WISCONSIN COURT OF APPEALS
DISTRICT III

Appeal No. 2013AP000591

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

Plaintiffs-Appellants,

v.

CITY OF GREEN BAY,

Defendant-Respondent.

Appeal from a Final Judgment of the Circuit Court of Brown County, the Honorable Marc A. Hammer Presiding, Circuit Court Case No. 2012CV002263

BRIEF OF PLAINTIFFS-APPELLANTS

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ISSUES PRESENTED FOR REVIEW

In March 2011, the Green Bay City Council approved a conditional use permit ("CUP") for a waste-to-energy facility in development by Oneida Seven Generations Corporation ("OSGC"). The approval was expressly conditioned on the facility complying with all federal and state environmental standards, including standards for air and water quality. Accordingly, OSGC embarked on an extensive, and very public, environmental permitting process with state and federal agencies. A small but vocal group of opponents claimed the facility would harm local air quality and urged the agencies to disapprove the facility. The agencies rejected the arguments of the opponents and gave OSGC a green light to build the facility, which OSGC began to do.

Having failed to persuade the state and federal agencies, the opponents of the project then went back to the City, claiming that OSGC had misrepresented the nature of the Facility during

the CUP application process by saying there would be no air emissions. In fact, OSGC had told the City many times in writing and orally that there would be emissions, and that those emissions would be subject to state and federal environmental standards. Nonetheless, the City directed the Plan Commission to hold a public hearing on the alleged misrepresentations. After considering hundreds of pages of written submissions and hours of testimony from both supporters and opponents of the project, the Plan Commission *unanimously found that there had been no misrepresentation.* At the next City Council meeting, however, the Council, without conducting any inquiry of its own, voted to rescind the CUP on the basis of the alleged misrepresentations.

On these facts, two issues are presented on appeal:

Issue No. 1: May a city council rescind a conditional use permit based on implied conditions that were not written in

the permit and when the city has already issued building permits for the facility at issue?

The circuit court held that it could.

Issue No. 2: May a city council rescind a conditional use permit for alleged misrepresentations about the environmental impacts of the facility at issue, when the permittee disclosed to the City these impacts; the council deferred the environmental vetting process to expert state and federal agencies, who approved the project; and the city's own plan commission—the only body to engage in factfinding regarding the matter—unanimously found that there was no misrepresentation?

The circuit court held that it could.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Plaintiff-Appellant requests oral argument. The record is sufficiently extensive that the Court would likely benefit from a full discussion of the issues in the presence of counsel possessing a command of the record.

As to publication, Plaintiff-Appellant believes that this case carries important consequences not only for the parties—one of whom has been publicly accused of misrepresentation, and the other of which is a large municipality—but also for economic development activity throughout the State of Wisconsin, which depends on predictability when embarking on large-scale economic and environmental investments. Accordingly, publication would be appropriate.

STATEMENT OF THE CASE

Nature of the Case

This is a certiorari action by OSGC, seeking reversal of the City's decision to revoke the CUP. The revocation occurred more than 18 months after the City originally issued the CUP, more than a year after the City issued a building permit, and nearly a year after state and federal agencies issued environmental approvals and permits for the facility.

The Proposed Facility

OSGC wants to bring clean energy to the Green Bay community by constructing a facility that turns garbage into electricity. The key to this conversion is a process known as "pyrolysis," in which the waste is gasified by heating it at very high temperatures in an enclosed, oxygen-starved chamber. R. 25 at 231-32, 374-75. The process produces a gaseous fuel (similar to natural gas) that is then used to run electricity-producing generators—essentially large internal combustion engines. *Id.* The pyrolysis gasification process itself does not produce air emissions because the process occurs in an enclosed chamber. While the generators (like all combustion engines) do produce emissions, they are at levels that the state Department of Natural Resources ("DNR") determined would be acceptable under state and federal environmental laws. R. 25 at 238, 290. Thus, the facility will reduce the amount of waste going to local

landfills while decreasing the community's reliance on electricity derived from fossil fuels. R. 25 at 387, 392.

In late 2010, OSGC representatives met with staff from the City's Economic Development and Planning Departments regarding their plan. R. 25 at 1; R. 26 at 725. Together, OSGC and City staff evaluated a number of possible sites within the City for the facility. R. 26 at 725. Ultimately, OSGC selected a site on Hurlbut Street surrounded by vacant land and heavy industrial operations. R. 25 at 156.

OSGC Submits a Conditional Use Permit Application that Discusses Potential Emissions at Length.

City officials at all levels were provided with extensive information about the proposed project, including information about potential air emissions. On February 4, 2011, OSGC submitted to the City a written application for a conditional use permit. R. 25 at 2-152. A conditional use permit is, in essence, a special zoning classification, which allows owners to use

property in a manner that does not fit into typical zoning classifications. *See* Green Bay Municipal Code § 13-205. The application explained the nature of the project and contained extensive information about potential environmental impacts, especially air emissions. *Id.* For example, it noted that the Wisconsin Department of Natural Resources ("DNR") would need to issue an air permit before construction could begin, and that "application and review of this permit will likely need to address air quality impacts . . . as well as emissions of hazardous air toxic compounds[.]"[1] R. 25 at 25. It also noted that the facility would need to report actual air emissions to the DNR on an annual basis, and that DNR would maintain oversight and enforcement responsibility over the facility's operations. *Id.* In a 50-page section titled "Emissions," OSGC provided the City with

[1] Though it noted that there would be emissions, the application did not contain any detailed projections of emissions levels from the facility. As is typical, these detailed projections were developed later as part of the DNR air permitting process. R. 25 at 326-327; R. 26 at 892.

detailed information about potential air emissions from similar technologies, including a lengthy report by a university engineering department. R. 25 at 26-76. OSGC also provided preliminary drawings and artists' renderings of the facility. R. 25 at 18-23.

