COURT OF APPEALS
DECISION
DATED AND FILED

March 25, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP591 **Cir. Ct. No. 2012CV2263**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

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

PLAINTIFFS-APPELLANTS,

v.

CITY OF GREEN BAY,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Brown County: MARC A. HAMMER, Judge. *Reversed*.

Before Hoover, P.J., Mangerson and Stark, JJ.

¶1 PER CURIAM. Oneida Seven Generations Corporation and Green Bay Renewable Energy, LLC ("Seven Generations") appeal an order affirming on certiorari review the City of Green Bay's decision to revoke a conditional use permit ("CUP"). We conclude the City acted arbitrarily and without substantial evidence of misrepresentation when it revoked the CUP. Accordingly, we reverse.

BACKGROUND

¶2 Oneida Seven Generations is a tribal corporation chartered under the laws of the Oneida Tribe of Wisconsin. Green Bay Renewable Energy is its wholly owned subsidiary. In 2010, Seven Generations discussed with the City potential locations for a waste-to-energy facility. Eventually, the parties identified 1230 Hurlbut Street as a suitable site. The Hurlbut site is zoned general industrial and is bordered by a city yard waste disposal site, a dredge disposal site, and construction companies.

¶3 In February 2011, Seven Generations applied for a CUP to operate a solid waste disposal facility at the Hurlbut location. Seven Generations provided a detailed summary of the project, which was forwarded to the City's Plan Commission. According to the materials, the facility would utilize pyrolysis, described as the "thermal decomposition of organic matter at temperatures sufficient to [vaporize] or gasify organic material in the absence of oxygen …." Seven Generations represented that the facility would convert municipal solid waste and other waste materials to energy by heating them in a sealed chamber with high efficiency, low emissions mono-nitrogen oxide burners. This process converts the materials into a synthetic fuel gas, or syngas, which then goes through a "scrubbing" system and is available for use in a gas turbine or engine generator to produce electricity.

¶4 Seven Generations provided substantial information regarding potential emissions as part of its project summary. In a section entitled "Emissions," Seven Generations included several papers discussing the impact of similar facilities on air quality. One, from the Los Angeles County Department of Public Works, concluded conversion technologies "have been used successfully in other parts of the world" and "can lead to a net reduction in air emissions." Another, from the University of California–Riverside, concluded that "[i]ndependently-verified emissions test results show that thermochemical conversion technologies are able to meet existing local, state, federal, and international emissions limits." The report further concluded, "Today, there are advanced air pollution control strategies and equipment that were not available even ten years ago. It is obvious from the results that emissions control of thermochemical conversion processes is no longer a technical barrier." Seven Generations represented it would need to obtain a pre-construction air permit from the Department of Natural Resources ("DNR"), and would be subject to ongoing oversight.

¶5 Seven Generations also authored a fact sheet about the project. According to this document, the pyrolysis process is "oxygen-starved" and takes place in a closed-loop system. The facility would be subject to, and meet, all DNR, Environmental Protection Agency ("EPA"), and Department of Energy ("DOE") rules and regulations, with continuous monitoring, reporting, and oversight required. The fact sheet states: "Emissions will meet or be better than the standards set by the EPA. There will be no smokestacks such as those associated with coal-fired power plants."

¶6 City staff prepared a report recommending the CUP be approved with conditions, and the Plan Commission took up the recommendation at its February 21, 2011 meeting. Seven Generations chief operating officer Kevin Cornelius presented a pre-recorded slideshow explaining how the facility would be used. During the slideshow, Seven Generations stated pyrolysis technology "is not new, nor is it experimental. It has been utilized throughout the United States and the world in various forms with great success." Seven Generations again assured the Plan Commission the process would "meet or exceed current federal standards for safety, emissions, and pollutants." The slideshow, upon showing an artist's rendering of the completed facility, also assured Plan Commission members there would be "no smokestacks such as those associated with coal-fired power plants."

