STATE OF WISCONSIN | CIRCUIT COURT BRANCH 17 | DANE COUNTY

ENBRIDGE ENERGY COMPANY, INC., and ENBRIDGE ENERGY, LIMITED PARTNERSHIP,

Petitioners,

v.

DANE COUNTY, DANE COUNTY BOARD OF SUPERVISORS, DANE COUNTY ZONING AND LAND REGULATION COMMITTEE, and ROGER LANE, in his official capacity as the Dane County Zoning Administrator,

Respondents.

Case No. 16-CV-0008
Case Code: 30955

ROBERT and HEIDI CAMPBELL, KEITH and TRISHA REOPELLE, JAMES and JAN HOLMES, and TIM JENSEN,

Plaintiffs,

v.

ENBRIDGE ENERGY COMPANY, INC., ENBRIDGE ENERGY, LIMITED PARTNERSHIP, and ENBRIDGE ENERGY, LIMITED PARTNERSHIP WISCONSIN,

Defendants.

Case No. 16-CV-0350
Case Code: 30704

PETITIONERS' INITIAL BRIEF

This matter relates to the imposition of unlawful Insurance Requirements by Dane County in a Conditional Use Permit ("CUP") issued to Petitioners Enbridge Energy Company, Inc. and Enbridge Energy, Limited Partnership (collectively "Enbridge"), for the expansion of the Waterloo Pump Station in the Town of Medina in northeast Dane County. After over a year of delays by Dane County, Enbridge received a CUP with Insurance Requirements that are

expressly preempted by state law, and which Dane County has no authority to impose on, or enforce against, Enbridge. For the reasons set forth herein, the Court should declare the Insurance Requirements void and require Dane County to remove the Insurance Requirements from the CUP and reinstate the CUP without the unlawful Insurance Requirements.[1]

STATEMENT OF FACTS

Enbridge is an interstate liquid pipeline company that owns the Lakehead System, the United States portion of an operationally integrated interstate pipeline network of over 3,400 miles of pipeline, which transports crude oil from the United States and Western Canada to the Eastern United States, over a distance of approximately 1,900 miles. (Pet. ¶¶ 1, 2, 9; Answer ¶ 1; R.-CUP Application, Aug. 19, 2014).[2] As an operator of an interstate hazardous liquid pipeline, Enbridge is regulated by the Pipeline Safety Act ("PSA"), 49 U.S.C. §§ 60101-60301, and attendant administrative regulations promulgated by the United States Department of Transportation, Pipeline and Hazardous Materials Safety Administration ("PHMSA"), 49 C.F.R. Part 195. (Pet. ¶ 10; Answer ¶ 4; R.-Ltr. from John Hess, PHMSA, to Stephen Lloyd, Enbridge Pipelines Inc., July 11, 2013).

In 2007-08, as part of its Southern Access Expansion Project, Enbridge installed a 42-inch outer-diameter liquid petroleum pipeline ("Line 61"), which originates in Wisconsin at the Enbridge Superior Tank Farm and Terminal Facility in Douglas County, Wisconsin, and extends to the Wisconsin/Illinois border for a total of 343 miles in Wisconsin. Line 61 was installed to

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[1] On April 21, 2016, the Court consolidated Dane County Case Nos. 16-CV-0008 and 16-CV-0350. In this brief, Enbridge only addresses the issues applicable to this certiorari review. Enbridge's motion to dismiss the claim pleaded in Case No. 16-CV-0350 is pending and need not be addressed until the certiorari review has been decided.

[2] "R.-" indicates that the document cited is part of the record. Unfortunately, the documents included in the record are not numbered or tabbed individually, nor are the pages numbered.

meet the capacity needs for crude oil by Midwest refineries and to meet the demand of petroleum producers and users. (Pet. ¶ 11; Answer ¶ 5).

Enbridge currently leases land from Wisconsin Electric Power Company ("WEPCO") on which it operates a pump station. As part of its Mainline Expansion Project, Enbridge acquired an easement from WEPCO to expand the pump station and increase the pumping capacity of Line 61 by constructing a pump station consisting of a pump house, switch gear building and related above and below ground piping and assorted equipment. The pump station is known as the Waterloo Pump Station and is located in the Town of Medina, Dane County, Wisconsin. (Pet. ¶ 15; Answer ¶ 7). The Mainline Expansion Project will increase the capacity of Line 61 from 400,000 bpd to 1.2 million bpd without the need for construction and installation of new pipelines from the Superior Terminal to the Illinois border. (R.-CUP Application, Aug. 19, 2014).

A. Zoning Permit Revocation And Conditional Use Permit Process.

On April 23, 2014, Enbridge applied for a zoning permit for purposes of constructing a 15,352 square foot pump station and related appurtenances and improvements at the Waterloo Pump Station location. On April 29, 2014, the Zoning Administrator issued Dane County Zoning Permit No. DCPZP-2014-00199 for "pumping station new construction and improvements" at the Waterloo Pump Station. On April 30, 2014, Enbridge signed the Dane County Zoning Permit agreeing to comply with all Dane County ordinances. (Pet. ¶¶ 21-22; Answer ¶ 9).