City planning staff carefully reviewed all of the information and prepared a report to the Plan Commission regarding the project. The report noted that OSGC had provided City staff with "considerable information . . . detailing the gasification process and its resulting impact." R. 26 at 155. The report explained that OSGC would have to obtain an air permit and operations permit from DNR. After observing that the facility would be in a "heavy industrial area separated from any residential uses by Interstate 43," the report concluded that the "proposed use is an appropriate land use for the subject site." R. 25 at 156; *see also* R. 25 at 245-57. The report recommended

approval of the CUP, subject to certain conditions, including the condition that the facility comply with "[a]ll Federal and State regulations and standards related to the proposed use including air and water quality." *Id.*

The Plan Commission Recommends Approval of the CUP after Detailed Consideration of the Facility's Operations, Including Potential Emissions.

On February 21, 2011, the Plan Commission discussed the project at its regularly scheduled meeting. R. 25 at 157-66; R. 26, Audio CD 1. After City planning staff reviewed OSGC's application and the report that staff had prepared, representatives from OSGC addressed the Commission. R. 25 at 160-65. They first presented a pre-recorded slideshow explaining how the facility would work—starting with waste delivery by trucks, then shredding and sorting of the garbage, followed by the pyrolysis gasification process, then the gas cleaning process, and finally the conversion of the gas to electricity through gas-fired generators. R. at 160-161. As part of

the presentation, OSGC promised that the Facility would "meet or exceed" federal standards for safety, emissions, and pollutants. R. 26, Audio CD 1 at 21:50. The slideshow further noted that "there are no smokestacks *such as those associated with coal-fired power plants*." *Id.* at 22:10 (emphasis added).

Plan Commission members then engaged OSGC in a lengthy question-and-answer session. R. 25 at 160-66. A number of the Plan Commission's questions pertained to air emissions. OSGC explained how the gasification process itself takes place in an "enclosed" system, in that no oxygen is allowed to enter the chamber. R. 25 at 161; R. 26, Audio CD 1, 20:45. One commission member noted that OSGC's written materials had described emissions from similar technologies, and that those emissions included certain chemicals. *Id.* at 43:45. In response, an engineer working for OSGC stated that there would be no chemicals from OSGC's facility because they would be

"scrubbed out"– a reference to the facility's "Venturi scrubbers" that would clean the gas before it is piped to the generators. *Id*. However, the contractor specifically noted that there would be dioxin emissions. *Id*.; *see also* R. 25 at 164 (misspelling "dioxins" as "diosons").[2] The contractor then clarified that the chemical emissions would be "acceptable" and "under EPA/DNR standards"—that is, there would be chemical emissions, but because of pollution control devices such as the Venturi scrubber, none of the emissions would exceed the safety thresholds designated by the environmental regulatory agencies. R. 26, Audio CD 1 at 47:20; R. 25 at 164.

[2] The minutes of the February 21, 2011 Plan Commission meeting, on which both the opponents of the project and the City rely heavily, are replete with errors and fail to capture the detail and context of what was said by the Plan Commission and by OSGC representatives. For example, as the circuit court recognized, they attribute to OSGC CEO Kevin Cornelius many statements that were actually made by the engineer working on OSGC's behalf. R. 25 at 164; R. 24 at 92. For another, they label a "Venturi scrubber" (a technical piece of equipment) as a "cherry scrubber." R. 25 at 160.

The Commission voted unanimously to recommend approval of the CUP, including the condition that the Facility comply with all federal and state environmental regulations. R. 25 at 166.

Following Extensive Deliberation About the Proposed Facility, the Council Approves the CUP.

On March 1, 2011, the Common Council met and considered the Plan Commission's recommendation. R. 25 at 171-72; *see generally* R. 26, Audio CD 1. Through deliberation that lasted well over an hour, the Council thoroughly vetted the proposed Facility in an open session. OSGC presented the same pre-recorded slideshow that explained that the Facility would "meet or exceed" federal standards for safety, emissions, and pollutants. R. 26, Video 1 at 1:11:00. In follow-up remarks, OSGC stated that "[a]ny emissions that come off the generator…will be subject to WDNR and EPA approval. So we just want to make that clear for the record." *Id.* at 1:14:53.

Part of the OSGC presentation was a slide titled "Emissions." *Id.* at 1:18:10. On that slide, a bullet point explained that "[t]here will be no smokestacks such as those associated with coal-fired power plants." *Id.* at 1:18:10. In explaining that slide, an OSGC representative said, "There are no smokestacks. For those of us in Green Bay, we know what that means." *Id.* In other words, he explained that there would be no stacks on the facility like the enormous structures familiar to Green Bay residents on the Pulliam power plant and local paper mills.

During the question and answer session, one alderperson referenced OSGC's remark about "no smokestacks" and clarified that the facility *would* have generators that *would* produce exhaust; OSGC agreed with this observation. *Id.* at 1:32:18. In addition, one member of the public with professional experience in air emissions spoke extensively about his research into

potential emissions from the proposed Facility. *Id.* at 1:46:00. He noted that emissions from gasification facilities are generally more favorable than traditional combustion, and that emissions from this facility would likely be very small in comparison to the nearby Pulliam coal-fired power plant. *Id.* In short, it was clear that everyone present knew there would be emissions from the Facility.

After the public comment period had concluded, the alderperson representing the district where the Facility would be located (Ald. Dorff) spoke in favor of the project. Referencing the plethora of regulatory review required for the facility, he noted: "[T]he environmental concerns that have been raised by my constituents have been addressed." *Id.* at 1:51:05. The chair of the Council, Alderman Thomas DeWane, also gave his unconditional support, stating: "I think this is going to be a good project. I also checked into it. They answered all of the my

questions. I'm very positive that this is good for Green Bay." *Id.* at 1:52:00. Thereafter, all but one Council member voted to approve the CUP. R. 25 at 172. As recommended by the Plan Commission, the CUP was conditioned on the facility complying with all federal and state environmental standards. R. 25 at 198. There were no conditions that mentioned emissions or stacks.

