STATE OF WISCONSIN : CIRCUIT COURT : BROWN COUNTY

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

Plaintiffs,

v.

CITY OF GREEN BAY,

Defendant.

Case No. 12-CV-2263

Code No(s). 30955
(Petition for Writ of Certiorari)

FILED
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CLERK OF COURTS
BROWN COUNTY, WI

BRIEF IN OPPOSITION TO PLAINTIFFS' REQUEST FOR CERTIORARI REVIEW

The Defendant, City of Green Bay ("City"), by its attorneys, Friebert, Finerty, & St. John, S.C. and Anthony S. Wachewicz, III, City Attorney, hereby submits its brief in opposition to the Plaintiffs', Oneida Seven Generations Corporation and Green Bay Renewable Energy, LLC (collectively, "OSGC"), request for certiorari review.

INTRODUCTION

The fundamental issue before this Court is whether the City had the authority to void a conditional use permit ("CUP") issued to the Plaintiffs, when inaccurate and misleading statements were made by the Plaintiffs during the CUP approval process. The City believes it acted within its rights in voiding the CUP because the record contains ample evidence that inaccurate and misleading statements were made by OSGC representatives during the CUP application process. For example, the architectural rendering submitted with OSGC's application for the CUP showed a building with no exhaust stacks for emissions. In addition, at public hearings before both the Plan Commission and Common Council, OSGC representatives repeatedly stated that the solid waste disposal facility ("Facility") that it proposed to construct

would be a closed loop system; that the Facility emissions would contain no hazardous materials; and that the "char" by-product of the Facility would contain no hazardous substances and could even be used for organic farming. None of these statements turned out to be accurate. Instead, the Facility actually was originally designed to have 10 stacks and chimneys, as high as 60 feet above its building[1], and to have toxic chemical residues in the char and have hazardous air pollutants in its emissions. Additionally, OSGC represented that the proposed Facility's technology was proven, when in reality the Facility would have been the first commercial, permitted pyrolysis gasification facility for municipal solid waste in the world. Based on this evidence, the City had the right to void the CUP and this decision should be affirmed.

STANDARD OF REVIEW

A court's review in a certiorari action is based on the record that was in front of the municipality and is limited to the following: (1) whether the municipality kept within its jurisdiction; (2) whether it proceeded on a correct theory of law; (3) whether its action was arbitrary, oppressive, or unreasonable and represented its will and not its judgment; and (4) whether the evidence was such that it might reasonably make the order or determination in question. *Ottman v. Town of Primrose*, 2011 WI 18, ¶ 35, 332 Wis. 2d 3, 796 N.W.2d 411. "Wisconsin courts have repeatedly stated that on certiorari review, there is a presumption of correctness and validity to a municipality's decision." *Id.* at ¶ 48; *Lamar Cent. Outdoor, Inc. v. Bd. of Zoning Appeals of City of Milwaukee,* 2005 WI 117, ¶ 16, 284 Wis. 2d 1, 700 N.W.2d 87; *State ex rel. Ziervogel v. Washington Cnty. Bd. of Adjustment,* 2004 WI 23, ¶ 13, 269 Wis. 2d 549, 676 N.W.2d 401; *Herman v. Cnty. of Walworth,* 2005 WI App 185, ¶ 9, 286 Wis. 2d 449, 703 N.W.2d 720. In other words, "[o]n certiorari review, the petitioner bears the burden to

[1] While the purported final design of the Facility was changed to have one large exhaust stack that would comply with the City's 35 foot height limitation in the zoning district where the Facility is located, this change does not change the fact that stacks were a part of the plan despite repeated statements to the contrary.

overcome the presumption of correctness." *Ottman,* 2011 WI 18, ¶ 50. Here, the record contains ample evidence of inaccurate and misleading statements by OSGC representatives during the CUP application process and, as such, the City had every right to void the CUP.

FACTS

On February 4, 2011, Broadway Manufacturing, LLC submitted an application for a CUP to operate a solid waste disposal facility at 1230 Hurlbut Street in the City of Green Bay. (R. 1-152.)[2] The application materials indicated that the Facility would use municipal solid waste to generate electricity. (R. 6, 153-54.) The architectural rendering of the Facility showed a building with no rooftop exhaust stacks. (R. 18, 21-23.) OSGC's application materials also included materials purporting to show that the "pyrolytic" process that would be used to "bake" the solid waste was a proven technology. (R. 27-76, 106-17, 121-52.)

On February 21, 2011, the City's Plan Commission met to discuss the CUP application. (R. 157-68; AUDIO 001.) Staff provided the Plan Commission with a report recommending approval of the CUP application subject to a number of conditions. (R. 156-57.) Kevin Cornelius, CEO of Oneida Seven Generations Corporation[3], gave a presentation at the meeting regarding the proposed Facility. (R. 160; AUDIO 001 at 18:27-23:20.) Additionally, Plan Commission members asked a number of questions of Mr. Cornelius regarding the Facility and its proposed operations. (R.160-65; AUDIO 001 at 23:20-48:49.)

