleged street did not meet applicable zoning definitions. *BRUNI v. PLANNING BOARD OF IPSWICH* (January 2009)

### Buildable Lot, Configuration

Property owner included land extending to the middle of an adjoining street in the square footage of a lot to assemble the 'buildable lot' under the applicable local zoning. Property owner claimed a fee interest in these lands included as part of the "buildable lot" by virtue of G.L. c. 183 § 58, the "derelict fee" statute.

**RULING:** The Appeals Court held that because the fee interest to the lands included in the square footage for the 'buildable lot' were not intended by statute to provide the holder a right to build on such lands, the land should not be included in lot size configuration for purposes of assembling a 'buildable lot.'

*SEARS v. BUILDING INSPECTOR OF MARSHFIELD* (January 2009)

### Municipal Conservation Commission, Adequacy of Decision

Plaintiff submitted a request to a municipal conservation commission for relief from wetlands by-laws regarding buffer zone compliance. Plaintiff offered expert and other evidence to meet its burden of showing by a preponderance of the evidence that its proposed project would not harm interests protected by those wetlands by-laws. Conservation commission denied the relief without specifically stating its reasons as to why the evidence was not sufficient.

**RULING:** A municipal conservation commission decision is inadequate where the decision simply states that the evidence presented by a party seeking such relief, in this case a variance from buffer zone compliance, was "not credible" or merely that plaintiffs "failed to sustain their burden." A basis for such denial or conclusion in the face of such evidence must be articulated in the conservation commission's decision to protect against arbitrary and capricious decisions and to provide a reviewing Court the ability to determine whether or not the decision was issued with "fairness and without predisposition."

*POLLARD v. CONSERVATION COMMISSION OF NORFOLK* (December 2008)

### "Person Aggrieved" Injury, Density

Property owner appealed a local zoning board decision, but was found by the trial court to have no standing as a "person aggrieved" under the Massachusetts Zoning Statute, G.L. c. 40A. Plaintiff was an abutter who demonstrated a loss of privacy based upon the proximity of two proposed homes to the rear of her home and the loss of trees as a result of the proposed project that had previously provided some privacy to her home.

**RULING:** The Appeals Court held that the trial court decision was "clearly erroneous" in finding the plaintiff had no standing where 1) the facts showed that the construction density in the applicable neighborhood exceeded the current zoning, 2) density is an issue protected by zoning by-laws, and 3) the plaintiff showed particular harm from the increased density to her property through a loss of privacy from the construction of two new homes to the rear of her home where trees providing some privacy had once stood.

*DWYER v. GALLO* (December 2008)

## Storm Water Continued...

CONTINUED FROM PAGE 3

for addressing them does not come without some obligations, and these new obligations are not simple. How your property will be obligated under the current proposed set of regulations depends on several factors. First, an "impervious surface" is expressly defined in the regulations and generally includes parking lots, and paved over surfaces that do not allow storm water to drain into the ground; the definition also includes "a roof, other than a green roof constructed in accordance with the Massachusetts Stormwater Handbook." Your property will be subject to the new regulations if your "impervious surface" is greater than or equal to five (5) acres in the aggregate. For example, if you have several paved parking lots in the aggregate that amount to five acres or more, all of which are served by a common stormwater discharge system, your property will be obligated to comply with the new regulations. However, if you are in what the regulations identify as a "Total Maximum Daily Load" or "TMDL" area, the compliance threshold decreases to two (2) acres or more of impervious surface. TMDL areas are those areas that contribute more pollution and have a greater impact on a local waterway's ability to stay under the permissible maximum load of pollutants. Most of Boston and the municipalities immediately west of it are considered TMDL areas.

The proposed regulations establish three categories of property owners "Existing," "Redevelopment" or "New Development." The compliance obligations applicable to a property owner subject to the regulations depend on which one of the three categories applies to your property. All three categories have varying levels of general permitting requirements and "Good Housekeeping" obligations regarding the operation and maintenance of the regulated surfaces. For example, one good "Good Housekeeping" requirement may be regularly sweeping the parking lot.

The regulations do provide for a variance process; however, existing property owners or developers in the planning phases of the project must consult with their legal and technical professionals to determine the planning, logistical and fiscal obligations created by the proposed set of regulations. ■

### 3 Minutes on Permits ©

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