RECEIVED
10-20-2014
CLERK OF SUPREME COURT
OF WISCONSIN

STATE OF WISCONSIN
SUPREME COURT

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

Plaintiffs-Appellants,

v.

CITY OF GREEN BAY,

Defendant-Respondent-Petitioner.

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

On a Petition for Review from a Decision of the Wisconsin Court of Appeals, District III, Reversing an Order of the Circuit Court for Brown County, the Honorable Marc A. Hammer, Presiding

BRIEF OF DEFENDANT-RESPONDENT-PETITIONER CITY OF GREEN BAY

Ted A. Warpinski (SBN: 1018812)
S. Todd Farris (SBN: 1006554)
Christopher M. Meuler (SBN: 1037971)
Joseph M. Peltz (SBN: 1061442)
FRIEBERT, FINERTY & ST. JOHN, S.C.
Two Plaza East – Suite 1250
330 East Kilbourn Avenue
Milwaukee, WI 53202
Phone: (414) 271-0130
Fax: (414) 272-8191

Attorneys for Defendant-Respondent-Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Ordinances

Jury Instruction

Miscellaneous

INTRODUCTION

This case involves a challenge to the City of Green Bay's ("City") revocation of a conditional use permit ("CUP") after the City's Common Council determined that the applicant had misrepresented material information during the application process. In February 2011, the Oneida Seven Generations Corporation ("OSGC") applied for a CUP for a waste-to-energy facility ("Facility"). As part of the application process, OSGC made representations regarding the Facility, including that the Facility's emissions would contain no hazardous materials, that the Facility would not include stacks, that the by-product of the Facility could be used for organic farming, and that the Facility's technology was proven and in use elsewhere. The City Plan Commission recommended approval and, in March 2011, the Common Council approved a CUP.

Subsequently, OSGC sought the requisite approvals for the Facility from State and Federal agencies. As greater details emerged from these applications, local residents began to voice concerns that OSGC had misrepresented the viability and impacts of the Facility when it applied for the CUP. These concerns were presented to the Common Council at its April 10, 2012 meeting. The Common Council voted to conduct a further

hearing in order to investigate the allegations. The Plan Commission scheduled a public hearing for October 3, 2012.

Prior to the hearing, the Plan Commission accepted written comments from the public. At the hearing on October 3, 2012, members of the public voiced concerns regarding the differences between the project that OSGC described at the public hearings during the original CUP process and the project that OSGC later submitted to State and Federal agencies for approval. OSGC representatives defended the Plan Commission's original recommendation by essentially pointing to other parts of the record that they believed further explained the prior representations. At the end of the public hearing, the Plan Commission recommended that the CUP not be revoked − concluding that the original information presented to it had been adequate to support its recommendation to approve the CUP.

At its meeting on October 16, 2012, the Common Council heard comments from the public both in support of and opposed to the Plan Commission's recommendation. By a vote of 7-5, the Common Council rejected the Plan Commission recommendation and then by the same

margin voted to revoke the CUP after concluding that material misstatements had been made as part of the application process.

OSGC sought certiorari review claiming that the City's decision was arbitrary and not supported by substantial evidence. The Circuit Court held that substantial evidence supported the Council's conclusion. However, in an unpublished, *per curiam* decision ("*Decision*"), the Court of Appeals reversed, finding that (1) the City's decision was arbitrary because it did not adequately explain its reasoning for rejecting the Plan Commission's recommendation, and (2) substantial evidence did not exist to support the Common Council's conclusion that material misstatements had been made during the application process.

The facts in the matter at bar present unique questions with respect to "substantial evidence" jurisprudence and the role of the courts in reviewing a municipality's reliance on representations at a public hearing for its decision to revoke a CUP. The record here unequivocally demonstrates that material misstatements were made by representatives of OSGC at public hearings prior to the CUP's initial approval. The record can also be read, if one searches other parts of the record (including

OSGC's voluminous written submission), to demonstrate that there is evidence arguably clarifying those misstatements.

The "substantial evidence" test that was applied by the Court of Appeals involved searching the record for evidence that conflicted with or arguably explained in further detail the statements made by OSGC representatives at public hearings. The Court of Appeals then relied on this evidence when it held that substantial evidence did not exist to support the City's decision. The Common Council, however, acted within its discretion in determining that OSGC representatives had made material misstatements during the application process. The Court of Appeals' application of the "substantial evidence" test goes too far, whether for a permit revocation situation or otherwise. Ultimately, this was a judgment call that the Council was entitled to make and it is one that should not be disturbed by the courts. The *Decision* of the Court of Appeals must be reversed.

ISSUES PRESENTED FOR REVIEW

The Supreme Court granted review of the following issues:

1. Under precedent establishing certiorari review standards, should the Court of Appeals have remanded the case back to the City once it concluded that the City failed to sufficiently articulate the rationale for its decision?

The Circuit Court upheld the City's decision as properly made. The Court of Appeals concluded that the City's revocation decision was arbitrary because it did not articulate the rationale for its decision, but it did not remand for further proceedings. Instead, the Court of Appeals examined the record and rendered its own assessment of the evidence.

2. Did the Court of Appeals' "substantial evidence" review conflict with controlling decisions of this Court addressing the substantial evidence standard to be applied in certiorari actions by substituting its judgment for that of the City and equating the substantial evidence standard with the great weight and clear preponderance of the evidence standard?

The Circuit Court concluded that substantial evidence supported the City's revocation decision. The Court of Appeals

searched the record for evidence purporting to explain or clarify the false and misleading statements made by OSGC and thereby substituted its judgment for that of the City and equated the substantial evidence standard with the great weight and clear preponderance of the evidence standard.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is appropriate and requested, consistent with the Court's standard procedure. Publication is appropriate to guide lower courts as to the type and amount of evidence needed to support a municipality's decision revoking a conditional use permit after finding material misstatements were made during the application process.

STATEMENT OF THE CASE

I. NATURE AND PROCEDURAL STATUS OF THE CASE.

The *per curiam* decision of the Court of Appeals, District III, reversed the Order of the Brown County Circuit Court, the Honorable Marc A. Hammer presiding, which affirmed the decision of the Defendant-Respondent-Petitioner City of Green Bay rescinding a CUP allowing for Plaintiff-Appellant Oneida Seven Generations Corporation to site a solid waste disposal facility at 1230 Hurlbut Street. The Court of Appeals weighed the evidence in the record and held that the Common Council's revocation decision was arbitrary and without substantial evidence. On September 18, 2014, this Court granted the City's Petition for Review.

