

STATE OF WISCONSIN : CIRCUIT COURT : BROWN COUNTY

ONEIDA SEVEN GENERATIONS  
CORPORATION; and GREEN BAY  
RENEWABLE ENERGY, LLC,

Plaintiffs,

Case No. 2012CV002263

v.

Code No(s). 30955 (Petition for Writ of  
Certiorari)

CITY OF GREEN BAY,

Defendant.

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**COMPLAINT FOR CERTIORARI REVIEW**

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Oneida Seven Generations Corporation ("OSGC"), by and through its attorneys,  
Godfrey & Kahn, S.C., brings this Complaint pursuant to Wis. Stat. § 68.13 against the City of  
Green Bay, seeking certiorari review of the City's rescission of a conditional use permit.

**NATURE OF THE CASE**

1. For more than two years, Oneida Seven Generation Corporation and  
Green Bay Renewable Energy, LLC, along with their predecessors-in-interest and individuals  
and entities working on their behalf (collectively, "OSGC"), have been working to develop a  
waste-to-energy facility (the "Facility") at 1230 Hurlbut Street in the City of Green Bay (the  
"City"). Early in the process, the City approved a conditional use permit (the "CUP") for the  
Facility. The CUP contained certain conditions, including the condition that the Facility comply  
with all state and federal environmental regulations. OSGC has met and continues to meet all of  
the conditions specified in the CUP and the City's zoning code. Indeed, after an exhaustive  
environmental permitting process, state and federal agencies both confirmed that the Facility  
would comply with all applicable regulations.

2. Nevertheless, on October 16, 2012—more than a year and half after the City granted the CUP—the City’s Common Council voted to rescind the CUP, purportedly because of alleged misrepresentations during the CUP permitting process.

3. There was absolutely no factual or legal basis for the Council’s decision. Just two weeks before the Council’s decision, the City Plan Commission held an extensive public hearing and determined—unanimously—that there had been no misrepresentation of the project.

4. The Council’s decision to revoke the CUP was arbitrary and unreasonable, without an evidentiary basis, procedurally inadequate, and outside of its jurisdiction. Moreover, OSGC had a vested right to develop the Facility. Accordingly, this Court should issue an Order reversing the City’s decision to rescind the CUP.

### **THE PARTIES**

5. Oneida Seven Generations Corporation is a tribal corporation chartered under the laws of the Oneida Tribe of Indians of Wisconsin. Its principal place of business is 1239 Flightway Drive, De Pere, Wisconsin 54115.

6. 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.

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

### **FACTUAL AND PROCEDURAL BACKGROUND**

#### ***Conditional Use Permit and Building Permit***

8. The Facility is designed to convert municipal solid waste into electricity and other useful byproducts via a process known as pyrolysis. The Facility will first sort and shred the

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

9. In late 2010, OSGC met with staff from the City's Planning and Economic Development Departments to discuss potential sites for the Facility in the City. City staff proposed a number of possible sites within the City, which staff and OSGC evaluated together.

10. Ultimately, OSGC and City staff determined that the site at 1230 Hurlbut Street was appropriate. Among other reasons, the site is in an industrial area and can handle the necessary traffic from waste haulers.

11. On or about February 4, 2011, an application was submitted for a conditional use permit to allow the site to be used for the Facility. As part of the application, extensive documentation was submitted regarding the proposed design and operation of the Facility. This information included extensive information regarding potential air emissions and the environmental permits that the Facility would be required to obtain. This information was presented to City Planning staff and to Plan Commission members.

12. At a meeting on February 21, 2011, the City Plan Commission considered the CUP application. OSGC gave a presentation during the meeting and answered questions about the Facility from the Plan Commission members. Planning staff also presented an oral and written report recommending approval of the CUP with certain conditions, including the condition that the Facility comply with all federal and state environmental standards.

13. The Plan Commission voted to recommend to the Common Council that it approve the CUP.

14. On or about March 1, 2011, the Common Council considered the recommendation of the Plan Commission regarding the CUP. OSGC gave a presentation regarding the Facility to the Common Council members. The presentation included a statement that the Facility would need to meet all state and federal standards for air emissions. Members of the public also were given an opportunity to speak regarding the Facility. One member of the public, who claimed to have expertise in air emissions, spoke extensively about potential emissions from the Facility and noted that he was in favor of the Facility.

