
**IN THE APPELLATE COURT OF ILLINOIS
FIRST DISTRICT**

ACF LEASING, LLC, ACF SERVICES, LLC, and GENERATION CLEAN FUELS, LLC,)	
	)	Appeal from the Circuit Court of
	)	Cook County, Illinois
Plaintiffs-Appellants,	)	County Department, Law Division
)	
vs.	)	Circuit Court No. 14 L 2768
)	
GREEN BAY RENEWABLE ENERGY, LLC,	)	Honorable Margaret Ann Brennan,
ONEIDA SEVEN GENERATIONS	)	Judge Presiding
CORPORATION and THE ONEIDA TRIBE)	
OF INDIANS OF WISCONSIN,)	
)	
Defendants-Appellees.)	

APPENDIX

<u>Document</u>	<u>Page</u>
Order from Cook County Circuit Court Dated 10/8/14	A1
Order from Cook County Circuit Court Dated 10/27/14	A2-3
Notice of Appeal filed on 11/7/14	A4-9
Table of Contents of Record on Appeal	A10-19
Brief of Plaintiffs-Appellants, <i>Oneida Seven Generations Corporation, et al. v. City of Breen Bay</i> , 2013 WL 2731350 (May 28, 2013)	A20-35

IN THE CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT, LAW DIVISION

HCF Leasing, LLC et al
Plaintiff(s)

No. 2014 L 2768

v.

Qveda Tribe of Indians et al
Defendant(s)

ORDER

The Cause comes before the Court for hearing on the defendants
The Qveda Tribe of Indians et al and Qveda Seven Generations Corp's
motions to (a) dismiss for lack of subject matter jurisdiction and
(b) dismiss for lack of personal jurisdiction, the Court being informed
Orders as follows:

1. The defendants' motion to dismiss for lack of subject matter jurisdiction is granted;
2. The defendants' motion to dismiss for lack of personal jurisdiction is denied as moot; And
3. The defendants ~~and~~ The Qveda Tribe of Indians et al and Qveda Seven Generations Corp ~~and~~ are dismissed as defendants in this action.

Atty. No.: 29558

Name: T. Vertich

Atty. for: Def. OSC and Qveda Tribe

Address: 330 N. Wacker St 3300

City/State/Zip: Chicago, IL 60611

Telephone: 312 923 8771

ENTERED:

Judge Margaret Ann Brennan
Mc OCT 08 2014
Judge
Circuit Court Case No. 1848

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

ACF LEASING, LLC; ACF SERVICES,)
LLC; and GENERATION CLEAN)
FUELS, LLC,)

Plaintiffs,)

v.)

Case No. 2014 L 2768

GREEN BAY RENEWABLE ENERGY,)
LLC; ONEIDA SEVEN GENERATIONS)
CORPORATION; and THE ONEIDA)
TRIBE OF INDIANS OF WISCONSIN,)

Defendants.)

ORDER

The cause comes before the Court on defendants Oneida Seven Generations Corporation and The Oneida Tribe Of Indians Of Wisconsin's Motion for Illinois Supreme Court Rule 304(a) Finding, the Court being fully informed, ORDERS AS FOLLOWS:

1. Plaintiffs, ACF Leasing, LLC, ACF Services, LLC, and Generation Clean Fuels, LLC, named three defendants in this action, Green Bay Renewable Energy, LLC, Oneida Seven Generations Corporation, and The Oneida Tribe of Indians of Wisconsin.

2. On October 8, 2014, the Court entered an order granting defendants Oneida Seven Generations Corporation and The Oneida Tribe of Indians of Wisconsin's motion to dismiss for lack of subject matter jurisdiction, dismissing those defendants from this action (the "Order"). Also on October 8, 2014, the Court denied, in part, defendant Green Bay Renewable Energy, LLC's motion to dismiss. As a result, claims against defendant Green Bay Renewable Energy, LLC remain pending.

3. Illinois Supreme Court Rule 304(a) provides that "[i]f multiple parties or multiple claims for relief are involved in an action, an appeal may be taken from the final judgment as to one or more but fewer than all of the parties or claims only if the trial court has made an express

written finding that there is no just reason for delaying either enforcement or appeal or both.” Ill. Sup. Ct. Rule 304(a).

4. An order is “final” for Rule 304(a) purposes if it provides for the “ultimate disposition of an individual claim entered in the course of a multiple claims action.” Geier v. Hamer Enterprises, Inc., 226 Ill.App.3d 372, 379 (1st Dist. 1992) (citations and quotations omitted); see also Mar Cement, Inc. v. Diorio Builders, Inc., 153 Ill.App.3d 798, 801 (2d Dist. 1987) (Rule 304(a) “applies to orders that are final in character although entered in comprehensive proceedings that include other matters”) (citation and quotation omitted). Here, the Order is “final” for Rule 304(a) purposes because it dismisses Oneida Seven Generations Corporation and The Oneida Tribe of Indians of Wisconsin on subject matter jurisdiction grounds, dismissing them as defendants in this multiple claim and multiple party action.

5. In the exercise of its discretion pursuant to Illinois Supreme Court Rule 304(a), the Court finds that there is no just reason for delaying appeal from its October 8, 2014 Order granting defendants Oneida Seven Generations Corporation and The Oneida Tribe of Indians of Wisconsin’s Motion to Dismiss for Lack of Subject Matter Jurisdiction, and the Court hereby certifies the Order for immediate appeal.

_____, 2014
JUDGE MARGARET ANN BRENNAN
ENTER: OCT 27 2014
Circuit Court - 1846

Circuit Court Judge

Prepared by:
Thomas J. Verticchio, Esq.
Swanson, Martin & Bell, LLP
330 North Wabash Avenue, Suite 3300
Chicago, Illinois 60611
(312)321-9100
(312) 321-0990 – Fax
Firm No. 29558
Attorneys for Defendants

No.:

APPEAL TO THE FIRST DISTRICT OF THE APPELLATE COURT OF ILLINOIS
FROM THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

ACF LEASING, LLC, ACF SERVICES, LLC,)
and GENERATION CLEAN FUELS, LLC,)

Plaintiffs-Appellants,)

vs.)

GREEN BAY RENEWABLE ENERGY, LLC,)
ONEIDA SEVEN GENERATIONS)
CORPORATION and THE ONEIDA TRIBE)
OF INDIANS OF WISCONSIN,)

Defendants-Appellees.)

No.: 14 L 2768

Honorable Margaret Ann Brennan,
Judge Presiding

NOTICE OF FILING

To: All Attorneys of Record – Service List Attached

PLEASE TAKE NOTICE that on the 7th day of November, 2014, we shall file with the Clerk of the Appellate Court for the First Judicial District of Illinois, **Plaintiffs/Appellants'** **Notice of Appeal**, a copy of which is attached hereto and served upon you herewith

Respectfully submitted,

By: Heather D. Erickson

Gerald M. Dombrowski

Heather D. Erickson

SANCHEZ DANIELS & HOFFMAN LLP

333 West Wacker Drive, Suite 500

Chicago, Illinois 60606

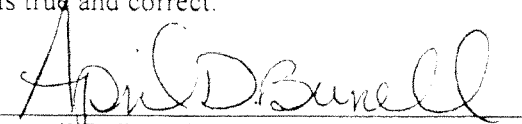
(312) 641-1555

Attorneys for Plaintiffs-Appellants
ACF LEASING, LLC, ACF SERVICES, LLC,
& GENERATION CLEAN FUELS, LLC

PROOF OF SERVICE

The undersigned certifies, under penalties as provided by law pursuant to 735 ILCS 5/1-109, that she served this Notice by mailing a copy to the attorneys listed on the attached service list by depositing a copy of same in the U.S. Mail at 333 West Wacker Drive, Chicago, Illinois 60606, at or before 5:00 p.m. on November 7, 2014, with proper postage prepaid, and that this statement as set forth is true and correct.

Signed and Certified:


April D. Burrell

F:\DATA\HISTORY\BURELL\APPEAL\NOTICE\SUN OF NGA 06-11-14.doc

APPEAL TO THE FIRST DISTRICT OF THE APPELLATE COURT OF ILLINOIS
FROM THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

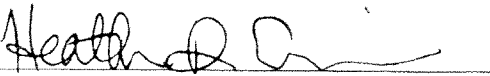
Honorable Margaret Ann Brennan
Judge Presiding

FILED
CIRCUIT COURT OF COV
COUNTY, ALABAMA
2014 NOV -7 PM 2:40
CLERK
CIVIL APPEALS DIVISION
JOSHUA DODDSON
ret Ann Brennan

PLEASE TAKE NOTICE that Plaintiffs-Appellants, **ACF LEASING, LLC, ACF SERVICES, LLC** and **GENERATION CLEAN FUELS, LLC**, by and through their attorneys, **SANCHEZ DANIELS & HOFFMAN LLP**, hereby appeal to the Appellate Court of Illinois, First Judicial District, from the following orders entered in this matter in the Circuit Court of Cook County, Illinois, County Department, Law Division: the Order of October 8, 2014, dismissing with prejudice their Complaint against Defendants, Oneida Seven Generations Corporation and The Oneida Tribe of Indians of Wisconsin for lack of subject matter jurisdiction and the Order of October 27, 2014 granting Defendants, Oneida Seven Generations Corporation and The Oneida Tribe of Indians of Wisconsin's Motion for Illinois Supreme Court Rule 304(a) Finding and finding no just reason for delaying appeal from the October 8, 2014 Order.

By this appeal, Plaintiffs-Appellants pray the Appellate Court to reverse the Order of October 8, 2014 and remand this cause with directions to reinstate all counts of the Complaint for trial on the merits to all claims, or for such other and further relief as the Appellate Court may deem proper.

