STATE OF WISCONSIN | CIRCUIT COURT BRANCH 17 | DANE COUNTY

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

Petitioners,

v.

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

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.

DANE COUNTY'S ON REMEDY

ADDITIONAL STATEMENT OF FACTS

Dane County is cognizant of the court's admonition to keep this Brief short, however a review of the ZLR's actions is necessary to demonstrate that the insurance conditions were always an integral part of their consideration of this conditional use permit. The Zoning and Natural Resources Committee (ZLR) held their first public hearing on CUP 2291 on October 28, 2014. At that time eight individuals representing Enbridge registered in support of granting the CUP, as well as 27 other individuals. Sixty eight individuals registered in opposition, including representatives of the advocacy groups 350 Madison, Sierra Club – John Muir, and Four Lakes Group Sierra Club. A motion was adopted by ZLR to postpone action due to opposition at the public hearing. (R. 84)

ZLR next considered CUP 2291 at its Work Meeting on November 11, 2014. There were 12 registrants in favor of the CUP and 45 against. The matter was postponed until the ZLR's meeting on December 9, 2014 with the following direction:

> Staff is direct to pursue a condition requiring a surety bond for assurances of spill clean up due to the increase pressure that the pumping station will create on the existing line. Staff will work with Risk Management and Corporation Counsel to determine the language of a surety bond. The bond shall list Dane County as a insurer, determine the risk associated with the spill, ensure the restoration of lands, and require an environmental study be conducted after clean-up.

ZLR also requested that Enbridge produce documentation regarding proof of insurance for a catastrophic event. (R. 91)

CUP 2291 was next on ZLR's agenda at its meeting on January 27, 2015. At that meeting a motion was made and seconded to approve the CUP with 9 conditions including Condition #6 that stated:

> 6. That Dane County be included as a named insured party of comprehensive Environmental Impairment Liability Insurance, purchased by the petitioner, to ensure enough resources to cover complete cleanup of a spill of crude or dilbit within Dane County. The Environmental Impairment Liability (EIL) Insurance policy should be written by a A.M. Best rated "A" or better insurance company. The insurance policy should in effect for each year the Enbridge Line 61 through Dane County is operated. The insurance policy shall have these coverage provisions. a. Clean up expenses. b. Bodily Injury Liability. c. Property damage. d. Natural resource damage. e. Dane County should be named as an additional insured. The EIL policy should be primary and not contributory.

ZLR took no action on that Motion. A Motion was then adopted "that the Conditional Use Permit be postponed to investigate the possibility of retaining an insurance expert, as well as an environmental risk assessment, for the purposes of determining the insurance needs of the proposal." (R. 102-103).

As discussed in previous briefs Enbridge agreed to fund retention of an insurance expert. Mr. David J. Dybdahl, a recognized expert in environmental risk management was retained at

Enbridge's expense. Mr. Dybdahl recommended that Enbridge be required to maintain $100,000,000 in General Liability insurance and Environmental Impairment Liability insurance with a $25,000,000 limit. (R. 220) The details of his recommendations are set forth in Appendix A to his Report. (R. 222-223).

After receiving Mr. Dybdahl's Report, the ZLR next considered CUP 2291 at its April 14, 2015 meeting. A motion was made and approved to grant CUP 2291 with 12 conditions, including what has been referred to in this litigation as the "insurance conditions:"

> 7. 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), and $25,000,000 of Environmental Impairment Liability insurance. Enbridge shall list Dane County as an Additional Insured on the total $125,000,000 of combined liability insurance.
> 8. The required General Liability Insurance and Environmental Impairment Liability insurances shall meet the technical insurance specifications listed in Appendix A of the insurance consultant's report, which is incorporated herein by reference.

(R. 106-109) Clearly the ZLR adopted the insurance requirements directly from Mr. Dybdahl's Report. Even more clearly, the insurance requirements were an integral component of the ZLR's approval of CUP 2291.

ARGUMENT

I.

THE COURT HAS AUTHORITY TO REMAND THIS CASE TO THE ZLR

This court has inherent authority to remand this case to the ZLR. In light of the court's determination that the insurance conditions cannot legally be included in CUP 2291, the ZLR should be afforded the opportunity to determine whether the CUP should be granted without the

insurance conditions. Contrary to the Petitioners' argument there is no statutory prohibition to such a remand.

The Petitioners are operating under the mistaken belief that this is a statutory certiorari proceeding pursuant to Wis. Stat. §59.694(10). That statute expressly applies to certiorari review of decision of the board of adjustment. It has no application to this case, as it does not involve any decision of the board of adjustment. The court's jurisdiction in this case is based upon common law certiorari. There is no statutory authority either defining or limiting the court's remedial authority.

