

**Objection to the Issuance of Sanitary Sewer Construction
Permit Approval No. 20596 to
Affordable Sewer Service, LLC
Fort Wayne, Allen County, Indiana
2014 OEA 1, (13-W-J-4646)**

OFFICIAL SHORT CITATION NAME: When referring to 2014 OEA 1 cite this case as
Affordable Sewer Service, LLC, 2014 OEA 1.

TOPICS:

sanitary sewer construction
restrictive covenants
landowner consent
alternative plan
gravity fed
forced main
alternate separation distance
327 IAC 3

PRESIDING JUDGE:

Mary L. Davidsen

PARTY REPRESENTATIVES:

Petitioners: Matt Schenkel, pro se
Respondent/Permittee: Douglas E. Johnston, Esq.;
Tourkow Crell Rosenblatt & Johnston LLP
IDEM: Sierra L. Alberts, Esq.

ORDER ISSUED:

January 22, 2014

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:)
)
OBJECTION TO THE ISSUANCE OF SANITARY)
SEWER CONSTRUCTION PERMIT APPROVAL NO. 20596 TO)
AFFORDABLE SEWER SERVICE, LLC)
FORT WAYNE, ALLEN COUNTY, INDIANA)
_____)
Matt Schenkel, Norm Wall, Barry Williams, Janet Brooks,)
Mark Bevineau, Armida Koslow, Phyllis Cleaver,)
Deb Ward, Dale Borne, Mary A. Nicholson,)
Petitioners,)
Affordable Sewer Service, LLC,)
Permittee/Respondent,)
Indiana Department of Environmental Management,)
Respondent)

CAUSE NO.
13-W-J-4646

FINDINGS OF FACT, CONCLUSIONS OF LAW and FINAL ORDER

This matter came before the Court on summary judgment, as to whether the Indiana Department of Environmental Management (“IDEM”) appropriately decided to approve sanitary sewer system construction permit approval No. 20596 to Affordable Sewer Service, LLC. The Chief Environmental Law Judge (“ELJ”), having considered the testimony, evidence, and pleadings of the parties, now finds that judgment may be made upon the record. The Chief ELJ, by substantial evidence, and being duly advised, now makes the following findings of fact and conclusions of law and enters the following Final Order:

FINDINGS OF FACT

1. On March 8, 2013, IDEM issued Construction Permit Application Plans and Specifications for Sanitary Sewer, Centaur Acres, Permit Approval No. 20596 (“Permit”) to Permittee/Respondent Affordable Sewer Service, LLC (“Affordable Sewer”). The Permit authorized construction of a sanitary sewer system to serve single family homes on the west side of Goldspur Drive, approximately 840 feet south of State Road 14 in Fort Wayne, Allen County, Indiana.

2. On March 22, 2013, Petitioner Matt Schenkel filed a Petition for Administrative Review (“Petition”), based upon the following objections:

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- a. the construction was placed on easements in the addition, in conflict with restrictive covenants;
 - b. the project lacks consent for construction upon the land of several property owners; therefore, it cannot be constructed legally as permitted.
 - c. Petitioners have developed a separate plan to construct sewer service, therefore approval for the permitted project should be revoked in favor of the alternative plan advocated by Petitioners. In sum, the Permitted project utilized a forced main system to propel flow; the Petitioners proposed a gravity-fed system.
3. Petitioner Schenkel's Petition was filed on behalf of Mark Bevineau, Al and Phyllis Cleaver¹, Giridar and Zoila Veerula, Dale and Kelly Borne, Brad and Nelda McAllister, Ed and Armida Koslow, Larry and Janet Brooks, Chris and Laura Klerner, John and Mary Nicholson, Barry Williams, Matt and Susan Schenkel, Norm and Ellen Wall, and Debbie Ward.
 4. On May 6, 2013, Petitioner Schenkel filed a Consent of Representation authorizing him to represent eight of the named petitioners. Of the remaining petitioners, Norm Wall elected to represent himself; Petitioners Janet Brooks, Chris Klerner and Zoila Veerula did not sign the Consent to Petitioner Schenkel's representation.
 5. All parties, including the above Petitioners, were served notice of the Prehearing Conference and Stay Hearing. At the May 9, 2013 Stay Hearing, Petitioners Giradir and Zoila Veerula, Larry and Janet Brooks and Chris and Laura Klerner did not attend in person or by counsel, nor did they seek leave from attending. Petitioner Schenkel attended in person without legal counsel and represented himself and Petitioners Bevineau, McAllister, Nicholson, Cleaver, Borne, Koslow and Williams. Petitioner Norm Wall attended in person, and noted that he consented to Petitioner Schenkel's representation in this case. Permittee Affordable Sewer was represented by legal counsel and by owner Brad Olson. IDEM was represented by legal counsel and witnesses Don Worley and Levi Soliven.
 6. In his Stay Hearing testimony, Petitioner Schenkel stated that he was not aware of any laws or rules that were violated by IDEM's issuance of Permit 20596.
 7. The Court's May 9, 2013 Findings of Fact, Conclusions of Law and Order on Stay Hearing² denied Petitioners' request to stay the effectiveness of Permit No. 20956 of the forced main system issued to Permittee Affordable Sewer.

