STATE OF WISCONSIN
SUPREME COURT

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

Plaintiffs-Appellants,

v.

CITY OF GREEN BAY,

Defendant-Respondent-Petitioner.

Appeal No. 2013AP000591
Brown County Circuit Court
Case No. 2012CV002263

On a Petition for Review from a Decision of the Wisconsin Court of Appeals, District III, Reversing an Order of the Circuit Court for Brown County, the Honorable Marc A. Hammer, Presiding

REPLY BRIEF OF DEFENDANT-RESPONDENT-PETITIONER CITY OF GREEN BAY

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INTRODUCTION

Oneida Seven Generations Corporation and Green Bay Renewable Energy, LLC (collectively, "OSGC") begin their brief with a quote from the film Casablanca to advance the notion that the City of Green Bay ("City") was "wholly insincere" when it revoked the conditional use permit ("CUP") at issue. OSGC's brief is indeed littered with phrases like "pure makeweight" and "sandbagged" to describe its view of the City's decision.

OSGC "doth protest too much,"[1] as epitomized by this more relevant quote from the Circuit Court:

> Seven Generation argues that they simply did not make representations that they told the Common Council there would be [no] emissions, that it was unreasonable for the Common Council to assume no exhaust vents as part of the smokestack, and that the system was, in fact, closed.
>
> I'm satisfied that the Planning Commission initially and the Common Council subsequently were left to believe there would ***not*** be the type and nature of the emissions that ultimately were identified and approved by the DNR. And I base that simply on the comments that I placed on this record, the representations made in PowerPoint, the representations made by representatives of Seven Generation to the Planning Commission initially and to the City Council ***repeatedly***.

(App. 103, R.24, 81:3-18) (emphasis added.)

The Circuit Court found that the record of OSGC's repeated misstatements supported the City's decision. OSGC's representations were

[1] Hamlet, Act 3, Scene 2.

a conscious part of its larger public relations campaign, involving specific talking points crafted by OSGC to convince the City and the public that it was proposing an essentially "green" facility. OSGC's brief completely ignores the Circuit Court's decision, which might explain its indecorous posturing.

In a tacit acknowledgement of what lies in the record, OSGC now argues that any misstatements were "wholly inconsequential," said "in passing," or were "slips of the tongue," and that they could not have reasonably misled anyone. OSGC seems to be saying that applicants can say what they want prior to municipal approval as long as the record contains some qualifying fine print. That should not be the law of Wisconsin. OSGC should have simply presented its proposed facility ("Facility") to the City in an accurate manner:

- Instead of saying its emissions would be clean and that there would be no hazardous materials, OSGC could have said that there would be emissions of toxins but that it was uncertain about the particular contaminants and levels.

- Instead of representing that there would be no stacks, OSGC could have said that there would be stacks but it was not yet certain about

the number and size of stacks necessary to disperse the hazardous emissions.

- Instead of saying that the char byproduct could be used in organic farming, OSGC could have said that some of the char may be used as additives in roads but that most of it would likely be landfilled as hazardous waste.

- Instead of saying that the project was similar to others throughout the world, OSGC could have said it would be the first privately owned "for profit" facility employing a new pyrolysis technology.[2]

OSGC made its own bed and, after a public hearing, the City revoked the CUP because it believed it had been misled. OSGC challenged the decision via certiorari review. The Circuit Court, applying established certiorari review standards, held that "substantial evidence" in the record supported the City's decision. The Circuit Court applied the common sense notion that applicants are responsible for ensuring that their presentations and responses to questions at public hearings are truthful and accurate. (*See* App. 54-55, R.24, 32:15-33:5.)

[2] OSGC's project was not market driven. (*See* OSGC App. 232 (identifying over $23 million in public funds to be committed to the project).)

The Court of Appeals obviously disagreed with the Circuit Court, but its review was not conducted in accordance with established certiorari standards. It combed the record for evidence to support OSGC's position rather than according proper deference to the City's decision. Further, it found that the City's rationale was unclear; once it made that finding, certiorari procedure required that the matter be remanded. For these and other reasons, the Court of Appeals' *Decision* should be reversed.

ARGUMENT

I. THE STANDARD OF REVIEW ADVOCATED BY OSGC AND APPLIED BY THE COURT OF APPEALS DOES NOT COMPORT WITH WELL-ESTABLISHED CERTIORARI STANDARDS.

