COURT OF APPEALS OF WISCONSIN
DISTRICT IV
Consolidated Case Nos. 16 AP 2503 and 17 AP 0013
Dane County Case Nos. 16 CV 0008 and 16 CV 0350

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

Petitioners-Respondents,

v.

DANE COUNTY, DANE COUNTY BOARD OF SUPERVISORS, DANE COUNTY ZONING AND LAND REGULATION COMMITTEE AND ROGER LANE, DANE COUNTY ZONING ADMINISTRATOR,

Respondents-Appellants.

Appeal No. 17 AP 0013

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

Plaintiffs-Appellants,

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

Defendants-Respondents.

Appeal No. 16 AP 2503

On Appeal from a Judgment Dated November 11, 2016,
Entered in the Dane County Circuit Court, Branch 17,
The Honorable Peter Anderson, Presiding
Case Nos. 16 CV 0008 and 16 CV 0350

PETITIONERS-RESPONDENTS' AND DEFENDANTS-RESPONDENTS' RESPONSE BRIEF

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Enbridge Energy Company, Inc. and Enbridge Energy, Limited Partnership ("Enbridge") do not request oral argument. The issues in this certiorari review proceeding are limited to questions of law and these questions can be fully developed and presented in the parties' briefs.

Enbridge does not request publication. The issues in this certiorari review proceeding involve the application of clear statutory and other well-settled rules of law.

STATEMENT OF THE CASE

This matter relates to the imposition of unlawful conditions by Dane County in a Conditional Use Permit ("CUP") issued to 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. However, the CUP included conditions in the form of certain Insurance Requirements that are expressly prohibited by state statute. On that basis, the Circuit Court properly declared the Insurance Requirements void and unenforceable as a matter of law and removed the Insurance Requirements from the CUP.

In the consolidated matter, Plaintiffs attempted to utilize the citizen suit provision in Wis. Stat. § 59.69(11) to enforce the Dane County Zoning Ordinance through injunctive relief. Plaintiffs, however, sought to enforce conditions in Enbridge's CUP that Dane County itself is prohibited from imposing and enforcing. Just as Dane County is prohibited from enforcing the Insurance Requirements, so too are Plaintiffs in a citizen suit. Thus, the Circuit Court properly dismissed the complaint for the failure to state a claim upon which relief can be granted.

Enbridge brought its claims in a certiorari review proceeding pursuant to Wis. Stat. § 59.694(10). The scope of a reviewing court's authority, as well as the available remedies, are defined by that statute. Specifically, "[t]he court may reverse or affirm, wholly or partly, or may modify, the decision brought up for review." *Id.* Thus, a court has express authority under Wis. Stat. § 59.694(10) to modify a CUP by striking conditions it determines are unlawful. In contrast, the statute does not authorize a court to remand a CUP to a zoning committee to amend or revoke a CUP as a result of the court's decision.

Here, the Circuit Court properly addressed the claims brought in the certiorari action and determined that the Insurance Requirements are void pursuant to the clear mandate set forth in Wis. Stat. § 59.69(2)(bs) and Wis. Stat. § 59.70(25). The Circuit Court then exercised its express authority under Wis. Stat. § 59.694(10) and modified the CUP by removing the unlawful Insurance Requirements from the CUP. In light of the Circuit Court's decision that the Insurance Requirements are void and unenforceable, the Circuit Court also granted Enbridge's Motion to Dismiss the Plaintiffs' claims, which are premised on the enforceability of the Insurance Requirements.

The Circuit Court's decision should be affirmed in its entirety.

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. (R. 2 ¶¶ 1, 2, 9; R. 7 ¶ 1; R. 8:230). Enbridge is regulated by the Pipeline Safety Act, 49 U.S.C. §§ 60101-60301, and regulations promulgated by the United States Department of Transportation, Pipeline and Hazardous

Materials Safety Administration, 49 C.F.R. Part 195. (R. 2 ¶ 10; R. 7 ¶ 4; R. 8:283).

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. Line 61 was installed to meet the capacity needs for crude oil by Midwest refineries and to meet the demand of petroleum producers and users. (R. 2 ¶ 11; R. 7 ¶ 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 piping and equipment. The pump station is known as the Waterloo Pump Station and is located in the Town of Medina. (R. 2 ¶ 15; R. 7 ¶ 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. (R. 8:230).

A. Conditional Use Permit Application.

On April 23, 2014, Enbridge applied to Dane County for a zoning permit in order to construct a 15,352-square-foot pump station and related improvements at the Waterloo Pump Station. On April 29, 2014, the Zoning Administrator issued the requested zoning permit. (R. 2 ¶¶ 21-22; R. 7 ¶ 9).

On June 12, 2014, the Dane County Board of Supervisors ("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. (R. 2 ¶ 23; R. 7 ¶ 9). That same day, the Zoning Administrator revoked Enbridge's zoning permit, contending that the Waterloo Pump Station expansion was not a permitted use but that it required a CUP. (R. 2 ¶ 23; R. 7 ¶ 9).

On August 19, 2014, Enbridge filed a CUP application for the expansion at the Waterloo Pump Station. (R. 2 ¶ 24; R. 7 ¶ 10). That expansion 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. 8:230). The expanded 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, to protect the surrounding area. Berms are built according to regulatory requirements using clay or compacted soil and grading to allow drainage to a designated area on the property. (R. 8:230).

The Waterloo Pump Station property was already being utilized for multiple pipeline and utility purposes involving the same use as the proposed pump station facility expansion. (R. 8:138). 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. 8:230). 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 site. The expansion, which is based on state of the art construction methods and techniques, safety operations and maintenance protocols, will not heighten the risk of an oil release in the area. (R. 8:230, 241-42).

B. ZLR Committee Action On Permit Application.

Pursuant to the CUP approval process established in the Dane County 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. (R. 2 ¶ 28; R. 7 ¶ 12; R. 8:138, 144).

The Dane County Zoning and Land Regulation Committee ("ZLR") then held a public hearing on Enbridge's CUP application on October 28, 2014 but postponed action on the application. During several subsequent meetings, ZLR continued to postpone action. (R. 2 ¶ 29; R. 7 ¶ 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 dba at the property line and that exterior lighting shall be down-shrouded to limit light pollution. (R. 2 ¶ 30; R. 7 ¶ 13). Enbridge agreed to provide Dane County with 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 project specifications. (R. 2 ¶ 31; R. 7 ¶ 13).

Enbridge notified ZLR that it carried $700 million of Commercial General Liability ("CGL") Insurance, which includes Sudden and Accidental Pollution Liability Coverage."[1] (R. 2 ¶ 32; R. 7 ¶ 13). Enbridge provided ZLR notice that, in addition to this insurance, up to $4 billion in funds were available through the Oil Spill Liability Trust

[1] During the pendency of the CUP process, that amount increased to $860 million in coverage. (R. 8:654).