As Contemplated and Required by the CUP, OSGC Engages in an Extensive Environmental Permitting Process with State and Federal Agencies.

After obtaining the CUP, OSGC embarked on an extensive environmental review and permitting process—exactly as the Plan Commission and Common Council had anticipated when they adopted the condition that the OSGC facility must meet all state and federal air and water quality requirements. As a result of this review, state and federal agencies with expertise on environmental matters issued findings and permits allowing construction of the facility. R. 25 at 253, 328, 367; R. 26 at 618.

Throughout this lengthy and very public review process, numerous groups and individuals opposed to the facility (as well as project supporters) appeared at public meetings hosted by the regulators to speak against the requested environmental approvals. R. 25 at 262-265, 284-285, 387-389. The project opponents submitted numerous comments to both DNR and the U.S. Department of Energy ("DOE") detailing concerns with the facility's alleged environmental impacts. R. 25 at 265-285, 387-388, 548-561. Both agencies thoughtfully considered these comments and responded to them in writing. *Id*. Many of the opponents appeared to believe that the pyrolysis process was just another version of trash incineration that would emit damaging levels of pollutants into the atmosphere. *E.g.*, R. 25 at 266, 565. In fact, one of the more vocal opposition groups called itself "Incinerator Free Brown County." R. 26 at 763, 856. During the course of their review, however, both DNR and DOE

confirmed that the pyrolysis process did *not* involve any incineration. R. 266, 565-566.

After this public process, in September 2011, DNR issued permits and approvals under the state's clean air and solid waste laws. R. 25 at 286-327; R. 26 at 618-627.[3] The DNR published the results of its formal Environmental Analysis, in which it concluded that approval of the facility was *not* a "major action" and would *not* have significant environmental effects. R. 25 at 253. The DNR study included a lengthy analysis of a wide range

[3] The original DNR permit provided that OSGC must install stacks to vent the exhaust from the generators that would be as high as 60 feet above the ground (approximately 30 feet above the building roof). R. 25 at 294. After City staff advised OSGC that local zoning ordinances required the stacks to be no higher than 35 feet, OSGC obtained a revised permit from DNR specifying a stack height of 35 feet (only approximately 3 feet above the building roof). R. 25 at 339, 342, 347. The circuit court apparently misunderstood this reconfiguration of the exhaust stacks as a major redesign of the entire facility. R. 24 at 35. In fact, it was merely a change in the size and shape of the "tailpipe" for the generators; the remainder of the facility's design and operations were unchanged. R. 25 at 339, 342, 347.

of potential environmental impacts, including air emissions. R. 25 at 231-260.[4]

In November 2011, DOE published its final Environmental Assessment.[5] R. 25 at 372-568. The assessment thoroughly evaluated the environmental impact of the facility, and included 18 pages of analysis dedicated specifically to air emissions. R. 25 at 422-440. Based on its review, DOE issued a Finding of No Significant Impact (referred to colloquially as "FONSI"). R. 25 at 367-371. DOE concluded that "the area's air quality would remain in compliance with current standards." R. 25 at 368. In fact, DOE determined that the facility would have a positive

[4] DNR conducted this analysis pursuant to Wis. Stat. § 1.11, which requires all state agencies to consider the environmental impacts of proposed agency actions. *See also* Wis. Admin. Code § NR 150.01(1) (noting that the purpose of the environmental analysis process is "to assure governmental consideration of the short- and long-term environmental and economic effects of policies, plans and programs upon the quality of the human environment").

[5] DOE conducted its assessment pursuant to the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321, *et seq.* and Council on Environmental Policy NEPA regulations, 40 C.F.R. Parts 1500-1508. R. 25 at 382.

impact on greenhouse gas emissions because of the reduced traffic of waste to local landfills. *Id.*

The City Issues a Building Permit, and OSGC Commences Construction.

As the environmental permitting process was wrapping up, OSGC submitted detailed site plans and building plans to the City, as required under the City's zoning and building codes. On August 3, 2011, the City approved those plans and issued a building permit. R. 25 at 200-206, 730-731. With the required approvals in hand, OSGC proceeded with preparatory construction work.

The Opposition Groups Renew Their Objections, This Time Before the City Council.

Having failed to persuade DNR or DOE that the project would not meet environmental standards, the opposition groups began to pressure the Common Council to reconsider the CUP. On April 10, 2012, numerous opponents of the project attended a Common Council meeting, alleging that OSGC had

misrepresented the environmental impacts of the facility when applying for the CUP. R. 25 at 209-210. In particular, the opposition groups alleged that OSGC had claimed the facility would have no stacks and would produce no emissions. *Id*.

Responding to the outcry from a vocal opposition, the Council voted to "hold a public hearing" regarding the CUP and to "continue further investigation." R. 25 at 210. Through correspondence from its counsel sent shortly thereafter to the City Attorney, OSGC objected to the proceeding contemplated by the Council. R. 25 at 211-214. OSGC pointed out that it had presented extensive information about potential emissions to the Plan Commission and the Council, and that DNR and DOE had reviewed the potential emissions in detail—which is exactly what the CUP approved by the Council had specified should happen. *Id*. Despite the absence of any evidence—indeed, even any allegation—that the facility would be out of compliance with

the CUP, the City forged ahead with its "investigation." Eventually, the City decided that the Plan Commission—the body that had originally considered and recommended approval of the CUP—should hold a public hearing. R. 26 at 956.

The Plan Commission Unanimously Determines that OSGC Did Not Misrepresent the Project.

The City published a notice of the Plan Commission hearing, inviting citizens to submit written comments prior to the hearing and to speak at the hearing. *Id*. The purpose of the hearing, as described in the notice, was 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." *Id*.

Although OSGC objected to the proceeding, it nonetheless submitted written materials to the Plan Commission. R. 25 at 221-568. In those materials, OSGC outlined the extensive

information that had been presented to Planning staff and the Plan Commission and highlighted the numerous mentions of potential emissions from the Facility *Id.* at 221-226. OSGC also submitted the record of the detailed environmental review process conducted by DNR and DOE. *Id.* The Director of DNR's Air Bureau wrote a letter emphasizing that "the Department believes that the proposed facility will meet all applicable state and federal air quality requirements[.]" R. 25 at 229-232. Many proponents and opponents of the project also submitted their own materials. R. 26 at 571-712.