II. STATEMENT OF RELEVANT FACTS.

A. OSGC's Representations to the City During the CUP Application Process.

On February 4, 2011, OSGC submitted an application for a CUP to operate a solid waste disposal facility at 1230 Hurlbut Street. (R.25, 1-152.) The application materials indicated that the Facility would use municipal solid waste to generate electricity. (R.25, 153-54.)

1. Plan Commission Hearing

On February 21, 2011, the City's Plan Commission held a hearing to address the CUP application. (R.25, 157-68; R.26, AUDIO 1.) Kevin Cornelius, CEO of OSGC, and Pete King, the Project Manager, presented OSGC's proposal. (R.25, 160; R.26, AUDIO 1 at 18:27-23:20.) Plan Commission members directed a number of questions to Mr. Cornelius and Mr. King regarding the Facility and its proposed operations. (R.25, 160-65; R.26, AUDIO 1 at 23:20-48:49.) In response to a question from a member of the Plan Commission regarding whether hazardous materials would be left over when the gasification process is complete, the record indicates that OSGC representatives stated as follows:

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

(R.25, 160-61; R.26, AUDIO 1 at 23:20-24:37) (emphasis supplied.)

In response to a question from the Plan Commission regarding whether any other local communities were using this technology, the record indicates that OSGC representatives stated as follows:

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

(R.25, 162; R.26, AUDIO 1 at 33:12-33:39) (emphasis supplied.)

In response to a request for clarification from the Plan Commission regarding the activities to be carried out at the proposed Facility, the record indicates that OSGC representatives stated as follows:

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

(R.25, 163-64; R.26, AUDIO 1 at 42:27-44:20) (emphasis supplied.)

The Plan Commission asked about certain emissions from other facilities that were referenced in the CUP application, such as hydrogen chloride, nitrogen oxide, sulfur dioxide, mercury, and dioxins. OSGC representatives stated as follows:

> [OSGC representatives] stated ***this is all taken out in the process***. It's all scrubbed out. A lot of this stuff is destroyed when it goes through the energy process at the end.
>
> ***
>
> [OSGC representatives] stated from 2002-2009 there was a study done in this area and regarding municipal waste and in that time period they could not find a lot of these things. But in these reports it is stating other

> sources are possible ***but in this plant there will be none***. It will always be under the DNR standards.
>
> ***
>
> [OSGC representatives] stated the emissions that will be going out will be acceptable and ***there will not be any chemicals***.

(R.25, 164; R.26, AUDIO 1 at 44:34-45:35, 47:18-48:49) (emphasis supplied.)

After the Plan Commission's questions were addressed by Mr. Cornelius and Mr. King, a motion was made to recommend approval of the CUP application subject to a number of conditions and the motion carried unanimously. (R.25, 166.)

2. Common Council Meeting

At its March 1, 2011 meeting, the Common Council considered the Plan Commission's recommendation. (R.25, 169-97; R.26, VIDEO 1 at 57:13-2:08:32.) According to the record, Mr. Cornelius and Mr. King gave a presentation to the Common Council that was similar to the one given to the Plan Commission. (R.25, 172; R.26, VIDEO 1 at 1:10:25-1:19:52.) Mr. Cornelius and Mr. King also answered questions from the Common Council. (R.25, 172; R.26, VIDEO 1 at 1:19:52-1:34:35.) The Common Council then voted to approve the CUP as recommended by the Plan Commission. (R.25, 172, 198-99.)

B. The City's Decision to Rescind the CUP.

OSGC applied for permits from the Wisconsin Department of Natural Resources ("WDNR") and the Department of Energy ("DOE") during the summer of 2011, and a groundswell of opposition by residents and environmental groups developed as more detailed information about the project became available. Ultimately, citizens reviewed the information presented to the City and assembled evidence they believed demonstrated that OSGC's application materials and statements at the public hearings regarding the CUP materially misrepresented critical facts about the Facility.

This evidence was presented to the Common Council at its April 10, 2012 meeting, and the Common Council voted 9 to 2 to hold a public hearing to further investigate the allegations. (R.25, 210.) The public hearing was scheduled for October 3, 2012 before the Plan Commission. (R.26, 956-57.)

In advance of the October 3, 2012 hearing, the Plan Commission accepted written comments from the public. (R.26, 571-712.) For example, a letter dated September 26, 2012 submitted by Midwest

Environmental Advocates ("MEA"), on behalf of Clean Water Action Council of Northeast Wisconsin ("CWAC"), provided in part:

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

(R.26, 584.)

The MEA letter also identified some of the specific misrepresentations it asserted were made by OSGC:

- The Facility's proponents represented that the Facility was a closed loop system, with no hazardous materials, no stacks,

no odors, and no emissions. Indeed, the CUP application and site drawings submitted to the Plan Commission showed no stacks, vents, or chimneys, nor any indication that there were toxic air pollutants that would have to be released high into the sky in order to disperse them widely enough to meet air quality requirements. (R.26, 585-86.)[1]

- When questions were raised about information in the applicant's reports that showed emissions from waste to energy plants, the representation was made that in the proposed Facility, there would not be any chemical emissions. (R.26, 586.)
- Contrary to the representations of a closed loop system of no chemicals, of no emissions, of no stacks or chimneys, and of chemical-free, organic-quality solid waste residues, the Facility actually was designed to have 10 stacks and chimneys, as high as 60 feet above ground, and to have toxic chemical residues in its solid waste and to release a list of hazardous air pollutants into the City's air. (R.26, 587.)

[1] Additionally, at the March 1, 2011 Common Council meeting, OSGC's PowerPoint presentation showed a site drawing with no stacks. (R.26, VIDEO 1 at 1:18:14-48.)

The letter concluded:

> Stacks were going to be needed as part of the facility – contrary to the representations. They are needed to disperse hazardous air pollutants that Mr. Cornelius denied would even be emitted from the facility. Contrary to his representations to this Commission that the solid waste residue would be of organic quality and that there would be "no chemicals," the solid waste residue will contain toxic substances, and there will be hazardous chemical air emissions from the facility. Those are all material facts for the Commission in considering whether an exception from the City's ordinances satisfies the public health, safety and general welfare.

(R.26, 588.)

Another written comment submitted by a member of the public asserted similar misrepresentations made by OSGC:

- Stacks were omitted from the renderings OSGC submitted to the City with its application. (R.26, 648-51.)
- OSGC represented that there would be no emissions because they would be "scrubbed out" when in reality the Facility would release substantial emissions. (R.26, 665-70.)
- OSGC represented that the Facility's technology was proven when in reality the Facility would have been the first commercial, permitted pyrolysis gasification facility for municipal solid waste in the world. (R.26, 674-76.)