Fund administered by the U.S. Coast Guard pursuant to the Oil Pollution Act, 33 U.S.C. §§ 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 entering the United States, not by general taxpayer dollars. (R. 2 ¶ 33; R. 7 ¶ 13; R. 8:218). ZLR requested that Enbridge provide funds to hire a third party to advise ZLR on the insurance matter. Enbridge agreed. (R. 2 ¶ 34; R. 7 ¶ 14). The insurance consultant concluded that the balance in the Oil Spill Liability Trust fund exceeded $4 billion, and is expected to increase by $300 million annually. The consultant confirmed that those funds are available if Enbridge did not fully respond to a release with its own financial resources. (R. 8:218, 654-55).

On April 14, 2015, ZLR granted Enbridge a CUP for the expansion of the Waterloo Pump Station. However, as a condition, ZLR required Enbridge to purchase and maintain an additional Environmental Impairment Liability ("EIL") Policy with coverage limits of $25,000,000. (R. 2 ¶ 35; R. 7 ¶ 15). ZLR also 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. These two conditions are referred to collectively as the "Insurance Requirements." (R. 2 ¶ 35; R. 7 ¶ 15).

The CUP became effective on April 21, 2015. (R. 2 ¶ 36; R. 7 ¶ 15). On May 4, 2015, Enbridge appealed ZLR's decision to impose the Insurance Requirements to the County Board. (R. 2 ¶ 36; R. 7 ¶ 15).[2] A hearing on Enbridge's appeal was scheduled to be held at a meeting on July 16, 2015. However, prior to that meeting it was removed from the Dane County Board's agenda.

C. State Prohibition On Insurance Requirements.

Prior to any action on the appeal by the Dane County Board, 2015 Wisconsin Act 55 was enacted. Act 55 created Wis. Stat. § 59.70(25), which provides: "A county may not require an operator of an interstate hazardous liquid pipeline to obtain insurance if the pipeline operating company carries

[2] As discussed in Section III, below, an appeal to the County Board under Dane County Ordinance § 10.255(2)(j) provides for a *de novo* review. Thus, final action on the CUP was not taken until the eventual County Board hearing.

comprehensive general liability insurance coverage that includes coverage for sudden and accidental pollution liability." (R. 2 ¶ 37; R. 7 ¶ 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 took effect on July 14, 2015. (R. 2 ¶ 37; R. 7 ¶ 15).

On July 13, 2015, senior zoning staff notified Enbridge that its CUP appeal had been removed from the July 16, 2015 County Board agenda stating, "the appeal is moot since the county cannot enforce the insurance requirements of CUP #2291 that were the subject of the Enbridge appeal." (R. 2 ¶ 38; R. 7 ¶ 15). 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. 8:129). Based 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. (R. 2 ¶ 39; R. 7 ¶ 15).

On August 10, 2015, the advocacy organization 350 Madison filed with ZLR 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 or otherwise in support of such a petition. 350 Madison did not file an appeal with the County Board seeking review of the issuance of the revised CUP on July 24, 2015. (R. 2 ¶ 40; R. 7 ¶ 15).

The County Corporation Counsel issued an opinion letter to ZLR, 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." (R. 2 ¶ 41; R. 7 ¶ 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. 8:159). Based on this letter, ZLR Committee discussed but took no action on the 350 Petition at its September 8, 2015 meeting. 350 Madison did not file an appeal with the County Board seeking review of ZLR's "no action" decision. (R. 2 ¶ 41; R. 7 ¶ 15).

In reliance on the reissued July 24, 2015 CUP without the Insurance Requirements, Enbridge spent approximately $10 million on construction expenses including the completion of site survey work and a variety of construction activities. (R. 8:660-61).

Despite the County Corporation Counsel's opinion that ZLR could not "reconsider or rescind the [July 24, 2015] CUP granted to Enbridge," it nevertheless took action to revoke or amend the July 24, 2015 CUP. On September 29, 2015, ZLR 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. 8:590-91). At the direction of ZLR, the Zoning Administrator issued a new CUP on October 9, 2015, which included the Insurance Requirements with an asterisk noting the change in state law. (R. 9:133).

D. Appeal to Dane County Board.

On October 19, 2015, Enbridge appealed ZLR's September 29, 2015 decision and the October 9, 2015 CUP to the County Board, pursuant to Wis. Stat. § 59.694 and County Ordinance § 10.255(2)(j). (R. 2 ¶ 45; R. 7 ¶ 19). On December 3, 2015, the County Board held a hearing on Enbridge's May 4, 2015 appeal, which was still pending, as well as the October 19, 2015 appeal. (R. 2 ¶ 46; R. 7 ¶ 20). During deliberations by the County Board, a number of board supervisors 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. 8:682, 734, 744, 765). Additionally, they asserted 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. (R. 8:703, 750). Immediately

following the hearing on December 3, 2015, the County Board dismissed both appeals and upheld ZLR's April 14, 2015 and September 29, 2015 CUP decisions imposing the Insurance Requirements. (R. 2 ¶ 47; R. 7 ¶ 21).

E. Circuit Court Proceedings.

Enbridge filed a Petition for Certiorari Review in Dane County Circuit Court on January 4, 2016 seeking review of the County's decision imposing the unlawful Insurance Requirements. (R. 2). On February 8, 2016, Plaintiffs filed a separate action in Dane County Circuit Court seeking an injunction to enforce the unlawful Insurance Requirements. (R. 1).[3] Enbridge filed a Motion to Dismiss Plaintiff's Complaint on March 2, 2016. (R. 4).[4]

The actions were consolidated on April 22, 2016. (R. 11). At the conclusion of a hearing on July 11, 2016, the Circuit Court concluded the Insurance Requirements are void and unenforceable as a matter of law. (R. 37). Following a

[3] Case No. 16-CV-350.

[4] Plaintiffs spend considerable time in their Statement of Facts discussing "tar sands" oil and risks associated with pipeline releases, none of which have any relevance to the issues on certiorari review. (*See* Campbell Br. 4-7). Enbridge has not "admitted" any facts alleged by Plaintiffs. It is undisputed that Enbridge carries $860 million of Comprehensive General Liability insurance coverage for any release and has always funded cleanup efforts from any inadvertent release. (R. 8:654).

hearing on September 27, 2016, the Circuit Court ordered that the unlawful Insurance Requirements be stricken from the CUP. (R. 45).

In the Circuit Court's decision and order issued on November 11, 2016, the Court: (1) granted Enbridge's Petition for Writ of Certiorari; (2) deemed Plaintiffs Intervening Respondents in the certiorari proceeding but concluded Plaintiffs do not have the right in that capacity to challenge Dane County's findings related to Enbridge's insurance coverage; (3) granted Enbridge's Motion to Dismiss Plaintiff's Complaint; (4) declared the Insurance Requirements void and unenforceable as a matter of law; and (5) struck the Insurance Requirements from the CUP. (R. 50).

Dane County filed a notice of appeal on December 20, 2016. (R. 52). Plaintiffs filed a notice of appeal on December 23, 2016. (R. 53). The two appeals were consolidated on March 1, 2017.

On appeal, the County does not challenge the Circuit Court's finding that the Insurance Requirements are unenforceable. Instead, the County *concedes* the Insurance Requirements are unenforceable. The only issue raised by the

County is whether the Circuit Court properly struck the unlawful Insurance Requirements from the CUP rather than remanding the matter back to the County for further proceedings before ZLR. As established below, the Circuit Court properly exercised its statutory authority by removing the unlawful Insurance Requirements from the CUP and denying the County's improper and unsupported request for remand.