[2] Citations to the record appear as "R.__" and refer to the record submitted by the parties on December 21, 2012. Page numbers refer to the bates numbered page of the record, which bears an "OSGC" prefix. Also included in the record are discs containing audio and video recordings of several meetings, which bear "AUDIO" and "VIDEO."

[3] There is nothing in the record explaining the relationship between Broadway Manufacturing, LLC and either of the Plaintiffs. This was not an issue that was explored during any of the public hearings, as such, it is presumed that Oneida Seven Generations Corporation and Green Bay Renewable Energy, LLC are the legal successors to Broadway Manufacturing, LLC.

In response to a question from the Plan Commission regarding whether hazardous materials would be left over when the gasification process is complete, the minutes indicate that Mr. Cornelius stated as follows:

> Mr. Cornelius stated there is ***no hazardous material.*** The system is ***closed*** so there is no oxygen. Once it is baked all the gas is taken off by a "cherry scrubber" ***so it takes away any kind of harmful toxins*** that might be in the gas and the rest is burned as natural gas. Anything that is left over will run back through the system. ***The ash that comes out can be dumped in a landfill or mixed as a road base.***

(R. 160-61; AUDIO 001 at 23:20-24:37) (emphasis supplied.)

In response to a question from the Plan Commission regarding whether any other local communities use this technology, the minutes indicate that Mr. Cornelius stated as follows:

> In the state of Wisconsin, [this] would probably be the first one using this technology. There are other gasification systems in other areas. A lot of industries use that system. This is just one version.

(R. 162; AUDIO 001 at 33:12-33:39) (emphasis supplied.)

In response to a request for clarification from the Plan Commission regarding the activities to be carried out at the proposed Facility, the minutes indicate that Mr. Cornelius stated as follows:

> Mr. Cornelius stated the heat is generated from a natural gas burner that runs on product gas. The system does have to be started up by propane or natural gas. Once you get rolling, you're on syngas. He added ***there are no smoke stacks, no oxygen, and no ash.*** There is carbon and ash which actually could have been tested ***and go right into organic farming.*** There are no fallout zones. There are some dioxins but no PCB's. This all goes into slag in here.

(R. 163-64; AUDIO 001 at 42:27-44:20) (emphasis supplied.)

In response to a question from the Plan Commission about certain emissions from other facilities that were referenced in the CUP application such as hydrogen chloride, nitrogen oxide, sulfur dioxide, mercury, and dioxins, the minutes indicate that Mr. Cornelius stated as follows:

> Mr. Cornelius stated ***this is all taken out in the process. It's all scrubbed out.*** A lot of this stuff is destroyed when it goes through the energy process at the end.
>
> ***
>
> K. Cornelius stated from 2002-2009 there was a study done in this area and regarding municipal waste and in that time period they could not find a lot of these things. But in these reports it is stating other sources are possible ***but in this plant there will be none.*** It will always be under the DNR standards.
>
> ***
>
> K. Cornelius stated the emissions that will be going out will be acceptable and ***there will not be any chemicals.***

(R. 164; AUDIO 001 at 44:34-45:35, 47:18-48:49) (emphasis supplied.) No members of the public testified in opposition to the proposed CUP.

After the Plan Commission's questions were addressed by Mr. Cornelius, a motion was made to approve the CUP application subject to a number of conditions:

- Compliance with all other regulations of the Green Bay Municipal Code not covered under the Conditional Use Permit, including the City building code, building permits, standard site plan review and approval.
- All Federal and State regulations and standards related to the proposed use including air and water quality.
- The front facade, facing the street, shall be faced with all masonry or a mix with stucco as required under Section 13-905.
- Service areas shall be screened with an approved combination of berms, landscaping, and walls or fences architecturally complementary to the principal building per Section 13-905(d) Site Design Criteria.

- All ground and/or roof mounted mechanicals shall be screened per Section 13-1815.

- In the event the state determines the proposed use is a tax exempt recycling and/or solid waste facility as provided under State statute, the property owner voluntarily agrees to a payment in lieu of taxes for the City portion of the taxes.

- The land is not eligible to be put into Trust with the Bureau of Indian Affairs however the property owner agrees that it shall at no time attempt to put the land into Trust.

