

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF WISCONSIN

ONEIDA SEVEN GENERATIONS
CORPORATION
1239 Flightway Drive
De Pere, WI 54115

Case No.

GREEN BAY RENEWABLE ENERGY, LLC
1239 Flightway Drive
De Pere, WI 54115

JURY DEMANDED

Plaintiff,

v.

CITY OF GREEN BAY
100 North Jefferson Street
Green Bay, WI 54301,

Defendant.

COMPLAINT

Oneida Seven Generations Corporation and Green Bay Renewable Energy, LLC, (collectively, “OSGC”), by and through their attorneys, Godfrey & Kahn, S.C., bring this Complaint pursuant to 42 U.S.C. § 1983 and 42 U.S.C. § 1988 against the City of Green Bay (“the City”), seeking to recover damages sustained as a result of the City’s violation of OSGC’s substantive and procedural due process rights, and state as follows:

NATURE OF THE CASE

1. In or around 2010, as a means of reducing solid waste transported to costly landfills and as an environmentally-friendly alternative energy source for City taxpayers, the City encouraged OSGC to locate a facility in Green Bay that would use municipal solid waste as fuel to generate electricity.

2. The facility would be designed to convert municipal solid waste into electricity and other useful byproducts via a process known as pyrolysis. The facility would first sort and

shred the municipal solid waste, then convey the waste to the pyrolysis unit, which would heat the waste at very high temperatures in an oxygen-starved environment. This process produces “syngas,” which is chemically similar to natural gas or methane. After being scrubbed, the syngas would fuel three generators (large internal combustion engines) to produce electricity.

3. After working with the City to choose an appropriate site for the facility in an industrial area, OSGG sought a conditional use permit (“CUP”) from the City to build the facility at that location. OSGC submitted extensive information about the waste-to-energy facility in connection with its permit application. Following a public hearing to consider the application, the City’s Plan Commission recommended that the City approve the permit. In March 2011, after an extensive presentation by OSGC during a public meeting of the Common Council, the City approved the CUP.

4. Thereafter, and in reliance on the CUP, OSGC invested significant funds developing the project. OSGC completed a substantial environmental permitting process with both state and federal regulators. Eventually, OSGC obtained all necessary permits to begin construction of the facility.

5. Not satisfied with the City’s approval of the CUP, private citizen opposition groups went back to the City and resorted to false accusations against OSGC, absurdly claiming that OSGC had lied to the Plan Commission to obtain the original CUP. For example, the opposition groups falsely stated that OSGC misrepresented to the City that there would be no emissions from the facility—a reckless accusation blatantly at odds with voluminous written materials submitted to the City as well as numerous statements made in multiple public hearings.

6. In April 2012, more than a year after it had originally approved the CUP, the Common Council sought input from the Plan Commission about whether OSGC had lied to the

City. In response, the Plan Commission held a lengthy public hearing to consider the accusations of the opposition groups. At the conclusion of the hearing, the Plan Commission unequivocally and unanimously concluded that OSGC had *not* made any misrepresentations in applying for the CUP.

7. Nonetheless, bowing to political pressure from these private citizen opposition groups and ignoring the economic benefits of the proposed facility to the City, the Common Council inexplicably revoked the CUP anyway, concluding—with absolutely no legitimate basis whatsoever—that OSGC *had* made misrepresentations.

8. OSGC requested an administrative appeal of the Common Council’s revocation of the CUP, which was summarily denied by the City.

9. OSGC was then forced to appeal the City’s arbitrary and capricious abuse of political power to Wisconsin state court. In opinions highly critical of the egregious actions by the City, the Wisconsin Court of Appeals and the Wisconsin Supreme Court each held that there was no reasonable justification for the City’s revocation of the CUP. The Court of Appeals described the City’s conduct as inconsistent with “common sense and traditional notions of due process.”

10. The City’s irrational decision to revoke the CUP based on a manufactured rationale shocks the conscience and constitutes a violation of OSGC’s constitutional right to due process. As a proximate result, OSGC has sustained over \$5 million in out-of-pocket expenses, lost profits of approximately \$16 million, and substantial legal expenses, including attorney’s fees to try to convince the City to reconsider its decision, and to pursue the state court and these federal court proceedings. The City has left OSGC with no choice but to bring this lawsuit seeking to recover the significant damages it incurred as a result.

