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SUPREME COURT
STATE OF WISCONSIN

Appeal No. 2013AP000591

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

Plaintiffs-Appellants,

v.

CITY OF GREEN BAY,

Defendant-Respondent-Petitioner.

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

BRIEF OF PLAINTIFFS-APPELLANTS

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PRELIMINARY STATEMENT

I'm shocked, *shocked* to find that gambling is going on in here!

Captain Louis Renault, *Casablanca*

On October 16, 2012, the City of Green Bay's Common Council, declaring itself shocked, *shocked* to find that a proposed hydrocarbon-burning, electricity-generating facility it had approved over 18 months earlier would actually produce some emissions, revoked the conditional use permit (or "CUP") granted to Oneida Seven Generations Corporation and Green Bay Renewable Energy, LLC (for the sake of brevity, "OSGC"). According to the City, OSGC had misled it into thinking that the proposed facility would produce no emissions whatsoever (or, as it now argues, that any emissions would contain no toxins whatsoever), and that it would not have any "stacks" through which emissions might be vented from the facility.

The problem is, just two weeks before revocation, the City's Plan Commission—the very body before which the

alleged misrepresentations had been made in 2011—had investigated the accusations at the Common Council's request and concluded unanimously that it had *not* been misled, about emissions or any other aspect of the project. To the contrary, the Commission knew about emissions, toxins, and stacks and had concluded that the various layers of state and federal regulations and oversight provided protection enough. The Court of Appeals, after engaging in a meticulous examination of the record, decided that no reasonable person could possibly have believed that OSGC had misrepresented anything. And under those circumstances, this Court's own, long-established doctrine (recently reinforced by the Legislature) establishes that an applicant's rights in a project are vested and cannot be altered.

Undaunted by these considerable obstacles, the City defends its actions with a variety of decidedly novel arguments. According to the City, it has as much discretion to revoke the

CUP as it did to issue it in the first instance, even though, in reliance on the CUP (and at substantial expense), OSGC had obtained all other necessary local, state and federal permits in the interim. The conclusion of its own Plan Commission that it had *not* been misled was a "mere recommendation," warranting only a single footnote in its brief. Moreover, according to the City, if any statement attributable to OSGC ripped out of context could possibly be construed as false, the "substantial evidence" standard of review should have prevented the Court of Appeals from examining other parts of the record to determine the speaker's true meaning. And should this Court think otherwise, the City argues, the very absence of support in the record for its actions should earn it a remand and a second kick at the cat.

If the foregoing suggests that OSGC is outraged at the City's position, that is because it is. As the Court of Appeals perceived, the City's decision to revoke the CUP was a response

to political pressure; its claim to have been misled is a smokescreen in which no reasonable person could possibly believe. Just as bad, the legal principles the City now urges this Court to adopt would eviscerate the "vested rights" doctrine and transform judicial review into a meaningless exercise.

This Court, we respectfully submit, should examine the entire record. If it does, it will come to the same conclusion as the Court of Appeals: there were no misrepresentations here. OSGC has a vested right to proceed as long as the facility complies with City ordinances and state and federal emissions standards, as the CUP required. It does comply, and so this Court should affirm.

RESPONDENTS' COUNTER-STATEMENT OF ISSUES PRESENTED FOR REVIEW:

OSGC respectfully suggests that the following articulation better represents the issues presented by this appeal:

1. Did the City have unfettered discretion to revoke the CUP once OSGC relied on the CUP to its detriment? If not, under what conditions may the City revoke the CUP, and what standards govern judicial review of that revocation? (Addressed in Section I, below)

2. Does the record contain substantial evidence that OSGC materially misrepresented the nature of the proposed facility in obtaining the CUP? (Addressed in Section III, below)

3. In answering that question, does the "substantial evidence" standard of review require the Court of Appeals to ignore portions of the record that explain or provide the context for the statements allegedly constituting the "misrepresentations"? (Addressed in Section II, below)

4. If, as the Court of Appeals concluded, the record contains no substantial evidence of misrepresentations, is there any reason to remand the case to the City for further proceedings? (Addressed in Section IV, below)

STATEMENT OF THE CASE

Nature of the Case

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

The Proposed Facility

On February 4, 2011, in an effort to diversify its tribes' economic development, Cert.Rec. at 153,[1] OSGC applied to the City of Green Bay for a conditional use permit (or "CUP") to construct a so-called "waste-to-energy" facility to convert

[1] All written parts of the certiorari record, found at R. 25 and 26, are included in Petitioner's Supplemental Appendix. For purposes of clarity, citations will be directly to the existing Bates page numbers of that record (*e.g.*, "Cert.Rec.").

garbage into electricity. *Id.* at 2-152.[2] The key to this conversion is a process known as "pyrolysis gasification," in which waste is turned into gas by heating it at very high temperatures in an enclosed, oxygen-starved chamber. *Id.* at, *e.g.*, 7-8, 109-10, 231-32, 374-75.[3] The process produces a gaseous fuel ("syngas," similar to natural gas) that, once scrubbed, is used not only to sustain the pyrolysis reaction but to run electrical generators. *Id.* The municipal waste fed into the facility is reduced in volume by 80% or more, the residue consisting of ash or "char." *Id.* at, *e.g.*, 108, 154, 232, 459-60.

The pyrolysis gasification process itself occurs in a sealed chamber; it does not produce air emissions. *Id.* at 7, 109, 401, 403. However, the generators that run on the syngas produced

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[2] A conditional use permit is, in essence, a special zoning classification, which allows owners to use property in a manner that does not fit into typical zoning classifications. *See* Green Bay Municipal Code § 13-205.

[3] As both the Wisconsin Department of Natural Resources and the U.S. Department of Energy confirm, this process is *not*, as its critics here claimed, "incineration." Cert.Rec. at 266, 565-66; *see also* 42.

by the pyrolysis, like all combustion engines, do produce emissions. Nevertheless, the net environmental benefits are significant. Per kilowatt, electricity generated by syngas produces fewer pollutants than fossil fuels while at the same time reducing landfilling of the municipal solid waste and the air emissions associated with such landfills (including not only the methane produced by decomposing waste but the vehicular emissions from trucking the waste to ever-more-distant landfills). *E.g.*, *id.* at 43, 108, 109-10, 120, 126, 154, 368, 456.

The Proposed Site

In late 2010, OSGC representatives met with staff from the City's Economic Development and Planning Departments regarding their plan. *Id.* at 1, 725. Together, OSGC and City staff evaluated a number of possible sites within the City for the facility. *Id.* at 725. Ultimately, OSGC selected a site on Hurlbut Street, near the mouth of the Fox River.

The site in question is intensely industrial. It is located in an area zoned "General Industry," a classification that "accommodates high-intensity industry and often includes very large structures," including "solid waste disposal facility[ies]" to dispose of garbage or trash by "incineration, or any other similar means." *Id.* at 417.

Bordered on the south by I-43, the site is flanked in all other directions by: a city yard waste disposal site; a dredge material disposal site; concrete and asphalt plants; a construction facility; petroleum tank farms; and the Pulliam coal-fired power plant. *Id.* at 153, 241, 417, 421-22. Not surprisingly, the area is sparsely populated; the nearest residential zoning is a half-mile away. *Id.* at 246, 417.