The Plan Commission meeting lasted several hours. R. 26 at 716. Numerous parties spoke at the hearing, including City Planning Director Rob Strong, who reviewed the process by which the City had issued the CUP in 2011. R. 26 at 724-731, 889-894. Director Strong noted the extensive information that had been submitted with the CUP application and recalled that

OSGC and Planning staff had gone "back and forth quite frequently" even before the Plan Commission considered the CUP. R. 26 at 726. Director Strong emphasized: "[W]e didn't do anything different here. We followed the same process we do for every other project that comes forward." R. 26 at 890. With regard to the "stacks" issue specifically, Director Strong noted that the City had not been misled, explaining:

> [I]t's not unusual to go through these things. Doors move on buildings, roof lines will change, but they still have to meet the basic Code requirements that are in the City's Code for building a building in this community, which includes zoning as well as a building permit. So I just wanted you to understand that this process isn't that much different than any other.

R. 26 at 892-893. The same member of the public with expertise in air emissions who had addressed the Council the previous year also spoke at the Plan Commission hearing, stating:

> [W]hen I spoke to the City Council [in March 2011], I made it real clear that there are air emissions. . . . And what I tried to do to my alderman and to the

> City Council was to make it real clear to them that there were stacks, that there were emissions.

R. 26 at 795, 798.

After considering the written materials and oral presentations, the Plan Commission publicly discussed the matter. Commissioner Bremer stated:

> [W]e were not deceived on that point [regarding emissions]. We knew that there was emission. We knew that there would be vents. We did not know the exact placement or height of those vents, because it was very early in the process. And it's been my experience with the Plan Commission and with the many projects that are to the betterment of the community that, indeed, there is a process that evolves over time in a back-and-forth conversation, and this has gone very much along those lines.
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> * * *
>
> I appreciate that I am not convincing anybody who feels to the contrary. I'm simply expressing my own thinking that, despite new information that has occurred since we recommended this, we were not deceived on the front end. We did have adequate information about what was known at the time, and the process that has moved forward has done so I think in an appropriate way.

R. 26 at 895-897.

Thereafter, the members of the Plan Commission unanimously concluded that OSGC had *not* misrepresented the facility and that the Commission had adequate information to approve the CUP. Specifically, the Commission approved the following language as a report and recommendation to the Common Council:

> 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.

R. 26 at 955.

The City Council Ignores the Plan Commission's Findings and Revokes the Permit.

On October 16, 2012, the Common Council met for a regularly-scheduled meeting. Numerous project opponents attended the meeting and, against the express advice of the City Attorney, the Council opened the floor to public comment regarding the CUP. R. 26 at 956; Video 2 (Part 1) at 46:00. The Council voted to reject the Report of the Plan Commission, and then it voted to rescind the CUP. Both votes carried by a bare majority of seven-to-five. R. 26, Video 2 (Part 2) at 37:22, 38:53. The Council did not explain the basis for its vote or the rationale that supported it.

Because the Council itself failed to explain the basis for its decision, two weeks later the City Attorney sent a letter to OSGC purporting to explain why the Council has rescinded the CUP. R. 26 at 950-951. The letter claimed that OSGC had made "false statements and misrepresentations" to the City "relating to the

public safety and health aspect of the Project and the Project's impact upon the City's environment" and "regarding emissions, chemicals, and hazardous materials." *Id.* The letter never identified, however, any particular statement that was allegedly false, nor did it explain the basis for the City's determination that any statements were false. *Id*. The letter closed by stating that "any further action at 1230 Hurlbut Street to construct the solid waste facility will be prohibited by legal action, if necessary[.]" R. 951.

Through its counsel, OSGC submitted a letter to the City requesting an administrative appeal of the Council's decision to rescind the CUP pursuant to Wis. Stat. §§ 68.08-68.11. R. 26 at 958-960. The City denied that request. R. 26 at 961-962.

The Ruling Below

OSGC initiated this litigation to restore the CUP and save development of the facility. Its complaint alleged that the City had illegally rescinded the permit based on an implied,

unwritten condition; had deprived OSGC of its vested right to develop the facility; had rescinded the permit without substantial evidence of misrepresentation; and had acted arbitrarily and unreasonably. R. 2. OSGC also raised a number of procedural arguments but voluntarily dropped those arguments in order to proceed to a quick resolution on the substantial issues relating to the City's underlying authority to rescind the permit.

After briefing and oral argument, the circuit court ruled against OSGC on all claims. The circuit court did not believe that the City had revoked the CUP based on an implied condition (zero emissions) that was not written in the CUP. R. 24 at 77. The circuit court also ruled that the vested rights doctrine did not apply because in its view it was fundamentally a question of damages, not a question of the Council's authority to rescind the CUP. *Id.* at 78. In addition, the circuit court

believed that OSGC had misrepresented the project by saying that there were "no emissions during the baking process," *id.* at 89, and by showing a "photograph" of the facility without stacks, *id.* at 90. The circuit court disregarded the unanimous finding of the Plan Commission, stating that "The Plan[] Commission . . . had no authority to do anything" and "I think what happened in this case is two organizations processing very similar pieces of information came to different conclusions." *Id.* at 80.

OSGC timely filed this appeal.

STANDARD OF REVIEW

In certiorari actions, this Court reviews the circuit court's conclusions de novo. *Nielsen v. Waukesha County Bd. of Supervisors*, 178 Wis. 2d 498, 511, 504 N.W.2d 621 (Ct. App. 1993). In reviewing the underlying action taken by the City, the Court affords a "presumption of correctness and validity to a municipality's decision" but still undertakes a "meaningful

review" of the municipality's decision. *Ottman v. Town of Primrose*, 2011 WI 18, ¶¶ 48, 51, 332 Wis. 2d 3, 796 N.W.2d 411. However, this Court reviews "questions of law independently from the determinations rendered by the municipality or the circuit court." *Id.* at ¶ 54.

