

RECEIVED

05-15-2017

**STATE OF WISCONSIN
COURT OF APPEALS – DISTRICT OF WISCONSIN
CLERK OF COURT OF APPEALS
OF WISCONSIN**
**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.

Case No. 16 AP 2503

**DANE COUNTY,
Respondent-Appellant,**

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

**ON APPEAL FROM A JUDGMENT DATED NOVEMBER 11, 2016,
ENTERED IN THE DANE COUNTY CIRCUIT COURT, BRANCH
17, THE HONORABLE PETER ANDERSON, PRESIDING**

**REPLY BRIEF OF RESPONDENT-APPELLANT
DANE COUNTY**

**David Gault, State Bar No. 1016374
Assistant Corporation Counsel
Office of the Dane County Corporation Counsel
210 Martin Luther King, Jr. Blvd., Room 419
Madison, Wisconsin 53703
(608) 266-4355**

**Attorney for Respondent-Appellant,
Dane County**

**STATE OF WISCONSIN
COURT OF APPEALS – 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,

v.

Case No. 17 AP 0013

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

Respondents.

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

Plaintiffs-Appellants,

v.

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

Defendants-Respondents.

**ON APPEAL FROM AN ORDER DATED NOVEMBER 11, 2016,
ENTERED IN THE DANE COUNTY CIRCUIT COURT, BRANCH
17, THE HONORABLE PETER ANDERSON, PRESIDING**

**David Gault, State Bar No. 1016374
Assistant Corporation Counsel
Office of the Dane County Corporation Counsel**

TABLE OF CONTENTS

<u>Description</u>	<u>Page</u>
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
ARGUMENT	1
I. THE APPROPRIATE STANDARD OF REVIEW IS DE NOVO	1
II. REMAND IS AN AVAILABLE REMEDY IN ANY CERTIORARI CASE.....	2
III. THE SUPREME COURT’S DECISION IN <i>ADAMS V. STATE LIVESTOC FACILITIES SITING REVIEW BOARD</i> IS NOT BINDING PRECEDENT IN THIS CASE.....	4
IV. IF THE CASE WAS REMANDED TO ZLR THEY COULD CONSIDER NEW CONDITIONS OR DECIDE THAT PERMIT SHOULD NOT BE ISSUED.....	8
CONCLUSION	9
CERTIFICATION REGARDING LENGTH	11
CERTIFICATION REGARDING ELECTRONIC FILING	12

TABLE OF AUTHORITIES

CASES

Adams v. State Livestock Facilities Siting Review Bd.,
2012 WI 85, 342 Wis. 2d 444, 820 N.W.2d 404
2010 WI App 88, 342 Wis. 2d 676, 787 N.W.2d 9414-8

Boynton Cab Co. V. DILHR,
96 Wis. 2d 396, 291 N.W.2d 850 (1980) 2

Clark v. Waupaca County Bd. Of Adjustment,
186 Wis. 2d 300, 519 N.W.2d 782 (Ct. App. 1994) 2

Duhamé by Corrigan v. Duhamé,
154 Wis. 2d 258, 453 N.W.2d 149 (Ct. App. 1989) 1, 2

*Lamar Central Outdoor, Inc. v. Bd. of Zoning Appeals of the
City of Milwaukee*,
284 Wis. 2d 1, 700 N.W.2d 87 (2005) 3, 9

Town of Delafield v. Winkelman
269 Wis. 2d 109, 675 N.W.2d 470 (2004) 1

Statutes

Wis. Stat. § 93.90 (2015-2016)5-7

Other Authorities

Dane County Code of Ordinances 10.255.....7-9

ARGUMENT

I. THE APPROPRIATE STANDARD OF REVIEW IS DE NOVO.

The Respondent erroneously argues that this court should apply an abuse of discretion standard to the circuit court's decision. This is a certiorari review of the Dane County Zoning and Land Regulation (ZLR) Committee's decision to grant a CUP for the Waterloo pumping station with the insurance conditions. The appropriate standard of review is de novo.