(R. 166.) The motion carried unanimously. (*Id.*)

On March 1, 2011, the Common Council met to consider the Plan Commission's recommendation to grant the CUP. (R. 169-97; VIDEO 001 at 57:13-2:08:32.) According to the minutes from the Common Council's meeting, Mr. Cornelius gave a presentation on the following: how the pyrolytic process works, energy created, safety standards, emissions, approval process, job creation, and reduction in landfill benefits. (R. 172; VIDEO 001 at 1:10:25-1:19:52.) OSGC's power point presentation highlighted the fact that the technology is not new or experimental and that the Facility would not have any smokestacks such as those associated with coal-fired power plants. (VIDEO 001 at 1:15:32-1:16:20, 1:18:07-1:18:39.) Mr. Cornelius also answered questions from the Common Council. (R.172; VIDEO 001 at 1:19:52-1:34:35.)

Once again, there was no citizen opposition to the proposed Facility. The Common Council then voted to approve the CUP as recommended by the Plan Commission. (R. 172, 198-99.) Subsequently, the City approved the Site Plan and issued a building permit for the Facility. (R. 200-06.)

As the Facility was going through the WDNR and DOE approval process during the summer of 2011, a groundswell of opposition by residents and environmental groups developed.[4] While the WDNR and DOE both determined that there would be no significant impacts from the facility, (R. 231-60, 367-71,) the local opposition started to make the case that OSGC's application materials and statements at the public hearings regarding the CUP materially misrepresented critical facts about the Facility.

In response to this outcry, on April 10, 2012, a little more than a year after the Common Council approved the CUP, the Common Council met and addressed, among other things, its approval of the CUP to operate a solid waste disposal facility at 1230 Hurlbut Street. (R. 207-10.) A number of residents in the neighborhood and citizen and environmental groups appeared and spoke about misrepresentations they believed were made by Mr. Cornelius at the previous public hearings. (R. 209-10.) The Common Council voted 9 to 2 to hold a public hearing to further investigate the CUP that was approved. (R. 210.)

On September 17 and 24, 2012, the City published notice of a public hearing to review the CUP, which was scheduled for October 3, 2012. (R. 956-57.) The notice provided as follows:

> A hearing will be held by the Green Bay Plan Commission on Wednesday, October 3, 2012 at 5:30pm in Room 604, City Hall, 100 N. Jefferson Street, Green Bay, WI to determine if the information submitted and presented to the Plan Commission was adequate for it to make an informed decision whether or not to advance the Seven Generations Conditional Use Permit (CUP) that was recommended. The record will consist of all documents and information before the Plan Commission

[4] That the Facility received approvals by the DNR and DOE is not relevant to the issue before the Court. Both permitted and conditional uses must comply with state and federal environmental laws and it is well-settled that a local government has substantial discretion to deny approval of a conditional use even if it will, as it must, comply with environmental laws. In fact, OSGC's facility was denied approval for an on-reservation site by the Oneida Tribe and also by the Village of Ashwaubenon for a site in that Village before being proposed for the property in the City.

> members at the time that it made its recommendation. No less than seven (7) days prior to the hearing, persons interested in the matter may submit their written comments and questions for consideration by the Plan Commission. Written and oral comments shall be limited to the issue presented. As usual, the Plan Commission will ask anyone wishing to speak to sign up at the beginning of the hearing and when their turn comes, not to repeat points made by previous speakers. All questions and comments will be directed to the Commission. Direct questions between opponents and proponents of the project will not be allowed. After hearing the public comments, the Plan Commission will deliberate on the issue with possible action.

(R. 956.)

In advance of the public hearing, OSGC submitted its written comments to the Plan Commission. (R. 221-570.)

Additionally, numerous members of the public also submitted comments to the Plan Commission. (R.571-712.) For example, a letter dated September 26, 2012 submitted to the Plan Commission by Midwest Environmental Advocates ("MEA"), on behalf of Clean Water Action Council of Northeast Wisconsin ("CWAC"), stated in relevant part as follows:

> This project came to you for action on the CUP after an extensive public relations campaign that described the facility as a completely self-contained, non-polluting facility that would not release toxic or hazardous substances into the environment, and that would not have smokestacks or chimneys. That is how it was presented to this Commission before it approved the CUP on February 21, 2011.
>
> After the CUP was issued, CWAC learned that the DNR air permit for the facility identified 10 stacks and vents to be built atop the facility building, three of them 60 feet tall, and that DNR identified the following as emissions from the facility: arsenic, cadmium, chromium, fluoride, lead, mercury, copper, nickel, iron, tin, selenium, antimony, zinc, phosphorus, siloxanes, potassium, hydrogen sulfide, dioxin/furans, and formaldehyde. The air permit identified dioxins, cadmium, lead, mercury, hydrogen chloride, nitrogen oxides, sulfur dioxide, and particulate matter as air emissions from the facility that needed to be monitored

> for and kept within prescribed limits. As a result, CWAC requested the Green Bay Common Council, which had approved the CUP following this Commission's recommendation, to consider whether the CUP should be revoked or rescinded as a result of having been obtained on the basis of fraud or misrepresentation.

