

**Objection to Construction Permit Application, Plans and Specifications
for Thompson/Emerson Barrett Law Sewer, Petitioner Raymond Grahn
2004 OEA 40 (03-W-J-3225)**

OFFICIAL SHORT CITATION NAME: When referring to 2004 OEA 40, cite this case as
Grahn, 2004 OEA 40.

TOPICS:

sewer construction
dismissal
aggrieved
Kunz
potential violations

PRESIDING JUDGE:

Gibbs

PARTY REPRESENTATIVES:

Petitioner: Raymond Grahn, Esq.
Respondent: Matt Senseny, Esq., Allison Wells Gritton, Esq.
Permittee (City of Indianapolis)
IDEM: Anne M. Patterson, Esq.

ORDER ISSUED:

June 1, 2004

INDEX CATEGORY:

Water

FURTHER CASE ACTIVITY:

[none]

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STATE OF INDIANA)
) BEFORE THE INDIANA OFFICE OF
) ENVIRONMENTAL ADJUDICATION
COUNTY OF MARION)

IN THE MATTER OF)
)
327 IAC ARTICLE 3 CONSTRUCTION)
PERMIT APPLICATION PLANS AND)
SPECIFICATION FOR THOMPSON/) CAUSE NO. 03-W-J-3225
EMERSON BARRETT LAW SEWER)
SRF LOAN NO. CS18241101)
INDIANAPOLIS, MARION COUNTY, IN)

**FINDINGS OF FACT, CONCLUSIONS OF LAW
AND ORDER GRANTING MOTION TO DISMISS**

This matter having come before the Court on the Amended Motion to Dismiss filed by the City of Indianapolis (the "City") on January 30, 2004, which pleading is a part of the Court's record; and the Environmental Law Judge ("ELJ") having read and considered the petitions, motions, record of proceedings, evidence, and the briefs and responses of the parties, now finds that judgment may be made upon the record; and the ELJ, being duly advised, now makes the following findings of fact and conclusions of law and enters the following Order with respect to the City's Amended Motion to Dismiss:

Findings of Fact

1. Findings of fact that may be construed as conclusions of law and conclusions of law that may be construed as findings of fact are so deemed.
2. Raymond J. and Mary Ellen Grahn, (the "Petitioners"), filed their Petition for Administrative Review on November 17, 2003 of the Construction Permit for the Thompson/Emerson Barrett Law Sewer Project (the "Permit") issued to the City of Indianapolis on November 6, 2003.
3. On December 29, 2003, the City filed its Motion to Dismiss alleging that Petitioners had failed to state a claim upon which relief could be granted.
4. The parties attended the prehearing conference on January 6, 2004. Petitioners were ordered to file an Amended Petition for Review on or before January 23, 2004.
5. Petitioners filed their Amended Petition for Administrative Review on January 26, 2004.
6. The City filed its Amended Motion to Dismiss on January 30, 2004; the Indiana Department of Environmental Management (IDEM) filed its Response in Support of Motion to Dismiss on February 13, 2004; Petitioners filed a Response to Amended

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Motion to Dismiss; and the City filed its Reply to Petitioners' Response to Respondent's Amended Motion to Dismiss on February 20, 2004. Oral Argument was held on May 19, 2004.

7. The Petitioners raise only one issue: whether the City should install a lift station instead of grinder pumps to service approximately 24 homes as part of this new sewer construction. It is clear from Petitioners' pleadings and oral argument that this is the only issue in this matter.
8. Petitioners' allegations that pollution will arise from the installation of grinder pumps is premised on 2 factors; (1) that the residents with the grinder pumps will not maintain the pumps as they should and (2) that the construction of a lift station will disturb less area than the installation of the grinder pumps.

Conclusions of Law

1. The Office of Environmental Adjudication ("OEA") has jurisdiction over the decisions of the Commissioner of the Indiana Department of Environmental Management ("IDEM") pursuant to Ind. Code § 4-21.5-7, et seq. In *Indiana Office of Environmental Adjudication v. Kunz* 714 N.E.2d 1190 (Ind.Ct.App. 1999), the Petitioners challenged IDEM's issuance of a NPDES permit. In that case, the appellate court held that OEA did, in fact, have subject matter jurisdiction over the Kunzes' case.
2. This Court has subject matter jurisdiction over this matter, which appeals a decision by IDEM, namely, the issuance of the Permit.
3. This is a Final Order issued pursuant to Ind. Code § 4-21.4-3-27. Findings of Fact that may be construed as Conclusions of Law and Conclusions of Law that may be construed as Findings of Fact are so deemed.
4. The City filed its Motion to Dismiss, pursuant to T.R. 12(B)(6),
5. "In a 12(B)(6) motion, the court is required to take as true all allegations upon the face of the complaint, and may only dismiss if plaintiff would not be entitled to recover under any set of facts admissible under the allegations of the complaint." *Dixon v. Siwy* 661 N.E.2d 600, 603 (Ind.Ct.App. 1996). A 12(B)(6) motion is "made to test the legal sufficiency of the claim, not the supporting facts." *Blanck v. Indiana Department of Corrections* 806 N.E.2d 788, 790 (Ind.Ct.App. 2004) The Court must view the pleadings in a light most favorable to the non-moving party and must draw every reasonable inference in favor of that party. *Lattimore v. Amsler* 758 N.E.2d 568 (Ind.Ct.App. 2001)
6. IC 4-21.5-3-7(a)(1) states that in order to qualify for review, a person must state sufficient facts to demonstrate that the person is:
 - (A) a person to whom the order is specifically directed;
 - (B) aggrieved or adversely affected by the order; or
 - (C) entitled to review under any law.