The Respondent cites *Duhamel by Corrigan v. Duhamel*, 154 Wis. 2d 258, 262-63, 453 N.W.2d 149 (Ct. App. 1989) for the proposition that the court employ an "erroneous exercise of discretion standard." (Resp. Brief, p.19). [In fact *Duhamel* applied an "abuse of discretion standard."] But, *Duhamel* involved the circuit court's equitable jurisdiction based upon its interpretation of a divorce judgment. A court does not exercise equitable jurisdiction when conducting certiorari review. *Town of Delafield v. Winkelman*, 269 Wis.

2d 109, 123, 675 N.W.2d 470, 478 (2004). Therefore, *Duham* has no applicability to this case.

The appropriate standard of review in this case is de novo, without deference to the views of the circuit court. *Clark v. Waupaca County Bd. of Adjustment*, 186 Wis. 2d 300, 303, 519 N.W.2d 782 (Ct. App. 1994), citing *Boynton Cab Co. v. DILHR*, 96 Wis. 2d 396, 405, 291 N.W.2d 850, 855 (1980). This court should review the record without deference to the circuit court's decision and determine whether remand to the County's ZLR was appropriate because the insurance conditions were integral to the issuance of the permit.

II. REMAND IS AN AVAILABLE REMEDY IN ANY CERTIORARI CASE.

The Respondent argues that the circuit court was prohibited from remanding this case to the County's ZLR. This is simply a misstatement of the law. They state "the statute does not authorize a court to remand a CUP to a zoning committee..." (Resp. Brief, p. 2) "Remanding the matter to the County to commence a new permitting process

is not authorized by law...” (Resp. Brief, p. 20) “Indeed, the statute does not authorize such a remand to the zoning committee.” (Resp. Brief, p. 21) These arguments are simply wrong and ignore the well established law in the State of Wisconsin.

Remand to the agency or tribunal being reviewed is an inherent remedy available to a Wisconsin court exercising either statutory or common law certiorari jurisdiction. The Respondent has taken the position that remand is not authorized, period. The County set forth at pages 26-28 of its Brief the long line of cases authorizing remand in zoning certiorari cases. While the facts of those cases may not be completely analogous to this case, they support the County’s position that remand is an available remedy in any certiorari case.

In this case, the ZLR determined that the insurance conditions were necessary to issue the CUP. Indeed, they were the primary focus of the ZLR’s consideration of this CUP. As the Supreme Court held in *Lamar Central Outdoor*,

Inc. v. Board of Zoning Appeals of the City of Milwaukee,
2005 WI 117, ¶ 40, 284 Wis. 2d 1, 700 N.W.2d 87, 97,
remand is appropriate on certiorari review of a zoning case,
because “the Board is the body best suited to make such
factual determinations,…”

Remand was a remedy available to circuit court.
Respondent’s assertions to the contrary are just wrong as a
matter of law. Because the conditions were integral and
material to the issuance of the permit, the circuit court should
have exercised its authority to remand the matter to the ZLR
rather than excising the insurance conditions and rewriting
the permit.

III. THE SUPREME COURT’S DECISION IN *ADAMS
V. STATE LIVESTOCK FACILITIES SITING REVIEW
BOARD* IS NOT BINDING PRECEDENT IN THIS
CASE.