The land itself has historically been used for waste disposal, primarily dredge materials. *Id.* at 419. The area is described by various governmental agencies as "highly

disturbed," "altered beyond restoration," and "mildly contaminated"; it is dominated by invasive vegetation, not consistently inhabited by wildlife, and has no known archeological or historical value. *Id.* at 242-45, 417, 471, 474-76.

OSGC's Disclosures

OSGC's application for the CUP, *id.* at 2-152, explained the nature of the project and contained extensive information about potential environmental impacts, especially air emissions. For example, it noted that the Wisconsin Department of Natural Resources ("DNR") would need to issue an air permit before construction could begin, and that "application and review of this permit will likely need to address air quality impacts . . . as well as emissions of hazardous air toxic compounds[.]"[4] *Id.* at 25.

[4]As is typical, detailed projections of emissions levels were developed later as part of the DNR air permitting process. *Id.* at 326-327, 892.

The application also noted that the facility would need to report actual air emissions to the DNR on an annual basis, and that DNR would maintain oversight and enforcement responsibility over the facility's operations. *Id.* In a 50-page section titled "Emissions," OSGC provided the City with detailed information about potential air emissions from similar technologies, including a lengthy report by a university engineering department. *Id.* at 26-76.

That report and other OSGC submissions disclosed not only that syngas was made up of hydrocarbons including methane, ethane, propane, butane, and pentane, *id.* at 8, 111, but that emissions from its combustion included nitrogen oxides, sulfur dioxides, mercury, and dioxin/furans (albeit in significantly smaller amounts than fossil fuels). *Id.* at 43-71, 126. The technology is beneficial, the submissions explained, because it *reduces* emissions associated with landfilling municipal solid

waste and makes air cleaner on a *net* basis when such material is used as a fuel source for this project. *Id.* at 27; *see also* 42-44.

City planning staff carefully reviewed all of the information and prepared a report to the Plan Commission regarding the project. The report noted that OSGC had provided City staff with "considerable information . . . detailing the gasification process and its resulting impact." *Id.* at 155. It explained that OSGC would have to obtain an air permit and operations permit from DNR. *Id.* at 156. The report concluded that the "proposed use is an appropriate land use for the subject site," and recommended approval of the CUP, subject to certain conditions, including its compliance with "[a]ll Federal and State regulations and standards related to the proposed use including air and water quality." *Id.*

The Plan Commission Recommends Approval.

On February 21, 2011, the Plan Commission, which had already studied OSGC's materials, discussed the project at its

regularly scheduled meeting. *Id.* at 160-66; R. 26, Audio CD 1; *see also* Cert.Rec. at 895. After City planning staff reviewed OSGC's application and the report that staff had prepared, representatives from OSGC addressed the Commission. *Id.* at 160-65. They first presented a pre-recorded slideshow explaining how the facility would work. *Id.* at 160-161. As part of the presentation, OSGC mentioned the need for air permits and promised that the facility would "meet or exceed" federal standards for safety, emissions, and pollutants. R. 26, Audio CD 1 at 16:22, 21:50, 22:16, 48:05. The slideshow further noted that "there are no smokestacks *such as those associated with coal-fired power plants.*" *Id.* at 22:10 (emphasis added).

Plan Commission members then engaged OSGC in a lengthy question-and-answer session. Cert.Rec. at 160-66. A number of the Plan Commission's questions pertained to air emissions. OSGC explained how the gasification process itself

takes place in an "enclosed" system, in that no oxygen is allowed to enter the chamber. *Id.* at 160-161; R. 26, Audio CD 1, 20:45. One commission member noted that the technology was "less polluting" than other processes. *Id.* at 26:00. Another recognized that OSGC's submissions described emissions from similar technologies, and that those emissions included certain chemicals. *Id.* at 43:45. In response, an engineer working for OSGC stated that there would be no chemicals from OSGC's facility because they would be "scrubbed out"—a reference to the facility's "Venturi scrubbers" that would clean the gas before it is piped to the generators. *Id*. However, the contractor also noted that there would be dioxin emissions. *Id*.; *see also* Cert.Rec. at 164 (misspelled as "diosons"). The contractor then clarified that the chemical emissions would be "acceptable" and "under EPA/DNR standards"—that is, there would be chemical emissions but, because of pollution control devices, none would

exceed the safety thresholds designated by the environmental regulatory agencies. R. 26, Audio CD 1 at 47:20; Cert.Rec. at 164.

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

The Council Approves the CUP.

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

Part of the OSGC presentation was a slide titled "Emissions." *Id.* at 1:18:10. On that slide, a bullet point explained that "[t]here will be no smokestacks *such as those associated with coal-fired power plants*." *Id.* at 1:18:10 (emphasis added). In explaining that slide, an OSGC representative said, "There are no smokestacks. For those of us in Green Bay, we know what that means." *Id.* In other words, there would be nothing on the facility like the towering smokestacks familiar to Green Bay residents on the Pulliam power plant and local paper mills.[5]

During the question and answer session, one alderperson, speaking with reference to OSGC's remark about "no smokestacks," expressed his understanding that the facility

[5] Recent minutes of the Green Bay Plan Commission indicate the stack at the Pulliam plant is 377 feet tall. *See* http://greenbaywi.gov/wp-content/uploads/2013/10/GBPC-Minutes-042114.pdf. The eventual height of the tallest stack at the proposed OSGC facility would have been 35 feet above ground level, only a few feet above the roofline. *See infra* at 20.

would have generators that *would* produce exhaust; OSGC confirmed this. *Id.* at 1:32:18 (emphasis added). One member of the public with professional experience in air emissions who had been asked by an alderperson to look into the matter spoke extensively about his research into potential emissions from the proposed facility and compared them favorably to the nearby Pulliam coal-fired power plant. *Id.* at 1:46:00.

After the public had had an opportunity to comment, the alderperson representing the district where the facility would be located expressed the belief that the environmental concerns raised by his constituents would be addressed by the overlay of regulatory review required for the facility. *Id.* at 1:51:30. Thereafter, all but one Council member voted to approve the CUP. Cert.Rec. at 172.

As the Plan Commission had recommended, the CUP as approved was conditioned on the facility complying 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," as well as with "[a]ll Federal and State environmental standards related to the proposed use including air and water quality." *Id.* at 198. The CUP imposed no separate limits on either emissions or stacks.

OSGC Obtains All Necessary Permits.

After obtaining the CUP, OSGC embarked on an extensive review and permitting process.

On July 12, 2011, DNR determined that the project would meet all applicable state and federal requirements and would not violate or exacerbate air quality standards or ambient air increments. *Id.* at 229.

On July 14, 2011, the Wisconsin Department of Commerce – Safety and Buildings conditionally approved OSGC's plan,

noting that the owner was "responsible for compliance with all code requirements." *Id.* at 201.

As the environmental permitting process was proceeding, OSGC submitted detailed site plans and building plans to the City, as required under the City's zoning and building codes. On August 3, 2011, the City approved those plans and issued a building permit. *Id.* at 200-206, 730-731.

