

STATE OF WISCONSIN

CIRCUIT COURT  
BRANCH V

BROWN COUNTY

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

Case No. 12-CV-2263

Plaintiffs,

DECISION

-vs-

January 9, 2013

CITY OF GREEN BAY,

Defendant.

FILED  
JAN 14 2013

CLERK OF COURTS  
BROWN COUNTY, WI

THE HONORABLE  
MARC A. HAMMER  
PRESIDING

APPEARANCES:

**ERIC WILSON**, Attorney at Law, One East Main Street, Suite 500,  
Madison, Wisconsin 53701-2719, appearing on behalf of the  
Plaintiff, whose representative, Kevin Cornelius, is present.

**MATTHEW KEMP**, Attorney at Law, 780 North Water Street,  
Milwaukee, Wisconsin 53202, appearing on behalf of the Plaintiff,  
whose representative, Kevin Cornelius, is present.

**TED A. WARPINSKI, SCOTT FARRIS and JOSEPH PELTZ**,  
Attorneys at Law, Two Plaza East, Suite 1250, Milwaukee,  
Wisconsin 53202, appearing on behalf of the City of Green Bay.

**ANTHONY WACHEWICZ**, City Attorney for Green Bay, 100 North  
Jefferson Street, Room 200, Green Bay, Wisconsin 54301-5026,  
appearing on behalf of the City of Green Bay.

Sheri L. Piontek  
Official Reporter

amh

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

(Proceedings began at 1:01 p.m.)

THE COURT: I'll call Oneida Seven Generations Corporation, et al., versus the City of Green Bay. This is 12-CV-2263. Oneida Seven Generations Corporation appears by its attorney, Mr. Wilson.

Mr. Wilson, you are joined by Mr. Kemp and Mr. Cornelius?

MR. WILSON: That's correct, Your Honor.

01:02:13PM

THE COURT: City of Green Bay appears by Mr. Warpinski. He is joined by Mr. Farris, Mr. Wachewicz.

This is on the Court's calendar for hearing on Oneida Seven Generations' request for *certiorari* review of an action taken by the City of Green Bay. There is a, what I would call, a companion case, which is 12-CV-2262 seeking a writ of *mandamus*, which was filed as a separate proceeding, ultimately transferred to Judge Atkinson.

01:02:43PM

Mr. Wilson, are you making request that I take this *mandamus* action and consolidate it with the *certiorari* action?

MR. WILSON: Yes, I am, Your Honor. As the Court is likely aware, the two cases seek virtually the same relief, and for that reason, we are asking

1 that you not only accept the case here, but pursuant to  
2 a stipulation from the parties that we dismiss that  
3 action without prejudice and without costs.

4 THE COURT: Any objection?

5 MR. WARPINSKI: No objection, Your Honor.

6 THE COURT: Motion of the plaintiff the  
7 Court will judicially transfer 12-CV-2262, and further  
8 on motion of the plaintiff, the Court will dismiss  
9 without prejudice that pending matter.

01:03:23PM 10 As such, then the Court is left only with the  
11 cert. matter.

12 I had opportunity to briefly check with counsel  
13 before I called the case. It is my understanding that  
14 counsel seeks to make a short opening argument.

15 Is that right, Mr. Wilson?

16 MR. WILSON: Yes, Your Honor.

17 THE COURT: Case is with you.

18 MR. WILSON: Thank you, Your Honor. The  
19 project that Oneida Seven Generations Corporation wants  
01:03:50PM 20 to build will divert hundreds of tons of garbage from  
21 local landfills, will recycle what it can from that  
22 garbage, and with the rest it will use the garbage to  
23 generate electricity, displacing electricity that would  
24 otherwise be produced from a coal burning power plant,  
25 so this project will extend the life of local

1       landfills, reduce emissions from those landfills, and  
2       decrease the relying of burning on fossil fuels all the  
3       while providing for good paying jobs here in the local  
4       community.

5               It's no accident, Your Honor, that this project  
6       found a home in Green Bay. Seven Gens approached the  
7       city staff here in the city. The city staff encouraged  
8       Seven Gens to find a place for this project in the  
9       city. It worked together to find a suitable location  
01:04:37PM 10       and ultimately decided on the site on Hulbert Street  
11       just down the road from the Pulliam Power Plant and  
12       that property, Judge, was picked for good reason. It's  
13       zoned general industrial as is every other adjoining  
14       property over there. It's surrounded by several  
15       disposal sites in construction related companies. As I  
16       said, it's just down the road from the Power Plant.

17               So if we can imagine how this looked to city  
18       officials in early 2011 when they were considering the  
19       project, this was a project that would increase  
01:05:10PM 20       recycling, decrease waste going to local landfill,  
21       generate electricity from the garbage that would have  
22       gone to the landfill and didn't cost the City anything.  
23       No public funds were being used. There were no tax  
24       breaks being given. There was no commitment from the  
25       City of Green Bay to supply waste to the facility. And

1 the financial risk of the project was entirely on a  
2 private party. It was located on a piece of land  
3 entirely suitable for the project. And, most  
4 importantly, the whole project was subject to very  
5 strict environmental standards, so from the City's  
6 perspective in early 2011 it looked like a really good  
7 idea.

8 But they didn't just approve it willy-nilly.  
9 Before issuing the Conditional Use Permit, the CUP,  
01:05:59PM 10 there was substantial discussion involving numerous  
11 City departments, including the Economic Development  
12 Department, the Planning Department, the Law  
13 Department. City staff prepared a report and presented  
14 that to the Plan Commission. The Plan Commission  
15 studied materials and itself supplied a report to the  
16 Common Council. And then in March of 2011, the Council  
17 studied this matter and had a lengthy presentation  
18 given to them by representatives of Oneida Seven  
19 Generations Corporation.

01:06:30PM 20 During that presentation in a public hearing  
21 before the Common Council, there were many, many  
22 questions asked, and the only persons present  
23 acknowledged they had investigated and studied this  
24 matter, had asked questions about it in advance, and  
25 had those questions answered, and ultimately the

1 Council in March of 2011 voted to approve the project.  
2 So, quite clearly, Your Honor, this project did not fly  
3 under the radar.

4 But the approval did not come without conditions.  
5 The CUP was premised on the condition that Oneida Seven  
6 Gens comply with all Green Bay local ordinances and  
7 that it conformed all federal and state environmental  
8 standards. And following that approval of the CUP, the  
9 DNR conducted a lengthy and detailed investigation and  
01:07:18PM 10 an analysis. They issued an air permit. The DNR  
11 approved a solid waste plan for the facility, and the  
12 US Department of Energy itself conducted its own  
13 detailed analysis.

14 And we would submit, Your Honor, all of these  
15 materials are in the record before you that those  
16 studies that were done by both state and federal  
17 environmental agency were quite remarkable in their  
18 detail and the depth of their analysis. And as we sit  
19 here today, Seven Gens is in full compliance with every  
01:07:51PM 20 single condition of the CUP. Seven Gens is in full  
21 compliance with all local, state and federal laws with  
22 regard to this project. Seven Gens has not done  
23 anything wrong. It's in full compliance with the CUP,  
24 yet the Common Council decided to revoke the permit.  
25 This, Judge, it could not do.

1           Now, to defend its unlawful action, the City  
2 points to ways that it thinks that Seven Gens  
3 misrepresented this facility. The record, Judge, makes  
4 clear that Seven Gens did not misrepresent the  
5 facility. But the Court doesn't have to believe Seven  
6 Gens or its lawyers to come to that conclusion. The  
7 Court need only look to everyone from the City itself  
8 other than the Common Council.

9           The volunteers on the Plan Commission, employees  
01:08:50PM 10 from the City of Green Bay, people who live in  
11 Green Bay, they don't want an environmental hazard in  
12 their back yard anymore than anyone else. They have  
13 absolutely no connection to Seven Gens, absolutely  
14 nothing to gain, people whose job it is to consider  
15 conditional uses like this. And what did all of those  
16 people say and say unanimously? That the process here  
17 was normal, that they knew it was going on, that they  
18 had all of their questions answered, and most relevant  
19 for today's hearing, Seven Gens did not misrepresent  
01:09:24PM 20 this facility. These are City of Green Bay employees  
21 and residents with no connection to Seven Gens  
22 whatsoever.

23           Why would they possibly say that if it weren't  
24 true? So we would submit, Your Honor, that the matter  
25 before you today is rather straightforward. The

1 Council did exceed its jurisdiction. It revoked the  
2 CUP even though Seven Gens was not violating any  
3 condition of the CUP or any other ordinance. Its  
4 decision to do that was arbitrary and unreasonable. It  
5 was not based on substantial evidence, and for that  
6 reason, Your Honor, we would respectfully request that  
7 you reverse that decision and restore the permit.  
8 Thank you.

9 THE COURT: Thank you.

01:10:10PM 10 Mr. Warpinski, do you care to make an opening  
11 statement?

12 MR. WARPINSKI: Just a couple brief  
13 remarks, Your Honor. It is right that this question is  
14 about whether or not the City had the authority in the  
15 first instance to even make the decision to revoke the  
16 permit, and then if it did have that authority, did it  
17 properly exercise that authority?

18 On the first question: Did the City have  
19 authority to revoke? The answer to that question is  
01:10:32PM 20 the City does have authority. Under what circumstances  
21 is the issue before us right now? And here the  
22 question is, we're not exercising that decision, was  
23 there an arbitrary and capricious act by the City in  
24 doing so? That comes down to a review of the record.  
25 Is there information in the record that supports the

1 position that they took? And a review of the record  
2 will show that is the case. There is enough in there  
3 to show that statements were made by the Tribe to City  
4 officials, to the Council members regarding the nature  
5 of the facility. Those statements turned out not to be  
6 completely accurate. Things were learned after the  
7 fact that when brought to the attention of the City  
8 officials caused them to change their -- to review and  
9 revoke the permit.

01:11:18PM 10 Reasonable minds may differ on the evidence. And  
11 that is the point here. Reasonable minds can differ on  
12 what's out there, and in this situation, there is a  
13 *certiorari* action, we must defer to the decision made  
14 by the City. That's their discretion to make that.  
15 They had discretion in the first instance to grant the  
16 CUP. They could have denied it in March of 2011 based  
17 upon the information that was provided by Oneida Seven  
18 Generations. Instead, they granted it based upon that  
19 information. They relied upon that information. It  
01:11:50PM 20 subsequently came to their attention that not all that  
21 information was accurate, and in reviewing what they  
22 considered to be the -- these inconsistencies decided  
23 to revoke the permit. That was within their discretion  
24 just as much as the decision to originally grant the  
25 permit was. There was no vested right by Oneida Seven

1 Generations does carry on this activity in this context  
2 because they did provide the information to the City in  
3 the first instance and that's what was made with --  
4 what the original decision was based on.

5 We can obviously respond to any questions you may  
6 have about the record or about some of these legal  
7 issues, but I think it does come down to whether or not  
8 this was an arbitrary and capricious decision by the  
9 City, and it was not. There is ample evidence in the  
01:12:32PM 10 record to support their decision. Thank you.

11 THE COURT: Thank you. Let me start with  
12 you.

13 MR. WARPINSKI: All right.

14 THE COURT: Again, Mr. Warpinski.

15 MR. WARPINSKI: No problem.

16 THE COURT: These questions are really  
17 based on my review of the record. And if I can cite to  
18 the record to assist you in locating documents that I'm  
19 concerned about, I'll let you know.

01:12:57PM 20 We know in this case that the Planning  
21 Commission's initial recommendation was to approve the  
22 CUP.

23 MR. WARPINSKI: The initial initial?

24 THE COURT: Yes.

25 MR. WARPINSKI: Yes.

1 THE COURT: And we know that later upon  
2 directed from the Council the City Planning Commission  
3 had a separate hearing, properly noticed, all  
4 interested parties were present. They provided the  
5 Planning Commission tremendous amount of information,  
6 and the Planning Commission found that there was no  
7 material misrepresentations of fact when they  
8 recommended that the permit be issued.

9 MR. WARPINSKI: Correct.

01:13:30PM 10 THE COURT: How do I reconcile the two  
11 separate findings from the body charged with  
12 determining whether or not it would recommend that  
13 permit be issued as against the City's decision, Common  
14 Council decision to revoke the permit?

15 MR. WARPINSKI: I think we go back to the  
16 first instance. In the initial Planning Commission  
17 approval, the City was not bound by that approval to  
18 automatically approve of the CUP. They retained the  
19 discretion to have denied the CUP, even though it was  
01:14:01PM 20 recommended by the Planning Commission staff.

21 And so in that first instance, they did not have  
22 to accept the Planning Commission recommendation, and I  
23 think by the same token they weren't bound to accept  
24 the Planning Commission recommendation in the review  
25 process as well.

1 THE COURT: Why did they use the review  
2 process? There's no basis.

3 MR. WARPINSKI: It was an opportunity to  
4 gather information, to allow the parties to present  
5 their information to the Commission. The Commission  
6 then made its recommendation, but the underlying basis  
7 for that is the record. And each Council member would  
8 have been free to have looked at that record themselves  
9 and make their own decision based upon that record  
01:14:41PM 10 looking at the recommendation of the Planning  
11 Commission, looking at what other information they had  
12 gleaned to make their own vote.

13 Ultimately, it comes down to the Council acts as a  
14 body and its majority vote. So we can't get into why  
15 each person made their decision, but it was a vote of  
16 the Council as a whole to make this decision and --

17 THE COURT: What information did the City  
18 Common Council have in front of it when it made the  
19 decision to revoke the permit?

01:15:03PM 20 MR. WARPINSKI: When it made the decision  
21 to revoke, it would have had all of the information  
22 that was presented to the Common Council. It would  
23 have been part of the record that would have been in  
24 front of it, and there were Council members at the  
25 Planning Commission hearing so people would have been

1 paying attention to overall back and forth that was  
2 going on.