15. On or about March 1, 2011, the Common Council voted to grant the CUP with certain conditions. Among these conditions was the requirement that the Facility comply with all federal and state environmental standards.

16. On or about August 3, 2011, an application was submitted to the City for a building permit. The City thereafter granted the building permit.

17. In reliance on the CUP and building permit, OSGC undertook significant work on the Facility and incurred significant expenses, including but not limited to expenses relating to design, permitting, and construction. To date, the expenses incurred—for which OSGC will seek to hold the City liable—exceed \$4 million.

#### ***Federal and State Environmental Review***

18. The United States Department of Energy (“DOE”) conducted an Environmental Assessment to evaluate the potential environmental impacts of the Facility. As part of this process, the DOE held a public hearing in Green Bay on April 12, 2011. The DOE accepted written public comments from April 1 to May 15, 2011.

19. The DOE published its final Environmental Assessment in November 2011 and a “Finding of No Significant Impact” on November 10, 2011. Among other topics, the Environmental Assessment addressed potential air emissions from the Facility. The DOE

concluded that the Facility “would not constitute a major Federal action significantly affecting the quality of the human environment[.]”

20. On July 28, 2011, WDNR held a public informational meeting in Green Bay regarding the environmental impacts of the proposed Facility. WDNR accepted public comments on a draft environmental analysis for the Facility.

21. On July 29, 2011, WDNR held a public hearing in Green Bay regarding the proposed air permit for the Facility. WDNR also accepted written public comments regarding the air permit.

22. On or about September 9, 2011, WDNR issued a final environmental analysis for the Facility. Among other topics, the environmental analysis included extensive discussion of air emissions.

23. Also on or about September 9, 2011, WDNR issued a final air permit for the Facility, which included responses to public comments regarding emissions and other issues.

24. On June 11, 2012, after accepting and reviewing public comment on a revised air permit to account for a revised exhaust stack design, WDNR issued a revised final air permit approving the revised design.

#### ***Revocation of the Conditional Use Permit***

25. At the Common Council meeting on April 10, 2012—more than a year after the CUP had been granted—several members of the public opposed to the Facility alleged that OSGC had misrepresented the potential environmental impacts of the Facility when applying for the CUP.

26. On April 10, 2012, the Common Council voted to hold a hearing to determine whether the CUP had been properly granted in the first instance. In an April 19, 2012 letter to the City Attorney, OSGC, through counsel, objected to the reconsideration of the CUP.

27. The City determined that the Plan Commission—the body that had originally considered and recommended approval of the CUP—would conduct the hearing.

28. On September 17, and again on September 24, the City published a notice of the Plan Commission hearing on the CUP. The notice provided the following:

A hearing will be held by the Green Bay Plan Commission on Wednesday, October 3, 2012 at 5:30pm in Room 604, City Hall, 100 N. Jefferson Street, Green Bay, WI 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 record will consist of all documents and information before the Plan Commission members at the time that it made its recommendation. No less than seven (7) days prior to the hearing, persons interested in the matter may submit their written comments and questions for consideration by the Plan Commission. Written and oral comments shall be limited to the issue presented. As usual, the Plan Commission will ask anyone wishing to speak to sign up at the beginning of the hearing and when their turn comes, not to repeat points made by previous speakers. All questions and comments will be directed to the Commission. Direct questions between opponents and proponents of the project will not be allowed. After hearing the public comments, the Plan Commission will deliberate on the issue with possible action.

29. OSGC, while objecting to the proceeding, submitted extensive written materials regarding the Facility, the CUP application, and the environmental permitting process. A number of individual citizens and groups also submitted comments in advance of the hearing.

30. At the hearing on October 3, 2012, OSGC and members of the public gave oral presentations and answered questions from the members of the Plan Commission. The hearing lasted several hours.