(R.584.)

The MEA letter went on to identify what it believed to be some of the specific misrepresentations that were made by OSGC representatives:

- The Facility's proponents represented that the Facility was a closed loop system, with no hazardous materials, no stacks, no odors, and no emissions. Indeed, the CUP application and site drawings submitted to the Plan Commission showed no stacks, vents, or chimneys, nor any indication that there were toxic air pollutants that would have to be released high into the sky in order to disperse them widely enough to meet air quality requirements. None of these statements were true. (R. 585-86.)

- When questions were raised about information in the applicant's reports that showed emissions form waste to energy plants, the representation was made that in the proposed Facility, there would not be any chemical emissions. (R. 586.)

- Contrary to the representations of a closed loop system, of no chemicals, of no emissions, of no stacks or chimneys, and of chemical-free, organic-quality solid waste residues, the Facility actually was designed to have 10 stacks and chimneys, as high as 60 feet above its building, and to have toxic chemical residues in its solid waste and to release a list of hazardous air pollutants into the City's air. (R. 587.)

In conclusion, the letter stated as follows:

> Stacks were going to be needed as part of the facility – contrary to the representations. They are needed to disperse hazardous air pollutants that Mr. Cornelius denied would even be emitted from the facility. Contrary to his representations to this Commission that the solid waste residue would be of organic quality and that there would be "no chemicals," the solid waste residue will contain toxic substances, and there will be

> hazardous chemical air emissions from the facility. Those are all material facts for the Commission in considering whether an exception from the City's ordinances satisfies the public health, safety and general welfare.
>
> A permit that has been obtained by fraud or misrepresentation is voidable, and can be undone by the municipality once the misrepresentation comes to light. The applicant had a duty to provide accurate information to the Commission when seeking its conditional use permit. It is apparent that it withheld the truth and made affirmative misstatements about the facility to the Planning Commission, several of them in direct response to questions by public officials.

(R. 588.)

Another written comment submitted to the Plan Commission by a member of the public identified similar misrepresentations made by OSGC:

- Stacks were omitted from the renderings OSGC submitted to the City with its application. (R. 648-51.)
- OSGC represented that there would be no emissions because they would be "scrubbed out" when in reality the Facility would release substantial emissions. (R.665-70.)
- OSGC represented that the Facility's technology was proven when in reality the Facility would have been the first commercial, permitted pyrolysis gasification facility for municipal solid waste in the world. (R. 674-76.)

On October 3, 2012, the Plan Commission held a public hearing where a number of members of the public spoke about the misrepresentations made by OSGC during the CUP application process. (R. 716-947.) The Plan Commission, however, concluded that the information initially submitted and presented to it was adequate for it to make an informed decision whether or not to recommend granting the CUP. (R. 883-904, 955.)

On October 16, 2012, the Common Council held a meeting to address, among other things, the Plan Commission's October 3, 2012 vote.[5] (R. 952-57; VIDEO 002 at Part 1 38:38-Part 2 39:33.) The Common Council voted 8 to 4 to open the meeting to public comment. (R. 956; VIDEO 002 at Part 1 45:43-1:00:27.) Thereafter, a number of members of the public spoke in support of declaring the CUP void. (R. 956-57; VIDEO 002 at Part 1 1:00:27-Part 2 14:54.) After public comments, a vote was taken on a motion to adopt the report of the Plan Commission. (R. 957; VIDEO 002 at Part 2 15:20-37:41.) The motion failed by a vote of 5 to 7. (R.957; VIDEO 002 at Part 2 37:08-37:41.) Subsequently, a vote was taken on a motion to declare the CUP void based upon the following conclusions:

- Kevin Cornelius, CEO of OSGC, made untruthful statements before City governmental bodies while seeking the CUP. These false statements were made in response to questions or concerns related to the public safety and health aspect of the Project and the Project's impact upon the City's environment.

- Mr. Cornelius' statements were plain spoken, contained no equivocation, left no impression of doubt or uncertainty, and his words were intended to influence the actions of the governmental bodies he was addressing.

- Mr. Cornelius knew his statements were false. Mr. Cornelius was not a new or uninformed member of OSGC; he was the CEO and had been involved throughout the Project's development; therefore, he was knowledgeable about the pilot work, the process and the equipment, the materials that would be used, the nature of the by-products and chemical releases. Mr. Cornelius understood his role he accepted as spokesperson for OSGC for the Project and had every opportunity to say "I don't know" or "I can't answer that" when questions were put to him.