In September 2011, DNR issued permits and approvals under the state's clean air and solid waste laws. *Id.* at 286-327, 618-627. The DNR's formal Environmental Analysis addressed a wide range of potential environmental impacts, including air emissions, *id.* at 231-260, and concluded that approval of the facility was *not* a "major action" and would *not* have significant environmental effects. *Id.* at 253.[6]

[6] DNR conducted this analysis pursuant to WIS. STAT. § 1.11, which requires all state agencies to consider the environmental impacts of proposed agency actions. *See also* WIS. ADMIN. CODE § NR 150.01(1).

The original DNR permit provided that the generator exhaust stacks would have to be as high as 60 feet above the ground (almost 30 feet above the building roof). *Id.* at 294. After City staff advised OSGC that local zoning ordinances required them to be no higher than 35 feet, OSGC obtained a revised permit from DNR specifying a stack height of 35 feet (approximately 3 feet above the structure's 32-foot high roofline). *Id.* at 339, 342, 347.[7]

In November 2011, the U.S. Department of Energy ("DOE") published its final Environmental Assessment.[8] *Id.* at 372-568. The assessment thoroughly evaluated the environmental impact of the facility, including 18 pages of analysis dedicated specifically to air emissions. *Id.* at 422-440.

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[7] This reconfiguration of exhaust stacks merely changed the size and shape of the "tailpipe" for the generators; the remainder of the facility's design and operations were unchanged. Cert.Rec. at 339, 342, 347.

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

Based on its review, DOE issued a Finding of No Significant Impact. *Id.* at 367-371. DOE concluded not only that "the area's air quality would remain in compliance with current standards," *Id.* at 368, but that the facility would have a positive impact on greenhouse gas emissions because of the reduced traffic of waste to local landfills. *Id.*

With the required approvals in hand, OSGC proceeded with preparatory construction work.

The Opposition Groups Change Tactics.

Throughout this lengthy and very public review process, a variety of groups and individuals opposed to the facility (as well as project supporters) appeared at public meetings hosted by the regulators and spoke against the requested environmental approvals. *Id.* at 262-265, 284-285, 387-389. The project opponents submitted numerous comments to both DNR and the DOE detailing concerns with the facility's alleged environmental impacts. *Id.* at 265-285, 387-388, 548-561. Both agencies

thoughtfully considered these comments and responded to them in writing. *Id*.

No member of the public sought a review of either the state or federal permits. Instead, the opposition groups began to pressure the Common Council to reconsider the CUP. On April 10, 2012, numerous opponents of the project attended a Common Council meeting, alleging that OSGC had "misrepresented" the environmental impacts of the facility when applying for the CUP. *Id.* at 209-210. In particular, the opposition groups alleged that OSGC had claimed the facility would have *no* stacks and would produce *no* emissions. *Id*.

Responding to this pressure, the Council voted to "hold a public hearing" regarding the CUP and to "continue further investigation." *Id.* at 210. OSGC objected, pointing out that it had presented extensive information about potential emissions to the Plan Commission and the Council, and that DNR and

DOE had reviewed the potential emissions in detail as the CUP had specified. *Id.* at 211-214.

Despite the absence of any evidence—indeed, even any allegation—that the facility would be out of compliance with the CUP or the various permits, the City eventually decided that the Plan Commission (the body that had originally considered and recommended approval of the CUP) should hold a public hearing to "determine if the information submitted and presented to the Plan Commission was adequate for it to make an informed decision whether or not to advance the Seven Generation Conditional Use Permit (CUP) that was recommended." *Id.* at 956. The public notice of the hearing invited citizens to submit written comments prior to the hearing and to speak at it. *Id*.

The Plan Commission Unanimously Finds No Misrepresentations.

Although OSGC objected to the proceeding, it nonetheless submitted written materials to the Plan Commission. *Id.* at 221-568. OSGC outlined the extensive information that had been presented to Planning staff and the Plan Commission and highlighted the numerous mentions of potential emissions from the facility. *Id.* at 221-226. OSGC also submitted the record of environmental review conducted by DNR and DOE. *Id.* at 231-568. The Director of DNR's Air Bureau confirmed in writing that the proposed facility "will meet all applicable state and federal air quality requirements[.]" *Id.* at 229-230. Many proponents and opponents of the project also submitted their own materials. *Id.* at 571-712.

The Plan Commission meeting lasted several hours. *Id.* at 716-904. Numerous parties spoke at the hearing, including City Planning Director Rob Strong, who reviewed the process by

which the City had issued the CUP in 2011. *Id.* at 724-731, 889-894. Director Strong noted the extensive information that had been submitted with the CUP application and recalled that OSGC and Planning staff had gone "back and forth quite frequently" even before the Plan Commission considered the CUP. *Id.* at 726. He also emphasized the regularity of the process: "[W]e didn't do anything different here. We followed the same process we do for every other project that comes forward." *Id.* at 890.

Alderperson Kocha testified not only that the Common Council was well informed when it issued the CUP, *id.* at 783, but that she had reviewed the tape of the Common Council meeting with constituents, explaining why the statements now characterized as misrepresentations were not false. *Id.* at 783-84. The same member of the public with expertise in air emissions who had addressed the Council the previous year noted that he

had made it "real clear to them that there were stacks, that there were emissions." *Id.* at 795, 798; *see also* 697.

Members of the Plan Commission agreed. As Commissioner Bremer stated:

> [W]e were not deceived on that point [regarding emissions]. We knew that there was emission.
>
> * * *
>
> [D]espite new information that has occurred since we recommended this, we were not deceived on the front end.

Id. at 895-897. Commissioners Duckett and Bremer observed that the permit had been conditioned on compliance with state and federal regulations precisely because they understood there would be emissions. *Id.* at 899-901. *See also id.* at 703 (written comments of former Alderperson Dorff explaining that this was done "to take this out of the hands of politicians . . . with the caveat that it passed scientific review").

The same was true of stacks. As Commissioner Bremer explained, "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." *Id.* at 895. Director Strong further explained:

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

Id. at 892-893.

Thereafter, the members of the Plan Commission unanimously concluded that OSGC had *not* misrepresented the facility and that the Commission had adequate information to approve the CUP, *id.* at 903, and submitted the following report to the Common Council:

> Based on the information submitted and presented, the Plan Commission determines that the information provided to the Plan Commission was not misrepresented and that it was adequate for the

> Commission to make an informed decision, and recommends that the CUP stand as is. The Commission further determines that the information the Plan Commission received was adequate, and based upon information then available, that the Plan Commission did understand that there were emissions and venting as a part of the system, and therefore made sure that the Seven Generations Corporation would need to meet the requirements of the EPA and DOE, as well as meeting the requirements of the municipal code through a normal process of give or take.

Id. at 955.

The Common Council Ignores the Plan Commission's Findings.

On October 16, 2012, the Common Council met for a regularly-scheduled meeting. Numerous project opponents attended the meeting and, against the express advice of the City Attorney, the Council opened the floor to public comment regarding the CUP. Cert.Rec. at 956; R. 26, Video 2 (Part 1) at 46:00. The Council voted first to reject the Report of the Plan Commission and then to rescind the CUP. Both votes carried by

a bare majority of seven-to-five. R. 26, Video 2 (Part 2) at 37:22, 38:53.[9]

Two weeks later, the City Attorney sent a letter to OSGC purporting to explain why the Council had rescinded the CUP. Cert.Rec. at 950-951. The letter claimed that OSGC had made "false statements and misrepresentations" to the City "relat[ing] to the public safety and health aspect of the Project and the Project's impact upon the City's environment" and regarding "emissions, chemicals, and hazardous materials." *Id.* The letter never identified any particular statement that was allegedly false, nor did it explain the basis for the City's determination that any statements were false. *Id*. The letter closed by stating that "any further action at 1230 Hurlbut St. to construct the solid

[9] Of the twelve alderpersons sitting at the time of revocation, only five had been members at the time the Council approved the CUP. *Cf.* Cert.Rec. at 207, 210 *with* 952, 957.

waste facility will be prohibited by legal action, if necessary[.]" *Id.* at 951.

