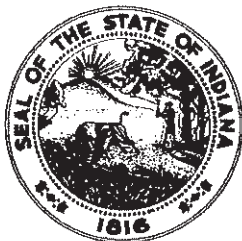


**OBJECTION TO THE ISSUANCE OF  
327 IAC 3 CONSTRUCTION PERMIT APPLICATION  
PERMIT APPROVAL NO. 24668  
WOODSHIRE PLACE, LLC.  
2022 OEA 157, OEA CAUSE NO.: 22-W-J-5214**

<b>Official Short Cite Name:</b>	Woodshire Place, LLC., 2022 OEA 157
<b>OEA Cause No.:</b>	22-W-J -5214
<b>Topics/Keywords:</b>	IC 4.21.5 IC 4.21.5-3-23 IC 4-21.5-5-5 IC 4.21.5-7-3 IC 4-21.5-7-5 IC 13-15-6-2 315 IAC 1-3-2(b)(4)(A) 315 IAC 1-3-6(c)(1) and (6) Ind. Tr. Rule 12(B) Sanitary sewer construction Incomplete petition for administrative review Mandatory attendance at prehearing conference
<b>Presiding ELJ:</b>	LORI KYLE ENDRIS
<b>Party Representatives:</b>	CHRIS E PATTERSON, PETITIONER JOY SKIDMORE, PERMITTEE/RESPONDENT THOMAS W. BAKER, ESQ., RESPONDENT SHANTELL R. DRUCKER, ESQ., RESPONDENT SIERRA ALBERTS, ESQ, IDEM
<b>Order Issued:</b>	November 28, 2022
<b>Index Category:</b>	WATER
<b>Further Case Activity:</b>	



# INDIANA OFFICE OF ENVIRONMENTAL ADJUDICATION

Mary L. Davidsen, *Chief Environmental Law Judge*  
Lori Kyle Endris, *Environmental Law Judge*  
Sara C. Blainbridge, *Legal Administrator*

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STATE OF INDIANA )  
 )  
COUNTY OF MARION )  
 )  
IN THE MATTER OF: )

BEFORE THE INDIANA OFFICE OF  
ENVIRONMENTAL ADJUDICATION

CAUSE NO. 22-W-J-5214

OBJECTION TO THE ISSUANCE OF )  
327 IAC 3 CONSTRUCTION PERMIT APPLICATION )  
PERMIT APPROVAL NO. 24668 )  
WOODSHIRE PLACE, LLC )  
GREENCASTLE, PUTNAM COUNTY, INDIANA. )

Chris E. Patterson, )  
Petitioner, )  
Woodshire Place )  
Permittee/Respondent, )  
Indiana Dept of Environmental Management, )  
Respondent. )

## FINAL ORDER GRANTING PERMITTEE/RESPONDENT’S MOTION TO DISMISS

This matter came before the Office of Environmental Adjudication (OEA or Court) on Woodshire Place, Inc.’s (Permittee/Respondent) October 17, 2022 Motion to Dismiss, the Indiana Department of Environmental Management’s (IDEM or Respondent) October 27, 2022 Concurrence, and Chris E. Patterson’s (Petitioner) Responses to the Motion to Dismiss filed October 25 and November 16, 2022, which documents are now part of the Court’s record. Having read and considered the Motion and brief, the Concurrence and Responses, the presiding Environmental Law Judge (ELJ) makes the following Findings of Fact, Conclusions of Law and enters the Final Order:

### FINDINGS OF FACT

1. On August 11, 2022, IDEM issued an Authorization for Construction of Sanitary Sewer System (“Approval”), permit 24668 (Permit) under 327 IAC 3, to Permittee/Respondent for a condominium development in Greencastle, Indiana.
2. On August 26, 2022, Petitioner filed a timely Petition for Administrative Review. Notwithstanding, the Court issued a Notice of Incomplete Filing, Order to Supplement Petition

and Notice of Proposed Order of Default on August 31, 2022 for Petitioner's failure to meet Ind. Code § 4.21.5 *et seq.* (I.C.) and 315 Indiana Administrative Code *et seq.* (IAC).

3. On September 26, 2022, Petitioner filed an Amended Petition for Administrative Review.

4. On September 27, 2022, the Court issued an Order Scheduling Prehearing Conference.

5. On October 18, 2022, the Prehearing Conference was held via Teams. Only counsel for Permittee/Respondent and IDEM appeared. On the same date, the Court issued a Report of Prehearing Conference, Case Management Order and a Notice of Proposed Order of Dismissal of Petitioner for failing to attend the Prehearing Conference.