[5] That the makeup of the Common Council was different in October 2012 compared to March 2011 is not relevant. The Common Council is the Common Council and its makeup will always be subject to change. In this regard, though, it is worth noting that the Council membership changes did not take effect until after the Council had voted to hold the public hearing on the alleged misrepresentations made by OSGC. Therefore, the same Council that initially approved the CUP also voted 9-2 to review the permit.

- The subject matter of the questions put to Mr. Cornelius was of very high importance. More specifically, on the subject of emissions, the documents submitted by OSGC in applying for the CUP referenced other plants using a variety of technologies, equipment and feedstock. Commissioners were rightfully interested in this Project and not what happened at other Projects. When Mr. Cornelius was asked about emissions, chemicals, and hazardous materials for this Project, Mr. Cornelius provided false information.

(VIDEO 002 at Part 1 40:44-43:52, Part 2 37:41-39:33.) The motion passed by a vote of 7 to 5. (R. 957; VIDEO 002 at Part 2 37:41-39:33.)[6]

On November 1, 2012, the City Attorney sent a letter to OSGC confirming that the Common Council voted to void the CUP issued for the Facility at 1230 Hurlbut Street. (R. 950-51.) The letter stated that the Common Council's action to void the CUP was based upon the conclusions stated at the Common Council's meeting on October 16, 2012. (R. 950-51.)

On November 14, 2012, OSGC filed this action for certiorari review. On December 3, 2012, the City filed its Answer and Affirmative Defenses. On December 21, 2012, OSGC filed its Brief in Support of Plaintiffs' Request for Certiorari Review. A hearing is scheduled to address this matter on January 9, 2013 at 1:00 p.m.

ARGUMENT

I. THE COURT SHOULD AFFIRM THE CITY'S DECISION TO VOID THE CUP BECAUSE THE CITY ACTED WITHIN ITS JURISDICTION AND PROCEEDED ON A CORRECT THEORY OF LAW.

A. A Municipality Has Substantial Discretion To Grant Or Deny A Conditional Use Permit Application.

In *Town of Rhine v. Bizzell*, 2008 WI 76, 311 Wis. 2d 1, 751 N.W.2d 780, the Wisconsin Supreme Court discussed at length the concept of a conditional use:

[6] The plaintiffs have suggested that at least one member of the Common Council may have pre-judged the issue because he appeared and spoke out against the project at the Plan Commission hearing. It is worth noting, however, that at least one other Council member spoke in favor of the project and another Council member was also a member of the Plan Commission.

> In general, zoning ordinances provide landowners with permitted uses, which allow a landowner to use his or her land, in said manner, as of right.... In addition to permitted uses, ordinances may also provide for conditional uses by virtue of a special use or conditional use permit. A conditional use, however, is different than a permitted use. While a permitted use is as of right, a conditional use does not provide that certainty with respect to land use. ***Conditional uses are for those particular uses that a community recognizes as desirable or necessary but which the community will sanction only in a controlled manner.***
>
> A conditional use permit allows a property owner to put his property to a use which the ordinance expressly permits when certain conditions or standards have been met. The degree of specificity of these standards may vary from ordinance to ordinance.
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> ***
>
> Allowing for conditional uses, in addition to permitted uses as of right, makes sense when one considers the purpose of the conditional use permit. First, conditional uses are flexibility devices, which are designed to cope with situations where a particular use, although not inherently inconsistent with the use classification of a particular zone, may well create special problems and hazards if allowed to develop and locate as a matter of right in a particular zone.
>
> Second, conditional use permits are appropriate for certain uses, considered by the local legislative body to be essential or desirable for the welfare of the community ..., but not at every or any location ... or without conditions being imposed... Thus, those uses subject to a conditional use permit are necessary to the community, but because they often represent uses that may be problematic, ***their development is best governed more closely rather than as of right.***

Id. at ¶¶ 19-24 (internal citations and quotations omitted) (emphasis supplied).

The City's Ordinances define a conditional use as a use "which, because of its unique characteristics, cannot be properly classified in a particular district or districts without consideration in each case of the impact of [the] use[] upon neighboring land and of the public need for the particular use at the particular location." §§ 13-302, 13-205(a). In order to obtain a

CUP, a property owner or resident wishing to receive a conditional use permit must file an application with the Planning Department. § 13-205(c)(1). After review and consideration of the application by the Plan Commission, the Plan Commission must forward its recommendation to the Common Council.[7] § 13-205(c)(3). For each requested conditional use, the Plan Commission must report to the Common Council its findings and recommendations. § 13-205(d). Conditional use approval may be recommended by the Plan Commission with reasonable consideration of the following:

> (1) The establishment, maintenance, or operation of the conditional use will not be detrimental to or endanger the public health, safety, or general welfare;
>
> (2) The establishment of the conditional use will not impede the normal and orderly development and improvement of the surrounding property for uses permitted in the district;
>
> (3) The conditional use, its exterior architectural design, and functional plan of any proposed structure will not be injurious to the use of other property in the immediate vicinity nor substantially diminish or impair property values within the surrounding neighborhood;
>
> (4) Adequate utilities, access roads, drainage, and/or necessary facilities have been or are being provided;
>
> (5) Adequate measures have been or will be taken to provide ingress and egress and so designed as to minimize traffic congestion;
>
> (6) The conditional use shall have adequate parking facilities as specified in Chapter 13-1700; and
>
> (7) The conditional use shall, in all other respects, conform to the applicable regulations of the district in which it is located and all other applicable City ordinances.