On June 12, 2014, the Dane County Board of Supervisors ("Dane County Board") adopted a resolution urging the Wisconsin Department of Natural Resources ("DNR") to prepare a new Environmental Impact Statement ("EIS") for Line 61 and to revoke the air permit the

DNR had already issued for the expansion of storage tank capacity at Enbridge's Superior Terminal as part of the Line 61 Mainline Expansion Project. (Pet. ¶ 23; Answer ¶ 9). That same day, June 12, 2014, the Zoning Administrator issued a letter to Enbridge revoking the zoning permit and contending that the Waterloo Pump Station expansion and improvement was not a permitted land use but rather that it required a conditional use permit. The Zoning Administrator stated: "Upon further review, in consultation with Dane County's Corporation Counsel's Office, we have determined that the permit for the Enbridge pump house issued on April 30, 2014, was issued prematurely. We have concluded that your proposed use is not a permitted use, and that a conditional use permit (CUP) is instead required. Please be advised that Zoning Permit No. DCPZP-2014-00199 is hereby revoked." (Pet. ¶ 23; Answer ¶ 9).

On August 19, 2014, Enbridge filed a CUP application for the work to be performed at the Waterloo Pump Station. (Pet. ¶ 24; Answer ¶ 10). The Waterloo Pump Station expansion and improvements include the installation of new electric pumps constructed adjacent to the existing station. The expansion at the Enbridge Waterloo Pump Station is designed to ensure that it will not be detrimental to the general public welfare, as it is designed in conformance with PHMSA design and safety requirements. (R.-CUP Application, Aug. 19, 2014). The expanded and improved Waterloo Pump Station will be monitored 24 hours a day from a state of the art control center, and multiple on-site detectors and transmitters are employed to promptly initiate remote shutdown and isolation, if needed. It is designed with protective barriers, including berms and graded soil, in place to protect the surrounding area. Berms are built according to Enbridge specifications and regulatory requirements using clay or compacted soil, and grading to allow drainage to a designated area within the facility and on the Waterloo Pump Station property. (R.-CUP Application, Aug. 19, 2014).

The Waterloo Pump Station property is already being utilized for multiple pipeline and utility purposes. A large American Transmission Company distribution substation and the existing Enbridge Waterloo Pump Station are currently located at the existing pump station site and are of the same use as the expansion pump station facility. (R.-County Staff Report, Oct. 28, 2014). By expanding its existing pump station, and co-locating with other utility uses, Enbridge has maximized its existing facilities to the greatest extent possible, thereby minimizing the impacts to the surrounding neighbors and land uses. (R.-CUP Application, Aug. 19, 2014). The fact that Enbridge's expansion and improvements to the Waterloo Pump Station are compatible with neighboring agricultural uses has been demonstrated based on the nearly 20 years that Enbridge has had an existing pump station at the Waterloo Pump Station site. The expansion and improvements to the Waterloo Pump Station based on state of the art construction methods and techniques and advanced state of the art safety operations and maintenance protocols will not heighten the risk of an oil release in the area. (R.-CUP Application, Aug. 19, 2014; R.-Ltr. from Vern Butzine, Waterloo Fire Dep't, to Town of Medina, Sept. 2, 2014; R.-Ltr. from Blair Pierce, Marshall Fire Dep't, to Town of Medina, Sept. 24, 2014).

Pursuant to the CUP approval process established in the Dane County Code of Ordinances, the Town of Medina initially approved the CUP on October 1, 2014 with only two conditions. Those conditions required: (1) "A signed agreement between the Town of Medina & Enbridge for use of Town of Medina Roads" and (2) "A spill basin sized at a minimum 60 minute flow." Enbridge agreed to the two conditions. (Pet. ¶ 28; Answer ¶ 12; R.-Town Board Action Report, Oct. 8, 2014; R.-County Staff Report, Oct. 28, 2014).

B. ZLR Committee Action On Conditional Use Permit.

The Dane County Zoning and Land Regulation Committee ("ZLR Committee") held a public hearing on Enbridge's CUP permit application on October 28, 2014, and the ZLR Committee postponed action on the application. During several subsequent meetings, the ZLR Committee continued to postpone action on Enbridge's CUP application. (Pet. ¶ 29; Answer ¶ 13).

During the pendency of its CUP application, in addition to agreeing to install an oversized spill basin at the Waterloo Pump Station expansion site sized at a minimum 60-minute flow, Enbridge agreed that noise associated with operations at the site will be below 50 db at the Waterloo Pump Station property line and that exterior lighting shall be down-shrouded to limit light pollution onto adjoining property. (Pet. ¶ 30; Answer ¶ 13). Enbridge agreed to provide Dane County the resources necessary to hire a local engineering firm to represent the County and landowners during construction of the pump station. Enbridge proposed that such firm would provide an independent opinion to the County and the neighboring landowners that Enbridge's construction drawings were in compliance with the project specifications. (Pet. ¶ 31; Answer ¶ 13).

Enbridge notified the ZLR Committee that it carried $700 Million of Commercial General Liability ("CGL") Insurance, which includes Sudden and Accidental Pollution Liability Coverage, providing protection in the event of a release that is "Sudden and Accidental."[3] (Pet. ¶ 32; Answer ¶ 13). Enbridge provided the ZLR Committee notice that, in addition to Enbridge's insurance, up to $4 billion in funds were available through the Oil Spill Liability Trust Fund administered by the U.S. Coast Guard pursuant to the Oil Pollution Act ("OPA"), 33 U.S.C.

