

*2009 NY Slip Op 50317U, *; 2009 N.Y. Misc. LEXIS 472, ***

[*1] Judith E. Dudley, RONALD P. IOCONO, TRUSTEE UNDER THE RONALD P. IOCONO REVOCABLE TRUST, AND J. LYNN IOCONO REVOCABLE TRUST, DATED 1/6/05, AL WORDINGHAM, AND ADVOCATES FOR PRATTSBURGH, INC., Petitioners, against Town Board of the Town of Prattsburgh, WINDFARM PRATTSBURGH, LLC, SUBSIDIARY OF FIRST WIND HOLDINGS, LLC, FORMERLY KNOWN AS UPC WIND PARTNERS, LLC, Respondents.

100,345

SUPREME COURT OF NEW YORK, STEUBEN COUNTY

2009 NY Slip Op 50317U; 2009 N.Y. Misc. LEXIS 472

February 26, 2009, Decided

NOTICE:

THE LEXIS PAGINATION OF THIS DOCUMENT IS SUBJECT TO CHANGE PENDING THE RELEASE OF THE FINAL PUBLISHED VERSION. THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

CORE TERMS: windfarm, condemnation, town boards, involvement, real estate transaction, conflict of interest, resident, subject to judicial review, estate agent, disqualification, acquisition, financially, voting, annul, property owners, underground, Municipal Law, wind turbines, eminent domain proceedings, public interests, financial interest, municipality's, materially, condemnor's, concrete, binding, inflict, abstain, condemn, parcel

COUNSEL: **[**1]** The Brocklebank Firm, Canandaigua (Derek G. Brocklebank, of counsel) for Petitioners.

Sullivan & Leyden, Wayland (John F. Leyden, of counsel) for Town of Prattsburgh.

Bond, Schoeneck & King, PLLC, Syracuse (Kevin M. Bernstein, of counsel) for Windfarm Prattsburgh, LLC.

JUDGES: Hon. [Marianne Furfure](#), Acting Supreme Court Justice.

OPINION BY: [Marianne Furfure](#)

OPINION

[Marianne Furfure](#), J.

This matter comes before the Court on petitioners' Article 78 proceeding challenging two resolutions adopted by the Prattsburgh Town Board (Town Board) on April 21, 2008, and June 24, 2008. The resolutions were made to commence a condemnation proceeding to allow the Town to acquire easements for the installation of an underground electrical

interconnect system needed to operate the 36 wind turbines being sited in the Town of Prattsburgh by Windfarm Prattsburgh, LLC (Windfarm). Petitioners claim that, in violation of Article 18 of the General Municipal Law and the Town's Code of Ethics, Town Supervisor Harold McConnell (McConnell) voted on the two resolutions when he should have abstained from voting because he had a conflict of interest. Petitioners argue that, as a result of this improper action by the Town Supervisor, this Court must **[**2]** annul the resolutions and award petitioners attorneys' fees, costs and disbursements.

Respondents have moved to dismiss the petition on several grounds. First, respondents argue that this Court lacks subject matter jurisdiction, as the resolutions were made to advance the eminent **[**2]** domain proceedings and are subject to review only by the Appellate Division. Second, respondents allege that petitioners' claims are without merit and must be dismissed. Third, respondents argue that, even if McConnell violated the Town Code of Ethics, annulment of the resolutions is not a remedy provided in the Code. Finally, respondents contend that petitioners Al Wordingham (Wordingham) and Advocates for Prattsburgh, Inc. (Advocates) lack standing to challenge the Town's action.

SUBJECT MATTER JURISDICTION

Challenges to eminent domain proceedings are governed by [EDPL Section 207](#) and can be brought only by those parties who are aggrieved by the condemnor's determination and findings. Challenges must be made directly to the Appellate Division of the Supreme Court in the Judicial Department where the project is located. Appellate Division review is limited to four specifically designated factors: 1) whether **[**3]** the proceeding was in conformity with state and federal constitutions, 2) whether the acquisition was within the condemnor's statutory jurisdiction or authority, 3) whether the determination and findings were made in accordance with statutory procedure, and 4) whether there was a public use, benefit, or purpose to be served by the acquisition [\[EDPL Section 207 \(c\) \(1 - 4\)\]](#).

In this case, petitioners have not raised a violation of any one of the factors which are exclusively subject to Appellate Division review, but rather they have claimed a violation of the General Municipal Law and the Town's Code of Ethics. Therefore, this Article 78 proceeding is the proper vehicle by which to seek judicial review of these claims ([Dudley v. Town Bd. of Town of Prattsburgh, 872 N.Y.S.2d 614, 2009 WL 279898 \[4th Dept. 2009\]](#)). Respondents' motion to dismiss the petition for lack of subject matter jurisdiction is denied.

STANDING

Respondents argue that Wordingham and Advocates have no standing to bring this action because these petitioners are not one of the property owners whose property was taken by the Town. Therefore, respondents argue that Wordingham and Advocates have failed to establish an injury in fact. Wordingham **[**4]** argues that, as a Town resident and taxpayer, he has standing because all Town residents are affected when a public official acts out of self interest or improper influence.