ARGUMENT

Plaintiffs make a number of arguments that are not property raised before this Court on appeal. First, Plaintiffs do not have standing to challenge the County's finding concerning the insurance coverage carried by Enbridge because they did not file a petition for certiorari review challenging the County's determination. Second, the question of whether the statute imposes a continuing obligation to maintain insurance was not a claim properly raised in the Circuit Court proceedings and is not a proper issue on appeal. The issue below was whether the County lawfully imposed the Insurance Requirements on Enbridge in 2015, and the CUP did not include a condition regarding future enforcement of the statutory requirement. Third, the issue of whether

Enbridge's appeal "stayed" the CUP was not an issue raised below; to the extent Plaintiffs are challenging the Circuit Court's finding that a change in law applies to a pending appeal, the Circuit Court properly determined that the new laws do apply to the Insurance Requirements in the CUP based on Enbridge's appeal to the County Board. Finally, Plaintiffs present no applicable authority supporting their claim that they have citizen suit authority to enforce the unlawful Insurance Requirements in the CUP.

STANDARD OF REVIEW

On appeal from a circuit court's decision in an action for certiorari review of a zoning board's decision, this Court reviews the decision of the board, not that of the circuit court. *State ex rel. Earney v. Buffalo Cnty. Bd. of Adjustment*, 2016 WI App 66, ¶ 10, 371 Wis. 2d 505, 885 N.W.2d 167 (citing *Roberts v. Manitowoc Cnty. Bd. of Adjustment*, 2006 WI App 169, ¶ 10, 295 Wis. 2d 522, 721 N.W.2d 499).

The well-established four-part standard the Court applies on certiorari review looks at (1) whether the zoning board 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 determination in question. *Id.*

While a reviewing court grants deference to a zoning committee on matters of a discretionary nature, questions of law are reviewed *de novo*. *Park 6 LLC v. City of Racine*, 2012 WI App 123, ¶ 6, 344 Wis. 2d 661, 824 N.W.2d 903 (citing *Ottman v. Town of Primrose*, 2011 WI 18, ¶ 59, 332 Wis. 2d 3, 796 N.W.2d 411)

Finally, a circuit court's decision on whether to grant a particular remedy based on equitable or factual considerations is reviewed by this Court under the erroneous exercise of discretion standard. *Duhame by Corrigal v. Duhame*, 154 Wis. 2d 258, 262–63, 453 N.W.2d 149 (Ct. App. 1989).

In this case there were specific legal questions addressed by the circuit court: first, whether the Insurance Requirements in the CUP were invalid under Wis. Stat. §§ 59.69(2)(bs) and 59.70(25); and, second, whether the circuit court had the authority to remand the matter to the County pursuant to Wis. Stat. § 59.694(10). These are legal issues this Court reviews *de novo.* Yet, even if the circuit court had authority to grant the remedy advocated by the County – namely remand to the County to consider new conditions –

the circuit court determined that such a remedy would be improper under the circumstances. That decision is subject to the erroneous exercise of discretion standard.

I. THE CIRCUIT COURT PROPERLY EXERCISED ITS AUTHORITY TO REMOVE THE UNLAWFUL INSURANCE REQUIREMENTS FROM THE CUP.

Following the Circuit Court's determination that Dane County improperly imposed the Insurance Requirements in Enbridge's CUP, the County and Plaintiffs sought a "remedy"—remand to the County—that no party had requested until after the Circuit Court had issued its decision on the substantive issues in the case and the County realized it had lost on the merits. Remanding the matter to the County to commence an entirely new permitting process is not authorized by law and, even if it were, such remedy would be grossly inequitable to Enbridge as the prevailing party.

The Circuit Court properly rejected the untimely and improper request by the County and Plaintiffs for another opportunity to impose new conditions on Enbridge, particularly where the County already had multiple opportunities but declined to do just that. This action is limited to the question of whether the Insurance Requirements are invalid. The Circuit Court properly

concluded that the Insurance Requirements are indeed invalid as a matter of law. The Circuit Court then properly concluded that remand is inappropriate and unnecessary and that by striking the unlawful Insurance Requirements the CUP has been modified accordingly. Enbridge respectfully requests that the Court of Appeals affirm the Circuit Court's rejection of the County's and Plaintiffs' improper remand request.

A. The Circuit Court Is Expressly Authorized To Modify A CUP In A Certiorari Review Proceeding.

A certiorari review proceeding involving the review of a county zoning decision is governed by Wis. Stat. § 59.694(10). The plain language of that section authorizes the Court to "reverse or affirm, wholly or partly, or … modify, the decision brought up for review." Wis. Stat. § 59.694(10). There is no requirement that the court remand the decision to the county zoning committee for additional proceedings upon finding that the county decision was improper. Indeed, the statute does not authorize such a remand to the zoning committee. Rather, the Court has the authority to modify the decision—in this case by removing the unlawful Insurance Requirements from the CUP.

An order modifying the CUP by the removal of the unlawful Insurance Requirements is the appropriate remedy here. Enbridge's Petition for Certiorari Review and the Circuit Court's decision on the merits were based solely on the legal question of whether the County had the authority to impose the Insurance Requirements as conditions in the CUP. Neither the Petition nor the Court's decision questioned any findings of fact by the County or otherwise require the County, as the initial finder of fact, to make any further determinations. Instead, the Court determined that the County's decision was in violation of statutory law. The proper remedy is to require the removal of the unlawful Insurance Requirements from the CUP without remanding the decision to the County for further proceedings.

The Wisconsin Supreme Court recently reached this conclusion in a case involving the Livestock Facility Siting Review Board's role in a livestock siting review proceeding under Wis. Stat. § 93.90(5), which is similar to a court's role in a certiorari proceeding. Pursuant to Wis. Stat. § 93.90(5)(d), the Siting Board "shall reverse the decision of the political subdivision" if it finds that the decision included unlawful conditions. The term "shall reverse" empowers the

Siting Board to remove the offending conditions without invalidating the entire permit. *Adams v. State Livestock Facilities Siting Review Bd.*, 2012 WI 85, ¶ 61, 342 Wis. 2d 444, 820 N.W.2d 404.

In *Adams,* the Supreme Court concluded that the town had imposed unlawful conditions in a permit for the siting of a livestock facility. Affirming this Court's decision, the Supreme Court then rejected the town's request to remand the CUP for reconsideration by the town. *Adams*, 2012 WI 85, ¶ 61. Instead, the Court affirmed the Siting Review Board's "modifi[cation] [of] the CUP, striking conditions one, three, five, and seven as invalid, narrowing condition two as overbroad, and affirming the unchallenged conditions (four and six)." *Id*. ¶ 60. The remedy of striking the unlawful conditions in *Adams,* rather than reversing and remanding the CUP to the town, was proper for a number of reasons.