Wisconsin courts conducting common law certiorari review have historically and consistently remanded cases in appropriate circumstances, particularly when the record is insufficient to address the issues raised. *Westel-Milwaukee Co., Inc. v. Walworth County*, 205 Wis.2d 244, 254, 556 N.W.2d 107, 111 (Ct. App. 1996). This includes certiorari review of county zoning decisions. Indeed, in *Keen v. Dane County Board of Supervisors*, 269 Wis.2d 488, 676 N.W.2d 154 (Ct. App. 2003) the Court of Appeals remanded a decision granting a CUP to Dane County's ZLR (then called ZNR). *Id.*, at 500. In *Marris v. City of Cedarburg*, 176 Wis.2d 14, 39, 498 N.W.2d 842, 853 (1993) the Supreme Court remanded a zoning case after common law certiorari review. See also, *Arndorfer v. Sauk County Bd. of Adjustment*, 162 Wis.2d 246, 469 N.W.2d 831 (1991) and *Guerrero v. City of Kenosha Housing Authority*, 337 Wis.2d 484, 805 N.W.2d 127 (Ct. App. 2011)[1]

The ZLR never considered granting CUP 2291 without some form of insurance requirement. It simply was never contemplated. Therefore, the record is insufficient to determine whether ZLR would have granted the CUP without the insurance requirements.

[1] These last cases involve statutory certiorari but support the general proposition that remand is an available remedy under either statutory or common law certiorari.

Therefore, remand is appropriate for ZLR to determine whether CUP 2291 should be granted without insurance requirements.

II.

REMAND TO ZLR IS THE APPROPRIATE REMEDY

The insurance conditions were an integral part of the ZLR's decision to grant CUP 2291. The ZLR never considered granting the CUP without some type of insurance or financial responsibility condition. As a condition precedent to granting a CUP the ZLR must make findings that all of the conditions set forth in Dane County Code of Ordinance (DCO) §10.255(2)(h) are met. There is no record to indicate whether ZLR did or could make such a findings without the insurance conditions.

DCO § 10.255(2) (h) states that ZLR shall not grant a CUP unless it makes findings that six standards are met, including:

> 1. That the establishment, maintenance or operation of the conditional use will not be detrimental to or endanger the public health, safety, comfort or general welfare;
> 2. That the uses, values and enjoyment of other property in the neighborhood for purposes already permitted shall be in no foreseeable manner substantially impaired or diminished by establishment, maintenance or operation of the conditional use;

The ZLR approved CUP 2291 ***with*** the insurance conditions, but never considered approval without the insurance requirements. Clearly there was no finding by ZLR that the CUP standards were met without the insurance conditions.

The court has determined that the insurance conditions as adopted by ZLR in CUP 2291 are unlawful. The insurance conditions were an integral and material part of the issuance of the CUP. It is therefore appropriate for the court to invalidate the entire permit and remand the

matter to ZLR to make findings as to whether the CUP can be issued without the insurance conditions or with alternative conditions.

The Petitioners cite *Riviera Airport, Inc. v. Piece County Bd. of Adjustment* for the proposition that removal of the insurance conditions without remand is the appropriate remedy. Ignoring that the facts of that case are clearly distinguishable, pursuant to Rule of Appellate Procedure 809.23(3) that opinion cannot be cited as precedent in any court of this state. The Petitioners also comment at length on the Supreme Court's holding in *Adams v. State Livestock Facilities Siting Review Bd.*, 327 Wis.2d 676, 787 N.W.2d 941 (2010). Yet, the Petitioners ignore that portion of the opinion where the court stated:

> We do, however, agree with the Town that there may be situations where it is appropriate to reverse an entire decision because of faulty conditions. This might be true, for example, where, had the municipality known that a critical condition was defective, it could have imposed an alternative proper condition. We leave this issue for another day.

Id, at 955, ¶ 51.

This may well be that other day. The ZLR acted in good faith on April 14, 2015 when it approved CUP 2291 with the insurance conditions. Nothing in state law prohibited imposition of those conditions at that time. Only after approval of CUP 2291 with the insurance conditions did Legislature adopt a statutory provision specifically designed to benefit Enbridge. The debate regarding financial responsibility and formulation of the insurance conditions was the sole reason that this CUP took over six months to resolve. There is absolutely nothing in the record to indicate that the ZLR would have granted the CUP without the insurance conditions. This court should not usurp the zoning agency's responsibility. Therefore, this matter should be remanded to the ZLR for findings consistent with the court's ruling that the insurance conditions are unlawful.

