SUPREME COURT OF WISCONSIN

ENBRIDGE ENERGY COMPANY, INC.,
AND ENBRIDGE ENERGY, LIMITED
PARTNERSHIP,
Petitioners-Respondents-Petitioners
v.

DANE COUNTY,
Respondent-Appellant,

Appeal No.
2016 AP 2503
2017 AP 0013

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

Respondents.

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

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

Appeal No.
2017 AP 0013
2016 AP 2503

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 ENGRIDGE ENERGY LIMITED
PARTNERSHIP WISCONSIN,
Defendants-Respondents-Petitioners.

On Petition for Review of the Decision of the Court of Appeals,
District IV, dated May 24, 2018

Appeal from a Judgment dated November 11, 2016,
Entered in the Dane County Circuit Court, Branch 17,
The Honorable Peter Anderson, Presiding
Case Nos. 16CV8 and 16CV350

BRIEF OF PLAINTIFFS-APPELLANTS ROBERT CAMPBELL, HEIDI CAMPBELL, KEITH REOPELLE, TRISHA REOPELLE, JAMES HOLMES, JAN HOLMES and TIM JENSEN

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STATEMENT OF THE ISSUES

I. Does the plain language of Wis. Stat. §59.70(25) require the operator of a hazardous liquid pipeline to show that it carries "comprehensive general liability insurance coverage that includes coverage for sudden and accidental pollution liability," to limit counties from requiring additional insurance? Does it limit a county from demanding proof of the described insurance at all?

In the consolidated case before the circuit court, the court found that Enbridge had the necessary insurance and that the county could not require additional insurance or proof of the insurance Enbridge had. The Court of Appeals reversed, found no evidence that limited the County from requiring proof of insurance or imposing other conditions related to insurance.

II. Are the Campbells, Reopelles, Holmes' and Mr. Jensen (Landowners) as consolidated parties in the trial court allowed to question the factual basis for application of the limiting statute, and as property owners of real estate in the district affected by Enbridge's tar sands pipeline expansion able to enforce the conditional use permit?

The circuit court ruled that the landowners were not allowed to raise the issue of the adequacy of Enbridge's insurance unless the County also challenged it, and dismissed their claim for injunction. The Court of

Appeals reversed, found that the consolidation order made the landowners full parties to the consolidated case, and nothing prevented them from raising the issue of whether Enbridge had met the insurance requirement of the statute.

III. When as in this case, the law is changed during a zoning proceeding to consider an appeal of a conditional use permit, and the conditions of the permit may have been affected by subsequent legislation, should the matter be remanded to the zoning authority or is the court free to rewrite the conditions integral to the permit?

Following its finding that the County was unable to require additional insurance from Enbridge, the circuit court removed that condition and another condition related to providing proof of coverage from the conditional use permit and refused to remand the matter to the zoning committee. The Court of Appeals reversed and found that the circuit court had impermissibly interfered in the committee's legislative function, and remanded the case to the circuit court and committee to find whether the limiting statute applied based on proof of Enbridge's insurance.

INTRODUCTION

Robert and Heidi Campbell, Keith and Trisha Reopelle, James and Jan Holmes and Tim Jensen ("Landowners") the Plaintiffs Appellees in

this proceeding all own and reside on property in close proximity to the pumping station and Enbridge Energy's Line 61, a 42 inch pipeline carrying Canadian tar sands oil from Alberta to a refinery south of the Illinois state line. In 2014 Enbridge sought to double the volume of tar sands oil through the pipeline and applied for a conditional use permit from Dane County to build a new pumping station near Marshall, in northeastern Dane County. ("CUP") This pumping station is expected to operate for decades.

The County Zoning and Land Regulation Committee ("ZLR") conditioned its approval of the CUP on Enbridge securing supplemental pollution insurance and providing proof of coverage. The insurance conditions were based on the recommendations of David Dybdahl, a nationally recognized expert in risk management. The insurance requirements were included in the CUP to assure the availability of funds to cover clean up and emergency response costs and to cover damages to natural resources in case of an accident in the County.

Enbridge refused to provide evidence of their insurance and sued the County challenging the insurance conditions included in the CUP. The Landowners seek protection of their health and property from the

devastating consequences of a pipeline leak or spill through such insurance. The outcome of this case revolves solely on the narrow *legal* questions of:

1) Whether the statute enacted after the CUP was granted necessitates that a hazardous liquid pipeline operator continually carries "comprehensive general liability insurance coverage that includes coverage for sudden and accidental pollution liability"
2) Whether Enbridge must provide proof to the County on an on-going basis of such insurance?
3) In the absence of proof that Enbridge carries insurance coverage specified by the legislature does Dane County has the authority to enforce its insurance conditions?

The plain words of Wis. Stat. §59.70 (25),[1] require a hazardous liquid pipeline company like Enbridge to demonstrate that it perpetually carries the necessary insurance in order to restrict the County's insurance requirements. The statute is clear and precise. It specifies "comprehensive general liability insurance coverage that includes coverage for sudden and accidental pollution liability." ("Sudden and Accidental Insurance") The statute also clearly and precisely requires that the pipeline company

"carries" certain insurance that "includes" coverage for sudden and accidental pollution liability.

