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

REPLY BRIEF OF PLAINTIFFS-APPELLANTS

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It is not possible to read the record in this case fairly and conclude that, in March 2011, the City of Green Bay thought it was approving a facility that would have no emissions and no stacks. Yet that is what the City Council claimed when, in October 2012, it rescinded the conditional use permit ("CUP") for a waste-to-energy facility properly obtained by Oneida Seven Generations Corporation ("OSGC").

The sum of the City's defense to all of OSGC's claims is to hold up the overheated talking points formulated by the project's opponents after the City already had approved the CUP, label them "facts," and assert that the Council was entitled to rely on them in rescinding the CUP. Implicit in the City's argument is the claim that, once having heard the belated cries of the opposition groups, the Council was then entitled to stick its head in the sand, ignore everything else in the record, and revoke a permit it had already properly approved—a position that this Court should firmly reject.

The City's action was arbitrary and without substantial evidence. Moreover, it illegally rescinded the permit based on an implied, unwritten condition and deprived OSGC of a vested right to develop the facility.

This Court should reverse the City Council's decision and the decision of the Circuit Court, and restore the CUP.

I. The City's Revocation of the Permit Was Arbitrary and Without Substantial Evidence, and its Defense Is Built Entirely on the Unfounded Assertions of the Political Opposition Groups.

In responding to OSGC's argument that the Council acted without substantial evidence, the City offers nothing more than the talking points submitted by the project's opponents. The City makes no attempt to engage the full record, but rather attempts to hide behind the "discretion" afforded to municipal decision-makers, portraying the Council's decision as a matter of weighing and then choosing between competing factual claims. *E.g.*, Resp. Br. at 42 ("The Common Council was entitled to accept the evidence submitted by those members of the public [*i.e.*, the opposition groups] that showed how OSGC misrepresented the nature of the Facility over the counter-evidence submitted by OSGC.").

If that was what the Council had actually done, OSGC would not be in court. But the Council did not actually weigh any competing evidence; rather, it swallowed whole the unsupported accusations of the opposition groups and ignored everything else. That is not how the substantial evidence standard works. 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) . The overblown talking points manufactured by the opposition groups—the "evidence" on which the City relies—are none of these things. Moreover, the substantial evidence test asks "whether, *taking into account all the evidence in the record*, reasonable minds could arrive at the same conclusion" as the Council. *State ex rel. Palleon v. Musolf*, 120 Wis. 2d 545, 549, 356 N.W.2d 487 (1984) (emphasis added internal quote omitted). Thus, contrary to the City's suggestion, it was not entitled to simply accept at face value the arguments of the opposition groups while ignoring the actual evidence.

As demonstrated in OSGC's opening brief, a reasonable mind considering all the evidence in the record could not rationally conclude that OSGC misrepresented the nature of the facility, as the City asserts. The City's position appears to center around four claims: OSGC allegedly misrepresented to the City that (1) there would be no hazardous air emissions; (2) there would be no stacks; (3) the facility was a "closed loop

system"; and (4) the pyrolysis gasification technology was not new or experimental.[1] OSGC already debunked these allegations in its opening brief, and the City fails to respond to OSGC's arguments, other than to trumpet, yet again, the submissions made by the opposition groups. To briefly summarize why none of these allegations is credible:

- **Emissions:** OSGC told the City many times that there would be air emissions, and that those emissions would be subject to DNR approval. Pl. Br. at 44-50. In a single sentence in its brief, the City grudgingly acknowledges this evidence, but then argues that the Council was entitled to disregard it in light of the "overwhelming number of other contradictory and inaccurate statements made by

[1] Even on this appeal, the City has never provided a definitive list of what it considers to be the alleged misrepresentations, instead gesturing vaguely at the arguments formulated by the opposition groups and certain statements made by the circuit court. *E.g.*, Resp. Br. at 9-13, 19-20, 32-34. (The circuit court's statements are not findings of fact that bind this Court, which reviews the administrative record *de novo*, *see Nielsen v. Waukesha Cnty. Bd. of Supervisors*, 178 Wis. 2d 498, 511, 504 N.W.2d 621 (Ct. App. 1993).) This imprecision is directly attributable to the Council's utter failure to explain why it revoked the CUP. The Council asserted only that "OSGC made untruthful statements before City governmental bodies . . . relat[ing] to the public safety and health aspect of the Project and the Project's impact upon the City's environment." Resp. Br. at 14; R. 26 at 951. But nowhere did the Council describe what OSGC actually said (or to whom) that was allegedly "untruthful," or how it determined such statements were "untruthful."