3 THE COURT: Let me stop you. Is it your  
4 representation that each councilmen had opportunity to  
5 review the entire record of the Planning Commission  
6 before they cast a vote one way or the other to rescind  
7 the vote?

8 MR. WARPINSKI: I can't speak to what each  
9 Council member did or didn't do.

01:15:38PM 10 THE COURT: That wasn't my question.

11 MR. WARPINSKI: I understand that. My  
12 response I believe they all would have had an  
13 opportunity to be present at the Planning Commission  
14 hearing, to review the information that was being  
15 provided to the Planning Commission. There were, in  
16 fact, members of the Council who were at the Planning  
17 Commission hearing that night but others could have  
18 been there. I don't know whether anybody independently  
19 went and reviewed the record between the time of that  
01:15:59PM 20 hearing and the time of the vote or they relied upon  
21 the information that was again presented at the Council  
22 hearing when they made the decision.

23 There was -- there was an exchange at that time as  
24 well where some of these same issues were discussed in  
25 front of the Council at the time of the vote. So they

1 had opportunity, and I certainly can't speak to what  
2 each individual may have done, but certainly their  
3 decision as implicated by the *certiorari* action is  
4 based on the record, and we must presume that they were  
5 familiar with the record to base their decision on the  
6 record as well.

7 THE COURT: I'm assuming, Mr. Wilson, you  
8 would agree it doesn't matter what the Planning  
9 Commission recommended to the Common Council at least  
01:16:40PM 10 on the second instance in which the Council determined  
11 that the CUP should be revoked? They have no authority  
12 to bind the Council, their recommendations, Council can  
13 take, not take, do what they wish with.

14 MR. WILSON: That's certainly true, Your  
15 Honor. The recommendation of the Planning Commission  
16 is just that, a recommendation. It's ultimately Common  
17 Council's decision.

18 However, I would make two points.

19 One, we think that the recommendation of the Plan  
01:17:11PM 20 Commission is in and of itself evidence of the  
21 arbitrary and unreasonable action that the Council took  
22 in the sense that to answer portion of the question  
23 perhaps that you asked Mr. Warpinski, I do think that  
24 the record from the Common Council meeting October 16th  
25 demonstrates that the Council had a portion of the

1 transcript from the Plan Commission meeting, I think  
2 about 24 pages, which was the last portion containing  
3 the portion we think is most relevant, where they make  
4 the recommendation and report that there had been no  
5 misrepresentations.

6 So we think that that conclusion is relevant to  
7 your decision today because there's no evidence, Judge,  
8 that the Council considered that whatsoever. This  
9 isn't a matter where they've got two competing views of  
01:18:02PM 10 the facts and demonstrate at the hearing, the Common  
11 Council does, okay, we're considering these two views  
12 of the record, but we're going to go with this view of  
13 the facts.

14 Now, here we have a situation where they've  
15 completely ignored the Plan Commission recommendation,  
16 and as our brief demonstrates, the other point I was  
17 going to make, Judge, is that it's our position given  
18 that Seven Gens was not violating the permit, was not  
19 violating any ordinance whatsoever, that the Common  
01:18:34PM 20 Council did not have the authority even, the Common  
21 Council didn't have the authority to revoke the permit  
22 given Seven Gens was in full compliance.

23 THE COURT: Let me stay with you for a  
24 minute. One of the thrust of your argument is, and you  
25 said it in writing, you said it here this afternoon, we

1       complied with all terms and conditions of the  
2       Conditional Use Permit, and as such, there's no basis  
3       for the City to begin -- for the City to execute  
4       actions in revoking it.

5               MR. WILSON: Correct.

6               THE COURT: The Conditional Use Permit,  
7       which is part of the record, it's at 198, indicates  
8       that this project is to comply with all other  
9       regulations at the Green Bay Municipal Code not covered  
01:19:18PM 10      under the Conditional Use Permit, including the  
11      building code, building permits, standard site plan  
12      review and approval.

13              As part of the building code, I presume the zoning  
14      code applies within that Conditional Use Permit. And I  
15      say that because that's where the Conditional Use  
16      Permit application process comes out of, out of the  
17      zoning ordinance for the City of Green Bay. And I  
18      looked at the zoning ordinance for the City of  
19      Green Bay. The zoning ordinance for the City of Green  
01:19:49PM 20      Bay addresses Conditional Use Permits. It says that it  
21      may be recommended by the Plan Commission with  
22      reasonable consideration of the following, and then it  
23      list things that the Planning Commission must consider  
24      before they can recommend anything to the Common  
25      Council.

1           And the first thing it requires that the Planning  
2 Commission consider is the establishment, maintenance  
3 or operation of the conditional use that will not be  
4 detrimental to or endanger the public health, safety or  
5 general welfare. That's the first requirement that the  
6 Council -- that the Commission has to assess.

7           I have reviewed on multiple occasions the audio  
8 from the first meeting of the Planning Commission. I  
9 can't find in that audio, and it's part of the record,  
01:20:37PM 10 any discussion regarding the public health, safety or  
11 general welfare of the City of Green Bay in issuing  
12 that permit. Can you find it, because I can't?

13           MR. WILSON: I think that's implicit, Your  
14 Honor, in the condition that the Plan Commission  
15 attached the permit in that it comply with all state  
16 and federal environmental regulations.

17           THE COURT: I hear you but that's not what  
18 it says. It addresses other standards in a different  
19 portion of the code. But that's not what that  
01:21:13PM 20 provision says. And I could be wrong. If I'm wrong, I  
21 want you to tell me I'm wrong, but the audio does not  
22 talk about how is this going to impact the public  
23 health safety or general welfare.

24           MR. WILSON: Respectfully, Judge, I've  
25 reviewed it several times as well. There's a lot of

1 talk as we've pointed out in our brief about the  
2 emissions from the facility, lots of questions by  
3 various members of the Plan Commission about how are  
4 the emissions going to work, and I think that goes  
5 directly to the Plan Commission considering how this  
6 will be detrimental and endanger public health, safety  
7 and general welfare.

8 THE COURT: I have looked at the  
9 Commission meeting minutes, which are in the record at  
01:22:02PM 10 160 through 166. That portion is what I pulled. I  
11 understand what you're saying. I can't find any  
12 provision in the minutes that talk about an analysis at  
13 that stage as to this action and its impacts on public  
14 health, safety or general welfare.

15 And, quite frankly, I would be surprised if it  
16 were there, Mr. Wilson, because Mr. Cornelius indicated  
17 that there would be no hazardous material produced by  
18 this facility, and if there's no hazardous material  
19 produced by the facility, there wouldn't be concern  
01:22:46PM 20 regarding endangerment of public health, safety or  
21 general welfare. I wouldn't worry about that if I were  
22 a member of a body when someone says there's nothing  
23 hazardous to produce.

24 Mr. Cornelius says to the Planning Commission that  
25 this scrubber takes away any kind of harmful toxin that

1 might be in the gas and the rest is burned as natural  
2 gas. And so I think there's a reasonable implication  
3 from those comments that there isn't any toxins. It  
4 couldn't endanger the public health.

5 Now, you have made argument in writing that, look,  
6 the Council -- I'm sorry -- the Planning Commission and  
7 the Council knew or should have known there was going  
8 to be some type of emission. It would be unreasonable  
9 to conclude that there wouldn't be some type of  
01:23:38PM 10 emission particularly when the CUP supplemental  
11 application, the materials that attach to the CUP talk  
12 about emissions. I don't disagree with you.

13 There were questions from Mr. Cornelius at the  
14 first meeting what are the emissions going to be in  
15 Green Bay, Wisconsin, if we build this plant? And the  
16 response was -- I'm sorry. The question was even  
17 though you show it being emissions in other places and  
18 other different plants, you are simply saying that you  
19 are eliminating that. And then this alderman says he  
01:24:20PM 20 wants to see a table that shows the emissions that  
21 would be produced from this plant in Green Bay,  
22 Wisconsin. Mr. Cornelius says that the emissions that  
23 will be going out would be acceptable. There won't be  
24 any chemicals.

25 Representative asks if they could have a table

1 ready for the next City Council meeting. The response  
2 was yes.

3 Now, when I read that, what that's telling me is  
4 that the Planning Commission knew there were going to  
5 be some type of emissions. They were suspect of the  
6 claim there would be no emissions, they wanted a better  
7 understanding of exactly what those emissions were and  
8 what would they be in Green Bay, Wisconsin, with this  
9 plant. I looked at the record. I can't find at any  
01:25:07PM 10 point in time other than the DNR report on emissions.  
11 I can't find anything else that the City Council or the  
12 Planning Commission would have had to talk to them  
13 about emissions when the CUP was voted. I could be  
14 wrong. Is there something that I'm missing?

15 MR. WILSON: Well, I have several  
16 responses to that, Your Honor. The first is just the  
17 factual correction. When you indicate that  
18 Mr. Cornelius said the things that are indicated in the  
19 record, he actually was not the speaker as we've  
01:25:40PM 20 pointed out in our brief. That's just one indication  
21 that it's risky to rely on the minutes for what was  
22 said.

23 We're not here today though arguing that we have  
24 to listen to the audio or I certainly will address what  
25 you've brought up in the minutes, but I think it's

1 important for the record to reflect that Mr. Cornelius  
2 was not the person who said the things that you've  
3 indicated.

4 THE COURT: Sure. His mother indicated he  
5 was a truthful person. His mother has indicated he's a  
6 truthful person, who was, I'm assuming, a  
7 representative?

8 MR. WILSON: That's right. I think I'm  
9 pointing out for the record, because we're not here  
01:26:18PM 10 claiming it wasn't someone speaking on behalf of Seven  
11 Gens.

12 I think it's also important to point out, Your  
13 Honor, and I think one of the reasons that there's some  
14 confusion here is that there's a difference between  
15 talking about emissions from the chamber where the  
16 gasification takes place itself where there aren't any  
17 emissions going out into the environment from there and  
18 the emissions from the generator that uses the gas that  
19 comes from the gasification process. There are  
01:26:50PM 20 emissions from that generator, and so I think some of  
21 the confusion lies in talking about the emissions from  
22 the chamber where there are none as compared to the  
23 emissions from the generator that everyone understood,  
24 including the folks in the Plan Commission and the  
25 folks at the Common Council, that this place is going

1 to have a generator. There has to be some exhaust  
2 coming from that.

3 And when you point out, you know, this alderperson  
4 who has to be on the Planning Commission and also on  
5 the Common Council is asking these questions about  
6 emissions, I think it's important to point out that  
7 that alderperson ultimately concluded that he wasn't  
8 misled.

9 So it's hard for us, I think, sitting here today,  
01:27:36PM 10 looking back at that meeting in February of 2011 before  
11 the Plan Commission to get the context of what was  
12 said. But I do think it's important to note that the  
13 person to whom the representations were made himself  
14 concluded that they weren't representations.

15 And so in the last point, Judge, because -- if I  
16 may?

17 THE COURT: Yeah.

18 MR. WILSON: There's no question that some  
19 of those statements would raise an eyebrow, okay, if  
01:28:06PM 20 viewed in isolation. But I think it's important to  
21 note that in looking at those, we're talking about a  
22 couple of minutes from a hearing before the Plan  
23 Commission, and there's no evidence whatsoever that  
24 anyone in the Common Council relied on any of those  
25 statements when they themselves made the decision to

1 grant the CUP the following month. There's no evidence  
2 that they had these minutes before them in making the  
3 decision. And, in fact, the Common Council themselves  
4 had a lengthy presentation by Seven Gens in a public  
5 hearing in March of 2011, asked lots of questions, and  
6 so that would be my response, Your Honor, is I think  
7 for the Common Council to think that has the authority  
8 to revoke this permit based on representations made to  
9 the Council when granting the permit, they have to show  
01:29:02PM 10 that the misrepresentations were made to the Council.  
11 And the things you've pointed out and the City has  
12 pointed out in its brief there's no evidence that the  
13 Council considered any of that.

14 THE COURT: I would agree with you that  
15 the Council may or may not have had access to these  
16 minutes. Your comments today and your comments in the  
17 brief is, Judge, everybody said this was a go until the  
18 City Council said we're not doing this anymore.

19 And I want to go back to your first point, that  
01:29:31PM 20 being the first approval, and whether or not that first  
21 approval was a fully informed and not approval but  
22 recommendation, whether or not that recommendation was  
23 a fully formed and strong, well-grounded, based  
24 allegation? I have concerns that the Planning  
25 Commission relied on staff recommendations and reports

1 and did not independently assess the impact of this  
2 permit on public health and safety. And I'm looking --  
3 I'm searching the record to find that analysis, and I  
4 can't find it where it should be. I can't find it in  
5 the minutes of the Planning Commission's notes that  
6 said, yes, we're going to recommend approval of this  
7 CUP. I can't find it.

8 You're saying, well, it must have been there  
9 because the alderman never raised it again. Maybe. I  
01:30:21PM 10 don't know.

11 MR. WILSON: I'm saying a little bit more  
12 than that, which is there are very clearly questions  
13 about emissions. If your question is did the Plan  
14 Commission consider the factors it set forth in the  
15 zoning ordinance that it has to consider when making a  
16 recommendation to Council, I think the evidence is  
17 there that they did because there are questions by  
18 Alderperson Wisbjeske about emissions and those go  
19 directly to public health and safety. So I would  
01:30:47PM 20 respectfully suggest that they did consider that.

21 And there's also the PowerPoint presentation that  
22 was delivered to the Plan Commission and to the Common  
23 Council in March that also talks about emissions and  
24 the CUP application itself, which is replete with  
25 studies about emissions. There's a whole emissions

1 study from U.C. Riverside that's part of the CUP  
2 application, so I think we have to assume that both the  
3 Plan Commission and the Council reviewed the materials  
4 submitted in support of the application itself.

5 THE COURT: That -- that supplement you  
6 just talked about from California is labeled Emissions  
7 from Thermal Chemical Conversion Technology. It's part  
8 of the record. And that report, which is part of the  
9 record, indicates at the end of the report relative to  
01:31:40PM 10 quality emission limits, air quality emission limit,  
11 the actual impacts of specific facilities will need to  
12 be evaluated on a case-by-case basis as part of a local  
13 permitting process. It's on page 40 of the cert.  
14 record.