First, "the Town committed the initial error that the Siting Review Board was required by law to rectify. The Town imposed the impermissible, extra-legal conditions." *Id*. ¶ 63. "It would make little sense, therefore, to read the Siting Law as prohibiting the Siting Board from correcting the problem in as efficient a manner as possible." *Id*. Similarly,

here, the County imposed the unlawful conditions in the CUP with full knowledge that the conditions were unlawful and in direct contravention of state law. It would "make little sense" to subject Enbridge to additional proceedings before the County where Enbridge has been seeking a CUP without the unlawful Insurance Requirements from the County for the past two years and the County has demonstrated its willingness to directly contravene state law. Removing the offending conditions from the CUP is the more efficient remedy rather than reopening the County permitting proceeding.

Second, according to the *Adams* Court, "long and unnecessary delays in the process were the problem [that prompted the Siting Law], and it would only compound that problem to 'reward' farm operators challenging invalid CUPs by returning them to the beginning of the application process." *Id*. ¶ 64. Similarly, the County's lengthy permitting process, marked by numerous delays, would provide no remedy to Enbridge and would inequitably "reward" the County for its unlawful actions. As stated by the Supreme Court, "[i]t would be absurd for the Siting Board to tell Larson, which filed an application more than four years

ago and was entitled to a permit shortly thereafter, that it was required to return to the beginning of the application process because of the Town's mistake." *Id.* ¶ 65. Similarly, it would be "absurd" to require Enbridge to essentially restart the permitting process when Enbridge has been seeking a permit from the County since April 2014, when the County's unlawful action in imposing the Insurance Requirements prompted the current action.

The County essentially has no response to the clear directive provided in *Adams*. Instead, the County latches on to *dicta* in the *Adams* decision in which the Supreme Court stated there might be situations where reversal of a permit due to faulty conditions might be proper, such as where "had the municipality known that a critical condition was defective, it could have imposed an alternative proper condition." (County Br. 19).

Notwithstanding the fact that the language is *dicta* and that the County asks the Court to establish new law through this case based on that *dicta* rather than the actual holding of *Adams*, in this case *the County knew the conditions were defective* when it acted on the CUP. ZLR knew the conditions were defective on September 8, 2015 when the

committee denied the request by 350 Madison to impose a trust fund requirement in place of the Insurance Requirements. ZLR knew the conditions were defective on September 29, 2015 when the committee reissued the CUP with the Insurance Requirements and an asterisk noting the passage of the new state laws affecting the conditions. And the County Board knew the conditions were defective on December 3, 2015 when it upheld the CUP with the unlawful Insurance Requirements. This is certainly not the case potentially envisioned by the *Adams* court where a municipality did not know a condition was defective. The County knew full well that the Insurance Requirements were defective and, rather than devising any alternative conditions, repeatedly reaffirmed the CUP with an asterisk stating the conditions were unlawful.

The County should not have another opportunity to impose additional conditions on Enbridge only after the County lost on the merits in defending its unlawful insurance conditions. The County made the decision to proceed knowing the Insurance Requirements were invalid, notwithstanding the County's "asterisk" in the permit. The County lost. The losing party in the case does not have the

right to a "do-over" just because it does not like the result. Nothing in *Adams* supports a different result. It would be absurd and inequitable to require Enbridge to return to the beginning of the application process, two years after filing its initial application, due to the County's unlawful actions. Such a result could hardly be considered a "remedy" for Enbridge as the prevailing party on the merits. Accordingly, the Circuit Court properly removed the unlawful Insurance Requirements from the CUP. (R. 55:2-8)

The County does not cite any applicable authority supporting the remand of a CUP following the removal of unlawful conditions. The primary case cited by the County involved reversal of a CUP decision *denying* a CUP; in other words, the court was not reviewing an approved permit. *Westel-Milwaukee Co. v. Walworth Cnty.*, 205 Wis. 2d 244, 247, 556 N.W.2d 107 (Ct. App. 1996). Once the Court reversed the denial of the CUP in that case, the CUP application was still pending before the county. In another case cited by the County, the court was reviewing an allegation of bias by ZLR; the court was not reviewing the validity of any conditions in the CUP. *Keen v. Dane Cnty. Bd. of Supervisors*, 2004 WI App 26, ¶ 21, 269 Wis. 2d 488,

676 N.W.2d 154.[5] The County has not cited any case law supporting remand of a CUP for wholesale reconsideration due to invalid conditions where the remainder of the CUP conditions are valid and uncontested.

B. Cases From Other Jurisdictions Do Not Support Remand Due To Unlawful Conditions.

The County cites a long list of cases from other jurisdictions allegedly supporting the "remand" of a permit to the issuing body. However, none of the cases address the situation here, where the issuing body is seeking to reconsider a CUP as a result of the invalidation of unlawful conditions it knowingly imposed after the conditions were declared unlawful by the Legislature. The cases are therefore distinguishable and do not change the clear directive established in *Adams*.

Decisions based on procedural errors or insufficient evidence in the record are inapposite; there has been no

[5] The other cases cited by the County did not even involve the review of CUP decisions. *See Lamar Cent. Outdoor, Inc. v. Bd. of Zoning Appeals of City of Milwaukee*, 2005 WI 117, 284 Wis. 2d 1, 700 N.W.2d 87 (reversing denial of variance based on application of wrong legal standard); *Marris v. City of Cedarburg*, 176 Wis. 2d 14, 498 N.W.2d 842 (1993) (reversing BOA decision on nonconforming use status due to evidence of bias); *Arndorfer v. Sauk Cnty. Bd. of Adjustment*, 162 Wis. 2d 246, 469 N.W.2d 831 (1991) (reversing BOA decision denying variance due to inadequate evidence); *Guerrero v. City of Kenosha Hous. Auth.*, 2011 WI App 138, 337 Wis. 2d 484, 805 N.W.2d 127 (reversing housing authority order due to inadequate evidence).

argument that the County committed any procedural error or that the evidence in the record does not support the County's decision.[6] Cases where conditions were reversed based on the lack of sufficient evidence or procedural error are distinguishable. The Insurance Requirements are not invalid based on procedural errors or insufficient evidence. They are invalid because the Legislature declared them invalid. There is no further evidence for the County to gather and no procedural error for the County to correct. There is nothing the County can do to make the unlawful Insurance Requirements lawful. The cases relied on by the County from other jurisdictions allowing remand to the issuing body are inapposite. Similarly, cases based on other types of government decisions other than CUP decisions are unpersuasive, particularly in the context of the Wisconsin

[6] *See Floch v. Planning and Zoning Comm'n of Westport*, 659 A.2d 746 (Conn. Ct. App. 1995) (reviewing special use permit conditions due to procedural error); *Dep't of Envtl. Servs., City and Cnty of Honolulu v. Land Use Comm'n*, 275 P.3d 809 (Haw. 2012) (reviewing special use permit decision due to insufficient evidence); *Hochberg v. Zoning Comm'n of Wash.*, 589 A.2d 889 (Conn. Ct. App. 1991) (reviewing special use permit due to insufficient evidence); *Bd. of Appeals of Dedham v. Corp. Tifereth Israel*, 386 N.E.2d 772 (Mass. Ct. App. 1979) (reviewing special use permit due to insufficient evidence); *O'Donnell v. Bassler*, 425 A.2d 1003 (Md. Ct. App. 1981) (reviewing special use permit due to lack of substantial evidence) (abrogated on other grounds, *see Changing Point, Inc. v. Maryland Health Res. Planning Comm'n*, 589 A.2d 502 (Md. Ct. App. 1991)).

certiorari review standards.[7] None of the cases cited by the County address a situation where permit conditions are invalid as a matter of law and the remainder of the CUP conditions are uncontested.