[OSGC's] representatives[.]" Resp. Br. at 38. As it turns out, the "overwhelming number" of supposedly inaccurate statements identified by the City is actually a *single exchange* between a contractor working on behalf of OSGC and a member of the Plan Commission, and that exchange is hardly the evidence of misrepresentation that the City claims it is.[2] Resp. Br. at 38-39. OSGC described this exchange in detail in its opening brief. Pl. Br. at 10-11, 46-47 n.11. The contractor's overall message to the Plan Commission was clear: 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 (*e.g.*, the contractor said the emissions would be "acceptable" and "under EPA/DNR standards"). This description was consistent with OSGC's overall message to the City—repeated many times orally and in writing—that there would be some amount of well-controlled

[2] The City's retelling of this exchange is based entirely on the minutes of the Plan Commission meeting, which, as OSGC pointed out in its opening brief, are not accurate. For example, the speaker during this exchange was a contractor working on behalf of OSGC, *not* OSGC CEO Kevin Cornelius. Pl. Br. at 11 n.2. The City apparently fails to recognize this discrepancy, mechanically reciting the phrase "the minutes indicate that Mr. Cornelius stated . . ." four times in two pages without noting that the minutes are wrong. Resp. Br. at 38-39.

emissions that would present no danger to human health or the environment.[3] Moreover, the commissioner with whom this exchange occurred, Alderman Wiezbiskie, was clear that there had been no misrepresentation. R. 26 at 955, Video 2 at 20:50. The City never gives any reason to doubt Alderman Wiezbiskie's conclusion.

- **Stacks:** OSGC's consistent message to the City was that there would be no stacks *such as those associated with coal-fired power plants*. The City fails to explain why OSGC's statements in this regard were inaccurate. The building will be 32 feet tall, R. 25 at 206, and the principal "stacks" will be 35 feet above ground level. R. 25 at 342. Thus, the "stacks" will protrude barely three feet above the roof of the structure—hardly the massive towers that one finds on power plants. That was the point that OSGC made repeatedly at hearings before the Plan Commission and the Council, and the City utterly fails to acknowledge or respond to this argument. Moreover, the

[3] In its brief, the City adopts the blatant scare tactics of the opposition groups, listing all of the chemicals that were expected to be emitted in trace amounts from the facility. Resp. Br. at 33. These types of emissions are emitted from almost any facility using combustion engines (indeed, many of them are found in automobile exhaust), and they would be emitted from this facility only at very low levels that the DNR determined would *not* present any risk to human health or the environment. *E.g.*, R. 25 at 229-332.

fact that there were no stacks depicted on early renderings of the facility is a non-issue—a controversy manufactured by the opposition groups. At the time the rendering was submitted, 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 own Planning Director explained that "it's not unusual" for plans to develop and evolve after a conditional use permit is issued. R. 26 at 892-893. Similarly, Commissioner Bremer stated, "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." R. 26 at 895. OSGC covered this ground in detail in its opening brief, *see* Pl. Br. at 50-52, but again, the City fails to acknowledge or engage with its argument. In sum, there is no support for the allegation of misrepresentation about stacks.

- **"Closed-Loop" System:** 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, the U.S. Department of Energy also used the word "closed" to describe the pyrolysis units. *E.g.*, 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.

- **Experimental Technology:** OSGC told the City that there were other pyrolysis, gasification, and waste-to-energy facilities operating around the world. This was a true statement, confirmed by the U.S. Department of Energy in its Environmental Assessment, which noted that "[t]he pyrolysis and gasification of MSW [municipal solid waste] is used all over the world . . ." R. 25 at 564. In its brief, the City actually labels the contrary but baseless allegations of the opposition groups as "Facts" (in bold text, no less), claiming that "[t]he Facility would have been the first commercial, permitted

> pyrolysis gasification facility for municipal solid waste in the world." Resp. Br. at 33. The City provides no credible support whatsoever for this supposed "fact"; it cites vaguely to a 30-page section of a document drafted by an opposition group, nothing more. *Id.* This allegation of misrepresentation is nothing more than a fabrication.

Simply put, there is no evidence that OSGC misrepresented anything.

Moreover, it was arbitrary and unreasonable for the Council to completely ignore the Plan Commission's well-reasoned finding that there was no misrepresentation—the culmination of a comprehensive process in which all interested parties were allowed to present information and arguments. The City protests that the Council was not bound by the Plan Commission's findings, which, like the Plan Commission's original recommendation to issue the CUP, were merely advisory. Resp. Br. at 44. But even if, as a general matter, the Council had the authority to disagree with the Plan Commission, there is no doubt that the Council was bound to at least consider the Commission's recommendation and to provide

some reasoned, fact-bound basis for disagreeing with it.[4] *See Von Arx v. Schwarz*, 185 Wis. 2d 645, 656, 517 N.W.2d 540 (Ct. App. 1994) (proper, non-arbitrary decisionmaking requires "a reasoning process based on the facts of record").

Again, the City falls back on the fiction that the Council simply weighed the evidence differently than the Plan Commission. Resp. Br. at 45. When and where that weighing occurred, we are never told. The Council never explained, and the City still has never explained, what the Council apparently discerned in the record that the Commission did not. The City likely has a good reason for this silence: as documented above and in OSGC's opening brief, it is not possible to read this record fairly and conclude that the City thought, based on statements made by OSGC, that it was approving a facility that would have no emissions and no stacks. Thus, the Council's decision to revoke the CUP was arbitrary and without substantial evidence.