There can be no doubt that the legislature's choice of the word "carries" in the statute imposes an ongoing obligation on Enbridge to carry such insurance in order to avoid the application of the County's own insurance conditions. Enbridge has **never** produced its policy to demonstrate that it has the required insurance. The Landowners are entitled under the law for the County to review and confirm that Enbridge's has the required insurance. ("Where's the beef?") Otherwise their property rights will not be protected.

Contrary to Enbridge's and WMC's incendiary briefs, this case has absolutely nothing to do with "an invitation to lawlessness" or "dodging legislation" Enbridge brief. p. 25, nor the collapse and ruin of the nation's essential energy infrastructure. It simply has to do with providing sufficient insurance coverage mandated by either the legislature or the insurance coverage that the CUP was conditioned upon.

Such a requirement is no different than verifying and enforcing the legislative mandate to carry adequate insurance as a condition to operating a motor vehicle.

Insurance is our economy's hallowed, free market-based mechanism to mitigate risk. Buying commercial insurance is part of the cost of doing business. By insuring against life's perils, all of the affected players, including innocent third parties, can at least be financially protected from the inevitable dangers inherent in living in an industrial society. When an officer stops a vehicle and asks to see proof of insurance, the driver must produce proof of insurance, not claim that it is a "trade secret," or misrepresent its coverage, at the risk of prosecution and forfeiture[1].

The overriding public interest demands interstate hazardous liquid pipeline operators verify that their facilities are adequately insured to

[1] 344.62 Motor vehicle liability insurance required.

(1) Except as provided in s. 344.63, no person may operate a motor vehicle upon a highway in this state unless the owner or operator of the vehicle has in effect a motor vehicle liability policy with respect to the vehicle being operated. 344.62(2) Except as provided in s. 344.63, no person may operate a motor vehicle upon a highway in this state unless the person, while operating the vehicle, has in his or her immediate possession proof that he or she is in compliance with sub. (1). The operator of the motor vehicle shall display the proof required under this subsection upon demand from any traffic officer. 344.64 Fraudulent, false, or invalid proof of insurance. No person may do any of the following for purposes of creating the appearance of satisfying the requirements under s. 344.62 (2):

(2) Represent that any printed or electronic proof of insurance, policy of insurance, or other insurance document or electronic image is valid and in effect, knowing or having reason to believe that the proof of insurance, policy of insurance, or other insurance document or electronic image is not valid or not in effect.

protect the health and property of neighbors. There was a good reason for the legislature and the County to be concerned. Enbridge caused the worst inland oil spill in U.S. history, which cost $1.2 billion to clean up. The need for insurance arises from the nature of Enbridge's pipeline operations: transporting, under high pressures, highly hazardous, combustible and corrosive liquid in pipes, which all too frequently rupture, and often are located in close proximity to family homesteads.

Shorn of Enbridge's rhetoric, this Court should examine the record to determine whether Enbridge has supplied the evidence necessary to invoke the budget amendment's limiting provision. Enbridge has failed to establish that it has the requisite insurance coverage. As a consequence, the Landowners are legally authorized to maintain this lawsuit to enforce the County's insurance conditions.

The Landowners respectfully request this Court to affirm the Court of Appeals in sustaining the Landowners cause of action and remand this matter to the ZLR.

STATEMENT OF THE CASE

Because Enbridge caused a catastrophic oil spill from a similar pipeline in Michigan in 2010, which cost $1.2 billion to partially remediate

and caused protracted litigation with Enbridge's insurer, the ZLR required Enbridge to purchase a $25 million environmental clean-up insurance policy to cover gaps in the policies Enbridge said it had.

As Enbridge described its existing insurance (having declined to provide the policies claiming that they contained "trade secrets"), R 8:207 it would not cover cleanup or emergency response costs and would not cover any leaks or spills unless they are discovered and reported within certain time limits. R 8:211-12.

Enbridge opposed the environmental clean-up insurance requirements and appealed the ZLR's decision to the Dane County Board. While the administrative appeal was pending, the state legislature adopted a statute in the 2015-16 Budget Bill limiting the circumstances when counties can impose insurance conditions on hazardous liquid pipeline companies.

The Dane County Board denied Enbridge's appeal and Enbridge petitioned the Circuit Court for a writ of certiorari to have the conditions removed. Separately, landowners living near the pipeline sought injunctive relief to have the conditions enforced. After the cases were consolidated by the Circuit Court, the Circuit Court found that the new statute applied and granted Enbridge's writ and Motion to Dismiss the Landowners' case. The

court refused to remand the permit to the County and instead removed two of the conditions from the permit. The County and the Landowners separately appealed from that same Circuit Court decision, and the original two lawsuits remain consolidated on appeal.

On appeal, the Court of Appeals reversed the Circuit Court, finding that 1) the Landowners are parties with authority to insist on proof of insurance in order to enforce those conditions; 2) Enbridge failed to show the ZLR that it carries any particular coverage, much less the type required by Wis. Stat.§ 59.70(25); and 3) that the appropriate remedy was remand to the Circuit Court to direct the ZLR to make the finding necessary to limit or uphold its insurance conditions (P-App. 17).

