

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

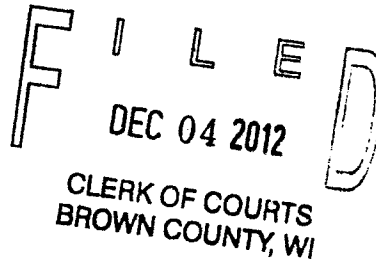
Case No. 12-CV-2263

Plaintiffs,

v.

CITY OF GREEN BAY,

Defendant.



**ANSWER AND AFFIRMATIVE DEFENSES OF DEFENDANT, CITY OF GREEN BAY,
FOR CERTIORARI REVIEW**

Defendant, City of Green Bay ("City"), by its attorneys, Friebert, Finerty & St. John, S.C., and City Attorney Anthony S. Wachewicz, III, hereby answers Plaintiffs' Complaint for Certiorari Review as follows:

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.

ANSWER: The City admits a CUP was approved for a project as represented to the City but lacks information sufficient to admit or deny the remaining allegations.

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.

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ANSWER: Admits that the City's Common Council voted to void the CUP for the reasons stated by Council members at the October 16, 2012 Council meeting including, but not limited to, lies or misrepresentations by OSGC.

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.

ANSWER: Denies.

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.

ANSWER: Denies.

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, DePere, Wisconsin 54115.

ANSWER: The City admits the allegations upon information and belief.

6. Green Bay Renewable Energy, LLC is a Delaware limited liability company with its principal 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.

ANSWER: The City lacks information sufficient to admit or deny this allegation.

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.

ANSWER: Admits.

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.

ANSWER: The City admits that the intent of the project as represented to the City is to convert municipal solid waste into electricity and other useful byproducts via a process known as pyrolysis, but lacks information sufficient to admit or deny the remaining allegations.

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.

ANSWER: Admits that such discussions occurred.

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.

ANSWER: The City admits that the 1230 Hurlbut Street site was identified as a possible site by City Staff for Plaintiffs' project but lacks information sufficient to admit or deny the remaining allegations.

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.

ANSWER: The City admits that an application was submitted for a CUP, the contents of which speak for themselves.

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.

ANSWER: Admits the factual allegations but affirmatively alleges that the parties disagree about the project that was presented by Plaintiffs and further alleges that

there is a recording of that hearing which more fully characterizes what occurred at that hearing and denies any allegation that is inconsistent with that record.

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

ANSWER: Admits and further alleges that there is a recording of that hearing which more fully characterizes what occurred at that hearing and denies any allegation that is inconsistent with that record.

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.

ANSWER: The City admits that the CUP recommendation was considered by the Common Council on March 1, 2011 and further alleges that there is a recording of that hearing which more fully characterizes what occurred at that hearing and denies any allegation that is inconsistent with that record.

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.

ANSWER: Admits the allegations but affirmatively alleges that the parties disagree about the project that was approved.

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.

ANSWER: Admits.

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.

ANSWER: The City lacks information sufficient to admit or deny this allegation.

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.

ANSWER: The City lacks information sufficient to admit or deny this allegation.

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[.]”

ANSWER: The City lacks information sufficient to admit or deny this allegation.

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.

ANSWER: The City lacks information sufficient to admit or deny this allegation.

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.

ANSWER: The City lacks information sufficient to admit or deny this allegation.

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.

ANSWER: The City lacks information sufficient to admit or deny this allegation.

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.

ANSWER: The City lacks information sufficient to admit or deny this allegation.

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.

ANSWER: The City lacks information sufficient to admit or deny this allegation.

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.

ANSWER: The City admits that residents expressed concerns at the April 10, 2012 Council meeting, the full extent of which can be determined by reviewing the record of the meeting, but denies the remaining allegations.

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.

ANSWER: Admits.

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

ANSWER: Admits that the Plan Commission was directed to hold a public 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 5:30 pm 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.

ANSWER: Admits.

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.

ANSWER: Admits.

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.

ANSWER: Admits.

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.

ANSWER: The City admits that the Plan Commission issued the report to the Common Council, the content of which speaks for itself.

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.

ANSWER: The City admits on October 16, 2012, the Common Council held a meeting and issued an agenda in advance of the meeting, the content of which speaks for itself.

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.

ANSWER: Admits the allegations in the first two sentences and denies the other allegations.

CLAIM FOR RELIEF – CERTIORARI REVIEW

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

ANSWER: The City incorporates by reference its responses to paragraphs 1 through 33.

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

ANSWER: Admits.

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.

ANSWER: Denies all of the above allegations and affirmatively alleges that the City exercised its lawful authority and that its decision is supported by substantial evidence in the record.

AFFIRMATIVE DEFENSES

As and for its affirmative defenses to the Complaint, the City alleges and shows to the Court as follows:

1. Plaintiffs may have failed to join necessary parties.
2. Plaintiffs' claims are barred by unclean hands.

WHEREFORE, Defendant, City of Green Bay, requests that Plaintiffs' Complaint be dismissed with prejudice, that the City be awarded reasonable attorneys' fees and costs incurred herein as well as such other and further relief as may be just and equitable.

Dated at Milwaukee, Wisconsin, this 3rd day of December, 2012.

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OF GREEN BAY**

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