THE PARTIES

11. OSGC is a tribal corporation chartered under the laws of the Oneida Nation, a federally recognized Indian tribe. Its principal place of business is 1239 Flightway Drive, DePere, Wisconsin 54115.

12. Green Bay Renewable Energy, LLC is a Delaware limited liability company with its principle place of business at 1239 Flightway Drive, DePere, Wisconsin 54115. It is a wholly-owned indirect subsidiary of Oneida Seven Generations Corporation, formed for the purpose of developing the facility.

13. The City is a body corporate and politic. Its City Hall is located at 100 North Jefferson Street, Green Bay, Wisconsin 54301.

JURISDICTION AND VENUE

14. This Court has jurisdiction over the subject matter of this dispute pursuant to 42 U.S.C. § 1331, which provides the district courts with “original jurisdiction of all civil actions arising under the Constitution, laws or treaties of the United States.”

15. This Court has personal jurisdiction over the City because the City is a local government located within the State of Wisconsin.

16. Venue is proper pursuant to 42 U.S.C. § 1391 because the City resides in this judicial district and a substantial part of the acts or omissions giving rise to this lawsuit arose in this judicial district.

FACTUAL AND PROCEDURAL BACKGROUND

OSGC Works with the City to Plan the Facility

17. In or around 2010, OSGC was exploring possible locations to develop a facility that would use solid waste as fuel to generate electricity. Learning about the project, and interested in the prospect of both reducing municipal waste sent to landfills while generating an environmentally-friendly alternative energy source for City taxpayers, the Mayor's office invited OSGC representatives to meet with the Mayor to discuss development of the facility at a location in Green Bay. From these and other discussions with the City, OSGC learned that the City was extremely interested in development of the waste-to-energy facility within the City limits of Green Bay.

18. Thereafter, OSGC representatives met with staff from the City's Economic Development and Planning Departments regarding a plan for the facility. The City proposed several locations in Green Bay as possible sites for the facility. Together, OSGC and City staff evaluated the sites proposed by the City.

19. Ultimately, the City and OSGC selected a site on Hurlbut Street, near the mouth of the Fox River. The site is industrial and located in an area zoned "General Industry," a classification that "accommodates high-intensity industry and often includes very large structures," including "solid waste disposal facilit[ies]." Bordered on the south by U.S. Interstate 43, the site is surrounded by a yard waste disposal site, a dredge material disposal site, concrete and asphalt plants, a construction facility, petroleum tank farms, and the Pulliam coal-fired power plant.

20. In fact, the site proposed by the City had historically been used for waste disposal, primarily dredge materials. The area is described by various government agencies as "highly

disturbed,” “altered beyond restoration,” and “mildly contaminated.” The site is dominated by invasive vegetation, not consistently inhabited by wildlife, and has no known archeological or historical value.

21. In reliance on the City’s representations, OSGC purchased the Hurlbut Street site for its waste-to-energy facility.

The City Approves a Conditional Use Permit for the Facility

22. Once the site had been selected and bought, in February 2011, OSGC submitted an application to the City for a conditional use permit that would allow OSGC to construct the waste-to-energy facility at that location.

23. OSGC’s application for the CUP was extensive and voluminous. OSGC explained the nature of the project and submitted a tremendous amount of information about potential environmental impacts, especially air emissions. For example, OSGC noted that the Wisconsin Department of Natural Resources (“DNR”) would need to issue an air permit before construction could begin, and that “application and review of this permit will likely need to address air quality impacts . . . as well as emissions of hazardous air toxic compounds[.]” The application also indicated that the facility would need to report actual air emissions to the DNR on an annual basis, and that DNR would maintain oversight and enforcement responsibility over the facility’s operations. In a 50-page section of the application titled “Emissions,” OSGC also provided the City with detailed information about potential air emissions from similar technologies, including a lengthy report by a university engineering department.