15 I, I would not be able to conclude that this  
16 packet says the emissions that are going to be produced  
17 from this facility are safe, they don't endanger the  
18 public health, when I read that language in the  
19 materials in the CUP.

01:32:15PM 20 MR. WILSON: And that's exactly -- because  
21 certainly, us sitting here today, the members of the  
22 Plan Commission, they're not experts on this stuff and  
23 that's precisely why they included it as part of the  
24 CUP, a condition that the federal and state agencies  
25 who are experts on these issues give everything the go

1 ahead before this project can open. And so that is  
2 how, that was the initial response I gave to the  
3 Court's question, which is the way that they considered  
4 it is precisely the point that you've referenced here,  
5 Your Honor, about the study that said that -- I'm  
6 trying to read -- the actual impacts of specific  
7 facilities will need to be evaluated on a case-by-case  
8 basis as part of a local permitting process. Exactly.

9 So that's why the Plan Commission and then the  
01:33:10PM 10 Common Council in adopting that recommendation said  
11 we're not experts. What we're going to do here is this  
12 sounds like a very good idea, but we're going to leave  
13 it to the experts to make sure that all of the public  
14 health and environmental issues have been taken care of  
15 and that's why that condition is in the CUP.

16 THE COURT: That's not what was told the  
17 Planning Commission. They were not told we don't know.  
18 We know there's going to be emissions, but we can't  
19 tell you what those emissions will be and how it  
01:33:36PM 20 impacts the community until we refer this, until you  
21 grant us the CUP, and we can take the next step and  
22 refer it over to DNR or WDNR or DOE. They didn't say  
23 that.

24 MR. WILSON: They did say it was going to  
25 be subject to DNR standards, Your Honor, and the Common

1 Council meeting in March of 2011, the OSG  
2 representatives present made very, very, very clear  
3 that this whole operation is going to be subject to  
4 state and federal environmental regulations.

5 THE COURT: They were going to be bound by  
6 those regulations and interpretations.

7 MR. WILSON: Right.

8 THE COURT: And after the CUP was issued,  
9 as we all know, after the CUP was issued and it was  
01:34:14PM 10 sent to DNR for permitting, DNR permitted the facility  
11 provided it had a 60-foot smokestack.

12 MR. WILSON: Correct.

13 THE COURT: That was inconsistent with the  
14 representations made to the Common Council and made to  
15 the Planning Commission when they secured the CUP.

16 MR. WILSON: Well, we respectfully  
17 disagree.

18 THE COURT: Help me understand.

19 MR. WILSON: I'm sorry?

01:34:42PM 20 THE COURT: Help me understand.

21 MR. WILSON: With regard to the  
22 representations about the stacks with the facility,  
23 Your Honor, everyone, whether it was the Plan  
24 Commission, the Common Council understood that this,  
25 these emissions from the generator itself had to be

1        vented somehow. And now the stacks, as the City has  
2        pointed out, were not in the elevation drawings that  
3        were initially submitted with the CUP, but the Planning  
4        Director of the City of Green Bay, a gentleman by the  
5        name of Rob Strong did a really good job of Planning  
6        Commission hearing on October 3rd explaining that  
7        that's not at all unusual. That -- this is the person  
8        who is most knowledgeable about how this whole process  
9        works, and he would be the one who would set this up  
01:35:29PM 10        and say they pulled a fast one but that's not at all  
11        what he said.

12                THE COURT: Which meeting are you talking  
13        about?

14                MR. WILSON: I'm talking about  
15        Mr. Strong's statements to the Plan Commission on  
16        October 3rd.

17                MR. WARPINSKI: Of 2012.

18                THE COURT: After the CUP was issued.

19                MR. WILSON: Correct.

01:35:47PM 20                THE COURT: Well, I appreciate that, and  
21        it is my understanding that staff had consistently  
22        recommended this project move forward, so it doesn't  
23        surprise me that Mr. Strong says, no, don't worry about  
24        that, that's standard.

25                MR. WILSON: Well, the reason I'm pointing

1 it out, Your Honor, is because the City has pointed  
2 that there's these drawings that don't have stacks on  
3 them, and I was just simply explaining why it would be  
4 the case that with preliminary drawings submitted with  
5 the CUP that something like that might not necessarily  
6 be rendered on those drawings, and Mr. Strong explained  
7 that.

8 THE COURT: But that wasn't explained to  
9 the Common Council when they voted the CUP.

01:36:23PM 10 MR. WILSON: What was said to the Common  
11 Council, and this is important, Your Honor, because  
12 there is no misrepresentation here is that there would  
13 be no stacks like the stacks associated with coal-fired  
14 power plants. In other words, the Pulliam Plant.

15 THE COURT: That's what the PowerPoint  
16 said. The PowerPoint said there will be no smokestacks  
17 such as those associated with coal-fired plants. This  
18 is at the first City Council meeting in March of 2011.  
19 That's not what Cornelius said. Cornelius said the  
01:36:55PM 20 following. Cornelius said there are no smokestacks.  
21 Obviously, the system has to be pretty safe, pretty  
22 clean for that to happen. And in the CUP, as you and I  
23 both know, there's drawings that do not indicate any  
24 type of smokestack. In fact -- and you know this. I'm  
25 not telling you anything you don't know.

1           The record at 21-122-23 shows a flat roof  
2           warehouse building, which I think would lead any  
3           reasonable person to believe there are no smokestacks  
4           because it's a completely closed loop process. Nothing  
5           is going to come out of that building. There would be  
6           nothing -- there would be nothing to associate a  
7           smokestack with.

8           The other visuals in the CUP showing sites nowhere  
9           show any type of venting. They don't show any type of  
01:37:46PM 10          smokestacks. So, again, let me take you back, because  
11          I think this is an important issue. I'm not finding  
12          any evidence in this record that would allow a  
13          reasonable person to conclude that there would (a) be a  
14          smokestack or that (b) there would be a smokestack of  
15          this type of dimension, which is required by the DNR.  
16          The agency that you say is going to stop any concerns  
17          that one would have has to be Emissions. Help me to  
18          understand.

19                   MR. WILSON: First of all, with regard to  
01:38:15PM 20          what Mr. Cornelius said at the March, 2011, Council  
21          meeting, I think it's important any of us who have  
22          given PowerPoint presentations before know that there's  
23          what's on the slide and there's what you say in  
24          relation to what's on the slide.

25                  The slide, as Your Honor has pointed out, said

1       there won't be stacks like those at coal-fired power  
2       plants. In connection with commenting on that bullet  
3       point on the slide, Mr. Cornelius said there will be no  
4       stacks. Implicit in that is what's on the PowerPoint.  
5       And then he quickly followed that by saying those of us  
6       in Green Bay know what that means. And I'm not a  
7       Green Bay resident, but I've been up here enough to  
8       know it's not only the Pulliam Power Plant, it's  
9       Georgia Pacific mill, its Proctor & Gamble plant, it's  
01:39:02PM 10       everything that lines the Fox River, there won't be  
11       stacks like that. And certainly the plan that was  
12       approved by DNR are nowhere near the stacks that tower  
13       over those -- there are a couple hundred feet tall  
14       there.

15               This, in contrast, was a stack that was 60 feet  
16       from the ground, not 60 feet above the building like he  
17       said.

18               But I think, more importantly, Judge, is that in  
19       October of 2012, the Common Council can't look at this  
01:39:35PM 20       Conditional Use Permit, which Seven Gens is in full  
21       compliance and revoke it based on a condition that  
22       there not be any stacks with the facility if that's not  
23       a condition in the first place.

24               If this was something that was really important  
25       that there be no stacks, and, frankly, I'm troubled by

1        why that's important in the first place. It seems to  
2        me the issue is emissions, which the record is clear  
3        that everyone knew there was going to be emissions. It  
4        can't be an aesthetic issue, I don't think. So it was  
5        important enough to the Council in March of 2011 when  
6        it granted this permit that there be no stacks, that  
7        should have been a condition of the CUP.

8                THE COURT: It must have been an important  
9        condition to Seven Generation. They're the one that  
01:40:26PM 10        presented the PowerPoint. They're the one that added  
11        the drawings. They are the ones that said there are no  
12        stacks. That would be consistent with the drawing that  
13        they created and inserted in the CUP.

14                So I'm not so certain -- and I'm being a bit  
15        facetious with your argument. If I have to rate what's  
16        the most believable statement, a PowerPoint prepared by  
17        I don't know whom, and I can't respond to that or ask  
18        about it, a human being sitting there, who represents  
19        as the C.E.O. who has seen the technology, who is here  
01:40:56PM 20        to explain and answer any of my questions who says this  
21        is exactly what they're doing in California, and the  
22        CUP tailor made -- strike that -- the CUP application  
23        tailor made for this hearing, the PowerPoint is the  
24        last thing I believe. I want to hear from the guy  
25        who's here to try to sell me this project, and when he

1 says no stacks, and the pictures show that, and he says  
2 that's why this is clean technology, I'm having a  
3 difficult time in reconciling statements no stacks and  
4 then the DNR permit that says in order to build this  
5 facility you must have a 60-foot stack.

6 And Seven Generation knows they can't do that  
7 because someone advised them of the building code that  
8 says it can't be higher than 35 feet. I imagine  
9 Mr. Strong advised them of that, although I don't know  
01:41:51PM 10 that, so they redesigned the plant.

11 Now we have no idea because there was never any  
12 evidence that I can find in the record that the  
13 redesigned building is going to work, has been tried  
14 and tested. Your client's earlier statement, this  
15 isn't new technology, this is done in California, is  
16 now inconsistent with the plans that are moving  
17 forward, inconsistent with the plans that were  
18 originally approved by the City of Green Bay when they  
19 issued the CUP.

01:42:21PM 20 Help me to understand. Because if my logic is  
21 faulty, I'm having a tough time figuring out where and  
22 I'm sure I'm missing something.

23 MR. WILSON: Well, it seems to me that  
24 this concern about stacks is a concern about emissions.  
25 It can't be anything else. And the record is clear

1 that Seven Gens throughout the process told not only  
2 the Plan Commission but the Common Council there will  
3 be emissions, and as the Plan Commission concluded  
4 after that October 3rd hearing this fall, it said that  
5 we did understand that there were emissions and venting  
6 as part of the system. Something was coming out of  
7 this building. And Seven Gens never, never ever  
8 misrepresented that.

9 And furthermore, if there ever was some concern  
01:43:15PM 10 that there be no stacks, now we've got a -- I don't  
11 know if you can call a stack. It's something that  
12 comes up that's only a couple feet above the roof of  
13 the building now. How can, if the Common Council is  
14 that concerned about a stack, whatever that is, they  
15 can't in October of 2012 revoke a Conditional Use  
16 Permit that doesn't have any?

17 THE COURT: Well, unless -- unless the DNR  
18 report, which you are arguing earlier is the measure of  
19 whether or not it's safe for the public, if the DNR  
01:43:52PM 20 permits it, then it's safe for the public.

21 MR. WILSON: And they reissued the air  
22 permit based on the revised height of the stacks,  
23 Judge.

24 THE COURT: But initially in order for  
25 Seven Generation to produce the energy they needed --

1 they designed to produce in this facility, the stack  
2 had to be 60 feet high. That's what DNR originally  
3 said; right?

4 MR. WILSON: Correct.

5 THE COURT: And --

6 MR. WILSON: One of the stacks -- or a few  
7 of the stacks.

8 THE COURT: I'm not being facetious. I  
9 think one of the ten. I think ultimately at least some  
01:44:24PM 10 advocates one way or another suggested this isn't a  
11 one-stack operation, this is a ten-stack operation.  
12 The biggest of the stack was a 60-foot stack.

13 MR. WILSON: Correct.

14 THE COURT: Seven Generation then  
15 repetitions the DNR and DNR repermits on, presumably, a  
16 new design. It's now a wider 35-foot stack.

17 MR. WILSON: Correct.

18 THE COURT: Am I correct that there is no  
19 information that was provided to the Council or to the  
01:44:51PM 20 Commission at any point in time showing a production  
21 facility with this size stack with this volume of  
22 material producing this amount of energy with this  
23 stream of recycling materials anywhere?

24 MR. WILSON: Well, it's certainly true --  
25 I keep coming back to the fact, Judge, that the record

1 is replete with references from Seven Gens to the City  
2 that there will be emissions coming from this facility.  
3 Then the City back then in 2011 says emissions. That's  
4 a concern. How are we going to address that concern?  
5 We are not the experts.

6 Here's what we'll do. We'll require as a  
7 condition of the CUP that you meet all state and  
8 federal environmental regulations.

9 THE COURT: That's one requirement under  
01:45:44PM 10 the code. But that's not all the requirements because  
11 the code requires the City independently to -- evaluate  
12 independently to evaluate emission of smoke particulate  
13 matter, noxious gas, or other air emission in such an  
14 amount or such a degree as to constitute a hazardous  
15 condition or as to unreasonably interfere with the use  
16 and enjoyment of property by any person of normal  
17 sensitivities or otherwise as to create a public  
18 nuisance.

19 And I'm reading right out of the building code,  
01:46:29PM 20 general regulation, 13.540. Second provision in that  
21 code, specific standards: All uses shall comply with  
22 the standards governing air emissions as regulated by  
23 the local, state or other designated agency."

24 So, Mr. Wilson, you're right. The City certainly  
25 may rely on DNR measures in monitoring but that don't

1       absolve the City from its own responsibility in making  
2       sure the community is safe from a hazardous condition  
3       that may unreasonably interfere with the use and  
4       enjoyment of property by a person of normal  
5       sensitivity. Those are separate issues that the City  
6       is responsible for.

