(5)

STATE OF WISCONSIN : CIRCUIT COURT : BROWN COUNTY

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

Plaintiffs,

v.

CITY OF GREEN BAY,

Defendant.

FILED
JAN 07 2013
CLERK OF COURTS
BROWN COUNTY, WI

Case No. 12-CV-2263

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

REPLY BRIEF IN SUPPORT OF PLAINTIFFS' REQUEST FOR CERTIORARI REVIEW

Plaintiff Oneida Seven Generations Corporation, together with Green Bay Renewable Energy, LLC and their predecessors in interest (collectively, "OSGC") hereby respectfully submit their reply brief in support of certiorari review. In defense of the Common Council decision to rescind the conditional use permit ("CUP"), the City offers nothing more than the talking points developed by opponents of the project. Because these arguments do not pass muster, the Court should reverse the Council's illegal and arbitrary decision.

ARGUMENT

I. The City Could Not Revoke The CUP When OSGC Had Not Violated The CUP Or Any Other Zoning Ordinance.

A. The revocation of the CUP was illegal because it was based on unwritten, implied conditions.

OSGC does not dispute that the City can and should consider public health and welfare when making permitting decisions. And that is exactly what the City did by requiring that the OSGC facility meet state and federal environmental standards as a condition of the CUP. (R. 172.) What the City cannot do is respond to political pressure by initiating an unauthorized

CUP revocation proceeding that ignores the facts in the record, including the detailed findings by expert agencies regarding the facility's potential effects on public health and the environment.

Contrary to the City's argument, this case is similar to the *Bettendorf* case cited by OSGC in its opening brief. In *Bettendorf*, St. Croix County improperly revoked a permit because the County apparently thought (but did not say) that the truck repair activities should be limited to one property. *See Bettendorf v. St. Croix Co. Bd. of Adjustment*, 224 Wis. 2d 735, 741, 591 N.W.2d 916, 919 (Ct. App. 1999). Likewise, in this case, the City of Green Bay revoked the CUP because it apparently thought (but did not say) that there should be "no emissions" and "no stacks" associated with the OSGC facility. The City revoked the permit because OSGC did not comply with these conditions—although the City never specified the conditions in the CUP. Under *Bettendorf*, that was improper.

B. OSGC had a vested right to develop the facility.

The City's attempts to dismiss the vested rights doctrine are unpersuasive. In arguing that the City could revoke the permit despite OSGC's vested rights to develop the facility, the City relies heavily on two cases, *Jelinski* and *Edling*. (Def. Br. at 16-19.) Neither of them is on point, because both involved property owners who were using their property in violation of local zoning requirements and state law. In stark contrast, OSGC's intended use of the property here is in full compliance not only with all conditions of the CUP, but also with all Green Bay zoning requirements and Wisconsin state law.

The *Jelinski* case involved a garage built too close to a property lot line, in violation of the local setback requirements. *Jelinski v. Eggers*, 34 Wis. 2d 85, 87-88, 148 N.W.2d 750, 752 (1967). Although the owner built the garage after obtaining a building permit, the permit did not authorize him to build the garage where he did, in violation of the setback requirement. *Id.* In holding that the owner did not have a vested right to keep the garage where it was, the

Supreme Court simply reached the unremarkable conclusion that "a building permit grants no vested rights to unlawful use." 34 Wis. 2d at 93, 148 N.W.2d at 755. By contrast, in this case, the City has not even alleged—much less proven—an unlawful use by OSGC.