Respectfully submitted,

By: 

Gerald M. Dombrowski

Heather D. Erickson

SANCHEZ DANIELS & HOFFMAN LLP

333 West Wacker Drive, Suite 500

Chicago, Illinois 60606

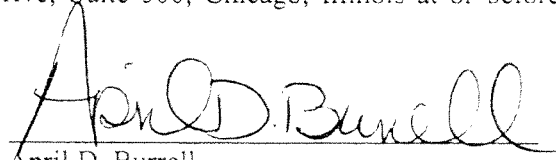
(312) 641-1555

Attorneys for Plaintiffs-Appellants
ACF LEASING, LLC, ACF SERVICES, LLC,
& GENERATION CLEAN FUELS, LLC

CERTIFICATE OF SERVICE

Under penalties as provided by law pursuant to 735 ILCS 5/1-109, the undersigned certifies that this Notice of Appeal was served on the attorneys listed on the attached service list by mailing a copy thereof and depositing same in the U.S. Mail with proper postage prepaid at 333 West Wacker Drive, Suite 500, Chicago, Illinois at or before 5:00 p.m. on November 7, 2014.

Signed and Certified:


April D. Burrell

I, JEFFREY H. BURELL, APPEALING ATTORNEY, CERTIFY THAT I AM THE UNDERSIGNED.

SERVICE LIST

ACF Leasing, LLC, et al. v. Green Bay Renewable Energy, LLC, et al.

Our File #: SD-80519

Trial Court #: 14 L 2768

**Attorneys for Oneida Seven Generations Corp.
& The Oneida Tribe of Indians of Wisconsin**

Mr. James B. Vogts
Mr. Thomas J. Verticchio
Swanson Martin & Bell
330 North Wabash - Suite 3300
Chicago, Illinois 60611
Tel: (312) 321-9100
Fax: (312) 321-0990
Email: jvogts@smbtrials.com
tverticchio@smbtrials.com

Mr. Thomas M. Pyper
Ms. Cynthia L. Buchko
Whyte Hirschboeck Dudek
P.O. Box 1379
33 East Main Street - Suite 300
Madison, Wisconsin 53701-1379
Tel: (608) 255-4440
Fax: (608) 258-7138
Email: tpyper@whdlaw.com
cbuchko@whdlaw.com

Attorneys for Green Bay Renewable Energy, LLC

Mr. Guy R. Temple
Reinhart Boerner Van Deuren S.C.
1000 North Water Street - Suite 1700
Milwaukee, Wisconsin 53202
Tel: (414) 298-1000
Fax: (414) 298-8097
Email: gtemple@reinhartlaw.com

Mr. Bryan K. Nowicki
Reinhart Boerner Van Deuren S.C.
22 East Mifflin Street
Madison, Wisconsin 53703
22 East Mifflin Street, Suite 600
Madison, Wisconsin 53703
Tel: (608) 229-2200
Dir.: (608) 229-2218
Fax: (608) 229-2100
Email: bnowicki@reinhartlaw.com

**IN THE APPELLATE COURT OF ILLINOIS
FIRST DISTRICT**

ACF LEASING, LLC, ACF SERVICES, LLC,)	
and GENERATION CLEAN FUELS, LLC,	)	Appeal from the Circuit Court of
	)	Cook County, Illinois
Plaintiffs-Appellants,	)	County Department, Law Division
)	
vs.	)	Circuit Court No. 14 L 2768
)	
GREEN BAY RENEWABLE ENERGY, LLC,	)	Honorable Margaret Ann Brennan,
ONEIDA SEVEN GENERATIONS	)	Judge Presiding
CORPORATION and THE ONEIDA TRIBE)	
OF INDIANS OF WISCONSIN,)	
)	
Defendants-Appellees.)	

TABLE OF CONTENTS OF RECORD OF APPEAL

Volume 1	Page
Civil Action Cover Sheet (3/6/14)	C00002
Complaint (3/6/14)	C00003-19
Plaintiff's Exhibit A - Master Lease Agreement	C00020-44
Plaintiff's Exhibit B - Operation and Maintenance Agreement	C00045-63
Notice of Calendar Call	C00064
Proof of Service – Summons and Complaint – The Oneida Tribe of Indians of Wisconsin (4/1/14)	C00065
Proof of Service – Summons and Complaint – Oneida Seven Generations Corp. (4/1/14)	C00066
Proof of Service – Summons and Complaint – Green Bay Renewable Energy, LLC (4/1/14)	C00067

Volume 1	Page
Appearance – Defendant, The Oneida Tribe of Indians of Wisconsin and Oneida Seven Generations Corporation (4/2/14)	C00068
Motion for Extension of Time of Defendants, The Oneida Tribe of Indians of Wisconsin and Oneida Seven Generations Corp. (4/2/14)	C00069-71
Order: Granting Defendants’ Motion for Extension of Time and Rescheduling for Initial Status on May 9, 2014 (4/2/14)	C00072
Appearance – Defendant, Green Bay Renewable Energy, LLC (4/4/14)	C00073
Certificate of Service – Defendant, Green Bay Renewable Energy, LLC (4/4/14)	C00074-75
Defendant, Green Bay Renewable Energy, LLC’s, Agreed Motion for Extension of Time to Answer (4/4/14)	C00076-77
Defendant, Green Bay Renewable Energy, LLC’s, Motion to Dismiss (5/2/14)	C00078-79
Defendant, Green Bay Renewable Energy, LLC’s Memorandum of Law in Support of their Motion to Dismiss (5/2/14)	C00080-91
Certificate of Service – Defendant, Green Bay Renewable Energy, LLC (5/2/14)	C00092
Notice of Filing: The Oneida Tribe of Indians of Wisconsin and Oneida Seven Generations Corp.’s Motion to Dismiss for Lack of Subject Matter Jurisdiction; The Oneida Tribe of Indians of Wisconsin and Oneida Seven Generations Corp.’s Motion to Dismiss for Lack of Personal Jurisdiction; The Oneida Tribe of Indians of Wisconsin and Oneida Seven Generations Corp.’s Brief in Support of Motion to Dismiss, Affidavit of Gene Keluche in Support of Motion to Dismiss, and Affidavit of Patricia Ninham Hoeft in Support of Motion to Dismiss (5/5/14)	C00093-95
Motion to Dismiss for Lack of Personal Jurisdiction of Defendants, The Oneida Tribe of Indians of Wisconsin and Oneida Seven Generations Corp. (5/5/14)	C00096-101
Brief in Support of Motion to Dismiss for Lack of Subject Matter Jurisdiction of Defendants, The Oneida Tribe of Indians of Wisconsin and Oneida Seven Generations Corp. (5/5/14)	C00101A-116

Volume 1	Page
Motion to Dismiss for Lack of Subject Matter Jurisdiction of Defendants, The Oneida Tribe of Indians of Wisconsin and Oneida Seven Generations Corp. (5/5/14)	C00117-120
Motion to Dismiss for Lack of Subject Matter Jurisdiction of Defendants, The Oneida Tribe of Indians of Wisconsin and Oneida Seven Generations Corp. (5/5/14)	C00121-124
Affidavit of Patricia Ninham Hoeft in Support of Motion to Dismiss (4/30/14)	C00125-133
Exhibit 1 – Constitution and By-Laws of the Oneida Tribe of Indians of Wisconsin	C00134-141
Exhibit 2 – Resolution # <u>12-4-96-B</u> Grant of Corporate Charter to Oneida Seven Generations Corp.	C00142
Exhibit 3 – Corporate Charter of Oneida Seven Generations Corp.	C00143-153
Exhibit 4 – By-Laws of Oneida Seven Generations Corp.	C00154-160
Exhibit 5 – Chapter 14 – Sovereign Immunity	C00161-163
Affidavit of Gene Keluche in Support of Motion to Dismiss	C00164-166
Appearance – Defendant, Green Bay Renewable Energy, LLC (5/8/14)	C00167
Appearance – Defendant, Green Bay Renewable Energy, LLC (5/8/14)	C00168
Notice of Motion: Defendant, The Oneida Tribe of Indians of Wisconsin’s Motion for Substitution of Judge (5/6/14)	C00169
Motion for Substitution of Judge of Defendant, The Oneida Tribe of Indians of Wisconsin – (5/6/14)	C00170-171
Appearance – Defendant, Green Bay Renewable Energy, LLC (5/8/14)	C00172
Appearance – Defendant, Green Bay Renewable Energy, LLC (5/8/14)	C00173
Order: The Oneida Tribe of Indians of Wisconsin’s Motion for Substitution of Judge is Granted (5/9/14)	C00174
Notice of Calendar Call	C00175

Volume 1	Page
Notice of Calendar Call	C00176
Notice of Calendar Call	C00177
Order: This Cause is Reassigned to Judge Margaret Brennan (6/5/14)	C00178
Appearance – Oneida Seven Generations Corp.; The Oneida Tribe of Indians of Wisconsin (6/24/14)	C00179
Appearance – Oneida Seven Generations Corp.; The Oneida Tribe of Indians of Wisconsin (6/24/14)	C00180
Correspondence – Enclosing Notices of Appearance of Thomas M. Pyper and Cynthia Buchko (6/17/14)	C00181
Order: Briefing Schedule regarding Motion to Dismiss for Lack of Personal Jurisdiction	C00182
Proof of Service – Responses to Plaintiff’s First Requests to Admit of Defendants, Oneida Seven Generations Corp. and The Oneida Tribe of Indians of Wisconsin (7/3/14)	C00183
Certificate of Service – Responses to Plaintiff’s First Requests to Admit of Defendants, Green Bay Renewable Energy, LLC (7/3/14)	C00184
Order: Briefing Schedule Order Setting Clerk’s Status Call on 8/26/14 (7/7/14)	C00185
Notice of Filing: Brief in Support of Motion to Dismiss for Lack of Personal Jurisdiction from Defendants, The Oneida Tribe of Indians of Wisconsin and Oneida Seven Generations Corp. (7/11/14)	C00186-88
Brief in Support of Motion to Dismiss for Lack of Personal Jurisdiction of Defendants, The Oneida Tribe of Indians of Wisconsin and Oneida Seven Generations Corp. (7/11/14)	C00189-198
Notice of Filing: Plaintiff’s Response to Green Bay Renewable Energy, LLC’s Motion to Dismiss (7/31/14)	C00199-200
Plaintiff’s Response to Green Bay Renewable Energy, LLC’s Motion to Dismiss (7/31/14)	C00201-211