7               MR. WILSON: We actually make a preemption  
8       argument in our brief, Judge, that, actually, that  
9       isn't the City's job. The agency responsible for  
01:47:23PM 10       governing air quality here in the state of Wisconsin is  
11       DNR, not the City of Green Bay Common Council or the  
12       City of Green Bay Planning Commission.

13              THE COURT: You're saying a community is  
14       not responsible for its own -- for the quality of its  
15       own air?

16              MR. WILSON: That's not what I said,  
17       Judge. Absolutely, the Common Council should consider  
18       the public health and general welfare when deciding  
19       whether or not to grant a Conditional Use Permit. The  
01:47:46PM 20       way it did so here, Judge, was by specifically  
21       directing that Seven Gens comply with all state and  
22       federal environmental regulations.

23              THE COURT: Let me stop you. Let me turn  
24       to you, Mr. Warpinski.

25              MR. WARPINSKI: All right.

1 THE COURT: Certainly everybody would  
2 anticipate that this thing is going to generate some  
3 type of emission. I mean, the packet is replete with  
4 information that there's going to be emissions. It's  
5 -- and I realize I may be using an incorrect wording.  
6 It's a trash recycling facility. I mean, how can --  
7 how can you possibly take the position no emissions  
8 means no emissions. That's like putting your head in  
9 the sand.

01:48:25PM 10 MR. WARPINSKI: Well, I think the question  
11 first is who created the confusion in the first  
12 instance? Why did this happen this way? It happened  
13 because of the information was provided by the  
14 applicant, not because the City independently made  
15 threats, determinations that there would be no  
16 emissions. It's because they were told there will be  
17 no emissions, and, more importantly, they were being  
18 told no chemicals, no hazardous materials. They were  
19 being told the waste stream, the physical waste stream  
01:48:49PM 20 could be used in organic farming. They were being told  
21 there was a proven technology. These are the things  
22 that they were being told, and they're entitled to rely  
23 upon the applicant in good faith making those  
24 statements and being accurate. Now it turns out that  
25 not all those things were accurate. Does that mean

1 that they're prevented from going back and saying, hey,  
2 had we known this, you know, would we have acted  
3 differently? No one is saying they can't come back and  
4 apply and make a full presentation of all this  
5 information and let it be a full presentation of  
6 information that's being considered.

7 The fact is there was confusion apparently about  
8 what was going on. Reasonable minds can differ as to  
9 what people knew or should have known at the time. And  
01:49:30PM 10 because of that, we have to defer the decision that was  
11 made by the Council here. That's within their  
12 discretion to do that. Because the confusion was being  
13 created by the applicant and going to the point of the  
14 DNR permit to be sure the City defers to the DNR to  
15 enforce the DNR's air standards but that does not mean  
16 the City lost its right to be fully informed about what  
17 the land use is going to be.

18 The issue here were they fully informed about what  
19 the land's use was going to be? And the information  
01:50:02PM 20 that was provided creates this problem, not because of  
21 anything independently, but because what was done, what  
22 was submitted, and the statements that were made that  
23 you have been discussing here. And this is exactly  
24 what was presented to the City. It saying, hey, did  
25 you know this was what was going on when it got to the

1 DNR review process? The DNR acknowledged this was not  
2 a proven technology. It was a new technology. They  
3 didn't know what the emissions were going to be. They  
4 estimate what they were going to be, but they don't  
5 know for sure because they don't know what the waste  
6 stream is going to generate.

7 So a lot of this information didn't come out until  
8 the DNR process perhaps were these statements become  
9 evident to what was really going on. That's the  
01:50:44PM 10 information that would have been available to the City  
11 to make this decision. So, yes, obviously, they can  
12 point to evidence in the record that says there's  
13 emissions. There's other evidence in the record that  
14 says there weren't going to be emissions. There's  
15 conflicting information. Each one -- reasonable minds  
16 may differ, and because of that alone, the decision  
17 must be affirmed what the City did here because that's  
18 their discretion to do that. There is information on  
19 both sides of the question, and for that reason, we  
01:51:16PM 20 must defer to the decision made by the Council.

21 THE COURT: You didn't respond to Seven  
22 Generation's argument in writing regarding issues of  
23 jurisdiction that this matter relegated to the Zoning  
24 Commission and the Common Council or the City Planning  
25 Commission is not the proper venue to address these

1 issues.

2 MR. WARPINSKI: I believe we did address  
3 that because I think the threshold question is the  
4 standard that was presented to the Council initially by  
5 the concerned citizens that were raised here saying,  
6 hey, if you were provided with incorrect, inaccurate,  
7 misleading information, you're entitled to void this  
8 permit. That is the law. We've looked at that. I  
9 haven't found anything that says that's not the law.

01:51:54PM 10 There is case law to support that position that if  
11 there is misinformation, misleading information that's  
12 provided, the permit can be rescinded or voided and  
13 that's the authority upon which the City acted here.  
14 That's what they believe the authority, and I believe  
15 they were correct in making that decision. That was  
16 within their authority.

17 If they determine that there was a  
18 misrepresentation made, it was within their authority  
19 to void the permit. That's the question.

01:52:21PM 20 THE COURT: Let me turn to you. In your  
21 brief, you cite the **Betendorf** case.

22 MR. WILSON: Correct.

23 THE COURT: I read it. And my initial  
24 perception of that case is that the fact pattern is  
25 substantially different. But I want to give you a

1 chance to challenge my analysis. In **Betendorf**, and I  
2 have it, because, fortunately for me, both of you cite  
3 very limited, very relevant cases and you talk about  
4 them in your respective brief.

5 From the **Betendorf** case, board approved without  
6 conditions an application for a truck repair shop and a  
7 transfer point. The dispute before the Court of  
8 Appeals, our district, was whether or not the board can  
9 add a condition as an alternative to revoking a  
01:53:10PM 10 Conditional Use Permit with no conditions, because in  
11 that case plaintiff allegedly improperly used their  
12 adjoining property.

13 I'm having a difficult time in suggesting that  
14 this case is on point, **Betendorf** is on point in this  
15 case, because I'm not hearing the City argue their  
16 implied conditions or that there are additional  
17 conditions. But, obviously, you believe that they are  
18 suggesting that.

19 Now, listening to what you're saying today in oral  
01:53:43PM 20 argument it sounds to me you're saying, well, Judge,  
21 they're adding an implied condition regarding the size  
22 of the smokestack or the emission of the smokestack and  
23 wasn't anything that was talked about in the CUP and  
24 we're bound to the terms of the CUP; correct?

25 MR. WILSON: That's a good summary, yes.

1 THE COURT: Your thoughts? I mean, it's  
2 not in there.

3 MR. WARPINSKI: It's not in there, you're  
4 correct. But that doesn't take away the underlying  
5 legal principle about the reliance upon information  
6 that was provided. It's not a matter of implied or  
7 express condition. It's a matter of whether or not the  
8 information upon which the decision was made to issue  
9 the CUP in the first instance was accurate, not whether  
01:54:22PM 10 or not they made a decision to add or not add a  
11 condition because of the information.

12 The issue here is did the City have authority to  
13 rescind or void the permit if it determined the  
14 information it was provided in first instance was  
15 inaccurate. They're not adding a condition. They're  
16 saying this is not the land use that we approved.

17 THE COURT: So you're saying if there was  
18 a material misrepresentation that the City reasonably  
19 relied upon, then **Betendorf** analysis doesn't take hold.  
01:54:48PM 20 It doesn't apply.

21 MR. WARPINSKI: Well, that's the law that  
22 we're relying on. That's the law the City relied on in  
23 making its decision. Clearly, I think the question is  
24 to the, you know, materiality becomes a question of  
25 this discretion you have to look at in terms of the

1 materiality of that information, who gets to decide how  
2 important the information was to the City in their  
3 process. But, yes, that is correct, that is the  
4 standard that we are relying upon here is that if there  
5 were misrepresentations made through the fault of the  
6 applicant, then the City is entitled to void or rescind  
7 the permit. They require no vesting in that permit.

8 MR. WILSON: If I may, Your Honor?

9 THE COURT: Um-hum.

01:55:28PM 10 MR. WILSON: With regard to the **Betendorf**  
11 case, here's why it's on point. In that case, the word  
12 "granted the permit" apparently anything that they were  
13 granting a permit for this property, and then the use  
14 sort of spilled out onto an adjoining property and they  
15 wanted to revoke it because they were spilling out into  
16 this other property.

17 Now, what the court said was if that's what you  
18 wanted them not to do, you should have put it in the  
19 permit. And so it is really two sides of the same  
01:56:00PM 20 coin. What they're arguing, which is they made these  
21 misrepresentations applying for the permit. That's why  
22 we can go back and revoke it. It doesn't matter what  
23 the permit says.

24 What they're really saying, a way to interpret  
25 that argument is that having no emissions, having no

1        stacks was important to the City. Had you told us  
2        that, this would have gone differently. Well, if  
3        that's the case, they should have put it in the permit  
4        in the first place, because imagine the implication  
5        now, for business developers coming to the City of  
6        Green Bay, you go to the City Planning Commission, you  
7        get a CUP approved, you go to the Common Council, CUP  
8        approved. Invest millions and millions of dollars in  
9        your business based on the reliance you have a valid  
01:56:46PM 10       CUP. It's five years later. You're in perfect  
11       compliance with the CUP and all Green Bay ordinances,  
12       and some neighbor, someone who doesn't like what you're  
13       doing, points back to the original CUP application and  
14       says there was something misrepresented in here. Does  
15       that mean the City can go back and revoke the permit?  
16       No. It's got to be in the CUP.

17                And so, you know, the result the City is  
18       suggesting this court reach really opens the flood  
19       gates of uncertainty for anyone looking to develop a  
01:57:27PM 20       business here in the City of Green Bay and it proposes  
21       arbitrary decision making by the Common Council who at  
22       any point in time can go back and revisit a decision.  
23       Who knows how long ago, who knows how much money has  
24       been invested by the business. If they're in perfect  
25       compliance with every single rule and regulation,

1 state, local, federal, doesn't matter, as long as the  
2 Common Council can find some hint allegation that they  
3 cherry picked that they think was misrepresented, they  
4 can revoke the CUP. That doesn't make any sense.

5 THE COURT: I wouldn't disagree with you,  
6 although when I look at the zoning ordinance, which is  
7 what we're governed by, and I look at the provisions in  
8 issuing Conditional Use Permits at 13-205, and I look  
9 at conditions and guarantees within the CUP, it says --  
01:58:18PM 10 the zoning ordinance says in all cases in which  
11 Conditional Uses are granted, the Council may require  
12 such evidence and guarantees as it determines is  
13 necessary as proof that the stipulated conditions are  
14 being complied with.

15 Now, you would argue, Judge, I agree with you, but  
16 my concern is one of the conditions is a general  
17 maintenance of the general regulation, and the general  
18 regulation talks about no structure being operated so  
19 as to constitute a dangerous, injurious or noxious  
01:58:59PM 20 condition because of . . . . and it lists other things,  
21 including air pollution. No use shall unreasonably  
22 interfere with the use or enjoyment of any property of  
23 normal -- of normal sensitivities.

24 What I'm hearing you saying is, Judge, we don't  
25 disagree but that's not measured by anybody or anything

1 other than DNR. That's not what --

2 MR. WILSON: I'm sorry.

3 THE COURT: Go ahead. If you think I'm  
4 wrong, stop me.

5 MR. WILSON: That's not what we're saying  
6 actually. If there's some evidence that a permit  
7 holder is violating some City ordinance, say, they're  
8 creating a nuisance, for example.

9 THE COURT: Isn't that exactly the  
01:59:34PM 10 evidence that the Common Council had at its last  
11 meeting to revoke? They had all these people come and  
12 talk to them before they took that action, and I  
13 watched that videotape. In fact, I watched it a couple  
14 times, and it was a long session that those people work  
15 at. But in that meeting in which the Council  
16 ultimately voided the CUP, they heard from a bunch of  
17 people. Some of them were citizens voicing their fears  
18 and frustrations. There were people getting upset that  
19 really, quite frankly, were venting their will and not  
02:00:06PM 20 their judgment. But there were some presentations  
21 there that were, in my opinion, exercising the right to  
22 point out valid concerns.

23 The president of the Clean Water Action Council  
24 spoke and talked to the Council about what information  
25 he thought was misleading. And, more importantly, what

1 information he thought would create a dangerous  
2 environment for the City of Green Bay. And he added  
3 some written documentation to support his comments  
4 because he only had a few minutes to speak. I don't  
5 know his name. I just wrote down his title.

6 There was a gentleman that was the president of  
7 Mather Heights Association who talked about his concern  
8 that there were no other plants built like this plant  
9 as it currently sits. And that the concern he had, he  
02:00:51PM 10 had some information that I think would lead a  
11 reasonable person to believe that this particular plant  
12 now as reconstructed after it had to be repermited  
13 because DNR initially said you had to build a 60-foot  
14 stack, that there are real questions about what this  
15 plant would produce.

16 MR. WILSON: And, Your Honor, all of those  
17 concerns were considered very thoughtfully and in a  
18 detailed fashion by the folks with the expertise to  
19 respond to them. And those folks are the experts at  
02:01:24PM 20 the DNR and the experts at the US Department of Energy.  
21 The record contains very lengthy and detailed responses  
22 to each and every one of those concerns that were  
23 raised.

24 THE COURT: I -- let me stop you because  
25 I'll forget if I don't stop you. His argument is, hey,

1 look, if we complied with the experts, what more can we  
2 possibly do or we're going to be subject to the whim of  
3 a neighbor who says I don't want my children playing  
4 next to the trash recycling center?

5 MR. WARPINSKI: Your Honor, you go back to  
6 the initial decision that was made. The City could  
7 have decided that despite experts' recommendations they  
8 just were uncomfortable approving this land use in the  
9 initial application. They could have done that. That  
02:02:06PM 10 would have been a reasonable exercise of their decision  
11 making authority to say we understand you're going to  
12 comply. There's concern we're not sure we want this  
13 kind of a use here. They could have said that at the  
14 time.