6. On October 25, 2022, Petitioner filed an apology for missing the Prehearing Conference and second Amended Petition for Administrative Review.

7. On October 26, 2022, the ELJ sent the parties an email that read as follows:

Good afternoon everyone.

Mr. Patterson, on September 26, 2022, you filed an Amended Petition for Administrative Review in response to the Court's Notice of Incomplete filing issued August 31, 2022. Your recent filing on October 25 consists of a second Amended Petition for Administrative Review.

315 IAC 1-3-2(e) states that a petition for administrative review may be amended as a matter of course at any time within thirty (30) days after the earlier of the initial prehearing conference, the filing of a motion to dismiss or the service of a notice of incomplete petition and order to supplement.

The earlier date here is the August 31, 2022 Notice of Incomplete which means that you would've had to file the second Amended Petition on or before September 30, 2022 OR by leave of the presiding ELJ OR the written consent of all of the parties. You did not seek leave to file an additional Amended Petition, and no written consent of all of the parties accompanied this latest filing.

Counsel for IDEM asked via email whether your filing was a response to the Permittee's Motion to Dismiss or whether you intended to file additional pleadings on or before November 16, 2022. The Court has not received your response, if any, to counsel's question.

All parties, please advise the court whether you possess or provided written consent to Petitioner to amend the petition a second time.

Counsels for the Permittee/Respondent and IDEM responded to the email and indicated that neither provided consent. Permittee did not respond to the email. The second Amended Petition will not be considered. 315 IAC 1-3-2(e).

8. On October 27, 2022, IDEM filed a Concurrence with Permittee/Respondent's Motion to Dismiss.

9. On November 16, 2022, Petitioner filed his Response to the Motion to Dismiss.

### CONCLUSIONS OF LAW

1. This is a Final Order issued pursuant to I.C. § 4-21.5-3-23. 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. OEA has jurisdiction over the decisions of the Commissioner of the IDEM and the parties to the controversy pursuant to I.C. § 4-21.5-7-3.

3. In reviewing a motion to dismiss, "a court is required to take as true all allegations upon the face of the complaint and may only dismiss if the plaintiff would not be entitled to recover under any set of facts admissible under the allegations of the complaint. [This] Court view[s] the pleadings in a light most favorable to the nonmoving party, and it draws every reasonable inference in favor of that party." *Huffman v. Office of Envir. Adjud.*, 811 N.E.2d 806, 814 (Ind. 2004).

4. As state agencies, IDEM and OEA only have the authority to take those actions granted by law. IDEM is authorized to determine whether a permit should be issued by applying the relevant statutes and regulations pertaining to permits and can only consider the relevant statutes and regulations when deciding whether to issue the permit. *American Suburban Utilities*, 2019 OEA 48, 53. Here, OEA's review is limited to determining whether IDEM complied with the applicable statutes and regulations. I.C. § 4-21.5-7-3; *Blue River Valley*, 2005 OEA 1, 11. OEA does not have authority to address any other issues.

5. I.C. § 13-15-6-2 requires a petition for administrative review to

- (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 person 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.

*Office of Env'tl. Adj., Ind. Dep't. of Env'tl Mgt. v. Kunz*, 714 N.E.2d 1190, 1196 (Ind. Ct. App. 1999) (internal citation omitted).

6. In addition to I.C. § 13-15-6-2, 315 IAC 1-3-2(b)(4)(A) requires a petitioner in a case involving an appeal of a permit to state with particularity<sup>1</sup> and identify:

(i) Environmental concerns or technical deficiencies related to the action of the commissioner that is the subject of the petition.

(ii) Permit terms and conditions that the petitioner contends would be appropriate to comply with the law applicable to the contested permit.

7. Both Permittee/Respondent and IDEM contend that pursuant to Indiana Trial Rule 12(B)(1), Ind. Tr. R. 12(B)(6), 315 IAC 1-3-6(c)(1) and 315 IAC 1-3-6(6) Petitioner's Petitions should be dismissed for lack of jurisdiction over the subject matter and failure to state a claim upon which relief can be granted. Here, Petitioner was afforded two (2) opportunities to meet the requirements of I.C. § 13-15-6-2 and 315 IAC 1-3-2(b)(4)(A).

8. Petitioner lists the following as "Interest[s] of the Petitioner":

- Disruption of internet service, which is essential for performing my responsibilities as a remote worker.
- Permanent flooding and surface damage to the street.
- Noise disruption during working hours.
- Environmental concerns based on increased water and sewage flow both above ground and below.

Amended Petition, p. 2.