[3] During the pendency of the CUP process, that amount increased to $860 Million in coverage. (R.-Dec. 3, 2015 Hr'g Tr. 32:12-19).

§§ 2701-2761. The Oil Spill Liability Trust Fund is funded through excise taxes on crude oil received at United States refineries and on petroleum products entered into the United States for consumption, use or warehousing. It is not funded by general taxpayer dollars. (Pet. ¶ 33; Answer ¶ 13; R.-Dybdahl Report, Apr. 8, 2015, p. 21). The ZLR Committee requested that Enbridge provide the resources to hire a third party to provide advice to the Committee on the insurance matter, which Enbridge did. (Pet. ¶ 34; Answer ¶ 14). The insurance consultant to the ZLR Committee concluded that the balance in the Oil Spill Liability Trust fund exceeded $4 billion, and the fund balance is expected to increase by $300 million annually. The consultant confirmed that the money in the Oil Spill Liability Trust Fund is available if Enbridge does not fully respond to a release with its financial resources being used for required remediation. (R.-Dybdahl Report, Apr. 8, 2015, p. 21; R.-Dec. 3, 2015 Hr'g Tr. 32:20-33:16).

On April 14, 2015, the ZLR Committee granted Enbridge a CUP for the expansion and improvements at the Waterloo Pump Station. However, as a condition to the CUP, the ZLR Committee required Enbridge to purchase and maintain for the life of the Waterloo Pump Station an additional Environmental Impairment Liability ("EIL") Policy with coverage limits of $25,000,000. (Pet. ¶ 35; Answer ¶ 15). As an additional condition to the CUP, the ZLR Committee required Enbridge to procure and maintain CGL coverage of $100,000,000: (a) from an insurance company "with an A.M. Best rating of at least A, XII;" (b) with a self-retention limited to $1 million for both the EIL and the CGL coverage; (c) that requires certain notices from the insurance carriers; and (d) that requires Enbridge to waive its subrogation rights, among other conditions. The two insurance requirements are referred to individually as the "EIL Requirement" and the "CGL Requirement" and collectively as the "Insurance Requirements." (Pet. ¶ 35; Answer ¶ 15).

Since it had amended the CUP approved by the Town, the ZLR Committee sent the CUP back to the Town for approval or rejection. Modification of the CUP by the Town was not permitted under the County ordinance. The Town approved the CUP with the Insurance Requirements on April 20, 2015, and the CUP became effective on April 21, 2015. (Pet. ¶ 36; Answer ¶ 15). On May 4, 2015, Enbridge appealed the ZLR Committee's decision to impose the Insurance Requirements to the Dane County Board. (Pet. ¶ 36; Answer ¶ 15). A hearing on Enbridge's appeal was scheduled to be held on July 16, 2015. However, for the reasons discussed below, it was removed from the Dane County Board's agenda. *See* page 8, *infra.*

C. State Prohibition On Insurance Requirements Being Imposed By A County.

Prior to any final action on the appeal by the Dane County Board, the Wisconsin State Legislature passed 2015 Wisconsin Act 55 on July 9, 2015, which created Wis. Stat. § 59.70(25) that provides: "A county may not require an operator of an interstate hazardous liquid pipeline to obtain insurance if the pipeline operating company carries comprehensive general liability insurance coverage that includes coverage for sudden and accidental pollution liability." (Pet. ¶ 37; Answer ¶ 15). The Act also created Wis. Stat. § 59.69(2)(bs), which provides: "As part of its approval process for granting a conditional use permit under this section, a county may not impose on a permit applicant a requirement that is expressly preempted by federal or state law." Act 55 was signed into law on July 12, 2015 and published on July 13, 2015 with an effective date of July 14, 2015. (Pet. ¶ 37; Answer ¶ 15).

On July 13, 2015, Majid Allan, Senior Planner, Dane County Planning & Development, notified Enbridge that its CUP appeal had been removed from the July 16, 2015 Dane County Board meeting agenda because, due to the newly enacted laws, "the appeal is moot since the county cannot enforce the insurance requirements of CUP #2291 that were the subject of the

Enbridge appeal." (Pet. ¶ 38; Answer ¶ 15). The Dane County Corporation Counsel issued an opinion letter to the Zoning Administrator, dated July 17, 2015, that concluded: "By the express language of the statute, effective July 14, 2015 the county is prohibited from requiring the [Insurance Requirements]. When the CUP was approved is irrelevant. The [Insurance Requirements] are rendered unenforceable prospectively by the language of §59.70(25)." (R.-Ltr. from David Gault, Assistant Corporation Counsel, to Roger Lane, Zoning Administrator, July 17, 2015). In reliance on the opinion letter, the Zoning Administrator issued a revised CUP on July 24, 2015 describing the changes in state law and removing the unenforceable Insurance Requirements. The Effective Date of the Permit continued to be listed as April 21, 2015 and the Revised Date was listed as July 24, 2015. (Pet. ¶ 39; Answer ¶ 15).

On August 10, 2015, the advocacy organization 350 Madison filed with the ZLR Committee a document called a "Petition for Reconsideration and Rescission of the Conditional Use Permit and Imposition of a Trust Fund Requirement" ("350 Petition"). The 350 Petition cited no authority under the Dane County Code of Ordinances or otherwise for an advocacy group to file such a petition. 350 Madison did not file an appeal with the Dane County Board seeking review of the issuance of the July 24, 2015 CUP. (Pet. ¶ 40; Answer ¶ 15).

