WISCONSIN COURT OF APPEALS
DITRICT 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

RESPONSE BRIEF OF DEFENDANT-RESPONDENT, CITY OF GREEN BAY

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the Defendant-Respondent, City of Green Bay ("City"), had the authority to void a conditional use permit ("CUP") issued to Plaintiff-Appellant, Oneida Seven Generations Corporation ("OSGC")[1], when inaccurate and misleading statements were made by OSGC during the CUP approval process.

Answered by the Circuit Court: Yes.

2. Whether the City's decision to void the CUP issued to OSGC was arbitrary and not based on substantial evidence.

Answered by the Circuit Court: No.

[1] Green Bay Renewable Energy, LLC is also named as a Plaintiff-Appellant.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The primary issue before the Court is whether a municipality has the authority to void a CUP when inaccurate and misleading statements were made by the applicant during the CUP approval process. On this issue, the parties' briefs discuss and develop the theories and legal authorities such that the City does not believe that oral argument is necessary. Likewise, the secondary issue before the Court, whether the City's decision to void the CUP issued to OSGC was arbitrary and not based on substantial evidence, involves solely questions of fact and the fact findings are clearly supported by sufficient evidence thereby rendering oral argument unnecessary.

With respect to publication, the Court's decision will likely clarify whether a municipality has the authority to void a CUP when inaccurate and misleading statements were made by the applicant during the CUP approval process and therefore publication is suggested.

INTRODUCTION

The fundamental issue before this Court is whether the City had the authority to void the CUP issued to OSGC. Because the record contains ample evidence that inaccurate and misleading statements were made by OSGC during the CUP application process, the City believes it acted within its lawful authority in voiding the CUP. For example, the architectural rendering submitted with OSGC's application for the CUP showed a building with no exhaust stacks for emissions. In addition, at public hearings before both the Plan Commission and Common Council, OSGC repeatedly stated that the solid waste disposal facility ("Facility") that it proposed to construct would be a closed loop system, that the Facility emissions would contain no hazardous materials, and that the "char" by-product of the Facility would contain no hazardous substances and could even be used for organic farming. None of these statements turned out to be accurate.

Instead, the Facility actually was originally designed to have 10 stacks and chimneys, as high as 60 feet above ground (30 feet above the

building)[2], and to have toxic chemical residues in the char and have hazardous air pollutants in its emissions. Additionally, OSGC represented that the proposed Facility's technology was proven, when in reality the Facility would have been the first commercial, permitted pyrolysis gasification facility for municipal solid waste in the world.

While OSGC spends a considerable amount of effort to point to instances in the record where one could glean information that might address these inaccuracies, there is no disputing the fact that these misleading statements were made. Based on the undisputed evidence, the City had the right to void the CUP and the Circuit Court's decision affirming the City's decision should be affirmed.

STATEMENT OF THE CASE

On February 4, 2011, OSGC submitted an application for a CUP to operate a solid waste disposal facility at 1230 Hurlbut Street in the City of Green Bay. (R.25, 1-152.) The application materials indicated that the Facility would use municipal solid waste to generate electricity. (R.25, 153-54.) The architectural rendering of the Facility showed a building with

[2] While the purported final design of the Facility was changed to have one large exhaust stack that would comply with the City's 35 foot height limitation in the zoning district where the Facility is located, this modification does not change the fact that stacks were a part of the plan despite repeated statements to the contrary.

no rooftop exhaust stacks. (R.25, 18, 21-23.) OSGC's application materials also included materials purporting to show that the "pyrolytic" process that would be used to "bake" the solid waste was a proven technology. (R.25, 27-76, 106-17, 121-52.)

On February 21, 2011, the City's Plan Commission met to discuss the CUP application. (R.25, 157-68; R.26, AUDIO 1.) Staff provided the Plan Commission with a report recommending approval of the CUP application subject to a number of conditions. (R.25, 156-57.) Kevin Cornelius, CEO of OSGC, and Pete King, the Project Manager, gave a presentation at the meeting regarding the proposed Facility. (R.25, 160; R.26, AUDIO 1 at 18:27-23:20.) Additionally, Plan Commission members asked a number of questions of Mr. Cornelius and Mr. King regarding the Facility and its proposed operations. (R.25, 160-65; R.26, AUDIO 1 at 23:20-48:49.)

In response to a question from the Plan Commission regarding whether hazardous materials would be left over when the gasification process is complete, the minutes indicate that Mr. Cornelius stated as follows:

> Mr. Cornelius stated there is ***no hazardous material***. The system is ***closed*** so there is no oxygen. Once it is

> baked all the gas is taken off by a "cherry scrubber"[3] ***so it takes away any kind of harmful toxins*** that might be in the gas and the rest is burned as natural gas. Anything that is left over will run back through the system. ***The ash that comes out can be dumped in a landfill or mixed as a road base***.

(R.25, 160-61; R.26, AUDIO 1 at 23:20-24:37) (emphasis supplied.)

In response to a question from the Plan Commission regarding whether any other local communities use this technology, the minutes indicate that Mr. Cornelius stated as follows:

> In the state of Wisconsin, [this] would probably be the first one using this technology. There are other gasification systems in other areas. A lot of industries use that system. This is just one version.

(R.25, 162; R.26, AUDIO 1 at 33:12-33:39.)

In response to a request for clarification from the Plan Commission regarding the activities to be carried out at the proposed Facility, the minutes indicate that Mr. Cornelius stated as follows:

> Mr. Cornelius stated the heat is generated from a natural gas burner that runs on product gas. The system does have to be started up by propane or natural gas. Once you get rolling, you're on syngas. He added ***there are no smoke stacks, no oxygen, and no ash***. There is carbon and ash which actually could have been tested ***and go right into organic farming***. There are no fallout zones. There are some dioxins but no PCB's. This all goes into slag in here.

(R.25, 163-64; R.26, AUDIO 1 at 42:27-44:20) (emphasis supplied.)

[3] The correct terminology is venturi scrubbers.

In response to a question from the Plan Commission about certain emissions from other facilities that were referenced in the CUP application such as hydrogen chloride, nitrogen oxide, sulfur dioxide, mercury, and dioxins, the minutes indicate that Mr. Cornelius stated as follows:

> Mr. Cornelius stated ***this is all taken out in the process***. ***It's all scrubbed out.*** A lot of this stuff is destroyed when it goes through the energy process at the end.
>
> ***
>
> K. Cornelius stated from 2002-2009 there was a study done in this area and regarding municipal waste and in that time period they could not find a lot of these things. But in these reports it is stating other sources are possible ***but in this plant there will be none***. It will always be under the DNR standards.
>
> ***
>
> K. Cornelius stated the emissions that will be going out will be acceptable and ***there will not be any chemicals***.

(R.25, 164; R.26, AUDIO 1 at 44:34-45:35, 47:18-48:49) (emphasis supplied.) No members of the public testified in opposition to the proposed CUP.