Volume 1	Page
Complaint at Law (3/6/14)	C00212-229
Plaintiff's Exhibit A – Master Lease Agreement	C00230-249
Volume 2	Page
Plaintiff's Exhibit A – Master Lease Agreement	C00252-257
Plaintiff's Exhibit B – Operation and Maintenance Agreement	C00258-277
Notice of Filing: Plaintiff's Response in Opposition to Oneida Seven Generations Corp. and The Oneida Tribe of Indians of Wisconsin's Motion to Dismiss for Lack of Subject Matter Jurisdiction	C00278-279
Notice of Filing: Plaintiff's Supplemental Brief in Support of their Responses in Opposition to Defendant OSGC and the Tribe's Motions to Dismiss for Lack of Subject Matter Jurisdiction	C00280-281
Plaintiff's Supplemental Brief in Support of their Responses in Opposition to Defendant OSGC and the Tribe's Motions to Dismiss for Lack of Subject Matter Jurisdiction	C00282-288
Case Law: <i>Solargenix Energy, LLC v. Acciona, S.A., et al.</i> 2014 Ill. App. (1 st) 12403 (Aug. 1, 2014)	C00289-301
Order: Granting Plaintiff's Motion to Supplement Response Brief, amending briefing schedule, and continuing for Clerk Status Date on 9/4/14 (8/14/14)	C00302
Certificate of Service: Defendant Green Bay Renewable Energy, LLC's Reply Brief in Support of Its Motion to Dismiss Counts I, III & V of Plaintiff's Complaint (8/21/14)	C00303
Green Bay Renewable Energy, LLC's Reply in Support of Its Motion to Dismiss Counts I, III & V of Plaintiff's Complaint (8/21/14)	C00304-310
Notice of Filing: The Oneida Tribe of Indians of Wisconsin and Oneida Seven Generation Corp.'s Reply Brief in Support of Motion To Dismiss for Lack of Personal Jurisdiction (8/28/14)	C00311
The Oneida Tribe of Indians of Wisconsin and Oneida Seven Generation Corp.'s Reply Brief in Support of Motion to Dismiss for Lack of Personal Jurisdiction (8/28/14)	C00312-325

Volume 2	Page
Notice of Filing: The Oneida Tribe of Indians of Wisconsin and Oneida Seven Generations Corp.'s Reply Brief in Support of Motion to Dismiss for Lack of Subject Matter Jurisdiction (8/28/14)	C00326
The Oneida Tribe of Indians of Wisconsin and Oneida Seven Generations Corp.'s Reply Brief in Support of Motion to Dismiss for Lack of Subject Matter Jurisdiction (8/28/14)	C00327-339
Notice of Filing: (1) Affidavit of Bruce King; (2) Affidavit of Joseph O. Kavan; and (3) Affidavit of Kevin Cornelius	C00340-341
Exhibit 1 Affidavit of Bruce King	C00342-347
Exhibit A Financing Package	C00348-350
Exhibit B Correspondence of 8/14/13	C00351-352
Exhibit 2 Affidavit of Joseph O. Kavan	C00353-357
Exhibit A Resume Summary	C00358
Exhibit 3 Affidavit of Kevin Cornelius	C00359-00363
Exhibit A Correspondence of 4/26/13	C00364-366
Order: Clerk Status setting hearing regarding three Motions to Dismiss on 10/8/14 (9/4/14)	C00367
Order: Granting Defendants, The Oneida Tribe of Indians of Wisconsin and Oneida Seven Generation Corp.'s Motion to Dismiss for Lack of Subject Matter Jurisdiction; and dismissing The Oneida Tribe of Indians of Wisconsin and Oneida Seven Generations Corp. as Defendants (10/8/14)	C00368
Order: Denying Count 1 of Green Bay Renewable Energy, LLC's Motion to Dismiss, Defendants to answer by 12/3/14; Granting Counts III and V, Plaintiff to file amended counts by 11/5/14; cause set for Status on 12/10/14 (10/8/14)	C00369
Notice of Filing: Defendants' Motion for Illinois Supreme Court Rule 304(a) Finding	C00370
Defendants' Motion for Illinois Supreme Court Rule 304(a) Finding	C00371-373
Exhibit A Court Order of 10/8/14	C00373A

Volume 2	Page
Certificate of Service: Defendants' Motion for Illinois Supreme Court Rule 304(a) Finding	C00374
Order: Defendants' 304(a) Motions and Status – 11/15/14 date for Plaintiffs to replead their Complaint is stricken; Defendant, Green Bay Renewable Energy, LLC's date to respond to Plaintiffs' amended pleading is stricken; 12/10/14 Status remains set for 12/10/14 at 9:30 a.m. in Room 2307 (10/27/14)	C00375
Order: pursuant to Illinois Supreme Court Rule 304(a), finding no just reason for delaying appeal from its October 8, 2014 Order granting Defendants, Oneida Seven Generations Corp. and The Oneida Tribe of Indians of Wisconsin's Motion to Dismiss for Lack of Subject Matter and certifying the order for immediate appeal (10/27/14)	C00376-377
Notice of Appeal of Plaintiffs-Appellants, ACF Leasing, LLC, ACF Services, LLC and Generation Clean Fuels, LLC (11/7/14)	C00378-381
Request for Preparation of Record on Appeal from Plaintiff-Appellants, ACF Leasing, LLC, ACF Services, LLC and Generation Clean Fuels, LLC (11/21/14)	C000382
Certificate of Service: Request for Preparation of Record on Appeal from Plaintiff-Appellants, ACF Leasing, LLC, ACF Services, LLC and Generation Clean Fuels, LLC (11/21/14)	C00383-384

Volume 3	Page
Stipulation of Report of Proceedings pursuant to Supreme Court Rule 323(b) (12/17/14)	00002-3
Report of Proceedings (10/8/14)	00004-28

**Supplemental Record
Volume 1**

	Page
Order: Plaintiffs/Appellants' Motion to Prepare the Supplemental Record on Appeal and Extension of Time to File the Record on Appeal is Granted (1/28/15)	C2
Certificate of Service: Plaintiffs/Appellants' Motion to Prepare the Supplemental Record on Appeal and Extension of Time to File the Record on Appeal is Granted (2/4/15)	C3-4

**Supplemental Record
Volume 1**

	Page
Plaintiffs' Response in Opposition to the Motion to Dismiss for Lack of Subject Matter Jurisdiction (7/31/14)	C5-20
Exhibit 1 - Complaint at Law (3/6/14)	C21-38
Exhibit A - Master Lease Agreement	C39-64
Exhibit B - Operation and Maintenance Agreement	C65-84
Exhibit 2 - Affidavit of Michael Galich	C85-91
Exhibit A - Joint Venture Agreement	C92-120
Exhibit B - Correspondence of 8/14/13	C121-123
Exhibit 3 - The Oneida Tribe of Indians of Wisconsin's Response to Plaintiffs' First Request to Admit	C124-138
Exhibit 4 - Oneida Seven Generations Corp.'s Response to Plaintiffs' First Request to Admit	C139-153
Exhibit 5 - Affidavit of Eric R. Decator	C154-161
Exhibit A - Joint Venture Agreement	C162-190
Exhibit B - Correspondence of 10/26/12	C191-198
Exhibit C - Correspondence of 05/03/13	C199-200
Exhibit D - Bruce King's PowerPoint Presentation Slides	C201-208
Exhibit E - Correspondence of 08/14/13	C209-211
Exhibit 6 - Deposition of Patricia Ninham Hoeft (7/17/14)	C212-249

**Supplemental Record
Volume 2**

	Page
Exhibit 6 – Deposition of Patricia Ninham Hoeft (7/17/14)	C252
Exhibit 7 – Deposition of Gene A. Keluche (7/17/14)	C253-280

**Supplemental Record
Volume 2**

Page

Exhibit 8 - Response Brief of Defendant-Respondent – <i>John Kroner v. Oneida Seven Generations Corporation</i> (2/14/11)	C281-306
Plaintiffs' Response in Opposition to the Motion to Dismiss for Lack of Personal Jurisdiction (7/31/14)	C307-321
Exhibit 1 - Complaint at Law (3/6/14)	C322-339
Exhibit A - Master Lease Agreement	C340-365
Exhibit B - Operation and Maintenance Agreement	C366-385
Exhibit 2 - Affidavit of Michael Galich	C386-392
Exhibit A - Joint Venture Agreement	C393-421
Exhibit B - Correspondence of 8/14/13	C422-424
Exhibit 3 - The Oneida Tribe of Indians of Wisconsin's Response to Plaintiffs' First Request to Admit	C425-439
Exhibit 4 - Oneida Seven Generations Corp.'s Response to Plaintiffs' First Request to Admit	C440-454
Exhibit 5 - Affidavit of Eric R. Decator	C455-462
Exhibit A - Joint Venture Agreement	C463-489
Exhibit B - Correspondence of 10/26/12	C490-497
Exhibit C - Email of 5/3/13	C498-499

**Supplemental Record
Volume 3**

Page

Exhibit D – Bruce King PowerPoint Presentative Slides	C502-509
Exhibit E - Correspondence of 8/14/13	C510-512
Exhibit 6 - Deposition of Patricia Ninham Hoeft	C513-550
Exhibit 7 - Deposition of Gene A. Keluche	C551-578

**Supplemental Record
Volume 3**

Page

Exhibit 8 - Response Brief of Defendant-Respondent –
John Kroner v. Oneida Seven Generations Corporation (2/14/11)

C579-604

2013 WL 2731350 (Wis.App. III Dist.) (Appellate Brief)
Court of Appeals of Wisconsin, District III

ONEIDA SEVEN GENERATIONS CORPORATION and Green Bay Renewable Energy, LLC,
Plaintiffs-Appellants,

v.

CITY OF GREEN BAY, Defendant-Respondent.

No. 2013AP000591.

May 28, 2013.

Appeal from a Final Judgment of the Circuit Court of Brown County, the Honorable Marc A. Hammer Presiding,
Circuit Court Case No. 2012CV002263

Brief of Plaintiffs-Appellants

Godfrey & Kahn, S.C., One East Main Street, Suite 500, Post Office Box 2719, Madison, WI 53701-2719, Phone:
608-257-3911, Fax: 608-257-0609.

Eric J. Wilson, # 1047241, Matthew T. Kemp, # 1080009.

Attorneys for Oneida Seven Generations Corporation and Green Bay Renewable Energy, LLC.