Enbridge filed a Petition for Review in this Court, which was granted.

STATEMENT OF FACTS

Enbridge's pipeline system. That part of Enbridge's Lakehead System at issue in this case is transporting hazardous bitumen, (more commonly known as tar sands oil), from the Fort McMurray-Hardisty area in the Athabascan tar sands oil fields of Alberta, Canada through Wisconsin

to a refinery in Flanagan, Illinois (Line 61) and from there to the Houston-Port Arthur area in Texas largely for export. R. 8:4 and 21.

Enbridge is transporting a dangerous product in the pipeline through Dane County. Enbridge's pipeline is carrying heavy crude oil through Dane County which is both hazardous and corrosive. As a result there is an increased probability of a break in the pipeline. Furthermore, the consequences of a pipe break are calamitous. The transport of heavy crude has thus aroused serious public concerns. R. 9:102-6

Bitumen or tar sands oil, like tar, is too viscous to flow through pipelines without substantial modifications. It has to be mixed with a diluent, which is toxic, volatile and explosive, and heated to approximately 140°F. Heating the tar sands increases the rate of corrosion. Then it must be accelerated with pumps under high pressure reaching 1200 pounds per square inch (psi), increasing the incidence of stress fractures in the pipeline. All of these modifications increase the probability of a break in the pipeline. R. 8:22, 9:103-104

So too, the consequences to the physical environment are irreversible. During oil spills the diluent can evaporate, releasing hazardous

air pollutants. If the bitumen reaches a waterway it will sink vastly increasing the difficulty and costs to clean up. R. 8:22

Enbridge's safety record. In 2010, another Enbridge tar sands pipeline in Michigan, Line 6B, ruptured, discharging approximately one million gallons of tar sands oil into adjoining wetlands, Talmadge Creek and the Kalamazoo River. Both because of the unusual characteristics of tar sands, which sinks instead of floating in water, and the volume of oil spilled over many hours before the leak was detected, it was the worst inland oil spill in U.S. history. Fifty families had to be evacuated due to dangerously elevated ambient levels of the carcinogen, benzene, and 320 people reported symptoms consistent with exposure to crude oil R.9-120, 126-27.

In the aftermath, Enbridge was severely criticized by the National Transportation Safety Board ("NTSA") for refusing to fix 329 of the 390 other known defects in the line and for failing to detect the 75,000 gallon per hour leak from the 6 feet 8 inch gash in the pipeline for more than 17 hours. NTSA pointed out that 10 days earlier Enbridge had testified to Congress that it could quickly detect and stop even the smallest leaks; and found a complete breakdown of Enbridge's culture of safety. R. 9:91-2,103

Kalamazoo was not an anomaly for Enbridge. Between 1999 and 2013, Enbridge pipelines saw an average of 71 spills leaking 500,000 gallons per year, or more than one oil spill every week. This included a recent pipeline spill of more than 50,000 gallons of light oil from Line 14 near Grand Marsh, Wisconsin, in 2012. R. 9:91

Wisconsin pipeline expansion. The year before the Kalamazoo accident, Enbridge completed construction of Line 61 in Wisconsin to carry tar sands oil. Line 61 transverses the State diagonally for approximately 343 miles from Superior through Dane County into Delavan. Line 61 is a 42" line now carries less than half its capacity, and is not subject to the increased pressures to be provided by the pumping stations. R. 8:4

Phase 2 (which is the subject of this appeal) involves adding four 6,000 horse power electric pumps to Line 61 at 5635 Cherry Lane in the Town of Medina in Dane County, designated the Waterloo Pump Station, Phase 2 will increase pressures to triple the flow through Line 61 from 400,000 barrels per day (bpd) ("Project") to 1.2 million bpd. R. 8:5-6

Conditional Use Required under the Dane County Zoning Ordinance ("Zoning Ordinance"). The Phase 2 Improvement is subject to the conditional use process because the parcel the pumping station is

located upon is zoned "A-1 Exclusive".(See: §10.123(3)(c), Dane Co. Ordinance "DCO".)

Dane County ZLR Proceedings. ZLR considered Enbridge's application for a CUP pursuant to the applicable requirements and standards set forth in Section 10.255 of the DCO . R. 8:50-126 and 8:164-169 The ZLR held four public hearings on the application, R. 8:50-126, and also commissioned an independent expert risk analyst, David Dybdahl[2] to review the Project. R. 8:198-227 (See L-App. 49-78) Mr. Dybdahl provided the only expert testimony to the ZLR on the environmental clean-up insurance. Enbridge presented no other expert to contradict or refute any of the opinions offered by Mr. Dybdahl. In addition the ZLR considered the testimony of many county residents and others about increased risks and unacceptable threats to the physical environment posed by the project.