ARGUMENT

In an action for certiorari review, court must "test the validity of a decision rendered by a municipality[.]" *Ottman*, 2011 WI 18, ¶ 34. To do so, the Court inquires whether: (1) the City was within its jurisdiction; (2) the City proceeded on a correct theory of law; (3) the City's action was arbitrary, oppressive, or unreasonable and represented its will and not its judgment; and/or (4) the evidence was such that the City might reasonably make the order or determination in question. *Ottman*, 2011 WI 18, ¶¶ 35-36.

Violation of any one of these standards would be enough to reverse the City's decision. The City has violated all four. The

Council acted outside of its jurisdiction and contrary to law by revoking the permit based on an unwritten, implied condition, and by depriving OSGC of its vested right to develop the facility. In addition, there was no evidence—let alone substantial evidence—that OSGC had misrepresented the project, and the Council's entire decisionmaking process culminating in its vote to rescind the CUP was arbitrary and unreasonable. In short, the Council's decision was nothing more than a knee-jerk reaction to vocal opposition groups rather than a reasoned exercise of legislative judgment.

The implications of the City's action are concerning not only for OSGC's project, but for economic development in municipalities around the state. Both developers and the general public depend on the certainty of established permitting processes. Here, after a developer (OSGC) had gone through that extensive process, received valid permits, and started on its

project in justifiable reliance on the approval it had obtained, the City pulled the rug out from under OSGC. Through a knee-jerk reaction to the allegations of a vocal opposition, whose arguments about the facility's environmental impacts had long since been considered and rejected by expert state and federal agencies, the City subverted the thorough and rational administrative process upon which developers like OSGC must rely when deciding when and where to invest their resources.

I. THE COUNCIL HAD NO AUTHORITY TO RESCIND THE CONDITIONAL USE PERMIT.

A. The Council Illegally Rescinded the CUP Based on the Implied, Unwritten Condition that the Facility Would Have Zero Emissions.

Though the City has never fully explained its reason for rescinding the CUP, it appears that seven out of twelve Council members believed (or claimed to believe) that the CUP was granted on the implicit condition that the proposed facility

would have zero emissions.[6] But by basing its rescission on an unwritten, implied condition, the Council violated a cardinal rule of conditional use permits: material conditions placed on a permittee's use of property *must* be spelled out in the permit itself. *See Bettendorf v. St. Croix County Bd. of Adjustment*, 224 Wis. 2d 735, 591 N.W.2d 916 (Ct. App. 1999).[7]

In *Bettendorf*, the municipality attempted to revoke a conditional use permit for a particular property based on the owner's alleged illegal use of an adjacent property. *Id.* at 737-738. The permit did not include any condition relating to the use of the adjacent property, but the municipality argued that such condition was "implied." *Id.* at 741. The court disagreed, explaining that "[a] conditional use permit allows a property owner to put property to a use which the ordinance expressly

[6] That belief is simply not credible, as explained in more detail in Section II, *infra*.

[7] Whether the City illegally rescinded the CUP based on an implied condition is a question of law, on which this Court owes no deference to the City or the circuit court. *See Ottman*, 2011 WI 18,¶ 54.

permits when certain conditions have been met." *Id.* (citing *State ex rel. Skelly Oil Co. v. Common Council*, 58 Wis. 2d 695, 701, 207 N.W.2d 585 (1973)). The property owner had not violated any of the terms of the conditional use permit, and the court refused to "read into the permit conditions the [municipality] discussed but chose not to incorporate." *Id.* The court held that the municipality had acted "outside its authority" in revoking the permit based on the implied condition. *Id.* at 742.

Here, the rescission of the CUP apparently was based on the Council's perception that the facility was supposed to produce zero emissions, and that this was a material condition of the approval. But the CUP says nothing about zero emissions. If anything, the CUP's condition requiring the facility to comply with air and water quality standards contemplates that there *would* be emissions.

Indeed, a condition requiring zero emissions in these circumstances would have been astonishing. This was a facility that was designed to create electricity using *gas-burning generators*, which by their very nature must produce exhaust; that is why OSGC told the City many times orally and in writing that there would be emissions and that the project would require an air permit.[8] The City's obligation to spell out material permit conditions in writing becomes all the more critical when the condition at issue is directly contrary to the applicant's own description of the project, and is as remarkable as a zero-emission limit.

Under these circumstances, the Council's revocation of the CUP is a more egregious violation of the *Bettendorf* principle than *Bettendorf* itself. In *Bettendorf*, the city at least had the

[8] For example, an OSGC representative told the Common Council on March 1, 2011: "Any emissions that come off the generator . . . will be subject to WDNR and EPA approval. So we just want to make that clear for the record." R. 26, Video 1 at 1:14:53; *see also* Section II, *infra*.

excuse that the permit holders were doing something illegal on the adjacent property. *Id.* at 737-38. Here, there has never been even an allegation that OSGC was acting, or planning to act, in violation of any state or local law. To the contrary, OSGC did precisely what the City expected and required: undertake the extensive environmental permitting process with DNR and DOE. No other condition relating to emissions was spelled out in the CUP. Under *Bettendorf*, the City cannot, eighteen months after the fact, pretend that there was such a condition. Thus, the City's revocation of the CUP was contrary to law and beyond its jurisdiction, and it must be reversed.[9]

[9] The circuit court ruled that *Bettendorf* did not apply but did not explain its holding, stating only that "I am not satisfied that the City has proceeded in a way that would suggest the addition of terms or implied terms. I'm not satisfied that is the basis upon which the theory proceeds today." R. 24 at 77.

B. By Virtue of the Building Permit Issued by the City, OSGC Enjoyed a Vested Right to Develop the Facility, Which the City Had No Power to Take Away.