¹ Petitioners with the same last name list a common address. In some instances in this case, a petitioner's response from a particular address would list both residents, in other instances, only one resident would be listed. There has been no submittal to the Court where co-residents state conflicting positions, thus the Court concludes that both residents agree with the statements of one resident. For accuracy, the above record notes the name(s) of the resident(s) responding in the particular instance.

² All court orders referenced herein are a part of the Court's record on this cause, and are incorporated into this Order.

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8. On May 9, 2013, this Court issued a Notice of Proposed Order of Default of Janet Brooks, Chris Klerner and Zoila Veerula for failing to attend the May 9, 2013 Stay Hearing without leave of Court, per the Court's April 4, 2013 Order Scheduling Prehearing Conference and Stay Hearing, and per the April 29, 2013 Report of Prehearing Conference and Stay Hearing Scheduling Order.
9. On May 31, 2013, this Court issued an Order Recalling Proposed Order of Default of Janet Brooks due to Ms. Brooks' filing a complaint response on May 15, 2013.
10. On June 27, 2013, this Court issued a Final Order of Default dismissing the Petitions of Chris Klerner and Zoila Veerula per Ind. Code § 4-21.5-3-24 and 315 IAC 1-3-8.
11. At the Court's urging, the parties participated in mediation, which did not result in case resolution.
12. On September 9, 2013, Respondent IDEM filed its Motion for Summary Judgment and supporting Memorandum of Law.
13. This Court's September 11, 2013 Order Scheduling Briefing on Respondent IDEM's Motion for Summary Judgment set deadlines of October 9, 2013 for Responses; to date, no Petitioner has responded, sought an amended schedule, or submitted any subsequent filings.
14. On October 23, 2013, IDEM filed its Reply and Proposed Findings of Fact, Conclusions of Law and Final Order.³

CONCLUSIONS OF LAW

1. The Indiana Department of Environmental Management ("IDEM") is authorized to implement and enforce specified Indiana environmental laws, and rules promulgated relevant to those laws, per I.C. § 13-13, *et seq.* The Office of Environmental Adjudication ("OEA") has jurisdiction over the decisions of the Commissioner of IDEM and the parties to this controversy pursuant to I.C. § 4-21.5-7, *et seq.*, and per I.C. § 4-21.5.3.7(a)(1)(A).
2. This is a Final Order pursuant to I.C. § 4-21.5-3-23, I.C. § 4-21.5-3-27 and 315 IAC 1-2-1(9). Findings of Fact that may be construed as conclusions of law that may be construed as findings of fact are so deemed.

³ The Court's election not to enter IDEM's Proposed Order is not an adverse reflection on the high quality of the Proposed Order submitted by IDEM's legal counsel.