The Respondent’s entire argument is premised on the
position that “[t]he 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.” (Resp. Brief, p. 22). In support of that

argument they rely exclusively upon *Adams v. State Livestock Facilities Siting Review Bd.*, 2012 WI 85, 342 Wis. 2d 444, 820 N.W.2d 404. However, *Adams* involved statutory interpretation of a specific statute that pertains to a very specialized type of case, and did not involve certiorari review.¹

The Respondents argue that *Adams* stands for the proposition that anytime conditions of any permit are held invalid they should be stricken and the remainder of the permit allowed to stand without remand. However, the Respondent's grossly overstate the applicability and scope of the *Adams holding*. Rather than establishing some blanket rule regarding all permit conditions, *Adams* is limited to the discrete statutory interpretation of Wis. Stat. § 93.90(5)(d) regarding review of livestock facility siting decisions by the

¹ As Justice Abrahamson pointed out in dissent, "This is the first case that the Wisconsin Livestock Facility Siting Review Board has had involving Wis. Stat. § 93.90, the Siting Law. It is also the first Siting Law case to come to this court.

The Siting Law is a complex statute. It is difficult to fit its various provisions together with the related provisions of the Wisconsin Administrative Code and apply them in a coherent, cohesive manner... *Id.*, at ¶ 67-68. (emphasis added)

Livestock Facilities Siting Review Board. Section 93.90(5)(d) simply states that “[i]f the board determines that a challenge is valid, the board shall reverse the decision of the political subdivision.” The Board’s authority to reverse is not tied to a finding that a decision included unlawful conditions as asserted by the Respondent (Resp. Brief, p. 22), and the only statutory remedy available to the Board is reversal.

The Court of Appeals noted that the Town of Magnolia argued that the case should have been remanded because “it might have withheld approval had it known that one or more of its conditions would be rejected by the Board.” *Adams v. State Livestock Facilities Siting Review Bd.* 2010 WI App 88, ¶ 50, 342 Wis. 2d 676, 787 N.W.2d 941. That court rejected this argument because it found that the town did not have the statutory authority to withhold approval if it was unable to impose adequate conditions. The court held that the town’s approval was governed by Wis. Stat. § 93.90(3)(a) “and does not hinge on whether or which conditions are attached.” *Id.* The town had no statutory authority to impose conditions.

The holding in *Adams* is not controlling in a certiorari case reviewing a conditional use permit. In that context whether a permit can be issued without particular conditions *is* the issue.

When considering a conditional use permit in Dane County, the ZLR cannot grant the permit unless it finds that the six standards in DCO § 10.255(2)(h) are met. There is no rote list of requirements like in Wis. Stat. § 93.90(3)(a) that mandates issuance of a permit without discretion. The ZLR imposes conditions which are particular to that case to assure the standards are met. This situation falls squarely within the dicta in *Adams* that the Respondents dismiss. Because had the ZLR known that the insurance conditions would be rendered unenforceable by subsequent action of the Legislature, “it might have imposed an alternative proper condition or denied the permit.” *Adams*, 2012 WI 85, ¶ 111 (Abrahamson, CJ, dissenting)

Because *Adams* involved a new and complicated statute involving a discrete administrative review process it

should not control this case. The Town in *Adams* had no authority to impose conditions on the permit. The inverse is true here. Consideration of a CUP by the ZLR is all about the proper conditions. The Siting Review Board's review of the permit in *Adams* in no way resembled the situation here. For that reason the court's holding in *Adams* should not control the disposition of this case.

IV. IF THE CASE WAS REMANDED TO ZLR THEY COULD CONSIDER NEW CONDITIONS OR DECIDE THAT PERMIT SHOULD NOT BE ISSUED.

If the case were remanded to ZLR, it would not need to invoke its authority to revoke the CUP pursuant to DCO § 10.255(2)(m). The Respondent erroneously argues that the ZLR would have no authority to consider new conditions because there are no grounds under that ordinance to revoke the CUP. This is the classic "strawman" argument that the Respondent has creatively set up and knocked down.

However, no one has raised the issue of revocation of the CUP by the ZLR.²

If the court determines that pursuant to *Lamar Central Outdoor, Inc.*, 2005 WI 117, ¶ 40 that “the Board is the body best suited to make such factual determinations,…” regarding the CUP standards, then issuance of the permit would be reversed and remanded to the ZLR. The ZLR would then make factual findings as to whether the standards set forth in DCO § 10.255(2)(h) can be met by alternative conditions. If not, they could determine that the permit should not be issued.