24. City planning staff carefully reviewed the information submitted by OSGC and prepared a report to the City’s Plan Commission regarding the project. The report noted that OSGC had provided City staff with “considerable information . . . detailing the gasification

process and its resulting impact.” The report noted that OSGC would need to obtain an air permit and an operations permit from the DNR in connection with the project. Ultimately, the report by City staff concluded that the “proposed use is an appropriate land use for the subject site,” and recommended approval of the CUP, subject to certain conditions, including its compliance with “[a]ll Federal and State regulations and standards related to the proposed use including air and water quality.”

25. On February 21, 2011, the Plan Commission discussed the OSGC waste-to-energy project at its regularly scheduled meeting. After City planning staff reviewed OSGC’s application and the report that staff had prepared, representatives from OSGC addressed the Commission in a hearing open to the public. As part of this presentation, OSGC mentioned the need for air permits and promised that the facility would “meet or exceed” federal standards for safety, emissions and pollutants. Thereafter, Plan Commission members engaged OSGC in a lengthy question-and-answer session, with a number of questions relating to air emissions.

26. Following this presentation, the Plan Commission voted unanimously to recommend that the City approve the conditional use permit sought by OGSC. As typically occurs with such permits, the Plan Commission attached several conditions to its recommendation, among them that the facility comply with all federal and state environmental regulations.

27. Thereafter, on March 1, 2011, the City’s Common Council met in open session to consider the Plan Commission’s recommendation. In a meeting that lasted over an hour, the Common Council considered and debated the Plan Commission’s recommendation.

28. During this public meeting of the Common Council, OSGC presented the same slideshow about the waste-to-energy facility that it had presented to the Plan Commission.

OSGC made it unequivocally clear that the facility would produce emissions. (In fact, one slide of the presentation was even titled “Emissions.”) OSGC explained that the facility would “meet or exceed” federal standards for safety, emissions and pollutants. In follow-up remarks, OSGC also made it “clear for the record” that “[a]ny emissions that come off the generator . . . will be subject to WDNR and EPA approval.” One member of the public with professional experience in air emissions spoke extensively about his research into emissions from the proposed facility and compared them favorably to the nearby Pulliam coal-fired power plant.

29. As part of the presentation, OSGC also explained that “[t]here will be no smokestacks such as those associated with coal-fired power plants.” That is, OSGC assured the City that there would be nothing on the facility like the towering smokestacks familiar to Green Bay residents on the Pulliam power plant and local paper mills. With reference to OSGC’s remark about “no smokestacks,” an alderperson expressed his understanding to those present that the facility would have generators that would produce exhaust—a view confirmed by OSGC at the meeting.

30. After members of the public had an opportunity to comment, the alderperson representing the district where the facility would be located expressed his belief that the environmental concerns raised by his constituents would be addressed by the overlay of regulatory review required for the facility—in other words, the subsequent review and approval required by state and federal environmental regulatory agencies.

31. Following the OSGC presentation and public comments, the Common Council voted ten-to-one to approve the CUP. As the Plan Commission had recommended, the CUP as approved was conditioned on the facility complying with “all other regulations of the Green Bay Municipal Code not covered under the conditional-use permit, including the City building code,

building permits, standard site plan review and approval,” as well as with “[a]ll Federal and State environmental standards related to the proposed use including air and water quality.”

32. Following the City Council’s March 1, 2011 approval of the CUP, private citizen opposition groups had the opportunity to file an appeal of the City’s decision to issue the CUP within 30 days. These opposition groups did not appeal the issuance of the CUP by the City.

OSGC Obtains All Necessary Permits for the Facility

33. In reliance on the CUP from the City, OSCG spent significant sums in purchasing equipment and pursuing necessary permits from the DNR and the Department of Energy. OSCG embarked on an extensive review and permitting process with state and federal regulatory agencies.

34. On July 12, 2011, the DNR determined that the project would meet all applicable state and federal requirements and would not violate or exacerbate air quality standards or ambient air increments.