¶7 Following the presentation, Cornelius, project manager Pete King, and others fielded questions about the facility from Plan Commission members. Most of the questioning concerned the pyrolysis process, which Seven Generations' representatives[1] said would take place in a closed system with no oxygen, produce gas that would be scrubbed for toxins, and would not produce hazardous material. Seven Generations asserted the only byproducts of the gasification process are carbon and ash, and there would be no smokestacks, particulate, or fallout zones. Seven Generations assured the Plan Commission that any emissions would be "acceptable" and "will always be under the EPA/DNR standards."

¶8 The Plan Commission voted to recommend approval of the CUP at the conclusion of the discussion. It conditioned approval on the facility's compliance with all other regulations of the Green Bay Municipal Code and all federal and state regulations, including those governing air and water

quality.

¶9 The Common Council considered the Plan Commission's recommendation at its March 1, 2011 meeting. Seven Generations presented the same pre-recorded slideshow as it had before the Plan Commission. In follow-up remarks, a Seven Generations representative told the Common Council: "Any emissions that come off the generator … will be subject to [DNR] and EPA approval. So we just want to make that clear for the record." When one Council member asked about Seven Generations' "no smokestacks" remark, Seven Generations acknowledged the facility would require exhaust outlets for the generators. The Common Council approved the CUP with largely the same conditions as recommended by the Plan Commission.

¶10 Seven Generations then began securing approval from the state and federal environmental authorities. During this public process, opponents of the project began expressing concern about the facility's environmental impact. Many believed pyrolysis was synonymous with incineration. Both the DNR and DOE responded that pyrolysis was not incineration because of the absence of oxygen. The DNR concluded the facility would not have a significant environmental effect and issued permits and approval in September 2011. The DOE also found no significant impact and concluded that "the area's air quality would remain in compliance with current standards."

¶11 In August 2011, Seven Generations applied for a building permit for the facility, which the City granted.

¶12 Opposition members appeared at the April 10, 2012 Common Council meeting and expressed their continued objections to the Seven Generations project. They asserted Seven Generations had misrepresented the potential environmental impact of the facility when applying for the CUP; specifically, they claimed the facility would have exhaust stacks and produce emissions. The Common Council voted to direct the Plan Commission to hold a hearing to determine whether the CUP had been obtained by misrepresentation. Notice of the hearing was published in late September 2012. The issue was defined as whether "the information submitted and presented to the Plan Commission was adequate for it to make an informed decision whether or not to advance the [CUP] that was

recommended." The public was invited to submit written and oral comments on the issue.

¶13 The Plan Commission hearing was held on October 3, 2012. The hearing lasted several hours, during which members of the public and Seven Generations' representatives were allowed to speak. At the conclusion of the hearing, the Plan Commission unanimously voted to recommend that the CUP stand:

> 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 [Seven Generations] 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 [and] take.

The Plan Commission decision was referred to the Common Council for action.

¶14 The Common Council took up the Plan Commission's recommendation on October 16, 2012. There was a motion to adopt the Plan Commission report, which failed after members of the public were permitted to speak about the project. Then, by a vote of seven to five, the Common Council voted to revoke the CUP based upon unidentified misrepresentations.

¶15 The City notified Seven Generations of its decision by letter on November 1, 2012. The City, in an apparent attempt to tailor its explanation to fit the elements of intentional misrepresentation, *see* ***Kaloti Enters. v. Kellogg Sales Co.***, 2005 WI 111, ¶12, 283 Wis. 2d 555, 699 N.W.2d 205, reached the following conclusions:

> 1. Kevin Cornelius, CEO of [Seven Generations], 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 [Seven Generations]; 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 a spokesperson for [Seven Generations] 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 [Seven Generations] 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.