After the Plan Commission's questions were addressed by Mr. Cornelius and Mr. King, a motion was made to approve the CUP application subject to a number of conditions:

> a. Compliance with all other regulations of the Green Bay Municipal Code not covered under the Conditional Use Permit, including the City

building code, building permits, standard site plan review and approval.

b. All Federal and State regulations and standards related to the proposed use including air and water quality.

c. The front facade, facing the street, shall be faced with all masonry or a mix with stucco as required under Section 13-905.

d. Service areas shall be screened with an approved combination of berms, landscaping, and walls or fences architecturally complementary to the principal building per Section 13-905(d) Site Design Criteria.

e. All ground and/or roof mounted mechanicals shall be screened per Section 13-1815.

f. In the event the state determines the proposed use is a tax exempt recycling and/or solid waste facility as provided under State statute, the property owner voluntarily agrees to a payment in lieu of taxes for the City portion of the taxes.

g. The land is not eligible to be put into Trust with the Bureau of Indian Affairs however the property owner agrees that it shall at no time attempt to put the land into Trust.

(R.25, 166.)

The motion carried unanimously. (*Id.*)

On March 1, 2011, the Common Council met to consider the Plan Commission's recommendation to grant the CUP. (R.25, 169-97; R.26, VIDEO 1 at 57:13-2:08:32.) According to the minutes from the Common Council's meeting, Mr. Cornelius and Mr. King gave a presentation on the

following: how the pyrolytic process works, energy created, safety standards, emissions, approval process, job creation, and reduction in landfill benefits. (R.25, 172; R.26, VIDEO 1 at 1:10:25-1:19:52.) OSGC's power point presentation highlighted the fact that the technology is not new or experimental and that the Facility would not have any smokestacks such as those associated with coal-fired power plants. (R.26, VIDEO 1 at 1:15:32-1:16:20, 1:18:07-1:18:39.) Mr. Cornelius also answered questions from the Common Council. (R.25, 172; R.26, VIDEO 1 at 1:19:52-1:34:35.)

Once again, there was no citizen opposition to the proposed Facility. The Common Council then voted to approve the CUP as recommended by the Plan Commission. (R.25, 172, 198-99.) Subsequently, the City approved the Site Plan and issued a building permit for the Facility. (R.25, 200-06.)

As the Facility was going through the Wisconsin Department of Natural Resources ("WDNR") and Department of Energy ("DOE") approval process during the summer of 2011, a groundswell of opposition

by residents and environmental groups developed.[4] While the WDNR and DOE both determined that there would be no significant impacts from the Facility, (R.25, 231-60, 367-71,) the local opposition started to assemble the evidence showing that OSGC's application materials and statements at the public hearings regarding the CUP materially misrepresented critical facts about the Facility.

The local opposition shared this evidence with members of the Common Council. Thereafter, at the April 10, 2012 Common Council meeting, Alderman Deneys requested that the City reconsider "the zoning and permits granted to [OSGC] for a gasification plant." (R.25, 208.) At that meeting, the City Attorney gave an oral presentation regarding OSGC's proposed Facility, and thereafter, a number of residents in the neighborhood and environmental groups presented the Common Council with their concerns about the Facility and about misrepresentations they believed were made by OSGC at the previous public hearings. (R.25, 209-

[4] That the Facility received approvals by the DNR and DOE is not relevant to the issue before this Court. Both permitted and conditional uses must comply with state and federal environmental laws and it is well-settled that a local government has substantial discretion to deny approval of a conditional use even if it will, as it must, comply with environmental laws. In fact, OSGC's facility was denied approval for an on-reservation site by the Oneida Tribe and also by the Village of Ashwaubenon for a site in that Village before being proposed for the property in the City.

10.) The Common Council ultimately voted 9 to 2 to hold a public hearing to further investigate the CUP that was approved. (R.25, 210.)

On September 17 and 24, 2012, the City published notice of a public hearing to review the CUP, which was scheduled for October 3, 2012. (R.26, 956-57.) The notice provided as follows:

> A hearing will be held by the Green Bay Plan Commission on Wednesday, October 3, 2012 at 5:30pm in Room 604, City Hall, 100 N. Jefferson Street, Green Bay, WI to determine if the information submitted and presented to the Plan Commission was adequate for it to make an informed decision whether or not to advance the Seven Generations Conditional Use Permit (CUP) that was recommended. The record will consist of all documents and information before the Plan Commission members at the time that it made its recommendation. No less than seven (7) days prior to the hearing, persons interested in the matter may submit their written comments and questions for consideration by the Plan Commission. Written and oral comments shall be limited to the issue presented. As usual, the Plan Commission will ask anyone wishing to speak to sign up at the beginning of the hearing and when their turn comes, not to repeat points made by previous speakers. All questions and comments will be directed to the Commission. Direct questions between opponents and proponents of the project will not be allowed. After hearing the public comments, the Plan Commission will deliberate on the issue with possible action.

(R.26, 956.)

In advance of the public hearing, OSGC submitted its written comments to the Plan Commission. (R.25, 221-568; R.26, 569-70).

Additionally, numerous members of the public also submitted comments to the Plan Commission. (R.26, 571-712.) For example, a letter dated September 26, 2012 submitted by Midwest Environmental Advocates ("MEA"), on behalf of Clean Water Action Council of Northeast Wisconsin ("CWAC"), stated in relevant part as follows:

> This project came to you for action on the CUP after an extensive public relations campaign that described the facility as a completely self-contained, non-polluting facility that would not release toxic or hazardous substances into the environment, and that would not have smokestacks or chimneys. That is how it was presented to this Commission before it approved the CUP on February 21, 2011.
>
> After the CUP was issued, CWAC learned that the DNR air permit for the facility identified 10 stacks and vents to be built atop the facility building, three of them 60 feet tall, and that DNR identified the following as emissions from the facility: arsenic, cadmium, chromium, fluoride, lead, mercury, copper, nickel, iron, tin, selenium, antimony, zinc, phosphorus, siloxanes, potassium, hydrogen sulfide, dioxin/furans, and formaldehyde. The air permit identified dioxins, cadmium, lead, mercury, hydrogen chloride, nitrogen oxides, sulfur dioxide, and particulate matter as air emissions from the facility that needed to be monitored for and kept within prescribed limits. As a result, CWAC requested the Green Bay Common Council, which had approved the CUP following this Commission's recommendation, to consider whether the CUP should be revoked or rescinded as a result of having been obtained on the basis of fraud or misrepresentation.

(R.26, 584.)

The MEA letter went on to identify what it believed to be some of the specific misrepresentations that were made by OSGC:

(1) The Facility's proponents represented that the Facility was a closed loop system, with no hazardous materials, no stacks, no odors, and no emissions. Indeed, the CUP application and site drawings submitted to the Plan Commission showed no stacks, vents, or chimneys, nor any indication that there were toxic air pollutants that would have to be released high into the sky in order to disperse them widely enough to meet air quality requirements. None of these statements were true. (R.26, 585-86.)

(2) When questions were raised about information in the applicant's reports that showed emissions from waste to energy plants, the representation was made that in the proposed Facility, there would not be any chemical emissions. (R.26, 586.)

(3) Contrary to the representations of a closed loop system of no chemicals, of no emissions, of no stacks or chimneys, and of chemical-free, organic-quality solid waste residues, the Facility actually was designed to have 10 stacks and chimneys, as high as 60 feet above ground, and to have toxic chemical residues in its solid waste and to release a list of hazardous air pollutants into the City's air. (R.26, 587.)