OSGC requested an administrative appeal pursuant to WIS. STAT. §§ 68.08-68.11, R. 26 at 958-960, but the City denied that request. *Id.* at 961-962.

The Court of Appeals Reverses.

OSGC then commenced an action for certiorari review, alleging that the City had illegally rescinded the permit based on an implied, unwritten condition; had deprived OSGC of its vested right to develop the facility; had rescinded the permit without substantial evidence of misrepresentation; and had acted arbitrarily and unreasonably. R. 2.

The circuit court ruled against OSGC on all claims, Pet.App. 8, ¶ 16, but, on *de novo* review, the Court of Appeals reversed. Pet.App. 21, ¶ 43. While acknowledging the established standards for review of municipal action, the Court

of Appeals was nevertheless troubled by many aspects of the City's revocation.

For example, every alleged misrepresentation on which the City relies was made before the Plan Commission, which "unanimously concluded none of the information presented to it previously had been misrepresented." Pet.App. 19-20, ¶ 40. Despite this, "the City did not so much as mention the Plan Commission's conclusion [that it had not been misled] in its decision," Pet.App. 11-12, ¶ 23, a failure which was "particularly noteworthy because the Plan Commission was in a far better position than the Common Council to determine whether misrepresentations had been made" or whether, if made, they were material. Pet.App. 19-20, ¶¶ 40-41. Not only did this failure "disappoint[]" the Court of Appeals, Pet.App. 11, ¶ 23, but, in combination with the City's "dismaying" failure to identify the alleged misrepresentations with any specificity,

Pet.App. 12, ¶ 24, it caused the court to conclude that the City's decision was based "not on a rational analysis of the statements Seven Generations made to the Plan Commission, but [on] the public pressure brought to bear on the Common Council after the CUP had been issued." Pet.App. 13-14, ¶ 27.

Moreover, even though the court believed the City's arbitrary action was sufficient to reverse without considering the City's subsequent attempts to explain or rationalize its reasons for revocation Pet.App. 14, ¶ 28, it nevertheless proceeded to examine the record to determine whether it contained substantial evidence of OSGC's supposed misrepresentations. After thoughtful examination of the record, the Court of Appeals concluded it did not. *Id.*, ¶ 29.

For example, the notion that OSGC promised the facility would produce "no emissions" was not only unsupported by the record, but "unreasonable." Pet.App. 16-17, ¶ 33. As the court

observed, "Any reasonable person understands that internal combustion engines like those required during the final energy-production stages will produce exhaust." *Id.*, ¶¶ 33, 34. Equally "untenable" was the notion that OSGC had represented there would be no hazardous materials, toxins, or omissions from those emissions. Pet.App. 15-16, ¶¶ 30-31. "[A]t 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." Pet.App. 16-17, ¶ 33.

Likewise, "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." Pet.App. 18, ¶ 36. Not only was it unreasonable to believe that a gas-burning engine would not produce exhaust that would have to be expelled from the

facility, but OSGC "specifically informed the Common Council before the CUP was granted that the facility would require exhaust outlets." *Id.* All OSGC represented was that there would be "no smokestacks *such as those associated with coal-fired power plants*." *Id.* (emphasis in decision). The failure to depict them on the preliminary sketches was immaterial; "[n]o reasonable person would believe the early representation of the facility in the initial planning documents was set in stone." Pet.App. 18-19, ¶ 37.

Nor did OSGC misrepresent the state of pyrolysis technology; as a DOE report on the OSGC facility stated, pyrolysis and gasification of municipal solid waste is "used all over the world," and 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." Pet.App. 19, ¶ 39. And as to the use of the

solid residue of pyrolysis, char, the Court perceived no misrepresentations; its potential use would depend upon DNR's environmental analysis. Pet.App. 16, ¶ 32.

The Court of Appeals also rejected the City's assertion that the court was required to limit its review to the excerpts from the record on which the City focused. "[W]hen 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." Pet.App. 17, ¶ 34.

Finally, the court emphasized the importance of the City's original decision to rely on existing codes and regulations to define the facility's size and emissions. "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." Pet.App. 20-21, ¶ 42. It did not. Instead, it required the facility to "comply with the Green Bay Municipal Code and federal and state regulations governing air and water quality, which Seven Generations has undisputedly done." *Id.*)

In light of its conclusion, the Court of Appeals found it unnecessary to reach OSGC's other arguments. Pet.App. 9, ¶ 18.

STANDARD OF REVIEW

An action for certiorari review "test[s] 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. To do so, the Court inquires whether: (1) the City was within its jurisdiction; (2) the City proceeded on a correct theory of law; (3) the City's action was arbitrary, oppressive, or unreasonable and represented its will and not its judgment; and/or (4) the evidence was such that the City might reasonably make the order or determination in question. *Id*. ¶¶ 35-36. While a municipality's decision is afforded a "presumption of correctness and validity," it is still subject to "meaningful review." *Ottman*, ¶¶ 48, 51.

ARGUMENT

I. THE CITY HAD NO DISCRETION TO REVOKE THE CUP ONCE OSGC RELIED ON THE PERMIT TO ITS DETRIMENT.

A. Once A CUP Issued And OSGC Acted In Reliance On It, The City Did Not Have Discretion To Revoke It.

At the heart of the City's position lies a subtle but significant bit of imprecision. Noting (correctly) that the *initial issuance* of a CUP is a matter within the City's discretion, City Brief at 28, the City leaps (incorrectly) to the proposition that the *revocation* of a CUP is a matter of discretion, too. *See, e.g.*, *id.* at 36. That is not the law.

This Court has long adhered to the "vested rights" doctrine, pursuant to which an owner or developer obtains vested rights in the proposed development of real estate. While ordinarily rights do not vest until a building permit is issued, the Court has recognized that rights may vest as soon as a party applies for a permit as long as the application conforms to the

existing legal requirements. *See generally Lake Bluff Hous. Partners v. City of South Milwaukee*, 197 Wis. 2d 157, 170-75, 540 N.W.2d 189 (1995) and cases discussed therein. This aspect of the "vested rights" doctrine has subsequently been codified. *See* WIS. STAT. § 66.10015, adopted by 2013 Wis. Act 74.

The vested rights doctrine seeks to protect the reasonable expectations of the developer. *See Lake Bluff* at 175. A developer has no reasonable expectation in a project that violates applicable law. *Id*. But where the project complies with applicable law, government may not later add different or additional conditions or requirements to the permit. *See id.* at 171-74.