The Dane County Corporation Counsel issued an opinion letter to the ZLR Committee, dated August 24, 2015, concluding that "the committee cannot reconsider or rescind the CUP granted to Enbridge for the pumping station at this time" due, in part, to Enbridge's "vested rights in the CUP." (Pet. ¶ 41; Answer ¶ 15). The letter further stated: "Dane County has no … statutory authority to impose a trust fund requirement on an interstate pipeline. In fact, it could be argued that Wis. Stat. § 59.70(25) is a strong indication of legislative intent against such a requirement. Therefore, I believe it is likely that a court reviewing the proposed [trust fund]

condition would find it to be unreasonably arbitrary and capricious." (R.-Ltr. from David Gault, Assistant Corporation Counsel, to ZLR Committee, Aug. 24, 2015). At its September 8, 2015 meeting, the ZLR Committee discussed but decided to take no action on the 350 Petition, based on the opinion letter from Corporation Counsel. 350 Madison did not file an appeal with the Dane County Board seeking review of the ZLR Committee's "no action" decision. (Pet. ¶ 41; Answer ¶ 15).

Enbridge paid approximately $10 Million for construction expenses in reliance on the July 24, 2015 CUP without the Insurance Requirements, including the completion of site survey work and construction activities. (R.-Dec. 3, 2015 Hr'g Tr. 39:18-23). The site survey has been completed along with four-way sweeps and pot-holing. The retention and bio-filtration ponds have been constructed, work has been commenced on the main access driveway along with site soil improvements (undercutting and improvements on the sub soil fill and concrete and pounded pile foundation work). All pump station equipment to be installed, including pipe, has been procured and is ready for installation. (R.-Dec. 3, 2015 Hr'g Tr. 38:13-39:17).

Despite the Dane County Corporation Counsel's opinion that the ZLR Committee could not "reconsider or rescind the [July 24, 2015] CUP granted to Enbridge," at its September 29, 2015 meeting, the ZLR Committee either revoked or amended the July 24, 2015 CUP when it voted to "direct the Zoning Administrator to have Conditional Use Permit #2291 reflect the exact conditions of approval as approved by the Zoning and Land Regulation Committee on April 14, 2015. A note shall be added to the conditional use permit which identifies that the County's ability to enforce conditions 7 & 8 are affected by the State Budget Bill, 2015 Wisconsin Act 55, that was enacted on July 12, 2015." (R.-Sept. 29, 2015 Mtg. Tr. 47:3-48:14). The ZLR Committee did not refer the proposed CUP amendment to the Town for approval. At the

direction of the ZLR Committee, the Zoning Administrator issued a new CUP on October 9, 2015, including the Insurance Requirements, with an asterisk noting the change in state law. (R.-Ltr. from Roger Lane, Dane County Zoning Administrator, to Aaron Madsen, Enbridge Energy Company, Oct. 9, 2015). The Insurance Requirements are now part of the October 9, 2015 CUP issued to Enbridge with an effective date of April 21, 2015.

D. Appeal to Dane County Board.

On October 19, 2015, Enbridge appealed the ZLR Committee's September 29, 2015 decision and the October 9, 2015 CUP to the Dane County Board, pursuant to Wis. Stat. § 59.694 and Dane County Ordinance § 10.255(2)(j). (Pet. ¶ 45; Answer ¶ 19). On December 3, 2015, the Dane County Board held a hearing on Enbridge's May 4, 2015 appeal, which it had not previously decided based on mootness grounds but was still pending, and the October 19, 2015 appeal. (Pet. ¶ 46; Answer ¶ 20). During deliberations by the Dane County Board, a number of board members and members of the public stated that although Wisconsin state law currently prohibits Dane County from enforcing the Insurance Requirements, Dane County could seek to enforce the Insurance Requirements in the future upon a change in state law. (R.-Dec. 3, 2015 Hr'g Tr. 60:9-15; 112:17-23; 122:16-18; 143:6-10). Additionally, a number of board members and members of the public stated that, although Dane County is currently prevented from enforcing the Insurance Requirements, in their view that would not prohibit a private right of action to enforce them.[4] (R.-Dec. 3, 2015 Hr'g Tr. 81:10-14; 128:17-24). Immediately following the hearing on December 3, 2015, the Dane County Board dismissed both appeals and upheld the ZLR Committee's April 14, 2015 and September 29, 2015 CUP decisions imposing the Insurance Requirements as conditions to the CUP. (Pet. ¶ 47; Answer ¶ 21). On January 4,

[4] And, of course, such a private cause of action was filed and is now consolidated with this certiorari appeal.

2016, Enbridge filed a Petition for Certiorari Review seeking review of the decisions of Dane County, the Dane County Board, the ZLR Committee, and the Zoning Administrator (the foregoing parties are collectively referred to herein as "the County").