§ 13-205(e).

[7] As is evident from the Ordinances, the Plan Commission's recommendation is not binding on the Common Council. It is simply that – a recommendation. Likewise, the Plan Commission's recommendation to the Common Council that the information initially submitted and presented by the Plaintiffs was adequate for it to make an informed decision whether or not to recommend granting the CUP was only a recommendation.

The bottom line is that a municipality's decision to grant a conditional use permit is discretionary. *Roberts v. Manitowoc Cnty. Bd. of Adjustment*, 2006 WI App 169, ¶ 10, 295 Wis. 2d 522, 721 N.W.2d 499. As such, courts hesitate to interfere with such decisions and are not permitted to substitute their discretion for that of the municipality. *Id.* (citing *Snyder v. Waukesha Cnty. Zoning Bd. of Adjustment,* 74 Wis. 2d 468, 476, 247 N.W.2d 98 (1976)). Instead, courts accord a municipality's decision a presumption of correctness and the party challenging that decision has the burden of overcoming that presumption. *Id.* (citing *Miswald v. Waukesha Cnty. Bd. of Adjustment,* 202 Wis. 2d 401, 411, 550 N.W.2d 434 (Ct.App.1996)).

This general understanding of the CUP process is important because what it means is that the City had broad authority to grant or deny the initial CUP application. In other words, based on the information provided to it, the City could have denied the CUP because it was concerned that the project might be detrimental to health or the general welfare, or might otherwise be injurious to the use of other property. Had it done so, the Plaintiffs would have been hard-pressed to argue that the City lacked such authority. Instead, based on the information submitted by the Plaintiffs, the City exercised its discretion and approved the CUP. The question now is whether the City has the authority to void its decision if it later determines that material information about the proposed facility submitted by the proponents was inaccurate or misleading.

B. OSGC Does Not Have A Vested Right To Insist Upon The Validity Of The CUP Because The CUP Was Secured By Misrepresentation.

The Plaintiffs argue that the City had no authority to void or rescind the CUP for a number of reasons. They argue that such action was not authorized by the zoning code. They argue that the City has illegally created an implied permit condition. They even argue that they had a vested right to the permit as long as they complied with its conditions. These arguments

all suffer from the same fatal flaw: "The rights of a permittee are protected only if the permit has been secured and the expenses have been incurred in good faith, ***and there has been no fraud or deceit or other fault on the part of the applicant.***" 101A C.J.S. Zoning & Land Planning § 291. (Emphasis supplied).

This general point of law is also the law in Wisconsin. In *Jelinski v. Eggers*, 34 Wis. 2d 85, 148 N.W.2d 750 (1967), the court held that where a party "did not act in good faith in obtaining the permit," he or she does not possess a vested right to insist upon the validity of the permit. *Id.* at 93. The lack of good faith in *Jelinski* involved the defendant falsely representing to the building inspector that the chairman of the board of appeals did not object to the defendant's plan to build a garage with only a two-foot setback, as opposed to a five-foot setback as required by the ordinance.

In support of its decision affirming the lower court's order that the defendant remove his garage to comply with the set-back requirements, the court quoted from *City of Milwaukee v. Leavitt*, 31 Wis. 2d 72, 142 N.W.2d 169 (1966):

> Zoning ordinances are enacted for the benefit and welfare of the citizens of a municipality. Issuance of an occupancy or building permit which violates such an ordinance not only is illegal per se, but is injurious to the interests of property owners and residents of the neighborhood adversely affected by the violation. ***Thus when the city acts to revoke such an illegal permit it is exercising its police power to enforce the zoning ordinance for the protection of all citizens who are being injured by the violation, and not to protect some proprietary interest of the city.*** These citizens have a right to rely upon city officials not having acted in violation of the ordinance, ***and, when such officials do so act, their acts should not afford a basis for estopping the city from later enforcing the ordinance. This is true regardless of whether or not the holder of the illegal permit has incurred expenditures in reliance thereon.***

Jelinski, 34 Wis. 2d at 93. (Emphasis supplied). This same rationale applies to the present case. A permit obtained after submitting false or misleading information creates no rights for the permit holder and may be revoked by the municipality.