In conclusion, the letter stated as follows:

> Stacks were going to be needed as part of the facility – contrary to the representations. They are needed to disperse hazardous air pollutants that Mr. Cornelius denied would even be emitted from the facility. Contrary to his representations to this Commission that the solid waste residue would be of organic quality and that there would be "no chemicals," the solid waste residue will contain toxic substances, and there will be hazardous chemical air emissions from the facility. Those are all material facts for the Commission in considering whether an exception from the City's ordinances satisfies the public health, safety and general welfare.
>
> A permit that has been obtained by fraud or misrepresentation is voidable, and can be undone by the municipality once the misrepresentation comes to light. The applicant had a duty to provide accurate information to the Commission when seeking its conditional use permit. It is apparent that it withheld the truth and made affirmative misstatements about the facility to the Plan [ ] Commission, several of them in direct response to questions by public officials.

(R.26, 588.)

Another written comment submitted to the Plan Commission by a member of the public identified similar misrepresentations made by OSGC:

(1) Stacks were omitted from the renderings OSGC submitted to the City with its application. (R.26, 648-51.)

(2) OSGC represented that there would be no emissions because they would be "scrubbed out" when in reality the Facility would release substantial emissions. (R.26, 665-70.)

(3) OSGC represented that the Facility's technology was proven when in reality the Facility would have been the first commercial, permitted pyrolysis gasification facility for municipal solid waste in the world. (R.26, 674-76.)

On October 3, 2012, the Plan Commission held a public hearing where a number of members of the public spoke about the misrepresentations made by OSGC during the CUP application process. (R.26, 716-947.) The Plan Commission, however, concluded that the information initially submitted and presented to it was adequate for it to make an informed decision whether or not to recommend granting the CUP. (R.26, 883-904, 955.)

On October 16, 2012, the Common Council held a meeting to address, among other things, the Plan Commission's October 3, 2012 vote. (R.26, 952-57; R.26, VIDEO 2 at Part 1 38:38-Part 2 39:33.) The Common Council voted 8 to 4 to open the meeting to public comment. (R.26, 956; R.26, VIDEO 2 at Part 1 45:43-1:00:27.) Thereafter, a number of members of the public spoke in support of declaring the CUP void. (R.26, 956-57; R.26, VIDEO 2 at Part 1 1:00:27-Part 2 14:54.) After public comments, a vote was taken on a motion to adopt the report of the Plan Commission.

(R.26, 957; R.26, VIDEO 2 at Part 2 15:20-37:41.) The motion failed by a vote of 5 to 7. (R.26, 957; R.26, VIDEO 2 at Part 2 37:08-37:41.) Subsequently, a vote was taken on a motion to declare the CUP void based upon the following conclusions:

(1) Kevin Cornelius, CEO of OSGC, made untruthful statements before City governmental bodies while seeking the CUP. These false statements were made in response to questions or concerns related to the public safety and health aspect of the Project and the Project's impact upon the City's environment.

(2) Mr. Cornelius' statements were plain spoken, contained no equivocation, left no impression of doubt or uncertainty, and his words were intended to influence the actions of the governmental bodies he was addressing.

(3) Mr. Cornelius knew his statements were false. Mr. Cornelius was not a new or uninformed member of OSGC; he was the CEO and had been involved throughout the Project's development; therefore, he was knowledgeable about the pilot work, the process and the equipment, the materials that would be used, the nature of the by-products and chemical releases. Mr. Cornelius understood his role he accepted as spokesperson

for OSGC for the Project and had every opportunity to say "I don't know" or "I can't answer that" when questions were put to him.

(4) The subject matter of the questions put to Mr. Cornelius was of very high importance. More specifically, on the subject of emissions, the documents submitted by OSGC in applying for the CUP referenced other plants using a variety of technologies, equipment and feedstock. Commissioners were rightfully interested in this Project and not what happened at other Projects. When Mr. Cornelius was asked about emissions, chemicals, and hazardous materials for this Project, Mr. Cornelius provided false information. (R.26, VIDEO 2 at Part 1 40:44-43:52, Part 2 37:41-39:33.)

The motion passed by a vote of 7 to 5. (R.26, 957; R.26, VIDEO 2 at Part 2 37:41-39:33.)

On November 1, 2012, the City Attorney sent a letter to OSGC confirming that the Common Council voted to void the CUP issued for the Facility at 1230 Hurlbut Street. (R.26, 950-51.) The letter stated that the Common Council's action to void the CUP was based upon the conclusions stated at the Common Council's meeting on October 16, 2012. (*Id*.)

On November 14, 2012, OSGC filed this action for certiorari review. (R.1-2.) On December 3, 2012, the City filed its Answer and Affirmative Defenses. (R.4.)

On December 21, 2012, OSGC filed its Brief in Support of Plaintiffs' Request for Certiorari Review. (R.12.) OSGC advanced a number of arguments in its brief. First, OSGC argued that the Common Council acted contrary to law by rescinding the CUP based on an implied condition that the Facility have zero emissions, citing to *Bettendorf v. St. Croix County Bd. of Adjustment*, 224 Wis. 2d 735, 591 N.W.2d 916 (Ct. App. 1999) in support of this argument. Second, OSCG argued that the Common Council acted contrary to law by depriving OSGC of its vested right to develop the Facility. And finally, OSCG argued that the Common Council's decision to rescind the CUP was arbitrary, unreasonable, and was not based on substantial evidence.

On January 9, 2013, a hearing was held, at which time the Circuit Court, the Honorable Marc A. Hammer presiding, affirmed the Common Council's decision to rescind the CUP. (R.24.) In affirming the Common Council's decision, Judge Hammer stated in relevant part as follows:

> [OSGC] argues that the City did not proceed on a correct theory of law that the City is requiring the imposition of

implied conditions to the Conditional Use Permit or additional conditions in the CUP. They relied on *Bettendorf*. I have reviewed it. 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.

I believe the City is clearly proceeding on a theory of misrepresentation and/or failure to disclose material fact and/or a lack of understanding, a failure to have a mutual meeting of the minds regarding the subject matter of the CUP.

As to whether or not the City deprived [OSGC] of a vested right to develop the facility, the City would argue that there is no vested right if the CUP was acquired by misrepresentation or fraud. That's not exactly what the *Jelinski* case says, I would agree with that, however, the *Jelinski* case is instructive and it's informative. I think it is disingenuous to suggest that if the CUP was acquired by a fraudulent – strike that. If the CUP was acquired by a misrepresentation of material fact or a failure to disclose or a failure of meeting of the mind, that it's difficult to conclude that any party would have a vested right to develop the land.

***

[OSGC] argues that the Common Council's action to rescind the CUP was arbitrary, oppressive, unreasonable, represented the [C]ouncil's will and not its judgment.

Further, [OSGC] argues that the City's action was not based on substantial evidence. Substantial evidence is evidence that is relevant, credible, probative and enough for a reasonable fact finder to base a motion.

Based upon my review of the record, I am satisfied that there was substantial evidence that the City had when it took its action to rescind the CUP. I'm satisfied based on my review that at the meeting upon which the [Common] Council approved the CUP, Mr. Cornelius made representations. I placed some of those representations on the record and they are in the videotape.