15 So it was within their discretion to have used  
16 their own judgment as to what land use they want for  
17 this community. They didn't have to defer to the DNR  
18 in saying, well, if you can get all the approvals,  
19 everything is fine. That's not the way that this law  
02:02:30PM 20 works as I think you're working your way through here.  
21 They don't give up that authority to look at local land  
22 use in how it might impact their constituents. That's  
23 something within their authority to do and that's what  
24 I think they did here.

25 THE COURT: You wouldn't disagree with

1 Mr. Wilson you have a conditional permit granted, you  
2 build a facility, it's up and operating, and someone  
3 has concerns about what they're producing or what  
4 they're not producing or their impact on health and  
5 that at any point in time the City could pull a  
6 Conditional Use Permit if the City believes it's  
7 violating its obligation? You wouldn't disagree with  
8 him?

9 MR. WARPINSKI: You're saying if they're  
02:03:10PM 10 operating under a permit and they violate that  
11 permit --

12 THE COURT: Right.

13 MR. WARPINSKI: -- can they pull the  
14 permit? Certainly, I agree that's within their right.

15 MR. WILSON: And so, Your Honor,  
16 Mr. Warpinski's point about how the City could have, in  
17 its considered judgment, decided, you know what, we  
18 understand what you're trying to do, but we don't  
19 really want that here. We don't want that in  
02:03:32PM 20 Green Bay. Could they have done that? Yes. The point  
21 is they didn't. Those aren't the facts. The facts are  
22 that they considered the facility, granted the  
23 Conditional Use Permit. Oneida Seven Generations --

24 THE COURT: Let me stop you because I'll  
25 forget.

1 MR. WILSON: Sure.

2 THE COURT: They didn't consider the City.  
3 They considered the site. They were consistently told  
4 at that meeting, look, all we're doing here is saying,  
5 yes, this would be an appropriate site.

6 MR. WILSON: For great use.

7 THE COURT: Well, the words that they were  
8 given when they were asked what are we doing here, we  
9 are -- because the aldermen starting to get off track,  
02:04:06PM 10 and they wanted to talk about tipping fees and how it  
11 would affect the Tri-County agreement and staff was  
12 very clear in explaining to them all you're doing when  
13 you vote to approve that CUP is indicates this is an  
14 appropriate site. Clearly -- go ahead.

15 MR. WILSON: It's a Conditional Use  
16 Permit, Judge.

17 THE COURT: Well, I know what it is but --

18 MR. WILSON: They're approving a use.  
19 They are approving that that particular site is going  
02:04:32PM 20 to contain a waste to energy facility.

21 THE COURT: With other representations.

22 MR. WILSON: I'm sorry?

23 THE COURT: With other representations,  
24 I'm assuming. When you're saying, Judge, they're doing  
25 more than saying this site is an appropriate site,

1       okay, I don't necessarily disagree with you, although  
2       if you go back and you look at the record, my  
3       recollection is that's not what they were told they  
4       were actually voting on. They were voting on a CUP.  
5       What does that mean? That means the City say, yes,  
6       there is an appropriate site for this type of building.  
7       What type of building? The building that was explained  
8       to them by Mr. Cornelius and supplemented by the Power  
9       Plant.

02:05:10PM 10

      MR. WILSON: Not this type of building.  
11       This type of business. This type of operation.

12       THE COURT: You're right. This type of  
13       business that this site is appropriate for this type of  
14       business.

15       MR. WILSON: Right. And at that point in  
16       time they could have said no thanks, but they didn't.  
17       They voted to approve it, and as a result, my client,  
18       Oneida Seven Generations Corporation, invested millions  
19       of dollars to pursue this business and had the rug  
20       yanked out from under them 18 months later.

02:05:32PM 20

21       THE COURT: You're arguing the vested  
22       property right?

23       MR. WILSON: Exactly. There's a reason,  
24       Your Honor, why these cases that deal with  
25       misrepresentations, all of them have a common thread

1 going through them, which is that the permit holder in  
2 some way has -- is not in compliance with the CUP or  
3 some local ordinance. And if that's the case, you  
4 can't say that I have a vested right because you're not  
5 in compliance with all the local laws and regulations.  
6 The situation here is much different.

7 THE COURT: Let me interrupt you. I  
8 understand what you're saying if that's your starting  
9 point by the City, starting point is a little  
10 different.

11 They're arguing this **Jelinski** case, which doesn't  
12 have much to do with compliance, but, rather,  
13 misrepresentation and fraud. And the **Jelinski** case  
14 says, "Zoning ordinance -- **Jelinski** is an old case,  
15 34 Wis.2d 85. Quoting **Leavitt**, and that case says:  
16 "Zoning ordinances are enacted for the benefit and  
17 welfare of the citizens of a municipality. Issuance of  
18 an occupancy or building permit which violates such an  
19 ordinance not only is illegal per se, but it is  
20 injurious to the interests of property owners and  
21 residents of the neighborhood adversely affected by the  
22 violation. When the city acts to revoke such an  
23 illegal permit, it is exercising its police power to  
24 enforce the zoning ordinance for the protection of all  
25 citizens who are being injured by the violation and not

1 to protect some proprietary interest of the city.  
2 These citizens have a right to rely upon city officials  
3 not having acted in violation of the ordinance, and  
4 when such officials do so act, their acts should not be  
5 afforded a basis for estopping the city from later  
6 enforcing the ordinance. This is true regardless of  
7 whether or not the holder of the legal -- strike that  
8 -- of the illegal permit has incurred expenditures in  
9 reliance thereon."

02:07:29PM 10 Now, I understand what you're suggesting. We  
11 didn't violate the CUP. We didn't violate the  
12 ordinance. My concern is adding or layering the City's  
13 argument that there's a misrepresentation and that the  
14 outcome is the same. You can't assert a vested  
15 interest or vested ownership argument if it is premised  
16 upon a material misrepresentation of fact. I'm  
17 assuming that's what you're arguing?

18 MR. WARPINSKI: That's correct, Your  
19 Honor.

02:07:58PM 20 THE COURT: Let me deal with this issue  
21 because not you, but a lawyer from your office appeared  
22 at one of the meetings, I think it was the last City  
23 Council meeting, tall fellow, and he said we've spent a  
24 lot of money on this project, very similar to what  
25 you're saying now. With all respect, I understand

1 that. The parties just spending a lot of money right  
2 in front of me right now. Isn't that issue of damage?  
3 I mean, you're saying we spent a lot of money. We  
4 didn't intend to make that a gift. We have a right to  
5 a vested interest in this property. Well, you have  
6 rights if you spend money, maybe, but isn't that an  
7 issue of damage?

8 If I grant the City's request, you may very well  
9 sue the City of Green Bay and that may cause the City  
02:08:47PM 10 of Green Bay a heck of a lot of money but that's a  
11 damage issue. Why the fact that you spent money do I  
12 automatically assume there's a vested right in  
13 property? Help me to understand.

14 MR. WILSON: Your Honor is correct to  
15 point that absolutely that's an issue of damages,  
16 that's a separate lawsuit in the event that the City  
17 Common Council's action is sustained. That's probably  
18 where this is headed. But that is not an issue that  
19 should concern the Court today.

02:09:15PM 20 The reason I pointed it out though was to point  
21 out how sort of the slippery slope before the Court of  
22 what the City is asking the Court to do, which is the  
23 uncertainty that's created when a business has a  
24 Conditional Use Permit, acts in reliance on that  
25 permit, and then 18 months later is told I know you're

1 in full compliance, I know you're doing everything  
2 right, but we don't care. We are going to revoke the  
3 permit anyway.

4 THE COURT: Do you think that reliance was  
5 reasonable on behalf of your client?

6 MR. WILSON: Absolutely.

7 THE COURT: What happened in Ashwaubenon?

8 MR. WILSON: Well, my reaction to that  
9 first is it's not in the record.

02:09:56PM 10 THE COURT: No. But neither is your  
11 client's reliance and you're making an argument of  
12 reliance that we reasonably relied on the  
13 representations of the City based on Schmitt signing  
14 the CUP, and we spent five million dollars on that  
15 piece of paper. I'm being a bit facetious, but you had  
16 a similar experience in this county with, I think, I  
17 don't know, because, you're right, it's not part of the  
18 record, but what I'm hearing you say is wait a minute.  
19 We would have -- we couldn't have reasonably foreseen  
02:10:26PM 20 that after the CUP was issued we'd have problems with  
21 the municipality in completing this project. And I  
22 don't know anything about the Village of Ashwaubenon's  
23 project.

24 What I know is that one day it looked like it was  
25 moving forward and the next day the farm was back there

1 and I don't know how that happened, but I'm having a  
2 hard time when you say wait a minute, you know, this is  
3 unjust because we reasonably relied when in Brown  
4 County, we know that facility, I presume at least it is  
5 scheduled to move forward. Again, it's not part of the  
6 record. If you can help me to understand?

7 MR. WILSON: Right. I think a couple of  
8 points are important. First of all, the City in a  
9 footnote in its opposition brief incorrectly describes  
02:11:07PM 10 what happened in Ashwaubenon. That project wasn't  
11 rejected. Oneida Seven Gens chose not to proceed on  
12 the project based upon some conditions that had been  
13 applied in that municipality.

14 I think what's constructive about the fact that  
15 this project was tried in other locations and, frankly,  
16 was, you know, reported in the **Press-Gazette** quite  
17 heavily when it was before Ashwaubenon supports that  
18 the City of Green Bay new exactly what it was getting  
19 into here. This was not something that flew under the  
02:11:40PM 20 radar screen where Seven Gens pulled a fast one on the  
21 City of Green Bay. Green Bay knew that other  
22 municipalities had chosen not to go forward with this  
23 project, yet they decided that they wanted to do it in  
24 Green Bay.

25 And I think that getting back to the **Jelinski**

1 case, Your Honor, the thing that that case was not  
2 decided on the alleged misrepresentation, that case was  
3 decided because the guy tried to claim that I've got a  
4 building permit and that's all that matters. And I  
5 said, no, it doesn't. You're in violation of the local  
6 zoning ordinance. That's why the case is different  
7 than this one.

8 THE COURT: He's making an important -- I  
9 think an interesting point that's not on the record. I  
02:12:21PM 10 mean, it's hard for me to believe the City wasn't aware  
11 this was a hot topic and they went ahead and approved  
12 it anyway.

13 MR. WARPINSKI: Well, the question what  
14 did they approve though? What did they approve? Sure,  
15 there was -- it was a high profile project. It had  
16 press before this. But you still have to go back to  
17 what, what was it that they approved? What were they  
18 told when it was being approved? We don't know  
19 anything about what they told Ashwaubenon.

02:12:49PM 20 THE COURT: But isn't the argument, look,  
21 you're claiming arguably that Seven Generation  
22 misrepresented something when they applied for the CUP;  
23 right?

24 MR. WARPINSKI: What I'm claiming is that  
25 there's sufficient evidence in the record to show that

1 they are the reason why there was misinformation that  
2 was created. It was because of information they  
3 provided and it was --

4 THE COURT: It was misrepresentation.

5 MR. WARPINSKI: And the City was entitled  
6 to look at that information and judge whether or not it  
7 was what it was what they thought.

8 THE COURT: But I think the argument, if I  
9 can borrow from it, is let's concede for a moment  
02:13:25PM 10 you're not. I'm going to. Let's concede for a moment  
11 there was a misrepresentation of material fact. The  
12 next element that has to be met is that the City's  
13 reliance on that misrepresentation was reasonable. Was  
14 it? Was it reasonable to assume there be no emissions?  
15 Was it reasonable to assume that Seven Generations  
16 stopped in Ashwaubenon because the City of Green Bay  
17 was offering them such a great deal and they could  
18 foresee that a year down the road? They said, well,  
19 let's abandon all the money we pumped into Ashwaubenon.  
02:13:56PM 20 Let's move to the City of Green Bay. Is that  
21 reasonable?

22 MR. WARPINSKI: I think that, that this  
23 Council believed it was reasonable. And their  
24 consideration of the information was that it was a  
25 reasonable decision. It was a reasonable reliance upon

1       that information.

2                   THE COURT:  Nobody picked up the phone and  
3       called Mike Aubinger in the Village of Ashwaubenon and  
4       say why aren't you building that, Mike?  What's the  
5       problem with this thing?

6                   MR. WARPINSKI:  I do not know that.  Your  
7       Honor, could I jump in?  I want to correct one  
8       statement I made earlier.

9                   THE COURT:  You may.

02:15:17PM 10

11                   MR. WARPINSKI:  You asked about the City  
12       could revoke the permit if they were not in compliance  
13       with the permit.  I think the answer is she should  
14       enforce the permit rather than revoke it automatically.  
15       There is a procedure that would have come into play  
16       there.

17                   THE COURT:  Thank you.  I'm sorry.  Do you  
18       have -- I have a question.

19                   MR. WILSON:  I'm interested in the code  
20       provision that lets them revoke it then because I can't  
21       find one without some enforcement proceeding, but as  
22       Your Honor is well aware, that would be a procedural  
23       argument and we are here to argue about the substance.

02:15:42PM 20

24                   THE COURT:  I don't disagree with either  
25       of the things you just said.  I've looked.  I can't  
      find that.  I can't find that process that you've just

1 made inquiry.

2 I want to go back and ask a couple more questions  
3 on the basics. So let me pull you out of this legal  
4 argument. At least I'm hoping to pull out a legal  
5 argument. I want to go back to representations because  
6 this is really a representation case and expectation on  
7 representation.

8 I'm looking at my notes on the first City Council  
9 meeting where the CUP was issued. Representations made  
02:16:35PM 10 by Mr. Cornelius was that this technology is, quote,  
11 "not new" and, quote, "not experimental." The system  
12 is operational in California. And I'm not talking  
13 about the modified system. I asked you questions  
14 earlier about the modified system, but I'm not doing  
15 that because there's no way anybody could have  
16 reasonably foreseen that the system would have to be  
17 modified, I'm satisfied of that, when the CUP was  
18 originally applied for.