At the public hearing, a number of people spoke about the misrepresentations they believed had been made by OSGC during the CUP application process. (App. 127-315, R.26, 716-947.) OSGC representatives responded that they believed there were no misrepresentations and, similar to the Court of Appeals, they pointed to other parts of OSGC's original written submission that they believed explained the disputed representations. The Plan Commission ultimately concluded that the information initially submitted and presented to it had been adequate for it to make an informed decision on whether or not to recommend granting the CUP. (App. 294-315, R.26, 883-904; R.26, 955.)

At a meeting on October 16, 2012, the Common Council addressed the Plan Commission's October 3, 2012 recommendation. (App. 121-126, R.26, 952-57; App. Attachment, R.26, VIDEO 2 at Part 1 38:38-Part 2 39:33.) After public comments both for and against adopting the Plan Commission report, a vote was taken on a motion to adopt the report of the Plan Commission. (App. 126, R.26, 957; App. Attachment, R.26, VIDEO 2 at Part 2 15:20-37:41.) The motion failed by a vote of 5 to 7. (App. 126, R.26, 957; App. Attachment, R.26, VIDEO 2 at Part 2 37:08-37:41.) At

that same meeting, a vote was taken on a motion to declare the CUP void based upon the following conclusions:

- Kevin Cornelius, CEO of OSGC, made untruthful statements before City governmental bodies while seeking the CUP. These false statements were made in response to questions or concerns related to the public safety and health aspect of the project and the project's impact upon the City's environment.
- Mr. Cornelius' statements were plain spoken, contained no equivocation, left no impression of doubt or uncertainty, and his words were intended to influence the actions of the governmental bodies he was addressing.
- Mr. Cornelius knew his statements were false. Mr. Cornelius was not a new or uninformed member of OSGC; he was the CEO and had been involved throughout the project's development; therefore, he was knowledgeable about the pilot work, the process and the equipment, the materials that would be used, the nature of the by-products and chemical releases. Mr. Cornelius understood his role he accepted as spokesperson for OSGC for the project. He did not say "I

don't know" or "I can't answer that" when questions were put to him.

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

(App. Attachment, R.26, VIDEO 2 at Part 1 40:44-43:52, Part 2 37:41-39:33.)

After some discussion both for and against, this motion passed by a vote of 7 to 5. (App. 126, R.26, 957; App. Attachment, R.26, VIDEO 2 at Part 2 37:41-39:33.)[2] On November 1, 2012, the City Attorney sent a letter

[2] In its *Decision*, the Court of Appeals suggests that there was no discussion on the motion. (*See* App. 6-7, *Decision* at ¶ 14.) The Court of Appeals further suggests that the City Attorney's letter to OSGC sent after the City voted to rescind the CUP was the first time that the City attempted to explain the rationale for its decision. (*See* App. 7, *Decision* at ¶ 15.) The Court of Appeals' account of these events is inaccurate. Indeed when the motion to rescind the CUP was made, a member of the Common Council

to OSGC confirming that the Common Council voted to void the CUP issued for the Facility at 1230 Hurlbut Street. (R.26, 950-51.)

C. OSGC Files a Certiorari Action and the Circuit Court Affirms the Common Council's Revocation Decision.

On November 14, 2012, OSGC filed an action for certiorari review. (R.1-2.) At a hearing on January 9, 2013, the Circuit Court held that there was substantial evidence to support the City's decision to rescind the CUP. (App. 23-120, R.24.) Specifically with respect to OSGC's representation that no hazardous materials would be emitted from the Facility, the Circuit Court found:

> I have looked at the [Plan] Commission meeting minutes, which are in the record at 160 through 166. That portion is what I pulled. I understand what you're saying. I can't find any provision in the minutes that talk about an analysis at that stage as to this action and its impact on public health, safety or general welfare.
>
> And, quite frankly, I would be surprised if it were there, Mr. Wilson, because Mr. Cornelius indicated that there would be no hazardous material produced by this facility, and if there's no hazardous material produced by the facility, there wouldn't be concern regarding endangerment of public health, safety or general welfare. I wouldn't worry about that if I were a member of a body when someone says there's nothing hazardous to produce.

---

articulated the same reasons for rescission that were subsequently set forth in the City Attorney's letter to OSGC notifying it that the CUP had been rescinded. (App. Attachment, R.26, VIDEO 2 at Part 1 40:44-43:52, Part 2 37:41-39:33.)

> Mr. Cornelius says to the Planning Commission that this scrubber takes away any kind of harmful toxin that might be in the gas and the rest is burned as natural gas. And so I think there's a reasonable implication from those comments that there [are not] any toxins. It couldn't endanger the public health.

(App. 37-41, R.24, 15:23-19:4.)

With respect to OSGC's representation that the Facility would not have any stacks, the Circuit Court found:

> The PowerPoint said there will be no smokestacks such as those associated with coal-fired plants. This is at the first City Council meeting in March of 2011. That's not what Cornelius said. Cornelius said the following. Cornelius said there are no smokestacks. Obviously, the system has to be pretty safe, pretty clean for that to happen. And in the CUP, as you and I both know, there's drawings that do not indicate any type of smokestacks. In fact – and you know this. I'm not telling you anything you don't know.
>
> The record at 21-122-23 shows a flat roof warehouse building, which I think would lead any reasonable person to believe there are no smokestacks because it's a completely closed loop process. Nothing is going to come out of that building. There would be nothing – there would be nothing to associate a smokestack with.

(App. 51-52, R.24, 29:16-30:7.)

Ultimately, the Circuit Court concluded that the Common Council's revocation decision was not arbitrary and was supported by substantial evidence:

> Based upon my review of the record, I am satisfied that there was substantial evidence that the City had when it took its action to rescind the CUP. I'm satisfied based

on my review that at the meeting upon which the [Common] Council approved the CUP, Mr. Cornelius made representations. I placed some of those representations on the record and they are in the videotape.

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

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

I don't think that the City was accurately and fully [apprised]. If anything, there is inconsistency, but to be frank, I think there was a misrepresentation.

The Seven Generations Group, plaintiff, makes argument that no deference should be given to the Common Council because they did not consider the evidence that the Planning Commission had considered. I don't find that argument persuasive. The Planning Commission has no authority but to recommend the issuance of a Conditional Use Permit. That is where their authority ends.

The fact that the City of Green Bay Common Council referred the matter back to the Planning Commission for further evaluation or analysis in no way limits or compromises the ability and really the obligation of the City of Green Bay to independently asses the information it has, the information it had, and made a reasoned decision based on its judgment and not on its will.