ARGUMENT

The standards applicable on certiorari review are well established and apply to the Court's review under Wis. Stat. § 59.694(10). The Court must review (1) whether the County "kept within its jurisdiction;" (2) whether the County "proceeded on a correct theory of law;" (3) whether the County's action was "arbitrary, oppressive or unreasonable and represented its will and not its judgment;" and (4) whether the evidence was such that the County "might reasonably make the order or determination in question." *Klinger v. Oneida Cty.*, 149 Wis. 2d 838, 843, 440 N.W.2d 348 (1989). In this case, the County's decision should be reversed because, as described below:

1. The County did not keep within its jurisdiction;
2. The County lacked the authority to impose the Insurance Requirements in the April 21, 2015 CUP, to revoke or amend the July 24, 2015 CUP or to issue the October 9, 2015 CUP with the unlawful Insurance Requirements as a condition to obtaining the CUP;
3. The County proceeded on one or more incorrect theories of law;
4. The County's decision was arbitrary, oppressive and unreasonable and represented its will and not its authorized judgment; and
5. The County did not reasonably make the decision to attach the Insurance Requirements as a condition to the CUP based on the evidence before it.

I. THE INSURANCE REQUIREMENTS WERE INVALIDATED RETROACTIVELY AND ARE NO LONGER IN EFFECT.

The prohibition on Dane County's ability to impose or enforce the Insurance Requirements under Wis. Stat. §§ 59.69(2)(bs) and 59.70(25) applies retroactively and prohibits the County from imposing, enforcing, restoring, reinstating or taking any other action to attempt to implement the Insurance Requirements, regardless of the date such action was taken. In general, a statute is applied retroactively if: (1) the statute expressly or by necessary implication evidences a legislative intent that it apply retroactively; or (2) if the statute is remedial or procedural rather than substantive. A statute is considered "substantive" if it creates, defines or regulates rights or obligations; a statute is deemed "remedial" or "procedural" if it affords a remedy or facilitates remedies already existing for the enforcement of rights or redress of injuries. *Rock Tenn Co. v. Labor & Indus. Review Comm'n*, 2011 WI App 93, 334 Wis. 2d 750, 799 N.W.2d 904. Retroactive application need not be expressly stated in the statute; instead, it can be implied by the purpose of the law. For example, in *Overlook Farms Home Ass'n, Inc. v. Alternative Living Servs.*, 143 Wis. 2d 485, 422 N.W.2d 131 (Ct. App. 1988), the court concluded that the "necessary implication of the statute also reveals the legislative intent to make the statute retroactive." *Id.* at 494. The purpose of the statute was to invalidate private covenants restricting group homes, and without retroactive application that purpose would have been thwarted.

In *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994), the court stated that, notwithstanding the general presumption against retroactivity, "in many situations, a court should apply the law in effect at the time it renders its decision." *Id.* at 273 (citation omitted). "We have regularly applied intervening statutes *conferring or ousting jurisdiction*, whether or not jurisdiction lay when the underlying conduct occurred or when the suit was

filed." *Id.* at 274 (emphasis added) (citing a case where the elimination of the amount-in-controversy requirement during the pendency of the case gave the court jurisdiction over the case where it otherwise would not have had jurisdiction). A jurisdictional rule "takes away no substantive right[s]" and such rules "speak to the power of the court rather than to the rights or obligations of the parties." *Id.* (citation omitted). The prohibition on retroactive application considers whether the retroactive application "would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Id.* at 280.

In *Turkhan v. Perryman*, 188 F.3d 814 (7th Cir. 1999), the court restated the general rule that a court should generally not apply a new statutory provision retroactively where it would "impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Id.* at 825 (quoting *Landgraf*, 511 U.S. at 280). However, "intervening procedural and jurisdictional provisions are regularly applied to pending cases" because "application of a new jurisdictional rule usually takes away no substantive rights" and instead speaks to "the power of the court rather than the rights or obligations of the parties." *Id.* at 826 (concluding that a new law was "jurisdictional" because it divested a government authority of power to take action with respect to a class of individuals).

Given that Dane County's authority to impose the Insurance Requirements is a jurisdictional issue, the new state laws apply retroactively and make the ZLR Committee's imposition of the Insurance Requirements unlawful when they were added to the April 21, 2015 CUP even though the new laws limiting the County's jurisdiction had not yet been enacted. The

new state laws are jurisdictional in that they divested the County of the jurisdiction to impose insurance requirements on hazardous liquid pipeline companies.[5]

Notably, a new law passed while the time for an appeal is still pending applies to the pending action. In *Salzman v. State of Wisconsin Department of Natural Resources.*, 168 Wis. 2d 523, 484 N.W.2d 337 (Ct. App. 1992), a new law was passed during the 45-day period the petitioner had to appeal a circuit court decision that extended the appeal deadline when a motion for reconsideration is filed. The court held that the new law applied and extended the appeal deadline in that case. The court concluded: "The state has no vested right to its judgment until the time for appeal has expired. In this case, the forty-five-day appeal time limit had not expired at the time [the new law] became effective. Therefore, at the time the statute became effective, the state had no vested right to the judgment." *Id.* at 530. *See also Trinity Petroleum, Inc. v. Scott Oil Co.*, 2007 WI 88, ¶ 48, 302 Wis. 2d 299, 735 N.W.2d 1 (concluding that a new law applied where the court had not yet issued a final decision, stating that "[n]o litigant has a vested right in a particular remedy, so he can have none in rules of procedure which relate to the remedy.").