Standing is a threshold determination which, if raised, must be considered at the outset of any litigation to determine whether a party " . . . should be allowed access to the courts to adjudicate the merits of a particular dispute. . . ." ([Society of Plastics Indus. v. County of Suffolk, 77 NY2d 761, 769, 573 N.E.2d 1034, 570 N.Y.S.2d 778 \[1991\]](#); [Matter of Dairylea Coop. v. Walkley, 38 NY2d 6, 9, 339 N.E.2d 865, 377 N.Y.S.2d 451 \[1975\]](#)). [Article 18 of the General Municipal Law](#) governs conflicts of interest involving officers and employees of towns, villages, and other municipalities. This law was enacted to protect the citizens of the community in general from actions taken by their elected or appointed officials when the

official personally stands to materially or financially benefit (1964 NY Laws Ch 946 Section 1; [Webster Associates v. Town of Webster](#), 59 NY2d 220, 227, 451 N.E.2d 189, 464 N.Y.S.2d 431 [1983]). As Wordingham is a resident and taxpayer of the Town, he is within the zone of interest sought to be protected by the statute and is affected when a town official acts in a way that his personal interests **[**5]** conflict with the public interests he represents ([Matter of Dykeman v. Symonds](#), 54 AD2d 159, 162, 388 N.Y.S.2d 422 [4th Dept. 1976]). Likewise, Advocates which has as its members landowners and taxpayers within the Town and whose purpose is furthered by the interests asserted here, has standing ([Matter of Ziembra v. City of Troy](#), 37 AD3d 68, 72, 827 N.Y.S.2d 322 [3rd Dept. **[*31]** 2006]; [Matter of Center Square Association v. City of Albany Board of Zoning Appeals](#), 9 AD3d 651, 780 N.Y.S.2d 203 [3rd Dept. 2004]). Even if the Court were to find Wordingham and Advocates lacked standing, Petitioners Dudley and Iacono are proper parties, as their properties were affected by the Town's condemnation resolution ([Dudley v. Town Bd. of Town of Prattsburgh](#), 872 NYS2d 614, 2009 WL 279898 [4th Dept. 2009]). Therefore, respondents' motion to dismiss the petition on the basis that Wordingham and Advocates do not have standing is denied.

APRIL 21, 2008 RESOLUTION

Petitioners challenge to the Town Board's April 21, 2008 resolution is not subject to judicial review in this proceeding. An Article 78 proceeding is available only after a determination becomes final and binding [[CPLR 217\(1\)](#)]. A municipality's determination is deemed final only after the body has reached a definitive **[**6]** position on the issue which inflicts actual, concrete injury, and the injured party has no other recourse but to seek judicial review ([Walton v. New York State Department of Correctional Services](#), 8 NY3d 186, 194, 863 N.E.2d 1001, 831 N.Y.S.2d 749 [2007]; [Matter of Essex County v. Zagata](#), 91 NY2d 447, 453 - 454, 695 N.E.2d 232, 672 N.Y.S.2d 281 [1998]). Determinations by town boards that are preliminary steps in the approval process of a larger project are not final determinations subject to judicial review (see, [Matter of Maor v. Town of Ramapo Planning Board](#), 44 AD3d 665, 666, 843 N.Y.S.2d 163 [2nd Dept. 2007]; [Mayerat v. Town Bd. of Town of Ashford](#), 185 AD2d 699, 700, 585 N.Y.S.2d 928 [4th Dept. 1992]).

In this case, passage of the April 21, 2008 resolution did not inflict actual, concrete injury on any resident of the Town because it was not a final action that obligated the Town to any course of action. Although the resolution authorized the commencement of a condemnation proceeding, it did not commit the Town to a definite course of action. The Town Board was required to conduct a public hearing on the proposal and, only after the conclusion of the hearing, determine whether condemnation was necessary and in the public interest. As the April 21, 2008 resolution required further action **[**7]** by the Town which could have prevented the condemnation proceeding from going forward, the resolution was not a final and binding determination subject to judicial review.

JUNE 24, 2008 RESOLUTION

Petitioners have also sought to annul the June 24, 2008 Town Board resolution which approved condemnation of eight parcels including those owned by Dudley and Iacono based on the alleged conflict of interest held by McConnell when he cast the tie breaking vote. Petitioners claim that in the weeks that preceded the Town Board vote, McConnell, a licensed real estate agent, represented Windfarm in the purchase of a piece of property Windfarm needed as part of their wind turbine project. Petitioners contend that McConnell's participation on behalf of Windfarm in the purchase of that property created a conflict of interest that disqualified McConnell from voting on the condemnation resolution. They claim that, despite McConnell's claim that his involvement in the property acquisition was limited,

he received a commission from the sale. They argue that this compensation mandated McConnell abstain from voting on the resolution, and that by refusing to abstain he violated General Municipal Law 805-a **[**8]** and the Town's Code of Ethics.