> I'm satisfied that those representations simply were not correct. I'm satisfied that the City relied on them in part and/or in whole but certainly as part of the basis to approve the CUP.
>
> I'm satisfied that the CUP contained conditions which required the City of Green Bay to initially ensure and to continue to ensure appropriate air quality for its citizens and appropriate safeties or assurances that the land adjacent to and surrounding the facility would not be harmed by its production.
>
> I don't think that the City was accurately and fully appraised. If anything, there is inconsistency, but to be frank, I think there was a misrepresentation.
>
> ***
>
> I'm satisfied that the Plan[ ] Commission initially and the Common Council subsequently were left to believe there would not be the type and nature of the emissions that ultimately were identified and approved by DNR. And I base that simply on the comments that I placed on this record, the representations made in PowerPoint, the representations made by representatives of [OSGC] to the Plan[] Commission initially and to the [Common] Council repeatedly.
>
> I'm not satisfied that the Common Council adequately considered public health and welfare by requiring [OSGC] to meet federal and state standards. They did require that. That was part of the CUP. But in addition, as part of the CUP, the City has the responsibility to require compliance on all zoning ordinances, and the zoning ordinances are crystal clear that the City is responsible to ensure safe air quality and land quality for the citizens of the City of Green Bay. And that is not abdicated by the fact that the ordinances reference in addition that any operation has to comply with state and federal regulatory agencies.

(R.24, 77:4-79:19, 81:9-82:6.)

On this final point, the Circuit Court stated the following earlier in the hearing:

> The zoning ordinance for the City of Green Bay addresses Conditional Use permits. It says that it may be recommended by the Plan Commission with reasonable consideration of the following, and then it lists things that the Plan[] Commission must consider before they can recommend anything to the Common Council.
>
> And the first thing it requires that the Plan[] Commission consider is the establishment, maintenance, or operation of the conditional use that will not be detrimental to or endanger the public health, safety or general welfare. That's the first requirement that the Council – that the Commission has to assess.
>
> I have reviewed on multiple occasions the audio from the first meeting of the Plan[] Commission. I can't find in that audio, and it's part of the record, any discussion regarding the public health, safety or general welfare of the City of Green Bay in issuing that permit.
>
> ***
>
> And, quite frankly, I would be surprised if it were there, Mr. Wilson, because Mr. Cornelius indicated that there would be no hazardous material produced by this facility, and if there's not hazardous material produced by the facility, there wouldn't be concern regarding endangerment of public health, safety or general welfare. I wouldn't worry about that if I were a member of a body when someone says there's nothing hazardous to produce.

(R.24, 16:19-18:23.)

Judge Hammer identified a number of specific inaccurate representations that OSGC made, including but not limited to the following:

(1) The technology is not new and experimental and the same system is operational in California. (R.24, 88:5-9.)

(2) There will be no smokestacks. (R.24, 88:19-22, 90:1-6, 91:6-9.)

(3) There are no hazardous materials; The system is a closed system so there is no oxygen; Once it is baked, all of the gas is taken off by a scrubber; Any kind of harmful toxins that might be in the gas is burned as natural gas. (R.24, 90:18-23, 91:3-6, 91:21-25.)

(4) The ash that comes out can be dumped in a landfill or mixed with cement as a road base. (R.24, 90:24-91:1, 91:9-11.)

A written Order was entered on January 24, 2013 and on March 11, 2013, OSCG filed a timely Notice of Appeal. (R.19-20.)

STANDARD OF REVIEW

When conducting statutory certiorari judicial review, an appellate court reviews the circuit court's ruling *de novo*. *Kapischke v. County of Walworth*, 226 Wis. 2d 320, 327, 595 N.W.2d 42 (Ct. App. 1999). A court's review in a certiorari action is based on the record that was in front of the municipality and is limited to the following: (1) whether the municipality kept within its jurisdiction; (2) whether it proceeded on a

correct theory of law; (3) whether its action was arbitrary, oppressive, or unreasonable and represented its will and not its judgment; and (4) whether the evidence was such that it might reasonably make the order or determination in question. *Ottman v. Town of Primrose*, 2011 WI 18, ¶ 35, 332 Wis. 2d 3, 796 N.W.2d 411.

"Wisconsin courts have repeatedly stated that on certiorari review, there is a presumption of correctness and validity to a municipality's decision." *Id*. at ¶ 48; *Lamar Cent. Outdoor, Inc. v. Bd. of Zoning Appeals of City of Milwaukee*, 2005 WI 117, ¶ 16, 284 Wis. 2d 1, 700 N.W.2d 87; *State ex rel. Ziervogel v. Washington Cnty. Bd. of Adjustment*, 2004 WI 23, ¶ 13, 269 Wis. 2d 549, 676 N.W.2d 401; *Herman v. County of Walworth*, 2005 WI App 185, ¶ 9, 286 Wis. 2d 449, 703 N.W.2d 720. In other words, "[o]n certiorari review, the petitioner bears the burden to overcome the presumption of correctness." *Ottman*, 2011 WI 18, ¶ 50.

Here, the record contains ample evidence of inaccurate and misleading statements by OSGC during the CUP application process and, as such, the City had every right to void the CUP. Accordingly, the Circuit Court's decision should be affirmed.

ARGUMENT

I. THIS COURT SHOULD AFFIRM THE CITY'S DECISION TO VOID THE CUP BECAUSE THE CITY ACTED WITHIN ITS JURISDICTION AND PROCEEDED ON A CORRECT THEORY OF LAW.

A. A Municipality Has Substantial Discretion To Grant Or Deny A Conditional Use Permit Application.

In *Town of Rhine v. Bizzell*, 2008 WI 76, 311 Wis. 2d 1, 751 N.W.2d 780, the Wisconsin Supreme Court discussed at length the concept of a conditional use:

> In general, zoning ordinances provide landowners with permitted uses, which allow a landowner to use his or her land, in said manner, as of right…. In addition to permitted uses, ordinances may also provide for conditional uses by virtue of a special use or conditional use permit. A conditional use, however, is different than a permitted use. While a permitted use is as of right, a conditional use does not provide that certainty with respect to land use. ***Conditional uses are for those particular uses that a community recognizes as desirable or necessary but which the community will sanction only in a controlled manner.***
>
> A conditional use permit allows a property owner to put his property to a use which the ordinance expressly permits when certain conditions or standards have been met. The degree of specificity of these standards may vary from ordinance to ordinance.
>
> ***
>
> Allowing for conditional uses, in addition to permitted uses as of right, makes sense when one considers the purpose of the conditional use permit. First, conditional uses are flexibility devices, which are designed to cope with situations where a particular use, although not inherently inconsistent with the use classification of a

> particular zone, may well create special problems and hazards if allowed to develop and locate as a matter of right in a particular zone.
>
> Second, conditional use permits are appropriate for certain uses, considered by the local legislative body to be essential or desirable for the welfare of the community ..., but not at every or any location ... or without conditions being imposed... Thus, those uses subject to a conditional use permit are necessary to the community, but because they often represent uses that may be problematic, ***their development is best governed more closely rather than as of right.***

Id. at ¶¶ 19-24 (internal citations and quotations omitted) (emphasis supplied).

