

**SUPREME COURT OF THE STATE OF NEW YORK**  
***Appellate Division, Fourth Judicial Department***

**287**

**CA 12-01011**

PRESENT: SCUDDER, P.J., PERADOTTO, CARNI, AND WHALEN, JJ.

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IN THE MATTER OF ECOGEN WIND LLC AND ECOGEN  
TRANSMISSION CORP.,  
PETITIONERS-RESPONDENTS-APPELLANTS,

V

MEMORANDUM AND ORDER

TOWN OF ITALY TOWN BOARD, CONSISTING OF  
MARGARET DUNN, IN HER CAPACITY AS ITALY  
TOWN SUPERVISOR AND MEMBER OF TOWN BOARD,  
AND AMANDA GORTON, TIMOTHY KINTON, CHARLES  
KREUZER, MALCOLM IAN MACKENZIE, IN THEIR  
OFFICIAL CAPACITIES AS MEMBERS OF TOWN BOARD,  
TOWN OF ITALY, RESPONDENTS-APPELLANTS-RESPONDENTS,  
ET AL., RESPONDENTS,  
AND FINGER LAKES PRESERVATION ASSOCIATION,  
INTERVENOR-RESPONDENT.

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GARY A. ABRAHAM, ALLEGANY, FOR RESPONDENTS-APPELLANTS-RESPONDENTS.

NIXON PEABODY LLP, BUFFALO (LAURIE STYKA BLOOM OF COUNSEL), FOR  
PETITIONERS-RESPONDENTS-APPELLANTS.

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Appeal and cross appeal from a judgment (denominated Decision and Order on Reserved Issues) of the Supreme Court, Yates County (John J. Ark, J.), entered June 11, 2012 in a proceeding pursuant to CPLR article 78. The judgment, inter alia, granted in part the application of petitioners for a special use permit to construct and operate a wind energy facility in respondent Town of Italy.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed without costs.

Memorandum: In this CPLR article 78 proceeding, respondents-appellants appeal and petitioners cross-appeal from an order entered February 24, 2012 that, inter alia, granted in part petitioners' application for a special use permit to construct and operate a wind energy facility in respondent Town of Italy, New York, and reserved decision on certain issues. Thereafter, Supreme Court decided the reserved issues in a judgment (denominated Decision and Order on Reserved Issues), which we deem to be the final judgment. Where, as here, the prior order is subsumed within the final judgment, the appeal is properly taken from the judgment (*see Chase Manhattan Bank, N.A. v Roberts & Roberts*, 63 AD2d 566, 567). Nevertheless, we exercise our discretion to treat the notices of appeal and cross

appeal as valid, and we deem the appeal and cross appeal as taken from the judgment (see *Hughes v Nussbaumer, Clarke & Velzy*, 140 AD2d 988, 988; see also CPLR 5520 [c]).

We affirm the judgment for reasons stated in the decision and order at Supreme Court entered February 24, 2012.

Entered: May 3, 2013

Frances E. Cafarell  
Clerk of the Court