On April 8, 2015, Mr. Dybdahl submitted his report to the ZLR. David Dybdahl started his analysis by stating: "Enbridge declined to provide the actual insurance policies (42 of them in total) to me for review,

[2] Mr. Dybdahl is a nationally prominent expert on environmental risks, and holds graduate degrees in risk management and insurance from the University of Wisconsin Madison where he is a guest lecturer. He has advised the Department of Defense, the Environmental Protection Agency and the Department of Energy on environmental insurance issues, and advised the World Bank on insuring the remediation of Chernobyl. Among his many publications, he authored the chapter on environmental risks and loss control in the standard textbook for the Chartered Property and Casualty Underwriters. R. 8:193-194

claiming that the documents contain trade secrets." R. 8:207. The policies were also about to expire May 1, 2015. R.8-207. However, based on the summaries provided to him, for purposes of making a recommendation to the ZLR (three (3) months before the Act 55 Insurance Limitations were enacted. He concluded that:

1. Due to a likely reduction in fossil fuel use and resulting financial down turn for Enbridge, coupled with aging pipe lines more prone to spill, Enbridge may not have liquid assets to pay for a more likely spill in the future;

2. Enbridge's existing $700 million General Liability insurance was less than the known $1.2 billion cost of the 2010 Enbridge Michigan spill, and contained a "time limited" pollution exclusion that did not cover clean-up costs, emergency response costs or natural resources damages, so it only partially insured the County for damages from an oil spill;

3. Ongoing litigation over the insurance coverage for Enbridge's 2010 Line 6B spill in Michigan resulted from disputes over the pollution exclusions in Enbridge's insurance policy, and led to $103 million in unrecovered insurance costs because Enbridge had inadequate coverage;

4. Enbridge should obtain more insurance, equal to ten percent of the Line 6B cost naming Dane County as an additional insured. He specifically recommended One hundred million of General Liability insurance with a "time element exception to the pollution exclusion (currently in place)" and twenty-five million dollars in "readily available" environmental impairment secondary insurance coverage. It was his opinion that such insurance coverage would better protect the County from the known pollution risks an oil pipeline expansion creates and the possibility of Enbridge going bankrupt. R.8-220-223

Pursuant to its authority under Section 10.255(h) of the DCO, the ZLR on April 14, 2015 determined that the standards for a conditional use set forth in §10.255 (2) (b) and (h)(1-6) of the DCO could not be satisfied unless certain conditions were included in the approval of this risky project. The ZLR adopted many of Mr. Dybdahl's recommendations, and specifically conditioned the approval of the pump station permit on Enbridge securing and maintaining for the life of the pipeline project $100 million in General Liability and $25 million in Environmental Impairment Liability insurance. Further, the insurance would name the County as an additional insured, be provided by an insurer with an AM Best rating of at

least A, and Enbridge would be required to provide evidence of coverage at the County's request. These requirements were included in the CUP #2291 as Conditions No. 7 and 8. (See L-App. 79-84). Conditions No. 7 and 8 read as follows:

> 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.

("Conditions No. 7 and 8")

Under the Zoning Ordinance and the stated terms of the permit, the CUP became final and effective on April 21, 2015 when it was mailed to Enbridge after being approved by the Town of Medina. R. 8:164-169 DCO at §10.255 (2) (j). Enbridge filed an appeal to the Dane County Board on May 4 pursuant to §10.255(2)(j). It argued that the insurance conditions were preempted by federal law, an argument it subsequently abandoned (R.8-310-313; *Enbridge Energy Co. v. Dane Cty.*, 2018 WI App 39, 382 Wis. 2d 830 . ¶ 21). (See L-App. 1-48)

Legislative intervention. On July 2, 2015, the State Legislature interceded through an anonymously authored amendment to the Budget

Bill. When the Joint Finance Committee introduced its Super Amendment to the Budget Bill, (2015 Assembly Bill 21), it included as the 55th of its 67 provisions a proposed new subsection limiting counties from requiring additional insurance for hazardous liquid pipeline companies, provided that the company has certain insurance coverage. Joint Finance Committee, Motion 999, p. 18, ¶55, dated July 2, 2015. This amendment, adopted without any debate or public hearing, contained terms directly related to Enbridge's dispute with the County. The Budget Bill became a part of the final 2015 State Budget effective on July 13, 2015, as §59.70(25), 2015 Wisconsin Act 55.

Dane County ZLR Proceedings –Post Budget Bill. On September 29, 2015 the ZLR met and reversed the Zoning Administrator's unauthorized action on July 24, 2015 in removing Conditions No. 7 and 8 from the CUP. It also voted to deny Enbridge's request to delete Conditions No. 7 and 8. R. 9:247-254. The ZLR was never presented any evidence or made any finding on the issue of whether Enbridge had "Sudden and Accidental Pollution Liability Insurance".

Dane County Board Proceedings –Post Budget Bill. On October 19, 2015, Enbridge appealed to the Dane County Board from the ZLR's

refusal to remove Conditions No. 7 and 8 from the CUP, R. 8:3-18. On December 3, 2015, the Board heard the appeal. It voted 27 to 2 to uphold the decision of the ZLR. R. 9:439-443

Circuit Court proceedings. On January 2, 2016, Enbridge petitioned the Circuit Court for certiorari review under Wis. Stat. §59.694(10) of Dane County's actions. Separately, on February 8, 2016, the Landowners sought injunctive relief under Wis. Stats. §59.69(11), to have the conditions enforced. Judge Anderson ruled on July 11 that the newly-enacted law applied, granted Enbridge's certiorari petition, excised the Conditions No. 7 and 8 from the CUP and granted Enbridge's Motion to Dismiss the Landowners' complaint for an injunction.