The City's reliance on *Edling v. Insanti County*, 2006 WL 1806397 (Ct. App. Minn. July 3, 2006), an unpublished decision from Minnesota, is similarly misplaced.[1] In that case, Ricky Lee Edling applied for a conditional use permit for a mining and excavating operation on his property. *Id.* at * 1. Mr. Edling represented to the county and to the Minnesota Department of Natural Resources that the operation would involve digging small ponds and excavating dirt. *Id.* Once granted the conditional use permit, however, he implemented a large-scale gravel-mining operation—far beyond what he had described to the county and to the Minnesota DNR. *Id.* The court held that if he had informed the county about the extent of his operation, the Minnesota DNR would have required an environmental assessment. *Id.* at *3. Therefore, the court held, "the county's decision to revoke the CUP because it exceeded the scope of the CUP application was not arbitrary." *Id.*

By contrast, in this case, there is no allegation that OSGC has exceeded the scope of the CUP in any way. In fact, unlike Mr. Edling, who avoided an environmental review of his operation when applying for a CUP, OSGC specifically agreed that its facility would be subject to state and federal environmental permitting requirements as a condition of the CUP. By the time the City issued the building permit on August 3, 2011 (R. 205), the environmental permitting process for the facility was well underway. This process was subject to public review and comment, including a public hearing in late July 2011 that took place just a few blocks from

[1] Wisconsin law prohibits citation to any unpublished decision decided before July 1, 2009, except to support an argument regarding claim preclusion, issue preclusion or law of the case. *See* Wis. Stat. § 809.23(3)(b) (prohibiting citation "in any court of this state"). For that reason alone, the Court can disregard the decision. As explained above, however, the case is hardly as "on point" as the City suggests. (Def. Br. 17.)

Green Bay City Hall. (R. 262.) Even assuming the City still had any questions about the facility (whether those questions related to exhaust stacks or emissions or anything else), this extremely public process should have answered them. Yet the City approved the building permit without comment, thus ensuring that OSGC had a vested right to develop the facility.

II. The City's Decision To Revoke The Cup Was Arbitrary And Not Based On Substantial Evidence.

The City completely fails to address OSGC's arguments that the Council's revocation of the permit was arbitrary and not based on substantial evidence—two of the standards for certiorari review. Indeed, the City's brief makes the same mistake the Council did in revoking the CUP: it relies exclusively on the talking points of the project's opponents while disregarding the great bulk of the record. The City ignores the detailed findings of the state and federal agencies, the unanimous conclusion of the City's Plan Commission, and the context in which the alleged misrepresentations were made. When the full record is considered, it is apparent that there were no misrepresentations, and that the City's contrary conclusion was arbitrary and unreasonable.

A. The City's disregard for the state and federal environmental permitting process—after specifically including that process as a condition of the CUP—was arbitrary and unreasonable.

The City asserts in a footnote that the permitting process and approvals before the Wisconsin DNR and the U.S. Department of Energy are "not relevant" to the issue before the Court. (Def. Br. 7, n. 4.) The City itself made these approvals supremely relevant, however, when it included them as a condition of the CUP.

The detailed and voluminous findings by DNR and DOE are the most credible description in the record of the facility's operations and anticipated environmental impacts. (R. 231-568.) Indeed, the review process worked exactly like the CUP had anticipated: the City

decided that the planned use was appropriate for the site, and the state and federal agencies ensured that the facility would comply with all environmental standards. The extensive record of that review process highlights the arbitrary and unreasonable nature of the City's claim—made long after this public review took place—that it was misled about the potential environmental effects of the facility.

B. The City relies on statements to the Plan Commission as alleged misrepresentations but simultaneously ignores that the Plan Commission itself determined exactly the opposite.

Most of the misrepresentations alleged by the City are based on minutes of the Plan Commission meeting on February 21, 2011. (Def. Br. 3-5; 8-10; 20.) The City utterly fails to address, however, that the Plan Commission itself—after a lengthy public hearing and consideration of numerous written comments—unanimously determined that there was no misrepresentation at that February 21 meeting. In its brief, the City does acknowledge that the Plan Commission "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." (Def. Br. 10.) But the City pointedly neglects to quote other, more relevant language from the Plan Commission's report and recommendation, *i.e.*, that "the information provided to the Plan Commission was not misrepresented." (R. 955.)

Of course, the Plan Commission itself was in the best position to make this determination. Not only was the Plan Commission the body to which the alleged misrepresentations were made, but it also was the body that held a hearing and considered extensive written and oral comments from the public on the very issue of whether it had been misled. The City fails to explain why or how the Council could doubt the unanimous conclusion of the Plan Commission that it was not misled.

