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STATE OF WISCONSIN
SUPREME COURT

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

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

Plaintiffs-Appellants,

v.

CITY OF GREEN BAY,

Defendant-Respondent-Petitioner.

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

**DEFENDANT-RESPONDENT-PETITIONER CITY OF GREEN
BAY'S RESPONSE TO WISCONSIN REALTORS®
ASSOCIATION'S AMICUS BRIEF**

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INTRODUCTION

The Wisconsin Realtors® Association (WRA) expresses its concern that allowing revocation of the CUP to stand in this case would cause uncertainty for property owners and developers and their ability to rely upon zoning permits granted by municipalities. The City of Green Bay (City), too, is concerned with certainty in development and zoning proceedings. The City respectfully submits that certainty begins with accurate representations by applicants regarding the details and scope of their projects. Permit applicants can reasonably expect revocation to be a consequence when misleading information is provided during the application process, especially when misstatements are made during public hearings.

The City determined that it had been misled in this case by statements made by OSGC at public hearings regarding its proposed project. Municipalities should be able to rely upon statements made to them at public hearings. While OSGC suggests that a careful review of its written materials shows that the project would have emissions and stacks, the materials related to different projects using similar technologies. OSGC representatives went out their way to reassure the City and public that their project was environmentally friendly; that there would be no stacks like those used by

paper companies—the clear implication being that the project would not be pumping out emissions like those companies; and that the process was so clean that the char could be used for organic farming.

The City agrees with the WRA that municipalities must exercise their discretion fairly. The City and the WRA further agree on the uncontroversial premise that zoning permits acquired based upon misrepresentation may be revoked. Here, when concerns were raised about the accuracy of the public statements made by OSGC during the application process, the City proceeded in a fair manner. It held public hearings regarding the nature of the misleading statements that were made, and it voted in open session. All sides had an opportunity to be heard before the City Plan Commission and then the Common Council. The Common Council voted to revoke the permit and OSGC filed this certiorari action. Ultimately, the question to be answered here, as in all certiorari actions, is whether substantial evidence in the record supports that decision.

Cities and developers need to be able to work together and rely upon each other in order to bring developments, particularly ones of this scale, to fruition. The record here shows that as details became known about the project during OSGC's State and Federal approvals process, concerns were

raised about whether the project had been accurately represented to the City prior to approval. The City's elected officials decided that the concerns warranted further inquiry. When OSGC was presented with these concerns, rather than acknowledge the changes that were being required of it or that it had learned more about its project along the way, OSGC argued that it was the plan all along.

The City of Green Bay is constantly working with developers to improve the City and its economy, and it did not take action lightly here. But when substantial concerns are presented, must the City turn a blind eye? Or, should it publicly review and debate the concerns? While the City truly welcomes this Court's guidance to resolve this matter, the City respectfully submits that the WRA's concerns are unfounded.

ARGUMENT

I. THE WRA'S VESTED RIGHTS DISCUSSION DOES NOT ASSIST IN RESOLUTION OF THE ISSUES PRESENTED.

While the City disagrees with the WRA's conclusion that OSGC obtained vested rights in the CUP,¹ that is not the real issue here because

¹ See *Rainbow Springs Golf Co. v Town of Mukwonago*, 2005 WI App 163, ¶ 18, 284 Wis. 2d 519, 702 N.W.2d 40, where the Court of Appeals held that the holder of a CUP whose permit had been properly revoked failed to state a claim that a property interest had been taken: "A CUP is merely a type of zoning designation, not a piece of property."

everyone – the City, OSGC, the WRA, and the courts below – agrees that a CUP obtained by misrepresentation can be revoked. In particular, the City agrees with the circuit court’s conclusion:

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

In addition, I view this argument as I suggested as one of damage. And Counsel[sic] has respectfully, quite frankly, indicated that's an interesting point and that may be left for a different day, and Seven Generation may pursue damage, and, obviously, the City proceeds in voiding CUPs at the risk of someone bringing an action that may or may not have validity or value. That's not for today. That's something for these parties to take up after today.

(App. 99-100, R.24, 77:18 - 78:14.)²

It is not entirely clear what the WRA is advocating with respect to its vested rights discussion. If it is saying that additional caution should be exercised when revoking a permit, the City agrees and submits that holding public hearings and inviting comment before voting exhibits such caution.

² The Court of Appeals did not address this issue. (App. 9, *Decision* at ¶ 18.)