The City's Ordinances define a conditional use as a use "which, because of its unique characteristics, cannot be properly classified in a particular district or districts without consideration in each case of the impact of [the] use[] upon neighboring land and of the public need for the particular use at the particular location." §§ 13-302, 13-205(a), City of Green Bay Municipal Code ("Code"). In order to obtain a CUP, a property owner or resident wishing to receive a conditional use permit must file an application with the Planning Department. § 13-205(c)(1), Code. After review and consideration of the application by the Plan Commission, the Plan Commission must forward its recommendation to the Common Council.[5] § 13-205(c)(3), Code. For each requested conditional use, the

[5] As is evident from the Ordinances, the Plan Commission's recommendation is not binding on the Common Council. It is simply that – a recommendation. Likewise, the

Plan Commission must report to the Common Council its findings and recommendations. § 13-205(d), Code. Conditional use approval may be recommended by the Plan Commission with reasonable consideration of the following:

> (1) The establishment, maintenance, or operation of the conditional use will not be detrimental to or endanger the public health, safety, or general welfare;
>
> (2) The establishment of the conditional use will not impede the normal and orderly development and improvement of the surrounding property for uses permitted in the district;
>
> (3) The conditional use, its exterior architectural design, and functional plan of any proposed structure will not be injurious to the use of other property in the immediate vicinity nor substantially diminish or impair property values within the surrounding neighborhood;
>
> (4) Adequate utilities, access roads, drainage, and/or necessary facilities have been or are being provided;
>
> (5) Adequate measures have been or will be taken to provide ingress and egress and so designed as to minimize traffic congestion;
>
> (6) The conditional use shall have adequate parking facilities as specified in Chapter 13-1700; and
>
> (7) The conditional use shall, in all other respects, conform to the applicable regulations of the district in which it is located and all other applicable City ordinances.

§ 13-205(e), Code.

Plan Commission's recommendation to the Common Council that the information initially submitted and presented by OSGC was adequate for it to make an informed decision whether or not to recommend granting the CUP was only a recommendation.

The bottom line is that a municipality's decision to grant a conditional use permit is discretionary. *Roberts v. Manitowoc County Bd. of Adjustment*, 2006 WI App 169, ¶ 10, 295 Wis. 2d 522, 721 N.W.2d 499. As such, courts hesitate to interfere with such decisions and are not permitted to substitute their discretion for that of the municipality. *Id*. (citing *Snyder v. Waukesha County Zoning Bd. of Adjustment*, 74 Wis. 2d 468, 476, 247 N.W.2d 98 (1976)). Instead, courts accord a municipality's decision a presumption of correctness and the party challenging that decision has the burden of overcoming that presumption. *Id*. (citing *Miswald v. Waukesha County Bd. of Adjustment*, 202 Wis. 2d 401, 411, 550 N.W.2d 434 (Ct. App.1996)).

This general understanding of the CUP process is important because what it means is that the City was well within its jurisdiction to grant or deny the initial CUP application. In other words, based on the information originally provided to it by OSGC, the City had the authority to deny the CUP for any number of reasons, including for example, a concern that the project might be detrimental to health or the general welfare, or might otherwise be injurious to the use of other property. Had the City originally denied the CUP, OSGC would have been hard-pressed to argue that the

City lacked such authority. Instead, relying on the information submitted by OSGC, the Plan Commission recommended approval and the City exercised its discretion and approved the CUP. The question now is whether the City had similar authority to void its approval of the CUP because it later determined that material information about the proposed Facility submitted by OSGC was inaccurate or misleading.

B. OSGC Does Not Have A Vested Right To Insist Upon The Validity Of The CUP Because The CUP Was Secured By Misrepresentation.

OSGC argues that the City had no such authority to void or rescind the CUP because, by that time, OSGC had a vested right to the permit. This argument ignores the following legal principle: "The rights of a permittee are protected only if the permit has been secured and the expenses have been incurred in good faith, ***and there has been no fraud or deceit or other fault on the part of the applicant***." 101A C.J.S. Zoning & Land Planning § 291 (emphasis supplied). Indeed, the Circuit Court got it right when it stated the following:

> If the CUP was acquired by a misrepresentation of material fact or a failure to disclose or a failure of meeting of the mind, it's difficult to conclude that any party would have a vested right to develop the land.

(R.24, 78:1-5.)

The legal principle mentioned above and the Circuit Court's conclusion that OSGC did not have a vested right to the CUP are consistent with Wisconsin law. In *Jelinski v. Eggers*, 34 Wis. 2d 85, 148 N.W.2d 750 (1967), the court held that where a party "did not act in good faith in obtaining the permit," he or she does not possess a vested right to insist upon the validity of the permit. *Id*. at 93. The lack of good faith in *Jelinski* involved the defendant falsely representing to the building inspector that the chairman of the board of appeals did not object to the defendant's plan to build a garage with only a two-foot setback, as opposed to a five-foot setback as required by the ordinance.

In support of its decision affirming the lower court's order that the defendant remove his garage to comply with the set-back requirements, the court quoted from *City of Milwaukee v. Leavitt*, 31 Wis. 2d 72, 142 N.W.2d 169 (1966):

> Zoning ordinances are enacted for the benefit and welfare of the citizens of a municipality. Issuance of an occupancy or building permit which violates such an ordinance not only is illegal per se, but is injurious to the interests of property owners and residents of the neighborhood adversely affected by the violation. ***Thus when the city acts to revoke such an illegal permit it is exercising its police power to enforce the zoning ordinance for the protection of all citizens who are being injured by the violation, and not to protect some proprietary interest of the city.*** These citizens have a right to rely upon city officials not having acted in

> violation of the ordinance, ***and, when such officials do so act, their acts should not afford a basis for estopping the city from later enforcing the ordinance. This is true regardless of whether or not the holder of the illegal permit has incurred expenditures in reliance thereon.***

Jelinski, 34 Wis. 2d at 93 (emphasis supplied). While the facts in *Jelinski* differ from the facts of this case, the same rationale applies. A permit obtained after submitting false or misleading information creates no rights for the permit holder and may be revoked by the municipality.

A recent case out of Minnesota is on-point. In *Edling v. Insanti County*, 2006 WL 1806397 (Minn. Ct. App. July 3, 2006) (unpublished), the Minnesota Court of Appeals affirmed a municipality's decision to rescind a CUP because of misrepresentations made by the applicant during the conditional use application process. The plaintiff in that case, Rick Lee Edling, submitted an application to the Insanti County Planning Commission where he indicated that he was seeking a mining and excavating conditional use permit for a 114 acre property. *Id*. at *1. Submitted with the application was a drawing detailing a proposed pond excavation. *Id*. After the application was filed, a hydrologist with the Minnesota Department of Natural Resources ("MDNR") submitted a letter to the Planning Commission requesting that the conditional use permit be tabled pending further review by the MDNR as to the need for an

Environmental Assessment Worksheet ("EAW"). *Id*. The Plan Commission tabled its review of the application accordingly. *Id*.

After further review by the MDNR, the Planning Commission addressed the application. *Id*. The minutes from the meeting stated as follows:

> Mr. Edling would like to dig ponds on his property and mine the black dirt. This request was at the last meeting and Mike Mueller, MDNR, had some concerns with the depth of the ponds and the total area to be used. Mike Mueller and Joe Basta [Insanti County Zoning Administrator] met out on the site with Mr. Edling and reviewed the project. The ponds will be under 10' deep and Mr. Edling will be using less than 40 acres total. After the site visit, Mike Mueller does not have a problem with this request.