TABLE OF CONTENTS

TABLE OF AUTHORITIES	iv
ISSUES PRESENTED FOR REVIEW	1
STATEMENT ON ORAL ARGUMENT AND PUBLICATION	3
STATEMENT OF THE CASE	4
Nature of the Case	4
The Proposed Facility	5
OSGC Submits a Conditional Use Permit Application that Discusses Potential Emissions at Length	6
The Plan Commission Recommends Approval of the CUP after Detailed Consideration of the Facility's Operations, Including Potential Emissions	9
Following Extensive Deliberation About the Proposed Facility, the Council Approves the CUP	12
As Contemplated and Required by the CUP, OSGC Engages in an Extensive Environmental Permitting Process with State and Federal Agencies	15
The City Issues a Building Permit, and OSGC Commences Construction	19
*i The Opposition Groups Renew Their Objections, This Time Before the City Council.	19
The Plan Commission Unanimously Determines that OSGC Did Not Misrepresent the Project.	21

The City Council Ignores the Plan Commission's Findings and Revokes the Permit	26
The Ruling Below	27
STANDARD OF REVIEW	29
ARGUMENT	30
I. ... THE COUNCIL HAD NO AUTHORITY TO RESCIND THE CONDITIONAL USE PERMIT.	32
A. ... The Council Illegally Rescinded the CUP Based on the Implied, Unwritten Condition that the Facility Would Have Zero Emissions.	32
B. ... By Virtue of the Building Permit Issued by the City, OSGC Enjoyed a Vested Right to Develop the Facility, Which the City Had No Power to Take Away.	37
II. ... THE COMMON COUNCIL ACTED ARBITRARILY AND WITHOUT SUBSTANTIAL EVIDENCE	42
A. OSGC Clearly Informed the City that the Facility Would Produce Emissions That Would Be Subject to DNR Approval.	44
*ii B. The City Arbitrarily Ignored the Unanimous Finding of the Plan Commission that There Was No Misrepresentation.	54
CONCLUSION	57
CERTIFICATIONS	59
CERTIFICATE OF SERVICE	62

*iii TABLE OF AUTHORITIES

Cases

<i>Atkinson v. Piper</i> , 181 Wis. 519, 195 N.W. 544 (1923)	37, 38
<i>Bettendorf v. St. Croix County Bd. of Adjustment</i> , 224 Wis. 2d 735, 591 N.W.2d 916 (Ct. App. 1999)	33, 34, 35, 36, 42
<i>Cornwell Personnel Assocs., Ltd. v. LIRC</i> , 175 Wis. 2d 537, 499 N.W.2d 705 (Ct. App. 1993)	42
<i>Gehin v. Wis. Group Ins. Bd.</i> , 2005 WI 16, 278 Wis. 2d 111, 692 N.W.2d 572	42, 43
<i>Klefisch v. Wisconsin Telephone Co.</i> , 181 Wis. 519, 195 N.W. 544 (1923)	37, 38
<i>Nielsen v. Waukesha County Bd. of Supervisors</i> , 178 Wis. 2d 498, 504 N.W.2d 621 (Ct. App. 1993)	29
<i>Ottman v. Town of Primrose</i> , 2011 WI 18, 332 Wis. 2d 3, 796	30, 33, 43

Next

N.W.2d 411	
<i>Sills v. Walworth Cnty. Land Mgmt. Comm.</i> , 2002 WI App 111, 254 Wis. 2d 538, 648 N.W.2d 878	42
*iv <i>State ex rel. Skelly Oil Co. v. Common Council</i> , 58 Wis. 2d 695, 207 N.W.2d 585 (1973)	34
<i>Van Ermen v. DHSS</i> , 84 Wis. 2d 57, 267 N.W.2d 17 (1978)	43
<i>Von Arx v. Schwarz</i> , 185 Wis. 2d 645, 517 N.W.2d 540 (Ct. App. 1994)	43, 57
Statutes	
42 U.S.C. § 4321, <i>et seq.</i>	18
Wis. Stat. § 1.11	18
Wis. Stat. § § 68.08-68.11	27
Other Authorities	
40 C.F.R. Parts 1500-1508	18
Green Bay Municipal Code § 13-205	7
Green Bay Municipal Code § 15.05(8)(a)	41
Wis. Admin. Code § NR 150.01(1)	18

***v ISSUES PRESENTED FOR REVIEW**

In March 2011, the Green Bay City Council approved a conditional use permit (“CUP”) for a waste-to-energy facility in development by Oneida Seven Generations Corporation (“OSGC”). The approval was expressly conditioned on the facility complying with all federal and state environmental standards, including standards for air and water quality. Accordingly, OSGC embarked on an extensive, and very public, environmental permitting process with state and federal agencies. A small but vocal group of opponents claimed the facility would harm local air quality and urged the agencies to disapprove the facility. The agencies rejected the arguments of the opponents and gave OSGC a green light to build the facility, which OSGC began to do.

Having failed to persuade the state and federal agencies, the opponents of the project then went back to the City, claiming that OSGC had misrepresented the nature of the Facility during the *1 CUP application process by saying there would be no air emissions. In fact, OSGC had told the City many times in writing and orally that there would be emissions, and that those emissions would be subject to state and federal environmental standards. Nonetheless, the City directed the Plan Commission to hold a public hearing on the alleged misrepresentations. After considering hundreds of pages of written submissions and hours of testimony from both supporters and opponents of the project, the Plan Commission *unanimously found that there had been no misrepresentation*. At the next City Council meeting, however, the Council, without conducting any inquiry of its own, voted to rescind the CUP on the basis of the alleged misrepresentations.

On these facts, two issues are presented on appeal:

Issue No. 1: May a city council rescind a conditional use permit based on implied conditions that were not written in

Next

***2 the permit and when the city has already issued building permits for the facility at issue?**

The circuit court held that it could.

Issue No. 2: May a city council rescind a conditional use permit for alleged misrepresentations about the environmental impacts of the facility at issue, when the permittee disclosed to the City these impacts; the council deferred the environmental vetting process to expert state and federal agencies, who approved the project; and the city's own plan commission - the only body to engage in factfinding regarding the matter - unanimously found that there was no misrepresentation?

The circuit court held that it could.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Plaintiff-Appellant requests oral argument. The record is sufficiently extensive that the Court would likely benefit from a full discussion of the issues in the presence of counsel possessing a command of the record.

***3** As to publication, Plaintiff-Appellant believes that this case carries important consequences not only for the parties - one of whom has been publicly accused of misrepresentation, and the other of which is a large municipality - but also for economic development activity throughout the State of Wisconsin, which depends on predictability when embarking on large-scale economic and environmental investments.

Accordingly, publication would be appropriate.

STATEMENT OF THE CASE

Nature of the Case

This is a certiorari action by OSGC, seeking reversal of the City's decision to revoke the CUP. The revocation occurred more than 18 months after the City originally issued the CUP, more than a year after the City issued a building permit, and nearly a year after state and federal agencies issued environmental approvals and permits for the facility.

***4 The Proposed Facility**

OSGC wants to bring clean energy to the Green Bay community by constructing a facility that turns garbage into electricity. The key to this conversion is a process known as "pyrolysis," in which the waste is gasified by heating it at very high temperatures in an enclosed, oxygen-starved chamber. R. 25 at 231-32, 374-75. The process produces a gaseous fuel (similar to natural gas) that is then used to run electricity-producing generators - essentially large internal combustion engines. *Id.* The pyrolysis gasification process itself does not produce air emissions because the process occurs in an enclosed chamber. While the generators (like all combustion engines) do produce emissions, they are at levels that the state Department of Natural Resources ("DNR") determined would be acceptable under state and federal environmental laws. R. 25 at 238, 290. Thus, the facility will reduce the amount of waste going to local landfills ***5** while decreasing the community's reliance on electricity derived from fossil fuels. R. 25 at 387, 392.

In late 2010, OSGC representatives met with staff from the City's Economic Development and Planning Departments regarding their plan. R. 25 at 1; R. 26 at 725. Together, OSGC and City staff evaluated a number of possible sites within the City for the facility. R. 26 at 725. Ultimately, OSGC selected a site on Hurlbut Street surrounded by vacant land and heavy industrial operations. R. 25 at 156.

OSGC Submits a Conditional Use Permit Application that Discusses Potential Emissions at Length.

City officials at all levels were provided with extensive information about the proposed project, including information about

Next

potential air emissions. On February 4, 2011, OSGC submitted to the City a written application for a conditional use permit. R. 25 at 2-152. A conditional use permit is, in essence, a special zoning classification, which allows owners to use property *6 in a manner that does not fit into typical zoning classifications. *See* Green Bay Municipal Code § 13-205. The application explained the nature of the project and contained extensive information about potential environmental impacts, especially air emissions. *Id.* For example, it noted that the Wisconsin Department of Natural Resources (“DNR”) would need to issue an air permit before construction could begin, and that “application and review of this permit will likely need to address air quality impacts ... as well as emissions of hazardous air toxic compounds[.]” R. 25 at 25. It also noted that the facility would need to report actual air emissions to the DNR on an annual basis, and that DNR would maintain oversight and enforcement responsibility over the facility’s operations. *Id.* in a 50-page section titled “Emissions,” OSGC provided the City with detailed *7 information about potential air emissions from similar technologies, including a lengthy report by a university engineering department. R. 25 at 26-76. OSGC also provided preliminary drawings and artists’ renderings of the facility. R. 25 at 18-23.

City planning staff carefully reviewed all of the information and prepared a report to the Plan Commission regarding the project. The report noted that OSGC had provided City staff with “considerable information ... detailing the gasification process and its resulting impact.” R. 26 at 155. The report explained that OSGC would have to obtain an air permit and operations permit from DNR. After observing that the facility would be in a “heavy industrial area separated from any residential uses by Interstate 43,” the report concluded that the “proposed use is an appropriate land use for the subject site.” R. 25 at 156; *see also* R. 25 at 245-57. The report recommended approval *8 of the CUP, subject to certain conditions, including the condition that the facility comply with “[a]ll Federal and State regulations and standards related to the proposed use including air and water quality.” *Id.*

The Plan Commission Recommends Approval of the CUP after Detailed Consideration of the Facility’s Operations, Including Potential Emissions.