I don't know why, quite frankly, the City of Green Bay sent this matter back to the Planning Commission because they simply had no authority to do anything. But, they're simply not bound by that decision, and, quite frankly, I think what happened in this case is two

> organizations processing very similar pieces of information came to different conclusions. That doesn't mean either one of them is right.
>
> What it means, quite frankly, is that two individuals can come up with differing conclusions and both of them are equally plausible, and the question is whether or not it's reasonable? It's based on the substantial evidence.
>
> I'm satisfied that the City's action was based on substantial evidence. I'm not bound by the Planning Commission's findings and neither is the City of Green Bay Common Council.
>
> Seven Generation argues that they simply did not make representations that they told the Common Council there would be emissions, that it was unreasonable for the Common Council to assume no exhaust vents as part of the smokestack, and that the system was, in fact, closed.
>
> I'm satisfied that the Planning Commission initially and the Common Council subsequently were left to believe there would not be the type and nature of the emissions that ultimately were identified and approved by the DNR. And I base that simply on the comments that I placed on this record, the representations made in PowerPoint, the representations made by representatives of Seven Generation to the Planning Commission initially and to the City Council repeatedly.

(App. 100-103, R.24, 78:14-81:18 (emphasis supplied); *see also* App. 110-113, R.24, 88:5-91:25 (Circuit Court identifies additional and specific misrepresentations made by OSGC such as that the byproduct from the Facility can be used for organic farming).)

D. The Court of Appeals Reverses the Circuit Court's Decision.

In an unpublished, *per curiam* decision, the Court of Appeals reversed the Circuit Court. According to the Court of Appeals, the Common Council acted arbitrarily and without substantial evidence of misrepresentations. (App. 1-2, *Decision* at ¶ 1.)

The Court of Appeals concluded that the Common Council did not sufficiently explain why it rejected the Plan Commission's recommendation and that it did not articulate any rationale for its revocation decision. (App. 11-14, *Decision* at ¶¶ 23-27.) As previously noted, this was not the case as the motion to rescind set forth the rationale for the revocation decision.[3] However, rather than remanding to the Common Council for the Common Council to correct the errors perceived by the Court of Appeals, *i.e.*, to further explain why it rejected the Plan Commission's recommendation and to articulate its rationale for its revocation decision, the Court of Appeals searched the record to determine if there was substantial evidence of misrepresentations made by OSGC.

The Court of Appeals reviewed the same record as the Circuit Court but came up with a different conclusion. Whereas the Circuit Court

[3] *See* footnote 2, *supra*.

essentially concluded that reasonable minds could differ on whether material misstatements had been made but that substantial evidence existed of the representations at issue, the Court of Appeals looked for information in OSGC's original written submissions that the Court of Appeals believed explained or clarified statements made at public hearings. In other words, though purporting to apply the substantial evidence standard, the Court of Appeals weighed the evidence and substituted its judgment for that of the Common Council. (App. 15-21, *Decision* at ¶¶ 30-43.)

E. This Court Grants the City's Petition for Review.

On April 24, 2014, the City filed a Petition for Review with this Court seeking review of the Court of Appeals' *Decision*. On September 18, 2014, this Court granted the City's Petition for Review.

STANDARD OF REVIEW

When conducting statutory certiorari judicial review, an appellate court reviews the lower court's ruling *de novo*. *Kapischke v. County of Walworth*, 226 Wis. 2d 320, 327, 595 N.W.2d 42 (Ct. App. 1999). A court's review in a certiorari action is based on the record that developed before the municipality and is limited to the following: (1) whether the municipality kept within its jurisdiction; (2) whether it proceeded on a

correct theory of law; (3) whether its action was arbitrary, oppressive, or unreasonable and represented its will and not its judgment; and (4) whether the evidence was such that it might reasonably make the order or determination in question. *Ottman v. Town of Primrose*, 2011 WI 18, ¶ 35, 332 Wis. 2d 3, 796 N.W.2d 411.

"Wisconsin courts have repeatedly stated that on certiorari review, there is a presumption of correctness and validity to a municipality's decision." *Id*. at ¶ 48; *Lamar Cent. Outdoor, Inc. v. Bd. of Zoning Appeals of City of Milwaukee*, 2005 WI 117, ¶ 16, 284 Wis. 2d 1, 700 N.W.2d 87; *State ex rel. Ziervogel v. Washington County Bd. of Adjustment*, 2004 WI 23, ¶ 13, 269 Wis. 2d 549, 676 N.W.2d 401; *Herman v. County of Walworth*, 2005 WI App 185, ¶ 9, 286 Wis. 2d 449, 703 N.W.2d 720. More plainly, "[o]n certiorari review, the petitioner bears the burden to overcome the presumption of correctness." *Ottman*, 2011 WI 18, ¶ 50.

ARGUMENT

I. THE CITY'S DECISION TO GRANT, DENY OR REVOKE A CUP IS DISCRETIONARY.

As an initial matter, case law from this State and from other jurisdictions confirms that municipalities maintain discretion in its permitting decisions. They have the authority to revoke a CUP when the

permit is granted based upon material misstatements. This principle is well-accepted as a legal matter and is good policy.

A. A Municipality Has Substantial Discretion to Grant or Deny a CUP Application.

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

> In general, zoning ordinances provide landowners with permitted uses, which allow a landowner to use his or her land, in said manner, as of right…. In addition to permitted uses, ordinances may also provide for conditional uses by virtue of a special use or conditional use permit. A conditional use, however, is different than a permitted use. While a permitted use is as of right, a conditional use does not provide that certainty with respect to land use. ***Conditional uses are for those particular uses that a community recognizes as desirable or necessary but which the community will sanction only in a controlled manner.***
>
> A conditional use permit allows a property owner to put his property to a use which the ordinance expressly permits when certain conditions or standards have been met. The degree of specificity of these standards may vary from ordinance to ordinance.
>
> ***
>
> Allowing for conditional uses, in addition to permitted uses as of right, makes sense when one considers the purpose of the conditional use permit. First, conditional uses are flexibility devices, which are designed to cope with situations where a particular use, although not inherently inconsistent with the use classification of a particular zone, may well create special problems and hazards if allowed to develop and locate as a matter of right in a particular zone.

> Second, conditional use permits are appropriate for certain uses, considered by the local legislative body to be essential or desirable for the welfare of the community ..., but not at every or any location ... or without conditions being imposed... Thus, those uses subject to a conditional use permit are necessary to the community, but because they often represent uses that may be problematic, ***their development is best governed more closely rather than as of right.***

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

The City's Ordinances define a conditional use as a use "which, because of its unique characteristics, cannot be properly classified in a particular district or districts without consideration in each case of the impact of [the] use[] upon neighboring land and of the public need for the particular use at the particular location." §§ 13-302, 13-205(a), City of Green Bay Municipal Code ("Code"). In order to obtain a CUP, a property owner or resident wishing to receive a CUP must file an application with the Planning Department. § 13-205(c)(1), Code. After review and consideration of the application by the Plan Commission, the Plan Commission must forward its recommendation to the Common Council.[4] §

[4] The Ordinances demonstrate unequivocally that the Plan Commission's recommendation is not binding on the Common Council. The recommendation is simply that – a nonbinding recommendation. The Plan Commission's recommendation to the Common Council that the information initially submitted and presented by OSGC was adequate for it to make an informed decision whether or not to recommend granting the CUP was therefore only a non-binding recommendation.