[4] On *this* record, there is no way that the Council could have legitimately disagreed with the Plan Commission, unless it accepted uncritically the allegations of the opposition groups and ignored the record.

II. The City Fails to Distinguish its Actions from *Bettendorf*, Which Holds that Conditional Use Permits May Not Be Rescinded Based on Violations of Implied, Unwritten Conditions.

In *Bettendorf v. St. Croix Cnty. Bd. of Adjustment*, 224 Wis. 2d 735, 741, 591 N.W.2d 916, 919 (Ct. App. 1999), this Court held that a county improperly revoked a permit because it thought (but did not say) that the truck repair activities should be limited to one property. Likewise, in this case, the City revoked the CUP because it allegedly thought (but did not say) that there should be no emissions associated with the OSGC facility.

The City's response is simply to deny that it revoked the permit based on an implied condition and to assert that it did so on the basis of the supposed misrepresentations. Not only does this assume that OSGC actually made such misrepresentations (as discussed above, it did not), it begs the *Bettendorf* question. The County in *Bettendorf* could easily have claimed that the permittee had "misrepresented" or "failed to disclose" the extent of the truck repair facility. The point is that, under *Bettendorf*, a material condition on the use of a property must be written into the permit itself; it cannot be left to implication. In other words, it is the burden of the permitting authority to spell out the material conditions and assumptions on which the permit is granted.

There are good reasons for this rule. Written conditions provide certainty to municipalities, permittees, and the public, thereby encouraging development while allowing fair and predictable enforcement of land use regulations. The *Bettendorf* rule applies with special force to conditions that are non-obvious and would place extraordinary limitations on a facility, such as a zero emissions limitation. As explained in OSGC's initial brief, a zero emissions condition would have been astonishing for a facility designed to produce electricity using *gas-burning generators*, which by their very nature must produce exhaust, yet the City did not see fit to include it as a condition of the CUP. Pl. Br. at 35. The City's brief utterly fails to respond to this argument.

III. OSGC had a Vested Right to Develop the Facility by Virtue of the Building Permit Issued by the City.

The City fails to acknowledge, let alone dispute, the key element of OSGC's vested rights argument—that the August 2011 building permit, issued well after the federal and state environmental permitting process was underway, guaranteed OSGC's right to develop the facility. OSGC's brief appropriately focused on the building permit because it is the key document for purposes of the vested rights analysis under Wisconsin law.

See Atkinson v. Piper, 181 Wis. 519, 533-34, 195 N.W. 544 (1923). Yet the City's brief never even mentions the building permit.[5] And the City certainly does not dispute that by the time the City issued the building permit, DNR and DOE had held several well-attended public meetings in the City discussing the emissions and other potential environmental impacts of the facility. Nor does the City dispute that the City could have denied the building permit request if it believed the project was inconsistent with the requirements of the conditional use permit. Indeed, the City raises no arguments at all suggesting that the building permit was not validly issued.

Nor could it plausibly make such arguments; the City itself voluntarily issued the permit in August 2011, knowing full well (as it must have from the beginning) that the facility would produce a small amount

[5] Instead, the City labors to establish the common-sense proposition that a developer has no vested rights in a permit secured by misrepresentation. But this argument assumes that there was misrepresentation; as demonstrated above, there was not. Moreover, the one Wisconsin case cited by the City, *Jelinski v. Eggers*, 34 Wis. 2d 85, 87-88, 148 N.W.2d 750 (1967), does not address the question in this case. In *Jelinski*, a property owner built a garage after obtaining a building permit, but the permit did not authorize him to build the garage where he did, in violation of a local setback requirement. *Id*. In holding that the owner did not have a vested right to keep the garage where it was, the Supreme Court reached the unremarkable conclusion that "a building permit grants no vested rights to unlawful use." 34 Wis. 2d at 93. In contrast, OSGC's intended use of the property is in full compliance with all conditions of the CUP, Green Bay zoning requirements, and state and federal environmental laws.

of emissions that would be controlled and regulated by DNR. Yet a year later, the City announced that it allegedly had thought all along that the facility would be emissions-free, and so rescinded the CUP and effectively voided the building permit. Even if we assume that, despite all evidence to the contrary, the City actually believed this, its action violated the well-established doctrine of vested rights.

CONCLUSION

For these reasons, and those stated in OSGC's opening brief, OSGC respectfully requests that this Court reverse the judgment of the circuit court and reverse the City's October 16, 2012 decision to rescind the CUP.

Dated this 2nd day of August, 2013.

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By: */s/ Matthew T. Kemp*
Matthew T. Kemp

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By: */s/ Matthew T. Kemp*
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