On February 21, 2011, the Plan Commission discussed the project at its regularly scheduled meeting. R. 25 at 157-66; R. 26, Audio CD 1. After City planning staff reviewed OSGC’s application and the report that staff had prepared, representatives from OSGC addressed the Commission. R. 25 at 160-65. They first presented a pre-recorded slideshow explaining how the facility would work - starting with waste delivery by trucks, then shredding and sorting of the garbage, followed by the pyrolysis gasification process, then the gas cleaning process, and finally the conversion of the gas to electricity through gas-fired generators. R. at 160-161. As part of the *9 presentation, OSGC promised that the Facility would “meet or exceed” federal standards for safety, emissions, and pollutants. R. 26, Audio CD 1 at 21:50. The slideshow further noted that “there are no smokestacks *such as those associated with coal-fired power plants.*” *Id.* at 22:10 (emphasis added).

Plan Commission members then engaged OSGC in a lengthy question-and-answer session. R. 25 at 160-66. A number of the Plan Commission’s questions pertained to air emissions. OSGC explained how the gasification process itself takes place in an “enclosed” system, in that no oxygen is allowed to enter the chamber. R. 25 at 161; R. 26, Audio CD 1, 20:45. One commission member noted that OSGC’s written materials had described emissions from similar technologies, and that those emissions included certain chemicals. *Id.* at 43:45. In response, an engineer working for OSGC stated that there would be no chemicals from OSGC’s facility because they would be *10 “scrubbed out” - a reference to the facility’s “Venturi scrubbers” that would clean the gas before it is piped to the generators. *Id.* However, the contractor specifically noted that there would be dioxin emissions. *Id.*; *see also* R. 25 at 164 (misspelling “dioxins” as “diosons”).³ The contractor then clarified that the chemical emissions would be “acceptable” and “under EPA/DNR standards” - that is, there would be chemical emissions, but because of pollution control devices such as the Venturi scrubber, none of the emissions would exceed the safety thresholds designated by the environmental regulatory agencies. R. 26, Audio CD 1 at 47:20; R. 25 at 164.

*11 The Commission voted unanimously to recommend approval of the CUP, including the condition that the Facility comply with all federal and state environmental regulations. R. 25 at 166.

Following Extensive Deliberation About the Proposed Facility, the Council Approves the CUP.

On March 1, 2011, the Common Council met and considered the Plan Commission’s recommendation. R. 25 at 171-72; *see*

generally R. 26, Audio CD 1. Through deliberation that lasted well over an hour, the Council thoroughly vetted the proposed Facility in an open session. OSGC presented the same pre-recorded slideshow that explained that the Facility would “meet or exceed” federal standards for safety, emissions, and pollutants. R. 26, Video 1 at 1:11:00. In follow-up remarks, OSGC stated that “[a]ny 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.” *Id.* at 1:14:53.

*12 Part of the OSGC presentation was a slide titled “Emissions.” *Id.* at 1:18:10. On that slide, a bullet point explained that “[t]here will be no smokestacks such as those associated with coal-fired power plants.” *Id.* at 1:18:10. In explaining that slide, an OSGC representative said, “There are no smokestacks. For those of us in Green Bay, we know what that means.” *Id.* In other words, he explained that there would be no stacks on the facility like the enormous structures familiar to Green Bay residents on the Pulliam power plant and local paper mills.

During the question and answer session, one alderperson referenced OSGC’s remark about “no smokestacks” and clarified that the facility *would* have generators that *would* produce exhaust; OSGC agreed with this observation. *Id.* at 1:32:18. In addition, one member of the public with professional experience in air emissions spoke extensively about his research into potential *13 emissions from the proposed Facility. *Id.* at 1:46:00. He noted that emissions from gasification facilities are generally more favorable than traditional combustion, and that emissions from this facility would likely be very small in comparison to the nearby Pulliam coal-fired power plant. *Id.* In short, it was clear that everyone present knew there would be emissions from the Facility.

After the public comment period had concluded, the alderperson representing the district where the Facility would be located (Ald. Dorff) spoke in favor of the project. Referencing the plethora of regulatory review required for the facility, he noted: “[T]he environmental concerns that have been raised by my constituents have been addressed.” *Id.* at 1:51:05. The chair of the Council, Alderman Thomas DeWane, also gave his unconditional support, stating: “I think this is going to be a good project. I also checked into it. They answered all of the my questions. *14 I’m very positive that this is good for Green Bay.” *Id.* at 1:52:00. Thereafter, all but one Council member voted to approve the CUP. R. 25 at 172. As recommended by the Plan Commission, the CUP was conditioned on the facility complying with all federal and state environmental standards. R. 25 at 198. There were no conditions that mentioned emissions or stacks.

As Contemplated and Required by the CUP, OSGC Engages in an Extensive Environmental Permitting Process with State and Federal Agencies.

After obtaining the CUP, OSGC embarked on an extensive environmental review and permitting process - exactly as the Plan Commission and Common Council had anticipated when they adopted the condition that the OSGC facility must meet all state and federal air and water quality requirements. As a result of this review, state and federal agencies with expertise on environmental matters issued findings and permits allowing construction of the facility. R. 25 at 253, 328, 367; R. 26 at 618.

*15 Throughout this lengthy and very public review process, numerous groups and individuals opposed to the facility (as well as project supporters) appeared at public meetings hosted by the regulators to speak against the requested environmental approvals. R. 25 at 262-265, 284-285, 387-389. The project opponents submitted numerous comments to both DNR and the U.S. Department of Energy (“DOE”) detailing concerns with the facility’s alleged environmental impacts. R. 25 at 265-285, 387-388, 548-561. Both agencies thoughtfully considered these comments and responded to them in writing. *Id.* Many of the opponents appeared to believe that the pyrolysis process was just another version of trash incineration that would emit damaging levels of pollutants into the atmosphere. *E.g.*, R. 25 at 266, 565. In fact, one of the more vocal opposition groups called itself “Incinerator Free Brown County.” R. 26 at 763, 856. During the course of their review, however, both DNR and DOE confirmed *16 that the pyrolysis process did *not* involve any incineration. R. 266, 565-566.

After this public process, in September 2011, DNR issued permits and approvals under the state’s clean air and solid waste laws. R. 25 at 286-327; R. 26 at 618-627.¹ The DNR published the results of its formal Environmental Analysis, in which it concluded that approval of the facility was *not* a “major action” and would *not* have significant environmental effects. R. 25 at 253. The DNR study included a lengthy analysis of a wide range of *17 potential environmental impacts, including air emissions. R. 25 at 231-260.²

In November 2011, DOE published its final Environmental Assessment.⁵ R. 25 at 372-568. The assessment thoroughly evaluated the environmental impact of the facility, and included 18 pages of analysis dedicated specifically to air emissions. R. 25 at 422-440. Based on its review, DOE issued a Finding of No Significant Impact (referred to colloquially as "FONSI"). R. 25 at 367-371. DOE concluded that "the area's air quality would remain in compliance with current standards." R. 25 at 368. In fact, DOE determined that the facility would have a positive impact *18 on greenhouse gas emissions because of the reduced traffic of waste to local landfills. *Id.*

The City Issues a Building Permit, and OSGC Commences Construction.

As the environmental permitting process was wrapping up, OSGC submitted detailed site plans and building plans to the City, as required under the City's zoning and building codes. On August 3, 2011, the City approved those plans and issued a building permit. R. 25 at 200-206, 730-731. With the required approvals in hand, OSGC proceeded with preparatory construction work.

The Opposition Groups Renew Their Objections, This Time Before the City Council.

Having failed to persuade DNR or DOE that the project would not meet environmental standards, the opposition groups began to pressure the Common Council to reconsider the CUP. On April 10, 2012, numerous opponents of the project attended a Common Council meeting, alleging that OSGC had misrepresented *19 the environmental impacts of the facility when applying for the CUP. R. 25 at 209-210. In particular, the opposition groups alleged that OSGC had claimed the facility would have no stacks and would produce no emissions. *Id.*

Responding to the outcry from a vocal opposition, the Council voted to "hold a public hearing" regarding the CUP and to "continue further investigation." R. 25 at 210. Through correspondence from its counsel sent shortly thereafter to the City Attorney, OSGC objected to the proceeding contemplated by the Council. R. 25 at 211-214. OSGC pointed out that it had presented extensive information about potential emissions to the Plan Commission and the Council, and that DNR and DOE had reviewed the potential emissions in detail - which is exactly what the CUP approved by the Council had specified should happen. *Id.* Despite the absence of any evidence - indeed, even any allegation - that the facility would be out of compliance with the *20 CUP, the City forged ahead with its "investigation." Eventually, the City decided that the Plan Commission - the body that had originally considered and recommended approval of the CUP - should hold a public hearing. R. 26 at 956.

The Plan Commission Unanimously Determines that OSGC Did Not Misrepresent the Project.

The City published a notice of the Plan Commission hearing, inviting citizens to submit written comments prior to the hearing and to speak at the hearing. *Id.* The purpose of the hearing, as described in the notice, was 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 Generation Conditional Use Permit (CUP) that was recommended." *Id.*

Although OSGC objected to the proceeding, it nonetheless submitted written materials to the Plan Commission. R. 25 at 221-568. In those materials, OSGC outlined the extensive information *21 that had been presented to Planning staff and the Plan Commission and highlighted the numerous mentions of potential emissions from the Facility *Id.* at 221-226. OSGC also submitted the record of the detailed environmental review process conducted by DNR and DOE. *Id.* The Director of DNR's Air Bureau wrote a letter emphasizing that "the Department believes that the proposed facility will meet all applicable state and federal air quality requirements[.]" R. 25 at 229-232. Many proponents and opponents of the project also submitted their own materials. R. 26 at 571-712.

The Plan Commission meeting lasted several hours. R. 26 at 716. Numerous parties spoke at the hearing, including City Planning Director Rob Strong, who reviewed the process by which the City had issued the CUP in 2011. R. 26 at 724-731, 889-894. Director Strong noted the extensive information that had been submitted with the CUP application and recalled that OSGC *22 and Planning staff had gone "back and forth quite frequently" even before the Plan Commission considered the CUP. R. 26 at 726. Director Strong emphasized: "[W]e didn't do anything different here. We followed the same process we do for every other project that comes forward." R. 26 at 890. With regard to the "stacks" issue specifically, Director Strong noted that the City had not been misled, explaining:

Next

[I]t's not unusual to go through these things. Doors move on buildings, roof lines will change, but they still have to meet the basic Code requirements that are in the City's Code for building a building in this community, which includes zoning as well as a building permit. So I just wanted you to understand that this process isn't that much different than any other.