Court of Appeals proceedings. After both Dane County and the Landowners in the consolidated cases appealed the circuit court's orders, the Court of Appeals held oral arguments in the case. The Court of Appeals reversed the circuit court's decision. It held that the Landowners could raise the issue of the sufficiency of Enbridge's insurance coverage and contest Enbridge's unsubstantiated claims; that it had the insurance required by the statute. It further held that remand of the case to the ZLR was the appropriate remedy in this case, because even if the statute applied,

the ZLR never considered issuing the CUP without those insurance conditions.

Following the Court of Appeals' decision May 24, 2018, Enbridge filed a petition for review, which this Court granted September 4, 2018.

STANDARD OF REVIEW

While Campbells et. al. agree with the standards for review in a certiorari action and interpretation of statutes, the standard for review of a court's remedy order in a certiorari review is far less deferential than the review in partition or divorce cases cited in Enbridge's brief. Judges cannot grant conditional use permits; a "highly deferential" abuse of discretion standard is inappropriate when review focuses on the action of the local government's legislative role. "The role of courts in zoning matters, is limited because zoning is a legislative function." *Buhler v. Racine County*, 33 Wis. 2d 137, 146-47, 146 N.W.2d 403 (1966), cited by *Town of Rhine v. Bizzell*, 2008 WI 76, ¶26, 311 Wis. 2d 1, 751 N.W.2d 780

ARGUMENT

I. THE ACT 55 INSURANCE LIMITATIONS DO NOT NOW APPLY BECAUSE ENBRIDGE HAS NOT SHOWN THAT IT CARRIES THE INSURANCE COVERAGE REQUIRED BY THE LEGISLATURE.

Enbridge's reliance on the statutes included in the Act 55 Insurance Limitations is unsupported by the clear language of the statutes themselves. Its complaint is based on a total disregard for elementary principles of statutory construction, and is doomed by its own refusal to produce evidence required by the very law that it exclusively relies upon.

The construction of the expressed statutory language used by the legislature in the Act 55 Insurance Limitations is the central legal issue in this appeal. Issues of statutory construction are reviewed by this Court de novo. *See Crown Castle USA, Inc., v. Orion Constr. Grp., LLC*, 2012 WI 29, ¶12, 339 Wis. 2d 252, 811 N.W.2d 332. Statutory interpretation must always begin with the text of the statute,

> "Well established principles of statutory construction grounded in precedent long established and consistently followed by this Court and the courts of this state over the last three centuries guide and control the decision of this case. We discover a statute's meaning in its **text**, context, and structure. "[S]tatutory interpretation begins with the language of the statute," and we give that language its "common, ordinary, and accepted meaning." *State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶¶45-46, [**572] 271 Wis. 2d 633, 681 N.W.2d 110 (internal mark and quoted source omitted) …If we determine the statute's plain meaning through this methodology, we go no further. *Id.*, ¶¶45-46 ("If the meaning of the statute is plain, we ordinarily stop the inquiry." (internal mark and quoted source omitted)). *See generally* Daniel R. Suhr, *Interpreting Wisconsin Statutes*, 100 Marq. L. Rev. 969(2017). Tetra Tech EC, Inc. v. Wis. Dep't of Revenue, 2018 WI 75, ¶96, 382 Wis. 2d 496, 914 N.W.2d 21

"[W]e assume that the legislature's intent is expressed in the

statutory language." *State ex rel. Kalal* 2004 WI 58, ¶44,

If the statutory language is clear, courts are bound to apply that language as it reads because the words used by the legislature are the best evidence of its intent. *Id.*, ¶¶45-46.

A. The Language in the Act 55 Insurance Limitations Allows Counties to Verify Insurance Coverage Include Other Conditions, and Require Liquid Hazardous Pipeline Companies to Obtain Insurance Mandated by the County In the Absence of Proof of the Insurance Specified By the Legislature.

Initially, the statute only limits a county's ability to require a hazardous liquid pipeline company to *obtain* insurance if the company *carries* the insurance prescribed by the legislature. If the company does not have that insurance, the limitation on county insurance requirements does not apply. Both terms ("carries" and "includes") are expressed in the present tense supporting the construction of the statute that the legislature imposed a continuing duty to maintain the specified insurance coverage.

Applying these well settled rules of statutory construction to the statutory provisions at issue in this matter, read in proper context, demonstrates that the rules that Dane County and Enbridge are subject to are those announced by the Court of Appeals:

> "The plain language of the Act 55 insurance limitations defines a strikingly narrow limitation on county action. That is, what is expressly preempted is quite specific. The phrase "may not require an operator of an interstate hazardous liquid pipeline *to obtain insurance*" creates only one limitation on a county once it is triggered, namely, preventing the county from requiring the operator *to obtain insurance*. *Enbridge Energy Co.*, 2018 WI App 39, ¶66

1) The Act 55 Insurance Limitations imposes no *other conditions related to insurance*, including any reasonable requirements that counties might use *related to* insurance, consistent with the nature of conditional use permits allowing conditional uses "only in a controlled manner," See *Town of Rhine*, 2008 WI 76, ¶¶20-21, whether or not the operator makes the required showing to trigger the Act.