Respondents contend that McConnell had no conflict of interest that prevented him from **[*4]** casting the tie-breaking vote because McConnell publicly acknowledged his limited involvement in the real estate transaction before the vote; McConnell acted at a time when there was no action pending before the Board; that he was not compensated by Windfarm and that his involvement in this unrelated real estate transaction was not likely to influence his judgment in any way.

Although it is conceded that McConnell received approximately \$ 1900 as a result of his activities in the land purchase, the extent of McConnell's participation in the real estate transaction is somewhat unclear. Although McConnell alleges that he was not Windfarm's agent in the transaction, he acknowledges receipt of monies from the seller's agent for his assistance in brokering the real estate transaction between Windfarm and a private property owner. Regardless of the nature of his representation and who paid him, he did benefit financially from proffering the purchase offer from Windfarm. That is what a real estate agent does and his involvement should be treated as such.

In determining what **[**9]** level of personal financial interest warrants disqualification, the court must examine the relevant facts and circumstances of each case presented to determine the extent of the interest at issue and whether it is substantial enough to require disqualification (Matter of Byer v. Town of Poestenkill, 232 AD2d 851, 852, 648 N.Y.S.2d 768 [3rd Dept. 1996]; Matter of Parker v. Town of Gardiner Planning Board, 184 AD2d 937, 938, 585 N.Y.S.2d 571 [3rd Dept. 1992]). "It is critical that the public be assured that their officials are free to exercise their best judgment without any hint of self-interest or partiality, especially if a matter under consideration is particularly controversial" (Matter of Byer v. Town of Poestenkill, *Id.* at page 852). However, the "mere fact of employment or similar financial interest does not mandate disqualification of the public official involved in every instance" (Matter of Schupak v. Zoning Brd. Of Appeals of Town of Marbletown, 31 AD3d 1018, 1020-1021, 819 NYS2d 335 [3rd Dept. 2006]; Matter of Heustis v. Town of Ticonderoga Planning Board, 11 AD3d 868, 870, 784 N.Y.S.2d 187 [3rd Dept. 2004]).

In assessing the circumstances in this case, the Court is aware of the controversy surrounding the entire windfarm project and the fact **[**10]** that this project has been the subject of extensive Town involvement since it was first proposed in 2003. It is also undisputed that McConnell has been in favor of the project and has consistently voted in support of the project since its inception. The record also reflects that, in 2007, the Town passed resolutions requiring all electrical connections for the Windfarm to be buried underground, and gave Windfarm permission to use the Town's rights of way for that purpose. The land transaction at issue here came about when Windfarm attempted to acquire easements from the property owners so that Windfarm could lay the underground interconnect service.

Documents submitted to the Court reflect that negotiations involving the real estate transaction at issue here occurred sometime between September and December of 2007 with the actual recording of the deed on February 6, 2008. McConnell received a portion of the real estate commission from the seller's broker sometime after the sale was finalized. There was no evidence that McConnell has acted as a real estate agent for Windfarm on any other transactions or that he had any ongoing financial relationship with Windfarm. Petitioners allege **[**11]** that, because of the substantial size of the project and the history of Town involvement, it was likely that further Town action was contemplated at the

time of the land negotiation. However, they produced no evidence of any pending applications before the Town during the time frame at issue. There is also no evidence that the Town's condemnation vote would somehow benefit McConnell financially or materially.

Given the isolated nature of the transaction, the time frame within which it occurred and **[*5]** McConnell's long standing support of the project, it cannot be said, under all the circumstances, that the monies he received were a gift from Windfarm for any official action on his part or compensation for a matter pending before the Board. The cases cited by Petitioners do not require a different result as the circumstances presented in those cases involved officials who were employed by or whose ongoing financial or property interests stood to benefit by the very vote being taken. Although McConnell's actions in the real estate transaction did advance the windfarm project which McConnell had long supported, they were done before the condemnation vote was taken and obviated the Town's **[**12]** need to condemn that parcel.

Under all the circumstances, receipt of this broker's commission did not create the likelihood that McConnell's vote to condemn was influenced by the payment he received (accord *Heustis v. Town of Ticonderoga Planning Bd.*, 11 AD3d 868, 784 N.Y.S.2d 187 [3rd Dept. 2004]; *Matter of DePaolo v. Town of Ithaca*, 258 AD2d 68, 694 N.Y.S.2d 235 [3rd Dept. 1999]; *Matter of Parker v. Town of Gardiner Planning Bd.*, 184 AD2d 937, 585 NYS2d 571 [3rd Dept. 1992]). Based on the above, petitioners' application to annul the June 24, 2008 resolution of the Town Board for violation of General Municipal Law Section 805-a or the Town's Code of Ethics is denied.

Respondents' counsel to submit judgment.

ENTER,

Hon. Marianne Furfure

Acting Supreme Court Justice