35. On July 14, 2011, the Safety and Buildings Division of the Wisconsin Department of Commerce conditionally approved OSCG’s plan, noting that the owner was “responsible for compliance with all code requirements.”

36. Meanwhile, OSCG submitted detailed site plans and building plans to the City, as required under the City’s zoning and building codes. On August 3, 2011, the City approved those plans and issued a building permit.

37. In September 2011, the DNR issued permits and approvals for the facility under the State’s clean air and solid waste laws. The DNR’s formal Environmental Analysis addressed a wide range of potential environmental impacts, including air emissions, and concluded that approval of the facility was not a “major action” and would not have significant environmental

effects. The original DNR permit provided that the generator exhaust stacks would have to be as high as 60 feet above the ground (almost 30 feet above the building roof). After City staff advised OSGC that local zoning ordinances required them to be no higher than 35 feet, OSGC obtained a revised permit from DNR specifying a stack height of 35 feet (approximately 3 feet above the structure's 32-foot high roofline).

38. In November 2011, the U.S. Department of Energy ("DOE") published its final Environmental Assessment with respect to the facility. The DOE assessment thoroughly evaluated the environmental impact of the facility, including 18 pages of analysis dedicated specifically to air emissions. Based on its review, DOE issued a Finding of No Significant Impact. DOE concluded not only that "the area's air quality would remain in compliance with current standards," but that the facility would have a positive impact on greenhouse gas emissions because of the reduced traffic of waste to local landfills.

39. Throughout this lengthy and public review process, a variety of groups and individuals opposed to the facility (as well as project supporters) appeared at public meetings hosted by the regulators and offered their views about the requested environmental approvals. The project opponents submitted numerous comments to both the DNR and the DOE detailing concerns with the facility's alleged environmental impacts. Both agencies thoughtfully considered these comments and responded to them in writing—ultimately deciding to approve the waste-to-energy facility proposed by OSGC. Opposition groups did not appeal or otherwise challenge the DNR and DOE approvals.

40. With all the required approvals in hand, OSGC proceeded with preparatory construction work.

Opposition Groups Make False Accusations Against OSGC

41. Not satisfied with the response from the environmental regulatory agencies, the private citizen opposition groups decided to turn their attention back to the City, and began exerting political pressure on the City to reverse its decision approving the facility.

42. The problem for the opposition groups was that there was no longer any convincing ground to do so: the regulatory agencies with expertise in environmental matters had unequivocally concluded that the facility was acceptable from an environmental standpoint. So the opposition groups resorted to making up facts, falsely alleging that OSGC had lied to the City in applying for the conditional use permit.

43. On April 10, 2012, numerous opponents of the project attended a Common Council meeting, alleging that OSGC had “misrepresented” the environmental impacts of the facility when applying for the CUP. Specifically, the opposition groups falsely alleged that OSGC had claimed the facility would have *no smokestacks* and would produce *no emissions*.

44. Responding to this political pressure, the Council voted to “hold a public hearing” regarding the CUP and to “continue further investigation.” OSGC objected, reminding the City that OSGC had presented extensive information to the Plan Commission and the Council about emissions, and that DNR and DOE had reviewed and approved the emissions as the CUP had specified.

45. Despite the absence of any evidence—indeed, even any allegation—that the facility would be out of compliance with the CUP or the various other permits OSGC had received, the City nonetheless gave in to the political pressure and decided that the Plan Commission (the body that had originally considered and recommended approval of the CUP) should hold a public hearing to “determine if the information submitted and presented to the Plan

Commission was adequate for it to make an informed decision whether or not to advance the Seven Generation Conditional Use Permit (CUP) that was recommended.”

The Plan Commission Unanimously Finds No Misrepresentations

46. Although OSGC objected to the Plan Commission proceeding directed by the Common Council, OSGC nonetheless submitted written materials to the Plan Commission for its consideration in connection with the proceeding. In these materials, OSGC outlined the extensive information that had been presented to City planning staff and the Plan Commission, and highlighted the numerous ways that OSGC had told the City about emissions from the facility when OSGC applied for the conditional use permit. In addition, OSGC submitted the record of environmental review conducted by the DNR and DOE, pointing out that the Director of DNR’s Air Bureau had confirmed that the proposed facility “will meet all applicable state and federal air quality requirements[.]”