R. 26 at 892-893. The same member of the public with expertise in air emissions who had addressed the Council the previous year also spoke at the Plan Commission hearing, stating:

[W]hen I spoke to the City Council [in March 2011], I made it real clear that there are air emissions And what I tried to do to my alderman and to theCity *23 Council was to make it real clear to them that there were stacks, that there were emissions.

R. 26 at 795, 798.

After considering the written materials and oral presentations, the Plan Commission publicly discussed the matter. Commissioner Bremer stated:

[W]e were not deceived on that point [regarding emissions]. We knew that there was emission. We knew that there would be vents. We did not know the exact placement or height of those vents, because it was very early in the process. And it's been my experience with the Plan Commission and with the many projects that are to the betterment of the community that, indeed, there is a process that evolves over time in a back-and-forth conversation, and this has gone very much along those lines.

* * *

I appreciate that I am not convincing anybody who feels to the contrary. I'm simply expressing my own thinking that, despite new information that has occurred since we recommended this, we were not deceived on the front end. We did have adequate information about what was known at the time, and the process that has moved forward has done so I think in an appropriate way.

R. 26 at 895-897.

*24 Thereafter, the members of the Plan Commission unanimously concluded that OSGC had *not* misrepresented the facility and that the Commission had adequate information to approve the CUP. Specifically, the Commission approved the following language as a report and recommendation to the Common Council:

Based on the information submitted and presented, the Plan Commission determines that the information provided to the Plan Commission was not misrepresented and that it was adequate for the Commission to make an informed decision, and recommends that the CUP stand as is. The Commission further determines that the information the Plan Commission received was adequate, and based upon information then available, that the Plan Commission did understand that there were emissions and venting as a part of the system, and therefore made sure that the Seven Generations Corporation would need to meet the requirements of the EPA and DOE, as well as meeting the requirements of the municipal code through a normal process of give or take.

R. 26 at 955.

***25 The City Council Ignores the Plan Commission's Findings and Revokes the Permit.**

On October 16, 2012, the Common Council met for a regularly-scheduled meeting. Numerous project opponents attended the meeting and, against the express advice of the City Attorney, the Council opened the floor to public comment regarding the CUP. R. 26 at 956; Video 2 (Part 1) at 46:00. The Council voted to reject the Report of the Plan Commission, and then it voted to rescind the CUP. Both votes carried by a bare majority of seven-to-five. R. 26, Video 2 (Part 2) at 37:22, 38:53. The Council did not explain the basis for its vote or the rationale that supported it.

Because the Council itself failed to explain the basis for its decision, two weeks later the City Attorney sent a letter to OSGC purporting to explain why the Council has rescinded the CUP. R. 26 at 950-951. The letter claimed that OSGC had made "false statements and misrepresentations" to the City "relating to the public *26 safety and health aspect of the Project and the Project's impact upon the City's environment" and "regarding emissions, chemicals, and hazardous materials." *Id.* The letter never identified, however, any particular statement that was allegedly false, nor did it explain the basis for the City's determination that any statements were false. *Id.* The letter closed by stating that "any further action at 1230 Hurlbut Street to construct the solid waste facility will be prohibited by legal action, if necessary[.]" R. 951.

Through its counsel, OSGC submitted a letter to the City requesting an administrative appeal of the Council's decision to rescind the CUP pursuant to Wis. Stat. § 68.08-68.11. R. 26 at 958-960. The City denied that request. R. 26 at 961-962.

The Ruling Below

OSGC initiated this litigation to restore the CUP and save development of the facility. Its complaint alleged that the City had illegally rescinded the permit based on an implied, unwritten *27 condition; had deprived OSGC of its vested right to develop the facility; had rescinded the permit without substantial evidence of misrepresentation; and had acted arbitrarily and unreasonably. R. 2. OSGC also raised a number of procedural arguments but voluntarily dropped those arguments in order to proceed to a quick resolution on the substantial issues relating to the City's underlying authority to rescind the permit.

After briefing and oral argument, the circuit court ruled against OSGC on all claims. The circuit court did not believe that the City had revoked the CUP based on an implied condition (zero emissions) that was not written in the CUP. R. 24 at 77. The circuit court also ruled that the vested rights doctrine did not apply because in its view it was fundamentally a question of damages, not a question of the Council's authority to rescind the CUP. *Id.* at 78. In addition, the circuit court believed *28 that OSGC had misrepresented the project by saying that there were "no emissions during the baking process," *id.* at 89, and by showing a "photograph" of the facility without stacks, *id.* at 90. The circuit court disregarded the unanimous finding of the Plan Commission, stating that "The Plan[] Commission ... had no authority to do anything" and "I think what happened in this case is two organizations processing very similar pieces of information came to different conclusions." *Id.* at 80.

OSGC timely filed this appeal.

STANDARD OF REVIEW

In certiorari actions, this Court reviews the circuit court's conclusions de novo. *Nielsen v. Waukesha County Bd. of Supervisors*, 178 Wis. 2d 498, 511, 504 N.W.2d 621 (Ct. App. 1993). In reviewing the underlying action taken by the City, the Court affords a "presumption of correctness and validity to a municipality's decision" but still undertakes a "meaningful review" *29 of the municipality's decision. *Ottman v. Town of Primrose*, 2011 WI 18, ¶¶ 48, 51, 332 Wis. 2d 3, 796 N.W.2d 411. However, this Court reviews "questions of law independently from the determinations rendered by the municipality or the circuit court." *Id.* at ¶ 54.

ARGUMENT

In an action for certiorari review, court must "test the validity of a decision rendered by a municipality[.]" *Ottman*, 2011 WI 18, ¶ 34. To do so, the Court inquires whether: (1) the City was within its jurisdiction; (2) the City proceeded on a correct theory of law; (3) the City's action was arbitrary, oppressive, or unreasonable and represented its will and not its judgment; and/or (4) the evidence was such that the City might reasonably make the order or determination in question. *Ottman*, 2011 WI 18, ¶¶ 35-36.

Violation of any one of these standards would be enough to reverse the City's decision. The City has violated all four. The Council *30 acted outside of its jurisdiction and contrary to law by revoking the permit based on an unwritten, implied condition, and by depriving OSGC of its vested right to develop the facility. In addition, there was no evidence - let alone substantial evidence - that OSGC had misrepresented the project, and the Council's entire decisionmaking process

Next

culminating in its vote to rescind the CUP was arbitrary and unreasonable. In short, the Council's decision was nothing more than a knee-jerk reaction to vocal opposition groups rather than a reasoned exercise of legislative judgment.

The implications of the City's action are concerning not only for OSGC's project, but for economic development in municipalities around the state. Both developers and the general public depend on the certainty of established permitting processes. Here, after a developer (OSGC) had gone through that extensive process, received valid permits, and started on its project *31 in justifiable reliance on the approval it had obtained, the City pulled the rug out from under OSGC. Through a knee-jerk reaction to the allegations of a vocal opposition, whose arguments about the facility's environmental impacts had long since been considered and rejected by expert state and federal agencies, the City subverted the thorough and rational administrative process upon which developers like OSGC must rely when deciding when and where to invest their resources.

I. THE COUNCIL HAD NO AUTHORITY TO RESCIND THE CONDITIONAL USE PERMIT.

A. The Council Illegally Rescinded the CUP Based on the Implied, Unwritten Condition that the Facility Would Have Zero Emissions.

Though the City has never fully explained its reason for rescinding the CUP, it appears that seven out of twelve Council members believed (or claimed to believe) that the CUP was granted on the implicit condition that the proposed facility would *32 have zero emissions.⁶ But by basing its rescission on an unwritten, implied condition, the Council violated a cardinal rule of conditional use permits: material conditions placed on a permittee's use of property *must* be spelled out in the permit itself. See *Bettendorf v. St. Croix County Bd. of Adjustment*, 224 Wis. 2d 735, 591 N.W.2d 916 (Ct. App. 1999).⁷

In *Bettendorf*, the municipality attempted to revoke a conditional use permit for a particular property based on the owner's alleged illegal use of an adjacent property. *Id.* at 737-738. The permit did not include any condition relating to the use of the adjacent property, but the municipality argued that such condition was "implied." *Id.* at 741. The court disagreed, explaining that "[a] conditional use permit allows a property owner to put property to a use which the ordinance expressly permits *33 when certain conditions have been met." *Id.* (citing *State ex rel. Skelly Oil Co. v. Common Council*, 58 Wis. 2d 695, 701, 207 N.W.2d 585 (1973)). The property owner had not violated any of the terms of the conditional use permit, and the court refused to "read into the permit conditions the [municipality] discussed but chose not to incorporate." *Id.* The court held that the municipality had acted "outside its authority" in revoking the permit based on the implied condition. *Id.* at 742.

Here, the rescission of the CUP apparently was based on the Council's perception that the facility was supposed to produce zero emissions, and that this was a material condition of the approval. But the CUP says nothing about zero emissions. If anything, the CUP's condition requiring the facility to comply with air and water quality standards contemplates that there *would* be emissions.

*34 Indeed, a condition requiring zero emissions in these circumstances would have been astonishing. This was a facility that was designed to create electricity using *gas-burning generators*, which by their very nature must produce exhaust; that is why OSGC told the City many times orally and in writing that there would be emissions and that the project would require an air permit.⁸ The City's obligation to spell out material permit conditions in writing becomes all the more critical when the condition at issue is directly contrary to the applicant's own description of the project, and is as remarkable as a zero-emission limit.