The City did not identify precisely what information it considered false, nor did it state how it determined the information's falsity. The City then denied Seven Generations' request for a WIS. STAT. ch. 68 administrative appeal, reasoning the prior hearings were consistent with constitutional standards and protections and substantially complied with WIS. STAT. § 68.11.[2]

¶16 Seven Generations filed this certiorari action. The City filed a brief in opposition to Seven Generations' request for review, in which it identified the alleged misrepresentations for the first time. According to the City, Seven Generations had misrepresented at the Plan Commission's February 21, 2011 hearing that the facility would be a closed system with no emissions, smokestacks, or hazardous material, and that the technology was proven. The circuit court agreed, concluding the City's revocation action was not arbitrary and was based on substantial evidence. Seven Generations appeals.[3]

DISCUSSION

¶17 Certiorari is a mechanism by which a court may test the validity of a decision rendered by a municipality. ***Ottman v. Town of Primrose***, 2011 WI 18, ¶34, 332 Wis. 2d 3, 796 N.W.2d 411. Municipal decisions are entitled to a presumption of correctness and validity. ***Sills v. Walworth Cnty. Land Mgmt. Comm.***, 2002 WI App 111, ¶6, 254 Wis. 2d 538, 648 N.W.2d 878. Accordingly, our review is limited to four inquiries: (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***, 332 Wis. 2d 3, ¶35.

¶18 Seven Generations challenges the City's revocation on all four grounds, but we need not address all of Seven Generations' arguments. *See* ***Sweet v. Berge***, 113 Wis. 2d 61, 67, 334 N.W.2d 559 (Ct. App. 1983) (courts need not address other issues when one is dispositive). We presume a municipality possesses the authority to revoke a CUP based on misrepresentations made during the permit process.[4] The operative questions are whether the City exercised that authority in an arbitrary manner, and without substantial supporting evidence.

¶19 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." ***State ex rel. Skelly Oil Co. v. Common Council, City of Delafield***, 58 Wis. 2d 695, 701, 207 N.W.2d 585 (1973), *superseded on other grounds by* WIS. STAT. § 62.23(7)(e).

¶20 The decision to revoke a CUP, like the decision to grant one, involves the exercise of a municipality's discretion. *See* ***Roberts v. Manitowoc Cnty. Bd. of Adj.***, 2006 WI App 169, ¶10, 295 Wis. 2d 522, 721 N.W.2d 499. "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)). We are hesitant to interfere with such discretionary determinations. *See* ***Roberts***, 295 Wis. 2d 522, ¶10.

¶21 Discretion, though, is not synonymous with decision making. *See* ***Klinger v. Oneida Cnty.***, 149 Wis. 2d 838, 846, 440 N.W.2d 348 (1989). A municipality misuses its discretion when it makes an arbitrary decision, one that is "unreasonable or without a rational basis." ***Snyder v. Waukesha Cnty. Zoning Bd. of Adj.***, 74 Wis. 2d 468, 476, 247 N.W.2d 98 (1976). "Arbitrary action is the result of an unconsidered, wilful or irrational choice, and not the result of the 'sifting and

winnowing' process." ***Robertson Transp. Co. v. PSC***, 39 Wis. 2d 653, 661, 159 N.W.2d 636 (1968). A flagrant misuse of discretion has been characterized as capricious, meaning "'a whimsical, unreasoning departure from established norms or standards; it describes action which is mercurial, unstable, inconstant, or fickle.'" ***Westring v. James***, 71 Wis. 2d 462, 476-77, 238 N.W.2d 695 (1976) (quoted source omitted).

¶22 Fickle and inconstant fairly describe the City's action here. The City's initial Plan Commission and Common Council meetings were noticed public meetings. It does not appear there was any significant opposition to Seven Generations' proposal. Public opposition grew during the state and federal environmental review process. Having failed to persuade those agencies, project opponents turned their attention back to the Common Council, which they successfully persuaded to revoke the CUP on misrepresentation grounds. The City did so despite the Plan Commission's specific finding that there were no misrepresentations and without ever identifying the allegedly false statements.