Petitioner did not identify with particularity the environmental concerns, technical deficiencies or the portion of the permit at issue as required by I.C. § 13-15-6-2 and 315 IAC 1-3-2(b)(4)(A). 327 IAC 3 does not authorize IDEM to consider either disruption of internet service or noise.

The Permit at issue here is for the construction --- not the operation --- of the sanitary sewer. Because the Permittee/Respondent must apply for and receive an operating permit before it can operate the plant, concerns relating to permanent flooding, surface damage to the

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<sup>1</sup> "Particularity" is defined as "as minute detail; the quality or state of being particular as distinguished from universal." Particularity. Merriam Webster Dictionary (11<sup>th</sup> ed. 2020).

street, and increased water and sewage flow both above ground and below are premature and speculative. “OEA may not overturn an IDEM approval upon speculation that the regulated entity will not operate in accordance with the law.” *Jennings Water, Inc. v. Off. Of Env’tl Adjud.*, 909 N.E.2d 1020, 1026 (Ind. Ct. App. 2009).

9. Under “Contents of Permit Petitioner is Objecting,” Petitioner stated, “Applicant provides a list of potentially-affected persons but no validation that notifications were received\acknowledged.”<sup>2</sup> Amended Petition, p. 2. [Punctuation original]. 327 IAC 3 does not require IDEM to provide validation that notifications were received or acknowledged.

10. Under “Petitioner is Aggrieved by the Decision,” Petitioner stated,

As a landowner directly affected by the construction, I want to be notified of the development stages as they proceed. I have personally contacted residents in our neighborhood for past notifications that they claim not to have received. Is there a way for Ms. Skidmore to show proof of delivery?

Petition, p. 3. Petitioner did not identify with particularity the environmental concerns, technical deficiencies or the portion of the permit at issue as required by I.C. § 13-15-6-2 and 315 IAC 1-3-2(b)(4)(A).

Pursuant to 327 IAC 3-2-2(e)(6), the Permittee is required to provide a list of potentially affected persons to IDEM for mailing the issued permit to each listed person. Neither IDEM nor the applicant is required to show proof of delivery under 327 IAC 3. Petitioner has no standing to bring a claim of lack of notice on behalf of another. *Objection to the Issuance of Permit Approval No. IN LA 000614*, 2002 OEA 33.

11. Under Petitioner’s first “Legal Issues Proposed for Review,” Petitioner lists a series of questions<sup>3</sup> that 327 IAC 3 does not require IDEM to consider when issuing a sanitary sewer construction permit. Further, the questions raised presuppose that pollution or nuisance conditions will be created and thus are speculative. Speculation without evidence that the construction will create pollution or nuisance conditions is not sufficient for OEA to overturn IDEM’s approval. *Christners*, 2020 OEA 16, 22.

Under Petitioner’s second labeled “Legal Issues Proposed for Review,” Petitioner states, “[b]ased on the Technical Review meeting notes from 06/09/2022, petitioner is requesting all concerns be addressed and resolutions be provided prior to construction to begin.” Amended Petition, p. 3. Petitioner’s statement does not identify with particularity the environmental concerns, technical deficiencies or the portion of the permit at issue as required by I.C. § 13-15-6-2 and 315 IAC 1-3-2(b)(4)(A).

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<sup>2</sup> Petitioner also stated, “[b]y submittal of this request to appeal, I hereby acknowledge receipt of notification.” Amended Petition, p. 2.

<sup>3</sup> Amended Petition, p. 3.

12. Under Petitioners "Terms and Conditions Deemed Appropriate and Compliant," Petitioner states he would like to

receive results for every step that must meet compliance for the construction including but not limited to:

- Gravity sewer leakage test
- Deflection tests on 'flexible' pipes
- Manhole air testing
- City-mandated requirements

Amended Petition, p. 3. 327 IAC 3 does not authorize IDEM to consider a gravity sewer leakage test, deflection tests on "flexible" pipes, manhole air testing or city-mandated requirements.

#### **FINAL ORDER**

**THE COURT**, being duly advised hereby **ORDERS, ADJUDGES AND DECREES**, that Permittee/Respondent's Motion to Dismiss is **GRANTED** and Petitioner's Petition for Administrative Review is **DISMISSED**.

You are further notified that pursuant to the provisions of I.C. § 4-21.5-7-5, the Office of Environmental Adjudication serves as the ultimate authority in administrative review of the decisions of the Commissioner of the Indiana Department of Environmental Management. This is a Final Order subject to judicial review consistent with the applicable provisions of I.C. § 4-21.5. 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** this 28<sup>th</sup> day of November, 2022 in Indianapolis, IN.

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Hon. Lori Kyle Endris  
Environmental Law Judge