Under these circumstances, the Council's revocation of the CUP is a more egregious violation of the *Bettendorf* principle than *Bettendorf* itself. In *Bettendorf*, the city at least had the excuse *35 that the permit holders were doing something illegal on the adjacent property. *Id.* at 737-38. Here, there has never been even an allegation that OSGC was acting, or planning to act, in violation of any state or local law. To the contrary, OSGC did precisely what the City expected and required: undertake the extensive environmental permitting process with DNR and DOE. No other condition relating to emissions was spelled out in the CUP. Under *Bettendorf*, the City cannot, eighteen months after the fact, pretend that there was such a condition. Thus, the City's revocation of the CUP was contrary to law and beyond its jurisdiction, and it must be reversed.⁹

***36 B. By Virtue of the Building Permit Issued by the City, OSGC Enjoyed a Vested Right to Develop the Facility, Which the City Had No Power to Take Away.**

Under Wisconsin law, a developer acquires vested rights in a construction project by acquiring a valid building permit. *Atkinson v. Piper*, 181 Wis. 519, 533, 195 N.W. 544 (1923); *Klefisch v. Wisconsin Telephone Co.*, 181 Wis. 519, 532, 195 N.W. 544 (1923) (*Klefisch* and *Atkinson* were part of the series of decisions known as the “Building Heights Cases”). Once those property rights vest, the municipality cannot reverse previous approvals or pass new legislation limiting the development. *Id.*

For example, in *Atkinson*, the state legislature had passed a law prohibiting the construction of buildings over 100 feet. 181 Wis. at 522, n.1. Prior to passage of the law, however, the developer of a Madison hotel had acquired a building permit allowing construction of a 115-foot hotel. The developer had also incurred architectural and site preparation costs and had arranged *37 financing, but had not yet begun construction of the hotel or incurred any expense that would have been lost had it only built a 100-foot tall hotel. *Id.* The court held that, under these circumstances, the developers had acquired a vested right to develop the 115-foot hotel. *Id.* at 533-34; see also *Klefisch*, 181 Wis. at 532 (holding that developer had a vested right to construct a 225-foot office building when the developer obtained a building permit and commenced construction prior to passage of the height limitation law).

The facts of this case are squarely in line with *Atkinson* and *Klefisch*, which found that the developers had vested rights to develop their projects. The City granted a valid CUP and, several months later, a valid building permit. R. 25 at 198-199, 201-206. These permits allowed OSGC to develop a waste-to-energy facility on the property. In doing so, OSGC was in full compliance with the municipal codes. Based on its vested right to *38 develop the facility, OSGC spent considerable sums of money on site preparation work and the environmental permitting process. By rescinding the CUP, the City has deprived OSGC of its vested right to develop the facility, thus acting beyond its jurisdiction and contrary to law.

The circuit court, in ruling that OSGC did not have a vested right to develop the facility, fundamentally misunderstood the nature of the vested rights doctrine. The court suggested that OSGC’s vested right was dependent on spending money on the project and that the issue was really “one of damage.” R. 24 at 55, 78. However, under well-established principles of Wisconsin law, the basis for OSGC’s vested right to develop the facility lies not in the costs that OSGC reasonably incurred, but in the permits that the City, after thorough consideration of the project, voluntarily issued.

*39 The key permit in the vested rights analysis is the building permit. The circuit court suggested, incorrectly, that the City did not have a choice “but to issue the building permit”; the City’s counsel agreed, stating that “[t]hey did issue a building permit because at that time they hadn’t made a decision that there was a reason not to.” R. 24 at 75. These statements are flatly wrong. At the time the building permit was issued, on August 3, 2011, there had already been several well-attended public hearings and meetings, all of them in the City of Green Bay, as part of the federal and state environmental review. The potential environmental impacts including air emissions were thoroughly discussed and vetted at these meetings.

Even if the City claims (implausibly) that it issued the CUP on March 1 thinking that the facility would produce no emissions, the City cannot possibly make the same claim on August 3, when it issued the building permit. At that point, everyone *40 knew, beyond any doubt, that the facility would produce emissions and had a detailed list of those projected emissions, and everyone knew that the facility would have exhaust stacks. Yet no one at the City - not Council members, not Plan Commission members, not staff - ever raised a question about the conformity of the project with the CUP.¹⁶ To the contrary, the City issued the building permit allowing the project to proceed.

The record indisputably shows that the City had information about emissions when it issued the CUP and even more detailed information about emissions when it issued the building permit. Under these circumstances, OSGC had a vested right to proceed with the project. Thus, because the Council’s rescission *41 of the Permit deprived OSGC of a vested right to develop the facility, it acted contrary to law and beyond its jurisdiction, and its decision must be reversed.

II. THE COMMON COUNCIL ACTED ARBITRARILY AND WITHOUT SUBSTANTIAL EVIDENCE.

Plainly, under the *Bettendorf* rule and the vested rights doctrine, the City did not have the legal authority to rescind the CUP.

Next, the City acted arbitrarily and without substantial evidence in rescinding the CUP.

But even if it had had such authority, there was still no basis for its decision. A municipality must base permitting decision on "substantial evidence." *Sills v. Walworth Cnty. Land Mgmt. Comm.*, 2002 WI App 111, ¶ 11, 254 Wis. 2d 538, 648 N.W.2d 878. "Substantial evidence is evidence that is relevant, credible, probative and of a quantum upon which a reasonable fact finder could base a conclusion." *Cornwell Personnel Assocs., Ltd. v. LIRC*, 175 Wis. 2d 537, 544, 499 N.W.2d 705 (Ct. App. 1993). "[S]ubstantial evidence is more than a 'mere scintilla' of evidence and more than 'conjecture and speculation.'" *Gehin v. *42 Wis. Group Ins. Bd.*, 2005 WI 16, ¶ 48, 278 Wis. 2d 111, 692 N.W.2d 572.

Moreover, municipal permitting decisions must be based on reasoned judgment, not arbitrary and unreasonable exercises of political will. *Ottman*, 2011 WI 18, ¶ 35. A proper exercise of discretion "contemplates a reasoning process based on the facts of record 'and a conclusion based on a logical rationale founded upon proper legal standards.'" *Von Arx v. Schwarz*, 185 Wis. 2d 645, 656, 517 N.W.2d 540 (Ct. App. 1994) (quoting *Van Ermen v. DHSS*, 84 Wis. 2d 57, 65, 267 N.W.2d 17 (1978)). Nothing of the sort happened here. Rather, the City's decision to ignore the finding of the Plan Commission and revoke the CUP lacked any basis in evidence and was arbitrary and unreasonable. It must be reversed.

***43 A. OSGC Clearly Informed the City that the Facility Would Produce Emissions That Would Be Subject to DNR Approval.**

The record plainly reveals that, contrary to the City's claim, OSGC did not misrepresent the nature of the facility. The circuit court's conclusion that OSGC made misrepresentations is based on a complete misunderstanding of how the facility is designed to operate. The circuit court made the same fundamental mistake the City Council did: treating the unsupported and inaccurate assertions of the opposition groups as the "substantial evidence" needed to rescind the permit, while ignoring the great bulk of the record that disproves those assertions.

The crux of the City's position is that it thought, based on OSGC's representations about the project, that the facility would produce zero emissions. Even on its face, that position is difficult to credit. After all, this was a facility that was designed to produce electricity using generators that burn gaseous fuel and *44 therefore must release exhaust. Considering only the nature of the facility, then, the City cannot seriously claim that the Council, in March 2011, thought that such a facility would have zero emissions. Moreover, once one actually reviews the statements that OSGC and others made about emissions during the permitting process, the City's position shifts from implausible to completely untenable.

OSGC's statements and discussions regarding emissions during the CUP application process included the following:

- In the written CUP application package, OSGC noted that DNR would need to issue an air permit before construction could begin, and that "application and review of this permit will likely need to address air quality impacts ... as well as emissions of hazardous air toxic compounds ..." R. 25 at 25. It also noted that the Facility would need to report actual air emissions to the DNR on an *45 annual basis, and that DNR would maintain oversight and enforcement responsibility over the Facility's operations. *Id.*

- Also in the written CUP application package, OSGC included a 50-page section titled "Emissions," which provided detailed information on potential air emissions from similar technologies. R. 25 at 26-76.

- At the February 21, 2011 Plan Commission meeting, OSGC's presentation included the statement that the facility would "meet or exceed" federal standards for safety, emissions, and pollutants. R. 26, Audio CD 1 at 21:50. An engineer working for OSGC also stated that the facility's emissions would be "acceptable" and would comply with "EPA/DNR standards." *Id.* at 47:20.

*46 - At the March 1, 2011 Common Council meeting, OSGC's presentation again included the statement that the facility would "meet or exceed" federal standards for safety, emissions, and pollutants. R. 26, Video 1 at 1:11:00.

- Also at the March 1, 2011 Common Council meeting, an OSGC representative stated plainly that "[a]ny 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." *Id.* at 1:14:53.

- Also at the March 1, 2011 Common Council meeting, a Council member pointed out that the facility would have generators

Next

*47 that would produce exhaust; OSGC agreed with this observation. *Id.* at 1:32:18.

Also at the March 1, 2011 Common Council meeting, a member of the public with professional experience in air emissions spoke extensively about his research into potential emissions from the proposed Facility. *Id.* at 1:46:00. He noted that emissions from gasification facilities are generally more favorable than traditional combustion, and that emissions from this facility would likely be very small in comparison to nearby Pulliam coal-fired power plant. *Id.*

Thus, OSGC was abundantly clear in its presentations to the City that there would be air emissions from the facility. Indeed, the circuit court recognized as much, correctly noting that OSGC had stated to the Council that “[t]here are emissions from the system. All emissions will be subject to WDNR and EPA *48 approval.” R. 24 at 88. In light of this record, the City’s claim that it thought it was approving a facility with no emissions simply cannot be true.

Yet the circuit court still somehow concluded that OSGC made a misrepresentation with respect to emissions - in particular with the statement that there are “no emissions during the baking process.” R. 24 at 89. The circuit court explained that it was “satisfied that that may have been a misrepresentation.” But this was not, in fact, a misrepresentation, because the “baking process” - the pyrolysis process that converts the municipal solid waste into gas - takes place in an enclosed chamber and produces no emissions. R. 25 at 231-32, 374-75. In ruling to the contrary, the circuit court simply failed to understand the difference between the pyrolysis/baking process *49 (which does not have emissions), and the electrical generation process, which does produce emissions.¹²

In sum, the City’s purported reason for rescinding the CUP - that OSGC told it there would be no emissions - is not supported by substantial evidence. The other supposed misrepresentations - that the facility would have “no stacks” and would be a “closed system” - are simply variations on the “emissions” theme. Any alleged concern with statements about stacks or closed systems is, at root, a concern over emissions (stacks are only relevant because of what comes out of the stacks; and whether a system is open or closed is only relevant because of what might come out the system).