Under Wisconsin law, a developer acquires vested rights in a construction project by acquiring a valid building permit. *Atkinson v. Piper*, 181 Wis. 519, 533, 195 N.W. 544 (1923); *Klefisch v. Wisconsin Telephone Co.*, 181 Wis. 519, 532, 195 N.W. 544 (1923) (*Klefisch* and *Atkinson* were part of the series of decisions known as the "Building Heights Cases"). Once those property rights vest, the municipality cannot reverse previous approvals or pass new legislation limiting the development. *Id.*

For example, in *Atkinson*, the state legislature had passed a law prohibiting the construction of buildings over 100 feet. 181 Wis. at 522, n.1. Prior to passage of the law, however, the developer of a Madison hotel had acquired a building permit allowing construction of a 115-foot hotel. The developer had also incurred architectural and site preparation costs and had

arranged financing, but had not yet begun construction of the hotel or incurred any expense that would have been lost had it only built a 100-foot tall hotel. *Id.* The court held that, under these circumstances, the developers had acquired a vested right to develop the 115-foot hotel. *Id.* at 533-34; *see also Klefisch*, 181 Wis. at 532 (holding that developer had a vested right to construct a 225-foot office building when the developer obtained a building permit and commenced construction prior to passage of the height limitation law).

The facts of this case are squarely in line with *Atkinson* and *Klefisch*, which found that the developers had vested rights to develop their projects. The City granted a valid CUP and, several months later, a valid building permit. R. 25 at 198-199, 201-206. These permits allowed OSGC to develop a waste-to-energy facility on the property. In doing so, OSGC was in full compliance with the municipal codes. Based on its vested right

to develop the facility, OSCG spent considerable sums of money on site preparation work and the environmental permitting process. By rescinding the CUP, the City has deprived OSGC of its vested right to develop the facility, thus acting beyond its jurisdiction and contrary to law.

The circuit court, in ruling that OSGC did not have a vested right to develop the facility, fundamentally misunderstood the nature of the vested rights doctrine. The court suggested that OSGC's vested right was dependent on spending money on the project and that the issue was really "one of damage." R. 24 at 55, 78. However, under well-established principles of Wisconsin law, the basis for OSGC's vested right to develop the facility lies not in the costs that OSGC reasonably incurred, but in the permits that the City, after thorough consideration of the project, voluntarily issued.

The key permit in the vested rights analysis is the building permit. The circuit court suggested, incorrectly, that the City did not have a choice "but to issue the building permit"; the City's counsel agreed, stating that "[t]hey did issue a building permit because at that time they hadn't made a decision that there was a reason not to." R. 24 at 75. These statements are flatly wrong. At the time the building permit was issued, on August 3, 2011, there had already been several well-attended public hearings and meetings, all of them in the City of Green Bay, as part of the federal and state environmental review. The potential environmental impacts including air emissions were thoroughly discussed and vetted at these meetings.

Even if the City claims (implausibly) that it issued the CUP on March 1 thinking that the facility would produce no emissions, the City cannot possibly make the same claim on August 3, when it issued the building permit. At that point,

everyone knew, beyond any doubt, that the facility would produce emissions and had a detailed list of those projected emissions, and everyone knew that the facility would have exhaust stacks. Yet no one at the City—not Council members, not Plan Commission members, not staff—ever raised a question about the conformity of the project with the CUP.[10] To the contrary, the City issued the building permit allowing the project to proceed.

The record indisputably shows that the City had information about emissions when it issued the CUP and even more detailed information about emissions when it issued the building permit. Under these circumstances, OSGC had a vested right to proceed with the project. Thus, because the Council's

[10] The City's building code provides that the Building Inspector shall issue building permits "[i]f the application, plans, and specifications conform to the requirements of this chapter and to all other laws or ordinances applicable thereto[.]" Green Bay Municipal Code § 15.05(8)(a). Plainly, the City had the authority to reject the building permit if it believed that the CUP was invalid.

rescission of the Permit deprived OSGC of a vested right to develop the facility, it acted contrary to law and beyond its jurisdiction, and its decision must be reversed.

II. THE COMMON COUNCIL ACTED ARBITRARILY AND WITHOUT SUBSTANTIAL EVIDENCE.

Plainly, under the *Bettendorf* rule and the vested rights doctrine, the City did not have the legal authority to rescind the CUP. But even if it had had such authority, there was still no basis for its decision. A municipality must base permitting decision on "substantial evidence." *Sills v. Walworth Cnty. Land Mgmt. Comm.*, 2002 WI App 111, ¶ 11, 254 Wis. 2d 538, 648 N.W.2d 878. "Substantial evidence is evidence that is relevant, credible, probative and of a quantum upon which a reasonable fact finder could base a conclusion." *Cornwell Personnel Assocs., Ltd. v. LIRC*, 175 Wis. 2d 537, 544, 499 N.W.2d 705 (Ct. App. 1993). "[S]ubstantial evidence is more than a 'mere scintilla' of evidence and more than 'conjecture and speculation.'" *Gehin v.*

Wis. Group Ins. Bd., 2005 WI 16, ¶ 48, 278 Wis. 2d 111, 692 N.W.2d 572.

Moreover, municipal permitting decisions must be based on reasoned judgment, not arbitrary and unreasonable exercises of political will. *Ottman*, 2011 WI 18, ¶ 35. A proper exercise of discretion "contemplates a reasoning process based on the facts of record 'and a conclusion based on a logical rationale founded upon proper legal standards.'" *Von Arx v. Schwarz*, 185 Wis. 2d 645, 656, 517 N.W.2d 540 (Ct. App. 1994) (quoting *Van Ermen v. DHSS*, 84 Wis. 2d 57, 65, 267 N.W.2d 17 (1978)). Nothing of the sort happened here. Rather, the City's decision to ignore the finding of the Plan Commission and revoke the CUP lacked any basis in evidence and was arbitrary and unreasonable. It must be reversed.