47. On October 3, 2012, as directed by the Common Council, the Plan Commission conducted the hearing to determine whether OSGC had lied to the City when applying for the conditional use permit. Numerous proponents and opponents of the project also submitted their own materials. In a public hearing that lasted several hours, multiple parties addressed the Commission. Several alderpersons who eventually voted to rescind the CUP were in attendance at this Plan Commission hearing.

48. One of the individuals who spoke at the Plan Commission hearing was City Planning Director Rob Strong, who reviewed the process by which the City had issued the CUP in 2011. Director Strong noted the extensive information that had been submitted with the CUP application and recalled that OSGC and Planning staff had gone “back and forth quite frequently” before the Plan Commission considered the CUP. Director Strong also emphasized

the regularity of the process: “[W]e didn’t do anything different here. We followed the same process we do for every other project that comes forward.”

49. An alderperson for the City also spoke at the Plan Commission hearing, noting that she had reviewed with her constituents the tape of the Common Council meeting where OSGC had presented its application for the conditional use permit. The alderperson explained why the statements now characterized as misrepresentations were not false.

50. Furthermore, the same air emissions expert who had addressed the Common Council the previous year when it considered the conditional use permit also addressed the Plan Commission at the hearing. In no uncertain terms, he told the Plan Commission that he had made it “real clear to them that there were stacks, that there were emissions.”

51. After hearing evidence from all parties, the Plan Commission came to a decision, unequivocally concluding that OSGC had *not* lied to the City. The Plan Commission submitted the following report to the Common Council:

Based on the information submitted and presented, the Plan Commission determines that the information provided to the Plan Commission was not misrepresented and that it was adequate for the Commission to make an informed decision, and recommends that the CUP stand as is. The Commission further determines that the information the Plan Commission received was adequate, and based upon information then available, that the Plan Commission did understand that there were emissions and venting as a part of the system, and therefore made sure that the Seven Generations Corporation would need to meet the requirements of the EPA and DOE, as well as meeting the requirements of the municipal code through a normal process of give or take.

52. A transcript from the Plan Commission meeting, which was subsequently provided to the Common Council members, includes the following express statement by several Plan Commissioners, “We were not deceived.”

53. Given the unequivocal nature of the Plan Commission’s conclusion, OSGC thought that would be the end of the matter. Worried that the Common Council would

nonetheless act on its own, counsel for OSGC sent a letter to the City, advising that there was no basis to revoke the CUP. In the letter, OSGC counsel expressly warned the City that if the City revoked the CUP at this point, the City would be exposed to a damages claim for millions of dollars.

The Common Council Ignores the Plan Commission's Findings

54. Prior to the October 16, 2012 meeting, several alderpersons had *ex parte* communications with opponents of the project and made up their minds to rescind the CUP—even prior to the Council convening to consider the issue.

55. On October 16, 2012, the Common Council met for a regularly-scheduled meeting. At the meeting, in an extraordinary measure, the City Attorney advised the Common Council in open session that there was no legal basis for the City to revoke the CUP. Not holding back, he opined to both the Common Council and members of the public who were present that the City's legal position for revoking the CUP based on any alleged lying or misrepresentation by OSGC was "fragile." The City Attorney continued: "Consequently, the City's legal risk appears to be significant enough to create pause . . . I'm hesitant to recommend an attempt to revoke the CUP."

56. The Common Council then opened the hearing for public comment. Predictably, many opponents of the OSGC waste-to-energy project attending the hearing, and spoke against it.

57. Unable to resist the political pressure from the opposition groups, and flatly ignoring the advice of its own legal counsel, the Common Council voted to reject the unanimous conclusions of Plan Commission, and then voted to rescind the OSGC conditional use permit. Both votes carried by a bare majority of seven-to-five.

58. The Common Council provided absolutely no explanation at the hearing supporting its decisions.

59. The City's Mayor, Jim Schmidt, knew the Common Council had no basis in fact or law to revoke the CUP. The Mayor could have righted the Common Council's wrong by vetoing the Common Council's decision to revoke the CUP. Instead, the Mayor did nothing.

