

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN
GREEN BAY DIVISION

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

Plaintiffs,

v.

Case No. 1:16-cv-01700

CITY OF GREEN BAY,

Defendant.

**SECOND DECLARATION OF GREGG J. GUNTA IN SUPPORT OF DEFENDANT'S
MOTION TO DISMISS THE COMPLAINT FOR LACK OF CAPACITY TO SUE**

Pursuant to 28 U.S.C. § 1746, I, Gregg J. Gunta, declare as follows:

1. I am an attorney with Gunta Law Offices, S.C., counsel for City of Green Bay in the above-captioned action and make this declaration in support of the City of Green Bay's Motion to Dismiss the Plaintiffs' Complaint.
2. The following statements are based on my personal knowledge of the material.
3. Attached as Exhibit 11 is a true and correct copy of the Petition for Writ of Mandamus, *Oneida Seven Generations Corporation et al v. City of Green Bay*, Case No. 12CV2262, filed by Plaintiff Oneida Seven Generations Corporation in Brown County Circuit Court of Wisconsin, November 14, 2012.
4. Plaintiff Oneida Seven Generations Corporation voluntarily dismissed the Petition.
5. I declare under penalty of perjury that the foregoing is true and correct.

Executed this 13th day of March, 2017 in the State of Wisconsin, Milwaukee County.

/s/ Gregg J. Gunta

Gregg J. Gunta

WI Bar No. 1004322

STATE OF WISCONSIN : CIRCUIT COURT 1 : BROWN COUNTY

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

Plaintiffs,

Case No.

12CV2262

v.

Code No(s). 30952 (Petition for Writ of
Mandamus)

CITY OF GREEN BAY,

Defendant.

Process Server
Time 2:54 AM
Address Served
Person Served

11-14-2012
Green Bay, WI
City Clerk
SUMMONS

AUTHENTICATED COPY
FILED
NOV 14 2012
JASON B. BECK
CLERK OF COURTS
BROWN COUNTY, WI

To each person named above as a Defendant:

You are hereby notified that the Plaintiff named above has filed a lawsuit or other legal action against you. The Complaint, which is attached, states the nature and basis of the legal action.

Within twenty (20) days of receiving this Summons, you must respond with a written answer, as that term is used in Chapter 802 of the Wisconsin Statutes, to the Complaint. The Court may reject or disregard an answer that does not follow the requirements of the statutes. The answer must be sent or delivered to the Court, whose address is 100 S. Jefferson Street, Green Bay, Wisconsin 54301, and to Godfrey & Kahn, S.C., Attention: Eric J. Wilson, One East Main Street, Suite 500, PO Box 2719, Madison, Wisconsin 53701-2719. You may have an attorney help or represent you.

If you do not provide an answer within twenty (20) days, the Court may grant judgment against you for the award of money or other legal action requested in the Complaint, and you may lose your right to object to anything that is or may be incorrect in the Complaint. A

Gunta Declaration Exhibit 11

judgment may be enforced as provided by law. A judgment awarding money may become a lien against any real estate you own now or in the future, and may also be enforced by garnishment or seizure of property.

Dated this 14 day of November, 2012.

GODFREY & KAHN, S.C.

By: 

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STATE OF WISCONSIN : CIRCUIT COURT : BROWN COUNTY

ONEIDA SEVEN GENERATIONS
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RENEWABLE ENERGY, LLC,

Plaintiffs,

Case No.

v.

Code No(s). 30952 (Petition for Writ of
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CITY OF GREEN BAY,

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ALTERNATE
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BROWN COUNTY, WI

COMPLAINT FOR WRIT OF MANDAMUS

Oneida Seven Generations Corporation, by and through its attorneys, Godfrey & Kahn, S.C., brings this Complaint seeking a writ of mandamus compelling the City of Green Bay to restore 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 compelling the City to restore 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, DePere, 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 – WRIT OF MANDAMUS

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

35. By virtue of the CUP issued on March 3, 2011, the building permit issued on or around August 3, 2011, and the substantial investment OSGC has made in the Facility in reliance on those permits, OSGC has a clear, vested legal right to develop the Facility at 1230 Hurlbut Street.

36. The City has a positive and plain duty to restore the CUP to allow OSGC to develop the Facility in accordance with OSGC's clear, vested legal rights.

37. OSGC will be substantially damaged if the City does not restore the CUP, because, among other reasons, it will be unable to develop the Facility.

38. OSGC has no other adequate specific legal remedy for the injury caused by the City's rescission of the CUP.

39. Under these circumstances, equity requires that the Court issue a writ of mandamus compelling the City to restore the CUP.

PRAYER FOR RELIEF

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

- A. Issue a mandamus order compelling the City to restore the conditional use permit.
- B. Grant the Plaintiffs their statutory costs, attorney's fees, and expenses in bringing this action.
- C. Grant the Plaintiffs all other relief that the Court deems just and equitable.

Dated this 14 day of November, 2012.

GODFREY & KAHN, S.C.

By: Matthew T. Kemp
Eric J. Wilson
State Bar No. 1047241
Matthew T. Kemp
State Bar no. 1080009

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