Although this Court appears never to have had occasion to consider the application of the vested rights doctrine to a CUP, the Court of Appeals effectively did so in *Bettendorf v. St. Croix Cnty. Bd. of Adjustment*, 224 Wis. 2d 735, 591 N.W.2d 916

(1999). There, the Court of Appeals held that a municipality could not impose additional conditions on a CUP once it had been issued, even in response to unlawful activities conducted by the permittee on an adjacent parcel. Accordingly, the permittee had the right to use the property for any lawful use consistent with and not expressly prohibited by the CUP.

Here, the City did not merely issue a CUP to OSGC; it also issued a building permit. It is undisputed that OSGC complied with all conditions in both of them, including obtaining all necessary state and federal environmental permits and reducing the size of the vent stacks to comply with existing City ordinances. In so doing, OSGC relied to its detriment on the CUP and the building permit, spending significant sums of money to obtain those regulatory approvals (among other expenses). R. 25 at 210; R. 26 at 714, 949. That being so, OSGC's

rights vested and the City could not lawfully impose any different or additional conditions on the use of the property.

B. Determining Whether OSGC Obtained The CUP Through Misrepresentation Is A Matter Of Fact, Not Discretion.

The City, of course, denies that it imposed different or additional conditions, arguing instead that OSGC's rights in the CUP never vested because it was obtained through the alleged misrepresentations. As a preliminary matter, OSGC notes that the support for such a proposition in Wisconsin is thin. Only one Wisconsin case, *Jelinski v. Eggers*, 34 Wis. 2d 85, 148 N.W.2d 750 (1967), appears to suggest that a party's bad faith prevents rights in a permit from vesting, and then as something of an afterthought; the principal driver of the Court's conclusion in *Jelinski* was the fact that the proposed use was unlawful. *Id.* at 92-93.

Nevertheless, OSGC concedes that a municipality that was induced to issue a CUP or other permit on the basis of a real,

material misrepresentation should be entitled to relief. But establishing the factual foundation for such relief is not a matter of discretion. Fraud and misrepresentation are matters of fact, *see, e.g.*, *Anthony Gagliano & Co. v. Openfirst, LLC*, 2014 WI 65, ¶ 44 n.13, 355 Wis. 2d 258, 850 N.W.2d 845. Moreover, not only are they traditionally regarded as affirmative defenses, *see generally* WIS. STAT. § 802.02(3), but are sufficiently problematic (not to mention inflammatory) to warrant imposition of the middle burden of proof. *See, e.g.*, *Kensington Dev. Corp. v. Israel*, 142 Wis. 2d 894, 905, 419 N.W.2d 241 (1988). And it is appropriate for a party seeking to avoid obligations voluntarily undertaken to assume the burden of establishing a sufficient basis for such avoidance. *See, e.g.*, *Archdiocese of Milwaukee v. Doe*, 743 F.3d 1101, 1106 (7th Cir. 2014) (under Wisconsin law, "A party seeking to rescind a contract based on fraudulent inducement must prove the claim by clear and convincing

evidence, the same burden that applies to fraud claims sounding in tort").

None of the City's authorities remotely suggests that a City's discretion to grant a CUP in the first instance extends to its decision to revoke that CUP once it has been relied on by the applicant. *Jelinski* did not involve the revocation of a permit or, indeed, any judicial review of municipal action. *Roberts v. Manitowoc Cnty. Bd. of Adjustment*, 2006 WI App 169, 295 Wis. 2d 522, 721 N.W.2d 499, says only that the "decision to *grant* a conditional use permit is discretionary," *id.* ¶ 10 (emphasis added), and did not discuss revocation, either. While *Edling v. Isanti County*, 2006 WL 1806397 (Minn. Ct. App. July 3, 2006) and *Lauer v. Pierce County*, 267 P.3d 988 (Wash. 2011) both involved the revocation of a CUP, in neither case does there appear to have been any dispute that the applicant had misrepresented the

facts; neither suggests the municipality has any discretion in determining that fact.

Thus, once the CUP *and* building permit were issued *and* OSGC complied with all their stated conditions *and* expended significant sums doing so, OSGC's rights were undeniably vested. The City had no "discretion" to pull the carpet out from under it. It could only revoke the CUP if it could establish, by appropriate proof and to the requisite degree of certainty, a factual predicate for relief from promises it had made to OSGC (here, supposed misrepresentations). As the following discussion will show, the City fell far short of doing so.

II. THE "SUBSTANTIAL EVIDENCE" STANDARD DOES NOT REQUIRE A REVIEWING COURT TO IGNORE THE TOTALITY OF THE RECORD IN DETERMINING WHETHER AN APPLICANT MATERIALLY MISREPRESENTED ITS PROJECT.

The City expressly acknowledges that the record contains evidence that "clarifies" and "explains" OSGC's comments. *See, e.g.*, City Brief at 3-4 ("The record can also be read, if one

searches other parts of the record (including OSGC's voluminous written submission), to demonstrate that there is evidence arguably clarifying those misstatements"); *id.* at 4 (criticizing court of appeals for "search[ing] the record" for evidence that "explained" OSGC's statements). As shown in Section III below, that is an understatement; the fact that there would be emissions and stacks to vent them leaps from OSGC's application (and should have been self-evident to anyone).

The City, however, contends that no amount of context or explanation is sufficient to overcome its decision to revoke as long as any excerpt of OSGC's statements could be construed as false. *See* City Brief at 35-44. This is a gross distortion of the "substantial evidence" standard. If accepted, it would make meaningful judicial review of municipal action a dead letter.

Neither party disputes that the "substantial evidence" standard governs review of the City's decision. "Substantial

evidence means credible, relevant and probative evidence upon which reasonable persons could rely to reach a decision." *Sills v. Walworth Cnty. Land Mgmt. Comm.*, 2002 WI App 111, ¶ 11, 254 Wis. 2d 538, 648 N.W.2d 878. Nothing about this standard allows, much less requires, a reviewing court to confine its *examination* of the record to such portions as the municipality party chooses to emphasize. "Rather, the test is whether, *taking into account* ***all*** *the evidence in the record*, '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) (emphasis added). *See also Milwaukee Symphony Orchestra v. Dep't of Revenue*, 2010 WI 33, ¶ 31, 324 Wis. 2d 68, 781 N.W.2d 674.

The City's brief's own authorities agree. Only after reviewing "the record as a whole" can a court determine whether "there was substantial credible evidence to support" an agency's conclusion. *DeGayner & Co. v. Dep't of Natural*

Resources, 70 Wis. 2d 936, 948, 236 N.W.2d 217 (1975). *See also Lauer v. Pierce County*, 267 P.3d at 992 (noting that the "substantial evidence standard of review" required the court to "consider[] *all* of the evidence" in determining "whether a fair-minded person would be persuaded by [it]") (emphasis added).

The issue here— whether the Plan Commission was misled about the true nature and essential characteristics of the facility—is not logically capable of being determined by reviewing anything less than the full record. Since the Plan Commission made its recommendation on the strength of OSGC's entire submission, *see, e.g.*, Cert.Rec. at 895, 899, 901, this is an inquiry that *necessarily* requires examination of the entire record.