31. After considering the extensive written and oral presentations, the Plan Commission determined unanimously that there had been no misrepresentation and that there had been adequate information presented for proper issuance of the CUP. The Plan Commission

also voted unanimously to recommend to the Council that the CUP stand. The Plan Commission's report to the Council provided the following:

The Commission heard testimony with respect to the Conditional Use Permit (CUP) that had been approved for the Oneida Seven Generations Corporation solid waste disposal facility to be constructed at 1230 Hurlbut Street. Prior to public testimony, the Plan Commission staff provided a detailed report on the history of the CUP application and the reasons for their original recommendation for approval with conditions, which was adopted by the Plan Commission. After considering information provided by representatives of the Oneida Seven Generations Corporation, representatives of the Clean Water Action Council of Northeast Wisconsin, alderpersons, and interested citizens, the Plan Commission unanimously approved the following motion:

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.

32. On October 16, 2012, the Common Council held a meeting to consider the recommendation of the Plan Commission. Prior to the Common Council meeting, the City published an agenda for the meeting, which included the following item under the "Reports for Council Action" section: "Report of the Plan Commission/Public Hearing held October 3, 2012." The agenda made no mention whatsoever of any action the Common Council might take with regard to the CUP.

33. At the Common Council meeting on October 16, 2012, the Council voted, seven-to-five, to defeat a motion to approve the report of the Plan Commission with respect to the CUP.

The Council also voted, seven-to-five, to rescind the CUP. Before rescinding the CUP, the Common Council did not provide OSGC any opportunity to present evidence at the meeting.

### **CLAIM FOR RELIEF – CERTIORARI REVIEW**

34. The allegations in paragraphs 1 through 33 are incorporated here by reference.

35. Pursuant to Wis. Stat. § 68.13, the City's decision to rescind the CUP is reviewable by certiorari.

36. The City's decision to rescind the CUP must be reversed on certiorari review for each of the following reasons:

(a) The Common Council acted beyond its jurisdiction and proceeded on an incorrect theory of law in rescinding the CUP, because nothing in the City's zoning ordinance or the Wisconsin Statutes gives the Common Council the authority to reconsider or revoke a conditional use permit when there was not any evidence (indeed, not even an allegation) that OSGC had violated any of the terms of the Permit or any other requirement of the City's zoning code.

(b) The Common Council acted beyond its jurisdiction and proceeded on an incorrect theory of law in rescinding the CUP, because the motion to rescind the CUP was not properly noticed to the public.

(c) The Common Council acted beyond its jurisdiction and proceeded on an incorrect theory of law in rescinding the CUP, because a local zoning authority may not revoke a permit based on "implied" conditions or any other condition not specified in the permit or the zoning code.

(d) The Common Council acted beyond its jurisdiction and proceeded on an incorrect theory of law in rescinding the CUP, because it failed to provide an impartial decisionmaker and failed to afford OSGC the right to cross-examine witnesses.



(e) The Common Council acted beyond its jurisdiction and proceeded on an incorrect theory of law in rescinding the CUP, because it failed to articulate the basis for its decision.

(f) The Common Council's decision to rescind the CUP was arbitrary and unreasonable. The City decided that the Plan Commission would determine whether the City had adequate information when it originally issued the Permit. The Plan Commission conducted a hearing and unanimously found that the City did have adequate information. The Council's decision to ignore these findings was arbitrary and unreasonable.

(g) The Common Council's decision to rescind the CUP was not based on substantial evidence. The Plan Commission's finding that the City had adequate information to issue the Permit and that there had been no misrepresentation was clear and unanimous. Furthermore, expert state and federal agencies had found that the Facility would meet all environmental requirements. Without any evidentiary basis, the Council ignored the recommendation of the Plan Commission and the determinations of the expert agencies.

**PRAYER FOR RELIEF**

WHEREFORE, Oneida Seven Generations Corporation respectfully requests that the Court:

- A. Issue an order directing the City to return to this Court for certiorari review the complete record of all papers and proceedings concerning the City's decision to rescind the CUP.
- B. Issue an order reversing the City's October 16, 2012 decision to rescind the CUP.
- C. Grant the Plaintiffs their statutory costs, attorney's fees, and expenses in bringing this action.
- D. Grant the Plaintiffs all other relief that the Court deems just and equitable.

Dated this \_\_\_\_ day of November, 2012.

GODFREY & KAHN, S.C.

By: \_\_\_\_\_

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