A. The Substantial Evidence Standard Applies To The Review Sought By OSGC.

For the first time, OSGC suggests that a higher burden of proof should apply where a municipality revokes a permit based on material misstatements by an applicant.[3] OSGC never raised this issue in proceedings before the City or the Circuit Court. OSGC chose certiorari

[3] OSGC spends several pages of its brief addressing the vested rights doctrine. This, of course, presupposes that an applicant has vested rights in a CUP, which it does not. *Rainbow Springs Golf Co., Inc. v. Town of Mukwonago*, 2005 WI App 163, ¶ 1, 284 Wis. 2d 519, 702 N.W.2d 40 (holding that a CUP is not a "vested property right" but "a species of zoning designations."). Nevertheless, OSGC concedes, as it must, that revocation is warranted when a CUP was granted based upon material misstatements.

review, and, it is well-settled that the substantial evidence standard applies in certiorari reviews.

OSGC has not pointed to any authority to support its new argument or articulated how a clear and convincing standard would work in conjunction with a substantial evidence test. The decisions cited by OSGC were conventional misrepresentations cases, not certiorari actions following permit revocation. The certiorari cases confirm the use of the substantial evidence test. *See e.g.*, *Edling v. Insanti County*, 2006 WL 1806397, *2 – *3 (Minn. Ct. App. 2006) (unpublished) (municipality's decision to revoke CUP due to material misstatements during application process was subject to the substantial evidence standard); *Lauer v. Pierce County*, 267 P.3d 988, 992 (Wash. 2011) (substantial evidence standard "requires the court to determine whether a fair-minded person would be persuaded by the evidence of the truth of the challenged findings.").

Wisconsin law is in accord: "On certiorari, a court will sustain a municipality's findings of fact if any reasonable view of the evidence supports them." *Ottman v. Town of Primrose*, 2011 WI 18, ¶¶ 53, 81, 332 Wis. 2d 3, 796 N.W.2d 411. When reviewing a finding of fact, "[a] certiorari court may not substitute its view of the evidence for that of the

municipality." *Id.* at ¶ 53.[4] "Substantial evidence does not mean a preponderance of the evidence." *Milwaukee Symphony Orchestra, Inc*. v. *Wis. Dept. of Revenue*, 2010 WI 33, ¶ 31, 324 Wis. 2d 68, 781 N.W.2d 674. "It means whether, after considering all the evidence of record, reasonable minds could arrive at the conclusion reached by the trier of fact." *Id.*

Further, there is a presumption of correctness and validity to a municipality's decision, which "recognizes that locally elected officials are especially attuned to local concerns." *Ottman*, at ¶¶ 48, 50. Based on the foregoing, this Court should decline OSGC's invitation to disturb these well-established standards.

OSGC also suggests that the City's position is that a reviewing court should not review the entire record to determine whether substantial evidence supports a municipality's decision. *OSGC's Br*. at 44-50. OSGC mischaracterizes the City's argument. The City acknowledges that the entire record may be consulted, but submits that the Court of Appeals did not apply certiorari review standards. Instead of searching for credible evidence to sustain the Council's decision, the Court of Appeals weighed the evidence and substituted its own judgment.

[4] A case cited by OSGC, *Anthony Gagliano & Co., Inc. v. Openfirst, LLC*, 2014 WI 65, ¶ 44 n.13, 355 Wis. 2d 258, 850 N.W.2d 845, confirms this point: "the court of appeals cannot make factual determinations where the evidence is in dispute."

OSGC cites only *Wagner v. Industrial Comm'n*, 273 Wis. 553, 79 N.W.2d 264 (1956), to support its contention that the Court of Appeals did not weigh the evidence. *OSGC's Br.* at 49. *Wagner*, a workers' compensation case, is readily distinguishable. The Industrial Commission had rejected a finding by the hearing examiner regarding the plaintiff's claim, and the circuit court affirmed. This Court reversed, concluding that the commission relied on "merely isolated statements taken out of context which are completely explained by other testimony given by [the] same physicians." *Id.* at 565. The *Wagner* Court noted that while it was appropriate to reverse the circuit court on this ground, a reviewing court is ***without*** the authority to weigh the evidence and disturb an agency's finding when a witness has given conflicting testimony. In that situation, an agency has discretion to determine which of two conflicting pieces of testimony it chooses to believe. *Id.*

In the present case, the Court of Appeals did not point to testimony by OSGC witnesses that explained other misleading testimony. Instead, contrary to *Wagner*, it searched OSGC's written materials and concluded that the materials contained enough information to explain the public misstatements. This is weighing the evidence.

