SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF MONROE

ECOGEN WIND LLC and ECOGEN TRANSMISSION CORP.,

Petitioners,

-vs-

DECISION
Index No.:16082/09

TOWN OF PRATTSBURGH TOWN BOARD, et al.,

Respondents.

APPEARANCES:

For the Petitioners: Laurie Styka Bloom, Esq.
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For the Respondents: John F. Leyden, Esq.
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For Board Members Kula & Shick: Edward P. Hourihan, Jr., Esq.
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HON. STEPHEN K. LINDLEY

In this Article 78 proceeding, respondents, including the Town Board of the Town of Prattsburgh, seek judicial approval of a settlement entered into by the parties several weeks ago. The written stipulation was signed by the Town

Supervisor on December 18, 2009, immediately following a special meeting of the Town Board, which voted 3-2 to approve the proposed settlement. Petitioners (Ecogen) support the motion, while the two Town Board members who voted against the settlement oppose it being judicially approved.

As a preliminary matter, the court rejects the Town's recent attempt to withdraw its motion. The request was made by the new Town Supervisor by letter dated January 4, 2010. Withdrawal of the motion to approve the settlement is precluded by the Temporary Restraining Order signed by the court on December 31, 2009. At that time, it was understood that until the T.R.O. expired, the incoming Town Board would take no action to rescind or alter the settlement previously approved by the outgoing Board. The T.R.O. was issued to give the court sufficient time to review the voluminous submissions. The subsequent request for withdrawal by the Town Supervisor, supported by three other members of the current Town Board, violates both the letter and spirit of the order. If the motion for judicial approval were allowed to be withdrawn, the entire purpose of the stay would be

frustrated, as there would be nothing left for the court to decide.

The court will thus address the merits of the motion. Before doing so, however, the court notes that, although scores of letters were received from non-parties (presumably persons living in the affected area), none of these submissions were read or considered by the court. Although the court appreciates the public's interest in Ecogen's proposed wind project, this proceeding is not a plebiscite; the motion will be determined based upon its legal merits, not its popularity.

The motion for judicial approval of the settlement is brought pursuant to Town Law § 68 (1) (a), which provides that the town board of any town may settle an action or proceeding against the town "with the approval of the court in which such action or proceeding is pending." In considering whether to approve the settlement, the court must determine whether the settlement is "just, reasonable and to the interest of the town" (Town Law § 68 [1] [b]).

Subdivision 4 of Town Law § 68, however, swallows whole the preceding subdivisions, including the requirement of

court approval for settlement of actions and proceedings involving towns. It reads: "Notwithstanding the foregoing provisions of this section, the town board of any town may compromise or settle any action, proceeding or claim against the town upon such terms as said board shall determine are just, reasonable and to the interest of the town." As can be seen, if the Town Board settles a claim pursuant to subdivision 4, there is no need for court approval under subdivision 1.

The seemingly inconsistent provisions are explained by the legislative history of various amendments to the statute. As originally enacted, Town Law § 68 required judicial approval of any and all settlements of lawsuits entered into by a town. In 1959, subdivision 4 was added to exempt towns with populations greater than 200,000 (Chapter 820 of the Laws of 1959). The town boards of such towns were authorized to settle actions or proceedings "upon such terms as said board shall determine are just, reasonable and to the interest of the town."

Smaller towns later complained about having to seek judicial approval of settlements involving claims where the

damages to be paid were minimal.[1] The legal costs associated with seeking judicial approval often exceeded the cost of the claim itself. The Legislature thus amended subdivision 4 to provide that small towns (populations under 200,000) could settle claims worth less than $100 without judicial approval. This amendment was passed in 1961. At that time, the only settlements requiring judicial approval were those of small towns involving claims greater than $100; as noted, large towns were previously authorized to settle any and all claims without going to court. The following year the threshold amount was increased to $300.

The dam fully burst in September 2000, when subdivision 4 was amended yet again to allow the town board of *any* town to compromise or settle *any* action without court approval (Chapter 428 of the Laws of 2000). The only remaining requirement is that the town board must determine that the settlement is "just, reasonable and to the interest of the town." That is how the statute now reads.[2]

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[1] New York Legislative Annual - 2000, p 263 (Memorandum of the Legislative Commission on Rural Resources).

[2] All of the cases cited by counsel, including the Fourth Department's decision in *Modern Landfill v Lewiston* (181 AD2d 159), were decided before Town Law § 68 was amended in 2000.

What this all means is that, in this case, the Town of Prattsburgh need not obtain judicial approval of its settlement with Ecogen. The Town Board already approved the settlement by its affirmative vote on December 18, 2009. To now seek judicial approval of the settlement, although permitted by statute, is both unnecessary and superfluous. Under the circumstances, the court declines the Town's invitation to further approve the settlement. The motion is thus denied.