2) The Act 55 Insurance Limitations do not restrict counties in their ability to include conditions requiring proof of insurance at any time, at specified intervals. The closely related provision, 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." County action in this area is not limited unless the requirement at issue involves express preemption. *Enbridge Energy Co.*, 2018 WI App 39, ¶65

3) It is not sufficient to show that the operator has carried this insurance in the past or might obtain it in the future. *Enbridge Energy Co.*, 2018 WI App 39 ¶71

4) Recognition of the ability of local officials to verify insurance requirements is inherent in the Act 55 Insurance Limitations.

To rule as Enbridge requests would necessarily implicate the judicial branch in engaging in the practice of rewriting legislation. The judicial principle of strict construction of legislation condemns such a practice. Enbridge is inviting this Court to breach these inviolate principles—the holy grail of conservative jurisprudence.

Even though Enbridge would like a rewrite of the hastily drawn Act 55 Insurance Limitations (See supra pp. 17-18) it does not get a "do over" in this Court unless this Court is prepared to overrule "...well-established principles of statutory construction grounded in precedent long established and consistently followed by this Court and the courts of this state over the last three centuries.." *Tetra Tech EC, Inc.* 2018 WI 75 ¶96. The result will be to invite the courts in this state now and in the foreseeable future to engage in judicial legislating.

B. There Has Been No Evidence Provided that Enbridge Has Had and Will Continue To Have the "Sudden and

Accidental Pollution Liability Insurance" Required by Wis. Stat. §59.70(25).

The record shows that the ZLR had no evidence to support a determination that Enbridge had secured Sudden and Accidental Insurance" in April or September 2015. Enbridge claimed a "trade secret" privilege and refused to share or disclose its insurance policies to either the ZLR or Mr. Dybdahl in April. The policies in effect in April were not the same policies Enbridge had in September.2015 (Supra p.14)

To this day, over three years after the legislature without public hearings approved the Act 55 Insurance Limitations, Enbridge has not produced its policies demonstrating that it has secured the Sudden and Accidental Insurance, a prerequisite to qualifying for the exemption.

There is no basis in the record for finding that Enbridge satisfied the prerequisite to the state exemption when it refused to produce the very evidence that would prove one way or the other whether it qualified for the exemption. Nor has Enbridge demonstrated that it will maintain that insurance on an on-going basis. In fact, Enbridge insists that it need not demonstrate compliance on an on-going basis and insists that it has no duty to maintain such insurance.

Enbridge's position is completely at odds with the plain language

of the Act 55 Insurance Limitations. The Court of Appeals observed, "… we see no starting point in the record for an argument that Enbridge demonstrated to the zoning committee that it "carries" the insurance delineated in the Act 55 Insurance Limitations that it now alleges. Nor do we see an attempt by Enbridge to make any credible argument." *Enbridge Energy Co.*, 2018 WI App 39 ¶¶75-76 During the zoning permit proceedings before the Circuit Court, and now on appeal, Enbridge has relied on the April 2015 insurance consultant's report, and the fictional "agreement" or "concession" [3] by the County that Enbridge has the insurance prescribed by Wis. Stat. §59.70(25) to establish what insurance it carried at any time.

The Dybdahl report, based as it was on a summary from Enbridge of policies due to expire May 1, 2015, contradicts Enbridge's position. He

[3] The County's "concession" lies at the feet of David Gault, an assistant corporation counsel. Gault is merely an employee, a ministerial officer of the County. He is nothing more. He is not the County Board which is the entity that makes binding determinations like these. He can no more bind the County than a building permit official can when he or she issues a building permit in error. A petitioner like Enbridge is held to constructive knowledge of the limits of a ministerial official's authority. Furthermore Gault's prescience, his ability to divine compliance of Enbridge's insurance policy with the Act 55 Insurance Limitations defies belief. First, because Enbridge never showed it to anyone—not to Dybdal, the County's consultant, not to the County Zoning Committee, not to the Circuit Court and certainly not to Gault. Gault has failed to offer any basis for the opinion Enbridge places so much reliance upon.

wrote “the words "sudden and accidental" carry no weight in the current pollution exclusion. A more accurate term to describe the limited coverage for pollution events within the current General liability insurance policy is "Time Element Pollution" coverage.” (R.8-209) The pollution had to be discovered in 30 days and reported within 90 days or there would be no insurance coverage, leaving “an obvious gap” in Enbridge’s coverage (R.8-211).