Further, the Common Council did not rely on merely "isolated statements" "taken out of context" that were made by OSGC during the application process which can be "completely explained by other testimony" given by OSGC. Rather, in granting the CUP, the Common Council relied on representations repeatedly made by OSGC during the application process.[5] OSGC's material misstatements were not "slips of the tongue" or "ambiguous phrases," as OSGC suggests.

B. Remand Was The Appropriate Remedy For The Court of Appeals.

The Court of Appeals stated that it could not "trace the City's reasoning." As described in the City's initial brief, the rules established for certiorari review provide that if the rationale for a municipality's decision cannot be discerned, the court must remand. Accordingly, once the Court of Appeals made this finding, remand was required.

OSGC is displeased with the required remedy, and proffers that the Court of Appeals' real finding is that the reason for the City's decision – misrepresentation − was apparent but it is unsupported. OSGC believes that remand serves no purpose because it would lead to an "endless cycle of

[5] OSGC uses its "isolated comments" theory to try to distinguish *D'Huyvetter v. A.O. Smith Harvestore Products*, 164 Wis. 2d 306, 475 N.W.2d 587 (Ct. App. 1991). *OSGC Br.* at 61. Given the repeated statements to the Common Council, this attempt is unavailing and *D'Huyvetter* supports the City.

appeal and remand." OSGC chose to pursue certiorari review. Such review is limited to the record. If this Court agrees with the Court of Appeals that the Common Council failed to adequately articulate its rationale, the case should be remanded.

II. THE RECORD CONFIRMS THE CITY'S REVOCATION DECISION.

A. The Common Council Was Not Required To Accept Its Plan Commission's Recommendation.

OSGC argues that the City has offered no basis for rejecting the Plan Commission's recommendation. If this Court concludes that a rationale is required, then, as stated above, remand is the required remedy. But, as the Circuit Court correctly found, the Common Council was not bound by the recommendation. It was free to reach the opposite conclusion if substantial evidence supported such a decision. (App. 102-03, R.24, 80:11-81:2.)

There should be no mistake: the record establishes that the same misleading talking points were presented to the Plan Commission and to the Common Council. *See infra* at § II.B. Thus, the Common Council was able to evaluate OSGC's credibility independent of the Plan Commission. The different conclusions simply demonstrate that reasonable minds may differ.

B. Substantial Evidence Supports the City's Decision To Revoke OSGC's Permit.

OSGC suggests that the City was not permitted to give weight to materials and testimony submitted to the Plan Commission and Common Council in support of revocation. *OSGC's Br.* at 56 n.11. OSGC argues that this information consists of only misunderstandings. OSGC's argument must be rejected. The 140 pages of information (*see* OSGC's App. 571-712) establish that OSGC's pre-developed talking points were hardly "slips of the tongue," but were repeated at town hall meetings and open houses. (*See, e.g.*, OSGC App. 572-74, 637.)

The Circuit Court correctly concluded that substantial evidence exists regarding each of OSGC's material misstatements to support the City's decision.

1. OSGC Repeatedly Misrepresented That The Facility Would Not Emit Hazardous Materials.

OSGC complains that the City's position regarding OSGC's hazardous materials representations is "wholly implausible." *OSGC's Br.* at 56. OSGC says it "clearly disclosed" that its emissions would contain

toxins. *Id*. at 60. This Court need look no further than the actual statements made by OSGC to conclude otherwise.

In response to a question from a member of the Plan Commission regarding hazardous materials, OSGC 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 [venturri scrubber] so it takes away any kind of harmful toxins that might be in the gas and the rest is burned.

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

When the Plan Commission asked OSGC about certain emissions from other facilities that were referenced in the CUP application, such as hydrogen chloride, nitrogen oxide, sulfur dioxide, mercury, and dioxins, OSGC responded:

> ***It's all scrubbed out***. A lot of this stuff is destroyed when it goes through the energy process at the end.

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

These same talking points were presented to the Common Council. (*See* R.26 VIDEO 1 at 1:32:17-1:33:19 (OSGC responding "yes" to a

question regarding whether the exhaust to be emitted from the Facility would be "actually clean.").)

Substantial evidence exists to sustain the City's finding that OSGC materially misrepresented that the Facility would not emit hazardous materials.

2. OSGC Repeatedly Misrepresented That The Facility Would Not Have Stacks.

According to OSGC, "[e]qually untenable is the City's assertion that OSGC led it to believe there would be no 'stacks' of any kind." *OSGC Br.* at 61. OSGC's "no stacks" talking point strategy was employed to make the Facility appear environmentally friendly with no hazardous emissions requiring stacks. The minutes from the Plan Commission indicate that OSGC stated as follows:

> [OSGC representative] added there are ***no smoke stacks***, no oxygen, and no ash. There is carbon and ash which actually could have been tested and go right into organic farming. There are no fallout zones. . .