This case is similar to *City of Madison v. Town of Madison*, 127 Wis. 2d 96, 377 N.W.2d 221 (Ct. App. 1985), in which the court held that a statute passed after the Town of Madison had commenced incorporation proceedings prevented the town from incorporating under that procedure. The court concluded that a town has no "right" to incorporate, and instead incorporation "is a matter of legislative grace, not a matter of right." *Id.* at 105. The town had

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[5] The Insurance Requirements are also a continuing obligation that regulates Enbridge's conduct long after the passage of the new state law, and, therefore, even if the application of the law to the period prior to its passage is prohibited, that would not speak to its application to the Insurance Requirements going forward. *See Ten Mile Invs., LLC v. Sherman*, 2007 WI App 253, ¶ 10, 306 Wis. 2d 799, 743 N.W.2d 442 (concluding that although the activity at issue was commenced before the effective date of the new statute, it was maintained after that date). Indeed, the County admits that the Insurance Requirements are not enforceable.

no vested rights that could be affected by the change in law, and the new law was a "procedural" statute.

Similarly, here Dane County has no "right" to impose the Insurance Requirements. Dane County's authority to regulate land use activities is created by the state legislature and is subject to changes in law. The legislature's decision to change the procedure by which counties can regulate land uses by removing counties' jurisdictional authority to impose the Insurance Requirements is a procedural statute with retroactive effect. Moreover, under *Trinity Petroleum*, the County had no vested rights in the Insurance Requirements until Enbridge had exhausted its appeal and, because the new laws came into effect during the appeal, it eliminated the County's right to impose the Insurance Requirements both when the ZLR Committee first included them in the April 21 CUP, when the County imposed them by denying Enbridge's appeal on December 3, 2015 and now on the certiorari review before this Court. Therefore, the Insurance Requirements were invalidated retroactively by the new state law and are no longer in effect. Accordingly, even if the County could have validly imposed the Insurance Requirements in the April 21, 2015 CUP, the Insurance Requirements were invalidated retroactively by the new state law, and the County had no authority to uphold them by denying Enbridge's appeal after they had been enacted and this Court must apply the laws passed during the pendency of Enbridge's appeal for purposes of this certiorari action.

II. THE COUNTY HAD NO LEGAL AUTHORITY TO IMPOSE THE INSURANCE REQUIREMENTS IN THE APRIL 21, 2015 CUP, TO REVOKE OR AMEND THE JULY 24, 2015 CUP OR TO ISSUE THE OCTOBER 9, 2015 CUP WITH THE UNLAWFUL INSURANCE REQUIREMENTS.

A. The ZLR Committee's Decision To Insert The Insurance Requirements In The April 21, 2015 CUP Was Unreasonable And An Exercise Of Its Will Rather Than Its Authorized Judgment.

The inclusion of the Insurance Requirements by the ZLR Committee in the April 21, 2015 CUP, and the upholding of the same by the Dane County Board, was done solely for political purposes due to the County's opposition to Enbridge's Line 61 Expansion Project rather than as a proper implementation of CUP review standards. After Dane County issued a zoning permit to Enbridge for construction of the Waterloo Pump Station upgrade, the Dane County Board passed a resolution in opposition to Enbridge's project. The Dane County Board urged the DNR to require an EIS for the Line 61 Expansion Project even though the project had been properly authorized by the DNR following appropriate environmental review. (Pet. ¶ 23; Answer ¶ 9). The Dane County Board passed its resolution simply as a political act to voice opposition to crude oil pipelines rather than on the merits of Enbridge's project. On the same day the resolution was passed, Dane County then revoked the Zoning Permit it had issued to Enbridge and instead required Enbridge to apply for a CUP to further thwart Enbridge's efforts to increase its pipeline capacity. (Pet. ¶ 23; Answer ¶ 9). From that point on, the ZLR Committee, Dane County and the Dane County Board acted for political purposes by using the CUP process as an obstacle to Enbridge's construction to increase capacity of its interstate pipeline. Such actions exceeded their authority and constitute arbitrary, oppressive and capricious actions.

No legitimate evidence supported the imposition of the Insurance Requirements as conditions to the April 21, 2015 CUP. Enbridge demonstrated adequate CGL coverage of $700 million at the time of the CUP application, which has since increased to $860 million. (Pet. ¶ 32; Answer ¶ 13; Dec. 3, 2015 Hr'g Tr. 32:12-19). An additional EIL insurance requirement of $25 million adds no further protection to Dane County residents. The Oil Pollution Trust Fund provides even further, ample protection, eliminating the need for the Insurance Requirements.

(Pet. ¶ 33; Answer ¶ 13; Dybdahl Report, Apr. 8, 2015, p. 21). Moreover, Enbridge's history of fully funding any inadvertent releases and thereafter seeking insurance indemnification for the costs it has already incurred demonstrates the lack of need for the Insurance Requirements. (Ltr. from Lee Monthei, Enbridge Energy Company, to Town of Medina, Sept. 24, 2014).

Accordingly, the ZLR's decision to impose the Insurance Requirements on Enbridge was arbitrary, oppressive, unreasonable and represented its will and not its authorized judgment. *Klinger*, 149 Wis. 2d at 843. That decision should be reversed and the CUP should be reinstated without the Insurance Requirements.

B. The July 24, 2015 CUP Without The Insurance Requirements Was Properly Issued By The Dane County Zoning Administrator And The ZLR Committee Had No Authority To Revoke Or Amend The July 24, 2015 CUP And Issue The October 9, 2015 CUP With The Unlawful Insurance Requirements.