A recent case out of Minnesota is on-point. In *Edling v. Insanti County*, 2006 WL 1806397 (Ct. App. Minn. July 3, 2006) (unpublished)[8], the Minnesota Court of Appeals affirmed a municipality's decision to rescind a CUP because of misrepresentations made by the applicant during the conditional use application process. The plaintiff in that case, Rick Lee Edling, submitted an application to the Insanti County Planning Commission where he indicated that he was seeking a mining and excavating conditional use permit for a 114 acre property. *Id.* at *1. Submitted with the application was a drawing detailing a proposed pond excavation. *Id.* After the application was filed, a hydrologist with the Minnesota Department of Natural Resources ("DNR") submitted a letter to the Planning Commission requesting that the conditional use permit be tabled pending further review by the DNR as to the need for an Environmental Assessment Worksheet ("EAW"). *Id.* The Plan Commission tabled its review of the application accordingly. *Id.*

After further review by the DNR, the Planning Commission addressed the application. *Id.* The minutes from the meeting stated as follows:

> Mr. Edling would like to dig ponds on his property and mine the black dirt. This request was at the last meeting and Mike Mueller, DNR, had some concerns with the depth of the ponds and the total areal to be used. Mike Mueller and Joe Basta [Insanti County Zoning Administrator] met out on the site with Mr. Edling and reviewed the project. The ponds will be under 10' deep and Mr. Edling will be using less than 40 acres total. After the site visit, Mike Mueller does not have a problem with this request.

Id.

[8] A copy of this case is attached for the Court's convenience.

The Planning Commission approved the application subject to the conditions that there would not be any filling of wetlands and that all soil would go on the high ground. *Id.* Subsequently, Edling entered into a 5-year lease and gravel-mining agreement with a mining company, which granted the company the exclusive right to mine and remove gravel from the property. *Id.*

After mining began, neighbors complained about the noise and dust coming from the property. *Id.* The municipality sent the applicant a letter stating that the CUP was granted to mine black dirt from the ponds and that an additional CUP would be required to mine any gravel, crush or have it leave the site. *Id.* After several officials visited the site and observed a large-scale mining operation, including large mining pits with depths exceeding 35 feet and several piles of sand and gravel more than 50 feet high, the municipality concluded that there were numerous problems with the way in which the property was being used. *Id.* at *2. The County Attorney's office sent the applicant a letter noting that the applicant had assured the Planning Commission that he was going to dig a few ponds and that they would be no more than 10 feet deep. *Id.* The letter further stated that the CUP was granted with "the paucity of conditions ***due to [the applicant's] representations to the planning commission***" during the application process. *Id.* (Emphasis supplied). A public hearing was scheduled regarding the revocation of the CUP. *Id.* At the conclusion of the hearing, the County Board of Commissioners voted to revoke the CUP. *Id.* The applicant then sought certiorari review.

On review, the court noted that its inquiry was limited to questioning whether the board had jurisdiction, whether the proceedings were fair and regular, and whether the board's decision was unreasonable, oppressive, arbitrary, fraudulent, without evidentiary support, or based on an incorrect theory of law. *Id.* The court also noted that it gives great deference to a county's land-

use decisions and will overturn them only when there is no rational basis for them. *Id.* The court ultimately concluded that the county's decision to revoke the CUP was not arbitrary:

> The county granted the CUP based on Edling's representations that he would be mining black dirt from ponds that would not exceed a depth of 10 feet. Absent these representations, the county and the DNR would have required an EAW and different conditions likely would have been placed on the CUP, as evidenced by Mueller's initial response to the CUP application. Mueller's assessment of the situation changed because Edling represented that the ponds would not be deeper than 10 feet and because Edling scaled the proposed operation down from 114 acres to 40 acres. Relying on Edling's representations, Mueller informed the county that the revised proposal did not require an EAW.

Id. at *3.

That a permit may be rescinded or declared void when the permit application contains misrepresentations of fact or when the applicant makes such misrepresentations during the application process is not open to dispute. *See also Lauer v. Pierce Cnty.*, 267 P.3d 988 (Wash. 2011) (holding that the defendants' rights did not vest because their building application contained knowing misrepresentations of material fact).[9] Moreover, this conclusion is good policy. Why should an applicant be granted a vested right in a permit that was obtained through misrepresentation? Indeed, this point was addressed by the court in *Lauer:*

> By way of comparison, this court has previously required governments to act in good faith and not subvert the legitimate efforts of a developer to vest his or her rights. The requirement that a building application be "valid" assures that the good faith requirement is not only one way.