The WRA does not articulate what, if anything, should have been changed about the process followed by the City.

The WRA cites a number of cases that it believes demonstrates that “Wisconsin courts have repeatedly invalidated attempts by local governments to revoke lawfully obtained permits.” (*WRA Br.* at 9.) The cases cited by the WRA are readily distinguishable. For example, in *Russel Dairy Stores, Inc. v. City of Chippewa Falls*, 272 Wis. 138, 145, 74 N.W.2d 759 (1956), the court noted that “[t]here is no suggestion of record that fraud was in anywise employed with respect to the issuance of the permit.” *See also State ex rel. A Hynek & Sons Co. v. Bd. of Appeals of the City of Racine*, 267 Wis. 309, 64 N.W.2d 623, 627 (June 8, 1954) (no fraud allegations).³ Here, of course, the issue is whether the zoning permit was lawfully obtained and, on this point, as noted, WRA agrees that misrepresentation can be grounds for revocation.

Rosenberg v. Village of Whitefish Bay, 199 Wis. 214, 225 N.W. 838, 840 (1929), did involve mention of false representations in the context of an ordinance change. But, in that case, the municipality was “fully informed as

³ The *Hynek* decision was subsequently reversed on a motion for reconsideration, and the decision of the Racine Board of Appeals that a use was unauthorized was affirmed. *See Hynek*, 267 Wis. 309, 66 N.W.2d 623 (Nov. 9, 1954)

to the falsity of any representations made” and “permitted the ordinance in question to stand for 18 months, during which time Mr. Rosenberg incurred expenses relying upon the rights given him under the ordinance in question.” The City here cannot be said to have sat on its hands.

The WRA’s vested rights discussion does not address the issues before the Court.⁴ The issues here center on (a) what a municipality is supposed to do when presented with evidence of misrepresentation by an applicant, and (b) whether substantial evidence supports the City’s decision. The WRA has not articulated suggestions for the first issue, and it relies entirely on OSGC’s arguments for the second point.

II. THE WRA RELIES ON OSGC’S SUBSTANTIAL EVIDENCE ARGUMENTS, AND THE CIRCUIT COURT CORRECTLY FOUND THAT SUBSTANTIAL EVIDENCE SUPPORTED THE CITY DECISION TO REVOKE THE CUP.

The only disagreement the WRA seems to have with the City is the City’s ultimate conclusion that the CUP should be revoked. The WRA relies entirely on OSGC’s brief to support its argument that the revocation was not justified. (*WRA Brief*, pp. 11-12.) It does not cite the record or make any

⁴ The Court granted certiorari review regarding two issues: (1) whether the Court of Appeals was required to remand the case under certiorari review standards, and (2) whether the “substantial evidence” standard applied by the Court of Appeals conflicted with controlling decisions of this Court.

additional arguments, and the WRA's argument on this score adds nothing new. As demonstrated by the City, substantial evidence exists to support its revocation decision.

CONCLUSION

The City of Green Bay acknowledges the importance of property rights, and agrees with the WRA that revocation of zoning permits should not be undertaken lightly. However, representations in the course of obtaining those permits should also not be made lightly or carelessly, and where misrepresentations are made a municipality has the right to revoke the permit. Substantial evidence supports the City's decision, and the Court of Appeals' Decision should be reversed.

Respectfully submitted this 19th day of December, 2014.

By:

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

I hereby certify that this response brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a response brief produced with proportional serif font. The length of this response brief is 1,518 words.

Respectfully submitted this 19th day of December, 2014.

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

I hereby certify that on the 19th day of December, 2014, pursuant to Wis. Stat. § 809.80(3)(b), the original and twenty-one (21) copies of the Defendant-Respondent-Petitioner City of Green Bay's Response to Wisconsin Realtors' Association Amicus Brief were sent to the Clerk of the Wisconsin Supreme Court via overnight delivery.

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

Respectfully submitted this 19th day of December, 2014.

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CERTIFICATION PURSUANT TO WIS. STAT. 809.19(12)

I hereby certify that upon granting of the City's motion for leave to file, an electronic copy of this response brief will be submitted which complies with the requirements of Wis. Stat. § 809.19(12). I further certify that this electronic response brief will be identical in content and format to the printed form of the response brief as of the date of filing. A copy of this certificate has been served with the paper copies of this response brief with the Court and served on all opposing parties.

Respectfully submitted this 19th day of December, 2014.

By:

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