Nor does the City explain why the alleged misrepresentations made to the *Plan Commission* in February 2011 are relevant to what the *Common Council* considered when approving the CUP in March 2011. When the Council approved the CUP, OSGC representatives gave a lengthy and detailed presentation before the Council, including a PowerPoint slide show, and answered numerous questions. (R. 171-72; VIDEO 001.) Yet in its brief, the City appears to rely primarily not on what OSGC said to the Council at this meeting, but instead what OSGC allegedly said to the Plan Commission at an earlier meeting—as summarized (sometimes inaccurately) in the minutes from that meeting.[2] But there is no evidence that the Council even considered the minutes of the February 2011 Plan Commission meeting, let alone based its approval of the CUP on those minutes.

C. The misrepresentations alleged by the City are not supported by the record.

In any event, even the few parts of the record addressed by the City do not support the Council's conclusion that OSGC misrepresented the facility when applying for the permit. The City's arguments in support of the alleged misrepresentations are nothing more than verbatim recitations of the talking points developed by opponents of the project. (*Compare* Def. Br. 20 *with* Def. Br. 9-10.) Indeed, in defending this lawsuit, the City makes the same mistake it did when revoking the permit: the City makes no effort to substantiate the statements made by opponents of the project.

[2] The minutes from the Plan Commission meeting in February 2011 attribute many statements to Kevin Cornelius, the Chief Executive Officer of OSGC, which were not made by Mr. Cornelius, but instead by an engineer working on behalf of OSGC. (R. 157-158.) For this reason, and other inconsistencies (*e.g.*, the minutes label a "Venturi scrubber" as a "cherry scrubber" (R. 160)), the minutes of the Plan Commission meeting are not an entirely accurate record of what occurred there, and they fail to capture the detail and context of what was said by the Plan Commission and by OSGC representatives. (AUDIO 001; R. 160-166.)

1. The allegation that OSGC misrepresented there would be "no emissions" is not supported by the record.

As OSGC explained at length in its initial brief, the record is replete with references and discussions to potential emissions from the facility and the fact that those emissions would be subject to state and federal environmental regulations. (Pl. Br. 2-6; 21.) Indeed, at the March 2011 meeting where the Council approved the CUP, OSGC told the Council: "Any emissions that come off the generator . . . will be subject to WDNR and EPA approval. So we just want to make that clear for the record." (VIDEO 001 at 1:14:53.) The Council ignored all of these statements, and the City's brief makes the same mistake.

Instead, the City appears to rely on an exchange between an engineer with the project on behalf of OSGC and Alderperson Wiezbiskie at the Plan Commission meeting on February 21, 2011. (Def. Br. 4-5; 9-10; 20.) During that meeting, and during the meeting where the Council approved the CUP, OSGC made clear that there would be emissions and that those emissions would comply with all applicable environmental regulations. More than a year and a half later, Ald. Wiezbiskie joined the Plan Commission's unanimous finding that there were no misrepresentations by OSGC. (R. 955.) As a member of the Council, he voted to uphold the CUP, telling his fellow Council members: "We were not duped." (VIDEO 002 at 20:50.) No one was in a better position than Ald. Wiezbiskie to make this determination. But the City never explains how the Council had any basis to doubt his insight.

2. The allegation that OSGC misrepresented there would be "no stacks" is not supported by the record.

OSGC has already explained in detail why the purported concern with "smokestacks" is a red herring and provides no basis for a finding of misrepresentation. (Pl. Br. 21-22.) The City's brief offers no response to these arguments, and OSGC will not belabor the point here, except to correct one factual error from the City's brief.