19 My question is -- I'm not clear, and maybe there  
02:17:07PM 20 isn't an answer, maybe I'm not there because it isn't  
21 there -- as the Green Bay facility was originally  
22 designed, I can't find a duplicate model anywhere. I,  
23 in other words, let's say hypothetically Cornelius says  
24 because the plaintiff like this in California and it's  
25 working and producing energy and it's safe and it's

1 clean. I'm not finding that in the CUP application.  
2 Is there one? Am I missing something?

3 MR. WILSON: And what is the particular  
4 alleged statement that you're pointing to?

5 THE COURT: The statement was  
6 Mr. Cornelius suggested this technology is, quote, "not  
7 new," closed quote, and, quote, "not experimental,"  
8 closed quote.

9 MR. WILSON: Right.

02:17:53PM 10 THE COURT: What he said was this system  
11 is operational in California. Now, he didn't say an  
12 identical and duplicate plant is operating in  
13 California. He didn't say that.

14 What I think he's saying, look, this isn't new.  
15 There are other places that are doing this. And this  
16 particular type of system is exactly what they're using  
17 in California but not a duplicate facility, not the  
18 same dimensions, the same width, the same volume. I  
19 just want to make sure I'm not incorrect in that  
02:18:23PM 20 regard.

21 The Council was not presented with a statement  
22 that said this exact facility is producing energy  
23 successfully and safely in another state. I'm not  
24 seeing that anywhere.

25 MR. WILSON: That's not I don't think what

1 he said. He said this technology isn't new.

2 THE COURT: Right.

3 MR. WILSON: And the question then -- and  
4 let me just go back to the premise of the Court's  
5 question, if I may, which is that the issue here is  
6 whether there's a misrepresentation.

7 THE COURT: Correct.

02:19:00PM 10

8 MR. WILSON: We would respectfully suggest  
9 that the analysis starts one step earlier, which is was  
10 the CUP violated? Okay. Because if the CUP wasn't  
11 violated and Seven Gens isn't in violation of any  
12 ordinance, it's our position, Judge, that there was no  
13 authority to revoke the CUP. I just want to make that  
14 clear.

15 THE COURT: I appreciate that.

02:19:28PM 20

16 MR. WILSON: But with regard to the  
17 alleged misrepresentation with regard to whether or not  
18 this is a new technology, if the issue is was that a  
19 misrepresentation as opposed to -- which I think it is  
20 -- as opposed to what information did the Council have,  
21 you need only look at a lengthy white paper that was  
22 included as part of the DOE's environmental analysis in  
23 Appendix D. It's pages 562 through 568 of the record.  
24 And we quoted a portion of it in our reply brief, but  
25 it goes on and on about, I think, that provides support

1 for the fact that that is a truthful statement, and I  
2 think the issue is was there substantial evidence that  
3 it wasn't? And, respectfully, we don't think that  
4 there was.

5 THE COURT: What about that,  
6 Mr. Warpinski? I mean, I don't think at any point in  
7 time Mr. Cornelius said this plant is operational, it's  
8 in California, it's making money, it's making energy,  
9 and it's complying with all health concerns of that  
10 community. I don't think he said that. I think what  
11 he said is, look, this technology isn't new. It's not  
12 experimental. It's successful. There's some -- the  
13 base of the system we're using here they're using in  
14 California. Those aren't misrepresentations, are they?

15 MR. WARPINSKI: If that's how you take  
16 those statements?

17 THE COURT: How else can I take them?

18 MR. WARPINSKI: I think you have to take  
19 it all in context. When he was referring to those  
20 sites, he was also saying we're not going to have any  
21 emissions. If those sites had emissions, he was trying  
22 to compare the two projects at certain occasions. It's  
23 the overall context of all the information. You can  
24 look at one piece and say, oh, one person will look at  
25 that evidence and say I understand exactly what he's

1 saying. And you go to another piece of evidence and  
2 you say I don't understand what he means by that. Here  
3 he is saying there is no emissions. Regardless of what  
4 these other facilities are going to do, this one isn't  
5 going to have any emissions, no hazard chemicals, no  
6 hazard materials. These byproducts will be used for  
7 organic farming.

8 Yes, you can go in and look at each one of them,  
9 and if you dig deep enough, it's not exactly like this.  
02:21:36PM 10 There were no -- it turns out there were no facilities  
11 like these, a commercial production type facility.  
12 These were experimental facilities. If you dig into  
13 the record, you look at the DOE and the DNR discussions  
14 of that, they talk about it as being unproven. They  
15 don't really know what the emissions are going to be,  
16 so there is -- this information came out after.

17 But what the question is what were they saying?

18 THE COURT: Let me ask you a question. Do  
19 you agree with the argument or what's wrong with the  
02:22:03PM 20 argument that the DNR issues a building permit that  
21 requires a 60-foot stack in order for this facility to  
22 operate and that event materially changes the nature of  
23 this entire project because the project was approved  
24 and the CUP was issued with a belief they would be  
25 absolutely no stacks? Now, DNR says, well, there has

1 to be a stack for this facility to be built. Do you  
2 believe that, that event literally changes the nature  
3 of this operation?

4 MR. WARPINSKI: I think that event gave  
5 grounds for the Council to ask them to come back and to  
6 void the permit and say come back. If you want to look  
7 at this land, you come back to us again with the full  
8 plan as you're talking about now. That gave them the  
9 right to make that decision is what I'm saying. Those  
02:23:04PM 10 facts along with the information that was provided  
11 originally by the applicant in total provided them with  
12 enough of a basis to make the decision that they did.

13 THE COURT: But they fixed the problem.

14 MR. WARPINSKI: If they fixed the problem,  
15 but the question still is what problem did they fix?

16 THE COURT: The height of the stack.

17 MR. WARPINSKI: They reduced the height of  
18 the stack. Did they address -- but it brought to light  
19 other questions that, that, that people were looking at  
02:23:28PM 20 at that time which was --

21 THE COURT: DNR said that's all okay.  
22 Everything is okay.

23 MR. WARPINSKI: The City does not lose its  
24 right to look at the full land use implications just  
25 because they're going to comply with the DNR permit.

1 THE COURT: Under what authority?

2 MR. WARPINSKI: Under what authority?

3 Because that's the first requirement under what they  
4 must consider. The general health and welfare of a  
5 community is part of issuing a conditional use.

6 THE COURT: You like that argument. What  
7 about that? What about that? I mean, isn't there an  
8 material change from no stack or a stack to a 60-foot  
9 stack?

02:24:02PM 10

11 MR. WILSON: Two responses to that. One  
12 is why would that be important? The only reason that  
13 could be an important is if no stacks was important to  
14 the City. And if it was important to the City, why  
15 isn't it in the CUP? That's the first response.

16 The second response is, as Your Honor has pointed  
17 out, it can't be a response -- it can't be a basis in  
18 October of 2012 to revoke the permit because there's no  
19 stacks anymore.

02:24:30PM 20

21 THE COURT: You think that every statement  
22 that Cornelius issued in selling this project should  
23 have been a condition in the CUP? There won't be any  
24 stacks, it will be, quote, unquote, "clean." The slag  
25 you can put it into farm fields. Every one of his  
statements should have been a condition.

MR. WILSON: No, I would turn that around,

1 Judge. I would say to the extent that he said  
2 something that was important to the Plan Commission or  
3 important to the Common Council in approving the CUP,  
4 yes, absolutely that should have gone in as a condition  
5 of the CUP.

6 THE COURT: Don't you think everything he  
7 said was important?

8 MR. WILSON: I can't agree with that  
9 statement. I think there are varying degrees of  
02:25:11PM 10 materiality of the statements that were made.

11 THE COURT: Well, Mr. Wilson, if I ask you  
12 a question, and you give me an answer, I'm going to  
13 rely on your answer. You're an expert, and you're  
14 coming to me and saying, I want you to do that and I'm  
15 going to have questions. I mean, how in the world  
16 would the Council be able to figure out, well, that's  
17 really important but that's not important?

18 MR. WILSON: When you're considering my  
19 arguments, I think some of them have probably been more  
02:25:35PM 20 persuasive than others.

21 THE COURT: Persuasive but not less  
22 important.

23 MR. WILSON: I think respectfully, yes.  
24 In making your decision, whether you agree with the  
25 City or you agree with Oneida Seven Generations

1 Corporation, there are certain aspects of what we've  
2 told the Court that are going to be more important to  
3 your decision. And I think that similarly when a  
4 applicant for a conditional use is making  
5 representation of the City, if there are aspects of  
6 that presentation that are critical to granting the  
7 CUP, they better be in the Conditional Use Permit.

8 THE COURT: What about that? If it was  
9 that important, why not put it in? What's the harm by  
02:26:09PM 10 putting it in the CUP?

11 MR. WARPINSKI: Think that's placing a  
12 pretty heavy burden on the City to parse through every  
13 statement and then have to say this is what happened.  
14 This is a unique situation. Let's not, you know, let's  
15 not forget about that. There is not case law out there  
16 that talks about cases like this and so we have to look  
17 at what actually happened.

18 THE COURT: Well, the situation may be  
19 unique but the process certainly isn't.

02:26:30PM 20 MR. WARPINSKI: Yes. But to ask the -- to  
21 ask the City to say look at every statement that's  
22 made, we have to make a decision, that's going to be an  
23 express condition of the permit. We're not talking  
24 about the conditions of the permit. We're talking  
25 about what was being used to grant the permit. The

1 permit contains conditions going forward that must be  
2 complied with, not con -- not representation that must  
3 be proven to be true.

4 I think what we're seeing here is in making the  
5 decision, if there was misinformation provided in  
6 making the initial decision to grant the CUP, that  
7 they're entitled to look at that just like any other  
8 agreement people make. If there's some sort of, I'll  
9 call it, sort of fraud and inducement, if you want, we  
10 don't make those conditions of contract. It's not  
11 condition precedent. This is something that sort of  
12 widely formed the disagreement to begin with.

13 THE COURT: I'm still not satisfied. I  
14 asked you earlier, and you answered my question. I  
15 found a different spot in my notes. At the first  
16 Council meeting, somebody -- I thought it was  
17 Mr. Cornelius, but I could be wrong. I don't want to  
18 misspeak -- someone from Seven Generation indicated  
19 tonight Seven Generation, I think it may have been  
20 Mr. King, tonight Seven Generation is asking for a  
21 Conditional Use Permit approval so that Seven  
22 Generation can get the CUP to the Department of Energy.  
23 Once the Department of Energy receives verification of  
24 the CUP, then the Department of Energy and at a public  
25 hearing to address public concerns. That's a

1 quotation. I can't attribute that to Mr. Cornelius. I  
2 think that was Mr. King. I mean, when I hear that, I'm  
3 wondering if Seven Generation and the Council had a  
4 belief that this is the first step in a long process  
5 that public concerns had not been fully addressed at  
6 that point in time and needed to be fully addressed at  
7 a public hearing. It leads me to believe that the City  
8 did not meet its mandate at that point in time in  
9 assessing public health and safety, but the intent at  
10 from -- the request from the Seven Generations and the  
11 action by the City Council was to accomplish the first  
12 step and to allow subsequent comment from the public.

13 What are your thoughts on that? Why would that  
14 language -- why would King say that: Give us this  
15 thing so we can take it to the next step and let the  
16 public in on this?

17 MR. WILSON: Right. I think that's right.  
18 That's exactly what the Common Council wanted to do.  
19 It intentionally and purposefully deferred to the  
20 agencies to seek input about whether or not these  
21 permits were going to be granted. And, in fact, the  
22 record shows that the DNR issued a preliminary air  
23 permit in July of 2012 and then sought a bunch of  
24 public input. There was a public hearing at the end of  
25 July and the air permit that eventually gets issued

1 does change in some respects based on that input. And  
2 so the Common Council in issuing the CUP, it said  
3 here's our one -- there are several conditions, but the  
4 condition that's important for today's purposes is this  
5 has got to comply with all state and federal regs.  
6 Now, please, let the agencies that are experts in that  
7 figure it out with public input.

8 THE COURT: And once the City indicates  
9 that it should comply with all federal and state  
02:30:01PM 10 regulations, the City no longer has any responsibility  
11 -- and this is an argument that we talked about before  
12 -- then the City has no responsibility to itself  
13 ensure, to itself measure the impact of the facility on  
14 the health of the citizens of the City or the impact on  
15 the property immediately surrounding the City.

16 MR. WILSON: I think that overstates it,  
17 Your Honor, because the City always can exercise its  
18 police power to enforce its own ordinances.

19 So to the extent there's some aspect of this  
02:30:34PM 20 project that's not in compliance with local ordinances,  
21 that's a condition of the CUP.

22 THE COURT: That's the remedy -- let me  
23 interrupt you -- that's the remedy put forth in the  
24 building codes not revoking the CUP. There's a very  
25 specific remedy if somebody violates the CUP. If

1 somebody violates the CUP, they're fined, but not, not  
2 have the CUP pulled.

3 MR. WARPINSKI: If you properly obtained a  
4 CUP and then violate the CUP, that's the mechanism.  
5 The question here is whether or not in the first  
6 instance the CUP was properly obtained. I think that's  
7 what we're talking about here, not post, post permit  
8 remedies. We're talking about should they have  
9 received this permit in the first instance? Was it  
10 properly obtained?

11 And what we're saying here is the Council  
12 determined it was not properly obtained, that it was  
13 based upon misinformation that was provided, and that  
14 misinformation came to light, albeit during these  
15 common periods with the Department of Natural Resources  
16 and Departments of Energy, that the inherent  
17 inconsistencies between some of the statements being  
18 made to the Council and the Plan Commission and  
19 statements that were being made are fleshed out in  
20 front of the DNR and the DOE.