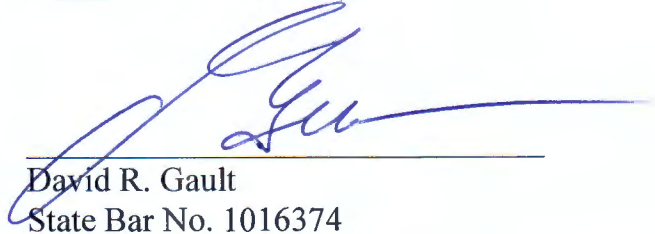
CONCLUSION

The insurance conditions were clearly integral and material to the issuance of the CUP. The record clearly establishes that the CUP would not have been issued without

² The Respondent states at Page 13 of their Brief that “Despite the Corporation Counsel’s opinion that ZLR could not ‘reconsider or rescind the [July 24, 2015] CUP granted to Enbridge…” In fact the opinion of Corporation Counsel referenced by the Respondent and dated August 24, 2015 made no reference to July 24, 2015. This is due to the fact that no CUP was legally issued that date. The only CUP issued by ZLR was dated April 15, 2015, before the Legislature enacted 2015 Wisconsin Act 55.

them. It was only after ZLR approved the CUP with the insurance conditions that the Legislature enacted 2015 Wisconsin Act 55 that rendered them unenforceable. The circuit court's decision to excise the insurance conditions while letting the permit stand is rewriting the permit. That is not the court's job. As the Supreme Court has held, the ZLR is "best suited to make such factual determinations." Contrary to the Respondent's argument, remand was an available, and the best remedy available to the circuit court. Exercising its de novo review, this court should reverse the circuit court and order remand to the Dane County ZLR.

Dated this 15th day of May, 2017.

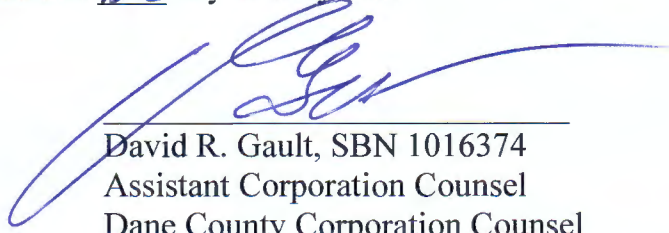


David R. Gault
State Bar No. 1016374
Assistant Corporation Counsel
Dane County Corporation Counsel
210 Martin Luther King, Jr. Blvd., Rm. 419
Madison, Wisconsin 53703
(608) 266-4355

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19 (8) (b) and (c) for a brief produced with a proportional serif font. The length of this brief is 1,688 words.

Dated this 15th day of May, 2017.

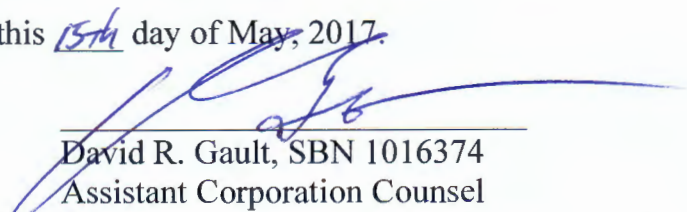


David R. Gault, SBN 1016374
Assistant Corporation Counsel
Dane County Corporation Counsel
210 Martin Luther King, Jr. Blvd., Rm. 419
Madison, Wisconsin 53703
(608) 266-4355

**CERTIFICATION REGARDING COMPLIANCE
WITH RULE § 809.19(12)**

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

Dated this 15th day of May, 2017.



David R. Gault, SBN 1016374
Assistant Corporation Counsel
Dane County Corporation Counsel
210 Martin Luther King, Jr. Blvd., Rm. 419
Madison, Wisconsin 53703
(608) 266-4355