¶23 We are disappointed the City did not so much as mention the Plan Commission's conclusions in its decision. In ***Transamerica Insurance Co. v. DILHR***, 54 Wis. 2d 272, 275, 284, 195 N.W.2d 656 (1972), a hearing examiner's findings on a workers' compensation claim were set aside by the department, which—like the Common Council here—had the right to make the ultimate determination. However, the department failed to explain why it concluded the examiner erred. ***Id.*** at 282. We stated that, as a matter of fundamental fairness, the parties were entitled to know the reasons for the reversal:

> The parties to litigation, workmen's compensation claims included, are entitled to know, not only that the department set aside the findings of an examiner but why it did so—not only what independent findings the department found proper, but on what basis and evidence it made such findings. Particularly is this true where credibility of witnesses is involved. Fundamental fairness requires that administrative agencies, as well as courts, set forth the reasons why a fact-finder's findings are being set aside or reversed, and spell out the basis for independent findings substituted.

Id. at 284; *see also* ***Voight v. Washington Island Ferry Line, Inc.***, 79 Wis. 2d 333, 342, 255 N.W.2d 545 (1977).[5] While we ultimately elected not to reverse on that basis in ***Transamerica***, the message

is clear: the City chose to ignore the Plan Commission's recommendation at its own peril.

¶24 Even more dismaying than the City's failure to mention the findings of its own Plan Commission, though, is its failure to articulate any rationale for its revocation decision. The City generically stated that Cornelius had made "false statements" while responding to questions and concerns about "the public safety and health aspect of the Project and the Project's impact upon the City's environment." The City claimed these misrepresentations were made by Seven Generations representatives while answering questions about "emissions, chemicals, and hazardous materials." But none of these findings identify the supposedly false statements with any specificity.

¶25 The absence of any identifiable false statements in the City's decision is troubling. The City is essentially alleging that the CUP was obtained by fraud—"a purposeful, volitional act on the part of the defrauding party." *See* ***Doe v. Archdiocese of Milwaukee***, 2005 WI 123, ¶49, 284 Wis. 2d 307, 700 N.W.2d 180. Fraud requires proof of an intentional misrepresentation, which is established, in part, by an untrue representation of fact. *See* ***Malzewski v. Rapkin***, 2006 WI App 183, ¶17, 296 Wis. 2d 98, 723 N.W.2d 156. Generally, pleadings must state fraud claims with "particularity"—meaning the plaintiff has to specify the time, place, and content of an alleged misrepresentation. *See* ***Friends of Kenwood v. Green***, 2000 WI App 217, ¶14, 239 Wis. 2d 78, 619 N.W.2d 271; *see also* WIS. STAT. § 802.03(2). This detailed procedure "protects persons from casual allegations of serious wrongdoing and puts defendants on notice 'so that they may prepare meaningful responses to the claim.'" ***Putnam v. Time Warner Cable of SE Wis. Ltd. P'ship***, 2002 WI 108, ¶26, 255 Wis. 2d 447, 649 N.W.2d 626 (quoted source omitted).

¶26 To properly review the City's action, we must know its basis. *See* ***Lamar Cent. Outdoor, Inc. v. Board of Zoning Appeals of Milwaukee***, 2005 WI 117, ¶32, 284 Wis. 2d 1, 700 N.W.2d 87. "Without such statement of reasoning, it is impossible for the circuit court [or this court] to meaningfully review a board's decision, and the value of certiorari review becomes worthless." ***Id.*** Requiring the City to provide the reasons for its determination is also consistent with common sense and traditional notions of due process. ***Id.***, ¶29. We require the same of circuit courts, *see* ***Klinger***, 149 Wis. 2d at 846-47 (circuit court must make a record of its reasoning "to ensure the soundness of its