Id.

The Planning Commission approved the application subject to the conditions that there would not be any filling of wetlands and that all soil would go on the high ground. *Id*. Subsequently, Edling entered into a 5-year lease and gravel-mining agreement with a mining company, which granted the company the exclusive right to mine and remove gravel from the property. *Id*.

After mining began, neighbors complained about the noise and dust coming from the property. *Id*. The municipality sent the applicant a letter stating that the CUP was granted to mine black dirt from the ponds and that

an additional CUP would be required to mine any gravel, crush or have it leave the site. *Id*. After several officials visited the site and observed a large-scale mining operation, including large mining pits with depths exceeding 35 feet and several piles of sand and gravel more than 50 feet high, the municipality concluded that there were numerous problems with the way in which the property was being used. *Id*. at *2. The County Attorney's office sent the applicant a letter noting that the applicant had assured the Planning Commission that he was going to dig a few ponds and that they would be no more than 10 feet deep. *Id*. The letter further stated that the CUP was granted with "the paucity of conditions ***due to [the applicant's] representations to the planning commission***" during the application process. *Id*. (Emphasis supplied). A public hearing was scheduled regarding the revocation of the CUP. *Id*. At the conclusion of the hearing, the County Board of Commissioners voted to revoke the CUP. *Id*. The applicant then sought certiorari review.

On review, the court noted that its inquiry was limited to questioning whether the board had jurisdiction, whether the proceedings were fair and regular, and whether the board's decision was unreasonable, oppressive, arbitrary, fraudulent, without evidentiary support, or based on an incorrect

theory of law. *Id*. The court also noted that it gives great deference to a county's land-use decisions and will overturn them only when there is no rational basis for them. *Id*. The court ultimately concluded that the county's decision to revoke the CUP was not arbitrary:

> The county granted the CUP based on Edling's representations that he would be mining black dirt from ponds that would not exceed a depth of 10 feet. Absent these representations, the county and the MDNR would have required an EAW and different conditions likely would have been placed on the CUP, as evidenced by Mueller's initial response to the CUP application. Mueller's assessment of the situation changed because Edling represented that the ponds would not be deeper than 10 feet and because Edling scaled the proposed operation down from 114 acres to 40 acres. Relying on Edling's representations, Mueller informed the county that the revised proposal did not require an EAW.

Id. at *3.

That a permit may be rescinded or declared void when the permit application contains misrepresentations of fact or when the applicant makes such misrepresentations during the application process is not open to dispute. *See also Lauer v. Pierce County*, 267 P.3d 988 (Wash. 2011) (holding that the defendants' rights did not vest because their building application contained knowing misrepresentations of material fact). Moreover, this conclusion is good policy. Why should an applicant be

granted a vested right in a permit that was obtained through misrepresentation? This point was addressed by the court in *Lauer:*

> By way of comparison, this court has previously required governments to act in good faith and not subvert the legitimate efforts of a developer to vest his or her rights. The requirement that a building application be "valid" assures that the good faith requirement is not only one way.

267 P.3d at 997.

Based on *Jelinski*, *Edling*, and *Lauer*, the City had every right to void the CUP when it was presented with evidence that false and misleading statements were made by OSGC during the application process. And, the record in this case supports a finding that such false and misleading statements were in fact made by OSGC:

OSGC Statement: OSGC represented that the Facility was a closed loop system, with no hazardous materials, stacks, odors, and emissions. The CUP application and site drawings submitted to the Plan Commission showed no stacks, vents, or chimneys, nor any indication that there were toxic air pollutants that would have to be released high into the sky in order to disperse them widely enough to meet air quality requirements. (R.25, 21-23.) When questions were raised about information in the CUP application that showed emissions from waste to energy plants, the

representation was made that there would not be any chemical emissions in the proposed Facility. (R.25, 160-61, 163-64; R.26, AUDIO 1 at 23:20-24:37, 42:27-44:20, 44:34-45:35, 47:18-48:49).

Fact: Contrary to the representations of a closed loop system, with no chemicals, emissions, stacks or chimneys, and of chemical-free, organic-quality solid waste residues, the air permit for the Facility identified 10 stacks and vents to be built atop the facility building, three of them 60 feet above ground, and the Facility was planned to have toxic chemical residues in its solid waste and to release a list of hazardous air pollutants into the City's air. (R.26, 589-617.) The DNR identified the following as emissions from the facility: arsenic, cadmium, chromium, fluoride, lead, mercury, copper, nickel, iron, tin, selenium, antimony, zinc, phosphorus, siloxanes, potassium, hydrogen sulfide, dioxin/furans, and formaldehyde. (R.26, 618-27.) The air permit also identified dioxins, cadmium, lead, mercury, hydrogen chloride, nitrogen oxides, sulfur dioxide, and particulate matter as air emissions from the Facility that needed to be monitored for and kept within prescribed limits. (R.26, 589-617.)

OSGC Statement: OSGC represented that the Facility's technology was proven. (R.25, 106-117, 162; R.26, AUDIO 1 at 33:12-39.)

Fact: The Facility would have been the first commercial, permitted pyrolysis gasification facility for municipal solid waste in the world. (R.26, 647-76.)

Based upon the Common Council's explicit findings that OSGC misrepresented the nature of the proposed Facility, OSGC does not possess a vested right to insist upon the validity of the CUP and the City's decision to declare the CUP void should be affirmed.[6]

C. The City Did Not Rescind The CUP Based On An Implied, Unwritten Condition And OSGC'S Reliance on *Bettendorf* is Misplaced.

OSGC attempts to avoid the consequence of its misstatements by arguing that the City improperly declared the CUP void based on an unwritten, implied condition that the Facility would have zero air

[6] OSGC asserts that the Circuit Court misunderstood the vested rights doctrine. According to OSGC, the Circuit Court suggested that OSGC's vested right was dependent on OSGC spending money on the project. Brief of Plaintiffs-Appellants at 39. OSGC incorrectly characterizes the Circuit Court's statements. The Circuit Court properly understood that simply incurring expenses is not sufficient to create a vested right. The Circuit Court recognized that while it rejected OSGC's vested rights argument, it was not deciding whether OSGC might have a separate claim for damages against the City. (R.24, 55:8-13, 78:6-14.)

OSGC also argues that the facts in *Atkinson v. Piper*, 181 Wis. 519, 195 N.W. 544 (1923) and *Klefisch v. Wisconsin Telephone Co.*, 181 Wis. 519, 195 N.W.544 (1923) are "squarely in line" with the facts in this case and support its argument that OSGC obtained a vested right to develop the Facility. These cases are not on point as there were no allegations in these cases that the permit applications contained misrepresentations of fact or that the developers made such misrepresentations during the application process.

emissions. In support, OSGC cites to *Bettendorf*, 224 Wis. 2d 735. As the Circuit Court concluded, however, OSGC's reliance on *Bettendorf* is misplaced as the facts in *Bettendorf* are not sufficiently analogous to the facts before this Court.