Indeed, examination of context is essential whenever a speaker's meaning is at issue. It is elementary that the meaning of a contractual provision must be gleaned "with reference to the

contract as a whole." *See, e.g., Seitzinger v. Comty. Health Network*, 2004 WI 28, ¶ 74, 270 Wis. 2d 1, 676 N.W.2d 426 (Abrahamson, C.J., dissenting)(collecting cases); *Southern Flour & Grain Co. v. McGeehan*, 144 Wis. 130, 132-33, 128 N.W. 879 (1910) (apparently contradictory provisions in contract must be harmonized from the instrument itself if possible); RESTATEMENT (SECOND) OF CONTRACTS § 202, cmt. d (1981) ("Meaning is inevitably dependent on context"). The same is true of statutes; "courts must not look at a single, isolated sentence or portion of a sentence, but at the role of the relevant language in the entire statute." *Indus. to Indus., Inc. v. Hillsman Modular Molding, Inc.*, 2002 WI 51, ¶ 8, 252 Wis. 2d 544, 644 N.W.2d 236). And it is likewise true of alleged misrepresentation, defamation, or even perjury; all must be viewed in the context in which they were uttered. *In re Disciplinary Proceedings Against Marks*, 2003 WI 114, ¶ 82, 265 Wis. 2d 1, 665 N.W.2d 836 (Prosser, J., dissenting)

("[The] purported 'misrepresentation' needs to be put in context"); *Gasner v. Bd. of Sup'rs of the Cnty. of Dinwiddie, Va.*, 103 F.3d 351, 358 (4th Cir. 1996) ("[A]lleged misrepresentations and omission[s] . . . must be considered in the full context in which they were made"); *Denny v. Mertz*, 84 Wis. 2d 654, 659, 267 N.W.2d 304 (1978) (defamation); *Van Liew v. United States*, 321 F.2d 674, 678 (5th Cir. 1963) (perjury).

Scrutinizing the entire record to discern the real meaning of testimony does not constitute "weighing" the evidence, as the City argues. This Court rejected such an argument in *Wagner v. Indus. Comm'n*, 273 Wis. 553, 565, 79 N.W.2d 264 (1956), *mandate amended, reh'g denied*, 273 Wis. 553, 80 N.W.2d 456 (1957). There, this Court reversed the circuit court's affirmance of an administrative determination precisely because the circuit court had relied on "isolated statements [of several testifying physicians] taken out of context which are completely explained

by other testimony…." This Court drew a distinction between *determination of the meaning* of evidence and the *weighing* of evidence:

> This is not a situation of the same witness having given conflicting testimony because, in such a situation, the commission may base its decision on which of the two conflicting pieces of testimony it chooses to believe, and, on review, a court would have no power to weigh the evidence and disturb such a finding.

Id. at 565. By contrast, in *Sills* (cited by the City), the record contained "competing" analyses of traffic and safety issues and the "Committee was entitled to accept the applicants' evidence of traffic impact over the neighbors' evidence." *Sills*, 2002 WI App 111, ¶ 18.

Nor does the presumption of correctness require the reviewing court to ignore portions of the record. It "does not follow . . . that affording the municipality a presumption of correctness eviscerates meaningful review." *Ottman*, 2011 WI 18 at ¶ 51. Let there be no doubt, the City's position, if accepted,

would eviscerate meaningful review. There is no proceeding of any substance—before a municipality or anywhere else—that does not contain some statement which, if taken out of context, could be characterized as untrue or misleading. The City's reading of the "substantial evidence" standard would effectively allow any municipality experiencing "buyer's remorse" to comb the record, "discover" a "misrepresentation," reverse course and revoke vested rights with impunity. As the Court of Appeals correctly concluded, "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." Pet.App. 20 ¶ 41.

In short, it was not error for the Court of Appeals to "search[] the record for evidence that conflicted with or arguably explained" OSGC's allegedly misleading statements, as the City contends. *See, e.g.*, City Brief at 4. Such a search was and is

essential to determine both OSGC's intended meaning and the Plan Commission's understanding.

III. THE COURT OF APPEALS THOROUGHLY DEBUNKED ANY NOTION THAT OSGC MISREPRESENTED ANYTHING.

A. The Court of Appeals did not confuse the "substantial evidence" standard with the "great weight and clear preponderance" standard.

The City devotes several pages overtly speculating that the court of appeal "equated the substantial evidence standard with the great weight and clear preponderance standard." City Brief at 45 – 47. The argument is based on nothing other than the fact that the Court of Appeals accurately described the City's own reference to the latter standard. *Id.* In fact, the Court of Appeals both acknowledged and applied the "substantial evidence" standard. *See, e.g.*, Pet.App. 14-21, ¶¶ 29-43. The City's argument has no independent analytical weight; it is just another way of arguing the Court of Appeals should have closed its eyes to vast chunks of the record.

B. The City Offers No Reasoned Basis For Overcoming The Findings Of Its Own Plan Commission.

The City assigned to the Plan Commission the job of investigating the sufficiency and veracity of OSGC's submissions. This was logical; it was the Plan Commission that heard the allegedly false statements in the first instance and knew firsthand how its own members understood them. Indeed, the City's own brief focuses on OSGC's statements to the Plan Commission. *See* City Brief at 8-10. Yet, after public notice and consideration of both written submissions and oral presentations by proponents and opponents alike, the Plan Commission determined unanimously that OSGC had not misrepresented anything. It knew full well at the outset that it was recommending a project with emissions, toxins, and stacks. *See supra* at 24-28.

In a single footnote, the City tries to dismiss the Plan Commission's conclusion as a "non-binding recommendation."

See City Brief at 26, n.4. But it was far more than that. It was a factual determination, *made by the very body allegedly misled*, that it had *not* been misled. In truth, the Plan Commission was probably the only body even competent to make this determination. And even if it might have been theoretically possible for the Common Council to have conducted a further evidentiary hearing, it did no such thing. It merely allowed members of the public to repeat their own beliefs in OSGC's supposed misrepresentation, *see generally*, R. 26, Video 2 at part 1, 1:04:23 through part 2, 14:52, and then denied OSGC's subsequent request for administrative review. *See* Cert.Rec. at 961.[10]

As one of the City's own authorities notes, the party entitled to favorable factual inferences is the one "who prevailed

[10] For this reason, the City's invocation of its "ability to evaluate the credibility of the [witnesses]," City Brief at 43, rings hollow, indeed.

in the highest forum *that **exercised** fact-finding authority*." *Lauer v. Pierce Cnty.*, 267 P.3d at 992 (emphasis added). That forum was the Plan Commission which, at the explicit direction of the Common Council, investigated the matter and determined that OSGC had not misled it. At the very least, it should have been the City's burden to demonstrate that this finding was incorrect. But, technical burdens aside, it is, to paraphrase Alderperson Moore at the October 3, 2012 Plan Commission hearing, "very, very hard" for the Common Council—the majority of which were "not part of the [original] process"—to say now the Commission was misled when the Commission itself said it was not. R. 26 at 876.