Nevertheless, to the extent that statements about stacks or closed systems have any independent relevance, there is no substantial evidence to support the City’s determination (or the circuit *50 court’s determination) that they were misrepresentations. OSGC’s consistent message during the CUP application process was that the facility would not have “stacks like those associated with coal-fired power plants.” *E.g.*, R. 26, Audio CD 1 at 22:10 (emphasis added). From any perspective, this is a true statement. The building will be 32 feet tall, R. 25 at 206, and the principal “stacks” (which will emit the exhaust from the generators and will contain pollution control monitoring devices) will be 35 feet above ground level, R. 25 at 342. Thus, the “stacks” will protrude only a few feet above the roof of the structure - hardly the massive towers that one finds on, for example, the nearby Pulliam coal-fired power plant.

Moreover, the fact that OSGC submitted an early rendering of the facility that did not show these minor stacks (which are, in essence, exhaust tailpipes for the generators), is a non-issue. At the time of OSGC’s application, the stack configuration *51 had not yet been developed; it was developed later as part of the DNR air permit process. R. 25 at 286-327. At the Plan Commission hearing on October 3, the City’s Planning Director explained that “it’s not unusual for the staff and the Plan Commission to make a decision on a conditional use permit before we have all the fine details of the project ... [, and] after the C.U.P. is approved, that’s when they typically will go out and hire their architects, do the design work, meet with the DNR in this case, meet with the EPA, DOE, whoever they need to meet with.” R. 25 at 892-893. In sum, the statements regarding stacks do not provide any basis whatsoever, let alone substantial evidence, to find misrepresentation.

Likewise, the allegation that OSGC misrepresented that the facility would be a “closed” or “closed loop” system is entirely unfounded. On repeated occasions, OSGC did explain that the pyrolysis gasification process itself is a “closed” system that *52 does not allow any oxygen to enter. *E.g.*, R. 25 at 153 (“Solid wastes will be heated to temperatures ranging between 800 to 1,200 degrees in the closed loop gasification process.”). In fact, DOE also used the word “closed” to describe the pyrolysis units. R. 25 at 374, 401.

But that is entirely different than saying that the entire facility would be a “closed” system. OSGC never said that, and no one from the City realistically understood that to be the case. The circuit court’s ruling to the contrary - like its ruling with respect to the “no emissions” statement - is based on a fundamental failure to recognize the difference between the pyrolysis

gasification process (which is closed to the atmosphere) and the electrical generation process (which is not). R. 24 at 89-90.

***53 B. The City Arbitrarily Ignored the Unanimous Finding of the Plan Commission that There Was No Misrepresentation.**

The body that the City selected to conduct the investigation and hold a public hearing regarding the CUP was the Plan Commission. To the extent the City felt compelled to address the unfounded allegations of the opposition groups at all, the Plan Commission was an appropriate choice of forum. The Plan Commission was the body that had considered the project in the most detail during the original permitting process, and under the City's ordinances, it is the body specifically designed to investigate and consider land use and zoning questions. The Plan Commission proceeding was publicly noticed, resulting in hundreds of pages of documents and hours of verbal commentary submitted by both proponents and opponents of the project. The hearing culminated in a unanimous decision from all five members of the Commission, who explained their decision at length. Their finding was unequivocal: *54 the City had had sufficient information when it first considered the CUP, and there had been no misrepresentation of the project. R. 26 at 955.

Two weeks later, the Council, without any independent investigation or inquiry, simply ignored the finding of the Plan Commission and voted to rescind the CUP. None of the Council members who voted to rescind the permit attempted to explain or distinguish the finding of the Plan Commission; they simply pretended that it never happened. If any action by a municipality can be characterized as "arbitrary," it is setting up a process in order to answer a particular question, and then, when the answer does not turn out a particular way, simply ignoring the process.

The circuit court, confronted with the Plan Commission's findings and the Council's subsequent rejection of those findings, simply threw up its hands, explaining: "I think what happened *55 in this case is two organizations processing very similar pieces of information came to different conclusions." R. 24 at 80. But that is not at all what happened. Only the Plan Commission conducted a publicly noticed, structured hearing dedicated to investigating the alleged misrepresentations. Only the Plan Commission heard all of the relevant testimony. Only the Plan Commission considered the extensive written submissions of the interested parties. And only the Plan Commission explained its conclusions in a reasoned way. On this record, the circuit court's statement that "the Plan[] Commission ... had no authority to do anything" is perplexing. R. at 80. The Plan Commission had the authority to determine if OSGC had misrepresented the project because the City itself decided to set it up that way.

The record of the subsequent Council meeting makes clear that the Council members considered very little information before *56 reaching their decision. They were provided only with a 24-page excerpt from the transcript of the Plan Commission hearing - the portion of the hearing in which the Commission explained its finding that there was no misrepresentation. R. 26, Video 2, Part 1 at 50:30; 1:31:30. With only the unanimous findings of the Plan Commission before it, it is evident that the Council's decision to revoke the permit was not a "reasoning process based on the facts of record." *Von Arx*, 185 Wis. 2d at 656. Simply put, the Council's revocation of the OSGC permit represented arbitrary political will and not considered judgment. This Court should reverse it.

CONCLUSION

The City's revocation of the CUP represents the sort of arbitrary action that discourages investment for the future. For this reason, and for the others stated in this brief, OSGC asks this Court to reverse the judgment of the circuit court and to reverse the City's October 16, 2012 decision to rescind the CUP.

*57 Dated this 28th day of May, 2013.
GODFREY & KAHN, S.C.

By: _____

Eric J. Wilson

Next

State Bar No. 1047241

Matthew T. Kemp

State Bar No. 1080009

Attorneys for Plaintiffs-Appellants, Oneida Seven Generations Corporation and Green Bay Renewable Energy, LLC

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

Footnotes

- ¹ Though it noted that there would be emissions, the application did not contain any detailed projections of emissions levels from the facility. As is typical, these detailed projections were developed later as part of the DNR air permitting process. R. 25 at 326-327; R. 26 at 892.
- ² The minutes of the February 21, 2011 Plan Commission meeting, on which both the opponents of the project and the City rely heavily, are replete with errors and fail to capture the detail and context of what was said by the Plan Commission and by OSGC representatives. For example, as the circuit court recognized, they attribute to OSGC CEO Kevin Cornelius many statements that were actually made by the engineer working on OSGC's behalf. R. 25 at 164; R. 24 at 92. For another, they label a "Venturi scrubber" (a technical piece of equipment) as a "cherry scrubber." R. 25 at 160.
- ³ The original DNR permit provided that OSGC must install stacks to vent the exhaust from the generators that would be as high as 60 feet above the ground (approximately 30 feet above the building roof). R. 25 at 294. After City staff advised OSGC that local zoning ordinances required the stacks to be no higher than 35 feet, OSGC obtained a revised permit from DNR specifying a stack height of 35 feet (only approximately 3 feet above the building roof). R. 25 at 339, 342, 347. The circuit court apparently misunderstood this reconfiguration of the exhaust stacks as a major redesign of the entire facility. R. 24 at 35. In fact, it was merely a change in the size and shape of the "tailpipe" for the generators; the remainder of the facility's design and operations were unchanged. R. 25 at 339, 342, 347.
- ⁴ DNR conducted this analysis pursuant to Wis. Stat. § 1.11, which requires all state agencies to consider the environmental impacts of proposed agency actions. *See also* Wis. Admin. Code § NR 150.01(1) (noting that the purpose of the environmental analysis process is "to assure governmental consideration of the short- and long-term environmental and economic effects of policies, plans and programs upon the quality of the human environment").
- ⁵ DOE conducted its assessment pursuant to the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321, *et seq.* and Council on Environmental Policy NEPA regulations, 40 C.F.R. Parts 1500-1508. R. 25 at 382.
- ⁶ That belief is simply not credible, as explained in more detail in Section II, *infra*.
- ⁷ Whether the City illegally rescinded the CUP based on an implied condition is a question of law, on which this Court owes no deference to the City or the circuit court. *See Ottman*, 2011 WI 18, ¶ 54.

Next

- ⁸ For example, an OSGC representative told the Common Council on March 1, 2011: “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.” R. 26, Video 1 at 1:14:53; *see also* Section II, *infra*.
- ⁹ The circuit court ruled that *Bettendorf* did not apply but did not explain its holding, stating only that “I am not satisfied that the City has proceeded in a way that would suggest the addition of terms or implied terms. I’m not satisfied that is the basis upon which the theory proceeds today.” R. 24 at 77.
- ¹⁰ The City’s building code provides that the Building Inspector shall issue building permits “[i]f the application, plans, and specifications conform to the requirements of this chapter and to all other laws or ordinances applicable thereto[.]” Green Bay Municipal Code § 15.05(8)(a). Plainly, the City had the authority to reject the building permit if it believed that the CUP was invalid.
- ¹¹ This same engineer’s statement that there would not be any chemicals because they would be “scrubbed out” has been repeatedly trumpeted by the project’s opponents as a misrepresentation. In the context of his entire exchange with the Plan Commission, however, his message is clear: the emissions from the facility will be acceptable according to state and federal environmental standards. He said during the same exchange: “the emissions that will be going out will be acceptable” and “under EPA/DNR standards.” R. 26, Audio CD 1 at 47:20; R. 25 at 164. The engineer also specifically noted that there would be dioxin emissions. R. 26, Audio CD 1 at 43:55; R. 25 at 164. Moreover, the commissioner with whom this exchange occurred (Alderman Wiezbiskie) concluded that he had not been misled and that there had been no misrepresentation. R. 955. As a member of the Council, he voted to uphold the CUP, telling his fellow council members: “We were not duped.” R. 26, Video 2 at 20:50.
- ¹² OSGC’s counsel also took care to point out this distinction to the circuit court during oral argument. R. 24 at 90.