Although there are no reported Wisconsin cases on this issue, remand is consistent with the well established common law of zoning. "Where conditions that were integral to the approval of a permit are held invalid, the appropriate remedy is to reverse the permit approval, not sever the invalid conditions." Patricia E. Salkin, *American Law of Zoning* 5th Ed., Vol. 2 §14.17. "Where site-specific conditions imposed by a zoning decision are found by a reviewing court to be illegal or unreasonable, the conditions may be held void and set aside, at least, where the condition held invalid is not deemed to be an essential or integral part of the zoning authority's decision....Where the condition imposed is found to be illegal or unreasonable but the reviewing court further determines that the condition was an integral or essential part of the zoning authority's decision, then the underlying rezoning, variance, or permit granted will be held invalid." 3 Arden H. Rathkopf, *The Law of Zoning and Planning*, §60.38 (2016).

Dating back as early as the 1950s the New Jersey Superior Court held that if conditions to a zoning permit are declared unlawful "the exception upon which they were engrafted must also be set aside." *Borough of North Plainfield v. Perone*, 54 N.J. Super.1, 11, 148 A.2d 50, 55 (N.J. Super. A.D., 1959), *citing*, 101 C.J.S. Zoning §310, pp. 1095 – 1096. Most jurisdictions have, however, made the determination based upon whether the invalid condition is integral to the issuance of the permit or part of an integrated whole.

In *Board of Selectmen of Stockbridge v. Monument Inn, Inc.*, 8 Mass. App. Ct. 158, 163-64, 391 N.E.2d 1265, 1268 (Ct. App. 1979) the Massachusetts Court of Appeals held the "the judgment affirmed the issuance of the special permit but made it subject to the eight restrictions both parties were invalid. ***The judgment was an integrated whole, and the invalidity of such a substantial portion of it must destroy the validity of the entire judgment."*** The court concluded

that it would be unconscionable to strike the conditions and leave an unconditional permit. *Id.* (emphasis added)

Connecticut courts have held that ***"the dispositive consideration is whether the condition was an 'integral' part of the zoning authority's decision…"*** *Vaszauskas v. Zoning Bd. of Appeals of Town of Southbury*, 215 Conn. 58, 66, 574 A.2d 212, 215 (1990). (emphasis added) That court held that "where a condition, which was the chief factor in granting the exception, is invalid, the exception must fall." *Id., citing*, 101A C.J.S., Zoning and Land Planning §238. If the invalid condition is an integral part of the zoning authority's decision, the permit cannot be upheld even if valid in all other respects. *Floch v. Planning and Zoning Com'n of Westport*, 38 Conn. App. 171, 173, 659 A.2d 746, 747 (1995), *citing, Parish of St. Andrew's Church v. Zoning Board of Appeals*, 155 Conn. 350, 354-55, 232 A.2d 916 (1967).

In *President and Directors of Georgetown College v. District of Columbia Board of Adjustment*, 837 A.2d 58 (D.C. Ct. App. 2003), the District of Columbia Court of Appeals relied upon U.S. Supreme Court precedent in determining that a case should be remanded to the zoning authority when conditions of a permit were determined to be invalid. The court noted that in *Federal Power Commission v. Idaho Power Co.,* 344 U.S. 17, 73 S.Ct. 85 (1952):

> the FPC granted a license for a hydroelectric project on certain specific conditions, which were designed to ensure that applicable federal requirements would be satisfied. Concluding that the Commission had no authority to impose these conditions, the United States Court of Appeals ordered that they be stricken from the Commission's order and that the license be issued without them. The Supreme Court reversed, holding that the appellate court had exceeded its own authority by effectively rewriting the terms of the license. Instead, the Supreme Court explained, the Court of Appeals should have remanded the case to the Commission for further proceedings consistent with the court's opinion.

Id., at 82. The D.C. Court then quoted the U.S. Supreme Court's opinion:

> When the [Court of Appeals] decided that the license should issue without the conditions, it usurped an administrative function. There doubtless may be

> situations where the provision excised from the administrative order is separable from the remaining parts or so minor as to make remand inappropriate. *But the guiding principle, violated here, is that the function of the reviewing court ends when an error of law is laid bare. At that point the matter once goes to the Commission for reconsideration.*

Id., quoting *Federal Power Commission*, 344 U.S. at 20, 73 S.Ct. 85.