C. Even Without The Plan Commission's Findings, There Simply Is No Evidence That OSGC Misled The City.

While troubled by the City's failure to acknowledge its own Plan Commission's findings, the Court of Appeals independently examined the record and still determined that no

reasonable person could have concluded that OSGC made any material misrepresentations. That determination, we submit, is the only one that could be reached on a fair review of OSGC's own statements.[11]

1. No reasonable person could have interpreted OSGC's statements to mean that the facility would have no emissions.

The first and most important misrepresentation alleged consists of OSGC's supposed assertion that the facility would produce zero emissions or, alternatively, that any emissions would contain zero toxins. Even on its face, that position is wholly implausible. This was a facility designed to produce electricity using generators that burn gaseous hydrocarbons and therefore must release exhaust. It was for this very reason that

[11] Much of the "evidence" cited by the City consists of comments by various members of the public either professing to their own (mis)understanding of the project or seeking to characterize what OSGC had told the Plan Commission. *See, e.g.*, City Brief at 11-15. Their subjective beliefs are irrelevant. What is relevant is what OSGC in fact told the Plan Commission and how that Commission understood it.

the City conditioned the CUP on compliance with federal and state emissions standards, which clearly permit some level of emissions.

A review of the statements that OSGC and others made about emissions during the permitting process only confirms the City's knowledge. For example:

- In the written CUP application package, OSGC noted that DNR would need to issue an air permit, that "application and review of this permit will likely need to address air quality impacts [and] as emissions of hazardous air toxic compounds . . . ." Cert.Rec. at 25. It also noted that the facility would need to report actual air emissions to the DNR on an annual basis, and that DNR would maintain oversight and enforcement responsibility over the facility's operations. *Id.*

- In that same package, OSGC included a 50-page section titled "Emissions," which provided detailed information on potential air emissions from similar technologies. *Id.* at 26-76. Specific components of syngas and byproducts of its combustion were noted. *Id.* at 8, 43-71, 111, 126. The Plan Commission was specifically aware of this section. R. 26, Audio CD 1 at 44:27, 47:17.
- At the February 21, 2011 Plan Commission meeting, OSGC's presentation stated that the facility would "meet or exceed" federal pollution standards. R. 26, Audio CD 1 at 21:50. An engineer working for OSGC also stated that the facility's emissions would be

"acceptable" and would comply with "EPA/DNR standards."[12] *Id.* at 47:20.

Likewise, at the March 1, 2011 Common Council meeting:

- OSGC's presentation again included the statement that the facility would "meet or exceed" federal standards for safety, emissions, and pollutants. R. 26, Video 1 at 1:11:00.
- An OSGC representative stated plainly that "[a]ny emissions that come off the generator . . . will be subject to WDNR and EPA approval." *Id.* at 1:14:53.

[12] This same engineer's statement that any chemicals would be "scrubbed out" was repeatedly trumpeted by the project's opponents as a misrepresentation. In the context of his entire exchange with the Plan Commission, however, his message is clear: the emissions from the facility will be acceptable according to state and federal environmental standards. R. 26, Audio CD 1 at 47:20; R. 25 at 164. The engineer also specifically noted that there would be dioxin emissions. R. 26, Audio CD 1 at 43:55; R. 25 at 164. Moreover, the commissioner with whom this exchange occurred (Alderman Wiezbiskie) later voted to uphold the CUP, telling his fellow council members: "We were not duped." R. 26, Video 2, part 2 at 20:50.

- A Council member pointed out that the facility would have generators that would produce exhaust; OSGC agreed with this observation. *Id.* at 1:32:18.
- A member of the public with professional experience in air emissions spoke extensively about his research into potential emissions from the proposed facility, *id.* at 1:46:00, noting that emissions from gasification facilities are relatively small in comparison to traditional fossil fuels. *Id.*

Thus, OSGC clearly disclosed—and the City clearly understood—that there would be air emissions from the facility and that these emissions would contain some toxins. The only part of the process that OSGC claimed would not produce emissions was the pyrolysis process itself, and that claim was true. The "baking process" that converts the municipal solid waste into gas takes place in an enclosed chamber and produces

no emissions. Cert.Rec. at 231-32, 374-75. Thus, this case is nothing like *D'Huyvetter v. A.O. Smith Harvestore Prods.*, 164 Wis. 2d 306, 321, 475 N.W.2d 587 (App. 1991), cited by the City. There, the representation in question (that a silo was "oxygen-free") was not a vagrant comment taken out of context, but a specific, plausible claim made repeatedly and consistently (and that the plaintiff actually believed).

There is, in short, no substantial evidence that OSGC led the City to believe, that the City actually believed, or that it could reasonably have believed it was approving a facility with zero emissions or zero toxins.

2. Likewise, no reasonable person could have believed the facility would have no vents or smokestacks.

Equally untenable is the City's assertion that OSGC led it to believe there would be no "stacks" of any kind. As noted above, both the Plan Commission and the Council itself knew full well that the combustion of syngas was going to produce

some emissions. There must be some way to vent them. To that point, OSGC's consistent message during the CUP application process was that the facility would not have "stacks *like those associated with coal-fired power plants*." *E.g.*, R. 26, Audio CD 1 at 22:10 (emphasis added). From any perspective, this is a true statement. The roofline of the building itself will be 32 feet, Cert.Rec. at 206, and the principal "stacks" (which will emit the exhaust from the generators and will contain pollution control monitoring devices) will be 35 feet, *i.e.* barely three feet above the roofline. *Id.* at 342. In light of the structures surrounding the proposed facility—including oil storage tanks, concrete and asphalt processing facilities, the Pulliam power plant, and the Leo Frigo bridge—it is difficult to credit the sincerity of the City's professed objection to that size of stack. *See id.* at 475-77 (DOE finding that visual impact of stacks would be minimal).

While OSGC submitted an early rendering of the facility that did not show any vents, it misled no one. At the time of OSGC's application, the stack configuration had not yet been developed; it was developed later as part of the DNR air permit process. *Id.* at 286-327. At the Plan Commission hearing on October 3, the City's Planning Director explained that "[i]t's not unusual for the staff and the Plan Commission to make a decision on a conditional use permit before we have all the fine details of the project" and that much design work takes place after a CUP is approved. *Id.* at 891-892. Tellingly, the City did not condition the CUP on the absence of stacks, but merely required compliance with the general City building ordinances. *See id.* at 180-81, 198. There is no question that, as finalized, the facility complied.

3. OSGC's assertion that the technology was proven was true.

The next alleged "misrepresentation" of which the City accuses OSGC is the assertion that "the Facility's technology was proven and in use elsewhere." *See, e.g.*, City Brief at 1. In fact, the record—including submissions at the time of the application and those submitted to the Plan Commission for its subsequent investigation—fully supports OSGC's assertion.

For example, OSGC submitted to the Plan Commission a report from the Engineering Department of the University of California at Riverside which concluded that, based on both peer reviewed information and its own independent verification, pyrolysis was technically viable. *Id.* at 35-76. The report noted that "[p]yrolysis and gasification facilities currently operating throughout the world with waste feedstocks meet each of their respective air quality emissions limits." *Id.* at 40. Attachments to the report listed not only those facilities the authorities had

independently reviewed (three of which used pyrolysis), *id.* at 47-71, but a chart listing worldwide gasification facilities (27 of which used pyrolysis). *Id.* at 73-76.