After enactment of Wis. Stat. §§ 59.69(2)(bs) and 59.70(25), on July 24, 2015, the Dane County Administrator lawfully issued a new CUP without the Insurance Requirements. The authority of the Dane County Zoning Administrator is described in Section 10.25 of the Dane County Code of Ordinances. Section 10.25(1)(b) provides: "It shall be the duty of the zoning administrator to receive applications for zoning permits and such other permits and licenses provided in this ordinance, and to issue such permits after applications have been examined and approved." That section provides further that it shall be the duty of the zoning administrator "to take such action as may be necessary for the enforcement of the regulations provided herein." The action of the zoning administrator in reissuing or revising the CUP without the Insurance Requirements was a permissible ministerial act under the zoning administrator's broad administrative authority to implement the zoning ordinance. A public official's duty is ministerial when it is "absolute, certain and imperative, involving merely the performance of a specific task when the law imposes, prescribes and defines the time, mode and occasion for its

performance with such certainty that nothing remains for judgment or discretion." *Pries v. McMillon*, 2010 WI 63, ¶ 22, 326 Wis. 2d 37, 784 N.W.2d 648. Here, the ZLR Committee approved the issuance of the CUP with the Insurance Requirements, which were thereafter invalidated by the newly enacted law. Accordingly, the reissuance of the CUP by the Zoning Administrator without the Insurance Requirements was a ministerial act because it was mandated by the new Wisconsin law "with such certainty that nothing remain[ed] for judgment or discretion."

The only express authority the ZLR Committee has under the Dane County Code of Ordinances related to a CUP that has already been issued is the committee's limited authority to revoke a CUP upon finding that the permit conditions and the standards for the issuance of a CUP have been violated. Dane County Ord. § 10.255(2)(m) provides:

> *Revocation of a conditional use permit.* If the zoning committee finds that the standards in subsection (2)(h) and the conditions stipulated therein are not being complied with, the zoning committee, after a public hearing as provided in subs. (2)(f) and (g), may revoke the conditional use permit. Appeals from the action of the zoning committee may be as provided in sub. (2)(j)

In issuing its September 29, 2015 decision to revoke the July 24, 2015 CUP and issue the October 9, 2015 CUP, the ZLR Committee did not identify a single condition Enbridge had violated that would support the revocation of the CUP under the ordinance. Enbridge has also complied with the general standards in sub. (2)(h) of the ordinance. There has been no action taken by Enbridge in violation of those standards.

The ZLR Committee's revocation authority is also limited by the common law vested rights doctrine. The vested rights doctrine prevents a political subdivision from revoking a permit where the permittee's rights have vested through the submission of a valid permit application and the issuance of a permit, especially where the property owner has taken action in

compliance with and in reliance on the permit. A property owner has substantial vested rights under a permit and a political subdivision cannot prevent construction pursuant to that permit, as long as the initial application complied with the zoning regulations in effect at the time of application and the property owner has incurred expenses in reliance on the permit. *See Building Height Cases*, *e.g.*, *State ex rel. Klefisch v. Wis. Tel. Co.*, 181 Wis. 519, 530-31, 195 N.W. 544 (1923) (builder obtained a valid building permit and had begun construction when the Legislature established a new building height restriction that would have prevented construction; the court held that the builder had substantial rights in construction of the building that vested prior to the passage of the restriction).

Therefore, under the vested rights doctrine as applied in Wisconsin, where a property owner obtains a permit and incurs expenses in reliance on that permit, the property owner has substantial vested rights under the permit and the political subdivision cannot prevent construction pursuant to that permit, as long as the initial application complied with the zoning regulations in effect at that time. *See Lake Bluff Hous. Partners v. S. Milwaukee*, 197 Wis. 2d 157, 171-72, 540 N.W.2d 189 (1995). As noted by Dane County Corporation Counsel, Enbridge has substantial vested rights in the July 24, 2015 CUP, which was obtained through a valid permit application and issued in compliance with the zoning regulations in effect at the time of application and issuance, including Wis. Stat. §§ 59.69(2)(bs) and 59.70(25). (Ltr. from David Gault, Assistant Corporation Counsel, to ZLR Committee, Aug. 24, 2015). Further, Enbridge has taken action and incurred expenses in reliance on the July 24, 2015 CUP, including the completion of site survey work and construction activities such as site preparation and excavation. (Dec. 3, 2015 Hr'g Tr. 38:13-39:23). Therefore, the action by the ZLR Committee to revoke the CUP also violated the vested rights doctrine.

Similarly, the ZLR Committee had no authority to amend the July 24, 2015 CUP. The Dane County Corporation Counsel issued an opinion on March 16, 2015 stating that the ZLR Committee has authority to amend a CUP only if there has been a violation of permit conditions *and* if amendment would "serve the interests and standards set forth in [Dane County Ordinance § 10.255(2)(h)]." (Ltr. from David Gault, Assistant Corporation Counsel, to Patrick Miles, ZLR Committee Chair, Mar. 16, 2015). The Corporation Counsel also stated that any CUP amendment would require approval of the affected town. Enbridge disputes that the ZLR Committee has the authority to amend a CUP. However, even under the standards articulated by the Corporation Counsel, the ZLR had no basis to amend the CUP in this case, given the absence of any violation of any permit conditions. Further, the ZLR Committee failed to send the amended October 9, 2015 CUP to the Town of Medina for approval as required under the Corporation Counsel's interpretation of the ordinance.