By denying the motion, the court is not *dis*approving the settlement, nor is it taking a position whether the settlement is reasonable, just or in the best interest of the town. Indeed, the court's ability to determine the town's best interests is quite limited. The court is simply ruling that the settlement entered into by the Town and Ecogen need not be judicially approved to be valid. And, unless and until the settlement is set aside or otherwise invalidated, the settlement must be honored by all parties involved, including this court.

This is not to say that the validity of the settlement is necessarily immune from challenge. That issue is not

before the court, as no one has moved to invalidate the action taken by the Town Board on December 18, 2009 when it approved the settlement. The only relief requested herein is for judicial approval of the settlement, and that request is denied. Thus, the various allegations of fraud and abuse of legal process (e.g., the filing of a "friendly" lawsuit) against Ecogen and the members of the Town Board who voted to approve the settlement have been disregarded by the court. Aside from being unproven, those allegations are irrelevant to the determination of this motion.

A final word about the related proceeding of *Kula & Shick v Town of Prattsburgh* (Index No. 09-17133). When the court issued the T.R.O. in that case on December 7, 2009, it did so based upon petitioners' claims that they were entitled to independent counsel (or at least a determination on their request for counsel from the Town Board) and that the town attorney had a conflict of interest. The court wanted time to look into those claims, and if the restraining order had not been granted, the Town Board would have been able to approve the settlement in the meanwhile, thus rendering the proceeding largely moot.

While the stay was in effect, the Town Board considered and then rejected petitioners' request for appointment of independent counsel. The following day, on December 14, 2009, the court, having heard argument from counsel and having reviewed the relevant law, lifted its restraining order. In the court's view, the petitioners did not demonstrate a likelihood of success on the merits. Specifically, there was no evidence or indication that the town attorney's representation of the Steuben County Industrial Development Agency on unrelated matters presented a conflict of interest with respect to his representation of the Town of Prattsburgh in the Ecogen litigation.

Additionally, it did not appear that petitioners were entitled to independent counsel under Local Law No. 1, as they were not sued in their individual capacity and, as petitioners' counsel acknowledged, there was no risk that they would be held personally liable. Thus, unlike situations where a town employee is sued individually (and the town, to avoid liability itself, has an incentive to show that the employee was acting outside the scope of his employment), there was no potential conflict of interest

between petitioners and the town. The petitioners' interests conflicted with the town only to the extent that they did not favor the Ecogen project and the proposed settlement, but that did not appear to be a ground upon which to appoint them independent counsel.

Nor was the court persuaded by the argument that the outgoing Town Board acted improperly by approving the settlement in a lame duck session. Although several of those board members were voted out of office (perhaps due to their support of the Ecogen wind project), their terms of office did not end on Election Day. They were authorized to serve and take action until 11:59 PM on December 31, 2009. Nothing in the law required them to defer to the expressed desires of the newly elected board members.

Reasonable minds can differ on these issues, and counsel for petitioners advanced cogent arguments on their clients' behalf, but the court, for the reasons stated, did not see a likelihood that the petition would be granted. That is why the T.R.O. was lifted. It was understood that the Town Board would likely approve the proposed settlement in short order. As the court noted at the time, however, it

was another matter entirely whether the court would approve the settlement. The court indicated that, if the Town moved for judicial approval of the anticipated settlement, it would give all sides an opportunity to be heard before rendering a decision.

It was hoped that a decision could be rendered by the end of the year, but that proved difficult given the lengthy memoranda of law and affidavits submitted by counsel. For instance, on December 30, the court received a 29-page memo of law from counsel for Kula and Shick, as well as numerous affidavits and affirmations. Responding papers arrived in chambers by fax later that day from counsel for Ecogen. During the telephone conference on December 31, 2009, the court indicated that, rather than rushing to judgment, it would prefer to take a few days to review carefully all the submissions. That is why the stay was issued in this proceeding.

But this stay is now lifted because the town's motion for judicial approval of the settlement has been denied. As far as the court is concerned, this proceeding, *Ecogen v Town of Prattsburh* (Index No. 16082-09) is resolved. Unless

and until that settlement (as approved by the Town Board on December 18, 2009) is set aside, the court will schedule no further proceedings in this case. The other proceeding, commenced by Kula and Shick against the town, is still pending, as is the related case of *Ecogen v Town of Italy* (Index No. 09-15485), in which the court will soon render a decision on the change of motion venue and FLPA's motion to intervene.

This constitutes the decision of the court. Counsel may submit an order consistent with the above.

Dated: January 7, 2010

Stephen K. Lindley
Supreme Court Justice