60. Two weeks later, the City Attorney sent a letter to OSGC purporting to explain why the Council had rescinded the CUP. The letter claimed that OSGC had made "false statements and misrepresentations" to the City "relat[ing] to the public safety and health aspect of the Project and the Project's impact upon the City's environment" and regarding "emissions, chemicals, and hazardous materials." The letter did not, however, identify any particular statement that was allegedly false, nor did it explain the basis for the City's determination that any statements were false. In closing, the City Attorney warned that "any further action at 1230 Hurlbut St. to construct the solid waste facility will be prohibited by legal action, if necessary[.]"

OSGC's Efforts to Remedy the City's Malfeasance, Misfeasance and Nonfeasance

61. On November 14, 2012, in a letter addressed to the City Attorney and pursuant to Chapter 68 of the Wisconsin Statutes, OSGC requested an administrative appeal of the City's baseless decision to rescind the CUP to be heard by an impartial decision-maker. The City Council, at the request of the Mayor and City Attorney, scheduled a special closed session meeting on November 17, 2012. Following the closed session the Council briefly went into open session. An alderperson made a motion to "instruct legal counsel to proceed as directed" without any further explanation. The meeting was adjourned after the motion passed. Two days later, on November 19, 2012, OSGC received a letter from the City Attorney, denying OSGC's

request to have an impartial decision-maker decide the matter. Not surprisingly, given the lack of due process that the City had afforded OSGC up to that point, the City summarily denied OSGC's request for an administrative appeal, determining that the hearings before the Plan Commission and the Common Council substantially complied with Wis. Stat. § 68.11 and met constitutional standards and protections.

62. On November 19, 2012, OSCG sent a Notice of Claim to the City pursuant to Wis. Stat. § 893.80, advising that OSGC suffered injury as a result of the City's October 16, 2012 rescission of the CUP. OSGC advised that it had incurred damages including the costs associated with the project that totaled \$5,216,433.29. The City never responded to OSCG's Notice of Claim.

63. OSGC subsequently commenced an action for *certiorari* review of the City's malfeasance, misfeasance and nonfeasance in Wisconsin state court. In its petition, OSGC alleged that the City had arbitrarily and capriciously rescinded the permit based on an implied, unwritten condition; had deprived OSGC of its vested right to develop the facility; had rescinded the permit without substantial evidence of misrepresentation; and had acted arbitrarily and unreasonably.

64. *Certiorari* is a mechanism by which a court may test the validity of a decision rendered by a municipality. Municipal decisions are entitled to a presumption of correctness and validity. Accordingly, a court's review is limited to four inquiries: (1) whether the municipality kept within its jurisdiction; (2) whether it proceeded on a correct theory of law; (3) whether its action was arbitrary, oppressive, or unreasonable and represented its will and not its judgment; and (4) whether the evidence was such that it might reasonably make the order or determination in question.

65. At a hearing in a Green Bay courtroom packed with numerous members of the opposition groups opposed to the waste-to-energy project, the circuit court judge denied the petition.

66. OSGC appealed the circuit court's decision to the Wisconsin Court of Appeals. After a thorough review of the record, the Court of Appeals was appalled at the way the City had acted. Noting its usual hesitation to interfere with a discretionary determination by a municipality, the Court nonetheless concluded that the City acted in a "fickle" and "inconstant" manner that amounted to a flagrant abuse of discretion. *Oneida Seven Generations Corp. v. City of Green Bay*, No. 2013AP591, unpublished slip op., ¶¶ 21-22 (Wis. Ct. App. Mar. 25, 2014) (attached as **Exhibit A**, and incorporated herein by reference).

67. Concluding that OSGC did not in fact make any misrepresentations to the City, the Court noted how "disappointed" it was that the City "did not so much as mention the Plan Commission's conclusions in its decision" to rescind the CUP. *Id.* at ¶ 23. The Court found the failure to explain why the Common Council refused to accept the Plan Commission's recommendations "particularly noteworthy because the Plan Commission was in a far better position than the Common Council to determine whether misrepresentations had been made." *Id.* ¶ 40. The Court ominously observed that the City "chose to ignore the Plan Commission's recommendation at its own peril." *Id.* ¶ 23.