Most recently the Hawaii Supreme Court considered whether remand to the agency is required when a condition that was material to issuance of the permit is stricken in *Dept. of Environmental Services, City and County of Honolulu v. Land Use Comm.,* 127 Hawaii 5, 275 P.3d 809 (2012). There, the court held that remand is necessary unless *the only* conclusion the agency could have reached was issuance of the permit without the condition. *Id.*, at 18, 822; *citing, Florida Power & Light Co. v. Lorion*, 470 U.S. 729. 105 S.Ct. 1598 (1985). For other cases supporting remand if a material or integral condition is stricken see: *Hochberg v. Zoning Comm. of the Town of Washington*, 24 Conn. App. 526, 589 A.2d 889 (1991); *Board of Appeals of Dedhem v. Corporation Tifereth Israel*, 7 Mass. App. Ct. 876, 386 N.E.2d 722 (1979); *O'Donnell v. Bassler*, 289 Md. 501, 425 A.2d 1003 (Md. Ct. App. 1981); *Orloski v. Planning Bd. of Ship Bottom*, 226 N.J. Super. 666, 545 A.2d 261 (Law Div. 1988); *Alperin v. Mayor and Tp. Committeee of Middletown*, 91 N.J. Super. 190, 219 A.2d 628 (Ch. Div. 1966).

Issuance of CUP 2291 without the insurance conditions was ***not*** the only conclusion ZLR could have reached. In fact a cursory review of the record establishes that ZLR never considered issuing the permit without the insurance conditions. The insurance conditions were integral to ZLR's findings and decision. The court should not usurp ZLR's authority and rewrite the permit. The matter should be remanded to ZLR so that they may make findings as to whether the standards set forth in DCO §10.255(2)(h) can be met without the insurance conditions.

III.

RECONSIDERATION OF THE CUP IS NOT BARRED ON REMAND

On July 11th the court determined that the insurance conditions cannot lawfully be included in CUP 2291. As discussed *supra*, the court should vacate the entire conditional use permit and remand the matter to ZLR to make findings as to whether the CUP should be issued without the insurance conditions. Contrary to Enbridge's assertions, Dane County has not waived the issue of remand. Furthermore, ZLR is not constrained from reconsideration of the entire permit if the court vacates the existing permit because the insurance conditions cannot be excised.

Enbridge argues that Dane County has waived its ability to seek remand of the entire permit. They cite *Brunton v. Nuvell Credit Corp.*, 325 Wis.2d 135, 785 N.W.2d 302 (2010) in support of their argument. Although the court was interpreting waiver under a specific statute (Wis. Stat. §421.401(2)), the court did discuss common law waiver, and held that it requires "the intentional relinquishment or abandonment of a known right." *Id.*, at 155. Enbridge cannot legitimately claim that the County relinquished or abandoned anything. Both ZLR and the County Board took action to retain the insurance conditions as part of CUP 2291. Whether they were enforceable then or in the future is another question. It was not until the court's oral ruling on July 11th that the County sought remand back to ZLR.

Enbridge argues that even if the court remands the matter the County has no authority under its own ordinance to reconsider the CUP. In support of that argument Enbridge relies upon DCO §10.255(2)(m) that authorizes the ZLR to *sua sponte* revoke a CUP if it finds that the standards in subsection 2(h) and the conditions of the permit are not being complied with. But,

Enbridge apparently misunderstands the nature of the remedy sought. Based upon the court's ruling that the insurance conditions are unlawful, the County requests that the Court invalidate the entire permit because those conditions were integral to issuance of the permit. The County's authority under DCO § 10.255(2)(m) is not implicated if the Court invalidates the entire permit.

Enbridge's reliance on the vested rights doctrine is simply misplaced. Enbridge cannot have vested rights in a permit that is still subject to their own appeal. Enbridge has specifically argued in this case that the permit was not final while their appeal was pending before the County Board. Therefore, any actions that they have taken pursuant to CUP 2291 was at their own peril with full knowledge that this matter was still pending. Enbridge is a multi-billion dollar corporation. Their calculated business decision to move forward with this project does not outweigh the public health, safety and welfare of the citizens of Dane County.

CONCLUSION

ZLR must make findings that the standards in DCO § 10.255(2)(h) are met before a CUP can be granted. This case was under consideration by ZLR for months for one reason. That was the issue of financial responsibility for clean up of a potential pipeline spill. The insurance conditions were integral to the issuance of CUP 2291, and it is irrefutable that ZLR would not have granted the CUP without the insurance conditions. Absent those material conditions, there is no record to support a finding by ZLR that the CUP standards are met. That is a function that is delegated by law to the ZLR. The Court should not usurp ZLR's authority and simply rewrite the permit by simply excising the insurance conditions. Rather, the great weight of the common law of zoning establishes that the Court should invalidate the entire CUP and remand the matter to ZLR to make findings as to whether the permit can be issued without the insurance conditions.

Dated this 19th day of August 2016.

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