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

OSGC delivered this same talking point to the Common Council. (*See* R.26, VIDEO 1 at 1:18:12-1:18:48 (OSGC PowerPoint presentation

which undeniably showed renderings of the Facility without any stacks and during the slideshow emphasized that "there are no smokestacks.").)

OSGC's argument that its rendering of the Facility that did not show any stacks "misled no one" therefore rings hollow. *See OSGC's Br.* at 63. Substantial evidence supports the Common Council's decision to revoke the CUP.

3. OSGC Misrepresented That The Facility's Char Byproduct Could Be Used For Organic Farming.

OSGC now refers to its statements regarding the use of char for organic farming as "wholly inconsequential." *OSGC's Br.* at 67. This begs the obvious question: if the statement was "wholly inconsequential," why was it made? The answer is simple – this was one of OSGC's talking points developed as part of its public relations campaign to convince everyone that the Facility would be environmentally-friendly. It is another example of the "no hazardous materials" theme.

OSGC refers to its representation as being "said in passing," and even goes so far as to say that "[w]hile OSGC did say that the char might be used for other purposes, the most likely purpose was road fill, not organic farming." *OSGC's Br.* at 68. OSGC could have made this clear from the outset, but instead represented that "[t]here is carbon and ash

which actually could have been tested and ***go right into organic farming***." (OSGC App. 164, R.25, 164; R.26, AUDIO 1 at 42:27-44:20) (emphasis supplied.)

4. OSGC Misrepresented That The Facility's Technology Was Proven.

The Environmental Analysis prepared by the DNR confirms that the proposed Facility's technology is experimental. (*See* OSGC App. 248 ("Pyrolytic/gasification technology using [municipal solid waste] as source material is not in large scale operation. Documentation of waste to energy operations, costs, and emissions is limited."); OSGC App. 249 ("This lack of information contributes to uncertainty about projected air contaminant emissions . . . .").) Because of this, OSGC's air permit from the DNR requires early emissions testing to determine the actual level of contaminants. (OSGC App. 248.) A reasonable person could find this "uncertainty" to be important to know during the application process.

OSGC now concedes that its proposed Facility would not be identical to facilities elsewhere. *OSGC's Br.* at 66. OSGC could have easily shared this same information during the application process but did not. Instead, OSGC touted the technology as proven. (*See* R.26, VIDEO 1 at 1:15-19 – 1:22:43.)

This misleading "proven technology" claim, along with the repeated comments regarding no hazardous materials, clan emissions, no stacks, and organic farming, evidence a pattern of repeated, misleading statements. This is substantial evidence that, as the Circuit Court observed, left the City "to believe there would not be the type and nature of emissions that ultimately were identified and approved by the DNR."

CONCLUSION

This Court should reverse the *Decision* of the Court of Appeals because the City properly exercised its discretion and substantial evidence supports the City's findings. If the Court agrees with the Court of Appeals that the City failed to adequately articulate its rationale, the matter should be remanded to the Common Council.

Respectfully submitted this 5th day of December, 2014.

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CERTIFICATION PURSUANT TO WIS. STAT. § 809.19(8)(d)

I hereby certify that this reply brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a reply brief produced with proportional serif font. The length of this reply brief is 2,923 words.

Respectfully submitted this 5th day of December, 2014.

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CERTIFICATE OF SERVICE PURSUANT TO WIS. STAT. § 809.80(4)

I hereby certify that on the 5th day of December, 2014, pursuant to Wis. Stat. § 809.80(3)(b), the original and twenty-one (21) copies of the Reply Brief of Defendant-Respondent-Petitioner City of Green Bay were mailed to the Clerk of the Wisconsin Supreme Court by first-class mail.

I further certify that three (3) copies of the same were served upon counsel by first-class mail.

Respectfully submitted this 5th day of December, 2014.

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CERTIFICATION PURSUANT TO WIS. STAT. 809.19(12)(f)

I hereby certify that I have submitted an electronic copy of this reply brief excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12). I further certify that this electronic reply brief is identical in content and format to the printed form of the reply brief as filed as of this date. A copy of this certificate has been served with the paper copies of this reply brief with the Court and served on all opposing parties.

Respectfully submitted this 5th day of December, 2014.

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