68. The Court found particularly "dismaying" the City's failure to articulate any rationale for its decision—a failure that the Court found inconsistent with "common sense and traditional notions of due process." *Id.* at ¶ 26. The Court did not stop there, though, going on to conclude:

Given its failure to identify the allegedly false statements or consider the Plan Commission's recommendation, we cannot help but believe the City's decision

was based not on a rational analysis of the statements [OSGC] made to the Plan Commission, but the public pressure brought to bear on the Common Council after the CUP had been issued.

Id. at ¶ 27. In essence, the Court of Appeals saw the City’s decision for what it was: a reckless, arbitrary and irrational act resulting from an abuse of political power and a disdain for established procedure.

69. After the Court of Appeals’ decision in favor of OSGC in March 2014, the City could have followed the Court of Appeals’ advice and re-issued the CUP to OSGC.

70. Shortly after the Court of Appeals issued its decision, OSGC met with the City to request the re-issuance of the CUP. On May 28, 2014, OSGC sent a follow-up letter to the City, asking the City re-issue the CUP without further delay in light of the Court of Appeal’s decision and to allow OSGC the opportunity to try to salvage the project in light of unique time-sensitive matters.

71. Instead of re-issuing the CUP and remedying the situation, the City appealed to the Wisconsin Supreme Court. Over a year later, in a decision affirming the Court of Appeals, the Supreme Court held that the City could not have reasonably concluded that OSGC’s statements regarding the proposed facility were misrepresentations. *Oneida Seven Generations Corp. v. City of Green Bay*, 2015 WI 50, ¶¶ 3, 81, 353 Wis. 2d 553, 846 N.W.2d 33 (attached as **Exhibit B**, and incorporated herein by reference). Like the Court of Appeals, the Supreme Court noted “where the question is whether the Plan Commission was misled and the Plan Commission unanimously finds that it was not, we have difficulty reaching another conclusion.” *Id.* ¶ 80. Also like the Court of Appeals, the Supreme Court engaged in a fact-intensive analysis of the record, and could not find any evidence of a misrepresentation by OSGC. *Id.* ¶ 79.

The Current Viability of the Waste-to-Energy Project

72. Despite firm rebukes by OSGC, its own legal counsel, and the Wisconsin courts, the City never re-issued the conditional use permit to OSGC.

73. OSGC proposed the waste-to-energy project when it did because of the availability of federal, state and local grants, tax deductions and other incentives. Unfortunately, those opportunities have expired, such that the project is no longer economically viable.

74. By seeking reconsideration by the City of its decision to revoke the CUP, and seeking legal redress before the Wisconsin state courts, OSGC has exhausted its potential state law remedies. Only this honorable Court remains as a venue to deliver justice to OSGC, and the remedy it deserves as a result of the egregious malfeasance, misfeasance and nonfeasance by the City of Green Bay.

CLAIM FOR VIOLATION OF 42 U.S.C. § 1983 — SUBSTANTIVE DUE PROCESS

75. The allegations in paragraphs 1 through 74 are incorporated herein by reference.

76. The Due Process Clause of the Fourteenth Amendment to the United States Constitution prohibits the government, including local governments, from depriving any person of his or her property without due process of law.

77. OSGC is a “person” within the meaning of the Due Process Clause of the Fourteenth Amendment.

78. The City irrationally and arbitrarily revoked the CUP without any factual or legal basis for doing so and thus, deprived OSGC of its substantive due process rights in violation of 42 U.S.C. § 1983.

79. The Court of Appeals specifically found that the City’s failure to articulate any rationale for its decision was inconsistent with “common sense and traditional notions of due

process.” The Court of Appeals further concluded that the City’s decision to revoke the CUP was “based not on a rational analysis of the statements [OSGC] made to the Plan Commission, but the public pressure brought to bear on the Common Council after the CUP had been issued.” The Court of Appeals determined that the City’s actions were the product of “unconsidered, willful or irrational choice.”