. As the Court of Appeals noticed, that report makes consistent references to time-limited insurance policies of Enbridge. Dybdahl’s report speaks in terms of the “current” Enbridge policy, what insurance “Enbridge is already purchasing,” the “financial resources available in 2015,” and explicitly notes that Enbridge’s purported “current insurance policies will expire on May 1st” 2015. Indeed, Dybdahl stated that, ‘[i]t served little purpose [for Dybdahl, on behalf of the ZLR] to closely review insurance policies that would expire in a few weeks.’” R.8-207

In sum, the “carries” and “includes” elements of the Act 55 Insurance Limitations have not been met, and therefore the insurance limitations have not been triggered. This conclusion is dispositive in establishing that the Act 55 Insurance Limitations do not apply based upon

the facts established in the current record. As Enbridge acknowledges, the Act 55 Insurance Limitations requires that Enbridge meet the "threshold question of whether Enbridge carries CGL insurance coverage that includes coverage for Sudden and Accidental liability." *Enbridge Energy Co*., 2018 WI App 39, ¶77

C. Wis. Stat. §59.70(25) Does Not Affect Enbridge's Conditional Use Permit Condition No. 8

The second condition Enbridge seeks to cut out of its CUP does not require it to obtain insurance; it only prescribes the quality of the insurer (A.M. Best rating), the named insureds, and that Enbridge must provide proof on demand of coverage it claims it already has[1]. Enbridge has offered no legally cognizable argument supporting the elimination of Condition No. 8.

D. "Sudden and Accidental" Pollution Liability Insurance Means What this Court Held it Means in *Just v. Land Reclamation*

WIS. STAT. § 59.70(25) expressly refers to a "comprehensive general liability insurance" policy with "coverage for sudden and accidental pollution liability". Comprehensive general liability insurance policies contain exclusions for damages resulting from pollution. This Court has defined the term "sudden and accidental pollution liability" in

its decision *Just v. Land Reclamation, Ltd.*, 155 Wis. 2d 737, 742-57, 456 N.W.2d 570 (1990).” we conclude that the phrase "sudden and accidental," contained in the pollution exclusion clause, means unexpected and unintended damages.” *Just* 166 Wis. 2d at 760 (following a discussion of a broad range of authority addressing pollution exclusions in comprehensive general liability insurance policies). The Court rejected the landfill owner’s insurance company’s claims that “sudden and accidental” had a strictly time limited meaning, and found that it had to defend against claims for damage to neighboring landowners’ health and property even though the harm continued for some time. By contrast, the insurance Enbridge claims to have had in March 2015 limited coverage to pollution discovered within 30 days and reported within 90 days. R. 8-209, what Dybdahl called “time element” coverage. Of course only Enbridge and its insurer know what insurance it had then, or has now.

Just is squarely on point as to the meaning ascribed to the legislature’s choice of the term “sudden and accidental pollution liability”. The legislature intended to mandate a pollution insurance policy that offers coverage for both “abrupt or immediate” and “unexpected and unintended.” casualty events *See Just,* 155 Wis. 2d at 741-42, 745-46 for a company to

avoid a requirement in a conditional use permit to obtain other insurance.

"The legislature is presumed to act with full knowledge of existing case law when it enacts a statute." *Strenke v. Hogner*, 2005 WI 25, ¶28, 279 Wis. 2d 52, 694 N.W.2d 296 (citing *Czapinski v. St. Francis Hosp., Inc.*, 2000 WI 80, ¶22, 236 Wis. 2d 316, 613 N.W.2d 120, in turn citing *Ziulkowski v. Nierengarten,* 210 Wis. 2d 98, 104, 565 N.W.2d 164 (Ct. App. 1997)).See also *Linda L. v. Collis (In re Guardianship & Protective Placement of Catherine P*., 2006 WI App 105, ¶57, 294 Wis. 2d 637, 718 N.W.2d 205

When interpreting a statute, we look first to its language. *Vill. of Lannon*, 2003 WI 150, 267 Wis. 2d 158, P13, 672 N.W.2d,275, Strenke, 2005 WI 25, ¶20. Therefore, despite the nearly nonexistent legislative history of the statute, we must conclude that the legislature intended to provide a reasonable assurance to communities before they could be limited from making a pipeline operator obtain more, so it did not use "time element pollution insurance" in the statute.

Certainly, neither Enbridge nor the County have identified either any legislative enactment or opinion of this Court since *Just* that could alter or contradict the meaning of this phrase In rejecting the "… argument that the

phrase "sudden and accidental" …has only a temporal meaning within the exclusionary clause…" *Just,* 155 Wis. 2d 737, 746, this Court has made clear that "time element" and "sudden and accidental" pollution insurance are not the same. We must presume the legislature knew that.

Enbridge's counsel conceded at oral argument that the interpretation it urges this Court to adopt would be better for Enbridge if the legislature had used the term "time element exception" in the Act 55 Insurance Limitations and not "sudden and accidental liability coverage." However, the legislature did not chose to use the phrase "time element insurance" and it is not this Court's function to rewrite the Act 55 Insurance Limitations to accommodate Enbridge. The legislature used a phrase that this Court has defined in crafting a narrow exception to the ability of counties to impose a conditional use permit insurance condition.