own decision making and to facilitate judicial review"); *see also* ***Alsum v. DOT***, 2004 WI App 196, ¶16, 276 Wis. 2d 654, 689 N.W.2d 68; ***Voecks v. Voecks***, 171 Wis. 2d 184, 189, 491 N.W.2d 107 (Ct. App. 1992); ***Earl v. Gulf & W. Mfg. Co.***, 123 Wis. 2d 200, 204-05, 366 N.W.2d 160 (Ct. App. 1985), and administrative agencies, *see* ***State ex rel. Harris v. Annunity & Pension Bd.***, 87 Wis. 2d 646, 661, 275 N.W.2d 668 (1979); ***Voight***, 79 Wis. 2d at 340-41; ***Daniels v. Wisconsin Chiropractic Exam. Bd.***, 2008 WI App 59, ¶6, 309 Wis. 2d 485, 750 N.W.2d 951. As the Seventh Circuit aptly put it, decision-makers must announce their decision "'in terms sufficient to enable a reviewing court to perceive it has heard and thought and not merely reacted."' ***Guentchev v. I.N.S.***, 77 F.3d 1036, 1038 (7th Cir. 1996) (quoted source omitted). We must be able to trace the path of reasoning. ***Diaz v. Chater***, 55 F.3d 300, 307 (7th Cir. 1995).

¶27 We cannot trace the City's reasoning because it prematurely stops. Nowhere in its decision did the City actually identify the alleged misrepresentations. Because the City did not identify the statements on which its action was based, its decision appears to be the product of "unconsidered, wilful or irrational choice, and not the result of the 'sifting and winnowing' process." *See* ***Robertson Transp. Co.***, 39 Wis. 2d at 661. Given its failure to identify the allegedly false statements or consider the Plan Commission's recommendation, we cannot help but believe the City's decision was based not on a rational analysis of the statements Seven Generations made to the Plan Commission, but the public pressure brought to bear on the Common Council after the CUP had been issued.

¶28 Perhaps recognizing the impossibility of defending an action without a stated basis, the City has subsequently attempted to remedy its omission. The City's appellate brief includes several allegedly false statements—which we shall soon address—but statements were not identified by the City with any specificity prior to commencement of the certiorari action. As we have said, the exercise of discretion must be evident from the municipal record, to which our review is confined. It follows that a municipality should not be permitted to expand upon a deficient rationale or manufacture its reasoning for purposes of surviving certiorari review.

¶29 Even if we were to allow the City to "fill in" its rationale on certiorari review, none of the allegedly false statements constitute substantial evidence of misrepresentation. "Substantial

evidence" means relevant, credible, and probative evidence upon which reasonable persons could rely to reach a decision. ***Sills***, 254 Wis. 2d 538, ¶11. "[S]ubstantial evidence is more than 'a mere scintilla' of evidence and more than 'conjecture and speculation.'" ***Gehin v. Wisconsin Grp. Ins. Bd.***, 2005 WI 16, ¶48, 278 Wis. 2d 111, 692 N.W.2d 572 (quoted sources omitted). If substantial evidence supports the City's determination, the weight to be accorded to that evidence lies within the City's discretion. *See* ***Sills***, 254 Wis. 2d 538, ¶11.

¶30 The City first claims Seven Generations misrepresented that there would be no hazardous material, toxins, or emissions from the facility, and the pyrolysis process would produce a reusable solid waste residue. Specifically, the City relies on the following notes from the minutes of the Plan Commission's February 21, 2011 meeting:

> 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"[6] 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.
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> ….
>
> Mr. Cornelius stated [various chemicals identified in the "Emissions" section of Seven Generations' proposal are] 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.
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> ….
>
> 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 [chemicals]. 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.

The City contends these statements contained falsities, in that the facility is not a closed system, has smoke stacks, and will in fact emit hazardous air pollutants pursuant to its DNR air permit.

¶31 The City's assertion that Seven Generations misrepresented the facility as a "closed

system" that would produce no chemicals or hazardous materials is untenable. The audio recording of the February 21, 2011 Plan Commission meeting establishes that the statements on which the City relies were responses to questions about the pyrolysis process specifically, not the facility as a whole. It is undisputed that the pyrolysis process indeed takes place in a closed, oxygen-starved system. The syngas produced is then scrubbed to remove toxins before being burned as fuel. We perceive no actionable misrepresentations in Seven Generations' comments related to pyrolysis.

¶32 To the extent the City contends Seven Generations lied about the suitability of the char byproduct for re-use, the DNR's environmental analysis states that the char would be landfilled or, if acceptable, "re-used as a beneficial product subject to DNR approval. The char may be suitable for beneficial use as concrete additives, flowable fill material, and aggregate for sub-base of roads and stabilization for landfill cover if it meets certain waste characteristics." Again, we perceive no actionable misrepresentations, and the City's reasoning for deeming these statements false is unclear.