13-205(c)(3), Code. For each requested conditional use, the Plan Commission must report to the Common Council its findings and recommendations. § 13-205(d), Code. Conditional use approval may be recommended by the Plan Commission with reasonable consideration of the following:

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

§ 13-205(e), Code.

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

The City, therefore, had substantial discretion to grant or deny the original CUP application. In other words, based on the information originally provided to it by OSGC, the City had the authority to deny the CUP for any number of reasons, including, for example, a concern that the project might be detrimental to health or the general welfare, or might otherwise be injurious to the use of other property. Had the City originally denied the CUP, OSGC would have been hard-pressed to argue that the City had abused its discretion.

B. A Municipality Has the Discretion to Revoke a CUP When the Permit Was Granted Based Upon Material Misstatements.

The Court of Appeals in its *Decision* correctly presumed that "a municipality possesses the authority to revoke a CUP based on misrepresentations made during the permit process." (App. 9, *Decision* at ¶ 18.) The Court of Appeals further recognized that "[t]he decision to revoke a CUP, like the decision to grant one, involves the exercise of a municipality's discretion." (App. 10, *Decision* at ¶ 20) (citing *Roberts*, 2006 WI App 169, ¶ 10). Additional authorities confirm the point:

- Where a party "did not act in good faith in obtaining the permit," he or she does not possess a vested right to insist upon the validity of the permit. *Jelinski v. Eggers*, 34 Wis. 2d 85, 93, 148 N.W.2d 750 (1967).
- "The rights of a permittee are protected only if the permit has been secured and the expenses have been incurred in good faith, and there has been no fraud or deceit or other fault on the part of the applicant." 101A C.J.S. Zoning & Land Planning § 291.

- In *Edling v. Insanti County*, 2006 WL 1806397 (Minn. Ct. App. July 3, 2006) (unpublished), the Minnesota Court of Appeals affirmed a municipality's decision to rescind a CUP because of misrepresentations made by the applicant during the conditional use application process.
- In *Lauer v. Pierce County*, 267 P.3d 988 (Wash. 2011), the Supreme Court of Washington held that the defendants' rights did not vest because their building application contained misrepresentations of material fact.

The Court of Appeals' conclusion that a municipality possesses the authority to revoke a CUP based on misrepresentations made during the permit process is good policy. An applicant has no vested right in a permit that was approved based upon material misstatements that were made during the approval process. In this case, the City properly exercised its discretion when it revoked the permit.

II. THE COURT OF APPEALS' *DECISION* SHOULD BE REVERSED BECAUSE ONCE IT CAME TO THE ERRONEOUS CONCLUSION THAT THE CITY HAD FAILED TO ARTICULATE A RATIONALE FOR REVOCATION, THE COURT OF APPEALS WAS REQUIRED TO REMAND FOR FURTHER PROCEEDINGS.

According to the Court of Appeals, the Common Council failed "to articulate any rationale for its revocation decision," (App. 12, *Decision* at ¶ 24,) and the Common Council's findings fail to "identify the supposedly false statements with specificity." (App. 12, *Decision* at ¶ 24.) The Court of Appeals concluded that based on these alleged deficiencies, it could not "trace the City's reasoning because it prematurely stops." (App. 13-14, *Decision* at ¶ 27.) It is difficult to reconcile this statement with the Court of Appeals' subsequent effort to search the record for "substantial evidence"; nevertheless, once it made this finding the Court of Appeals was bound by established precedent to remand the matter. For this reason alone, the Court of Appeals' *Decision* should be reversed.

In certiorari proceedings, where there is a finding that a decision-making body failed to adequately explain the rationale for its decision, this Court has consistently required remand to afford municipalities and administrative agencies the opportunity to better explain the rationale for

their decisions. For example, in *Transamerica Ins. Co. v. DILHR*, 54 Wis. 2d 272, 285, 195 N.W.2d 656 (1972), this Court stated as follows:

> Trial courts can be expected to reverse department findings and remand for the completion of the record whenever the department rejects the findings of its examiner and makes its own findings involving credibility of witnesses and fails to accompany such reversal and making of its own findings with an opinion stating why it has rejected the facts found by the examiner and why it has made its own and different findings of fact.

Similarly, in *Connecticut Gen. Life Ins. Co. v. DILHR*, 86 Wis. 2d 393, 405, 273 N.W.2d 206 (1979), this Court stated as follows:

> Nonetheless, sec 227.10 (and its predecessor sec. 227.13) has been interpreted to require remand when an administrative body has omitted necessary factual findings or when the factual basis of the decision is otherwise uncertain and unclear in cases where the evidence in the record is inconclusive or totally lacking, thus making it impossible for the court to supply the necessary findings on review.

Additionally, in a more recent decision, this Court in *Lamar Central Outdoor*, 2005 WI 117, ¶ 39, stated as follows:

> We conclude that the Board did not satisfactorily express its reasons for denying Lamar's application. Our remand will allow the Board to reconsider the facts in the wake of *Ziervogel* and *Waushara County*. We caution that we believe the Board – with or without attorneys – can do a far better job of expressing its reasoning on the record. The Board must allow for meaningful certiorari review by stating the "grounds" for its decision – the reasons that Lamar's application does or does not fit the statutory criteria.

See also Voight v. Washington Island Ferry Line, Inc., 79 Wis. 2d 333, 344, 255 N.W.2d 545 (1977) (remanding to allow the commission to explain its reasoning rather than speculating about the commission's rationale); *City of Appleton v. DILHR*, 67 Wis. 2d 162, 172, 226 N.W.2d 497 (1975) (remanding to allow the commission to set forth reasons, facts, and ultimate conclusions relied upon in rejecting the recommendations of the examiner).

The matter at hand is a certiorari proceeding and the Court of Appeals should have remanded in accordance with the established precedent once it found that the record or the reason for the City's decision was unclear. Instead, the Court of Appeals proceeded to set forth what it understood the City's concerns to be and then discounted them. For example, the Court of Appeals found:

> To the extent the City contends Seven Generations lied about the suitability of the char byproduct for re-use, the DNR's environmental analysis states that the char would be landfilled or, if acceptable, "re-used as a beneficial product subject to DNR approval. The char may be suitable for beneficial use as concrete additives, flowable fill material, and aggregate for sub-base of roads and stabilization for landfill cover if it meets certain waste characteristics." ***Again, we perceive no actionable misrepresentations, and the City's reasoning for deeming these statements false is unclear.***

(App. 16, *Decision* at ¶ 32) (emphasis supplied.)