21 And I think one of the comments that was made to  
22 one of the competitors to the DNR said, hey, what about  
23 the fact that this project that was presented to the  
24 City is different than we're talking about now, and the  
25 DNR punts on that and said we're not going to get into

1 that. We're not going to look at that issue. That's  
2 one of the comments that was in the record at 266, I  
3 believe it was.

4 So, you know, there are -- we have to go back.  
5 What is the context within which we're talking about?  
6 What's the decision that's at issue here? There's a  
7 *certiorari* action reviewing the decision by the City to  
8 void the permit and that comes down to the question:  
9 Do they have a right to void the permit under the fact  
10 assuming everything we're saying is true. If there was  
11 a misrepresentation, did they have the authority to  
12 void the permit? So if you say, yes, they did, of  
13 course, they had to have authority to void a permit if  
14 they're being misled about what was being approved.

15 If you reach that conclusion, then we have to  
16 defer to the decision because there's enough evidence  
17 in the record to support that conclusion if you agree  
18 in the first instance that they had legal authority to  
19 make that decision, which I think they did.

02:32:18PM 20 MR. WILSON: May I offer one additional  
21 point?

22 THE COURT: You may.

23 MR. WILSON: In response to that, I think  
24 it's interesting to note that after this process takes  
25 place, the public hearings with DNR and DOE, after that

1 the City issues a building permit further confirming  
2 Oneida Seven Gens' vested rights to proceed with this  
3 project.

4 THE COURT: I don't disagree with you. I  
5 mean that -- I don't know they would have had any  
6 choice but to issue the building permit. Think  
7 Mr. Warpinski is saying, Judge, you got to go back. In  
8 fact, I'm assuming you would say, of course, they had  
9 to because they had to. They wouldn't be able to say  
10 we don't issue a building permit because we don't want  
11 to. The only way, the only legal way I'm assuming you  
12 would argue to me that this project stops is by an  
13 argument that the CUP was issued based upon either  
14 misrepresentation or misunderstanding, but if the  
15 agencies indicate the satisfaction of their standards,  
16 building permit has to issue.

17 MR. WARPINSKI: That's what happened and I  
18 think we have to look at -- that's what they did. They  
19 did issue a building permit because at that time they  
20 hadn't made a decision that there was a reason not to.

21 THE COURT: Okay. Um, I have listened to  
22 arguments of counsel. I have tried my best to review  
23 this record. It's a long record. A lot of it was  
24 complicated and technical and scientific, and as to  
25 those individuals who understood all of the emission

1 control reports, give them a lot of credit. They  
2 understood it better than I could have.

3 I spent some time reviewing briefs of counsel.  
4 They were extremely helpful and extremely well written.  
5 I have reviewed case law both cited in the briefs and  
6 independently, including the **Jelinski** case, which I  
7 have referenced on this record, **Betendorf** case, which I  
8 have referenced on this record, and the **Ottman** case,  
9 which I'll reference in a moment.

02:34:43PM 10

11 I have had the opportunity to review the videos  
12 that were provided. In addition and outside of the  
13 record, I had reviewed relevant portions, I perceived  
14 to be relevant portions of Chapter 13 of the City of  
15 Green Bay zoning ordinance, and I paid particular  
16 attention, so the record is clear, because I'm  
17 satisfied this is a body of law, to introduction,  
18 Chapter 13-100 to Chapter 13-500, general regulation,  
19 and to Chapter 13-300, definition, as well as the  
general regulations that reference conditional use.

02:35:46PM 20

21 In this case, I am satisfied that based on what  
22 was asked of me in terms of this cert. action to  
23 conclude that either the issue of the City's  
24 jurisdiction is not before me and/or the City for  
25 purposes of today's proceeding had the jurisdiction,  
the authority to rescind the permit, that this is not a

1 matter that at this point in time is before me as to  
2 whether or not the matter would go before the Zoning  
3 Commission, Zoning Committee or the Common Council.

4 Seven Generation argues that the City did not  
5 proceed on a correct theory of law that the City is  
6 requiring the imposition of implied conditions to the  
7 Conditional Use Permit or additional conditions in the  
8 CUP. They relied on **Betendorf**. I have reviewed it.  
9 I am not satisfied that the City has proceeded in a way  
10 that would suggest the addition of terms or implied  
11 terms. I'm not satisfied that is the basis upon which  
12 the theory proceeds today.

13 I believe the City is clearly proceeding on a  
14 theory of misrepresentation and/or failure to disclose  
15 material fact and/or a lack of understanding, a failure  
16 to have a mutual meeting of the minds regarding the  
17 subject matter of the CUP.

18 As to whether or not the City deprived Seven  
19 Generation of a vested right to develop the facility,  
20 the City would argue that there is no vested right if  
21 the CUP was acquired by misrepresentation or fraud.  
22 That's not exactly what the **Jelinski** case says, I would  
23 agree with that, however, the **Jelinski** case is  
24 instructive and it's informative. I think it is  
25 disingenuous to suggest that if the CUP was acquired by

1 a fraudulent -- strike that. If the CUP was acquired  
2 by a misrepresentation of material fact or a failure to  
3 disclose or a failure of meeting of the mind, that it's  
4 difficult to conclude that any party would have a  
5 vested right to develop the land.

6 In addition, I view this argument as I suggested  
7 as one of damage. And Council has respectfully, quite  
8 frankly, indicated that's an interesting point and that  
9 may be left for a different day, and Seven Generation  
02:38:40PM 10 may pursue damage, and, obviously, the City proceeds in  
11 voiding CUPs at the risk of someone bringing an action  
12 that may or may not have validity or value. That's not  
13 for today. That's something for these parties to take  
14 up after today.

15 The Seven Generation organization argues that the  
16 Common Council's action to rescind the CUP was  
17 arbitrary, oppressive, unreasonable, represented the  
18 council's will and not its judgment.

19 Further, Seven Generation argues that the City's  
02:39:16PM 20 action was not based on substantial evidence.  
21 Substantial evidence is evidence that is relevant,  
22 credible, probative and enough for a reasonable fact  
23 finder to base a conclusion.

24 Based upon my review of the record, I am satisfied  
25 that there was substantial evidence that the City had

1 when it took its action to rescind the CUP. I'm  
2 satisfied based on my review that at the meeting upon  
3 which the City Council approved the CUP, Mr. Cornelius  
4 made representations. I placed some of those  
5 representations on the record and they are in the  
6 videotape.

7 I'm satisfied that those representations simply  
8 were not correct. I'm satisfied that the City relied  
9 on them in part and/or in whole but certainly as a part  
10 of the basis to approve the CUP.

11 I am satisfied that the CUP contained conditions  
12 which required the City of Green Bay to initially  
13 ensure and to continue to ensure appropriate air  
14 quality for its citizens and appropriate safeties or  
15 assurances that the land adjacent to and surrounding  
16 the facility would not be harmed by its production.

17 I don't think that the City was accurately and  
18 fully appraised. If anything, there is inconsistency,  
19 but to be frank, I think there was a misrepresentation.

20 The Seven Generation Group, plaintiff, makes  
21 argument that no deference should be given to the  
22 Common Council because they did not consider the  
23 evidence that the Planning Commission had considered.  
24 I don't find that argument persuasive. The Planning  
25 Commission has no authority but to recommend the

1 issuance of a Conditional Use Permit. That is where  
2 their authority ends.

3 The fact that the City of Green Bay Common Council  
4 referred the matter back to the Planning Commission for  
5 further evaluation or analysis in no way limits or  
6 compromises the ability and really the obligation of  
7 the City of Green Bay to independently assess the  
8 information it has, the information it had, and make a  
9 reasoned decision based on its judgment and not on its  
10 will.

02:41:52PM

11 I don't know why, quite frankly, the City of  
12 Green Bay sent this matter back to the Planning  
13 Commission because they simply had no authority to do  
14 anything. But they're simply not bound by that  
15 decision, and, quite frankly, I think what happened in  
16 this case is two organizations processing very similar  
17 pieces of information came to different conclusions.  
18 That doesn't mean either one of them is right.

19 What it means, quite frankly, is that two  
20 individuals can come up with differing conclusions and  
21 both of them are equally plausible, and the question is  
22 whether or not it's reasonable? It's based on the  
23 substantial evidence.

02:42:22PM

24 I'm satisfied that the City's action was based on  
25 substantial evidence. I'm not bound by the Planning

1 Commission's findings and neither is the City of  
2 Green Bay Common Council.

3 Seven Generation argues that they simply did not  
4 make representations that they told the Common Council  
5 there would be emissions, that it was unreasonable for  
6 the Common Council to assume no exhaust vents as part  
7 of the smokestack, and that the system was, in fact,  
8 closed.

9 I'm satisfied that the Planning Commission  
02:43:04PM 10 initially and the Common Council subsequently were left  
11 to believe there would not be the type and nature of  
12 the emissions that ultimately were identified and  
13 approved by DNR. And I base that simply on the  
14 comments that I placed on this record, the  
15 representations made in PowerPoint, the representations  
16 made by representatives of Seven Generation to the  
17 Planning Commission initially and to the City Council  
18 repeatedly.

19 I'm not satisfied that the Common Council  
02:43:38PM 20 adequately considered public health and welfare by  
21 requiring Seven Generation to meet federal and state  
22 standards. They did require that. That was part of  
23 the CUP. But in addition, as part of the CUP, the City  
24 has a responsibility to require compliance on all  
25 zoning ordinances, and the zoning ordinances are

1 crystal clear that the City is responsible to ensure  
2 safe air quality and land quality for the citizens of  
3 the City of Green Bay. And that is not abdicated by  
4 the fact that the ordinances reference in addition that  
5 any operation has to comply with state and federal  
6 regulatory agencies.

7 Seven Generation argues that the City made no  
8 effort to substantiate the statements that were made by  
9 the project opponents. Those individuals who came to  
10 City Council meeting, at least the second meeting, and  
11 who came to the Planning Commission meeting, the  
12 ordinances in this case indicates that the Council may  
13 require evidence and guarantees that all conditions are  
14 complied with. I think it would be remiss for the City  
15 to ignore those individuals. They are the residents of  
16 this town. They're the ones that truly do have a  
17 vested interest in the quality of air and the quality  
18 of the land in the City of Green Bay. And I'm not so  
19 sure that the ordinance doesn't allocate the  
02:44:36PM 20 responsibility of substantiation of other statements  
21 actually to the CUP applicants as opposed to the City  
22 of Green Bay.

23 These individuals that have come in opposition to  
24 this project are not new. They're not unknown.  
25 They've made these arguments longstanding relative to

1 these projects. It has, quite frankly, nothing to do  
2 with who proposes it, whether it's Seven Generations or  
3 the Broadway, LLC Company or two individuals that sign  
4 off on the CUP. The concerns remain the same  
5 regardless of who is on the dance floor.

6 And I'm not satisfied that the City has an  
7 absolute obligation to substantiate all statements made  
8 by project opponents and to what extent those  
9 statements have to be substantiated. I'm not satisfied  
10 that's the legal burden that the state carries -- or  
11 the City carries. The City carries the burden to act  
12 based on reasoned judgment and not its will, and those  
13 individuals provided the City of Green Bay with the  
14 basis to exercise their reasoned judgment.

15 I am satisfied regarding the standard of review in  
16 this case the **Ottman** decision is most helpful. It's  
17 referred to from both counsel. The **Ottman** case makes  
18 clear the Court's review today is limited to whether  
19 the municipality kept within its jurisdiction? I have  
20 addressed it. Whether it received it on a correct  
21 theory of law? I have addressed it. Whether its  
22 action was arbitrary, oppressive, or unreasonable and  
23 represented its will and not its judgment? I'm  
24 satisfied I have addressed it. Whether the evidence  
25 was such that it might reasonably make the order for

1 determination in question? I've addressed it.

2 Our courts according to **Ottman** have repeatedly  
3 stated that on *certiorari* review there is a presumption  
4 of correctness and validity to the municipality's  
5 decision. On *cert.*, the petitioner, Seven Generation,  
6 bears the burden to overcome this presumption of  
7 correctness. The presumption of correctness and  
8 validity is appropriate because it recognizes that  
9 locally elected officials are especially attuned to  
10 local concerns.

11 It does not follow, however, that affording a  
12 municipality's presumption of correctness it  
13 eviscerates meaningful review.

14 The court's acknowledgement of presumption does  
15 not mean that the presumption will never be overcome,  
16 and I agree with that statement of the law and  
17 attempted to maintain it in my analysis.

18 The Court may be asked to review a municipality's  
19 findings of fact and to determine whether the evidence  
20 was such that the municipality might reasonably have  
21 reached the decision it reached. A *certiorari* court  
22 may not substitute its view of the evidence for that of  
23 municipality.

24 On *cert.* a court will sustain a municipality's  
25 findings of fact if any reasonable view of the evidence

1 supports them. And I am satisfied today that the  
2 record supports the municipality's findings of fact.

3 In other circumstances, however, the language of a  
4 municipality's ordinance appears -- strike that. In  
5 other circumstances, the language of a municipality's  
6 ordinance may appear to be unique and does not have a  
7 parrot -- I'm sorry -- and does not parrot a state  
8 statute, but, rather, the language was drafted by the  
9 municipality in an effort to address a local concern.

02:48:35PM 10 And I am satisfied that the zoning ordinance is more of  
11 a local concern than a state statute.

12 In such a case, the municipality may be uniquely  
13 poised to determine what the ordinance means. Then  
14 applying a presumption of correctness, we, the Court of  
15 Appeals, will defer to the municipality's  
16 interpretation if it is reasonable. I think it's a  
17 reasonable interpretation in terms of what the City did  
18 today.

19 And so in light of the law, in light of the state  
02:49:04PM 20 of this record, the Court today denies Seven  
21 Generation's its petition for cert. review.

22 Mr. Warpinski, you may draft an order to that  
23 effect.

24 Is there any other record that you need to have  
25 this court consider or make in an effort to draft that

1 order?