Additionally, there are cases from other jurisdictions that *support* the authority of a court to modify a zoning permit by removing unlawful conditions. 3 *Rathkopf's The Law of Zoning & Planning* § 61.49 (4th ed. 2016) ("In some jurisdictions, a court is permitted to modify the conditions imposed by a special permit."); *see, e.g.*, *Beckish v. Planning & Zoning Comm'n of Columbia*, 291 A.2d 208, 212 (Conn. 1971) (removing unlawful condition from special use permit and upholding remainder of permit where the commission lacked the authority to impose the offending condition);

[7] *See Borough of N. Plainfield v. Perone*, 148 A.2d 50 (N.J. Super. Ct. App. Div. 1959) (reviewing permit conditions in the context of an enforcement action); *Bd. of Selectment of Stockbridge v. Monument Inn, Inc.*, 391 N.E.2d 1265 (Mass. Ct. App. 1979) (reviewing conditions imposed by the trial court); *Vaszauskas v. Zoning Bd. of Appeals of Southbury*, 574 A.2d 212 (Conn. 1990) (reviewing conditions placed on a variance); *The President and Dirs. of Georgetown Coll. v. D.C. Bd. of Zoning Adjustment*, 837 A.2d 58 (D.C. 2003) (reviewing conditions of approval of campus master plan); *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729 (1985) (reviewing federal agency decision on nuclear power facility); *Orloski v. Planning Bd. of Borough of Ship Bottom*, 545 A.2d 261 (N.J. Super. Ct. 1988), *aff'd*, 559 A.2d 1380 (N.J. Super. Ct. App. Div. 1989) (upholding variance conditions); *Alperin v. Mayor and Twp. Comm. of Middletown*, 219 A.2d 628 (N.J. Super. Ct. 1966) (upholding variance conditions).

Parish of St. Andrew's Protestant Episcopal Church v. Zoning Bd. of Appeals of Stamford, 232 A.2d 916, 919 (Conn. 1967) (removing unlawful condition from special use permit and upholding remainder of permit where modification rather than remand would end further litigation).

C. The County Repeatedly Reissued The CUP Knowing The Insurance Requirements Were Invalid.

The County's last ditch effort to obtain another opportunity to reconsider the CUP only after the Court's decision on the merits is procedurally improper and substantively disingenuous. Prior to the end of the Circuit Court's July 11, 2016 hearing on the merits, the County never took the position that the removal of the Insurance Requirements from the CUP should allow the County to consider additional conditions or revoke the CUP in its entirety. The County waived its ability to reconsider or revoke the CUP. *See Brunton v. Nuvell Credit Corp.*, 2010 WI 50, ¶ 36, 325 Wis. 2d 135, 785 N.W.2d 302 (a party waives a right where it intentionally relinquishes the right with actual knowledge of the right being waived).

ZLR and the County Board had several opportunities to reconsider or revoke the CUP and consider additional

conditions following the statutory invalidation of the Insurance Requirements. If ZLR believed the CUP could not be issued without the Insurance Requirements, it could have attempted to add new conditions on September 8, 2015 in response to the 350 Petition. Similarly, ZLR could have attempted to add new conditions on September 29, 2015 when reviewing the action of the Zoning Administrator. Finally, the County Board could have attempted to add new conditions on December 3, 2015 pursuant to its independent review authority contained in Dane County Ord. § 7.68 and Dane County Ord. § 10.255(2)(j).

Instead, on all three occasions the County decided, with full knowledge that the new statutes had been enacted and the Insurance Requirements had been invalidated, to uphold and reissue the CUP without any additional conditions. The County had at least three chances to take the action it now asks the Court for another opportunity to take. The Circuit Court properly rejected the County's improper request for another chance to reconsider or revoke the CUP made only after the County had lost on the merits. (R. 55:4-5)

D. Even If The Decision Were Remanded To The County, The County Could Not Impose New Conditions In The CUP.

Even if the Court were to grant the County's request to remand this action, the County has no authority under its own ordinance to do so. The only authority ZLR has under the County Ordinances related to a CUP that has already been issued is the Committee's limited authority to revoke a CUP upon finding that (1) the permit conditions ***and*** (2) 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.

Based on the conditions in the CUP, and pursuant to its authority under the County Ordinances, ZLR concluded that Enbridge had satisfied the standards for the issuance of the CUP and the County issued the CUP to Enbridge. The County cannot identify any CUP condition that Enbridge has violated. Accordingly, there can be no basis under the County Ordinances for the County to reconsider, revoke, amend or take any other action affecting Enbridge's rights in the CUP. Nor can the County identify which of the six CUP

standards Enbridge has violated. To the contrary, ZLR's action on September 8, 2015 rejecting the 350 Madison request to amend or revoke the CUP, ZLR's action on September 29, 2015 reissuing the CUP with the notation that the Insurance Requirements are unenforceable, and the County Board's action on December 3, 2015 upholding the CUP all confirm that Enbridge has complied with the general CUP standards and the specific conditions in the CUP. Remand does not give the County more authority than it would otherwise have. Remand would be unlawful and inequitable, and is precisely the result rejected by the Supreme Court in *Adams*.

II. THE CIRCUIT COURT PROPERLY CONCLUDED PLAINTIFFS ARE BARRED FROM CHALLENGING THE COUNTY'S FINDINGS ON INSURANCE.

A. Plaintiffs Are Not Full Parties To The Certiorari Action And Have No Standing To Raise New Issues.

Plaintiffs claim that Enbridge does not carry CGL insurance coverage with sudden and accidental pollution liability coverage and, therefore, that Wis. Stat. § 59.70(25) does not apply. (Campbell. Br. at 17). Plaintiffs are barred from raising that argument because the County has

consistently conceded the applicability of Wis. Stat. § 59.70(25). Certiorari review is limited to the record and cannot be expanded to include new issues raised on review, such as whether Wis. Stat. § 59.70(25) applies to Enbridge. *State ex rel. Brookside Poultry Farms, Inc. v. Jefferson Cnty. Bd. of Adjustment*, 131 Wis. 2d 101, 121, 388 N.W.2d 593 (1986).

Plaintiffs are not full parties to the certiorari proceeding and have no standing to raise new issues in the certiorari proceeding. Consolidation of the two proceedings does not merge the cases; parties in consolidated cases have the same relationship they occupied prior to consolidation in the separate cases. *Freuen v. Brenner*, 16 Wis. 2d 445, 454, 114 N.W.2d 782 (1962). Cases consolidated for trial are not merged together in one case but are only tried together "each keeping its own distinctive characteristic and its own separate judgment." *Aug. Schmidt Co. v. Hardware Dealers Mut. Fire Ins. Co.*, 26 Wis. 2d 517, 523, 133 N.W.2d 352 (1965). Plaintiffs are only full parties in the injunction action, notwithstanding the Court's discretionary authority to allow Plaintiffs to file a brief in the certiorari action.