There is also no legal authority for the ZLR Committee to "retain" or "restore" conditions that violate Wisconsin law and that were not included in the July 24, 2015 CUP. Although the ZLR Committee characterized its action as "retaining" conditions of approval from the original CUP, there is no procedure or authority for the ZLR Committee to take such action. The Insurance Requirements are prohibited under state law and were not part of the July 24, 2015 CUP. The ZLR Committee cannot simply "retain" conditions that are contrary to state law and that did not exist in the reissued CUP. The ZLR Committee either revoked or amended the July 24, 2015 when it issued the October 9, 2015 CUP with the unlawful Insurance Requirements. As discussed above, the ZLR Committee had no authority to revoke or amend the CUP in this case. Accordingly, there was no legal authority for the ZLR Committee to "retain" or "restore"

conditions by revoking or amending the July 24, 2015 CUP and issuing the October 9, 2015 CUP with the unlawful Insurance Requirements.

In summary, the Dane County Code of Ordinances allows for revocation of a CUP upon a finding that the permit conditions have been violated and the general conditional use standards are "not being complied with." Dane County Ord. § 10.255(2)(m). There was no legal basis for the ZLR Committee to find that there had been any violation of the CUP conditions or that the use of the property no longer complied with the general CUP standards in sub. (2)(h) when it issued the October 9, 2015 CUP with the Insurance Requirements. Section 10.255(2)(m) does not authorize an amendment of a CUP in lieu of revocation. Even if it did, Enbridge has not taken any action in violation of either the specific conditions in the CUP or the general conditions in the ordinance, and the ZLR Committee had no authority to amend the CUP to add the unlawful and unenforceable Insurance Requirements. Moreover, the ZLR Committee could not enact its amended CUP without the Town's approval, which it failed to seek. And, most importantly, when the ZLR Committee issued the CUP on October 9, 2015 and included the Insurance Requirements, it was expressly prohibited by Wis. Stat. §§ 59.69(2)(bs) and 59.70(25) from imposing the Insurance Requirements on Enbridge as conditions to the CUP.

C. The Insurance Conditions Directly Violate State Law.

Even if the ZLR Committee believed it had authority to restore the Insurance Conditions as long as the newly enacted Wis. Stat. § 59.70(25) was noted, the only action it could legally take was to remove the Insurance Conditions as the Zoning Administrator did in the July 24, 2015 CUP. Wis. Stat. § 59.70(25) provides: "A county may not require an operator of an interstate hazardous liquid pipeline to obtain insurance if the pipeline operating company carries comprehensive general liability insurance coverage that includes coverage for sudden and

accidental pollution liability." Wis. Stat. § 59.69(2)(bs) provides: "As part of its approval process for granting a conditional use permit under this section, a county may not impose on a permit applicant a requirement that is expressly preempted by federal or state law."

With full knowledge that it lacked the authority to require or impose the Insurance Requirements, the ZLR Committee issued the October 9, 2015 CUP with the Insurance Requirements. Whether the County actually intends to enforce those requirements in contravention of state law is irrelevant. State law expressly prohibits the County from requiring or imposing the Insurance Requirements as conditions to a CUP. The ZLR Committee simply flouted the newly enacted Wisconsin law as an exercise of its will rather than its authorized judgment because it is dissatisfied with the new law, which is an abuse of its authority as a matter of law. Additionally, Wis. Stat. § 59.69(2)(bs) expressly prohibits a county from imposing any requirement that is expressly preempted. The Insurance Requirements are expressly preempted by state law under Wis. Stat. § 59.70(25). Therefore, the ZLR Committee had no authority to impose such requirements and its action in issuing the October 9, 2015 CUP to impose the Insurance Requirements violates Wisconsin law. To adopt a county procedure of placing unlawful conditions into a CUP with a mere acknowledgement that they are unenforceable, as the ZLR Committee has done, is simply bad public policy. Far worse, it is unlawful.

Moreover, Wis. Stat. § 59.70(25) prohibits a "county" from imposing the Insurance Requirements. While the ZLR Committee initially imposed the conditions, its act in doing so was not the final act of Dane County. When Dane County upheld the ZLR Committee's Insurance Requirements conditions by denying Enbridge's appeal on December 3, 2015, it was the County that was imposing the Insurance Requirements conditions. Simply put, nothing was

final until the County imposed the Insurance Requirements by denying Enbridge's appeal on December 3, 2015, which it had no authority to do under Wis. Stat. §§ 59.69(2)(bs) and 59.70(25).

CONCLUSION

For the reasons set forth above, the County had no authority to impose the Insurance Requirements in the April 21, 2015 CUP, to revoke or amend the CUP issued on July 24, 2015, to reissue the October 9, 2015 CUP with the unlawful Insurance Requirements or not to enforce Wis. Stat. §§ 59.69(2)(bs) and 59.70(25) by granting Enbridge's appeal and striking the Insurance Requirements on December 3, 2015. Therefore, Enbridge respectfully requests that the Court declare void the Insurance Requirements and require Dane County to remove the Insurance Requirements from the CUP and reinstate the CUP without the unlawful Insurance Requirements.

Dated this 25th day of April, 2016.

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