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3. The OEA's findings of fact must be based exclusively on the evidence presented to the Environmental Law Judge ("ELJ") and deference to the agency's initial factual determination is not allowed. I.C. § 4-21.5-3-27(d); *Indiana Dept. of Natural Resources v. United Refuse Co., Inc.*, 615 N.E. 100 (Ind. 1993); *Indiana-Kentucky Electric v. Commissioner, Indiana Department of Environmental Management*, 820 N.E.2d 771, 781 (Ind. App. 2005). "De novo review" means that "all issues are to be determined anew, based solely upon the evidence adduced at the hearing and independent of any previous findings." *Grisell v. Consol. City of Indianapolis*, 425 N.E.2d 247 (Ind. Ct. App. 1981).
4. OEA is required to base its factual findings on substantial evidence. *Huffman v. Office of Env'tl. Adjud.*, 811 N.E.2d 806, 809 (Ind. 2004)(appeal of OEA review of NPDES permit); *see also* I.C. 4-21.5-3-27(d). "Standard of proof generally has been described as a continuum with levels ranging from a "preponderance of the evidence test" to a "beyond a reasonable doubt" test. The "clear and convincing evidence" test is the intermediate standard, although many varying descriptions may be associated with the definition of this intermediate test." *Matter of Moore*, 453 N.E.2d 971, 972, n. 2. (Ind. 1983). The "substantial evidence" standard requires a lower burden of proof than the preponderance test, yet more than the scintilla of the evidence test. *Burke v. City of Anderson*, 612 N.E.2d 559, 565, n.1 (Ind. Ct. App. 1993). *Gas America 347*, 2004 OEA 123, 129. *See also Blue River Valley*, 2005 OEA 1, 11-12. *Objection to the Denial of Excess Liability Trust Fund Claim Marathon Point Service, ELF #9810570/FID #1054, New Castle, Henry County, Indiana; Winimac Service, ELF #9609539/FID #14748, Winimac, Pulaski County, Indiana; HydroTech Consulting and Engineering, Inc.*, 2005 OEA 26,41.
5. Respondent IDEM seeks summary judgment, based on Petitioners' failure to raise any valid reason within IDEM's jurisdiction as to why IDEM should not have issued the Permit. The OEA may enter judgment for a party under the criteria stated in Rule 56 of Ind. Rules of Trial Procedure. I.C. § 4-21.5-3-23. Per Tr. R. 56(C), summary judgment shall issue if OEA finds that "the designated evidentiary matter shows that there is no genuine issue as to material fact and that the moving party is entitled to judgment as a matter of law." The moving party bears the burden of establishing that summary judgment is appropriate. All facts and inferences must be construed in favor of the non-movant. *Gibson v. Evansville Vanderburgh Building Commission, et al.*, 725 N.E.2d 949 (Ind. Ct. App. 2000). All evidence must be construed in favor of the opposing party, and all doubts as to the existence of a material issue must be resolved against the moving party. *City of North Vernon v. Jennings Northwest Regional Utilities*, 829 N.E.2d 1 (Ind. 2005), *Tibbs v. Huber, Hunt & Nichols, Inc.*, 668 N.E.2d 248, 249 (Ind. 1996). "A genuine issue of material fact exists where facts concerning an issue that would dispose of the litigation are in dispute or where the undisputed facts are capable of supporting conflicting inferences on such an issue." *Laudig v. Marion County Bd. of Voters Registration*, 585 N.E.2d 700, 703-704 (Ind. Ct. App. 1992). Further, the Indiana Tax Court in *Allied Collection Service Inc. v. Ind. Dept. of State Revenue* (Cause No. 49T10-0608-TA-76, December 22, 2008) stated, "If there is any doubt when ruling on a motion (or motions) for summary judgment as to what conclusion the Court

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could reach, the Court will conclude that summary judgment is improper, given that it is neither a substitute for trial nor a means for resolving factual disputes or conflicting inferences following from undisputed facts. *See Owens Corning Fiberglass Corp. v. Cobb*, 754 N.E.2d 905, 909 (Ind. 2001) (citations omitted).” When the moving party sets out a prima facie case in support of the summary judgment, the burden shifts to the non-movant to establish a factual issue. *City of North Vernon v. Jennings Northwest Regional Utilities*, 829 N.E.2d 1 (Ind. 2005), *Tibbs v. Huber, Hunt & Nichols, Inc.*, 668 N.E.2d 248, 249 (Ind. 1996).