In *Bettendorf*, Mr. and Mrs. Bettendorf were granted a CUP to operate a truck repair shop on a parcel of property. 224 Wis. 2d at 737. After the permit was granted, the municipality learned that the Bettendorfs were using an adjoining parcel of property, which was not subject to the CUP and which was zoned agriculture/residential, to park semi-trailers and other vehicles. *Id*. at 738. When the municipality learned of the Bettendorfs' use of the adjoining property, instead of revoking the CUP, the municipality added a condition to the permit that previously had no conditions. *Id*. The condition provided that the Bettendorfs had to construct a fence around its commercially zoned property or face immediate revocation. *Id*.

Instead of complying with the condition, the Bettendorfs filed a petition for certiorari, arguing that the municipality had no authority to add a condition to its CUP and revoke the permit if the condition was not complied with. *Id*. The municipality argued that the CUP prohibited the

Bettendorfs from using the adjoining property as part of its truck repair operations. According to the municipality, "there are implied conditions set forth in every conditional use permit; one is that the permitted use be kept within the boundary of the property subject to the permit." *Id*. at 740. The circuit court agreed with the municipality and affirmed its decision.

This Court reversed the circuit court's decision, refusing to read into the permit conditions that the municipality discussed but chose not to incorporate. *Id*. at 741. According to this Court, the county's appropriate remedy was to commence an enforcement action in connection with the adjoining property. *Id*. at 741-42.

As the above discussion illustrates, the facts in the present case are substantially different than the facts in *Bettendorf*. First, unlike *Bettendorf*, this case has nothing to do with the use of adjoining property. Moreover, the City did not declare OSGC's CUP void because OSGC failed to comply with some unwritten, implied condition. Rather, the City declared the CUP void because it concluded that OSGC made false and misleading statements during the application process. This is precisely the conclusion that the Circuit Court reached:

> [OSGC] argues that the City did not proceed on a correct theory of law [-] that the City is requiring the imposition

> of implied conditions to the Conditional Use Permit or additional conditions in the CUP. They relied on *Bettendorf*. I have reviewed it. 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.
>
> I believe the City is clearly proceeding on a theory of misrepresentation and/or failure to disclose material fact and/or a lack of understanding, a failure to have a mutual meeting of the minds regarding the subject matter of the CUP.

(R.24, 77:4-17.)

The Circuit Court's conclusion that the City was within its jurisdiction and proceeded on a correct theory of law when it declared the CUP void should be affirmed.

II. CONTRARY TO OSCG'S ALLEGATIONS, THE COMMON COUNCIL'S ACTIONS WERE BASED ON SUBSTANTIAL EVIDENCE AND WERE NOT ARBITRARY.

A. The Record Contains Substantial Evidence Of Inaccurate And Misleading Statements By OSGC During The CUP Application Process And, As Such, the Common Council Had Every Right To Void The CUP.

The Circuit Court also properly rejected OSGC's argument that the Common Council's decision to rescind the CUP was made without substantial evidence. "Substantial evidence means credible, relevant and probative evidence upon which reasonable persons could rely to reach a decision." *Sills v. Walworth County Land Mgmt. Comm.*, 2002 WI App 111, ¶ 11, 254 Wis. 2d 538, 648 N.W.2d 878. Substantial evidence has

been defined as "that quantity and quality of evidence which a reasonable [person] could accept as adequate to support a conclusion." *Gehin v. Wisconsin Group, Ins. Bd.*, 2005 WI 16, ¶ 48, 278 Wis. 2d 111, 692 N.W.2d 572.

The "substantial evidence test" is a "significant hurdle" to overcome. *Sills*, 2002 WI App 111, ¶ 10. A court must uphold a municipality's decision "so long as it is supported by substantial evidence, even if there is also substantial evidence to support the opposite conclusion." *Id*., ¶ 11.

In its brief, OSGC does identify a number of instances where it referred to emissions during the CUP application process and, accordingly argues that the City ignored substantial evidence. However, the weight to be accorded to the evidence lies within the discretion of the municipality rather than the courts. *Id*. And, OSGC fails to reconcile its statements with the overwhelming number of other contradictory and inaccurate statements made by its representatives before the Plan Commission and Common Council. For example:

In response to a question from the Plan Commission regarding whether hazardous materials would be left over when the gasification

process is complete, the minutes indicate that Mr. Cornelius stated as follows:

> Mr. Cornelius stated there is ***no hazardous material***. The system is ***closed*** so there is no oxygen. Once it is baked all the gas is taken off by a "cherry scrubber" ***so it takes away any kind of harmful toxins*** that might be in the gas and the rest is burned as natural gas. Anything that is left over will run back through the system. ***The ash that comes out can be dumped in a landfill or mixed as a road base***.

(R. 25, 160-61; R.26, AUDIO 1 at 23:20-24:37) (emphasis supplied.)

In response to a question from the Plan Commission regarding whether any other local communities use this technology, the minutes indicate that Mr. Cornelius stated as follows:

> In the state of Wisconsin, [this] would probably be the first one using this technology. There are other gasification systems in other areas. A lot of industries use that system. This is just one version.

(R.25, 162; R.26, AUDIO 1 at 33:12-39.)

In response to a request for clarification from the Plan Commission regarding the activities to be carried out at the proposed Facility, the minutes indicate that Mr. Cornelius stated as follows:

> Mr. Cornelius stated the heat is generated from a natural gas burner that runs on product gas. The system does have to be started up by propane or natural gas. Once you get rolling, you're on syngas. He added ***there are no smoke stacks, no oxygen, and no ash***. There is carbon and ash which actually could have been tested ***and go right into organic farming***. There are no fallout

> zones. There are some dioxins but no PCB's. This all goes into slag in here.

(R. 25, 163-64; R.26, AUDIO 1 at 42:27-44:20) (emphasis supplied.)

In response to a question from the Plan Commission about certain emissions from other facilities that were referenced in the CUP application such as hydrogen chloride, nitrogen oxide, sulfur dioxide, mercury, and dioxins, the minutes indicate that Mr. Cornelius stated as follows:

> Mr. Cornelius stated ***this is all taken out in the process***. ***It's all scrubbed out.*** A lot of this stuff is destroyed when it goes through the energy process at the end.
>
> ***
>
> K. Cornelius stated from 2002-2009 there was a study done in this area and regarding municipal waste and in that time period they could not find a lot of these things. But in these reports it is stating other sources are possible ***but in this plant there will be none***. It will always be under the DNR standards.
>
> ***
>
> K. Cornelius stated the emissions that will be going out will be acceptable and ***there will not be any chemicals***.

(R.25, 164; R.26, AUDIO 1 at 44:34-45:35, 47:18-48:49) (emphasis supplied.)

The Circuit Court emphasized the fact that the Common Council's decision to rescind the CUP was the result of affirmative statements made by OSGC regarding the impact upon the City's environment and health of its residents that the Common Council determined were untruthful. The

Circuit Court correctly noted that OSGC could have responded to a number of questions from the Plan Commission and the Common Council indicating that it did not have the answers to their questions yet. But, that is not what OSGC did. Rather, OSGC made untrue representations regarding the lack of emissions from the Facility, similar technology being used in other locations, the lack of stacks on the Facility, etc. In this regard, the Circuit Court stated as follows:

> That's not what was told [to] the Plan[] Commission. They were not told we don't know. We know there's going to be emissions, but we can't tell you what those emissions will be and how it impacts the community until we refer this, until you grant us the CUP, and we can take the next step and refer it over to DNR or WDNR or DOE. They didn't say that.