80. The substantial evidence—as recognized by both the Wisconsin Court of Appeals and the Wisconsin Supreme Court—conclusively shows that the City acted arbitrarily and capriciously in issuing and then revoking the CUP without justification after substantial reliance by OSGC.

81. At its core, the City’s claims of “misrepresentations” were a false and hastily developed pretext, manufactured to appease a small but vocal opposition, by which the City sought to stop the development of a renewable energy project that the City had not only supported, but had encouraged OSGC to locate in Green Bay in the first place. The Common Council confirmed its rationale for revocation was a sham when it simply ignored the Plan Commission’s finding that it had not been misled by OSGC.

82. The City arbitrarily revoking its prior land use decision based on a patently false rationale violated common sense, offended traditional notions of due process, and shocks the conscience.

83. Accordingly, OSGC has been deprived of its substantive due process rights by the City.

84. The City and its citizens could have had an environmentally-friendly renewable energy resource for years to come. Instead, the City caused OSGC to incur millions of dollars in

damages related to costs associated with the development of the waste-to-energy project as well as future lost profits and/or business—damages the City must now pay.

85. As a proximate result of the City's violation of OSGC's substantive due process rights, OSCG incurred out-of-pocket expenses of approximately \$5.2 million, lost profits of approximately \$16 million, and substantial legal expenses, including attorney's fees, to pursue the state court proceedings and this federal court case.

CLAIM FOR VIOLATION OF 42 U.S.C. § 1983 — PROCEDURAL DUE PROCESS

86. The allegations in paragraphs 1 through 85 are incorporated herein by reference.

87. In reliance on the CUP and the building permit issued by the City, OSGC had a reasonable expectation of developing and operating the waste-to-energy facility. Consequently, OSCG invested significant funds in developing the project.

88. Pursuant to 42 U.S.C. § 1983, OSGC had a constitutionally-protected interest in the construction, development and occupation of the waste-to-energy facility based on the CUP and the building permit issued by the City.

89. OSGC also had constitutionally-protected interests in its contracts for waste-to-energy with third-parties, and various grants and tax-credits for the project.

90. OSGC was deprived of its constitutionally-protected interests by the City without due process of law.

91. The City Council meeting on October 16, 2012 was not a meaningful hearing. Rather, the City Council flatly ignored, without basis or explanation, the recommendation from the Plan Commission, the body best positioned to make a factual finding about whether the City was misled.

92. Moreover, prior to the October 16, 2012 meeting, several alderpersons had *ex parte* communications with opponents of the project and made up their minds to rescind the CUP—even prior to the Council convening to consider the issue.

93. The City thereafter summarily denied OSGC’s request for an administrative appeal.

94. The City ignored OSCG’s Notice of Claim under Wis. Stat. § 68.

95. The City also refused OSCG’s request to re-issue the CUP after the Court of Appeals decision in favor of OSGC.

96. As a proximate result of the City’s violation of OSGC’s procedural due process rights, OSCG incurred out-of-pocket expenses of approximately \$5.2 million, lost profits of approximately \$16 million, and substantial legal expenses, including attorneys’ fees, to pursue administrative relief before the City, the subsequent state court proceedings, and now this federal court case.

JURY DEMAND

OSGC demands a trial by jury on all issues so triable in this action.

WHEREFORE, Oneida Seven Generations Corporation and Green Bay Renewable Energy, LLC respectfully request that the Court:

A. Enter a judgment in favor of OSGC, finding that the City violated OSGC’s substantive and procedural due process rights;

B. Awarding OSGC its damages as well as fees and costs, including attorneys’ fees in this action, pursuant to 42 U.S.C. § 1988; as well as its attorneys’ fees incurred in the administrative proceedings before the City and the state court proceedings, and

C. Any further relief this Court deems proper.

Dated this 23rd day of December, 2016.

s/ Amber C. Coisman

Eric J. Wilson (State Bar No. 1047241)

Amber C. Coisman (State Bar No. 1102371)

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