¶33 The City's assertion that Seven Generations promised the facility would produce "no emissions" is wholly unsupported by the record and is unreasonable. Any reasonable person understands that internal combustion engines like those required during the final energy-production stages will produce exhaust. Indeed, when discussing potential opposition to the project before the Plan Commission, a Seven Generations representative described the energy-generation process as simply "burning gas in an engine." At every stage of the municipal proceedings—from the initial application to the Common Council hearing in March 2011—Seven Generations disclosed there would be emissions and that it would be required to obtain an air permit and comply with all regulations governing air quality.

¶34 Despite overwhelming evidence to the contrary, the City clings tightly to the notion that Seven Generations' statements can be construed as promising an emission-free facility. The City argues its action was supported by substantial evidence, even though the great weight and clear preponderance of the evidence could have supported a contrary finding. *See* ***DeGayner & Co. v. DNR***, 70 Wis. 2d 936, 939, 236 N.W.2d 217 (1975). However, when considering whether a decision is supported by substantial evidence, it is proper to take into account "all the evidence in the record" to

determine whether reasonable minds could arrive at the same conclusion as the agency. ***State ex rel. Palleon v. Musolf***, 120 Wis. 2d 545, 549, 356 N.W.2d 487 (1984). No reasonable person could conclude, based on Seven Generations' statements, that there would be absolutely no emissions from the facility.

¶35 The City also claims Seven Generations misrepresented that the facility would have no smokestacks. In addition to Seven Generations' statements during the February 21, 2011 meeting, the City relies on architectural drawings submitted in advance of the meeting that did not show stacks. The City observes that a draft of the air permit required the facility to have ten stacks and vents, with three of them at least sixty feet above ground level, or about thirty feet taller than the building. However, the final design of the facility includes vents that are just a few feet above the building's roof.

¶36 None of the statements on which the City relies can be reasonably interpreted as a promise that the facility would have no stacks or vents. Again, no reasonable person could believe that a gas-burning engine would not produce exhaust, which must be expelled from the facility. Further, Seven Generations specifically informed the Common Council before the CUP was granted that the facility would require exhaust outlets. The facility's final design is fully consistent with the fact sheet and presentation Seven Generations submitted to the Plan Commission, which state there will be "no smokestacks *such as those associated with coal-fired power plants*." (Emphasis added.)

¶37 As for the architectural drawings, the early rendering of the facility was not probative evidence of misrepresentation. The City's community development director explained at the October 3, 2012 Plan Commission hearing:

> 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.
>
> ….
>
> [A]fter 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. The understanding [was] that this conditional use permit is going to require you to get all those certificates and permits in place before we are going to issue you a construction permit.

> So there never was a time when we approved a 65-foot tall stack. That's never happened. I've never seen a plan come to the planning office that had a sixty-foot stack. We had heard that that was going on. We told the Oneidas if you do that you need to get your C.U.P. amended or you have to bring it down under thirty-five feet and meet our Code.
>
> So that's where that was left. So it'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.

No reasonable person would believe the early representation of the facility in the initial planning documents was set in stone.

¶38 Finally, the City asserts Seven Generations misrepresented the technology used in the proposed facility as proven. The City again relies on comments a Seven Generations representative made during the initial Plan Commission meeting: "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." Citing generically to a thirty-page document prepared by opposition groups, the City argues that, in fact, the facility "would have been the first commercial, permitted pyrolysis gasification facility for municipal solid waste in the world."

¶39 We perceive no misrepresentations in Seven Generations' statement with respect to the state of pyrolysis technology. A DOE report on the Seven Generations facility states, "The pyrolysis and gasification of [municipal solid waste] is used all over the world …." A list attached to the report identifies at least twenty-seven gasification facilities worldwide that are currently using or planning to use municipal solid waste as the primary feedstock. The report concludes, "it is evident that the use of pyrolysis technology for processing solid waste is global. There are multiple commercial plants either proposed or currently in operation. The processing of waste using pyrolysis has been around for generations and … is expected to continue to evolve and advance."