(R.24, 26:16-23.)

Here, the record contains ample evidence of inaccurate and misleading statements by OSGC during the CUP application process. In deciding to void the CUP, the City obviously determined that such evidence was substantial and it was well within its discretion to do so.

OSGC refers to the evidence submitted by those in favor of rescinding the CUP as "unsupported." Brief of Plaintiffs-Appellants at 44. On this point, the Circuit Court was correct when it stated the following:

> And I'm not satisfied that the City has an absolute obligation to substantiate all statements made by project

> opponents and to what extent those statements have to be substantiated. I'm not satisfied that's the legal burden that the state carries – or the City carries. The City carries the burden to act based on reasoned judgment and not its will, and those individuals provided the City of Green Bay with the basis to exercise their reasoned judgment.

(R.24, 83:6-14.)

Accordingly, under the substantial evidence test, the Common Council was entitled to accept the evidence submitted by those members of the public that showed how OSCG misrepresented the nature of the Facility over the counter-evidence submitted by OSGC. The record is clear that all this information was before the Common Council. Because there is substantial evidence to support the Common Council's decision, its decision should not be disturbed.

B. The Plan Commission's Recommendation Was Not Binding Upon the Common Council And The Fact That The Two Bodies Reached Different Conclusions Does Not Render The Common Council's Decision Arbitrary.

OSGC's substantial evidence argument rests largely on the fact that the Plan Commission concluded that the information initially submitted and presented to it was adequate for it to make an informed decision whether or not to recommend granting the CUP. However, as OSGC's counsel even

conceded before the Circuit Court, the Plan Commission's recommendation was just that – a recommendation:

> THE COURT: I'm assuming, Mr. Wilson, you would agree it doesn't matter what the Plan[] Commission recommended to the Common Council at least on the second instance in which the Council determined that the CUP should be revoked? They have no authority to bind the Council, their recommendations, Council can take, not take, do what they wish with.
>
> MR. WILSON: That's certainly true, Your Honor. The recommendation of the Plan[] Commission is just that, a recommendation. It's ultimately Common Council's decision.

(R.24, 14:7-17.)

On this point, the Circuit Court correctly concluded that the Common Council was free to reach a decision adopting the Plan Commission's recommendation or rejecting it:

> The Plan[] Commission has no authority but to recommend the issuance of a Conditional Use Permit. That is where their authority ends.
>
> The fact that the City of Green Bay Common Council referred the matter back to the Plan[] Commission for further evaluation or analysis in no way limits or compromises the ability and really the obligation of the City of Green Bay to independently assess the information it has, the information it had, and make a reasoned decision based on its judgment and not its will.

(R.24, 79:24-80:10.)

OSGC argues that the Common Council's actions were arbitrary because it rendered a decision contrary to the Plan Commission's recommendation.[7] Brief of Plaintiffs-Appellants at 55. Apparently, OSGC misunderstands the definition of arbitrary. An action is arbitrary if it is "unreasonable or does not have a rational basis." *Olson v. Rothwell*, 28 Wis. 2d 233, 239, 137 N.W.2d 86 (1965). "Arbitrary action is the result of an unconsidered, willful and irrational choice of conduct and not the result of the 'winnowing and sifting' process." *Id.* In *Westring v. James*, 71 Wis. 2d 462, 238 N.W.2d 695 (1976), the arbitrariness standard was described as follows:

> It is, in general, the most flagrant violations of the scope of delegated discretionary powers which are described as capricious. In common usage, the term refers to a whimsical, unreasoning departure from established norms or standards; it describes action which is mercurial, unstable, inconstant, or fickle. In legal usage,

[7] OSGC asserts that the Common Council was 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." Brief of Plaintiffs-Appellants at 57. (Emphasis supplied). OSGC also asserts that the record of the . . . Council meeting makes clear that the Council members considered very little information before reaching their decision." *Id.* at 56-57. To be clear, all the record reflects is that the Council was provided with a 24-page transcript of the Plan Commission's deliberations. The record does not identify the universe of information that was made available to the Common Council. Indeed, it is possible that all of the members of the Common Council reviewed every page of the written comments submitted to the Plan Commission prior to the October 3, 2012 Plan Commission meeting. The record does reflect that at least some of the members of the Common Council personally attended the October 3, 2012 Plan Commission meeting. (R.26, VIDEO 2, Part 1 at 58:20-1:00.)

> a decision is capricious if it is so unreasonable as to shock the sense of justice and indicate lack of fair and careful consideration.

Id. at 476-77 (quoting *Scharping v. Johnson*, 32 Wis. 2d 383, 390, 145 N.W.2d 691 (1966) (internal quotations omitted).

A conclusion is not arbitrary simply because a reasonable person reviewing the same evidence might reach a different conclusion. This is precisely what the court stated in *Westring*:

> Again, while the conclusion that was drawn from the evidence by the director may have been one with which other reasonable persons might disagree, it cannot be said that it constituted willful or irrational choice of conduct.

71 Wis. 2d at 477.

OSGC maintains that the Circuit Court "simply threw up its hands," when it concluded that the Common Council's decision rejecting the Plan Commission's recommendation was not arbitrary. Brief of Plaintiffs-Appellants at 55-56. The Circuit Court's statement that OSGC points to in support of this argument is the following:

> . . . and, quite frankly, I think what happened in this case is two organizations processing very similar pieces of information came to different conclusions. That doesn't mean either of them is right.
>
> What it means, quite frankly, is that two individuals can come up with differing conclusions and both of them are

> equally plausible, and the question is whether or not it's reasonable? It's based on the substantial evidence.
>
> I'm satisfied the City's action was based on substantial evidence. I'm not bound by the Plan [ ] Commission's findings and neither is the City of Green Bay Common Council.

(R.24, 80:15-81:2.)

Ironically, the Circuit Court's statements essentially mirror the language quoted above from the *Westring* decision, where the court held that a decision is not arbitrary simply because reasonable minds could reach different conclusions based on the same evidence. Thus, the Common Council's decision to reject the Plan Commission's recommendation should be upheld.

CONCLUSION

For the foregoing reasons, the City respectfully requests that the Court affirm the decision of the Circuit Court, which affirmed the Common Council's decision to declare OSGC's CUP void.

Dated this 15th day of July, 2013.

FRIEBERT, FINERTY & ST. JOHN, S.C.

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FORM AND LENGTH CERTIFICATON PURSUANT TO WIS. STAT. § 809.19(8)(d)

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 10,582 words.

Dated this 15th day of July, 2013.

_____
Ted A. Warpinski
State Bar No. 1018812

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date. 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.

Dated this 15th day of July, 2013.

_____

Ted A. Warpinski
State Bar No. 1018812

CERTIFICATE OF MAILING

I hereby certify that on this 15th day of July, 2013, the original and nine (9) copies of the Response Brief of Defendant-Respondent, City of Green Bay were served upon the Wisconsin Court of Appeals via first-class mail. Three (3) copies of the same were served upon counsel of record via first-class mail.

Dated this 15th day of July, 2013.

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Ted A. Warpinski
State Bar No. 1018812