267 P.3d at 997.

Based on *Jelinski, Edling,* and *Lauer,* the City of Green Bay acted well within its authority to void the CUP if it concluded that false or misleading statements were made during

[9] A copy of this case is attached for the Court's convenience.

the application process and the record in this case supports a finding that such statements were made:

- OSGC represented that the Facility was a closed loop system, with no hazardous materials, stacks, odors, and emissions. Indeed, the CUP application and site drawings submitted to the Plan Commission showed no stacks, vents, or chimneys, nor any indication that there were toxic air pollutants that would have to be released high into the sky in order to disperse them widely enough to meet air quality requirements. None of these statements were true.

- When questions were raised about information in the CUP application that showed emissions from waste to energy plants, the representation was made that there would not be any chemical emissions in the proposed Facility.

- Contrary to the representations of a closed loop system, with no chemicals, emissions, stacks or chimneys, and of chemical-free, organic-quality solid waste residues, the Facility actually was designed to have 10 stacks and chimneys, as high as 60 feet above its building, and to have toxic chemical residues in its solid waste and to release a list of hazardous air pollutants into the City's air.

- OSGC represented that the Facility's technology was proven, when in reality the Facility would have been the first commercial, permitted pyrolysis gasification facility for municipal solid waste in the world.

Based upon the Common Council's explicit findings that OSGC misrepresented the nature of the proposed Facility, OSGC does not possess a vested right to insist upon the validity of the CUP and the City's decision to declare the CUP void should be affirmed.

C. OSGC'S Reliance on *Bettendorf v. St. Croix County Board of Adjustment* is Misplaced.

In connection with its argument that the City improperly declared the CUP void based on an unwritten, implied condition that the Facility would have zero air emissions, OSGC cites to *Bettendorf v. St. Croix County Board of Adjustment*, 224 Wis. 2d 735, 591 N.W.2d 916 (Ct. App.

1999). OSGC's reliance on *Bettendorf* is misplaced as the facts in *Bettendorf* are not the facts before this Court.

In *Bettendorf*, Mr. and Mrs. Bettendorf were granted a CUP to operate a truck repair shop on a parcel of property. 224 Wis. 2d at 737. After the permit was granted, the municipality learned that the Bettendorfs were using an adjoining parcel of property, which was not subject to the CUP and which was zoned agriculture/residential, to park semi-trailers and other vehicles. *Id.* at 738. When the municipality learned of the Bettendorfs' use of the adjoining property, instead of revoking the CUP the municipality added a condition to the permit that previously had no conditions. *Id.* The condition provided that the Bettendorfs had to construct a fence around its commercially zoned property or face immediate revocation. *Id.*

Instead of complying with the condition, the Bettendorfs filed a petition for certiorari, arguing that the municipality had no authority to add a condition to its CUP and revoke the permit if the condition was not complied with. *Id.* The municipality argued that the CUP prohibited the Bettendorfs from using the adjoining property as part of its truck repair operations. According to the municipality, "there are implied conditions set forth in every conditional use permit; one is that the permitted use be kept within the boundary of the property subject to the permit." *Id.* at 740. The circuit court agreed with the municipality and affirmed its decision.

The Court of Appeals reversed the circuit court's decision, refusing to read into the permit conditions that the municipality discussed but chose not to incorporate. *Id.* at 741. According to the court, the county's appropriate remedy was to commence an enforcement action in connection with the adjoining property. *Id.* at 741-42.

As the above discussion illustrates, the facts before this Court are substantially different than the facts from *Bettendorf*. Here, the City did not declare OSGC's CUP void because OSGC

failed to comply with an unwritten, implied condition. Rather, the City declared the CUP void because OSGC made false and misleading statements to the City during the application process.

CONCLUSION

For the foregoing reasons, the City of Green Bay respectfully requests that the Court affirm its decision to void the CUP to operate a solid waste disposal facility at 1230 Hurlbut Street.

Dated at Milwaukee, Wisconsin, this 30 day of January, 2013.

ATTORNEYS FOR DEFENDANT, CITY OF GREEN BAY

By: _____

Ted A. Warpinski (SBN: 1018812)
S. Todd Farris (SBN: 1006554)
Joseph M. Peltz (SBN: 1061442)
FRIEBERT, FINERTY & ST. JOHN, S.C.
Two Plaza East – Suite 1250
330 East Kilbourn Avenue
Milwaukee, WI 53202
(414) 271-0130
Fax: (414) 272-8191
TAW E-mail: taw@ffsj.com
STF E-mail: stf@ffsj.com
JMP E-mail: jmp@ffsj.com

OF COUNSEL:
Anthony S. Wachewicz, III (SBN: 1038433)
City Attorney – City of Green Bay
Room 200, City Hall
100 North Jefferson Street
Green Bay, WI 54301
(920) 448-3080
Fax: (920) 448-3181
E-mail: TonyWa@ci.green-bay.wi.us