Plaintiffs simply have no ability to raise any new issue in the certiorari action, particularly where they are attempting to take a contrary position on an issue that the County conceded and that the Plaintiffs have in fact conceded in their injunctive action. The Circuit Court correctly determined:

> Plaintiffs are deemed Intervening Respondents in Case No. 16-CV-0008 but do not have the right in that capacity to challenge Dane County's finding that Enbridge carries comprehensive general liability insurance coverage that includes coverage for sudden and accidental pollution liability, having not timely sought review of that determination.

(R. 50).

B. Plaintiffs Are Barred By Prior Admissions By The County And Plaintiffs' Prior Arguments.

Both the County and Plaintiffs have taken the position that Wis. Stat. § 59.70(25) applies to prohibit the County from imposing or enforcing the Insurance Requirements on Enbridge. The County expressly acknowledged: "Dane County has not disputed that Wis. Stat. § 59.70(25) applies to Respondent's Line 61 and renders the insurance conditions included in CUP 2291 unenforceable." (County Br. 13). Therefore, the County has conceded that Enbridge carries sudden and accidental pollution liability coverage. Since the County is the only party adverse to Enbridge in the certiorari

action, and since Plaintiffs are barred from interjecting a position contrary to the County's concession, that should end the Court's inquiry on certiorari review.

Plaintiffs did not assert in opposition to Enbridge's motion to dismiss their injunction action that Wis. Stat. § 59.70(25) is inapplicable. To the contrary, in their Answer, the Plaintiffs "admit that Enbridge notified ZLR that it carried $700 million of General Liability Insurance, including a Sudden and Accidental exception to the pollution exclusion." (R. 17:16). The Plaintiffs also acknowledge that "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.'" (R. 17:19). Likewise in the injunction action, the Plaintiffs have taken the position that Wis. Stat. § 59.70(25) applies to Enbridge: "Because the statute was not made retroactive, the Insurance Condition in the previously adopted Conditional Use Permit remained in effect, but prospectively the county was unable to enforce the

provision." (R. 1:33).[8] Obviously, if Wis. Stat. § 59.70(25) was inapplicable, the County could have enforced the Insurance Requirements prospectively; thus, Plaintiffs have conceded that the statute is applicable.

Plaintiffs cannot take one position in the injunction proceeding—arguing that Wis. Stat. § 59.70(25) applies to prevent the County from imposing or enforcing the Insurance Requirements—and take the opposite position in the certiorari proceeding—arguing that Wis. Stat. § 59.70(25) *does not* apply to Enbridge and *does not* prohibit the County from imposing or enforcing the Insurance Requirements. *See Olson v. Darlington Mut. Ins. Co.*, 2006 WI App 204, ¶ 4, 296 Wis. 2d 716, 723 N.W.2d 713 ("Judicial estoppel is properly invoked to prevent a party from adopting inconsistent positions in legal proceedings.") (citation omitted). Accordingly, the Plaintiffs are barred from asserting that Wis. Stat. § 59.70(25) does not apply to Enbridge, where they have already taken the opposite position in the injunction proceeding.

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C. Plaintiffs' Argument That Enbridge Does Not Carry Sudden And Accidental Pollution Liability Coverage Is Directly Contradicted By The Record, Including The Dybdahl Insurance Report.

Plaintiffs erroneously assert that the insurance consultant retained by the County, David Dybdahl, concluded that Enbridge does not carry comprehensive general liability insurance coverage that includes coverage for sudden and accidental pollution liability. (Campbell Br. 18-19). Those allegations are directly contradicted by the Dybdahl report.

Mr. Dybdahl expressly stated that his report addressed the "sudden and accidental pollution liability coverage **that Enbridge has today**." (R. 8:12) (emphasis added). "The Enbridge General Liability insurance coverage is the type most commonly used [by] large companies involved in the oil and gas business" and the policy "follows the usual and customary liability and insurance coverage purchased by large companies in the energy sector." (R. 8:10-11). "For unknown reasons, the terminology Sudden and Accidental Pollution Liability **is still used to describe the remnant liability insurance** created by the time element exception to the Pollution Exclusion in the General Liability insurance

policies commonly purchased by oil and gas companies." (R. 8:15) (emphasis added).

Mr. Dybdahl concluded: "'Sudden and accidental pollution liability' is what Enbridge shows for insurance coverage in their (*sic*) financial statements today." (R. 8:12.). "Enbridge is not alone in its use of the term sudden and accidental pollution liability coverage, **it is commonly used in the oil and gas business to describe a [General Liability] policy with an exception to the pollution exclusion for contamination events happening within certain time frames."** (R. 8:13) (emphasis added). While Mr. Dybdahl coined his own phrase "Time Element" pollution coverage to describe the types of occurrences covered by "Sudden and Accidental Pollution Liability Coverage," he confirmed that the term of art in the industry remains "sudden and accidental" liability coverage to describe the type of coverage carried by Enbridge. (R. 8:13, 15).

Indeed, the plain language of Condition #7 in the CUP itself confirms the County's finding that that Enbridge carries "sudden and accidental pollution liability coverage" or what Mr. Dydahl refers to as "a time element exception to the

pollution exclusion." Condition #7 states: "Enbridge shall procure and maintain liability insurance as follows: $100,000,000 limits in General Liability insurance with a time element exception to the pollution exclusion ***(currently in place)***." (R. 8:177) (emphasis added). Therefore, ZLR and County Board indisputably made the determination that Enbridge carries the coverage required by Wis. Stat. § 59.70(25).

There is no basis for the Plaintiffs' argument that Enbridge does not carry "sudden and accidental" insurance coverage as contemplated by Wis. Stat. § 59.70(25). Instead, Mr. Dybdahl confirmed that Enbridge does carry such coverage, and the County adopted that finding. Enbridge therefore falls within the protections of Wis. Stat. § 59.70(25), as the County has conceded for purposes of this certiorari review proceeding and as Plaintiffs conceded in their response to Enbridge's Motion to Dismiss.

D. Plaintiffs' Argument That Wis. Stat. § 59.70(25) Creates A Continuing Obligation To Carry The Required Insurance Is Contradicted By The Plain Language Of The Statute And Is Irrelevant In This Certiorari Proceeding.

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." The decision under review in this certiorari proceeding is the County's December 3rd decision to impose the unlawful Insurance Requirements. The "requirements" as described in the statute are CUP Conditions #7 and #8. Certiorari review is limited to the record and cannot be expanded to include new issues raised on review. *Brookside Poultry Farms,* 131 Wis. 2d at 121. Any events that occurred after the December 3rd decision are not part of this proceeding and are not relevant to the issue of whether the County imposed unlawful Insurance Requirements on that date. The questions of whether Enbridge currently carries the required insurance coverage—which it does—and whether the statute

imposes a continuing duty to do so are not before the Court. Plaintiffs' "continuing obligation" argument is without merit.

III. THE CIRCUIT COURT PROPERLY CONCLUDED THE COUNTY TOOK FINAL ACTION ON THE CUP AFTER THE EFFECTIVE DATE OF THE NEW STATUTES WHEN THE INSURANCE REQUIREMENTS WERE PROHIBITED.