In its introduction, the City claims that the Facility was originally designed to have stacks "as high as 60 feet *above its building*." (Def. Br. at 2 (emphasis added).) The City offers no citation for this statement, but (like the rest of the City's argument) it is apparently taken directly from the talking points developed by the opposition groups. (*See* Def. Br. at 9; R. 587.) This illustrates the folly of the City's exclusive reliance on the arguments of the project opponents, as the statement is inaccurate. The original air permit required some of the exhaust stacks not to be 60 feet *above the building*, but rather 60 feet *above the ground*. (R. 294.) That is, in the initial plan, even the tallest exhaust stacks would only have been roughly 30 feet above the building—a far cry from the enormous stacks that tower over the Pulliam power plant. In other words, just as OSGC had represented when applying for the CUP, the stacks would not be like the stacks "associated with coal-fired power plants." (AUDIO 001 at 22:10; VIDEO 001 at 1:18:35.) Indeed, under the current design, the tallest stack is now only 35 feet above ground level, and thus protrudes only a few feet above the roof of the building. (R. 342.)

3. The allegation that OSGC misrepresented that the facility would be a "closed system" is not supported by the record.

Like the allegations relating to "no emissions" and "no stacks," OSGC already addressed the allegations relating to the "closed system" systems in its opening brief. (Pl. Br. 22-23.) OSGC pointed out that the pyrolysis process is in fact closed to the atmosphere, and that DOE itself described the system as "closed." (R. 374, 401.) The City fails to address or even acknowledge these facts, and instead simply parrots the statements of the opposition groups. (Def. Br. 20.)

4. The allegation that OSGC misrepresented that the pyrolysis technology was not new or experimental is not supported by the record.

The City quotes a comment from an opposition group for the proposition that "the Facility would have been the first commercial, permitted pyrolysis gasification facility for municipal solid waste in the world." (Def. Br. 10, 20.) With no citation to the record, the City claims that this was a misrepresentation. (Def. Br. 20.) The Court should rely instead on the facts in the record, such as the DOE Environmental Assessment, which noted:

> The pyrolysis and gasification of MSW [municipal solid waste] is used all over the world, particularly in Japan and parts of Europe and Scandinavia. Denmark, for example, has been converting waste to energy for over a century, primarily through incineration of waste, but including through the use of pyrolysis plants in the 60's. Within the United States, refuse-derived fuel systems and pyrolysis units were introduced in the late 1970s . . . Today, there are numerous successful plants in operation around the world and in the United States that utilize various forms of pyrolysis to process different resources to produce energy.

(R. 564.)

By relying exclusively on the allegations of opposition groups, the City appears to have ignored the insight of former Alderperson Dorff, who represented the District that includes the Hurlbut Street site when the Council first approved the CUP. In response to the City's reconsideration of the CUP in October 2012, former Ald. Dorff wrote to the Plan Commission: "During the scientific review process, I ran the assertions of the both Oneida Seven Generations and Incinerator Free Brown County [one of the most vocal opposition groups] past the DNR scientists assigned to this project. While OSG[C's] assertions proved correct, many of the statements forwarded by [Incinerator Free Brown County] were debunked." (R. 703.) The City's blinkered approach to the record in this case—accepting at face value the allegations of a few opposition groups while ignoring everything else—highlights the lack of evidentiary basis and arbitrary nature of the Council's decision to revoke the CUP.

CONCLUSION

The Common Council's decision to revoke the conditional use permit exceeded the Council's jurisdiction, was contrary to law, was arbitrary, and was not based on substantial evidence. For these reasons, plaintiff Oneida Seven Generations Corporation, together with Green Bay Renewable Energy, LLC and their predecessors in interest, hereby respectfully request that the Court enter an Order reversing that decision and restoring the conditional use permit for the property at 1230 Hurlbut Street.

Dated this 7th day of January, 2013.

GODFREY & KAHN, S.C.

By: Matthew T. Kemp (ETS)

Eric J. Wilson
State Bar No. 1047241
Matthew T. Kemp
State Bar No. 1080009

P.O. ADDRESS:
One East Main Street, Suite 500
Post Office Box 2719
Madison, WI 53701-2719
Phone: (608) 257-3911
Fax: (608) 257-0609
ewilson@gklaw.com

8923642_6