In this regard, the record is clear that OSGC represented that the byproducts from the Facility would contain no hazardous substances and could be used for organic farming. (R.25, 163-64; R.26, AUDIO 1 at 42:27-44:20.) The Court of Appeals, however, focused on whether the byproducts could be used for concrete additives for roads.

Similarly, OSGC expressly represented that the Facility would not emit "hazardous materials." (R.25, 160-61; R.26, AUDIO 1 at 23:20-24:37.) The Court of Appeals, however, focused instead on "exhaust" emitted from the Facility. Exhaust is certainly different than the emission of hazardous materials. The Court of Appeals then dismissed the Common Council's conclusion that a misrepresentation was made:

> The City's assertion that Seven Generations promised the facility would produce "no emissions" is wholly unsupported by the record and is unreasonable. Any reasonable person understands that internal combustion engines like those required during the final energy-production stages will produce exhaust.
>
> ***
>
> No reasonable person could conclude, based on Seven Generations' statements, that there would be absolutely no emissions from the facility.

(App. 16-17, *Decision* at ¶¶ 33-34.)

If this Court agrees with the Court of Appeals' *Decision* that the City failed to adequately articulate its revocation decision, then the case should be remanded to the Common Council to allow the Common Council to

explain in more detail why it rejected the Plan Commission's recommendation and its rationale for its revocation decision.

III. IN ADDITION, THE COURT OF APPEALS' *DECISION* SHOULD BE REVERSED BECAUSE SUBSTANTIAL EVIDENCE SUPPORTS THE CITY'S REVOCATION DECISION AND THE COURT OF APPEALS INCORRECTLY SUBSTITUTED ITS JUDGMENT FOR THE COUNCIL.

"Substantial evidence means credible, relevant and probative evidence upon which reasonable persons could rely to reach a decision." *Sills v. Walworth County Land Mgmt. Comm.*, 2002 WI App 111, ¶ 11, 254 Wis. 2d 538, 648 N.W.2d 878. It has also been defined as "that quantity and quality of evidence which a reasonable [person] could accept as adequate to support a conclusion." *DeGayner & Co. Inc. v. DNR*, 70 Wis. 2d 936, 940, 236 N.W.2d 217 (1975). The record is replete with "substantial evidence" to support revoking (or sustaining) the permit, much of it articulated by the Circuit Court in its decision upholding the revocation decision.

In reversing the Circuit Court's decision, the Court of Appeals basically concluded that substantial evidence did not exist because it searched the record and found evidence that might provide an explanation for the false and misleading statements ostensibly relied upon by the

Common Council. This review by the Court of Appeals, performed under the auspices of the substantial evidence standard, conflicts with decisions requiring a reviewing court to search the record for evidence to support the Council's decision. The reason for this is simple. The decision to revoke a permit, like the decision to grant, is a discretionary determination, which means that the reviewing court may not substitute its judgment for that of the municipality.

A. The Court of Appeals Improperly Weighed the Evidence and Substituted Its Judgment for the Judgment of the Common Council.

In *Sills*, 2002 WI App 111, the Court of Appeals unequivocally stated that in a certiorari action a reviewing court should not weigh the evidence and that the weight to be accorded to the evidence lies within the discretion of the municipality:

> We must uphold the Committee's decision so long as it is supported by substantial evidence, even if there is also substantial evidence to support the opposite conclusion. Substantial evidence means credible, relevant and probative evidence upon which reasonable persons could rely to reach a decision. Finally, ***the weight to be accorded to the evidence lies within the discretion of the Committee.***

Id. (internal citations omitted) (emphasis supplied).

Decades of decisions from this Court confirm this point of law. For example, in *DeGayner*, 70 Wis. 2d 936, this Court stated as follows in discussing a prior decision:

> That case pointed out that in reviewing administrative decisions, "substantial evidence" did not include the idea of this court weighing the evidence to determine if a burden of proof was met or whether a view was supported by the preponderance of the evidence. Such tests are not applicable to administrative findings and decisions. We equated substantial evidence with that quantity and quality of evidence which a reasonable man could accept as adequate to support a conclusion. And, in this process, sec. 227.20(1)(d), Stats., providing that the decision of an agency may be reversed if unsupported by substantial evidence in view of the entire record as submitted ***does not permit this court to pass on credibility to reverse an administrative decision because it is against the great weight and clear preponderance of the evidence, if there is substantial evidence to sustain it***.

Id. at 940 (emphasis supplied); *Van Ermen v. DHSS*, 84 Wis. 2d 57, 64, 267 N.W.2d 17 (1978) ("When a court on certiorari considers whether the evidence is such that the Department might reasonably have made the order or determination in question, the court is not called upon to weigh the evidence; certiorari is not a de novo review."); *Ottman*, 2011 WI 18, ¶ 53 ("A certiorari court may not substitute its view of the evidence for that of the municipality.").

Instead of following these decisions, the Court of Appeals attempted to identify what it believed were the City's concerns and then it weighed the evidence. For example:

Undisputed Statements by OSGC:

> Mr. Cornelius stated that there is ***no hazardous material***. The system is closed so there is no oxygen. Once it is baked all the gas is taken off by a [venturi scrubber] ***so it takes away any kind of harmful toxins*** that might be in the gas and the rest is burned as natural gas. Anything that is left over will run back through the system.
>
> ***
>
> Mr. Cornelius stated [various chemicals identified in the "Emissions" section of Seven Generations' proposals ***are] all taken out in the process***. It's all scrubbed out. A lot of this stuff is destroyed when it goes through the energy process at the end.

(R.25, 160-61, 164 (emphasis supplied); R.26, AUDIO 1 at 23:20-24:37, 44:20-42:15.)

Court of Appeals' Weighing of the evidence:

> The City's assertion that Seven Generations misrepresented the facility as a "closed system" that would produce no chemicals or hazardous materials is untenable. The audio recording of the February 21, 2011 Plan Commission meeting establishes that the statements on which the City relies were responses to questions about the pyrolysis process specifically, not the facility as a whole. It is undisputed that the pyrolosis process indeed takes place in a closed, oxygen-starved system. The syngas produced is then scrubbed to remove toxins before being burned as fuel. We perceive no actionable misrepresentations in Seven Generations comments related to pyrolysis.

(App. 16, *Decision* at ¶¶ 31.)