¶40 Notably, every alleged misrepresentation on which the City relies was made before the Plan Commission. The Plan Commission unanimously concluded none of the information presented to it previously had been misrepresented. While the City correctly notes the Plan Commission's authority was limited to making recommendations to the Common Council, *see* WIS. STAT. § 62.23(5), the City

has never attempted to explain why it refused to accept the Commission's recommendation. This failure is particularly noteworthy because the Plan Commission was in a far better position than the Common Council to determine whether misrepresentations had been made.

¶41 The City also placed the Plan Commission in a better position to determine the materiality of any supposedly false statements. Naturally, not every slip of the tongue or ambiguous phrase will entitle a municipality to revisit, perhaps years after the fact, a prior action based on an alleged misrepresentation. There must be some logical nexus between the alleged misrepresentation and the earlier municipal action. *See* ***Malzewski***, 296 Wis. 2d 98, ¶17 (intentional misrepresentation requires proof that the plaintiff believed the representation was true and relied on it). Whether that logical nexus exists is an appropriate inquiry for certiorari review. *See* ***Snyder***, 74 Wis. 2d at 476 (certiorari review encompasses unreasonable decisions or decisions lacking a rational basis).

¶42 If, as the City contends, it was important to the Common Council that the facility have no smokestacks or produce absolutely no emissions, chemicals, or hazardous material, the Plan Commission could have imposed specific conditions to that effect. A municipality has authority to require that certain conditions be met when granting a CUP. *See* ***Rainbow Springs Golf Co. v. Town of Mukwonago***, 2005 WI App 163, ¶13, 284 Wis. 2d 519, 702 N.W.2d 40. The only conditions the Plan Commission imposed relating to the environmental impact of the facility were that Seven Generations comply with the Green Bay Municipal Code and federal and state regulations governing air and water quality, which Seven Generations has undisputedly done. Even if there were misrepresentations regarding the environmental impact of the facility, the City is not clear how they were "of very high importance," as the City claims.

¶43 In sum, the scant statements the City cites as support for its revocation action do not constitute substantial evidence of misrepresentation. Even if we were to overlook the City's failure to justify its decision prior to commencement of the certiorari action, the City's decision cannot stand.

By the Court.—Order reversed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

[1] It is not clear from the audio recording of the hearing who answered questions on behalf of Seven Generations. Seven Generations asserts the minutes of the meeting incorrectly attribute to Cornelius many statements that were actually made by an engineer working on Seven Generations' behalf. The City does not refute that assertion, and different voices can clearly be heard answering questions in the audio recording.

[2] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

[3] This case was submitted on briefs on October 15, 2013. On March 13, 2014, the City filed a motion in this court to dismiss Seven Generations' appeal as moot. The release of this decision effectively renders the City's motion moot.

[4] We do not address Seven Generations' assertions that it had a vested right to develop the facility upon issuance of the building permit, *see* ***State ex rel. Klefisch v. Wisconsin Tel. Co.***, 181 Wis. 519, 195 N.W. 544 (1923), or that the City unlawfully revoked the CUP based on implied, unwritten conditions, *see* ***Bettendorf v. St. Croix Cnty. Bd. of Adj.***, 224 Wis. 2d 735, 591 N.W.2d 916 (Ct. App. 1999).

[5] While ***Voight v. Washington Island Ferry Line, Inc.***, 79 Wis. 2d 333, 255 N.W.2d 545 (1977), was, in part, based on an administrative statute not at issue in this certiorari action, the rule in ***Transamerica Insurance Co. v. DILHR***, 54 Wis. 2d 272, 275, 284, 195 N.W.2d 656 (1972), was based on fundamental notions of due process and is not so limited.

[6] The proper term is "venturi scrubber." Seven Generations contends this is only one of numerous errors in the Plan Commission minutes.