The Plaintiffs argue for the first time on appeal that Enbridge's appeal of the unlawful Insurance Requirements did not "stay" the effectiveness of the CUP. (Campbell Br. 26). The issue of whether the appeal "stayed" the CUP was never raised before the Circuit Court, nor is there merit to Plaintiffs' new argument. It is clear that Wis. Stat. § 59.70(25), which prohibits the unlawful Insurance Requirements, was enacted prior to final action by the County. The statute was effective on July 14, 2015. Enbridge's appeals to the County Board were not heard until December 3, 2015.

Enbridge's appeal of the imposition of the Insurance Requirements in the April and October CUPs prevented the County's action on the CUP from being final. When the County Board considers a CUP appeal, it does not simply review ZLR's decision – it receives new evidence, which

includes but is not limited to the evidence before ZLR, and conducts a *de novo* review of the CUP on behalf of the County. In this case, that included reaching a decision as to whether the Insurance Requirements should be imposed on Enbridge.

Dane County Ord. § 10.255(2)(j) empowers the County Board to reverse or modify ZLR's action if the County Board finds the action was not just and reasonable, thereby giving the County Board the final decision on a CUP issued by the County. Further, County Ordinance § 7.68 empowers the County Board not just to independently review the record before ZLR but also to take additional evidence that was not in the record before ZLR in making its decision on the merits of the CUP and taking final action. By denying the appeal, the County took final action to impose the Insurance Requirements; however, by that time the new statutes were already in place, and they prohibited the County from imposing or enforcing the Insurance Requirements. Therefore, the County's final action imposing the Insurance Requirements through the CUP occurred after the new statutes took effect, at a time when imposition or enforcement of the requirements was prohibited as a matter of law.

The County Board was bound to apply the law in effect at the time it rendered its decision on Enbridge's appeal. A new law passed while the time for an appeal is still pending applies to the pending action. *Salzman v. State, Dep't of Nat. Res.*, 168 Wis. 2d 523, 530, 484 N.W.2d 337 (Ct. App. 1992) ("The [County] has no vested right to its judgment until the time for appeal has expired."); *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). *See also Landgraf v. USI Film Prods.*, 511 U.S. 244, 274 (1994) ("intervening statutes . . . ousting jurisdiction [apply on appeal] whether or not jurisdiction lay when the underlying conduct occurred or when the [appeal] was filed."). At the time the new statutes were enacted, the County Board had not yet taken action on Enbridge's administrative appeal. Therefore, the new statutes applied to the pending appeal and the County Board was required to apply the new law when issuing its decision.

Contrary to Plaintiffs' assertion that Enbridge took action under the CUP at a time when the CUP was not "final" (Campbell Br. 27-32), Enbridge commenced construction

only *after* the County declared Enbridge's CUP appeal "moot" on July 13, 2015, *after* Dane County Corporation Counsel stated the Insurance Requirements were "unenforceable" on July 14, 2015, and *after* the Zoning Administrator issued a revised CUP on July 24, 2015 removing the unlawful conditions. (R. 2 ¶¶ 38, 39; R. 7 ¶ 15; R. 8:129). It was not until months later—October 9, 2015—that the County re-imposed the unlawful Insurance Requirements in the amended CUP. (R. 9:133). At that point, Enbridge had already incurred approximately $10 million in construction costs and had undertaken significant construction activities. (R. 8:660-61). Since Enbridge's prior appeal of the unlawful Insurance Requirements had been declared "moot" by the County, the County did not take final action on Enbridge's appeals of the April 14, 2015 and September 29, 2015 ZLR Committee decisions until December 3, 2015. (R. 2 ¶ 47; R. 7 ¶ 21). Enbridge's reliance on the series of actions taken by the County in July 2015 has no bearing on the County's clear obligation to apply the law in effect at the time it took final action on the appeals.

IV. THE CIRCUIT COURT PROPERLY DISMISSED PLAINTIFFS' CLAIM FOR INJUNCTIVE RELIEF UNDER WIS. STAT. § 59.69(11).

Plaintiffs' sole claim in their Complaint in the consolidated injunction action is that Plaintiffs have authority under Wis. Stat. § 59.69(11) to enforce the Insurance Requirements contained in the CUP. (R. 1 ¶¶ 1-2).[9] Plaintiffs acknowledge, as they must, that Wis. Stat. §§ 59.69(2)(bs) and 59.70(25) prohibit Dane County from imposing the Insurance Requirements on Enbridge or requiring Enbridge to comply with the Insurance Requirements. (R. 1 ¶ 31.) However, Plaintiffs argue that the enforcement authority of private citizens under Wis. Stat. § 59.69(11) allows them – but not Dane County – to somehow enforce the Insurance Requirements against Enbridge. (R. 1 ¶¶ 34-35.)

Plaintiffs' argument is without merit. They have failed to state a claim for two reasons. First, private citizens only have authority to enforce violations of *county zoning ordinances*, and not conditions included in permits that are not rooted in and/or required by a county zoning ordinance. Here, because: (i) the Insurance Requirements are contained

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in Enbridge's CUP and not under any zoning ordinance; and (ii) the Insurance Requirements are unenforceable under state law, Plaintiffs cannot demonstrate any violation of a zoning ordinance to allow them to sustain a citizen suit against Enbridge.

Second, even if the citizen suit provision allowed Plaintiffs to enforce the Insurance Requirements contained in Enbridge's CUP as a zoning ordinance, they are still not entitled to enforce the Insurance Requirements because the citizen suit provision on which they base their Complaint only allows citizens to supplement, and not supplant, a county's authority to enforce zoning ordinances. Because Dane County has no authority to enforce the Insurance Requirements, Plaintiffs also have no authority to enforce the Insurance Requirements.

A. Plaintiffs Cannot Establish Any Violation Of The County Zoning Ordinance By Enbridge.

The county zoning ordinance enforcement provisions in Wis. Stat. § 59.69(11)[10] and predecessor provisions have

[10] Wis. Stat. § 59.69(11) provides:

PROCEDURE FOR ENFORCEMENT OF COUNTY ZONING ORDINANCE. The board shall prescribe rules, regulations and administrative procedures, and provide such administrative personnel as it considers necessary for the enforcement of this

been in effect for nearly a century. Section 59.69(11) authorizes a county or an owner of real estate in an affected zoning district through a citizen suit to seek "injunctive relief as a remedy for a zoning ordinance violation." *Forest Cnty. v. Goode*, 219 Wis. 2d 654, 657, 579 N.W.2d 715 (1998).