This is a clear example of the Court of Appeals misconstruing the City's concerns and then substituting its judgment for that of the City. The Common Council concluded that OSGC's representations stated at public hearings that the Facility would not have hazardous emissions. The statement turned out to be untrue. While the pyrolysis process itself is closed, hazardous materials would in fact be burned in the gas-fired generators and released through stacks into the environment. All of the hazardous materials would not be "scrubbed out" before being burned in the generator.

Another example:

Undisputed Statements by OSGC:

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

(R.25, 163-64; R.26, AUDIO 1 at 42:27-44:20) (emphasis added.)

Court of Appeals' Weighing of the Evidence:

> None of the statements on which the City relies can be reasonably interpreted as a promise that the facility

> would have no stacks or vents. Again, no reasonable person could believe that a gas-burning engine would not produce exhaust, which must be expelled from the facility. Further, Seven Generations specifically informed the Common Council before the CUP was granted that the facility would require exhaust outlets. The facility's final design is fully consistent with the fact sheet and presentation Seven Generations submitted to the Plan Commission, which states there will be "no smokestacks *such as those associated with coal-fired power plants*." (emphasis in original).

(App. 18, *Decision* at ¶ 36.)

Here again, the Court of Appeals misconstrues the City's concern and then substitutes its judgment for that of the City's. There is no question that OSGC made the "no stacks" claim and stated that the carbon and ash would go right into "organic farming." The fact is that OSGC always intended there to be significant stacks and originally proposed stacks as high as 60 feet until it learned that would violate the area height restrictions. The City, obviously, believed this to be a material misstatement and its judgment is not *per se* unreasonable as the Court of Appeals suggests. Regardless of whether the City should have understood that the gas burning engines running on clean syngas and natural or propane gas would have to be exhausted from the Facility, OSGC represented that the Facility would have no hazardous emissions, which turned out not to be the case.

OSGC's claim that the Facility's by-product could be used in organic farming also turned out to be untrue. The char would have to be landfilled as hazardous waste but could be used as additives in roads. The Court of Appeals did not address this misstatement.

The only possible way for the Court of Appeals to have reached the conclusions that it did given the clear and unambiguous statements made by OSGC representatives at the public hearings was by substituting its judgment for the judgment of the Common Council on the City's real concerns and as to the weight to be given the evidence, which it was not permitted to do.

The Court of Appeals' *Decision* suggests that there is no difference between vents and stacks, no difference between exhaust from a gas fired engine and emissions containing hazardous substances, and no difference between byproduct containing hazardous substances that could be an additive in roads if not landfilled as hazardous material and clean, environmentally friendly byproduct which could be used in organic farming. The *Decision* also goes to great lengths in trying to support OSGC's representation that the technology of the Facility is proven. A careful reading of OSGC's original, voluminous written submission

suggests that the technology is in its infancy at best. (R.26, 674-76.) Additionally, the OSGC Facility would be the first privately owned for-profit facility to attempt to use the technology to produce clean energy from municipal garbage. (*Id*.)

What the Court of Appeals did is no different than an appellate court upsetting a jury's verdict by weighing the testimony, evaluating the credibility of witnesses, and substituting its judgment for that of the jury. Indeed, this Court in *K&S Tool & Die Corp. v. Perfection Machinery Sales, Inc*., 2007 WI 70, 301 Wis. 2d 109, 732 N.W.2d 792, clarified the role of an appellate court when reviewing a jury's verdict finding that a misrepresentation was made:

> Appellate courts do not upset a jury verdict if there is any credible evidence to support it. Weighing testimony and evaluating credibility of witnesses are matters for the jury. In reviewing a jury verdict, evidence will be viewed in the light most favorable to the verdict and courts search for credible evidence that will sustain the verdict, not for evidence to sustain a verdict the jury could have but did not reach.

Id. at ¶ 38.[5]

[5] In a case involving alleged misrepresentations in the sale of a grain silo, the Court of Appeals addressed a somewhat analogous situation where the plaintiffs claimed that the seller represented the silo as "oxygen free" but the seller argued that the plaintiffs should have known that was not the case. *D'Huyvetter v. A.O. Smith Harvestore Products*, 164 Wis. 2d 306, 475 N.W.2d 587 (Ct. App. 1991). The defendant argued that the plaintiffs could not have justifiably relied on statements that it made wherein it stated that the silo was "oxygen-free," citing to the plaintiff's testimony that he knew air entered the structure each time it was filled or unloaded. *Id*. at 321-22. The appellate court

In its *Decision*, the Court of Appeals entirely ignores the possibility that the Common Council's revocation decision was the result of the Common Council losing its trust and confidence in OSGC after, for example, its representatives repeatedly failed to provide clear and convincing answers to the City's inquiries regarding the hazardous materials that would or would not be emitted from the Facility, the stacks that would or would not be attached to the Facility, and the byproducts produced by the Facility that could or could not be used for organic farming. The Common Council had the ability to evaluate the credibility of those that presented information to it and draw reasonable inferences from that testimony and information. *See State ex rel. Harris v. Annuity & Pension Bd., Emp. Ret. Sys. of City of Milwaukee*, 87 Wis. 2d 646, 662, 275

---

concluded that there was sufficient evidence to support the jury's finding of intentional misrepresentation against the defendant, stating as follows:

> While a purchaser may not rely on obviously false statements, it is not necessary "that he [or she] ... meet every positive statement with incredulity and ... ascertain whether it is false." [The plaintiff] stated that he was not aware of the fact that, because a dome of empty space existed under the feed, a large amount of air entered the Harvestore system during unloading. His wife stated that she was told that any other air that entered the system was contained in the breather bags, and kept from contacting the feed. We conclude that there was credible evidence that plaintiffs justifiably relied on [defendant's] false representations.

Id. at 322.

N.W.2d 668 (1979) (". . . the question of credibility and weight was for the Board."). Reviewing courts in certiorari actions are not permitted to weigh the evidence like the Court of Appeals did because they do not have the same ability to evaluate credibility and draw inferences therefrom.

At the end of the day, there was substantial − *i.e.*, credible, relevant and probative − evidence presented to the City to sustain a decision by the Council to either revoke or uphold the issuance of the CUP. Given this reality, the Court of Appeals erred in weighing the evidence and substituting its judgment for that of the City's. Had the Court of Appeals properly applied the substantial evidence standard, it would have searched the record for credible evidence to sustain the City's decision, not the other way around, *i.e.* searching the record for evidence to support reversing the City's decision. Where the evidence is conflicting and there is room for a rational choice either way, a reviewing court may not weigh the evidence and reject the choice of the municipality. Accordingly, this Court should reverse the *Decision* of the Court of Appeals and affirm the decision of the Circuit Court that upheld the City's decision to rescind the CUP granted to OSGC.