A. OSGC Clearly Informed the City that the Facility Would Produce Emissions That Would Be Subject to DNR Approval.

The record plainly reveals that, contrary to the City's claim, OSGC did not misrepresent the nature of the facility. The circuit court's conclusion that OSGC made misrepresentations is based on a complete misunderstanding of how the facility is designed to operate. The circuit court made the same fundamental mistake the City Council did: treating the unsupported and inaccurate assertions of the opposition groups as the "substantial evidence" needed to rescind the permit, while ignoring the great bulk of the record that disproves those assertions.

The crux of the City's position is that it thought, based on OSGC's representations about the project, that the facility would produce zero emissions. Even on its face, that position is difficult to credit. After all, this was a facility that was designed to produce electricity using generators that burn gaseous fuel

and therefore must release exhaust. Considering only the nature of the facility, then, the City cannot seriously claim that the Council, in March 2011, thought that such a facility would have zero emissions. Moreover, once one actually reviews the statements that OSGC and others made about emissions during the permitting process, the City's position shifts from implausible to completely untenable.

OSGC's statements and discussions regarding emissions during the CUP application process included the following:

- In the written CUP application package, OSGC noted that DNR would need to issue an air permit before construction could begin, and that "application and review of this permit will likely need to address air quality impacts . . . as well as emissions of hazardous air toxic compounds . . ." R. 25 at 25. It also noted that the Facility would need to report actual air emissions to the DNR on

an annual basis, and that DNR would maintain oversight and enforcement responsibility over the Facility's operations. *Id.*

- Also in the written CUP application package, OSGC included a 50-page section titled "Emissions," which provided detailed information on potential air emissions from similar technologies. R. 25 at 26-76.
- At the February 21, 2011 Plan Commission meeting, OSGC's presentation included the statement that the facility would "meet or exceed" federal standards for safety, emissions, and pollutants. R. 26, Audio CD 1 at 21:50. An engineer working for OSGC also stated that the facility's emissions would be "acceptable" and would comply with "EPA/DNR standards."[11] *Id.* at 47:20.

[11] This same engineer's statement that there would not be any chemicals because they would be "scrubbed out" has been repeatedly trumpeted by the project's opponents as a misrepresentation. In the context of his entire exchange with the Plan Commission, however, his message is clear: the

- At the March 1, 2011 Common Council meeting, OSGC's presentation again included the statement that the facility would "meet or exceed" federal standards for safety, emissions, and pollutants. R. 26, Video 1 at 1:11:00.
- Also at the March 1, 2011 Common Council meeting, an OSGC representative stated plainly that "[a]ny emissions that come off the generator . . . will be subject to WDNR and EPA approval. So we just want to make that clear for the record." *Id.* at 1:14:53.
- Also at the March 1, 2011 Common Council meeting, a Council member pointed out that the facility would have

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emissions from the facility will be acceptable according to state and federal environmental standards. He said during the same exchange: "the emissions that will be going out will be acceptable" and "under EPA/DNR standards." R. 26, Audio CD 1 at 47:20; R. 25 at 164. The engineer also specifically noted that there would be dioxin emissions. R. 26, Audio CD 1 at 43:55; R. 25 at 164. Moreover, the commissioner with whom this exchange occurred (Alderman Wiezbiskie) concluded that he had not been misled and that there had been no misrepresentation. R. 955. As a member of the Council, he voted to uphold the CUP, telling his fellow council members: "We were not duped." R. 26, Video 2 at 20:50.

generators that would produce exhaust; OSGC agreed with this observation. *Id.* at 1:32:18.

- Also at the March 1, 2011 Common Council meeting, a member of the public with professional experience in air emissions spoke extensively about his research into potential emissions from the proposed Facility. *Id.* at 1:46:00. He noted that emissions from gasification facilities are generally more favorable than traditional combustion, and that emissions from this facility would likely be very small in comparison to nearby Pulliam coal-fired power plant. *Id.*.

Thus, OSGC was abundantly clear in its presentations to the City that there would be air emissions from the facility. Indeed, the circuit court recognized as much, correctly noting that OSGC had stated to the Council that "[t]here are emissions from the system. All emissions will be subject to WDNR and

EPA approval." R. 24 at 88. In light of this record, the City's claim that it thought it was approving a facility with no emissions simply cannot be true.

Yet the circuit court still somehow concluded that OSGC made a misrepresentation with respect to emissions—in particular with the statement that there are "no emissions during the baking process." R. 24 at 89. The circuit court explained that it was "satisfied that that may have been a misrepresentation." But this was not, in fact, a misrepresentation, because the "baking process"—the pyrolysis process that converts the municipal solid waste into gas—takes place in an enclosed chamber and produces no emissions. R. 25 at 231-32, 374-75. In ruling to the contrary, the circuit court simply failed to understand the difference between the pyrolysis/baking process

(which does not have emissions), and the electrical generation process, which does produce emissions.[12]

In sum, the City's purported reason for rescinding the CUP—that OSGC told it there would be no emissions—is not supported by substantial evidence. The other supposed misrepresentations—that the facility would have "no stacks" and would be a "closed system"—are simply variations on the "emissions" theme. Any alleged concern with statements about stacks or closed systems is, at root, a concern over emissions (stacks are only relevant because of what comes out of the stacks; and whether a system is open or closed is only relevant because of what might come out the system).

Nevertheless, to the extent that statements about stacks or closed systems have any independent relevance, there is no substantial evidence to support the City's determination (or the

[12] OSGC's counsel also took care to point out this distinction to the circuit court during oral argument. R. 24 at 90.

circuit court's determination) that they were misrepresentations. OSGC's consistent message during the CUP application process was that the facility would not have "stacks *like those associated with coal-fired power plants*." *E.g.*, R. 26, Audio CD 1 at 22:10 (emphasis added). From any perspective, this is a true statement. The building will be 32 feet tall, R. 25 at 206, and the principal "stacks" (which will emit the exhaust from the generators and will contain pollution control monitoring devices) will be 35 feet above ground level, R. 25 at 342. Thus, the "stacks" will protrude only a few feet above the roof of the structure—hardly the massive towers that one finds on, for example, the nearby Pulliam coal-fired power plant.