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7. The Supreme Court in *Bagnall v. Town of Beverly Shores* 726 N.E.2d 782, 786 (Ind. 2000), said that a person, in order to be “aggrieved”, must show “a substantial grievance, a denial of some personal, pecuniary, or property right, on the imposition . . . of a burden or obligation.”
8. The Petitioners have stated sufficient facts to demonstrate that they are aggrieved or adversely affected by this Permit. They own property that will be directly affected by the construction of the sewer at issue here. Moreover, as the owners of the property, they will be required to install and maintain a portion of the sewer, namely, the grinder pump. The question remains whether the Petitioners have stated any valid grounds for invalidating the Permit.
9. IC 13-15-6-2 requires that the written request for an adjudicatory hearing must contain the following information:
 - (1) State the name and address of the person making the request.
 - (2) Identify the interest of the person making the request.
 - (3) Identify any persons represented by the person making the request.
 - (4) State with particularity the reasons for the request.
 - (5) State with particularity the issues proposed for consideration at the hearing.
 - (6) Identify the permit terms and conditions that in the judgment of the person making the request, would be appropriate in the case in question to satisfy the requirements of the law governing permits of the type granted or denied by the commissioner’s action.
10. The Court in *Kunz* held that IC 13-15-6-3(a)(1) requires that the petitioner meet the requirements of IC 13-15-6-2 in order to maintain an action.
11. In addition to the requirements under IC 13-15-6-2, 315 IAC 1-3-2 requires the following:
 - (b) The petition for administrative review shall contain the following information:
 - (1) Name, address, and telephone number of each person filing the petition.
 - (2) Identification of the interest of each petitioner in the subject of the petition.
 - (3) Statement demonstrating that the petitioner is:
 - (A) a person to whom the order is directed;
 - (B) aggrieved or adversely affected by the order; or
 - (C) entitled to review under any law.
 - (4) Statement with particularity the legal issues proposed for consideration in the proceedings and in a case involving an appeal of a permit:
 - (A) identification of environmental concerns or technical deficiencies related to the action of the commissioner which is the subject of the petition; and
 - (B) identification of permit terms and conditions that the petitioner contends would be appropriate to comply with the law applicable to the contested permit.

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12. The Petitioners' only ground for invalidating the permit is that IDEM should have forced the City to choose a lift station over the grinder pumps. IDEM is required to review the permit application submitted by the City under the technical standards set out in 327 IAC 3. The Petitioners have not identified any deficiency in the permit or the IDEM's permit review process.
13. The IDEM presumes that any person that receives a permit will comply with the applicable regulations. OEA may not overturn an IDEM approval upon speculation that the regulated entity will not operate in accordance with the law. *In the Matter of: Objection to the Issuance of Approval No. AW 5404, Mr. Stephen Gettelfinger, Washington, Indiana, 1998 WL 918589 (Inc.Off.Env.Adjud.)*
14. This Court may not consider Petitioners' allegations of future violations as a basis for invalidating the Permit.
15. The Petitioners have failed to state sufficient facts to state a claim.

ORDER

AND THE COURT, being duly advised, hereby **ORDERS, JUDGES AND DECREES** that the Amended Motion to Dismiss filed by the Respondent, City of Indianapolis is **GRANTED** and the Petition for Review filed by Raymond J. and Mary Ellen Grahn is hereby dismissed.

You are further notified that pursuant to provisions of IC 4-21.5-7-5, the Office of Environmental Adjudication serves as the ultimate authority in administrative review of decisions of the Commissioner of the Indiana Department of Environmental Management. This is an order subject to further review consistent with applicable provisions of IC 4-21.5 and other applicable rules and statutes.

IT IS SO ORDERED THIS 1st day of June, 2004.

Catherine Gibbs
Environmental Law Judge