Court decisions interpreting § 59.69(11) make clear that, in order for injunctive relief to be granted, a "proven zoning ordinance violation" must first be demonstrated. *Id*. at 657, 661-62 ("Compliance with such ordinance *may also be enforced* by injunctional order instituted at the suit of the county or an owner of real estate within the district affected by the regulation."); *Town of Delafield v. Winkelman*, 2004 WI 17, ¶ 28, 269 Wis. 2d 109, 675 N.W.2d 470. Thus, while § 59.69(11) provides counties and citizens with an enforcement mechanism, that mechanism is inextricably tied to the enforcement of a violation of a county zoning

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section, and all ordinances enacted in pursuance thereof. The rules and regulations and the districts, setback building lines and *regulations authorized by this section, shall be prescribed by ordinances* which shall be declared to be for the purpose of promoting the public health, safety and general welfare. The ordinances shall be enforced by appropriate forfeitures. *Compliance with such ordinances* may also be enforced by injunctional order at the suit of the county or an owner of real estate within the district affected by the regulation. (emphasis added).

ordinance, and *not* any other type of violation. *Columbia Cnty. v. Bylewski*, 94 Wis. 2d 153, 288 N.W.2d 129 (1980).

Accordingly, in the typical case, § 59.69(11), like its predecessor provisions dating back nearly a century, has been utilized where a property owner is constructing a structure or commenced a use that does not comply with the express terms of a zoning ordinance. For example, in one of the earliest reported cases of a citizen enforcement action of a zoning ordinance violation in Wisconsin, the plaintiffs sought an injunction to stop the construction of a nonresidential building in a residential zoning district. *Holzbauer v. Ritter*, 184 Wis. 35, 198 N.W. 852 (1924).

This is the intent of § 59.69(11) – the provision recognizes that residents of a particular zoning district have an interest in seeing the standards for that district enforced. If the county refuses to enforce those standards, § 59.69(11) provides residents living in that district with an avenue to protect their interests. For example, if an applicant was proposing to construct a structure that was prohibited under the zoning ordinance and the county issued a permit for its construction, the residents of the district could seek an injunction to prevent construction. Alternatively, § 59.69(11)

is *not* an appropriate mechanism to enforce a condition in a conditional use permit that is not prohibited under any zoning ordinance.

Here, Plaintiffs have failed to allege that Enbridge has violated the County Zoning Ordinance. Instead, Plaintiffs' sole allegation is that Enbridge has not complied with the Insurance Requirements contained in Enbridge's CUP. However, a CUP is not a zoning ordinance.

While, in limited circumstances, courts have allowed citizens to enforce permit violations under § 59.69(11), those permit violations are limited to enforcing permit conditions that are expressly rooted in a zoning ordinance. *See, e.g.*, *Town of Cedarburg v. Shewczyk*, 2003 WI App 10, 259 Wis. 2d 818, 656 N.W.2d 491 (a provision of a conditional use permit can be enforced under § 59.69(11) only when the provision is issued pursuant to and consistent with the zoning ordinance). Unlike those cases, Plaintiffs here are attempting to enforce Insurance Requirements that are unenforceable under state law.

Further, § 59.69(11) only allows a citizen suit to enforce an ordinance that has adopted "regulations authorized by" Wis. Stat. § 59.69. Yet, Wis. Stat. § 59.69(2)(bs)

prohibits enforcement of a CUP condition that is preempted by state law and Wis. Stat. § 59.70(25) preempts the Insurance Requirements Plaintiffs are seeking to enforce. The Insurance Requirements are not authorized by Wis. Stat. § 59.69 and, according to the express provisions of § 59.69(11), cannot be enforced by Plaintiffs.

Absent an allegation that Enbridge failed to comply with the County Zoning Ordinance, Plaintiffs cannot establish a claim under § 59.69(11). *See Sohns v. Jensen*, 11 Wis. 2d 449, 456, 105 N.W.2d 818 (1960) ("It is clear from the record that *this permit was issued in violation of the ordinance*.") (emphasis added); *Jelinski v. Eggers*, 34 Wis. 2d 85, 91, 148 N.W.2d 750 (1967) ("Such property right can be protected by injunction when threatened by *violation of a zoning ordinance*.") (emphasis added).

B. Plaintiffs Cannot Supplant The County's Zoning Ordinance Enforcement Authority.

Plaintiffs' claim also fails because they have no authority to enforce the Insurance Requirements, which state law prohibits Dane County from enforcing. This is because the citizen suit provision only supplements, and does not

supplant, a county's ability to enforce a zoning ordinance violation.

Specifically, the purpose of the citizen suit provision in § 59.69(11) is to allow a private citizen to enforce a county zoning ordinance where the county has failed to act, not when the county is prohibited from acting.

> While zoning regulations, like other regulations enacted pursuant to the police power, are enacted with the expectation that the burden of enforcement will rest with the municipality, the enabling acts of a substantial number of states authorize a taxpayer or other private person to institute an action to enjoin a violation of the zoning regulations. Provisions of this kind recognize not only the fact that landowners have a singular stake in the enforcement of land-use controls, but that the likelihood of vigorous enforcement is not always great. It is common knowledge that when zoning is commenced in many communities no adequate provision is made for enforcement. Frequently, enforcement is committed to a building inspector who is already understaffed for the task of enforcing the building code. When zoning enforcement is committed to his office he is unable to give it more than desultory attention.

Goode, 219 Wis. 2d at 679, n. 13 (quoting Kenneth H. Young, *Anderson's American Law of Zoning*, § 29.01, 683 (4th ed. 1997). The citizen suit provision thus does not establish unlimited and unfettered authority for private citizens to enforce a zoning ordinance, and it extends only so far as expressly permitted by express statutory law. *See Avondale Fed. Sav. Bank v. Amoco Oil Co.*, 170 F.3d 692, 694 (7th Cir. 1999) (denying remedy not expressly provided

in citizen suit statute); *see also Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 60 (1987) (a citizen suit "is meant to supplement rather than to supplant governmental action.").

In a case such as this where the Legislature has made clear that the public interest in the enforcement of county zoning ordinances is limited as provided in Wis. Stat. §§ 59.69(2)(bs) and 59.70(25), the citizen suit provision in § 59.69(11) does not provide an avenue for private citizens to trump that interest. Indeed, here, as in *Gwaltney*, allowing Plaintiffs to file a citizen suit where the Legislature has clearly prohibited the imposition or enforcement of the Insurance Requirements "would *change the nature of the citizens' role from interstitial to potentially intrusive*." *See Gwaltney*, 484 U.S. at 61 (emphasis added). Plaintiffs have no authority to bring a citizen suit to enforce the Insurance Requirements where the Legislature has eliminated the County's authority to do so. In the absence of County enforcement authority, there is no citizen enforcement authority.

CONCLUSION

The County had no authority to impose the unlawful Insurance Requirements under Wis. Stat. §§ 59.69(2)(bs) and 59.70(25). The Circuit Court properly concluded that the Insurance Requirements were unlawful when imposed by the County, and the Circuit Court properly exercised its statutory authority in modifying the CUP by striking the Insurance Requirements and dismissing Plaintiffs' Complaint. Accordingly, Enbridge respectfully requests that the Court of Appeals affirm the decision of the Circuit Court.

Dated this 28th day of April, 2017.

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font: Min. printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of min. 2 points, maximum of 60 characters per full line of body text. The length of this brief is 10,741 words.

Dated this 28th day of April, 2017.

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Dated this 28th day of April, 2017.

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CERTIFICATION OF FILING AND SERVICE

I certify that on April 28, 2017, this brief was hand delivered to the Clerk of the Court of Appeals.

I further certify that, on April 28, 2017, three copies of the brief were mailed via U.S. Mail to:

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