6. As IDEM accurately notes in its October 23, 2013 Proposed Findings of Fact, Conclusions of Law and Order, in order to succeed, Petitioners are required to show that the Permit did not meet applicable regulations for construction of sanitary sewers; many relevant regulations are stated in 327 IAC 3. OEA reviews IDEM’s decisions to determine whether IDEM’s decision conformed with controlling statutes and regulations. *In the Matter of: Objection to Construction Permit Application for Water and Wastewater System Improvements, Permit Approval No. 20218, Town of Whitestown, Whitestown, Boone County, Indiana, Cause No. 12-W-J-4574, 2013 OEA 1* (“Town of Whitestown”); *In re: Objection to Issuance of Section 401 Water Quality Certification COE ID No. 198800247 Conagra Soybean Processing Co.*, 1998 WL 918585 at *3, OEA Cause No. 98-W-J-2052 (Nov. 12, 1988). Allegations that fail to raise any issue concerning compliance with controlling legal requirements fail to state a valid claim. *Town of Whitestown, Id.*; *In re: Objection to Issuance of Public Water Supply Construction Permit No. WS-2924 Issued to the City of Mishawaka, Indiana*, 1989 WL 436899 at *6, OEA Cause No. 89-W-J-241 (September 1, 1989). IDEM is prohibited from expanding its requirements for Affordable Sewer’s Permit beyond those specified in 327 IAC 3.
7. To prevail on the merits of this case, Petitioners are required to show that the Permit terms failed to meet the applicable regulations for construction of sanitary sewers contained in 327 IAC 3. Petitioners’ timely-filed objection to the Permit is based on allegations of violation of restrictive covenants, upon the lack of consent from property owners, and the existence of an acceptable alternative plan. If other required permits and consents are not obtained, actual construction may not be authorized, but such factors do not allow IDEM to deny a permit. *See Town of Whitestown*; *see also In Re: Wastewater Treatment Plant and Sanitary Sewer Construction Approval No. 16684, Sidney, Indiana*, 2004 OEA 99, 102. 327 IAC 3 does not require applicants to comply with restrictive covenants or obtain access approval from a landowner in order to obtain a construction permit from IDEM. Thus, by substantial evidence, IDEM is entitled to summary judgment.
8. As a matter of law, Permit 20596 may not be invalidated on the basis that a separate plan exists for a gravity-fed system. This Court may only consider whether IDEM’s permit issuance complied with the applicable statutes, regulations and policies, which do not require IDEM, nor OEA, to evaluate alternatives, even if those alternative receive permit approval.

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9. By substantial evidence, Affordable Sewer's Permit conforms with technical system standards stated in 327 IAC 3. IDEM properly did not expand its jurisdiction beyond current regulations by conducting an evaluation as to whether restrictive covenants would be violated, whether landowners authorized access, or whether the gravity-fed system presented an acceptable alternative. The Permit and variances IDEM granted for Affordable Sewer's forced main system satisfied requirements stated in 327 IAC 3. Petitioners' Petitions for Administrative Review should therefore be denied.

FINAL ORDER

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Respondent, Indiana Department of Environmental Management's Motion for Summary Judgment is **GRANTED**. Petitioners Mark Bevineau, Al and Phyllis Cleaver, Dale and Kelly Borne, Brad and Nelda McAllister, Ed and Armida Koslow, Larry and Janet Brooks, John and Mary Nicholson, Barry Williams, Matt and Susan Schenkel, Norm and Ellen Wall and Debbie Wards' Petitions for Administrative Review and Requests for Stay of Construction Permit Approval No. 20596 issued to Affordable Sewer Service, LLC for a sanitary sewer system, are **DENIED**.

You are hereby further notified that pursuant to provisions of I.C. § 4-21.5-7-5, the Office of Environmental Adjudication serves as the Ultimate Authority in the administrative review of decisions of the Commissioner of the Indiana Department of Environmental Management. This is a Final Order subject to Judicial Review consistent with applicable provisions of I.C. § 4-21.5, *et seq.* Pursuant to I.C. § 4-21.5-5-5, a Petition for Judicial Review of this Final Order is timely only if it is filed with a civil court of competent jurisdiction within thirty (30) days after the date this notice is served.

IT IS SO ORDERED in Indianapolis, Indiana this 22nd day of January, 2014.

Hon. Mary L. Davidsen
Chief Environmental Law Judge