The widespread use of the technology was confirmed by both state and federal regulators. In granting a state air permit, DNR noted (in specific response to assertions that the proposed application was unique) that "this technology has been in existence for many years operating at small or research and testing levels." *Id.* at 274. DOE attached to the Environmental Assessment a paper on pyrolysis technology and its use "in applications similar to the proposed project." *Id.* at 389. That report noted, among other things, that "[t]he pyrolysis and gasification of MSW [municipal solid waste] is used all over the world, particularly in Japan and parts of Europe and Scandinavia," *id.* at 564, and that "there are numerous successful plants in operation around the world and in the United States

that utilize various forms of pyrolysis to process different resources to produce energy," using various feedstock, including (like OSGC's proposal) municipal solid waste, and resulting in various end-products, including (like OSGC's proposal) "syngas for combustion into electricity . . . ." *Id.* Moreover, based on the Department of Energy's own research, pyrolysis of MSW "is a technology that has advanced to an adequate stage to result in MSW reduction benefits, energy generation benefits, and has subsequently produced greenhouse gas benefits . . . ." *Id.* at 565. The report attaches a sample list of waste-to-energy facilities using pyrolysis technology to process MSW in at least 13 countries. *Id.* at 566-68.

Was the proposed facility *identical* to facilities elsewhere? Probably not, but OSGC never said it was. In fact, OSGC explained to the City that this probably would be the first pyrolysis plant in Wisconsin and that it was just one possible

version. *Id.* at 162. But, as the DNR observed in granting the air permit, "the fact that a proposed project is unique is not a valid reason to deny Department approval." *Id.* at 268.

4. OSGC's comment about the possible use of char in organic farming was both true and inconsequential.

The last of OSGC's alleged misrepresentations consists of the assertion that "the by-product of the Facility could be used for organic farming." *See, e.g.*, City Brief at 1. The assertion, while perhaps optimistic, was not only technically accurate but wholly inconsequential.

As they related to the solid byproducts of pyrolysis, the predominant theme of OSGC's submissions was that the facility would allow the reduction of landfilling by 80% or more. *See, e.g.*, Cert.Rec. at 6; R. 26, Audio CD 1 at 22:40. In other words, of every 100 tons of municipal waste processed by the facility, 20 tons would *still* have to be hauled to a landfill. While OSGC did say that the char might be used for other purposes, the most

likely purpose was road fill, not organic farming, *see, e.g.*, R. 26, Audio CD 1 at 24:18, 43:13-27, a fact apparent in one of the very quotes selected by the City, *see* City Brief at 8 (citing Cert.Rec. at 160-61), and that even the public opponents recognized. *E.g.*, Cert.Rec. at 263 (Chaudoir oral comment), 275 (unattributed comment).

Moreover, whatever the potential use of char, from the beginning OSGC emphasized that it would depend on the purity of the feedstock, *i.e.*, the municipal waste. *Id.* at 8; *see also* 460-61 (changes to feedstock could alter composition and the reuse potential of the solid byproduct). And it was clear that the char would have to be tested periodically. *See, e.g.*, *id.* at 232, 266, 275, 369, 460.

Thus, when OSGC said in passing that the char "could have been tested and go right into organic farming," *id.* at 164, it was correct; *if* the char tested sufficiently clean, it *could* be used

for that application. Was this optimistic? Perhaps. Was it deceptive? Hardly, because in the very next breath OSGC noted that the char could and probably would contain dioxins. *Id.*

In short, no reasonable person could possibly have believed that OSGC obtained its CUP by misrepresenting the potential use of char for organic farming. The Planning Commission did not think so; the Court of Appeals did not think so; and this Court should not think so, either.

5. Given the conditions built into the CUP and all subsequent permits, the City's alleged need for "trust and confidence" is makeweight.

Finally, the City chides the Court of Appeals for "ignoring the possibility" that the Common Council's revocation decision was the result of its loss of "trust and confidence" in OSGC based on its alleged misrepresentations. This is pure makeweight.

As discussed above, there were no misrepresentations and, thus, any alleged loss of trust and confidence would have been arbitrary and irrational. Just as significantly, by the time of revocation, the need for abstract "trust and confidence" had been replaced by layer upon layer of detailed criteria imposed by the City's own building code and the various permits issued by the City, DNR, and DOE (the two latter of which, at least, would be constantly monitoring the facility). In light of these protections, on which the City chose to rely, its invocation of "loss of confidence" is, we respectfully submit, wholly insincere.

* * * * *

In sum, examination of the record as a whole confirms that no reasonable person could have been misled by OSGC's statements. If the error-correcting function of the Court of Appeals means anything, its conclusion here must be upheld.

IV. WITHOUT SUBSTANTIAL EVIDENCE OF MISREPRESENTATION, THERE IS NO REASON TO REMAND THIS CASE FOR FURTHER PROCEEDINGS.

Finally, the City argues that, once the Court of Appeals found that the reasons for the City's actions were unclear, that court should have closed its eyes to the remainder of the record and remanded to the Common Council to allow it to "explain" its actions in greater detail. *See* City Brief at 31-35.

Remand is neither required nor appropriate here. When the Court of Appeals said that the City had failed to articulate any rationale for its decision, Pet.App. 12, ¶ 24, it did not mean that the *reasons* for the City's actions were unclear (after all, those reasons—alleged misrepresentation—had been asserted at the October 16, 2012 meeting of the Common Council and have been repeated by the City at every occasion thereafter). It meant, rather, that the City had failed to identify any facts to support its

accusations. *Id*. It failed to do so, in turn, because (as the Court of Appeals went on to find) the record contains no such support.

The cases on which the City relies stand for no more than the proposition that remand is appropriate where the reasons for the action under review "are either entirely absent or are so inadequate that the determination cannot adequately be reviewed." *Lamar Cent. Outdoor, Inc. v. Bd. of Zoning Appeals*, 2005 WI 117, ¶ 26, 284 Wis. 2d 1, 700 N.W.2d 87 (quoting 3 RATHKOPF, THE LAW OF ZONING AND PLANNING § 62:47 at 62-133 (4th ed. (Ziegler rev.) 1975, Supp. 2004)). Thus, in the cases cited by the City, the underlying record's deficiencies *precluded meaningful review*. *See id.* ¶ 27; *see also, e.g., Conn. Gen. Life Ins. Co. v. Dep't of Indus., Labor & Human Relations*, 86 Wis. 2d 393, 407, 273 N.W.2d 206 (1979) (not enough evidence in record or language of department's decision for court to determine basis of department's conclusion); *Voight v. Washington Island Ferry*

Line, Inc., 79 Wis. 2d 333, 344, 255 N.W.2d 545, 550 (1977) (remanding to allow commission to explain ambiguous language in its decision). *Cf. Transamerica Ins. Co. v. DIHLR*, 54 Wis. 2d 272, 195 N.W.2d 656 (1972) (addressing merits despite unclarity of reasons expressed by agency for its actions).

Here, the Court already knows the City's stated reason for its revocation. What possible purpose would be served by remanding here (except, we suspect, to give the City the opportunity to invent *other* reasons for its supposedly "discretionary" revocation)? To allow another chance would reward arbitrary and capricious action, encourage municipal inattention if not sandbagging, and lead to an endless cycle of appeal and remand.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals should be affirmed.

Dated this 14th day of November, 2014.

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font: Minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per full line of body text. The length of this brief is 10,963 words.

By:_____
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I hereby certify that:

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CERTIFICATE OF SERVICE

I certify that I filed the Brief of Plaintiffs-Appellants, Oneida Seven Generations Corporation and Green Bay Renewable Energy, LLC in the above-captioned appeal with the Clerk of the Supreme Court and served copies on counsel of record this 14th day of November, 2014 by messenger as designated below:

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