Moreover, the fact that OSGC submitted an early rendering of the facility that did not show these minor stacks (which are, in essence, exhaust tailpipes for the generators), is a non-issue. At the time of OSGC's application, the stack

configuration had not yet been developed; it was developed later as part of the DNR air permit process. R. 25 at 286-327. At the Plan Commission hearing on October 3, the City's Planning Director explained that "it's not unusual for the staff and the Plan Commission to make a decision on a conditional use permit before we have all the fine details of the project . . . [, and] after the C.U.P. is approved, that's when they typically will go out and hire their architects, do the design work, meet with the DNR in this case, meet with the EPA, DOE, whoever they need to meet with." R. 25 at 892-893. In sum, the statements regarding stacks do not provide any basis whatsoever, let alone substantial evidence, to find misrepresentation.

Likewise, the allegation that OSGC misrepresented that the facility would be a "closed" or "closed loop" system is entirely unfounded. On repeated occasions, OSGC did explain that the pyrolysis gasification process itself is a "closed" system

that does not allow any oxygen to enter. *E.g.,* R. 25 at 153 ("Solid wastes will be heated to temperatures ranging between 800 to 1,200 degrees in the closed loop gasification process."). In fact, DOE also used the word "closed" to describe the pyrolysis units. R. 25 at 374, 401.

But that is entirely different than saying that the entire facility would be a "closed" system. OSGC never said that, and no one from the City realistically understood that to be the case. The circuit court's ruling to the contrary—like its ruling with respect to the "no emissions" statement—is based on a fundamental failure to recognize the difference between the pyrolysis gasification process (which is closed to the atmosphere) and the electrical generation process (which is not). R. 24 at 89-90.

B. The City Arbitrarily Ignored the Unanimous Finding of the Plan Commission that There Was No Misrepresentation.

The body that the City selected to conduct the investigation and hold a public hearing regarding the CUP was the Plan Commission. To the extent the City felt compelled to address the unfounded allegations of the opposition groups at all, the Plan Commission was an appropriate choice of forum. The Plan Commission was the body that had considered the project in the most detail during the original permitting process, and under the City's ordinances, it is the body specifically designed to investigate and consider land use and zoning questions. The Plan Commission proceeding was publicly noticed, resulting in hundreds of pages of documents and hours of verbal commentary submitted by both proponents and opponents of the project. The hearing culminated in a unanimous decision from all five members of the Commission, who explained their decision at length. Their finding was

unequivocal: the City had had sufficient information when it first considered the CUP, and there had been no misrepresentation of the project. R. 26 at 955.

Two weeks later, the Council, without any independent investigation or inquiry, simply ignored the finding of the Plan Commission and voted to rescind the CUP. None of the Council members who voted to rescind the permit attempted to explain or distinguish the finding of the Plan Commission; they simply pretended that it never happened. If any action by a municipality can be characterized as "arbitrary," it is setting up a process in order to answer a particular question, and then, when the answer does not turn out a particular way, simply ignoring the process.

The circuit court, confronted with the Plan Commission's findings and the Council's subsequent rejection of those findings, simply threw up its hands, explaining: "I think what

happened in this case is two organizations processing very similar pieces of information came to different conclusions." R. 24 at 80. But that is not at all what happened. Only the Plan Commission conducted a publicly noticed, structured hearing dedicated to investigating the alleged misrepresentations. Only the Plan Commission heard all of the relevant testimony. Only the Plan Commission considered the extensive written submissions of the interested parties. And only the Plan Commission explained its conclusions in a reasoned way. On this record, the circuit court's statement that "the Plan[] Commission . . . had no authority to do anything" is perplexing. R. at 80. The Plan Commission had the authority to determine if OSGC had misrepresented the project because the City itself decided to set it up that way.

The record of the subsequent Council meeting makes clear that the Council members considered very little information

before reaching their decision. They were provided only with a 24-page excerpt from the transcript of the Plan Commission hearing—the portion of the hearing in which the Commission explained its finding that there was no misrepresentation. R. 26, Video 2, Part 1 at 50:30; 1:31:30. With only the unanimous findings of the Plan Commission before it, it is evident that the Council's decision to revoke the permit was not a "reasoning process based on the facts of record." *Von Arx,* 185 Wis. 2d at 656. Simply put, the Council's revocation of the OSGC permit represented arbitrary political will and not considered judgment. This Court should reverse it.

CONCLUSION

The City's revocation of the CUP represents the sort of arbitrary action that discourages investment for the future. For this reason, and for the others stated in this brief, OSGC asks this Court to reverse the judgment of the circuit court and to reverse the City's October 16, 2012 decision to rescind the CUP.

Dated this 28th day of May, 2013.

GODFREY & KAHN, S.C.

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CERTIFICATIONS

1. Form and Length: I hereby certify that this Brief of Plaintiffs-Appellants and accompanying Appendix conforms to the rule contained in § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this Brief, exclusive of tables, signatures and certifications, is 8,605 words.

2. Electronic Filing: I hereby certify that I have submitted an electronic copy of this Brief, which complies with the requirements of § 809.19(12).

I further certify that the text of the electronic copy of this Brief is identical to the text of the paper copy of this document.

A copy of this certificate has been served with the paper copies of this Brief filed with the Court and served on all opposing parties.

3. Contents and Confidentiality of Appendix: I hereby certify that file with this Brief, either as a separate

document or as part of this Brief, is an Appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under § 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the Appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of

juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

By:_____
Matthew T. Kemp

CERTIFICATE OF SERVICE

I certify that I filed the Brief and Appendix of Plaintiffs-Appellants in the above-captioned appeal with the Clerk of the Wisconsin Supreme Court by FedEx and served a copy on counsel of record this 28th day of May, 2013 by first class mail.

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