B. The Court of Appeals Equated the Substantial Evidence Standard With the Great Weight and Preponderance of the Evidence Standard.

In its *Decision*, the Court of Appeals states as follows:

> The City argues its action was supported by substantial evidence, even though the great weight and clear preponderance of the evidence could have supported a contrary finding.

(App. 17, *Decision* at ¶ 34) (citing *DeGayner*, 70 Wis. 2d at 939). It is true that the City made this argument. Indeed, it is a correct statement of the law as applied to the facts of this case. However, the Court of Appeals' reference to this argument, and the effort it undertook to look for contrary evidence, suggests that it took a contrary view and somehow concluded that evidence may not be substantial when the great weight and clear preponderance of the evidence could support a contrary finding.

The governing rule of law is clearly set forth by this Court in *DeGayner*:

> And, in ***this process***, sec. 227.20(1)(d), Stats., providing that the decision of an agency may be reversed if unsupported by substantial evidence in view of the entire record as submitted ***does not permit this court*** to pass on credibility ***to reverse an administrative decision because it is against the great weight and clear preponderance of the evidence***, if there is substantial evidence to sustain it.

236 Wis. 2d at 940. (Emphasis added).

Application of this standard goes hand in hand with the "presumption of correctness and validity" that is present in a municipality's decision. *Ottman*, 2011 WI 18, ¶ 48. This presumption is appropriate because it "recognizes that locally elected officials are especially attuned to local concerns." *Id*. at ¶ 51. This is why it is similarly well-established that for a reviewing court to affirm a municipality's decision, it should look for "***any*** reasonable view of the evidence" that supports the decision. *Id.* at ¶ 53. (Emphasis supplied).

The Circuit Court expressly understood how it was to view the evidence. The Court of Appeals' *Decision*, on the other hand, is in direct conflict with controlling decisions from this Court. The Court of Appeals searched the record for any evidence that in the Court of Appeals' mind, clarified the misstatements made by OSGC representatives at the public hearings. This is not the standard of review in a certiorari proceeding.

Elected officials and administrative agencies rely on the statements made by applicants at public hearings. It is up to the applicants to make sure that their presentations and responses to questions are both truthful and accurate. This point was made by the Circuit Court:

> If I have to rate what's the most believable statement, a PowerPoint prepared by I don't know whom, and I can't

> respond to that or ask about it, [or] a human being sitting there, who represents as the C.E.O. who has seen the technology, who is here to explain and answer any of my questions who says this is exactly what they're doing in California, and the CUP tailor made – strike that – the CUP application tailor made for this hearing, the PowerPoint is the last thing I believe. I want to hear from the guy who's here to try to sell me this project, and when he says no stacks, and the pictures show that, and he says that's why this is clean technology, I'm having a difficult time in reconciling statements [about] no stacks and then the DNR permit that says in order to build this facility you must have a 60-foot stack.

(App. 54-55, R.24, 32:15-33:5.)[6]

Because the Court of Appeals' *Decision* misstates and misapplies the substantial evidence standard, this Court should reverse the Court of Appeals' *Decision* and affirm the decision of the Circuit Court which upheld the City's decision to rescind the CUP granted to OSGC.

CONCLUSION

For the foregoing reasons, this Court should reverse the *Decision* of the Court of Appeals because the City properly exercised its discretion. If the Court agrees that the City failed to adequately articulate its revocation decision, the matter should be remanded to the Common Council with instructions that the Common Council explain its rationale in greater detail.

[6] Municipal officials, just like a plaintiff alleging a claim of misrepresentation, should not be required before relying upon the representation of fact to make an independent investigation. *See* WIS-JI Civil 2402 ("Plaintiff is not required before relying upon the representation of fact to make an independent investigation.").

Alternatively, this Court should reverse the *Decision* of the Court of Appeals and affirm the decision of the Circuit Court which concluded that there was substantial evidence to support the City's decision to rescind the CUP granted to OSGC.

Respectfully submitted this 20th day of October, 2014.

By: _____

Ted A. Warpinski (SBN: 1018812)
S. Todd Farris (SBN: 1006554)
Christopher M. Meuler (SBN: 1037971)
Joseph M. Peltz (SBN: 1061442)
FRIEBERT, FINERTY & ST. JOHN, S.C.
Two Plaza East, Suite 1250
330 East Kilbourn Avenue
Milwaukee, WI 53202
Telephone: (414) 271-0130
Facsimile: (414) 272-8191

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

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief and appendix produced with proportional serif font. The length of this brief is 10,020 words.

Respectfully submitted this 20th day of October, 2014.

By: _____

Ted A. Warpinski (SBN: 1018812)
S. Todd Farris (SBN: 1006554)
Christopher M. Meuler (SBN: 1037971)
Joseph M. Peltz (SBN: 1061442)

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

I hereby certify that on the 20th day of October, 2014, pursuant to Wis. Stat. § 809.80(3)(b), the original and twenty-one (21) copies of the Brief and Appendix of Defendant-Respondent-Petitioner City of Green Bay were hand-delivered to the Clerk of the Wisconsin Supreme Court.

I further certify that three (3) copies of the same were served upon counsel by hand-delivery.

Respectfully submitted this 20th day of October, 2014.

By: _____

Ted A. Warpinski (SBN: 1018812)
S. Todd Farris (SBN: 1006554)
Christopher M. Meuler (SBN: 1037971)
Joseph M. Peltz (SBN: 1061442)

CERTIFICATION PURSUANT TO WIS. STAT. § 809.19(2)(b)

I hereby certify that filed with this brief, either as a separate document or as part of this brief, is an appendix that complies with Wis. Stat. § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the decision of the Court of Appeals; (3) the findings or opinion of the Circuit Court; (4) a copy of any unpublished opinion cited under Wis. Stat. § 809.23(a) or (b); and (5) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Respectfully submitted this 20th day of October, 2014.

By: _____

Ted A. Warpinski (SBN: 1018812)
S. Todd Farris (SBN: 1006554)
Christopher M. Meuler (SBN: 1037971)
Joseph M. Peltz (SBN: 1061442)

CERTIFICATION PURSUANT TO WIS. STAT. 809.19(12)(f)

I hereby certify that I have submitted an electronic copy of this brief excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief as filed as of this date. A copy of this certificate has been served with the paper copies of this brief with the Court and served on all opposing parties.

Respectfully submitted this 20th day of October, 2014.

By: _____

Ted A. Warpinski (SBN: 1018812)
S. Todd Farris (SBN: 1006554)
Christopher M. Meuler (SBN: 1037971)
Joseph M. Peltz (SBN: 1061442)