2 MR. WARPINSKI: I don't think so. I can  
3 get something submitted.

4 THE COURT: The order should be -- it is  
5 my presumption and intent the order be a final and  
6 appealable order.

7 Mr. Wilson?

8 MR. WILSON: I would respectfully suggest  
9 that we do need to make an additional record before  
02:49:38PM 10 that order can be drafted. I think it's important,  
11 Your Honor, that we identify the particular  
12 misrepresentations that the Court relies upon as the  
13 basis for its ruling.

14 In listening to the Court's opinion, and my  
15 inference is there will be no written decision, that  
16 the ruling from the bench will be the Court's decision;  
17 is that correct?

18 THE COURT: That is my intent, and I  
19 indicate that because you had asked when we started  
02:50:05PM 20 this process for a speedy resolution. And I gave you  
21 an expedited hearing date and I reviewed these  
22 materials as soon as they were received.

23 So in an effort to accommodate both parties'  
24 request that I act as promptly as a court can, I was  
25 not planning on issuing a written decision. I have no

1 problem in reviewing what I had indicated on the record  
2 if you are asking that be inserted in the order.

3 MR. WILSON: Well, I think it's important  
4 that the -- either the Court's order or the record  
5 reflect exactly which alleged misrepresentations the  
6 Court relies upon to base its ruling, not only the  
7 statements, but where they were made and to whom.

8 THE COURT: I can attempt to do that.

9 MR. WILSON: Okay.

02:50:52PM 10

11 THE COURT: You indicated that you took  
12 some notes. You were getting ready to recite them to  
13 me. Let me be selfish and recite them to you, and if I  
14 have missed one, I ask that you advise because I don't  
15 want to have the court reporter prepare a transcript  
16 and slow you down.

17 From the first City Council meeting of March 1,  
18 2001 (sic), based on my videotape review, City  
19 Councilmen were specifically told that the purpose in  
20 approving the Conditional Use Permit was to confirm  
21 that the site on Hulbert was a "suitable location for  
22 the facility," closed quote, period.

02:51:23PM 20

23 Mr. Cornelius at that first City Council meeting  
24 provided a PowerPoint presentation. That PowerPoint  
25 presentation indicated that, quote, "There be no  
emissions during the baking process," closed quote.

1 Quote, "Emitted gas goes through a scrubber," closed  
2 quote. Quote, "There are emissions from the system.  
3 All emissions will be subject to WDNR and EPA  
4 approval."

5 There were representations, and I believe this was  
6 by Mr. Cornelius, not on the PowerPoint, that this  
7 technology is, quote, "not new," closed quote, and,  
8 quote, "not experimental," closed quote. This system  
9 is operational in California. Mr. King at that meeting  
10 indicated "Tonight Seven Generation is asking for a  
11 Conditional Use Permit approval so that Seven  
12 Generation can get Department of Energy approval. Once  
13 the Department of Energy receives verification of the  
14 CUP, the Department of Energy can have a public hearing  
15 to address public concerns.

16 The video presentation indicated, quote, "There  
17 will be no smokestacks such as those associated with  
18 coal-fired plants," closed quote.

19 Mr. Cornelius represented the following: Quote,  
20 "There are no smokestacks, period. Obviously, comma,  
21 the system has to be pretty safe, comma, pretty clean,  
22 comma, for that to happen," closed quote.

23 As I'm reading, and I'm remembering you want me to  
24 identify the precise misrepresentations as to opposed  
25 to what I perceive to be significance in issuing my

1 decision. I apologize, because I was reading  
2 everything from my notes.

3 MR. WILSON: That's correct.

4 THE COURT: So the statement that I just  
5 read from Mr. Cornelius I believe was a  
6 misrepresentation.

7 MR. WILSON: If I may, Your Honor? Just  
8 so the record is clear, and certainly appreciate you  
9 are going through this, but with regard to the  
10 statements you've already made, were there any of those  
11 that you have deemed to be misrepresentations?

12 THE COURT: There was a statement --  
13 again, my hesitation is I can't tell you from my notes  
14 if it was out of Cornelius' mouth or out of the  
15 PowerPoint presentation.

16 I can say I'm satisfied both were relied upon in  
17 making the decision from the Common Council. One  
18 statement that was made either by Cornelius or from the  
19 PowerPoint was there were, quote, "No emissions during  
20 the baking process," closed quote, period. I'm  
21 satisfied that was a statement of fact.

22 MR. WILSON: And a misrepresentation?

23 THE COURT: I'm satisfied that that may  
24 have been a misrepresentation. There was a photograph.

25 MR. WILSON: Okay.

1 THE COURT: Sorry. There was a photograph  
2 of the proposed facility that was included in the  
3 PowerPoint. That facility clearly showed no stacks of  
4 any sort or kind as part of the operation. I'm  
5 satisfied that was a misrepresentation. That's in the  
6 record at record pages 21, 22, 23.

7 MR. WILSON: Just so the record is clear,  
8 Your Honor, our position is that the baking process,  
9 the gasification process is, in fact, a closed system  
10 and there are no emissions from that process as opposed  
11 to the generator.

12 THE COURT: Thank you. The record  
13 includes minutes from the City Planning Commission. I  
14 compare those minutes to the audio that was available  
15 to me on the record and as part of the record.

16 I'm satisfied that the following misstatements  
17 were included in the minutes and on the audio tape.  
18 Mr. Cornelius stated there are no hazardous material.  
19 I don't think that's true. The system is closed so  
20 there is no oxygen. Once it is baked, all the gas is  
21 taken off by a, quote, "cherry scrubber," closed quote,  
22 so it takes away any kind of harmful toxins that might  
23 be in the gas and the rest is burned as natural gas.  
24 Anything that is left over will run back through the  
25 system. The ash that comes out can be dumped in a

1 landfill or mixed with cement as road base.

2 Now, the last sentence I'm not satisfied is a  
3 misrepresentation. I don't know. I'm satisfied that  
4 comments regarding "once it is backed out, all the gas  
5 is taken off, it takes away harmful toxins." I'm  
6 satisfied these aren't true statements. Mr. Cornelius  
7 indicated at the Planning Commission hearing that there  
8 are no smokestacks, no oxygen and no ash. I'm  
9 satisfied that's a misstatement. There is carbon and  
02:57:21PM 10 ash which actually could have been tested and go right  
11 into organic farming. I'm satisfied that's not true.  
12 There are no fallout zones. I have no reason to  
13 challenge that. There have been some dioxins but no  
14 PCBs. This all goes into slag here. I'm not satisfied  
15 that is a truthful statement.

16 Mr. Cornelius in response to a question -- the  
17 question was from an alderman, and he said, in the  
18 report under emissions, it refers to some particulate  
19 matter, also hydrogen chloride, nitrogen oxide, sulfur  
02:58:06PM 20 dioxide, mercury and dioxins. The alderman asked if  
21 all of this was in the ash. Mr. Cornelius stated this  
22 is all taken out in the process, is all scrubbed out.  
23 A lot of this stuff is destroyed when it goes through  
24 the energy process at the end. I'm satisfied that's  
25 not true based on my interpretation of what was said.

1 MR. WILSON: And, again, Your Honor,  
2 apologize to interrupt. Just so the record is clear,  
3 Mr. Cornelius was not the one who made those  
4 statements. It was Seven Gens representative but not  
5 Mr. Cornelius.

6 THE COURT: And you are correct. I  
7 remember the voice. You're right. Any objection to  
8 that correction?

9 MR. WARPINSKI: No, Your Honor.

02:58:44PM 10 THE COURT: I think that's a true  
11 statement. And I believe that those were all of the  
12 material misstatements. I believe those are all the  
13 material misstatements that I relied on in making my  
14 ruling today.

15 MR. WILSON: I think what we'd like to do  
16 from our perspective is to attempt to incorporate those  
17 into the order with the consultation with Mr. Warpinski  
18 and then for the Court's review.

19 MR. WARPINSKI: Right. I suspect the  
02:59:18PM 20 question would be whether or not the whole transcript  
21 gets incorporated as the basis for your decision and  
22 not in limited statement because you did make a lot of  
23 comments and I haven't had a chance to compare all of  
24 the statements that you've made, all the statements  
25 that were presented versus the ones just listed.

1           So my perspective would be is for the reasons  
2       stated on the record, you've made your decision. As  
3       stated, it will be added to the transcript which will  
4       be incorporated into the --

5           THE COURT: I understand what you want.  
6       And I understand what you want. What I'm wondering if  
7       it makes sense to issue an order and order a  
8       transcript. The court reporter needs substantial time  
9       to prepare this size of transcript.

02:59:58PM 10           Do you want an order that you, I presume, want to  
11       file an appeal to maximize your options? Nothing wrong  
12       with that. Why don't I issue an order as set forth in  
13       the record of proceedings, give my court reporter some  
14       time to get that transcript together so that you can  
15       move forward in whatever remedies, if any, you intend  
16       to pursue.

17           MR. WILSON: Well, respectfully, Your  
18       Honor, if we're not going to get a written decision, we  
19       need that order to be as precise as possible for  
03:00:25PM 20       purposes of appeal. And so, you know, if we need to  
21       wait for the transcript to issue the order, and have  
22       just a preliminary bench ruling today, but I do think  
23       we need a written order that incorporates with  
24       particularity what are the particular bases for the  
25       Court's decision.

1 THE COURT: Sure.

2 MR. WARPINSKI: Well, I don't know that's  
3 needed for him to commence an appeal. I think it's  
4 sufficient to say for the reasons stated on the record  
5 and have the transcript be incorporated as part of that  
6 record, obviously. I will defer to you, obviously, to  
7 how you want to handle this.

8 THE COURT: I'll issue a written order --  
9 strike that. I'll entertain you forwarding to me a  
03:01:03PM 10 written order denying Seven Generation's request for  
11 cert. subject to the record -- subject to the record of  
12 hearing.

13 I certainly don't have a problem signing a  
14 supplemental order if you want to prepare one. If you  
15 can stipulate as to the content of that order, I'll  
16 sign it. If you can't -- and my concern is you may not  
17 be able to -- quite frankly, reasonable minds may  
18 differ in terms of what goes into that order, attach  
19 the entire transcript as part of the basis of the  
03:01:33PM 20 Court's reasoning. I share to some extent your  
21 concern.

22 We have been at that now for two hours and there's  
23 a lot of things that I said for me now to exclusively  
24 enlist the basis upon which an appeal is taken, I'm a  
25 bit concerned about that.

1 MR. WILSON: That's incumbent upon us here  
2 in the lower court to give the Court of Appeals -- this  
3 is the time to do it, frankly.

4 THE COURT: Well, sure.

5 MR. WILSON: And it's going to take some  
6 work between counsel. I think that it's, you know,  
7 sifting through several hundred page transcript is  
8 doing the Court of Appeals no favors. And I think that  
9 we ought to -- it's not rocket science. We can take  
03:02:15PM 10 the reasons you've listed and put them in the order. I  
11 think we can get that done in a couple of days so  
12 that's what I would suggest how we proceed.

13 MR. WARPINSKI: Well, I think I agree with  
14 you. It's just dangerous for us to try to identify  
15 everything, so if you want to try to prepare something,  
16 we can try to work that out, but I kind of sort believe  
17 we must proceed in the way we just referenced the  
18 transcript.

19 THE COURT: I understand you want to  
03:02:39PM 20 compare the record for appeal. Nothing wrong with  
21 that. To some extent that's a concern from the Court  
22 of Appeals, not necessarily my concern. If you want to  
23 order, I'm not being facetious, you want an order, I'm  
24 giving you an order. That's what you're entitled to.  
25 I'm satisfied the order is based properly. I'm just

1 concerned that, you know, we can look at things. If we  
2 miss something, it's simply going to create havoc in  
3 the Court of Appeals when Mr. Warpinski, if it goes up,  
4 if it goes up to the Court of Appeals and says, wait a  
5 minute, this is what he also said, and it is part of  
6 the record. So I don't have a problem with you trying  
7 to identify though bases that I placed on the record,  
8 you now, and that I have referenced.

9 Before I can sign that order, I want Mr. Warpinski  
03:03:15PM 10 to have the opportunity to confirm, yes, that's what  
11 was on the record. If you can't, we'll have to wait  
12 for the transcript. If you want me to hold the order  
13 for whatever reason, I will. I assumed you wanted me  
14 to sign the order immediately, but if you said, Judge,  
15 give me a little bit of time --

16 MR. WILSON: Can you give us five court  
17 days, Your Honor, to try to work something out before  
18 the order is entered?

19 THE COURT: Sure. I was asking for an  
03:03:37PM 20 expedited order for your benefit.

21 MR. WILSON: I understand that, Your  
22 Honor. I appreciate that, but I think the bigger  
23 picture is here is such that we at least like to try to  
24 have that order be as precise as possible.

25 THE COURT: Sure. I'll ask for the order

1 in ten days.

2 MR. WILSON: Okay.

3 MR. WARPINSKI: Thank you, Your Honor.

4 THE COURT: Anything further,

5 Mr. Warpinski?

6 MR. WARPINSKI: Nothing, Your Honor.

7 THE COURT: Mr. Wilson?

8 MR. WILSON: No, Your Honor.

9 THE COURT: This matter is concluded.

03:03:57PM 10 Thank you.

11 (End of proceedings at 3:04 p.m.)

12

13

14

15

16

17

18

19

20

21

22

23

24

25

FILED  
JAN 14 2013

STATE OF WISCONSIN)

CLERK OF COURTS  
BROWN COUNTY, WI

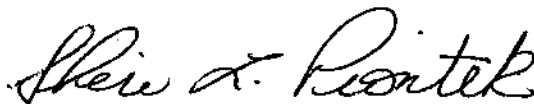
) SS.

CERTIFICATE

COUNTY OF BROWN )

I, SHERI L. PIONTEK, certify that I am an official reporter for said county; that the foregoing pages have been carefully compared against my stenographic notes; that the foregoing 97 pages is a true and accurate transcript of the proceedings taken on January 9, 2013.

Dated this 14th day of January, 2013.



Sheri L. Piontek, Official Reporter