Enbridge attempts to avoid the definition of the term "sudden and accidental," adopted in *Just* on the basis that *Just* involved an insurance coverage dispute. That *Just* arose in the context of the interpretation of an insurance contract does not diminish its precedential value in this matter involving the adequacy of Enbridge's insurance and a county's ability to impose conditions and verify coverage pursuant to a conditional use

permit. *Just* remains good law interpreting the language the statute employs in the insurance coverage context. Enbridge had to go to Texas, Louisiana and Oklahoma to find other authority interpreting that term, because Wisconsin case law did not support its position. (Enbridge brief pp. 24-25).

E. Neither the Insurance Consultant's Report, Nor the Unsupported Opinions of the Assistant Corporation Counsel, Nor Statements of Enbridge's Attorneys Can Serve as Evidence of Enbridge's Insurance Coverage at Any Time during the Last Three Years.

Enbridge tries to finesse the distinction between "time element" and "sudden and accidental" pollution liability insurance by claiming for the first time in its Supreme Court brief that there is no difference between these two types of coverage, or if there is, Enbridge has both kinds of insurance, or incredibly despite everything the insurance consultant and this Court have opined, that "time element" is even better (Enbridge brief pp 22-24) with no basis in fact or law. As Enbridge will not disclose its policies, it relies on false representations of the statements contained in the Dybdahl report and statements taken out of context made by Asst. Corporation Counsel Gault. It cannot claim that ZLR or the County Board made any finding that its insurance met the specifications of Wis. Stat.

§59.70(25), for that question was never addressed by any fact finding legislative or quasi-judicial body.

Dybdahl questioned Enbridge's use of the term "sudden and accidental" pollution insurance in the portion of his report titled "Sudden and Accidental Pollution Insurance?" Mr. Dybdahl asks "..why does Enbridge represent that it has Sudden and Accidental Insurance when its only liability insurance on Line 61 is a General Liability insurance policy which contains a pollution exclusion?" R.8-211 and proceeds to explain the confusion around the term, and the evolution of pollution insurance. He never saw Enbridge's policies, but what he saw in its summary was "time element" pollution insurance, at least in March 2015. The pollution exclusion would apply to prevent coverage, if a pollution release were not discovered within 30 days or if Enbridge failed to report the loss to the insurer within 90 days of discovery. R. 8-211

As for the statements of Mr. Gault, those are not the result of any fact finding that either the ZLR, the County Board or he conducted as to whether Enbridge's insurance meets the requirements of Act 55 Insurance Limitations. He is in the dark on Enbridge's insurance coverage like

everyone else. The misbegotten action of the zoning administrator[4], lacking authority to issue or modify conditional use permits under DCO 10.255(b) removed the insurance conditions from the CUP in July 2015, was overruled by the ZLR after they were informed about it in September 2015.R.8-125.

The absence of evidence on the nature of Enbridge's insurance coverage and the County's inability to ascertain whether that it meets the statutory requirements is entirely Enbridge's fault. Having refused to disclose its policies for over three years based on a claim of "trade secret," it cannot now invent the evidence it has concealed all this time. Enbridge has never demonstrated that it has the insurance necessary to limit the County from making it comply with Conditions No. 7 and 8 and the Act 55 Insurance Limitations do not expressly preempt the County from verifying that Enbridge has adequate insurance.

II. The Conditional Use Permit and the Insurance Conditions Attached to It Are Enforceable by Property Owners under Wis. Stat. § 59.69(11)'s Enforcement Remedy.

[4] Roger Lane, the zoning administrator admitted he has no authority to do what he did, and sent Enbridge the conditional use permit with the insurance conditions restored October 9, 2015. R.8-133

In persistent attempts to cut the Campbells and other landowners out of this litigation (continually referring to them as "Citizens," though only property owners in the district have enforcement power under the statute, and claiming that they are not real parties to the case despite the language of the court order consolidating the circuit court cases), Enbridge argues against enforceability of the Insurance Condition—that a Conditional Use and all of the conditions attached to it are not a zoning ordinance as that term is used in Subsection 11 § 59.69(11) (E.Br at 35) Its argument is frivolous.

A. Conditional Use Permits May Be Enforced Like Any Other Zoning Ordinance.

Enbridge relies upon an overly narrow and constrained interpretation of Subsection 11 and ignores the plain language of the statute. Subsection 11 uses the term "ordinances":

> **59.69 (11)** PROCEDURE FOR ENFORCEMENT OF COUNTY ZONING ORDINANCE. 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.(**e.s.**)

The Subsection 11 Enforcement Remedy, is equally applicable to counties and owners of real estate. The absurd result that the Enbridge's

argument leads to is that none of the County conditions in a conditional use can be enforced, because according to Enbridge's construction of Subsection 11 neither a conditional use nor a condition in a conditional use is a zoning ordinance. Even though the Legislature authorized counties to impose conditions in a CUP for the purpose of *promoting the public health, safety and general welfare,* to have it Enbridge's way, neither the conditional use nor the conditions fall within the purview of subsection 11 and therefore none are enforceable.

The Supreme Court's decision in *Forest County. v. Goode,* 219 Wis. 2d 654, 657, 579 N.W.2d 715 (1998), makes it abundantly clear that Subsection 11 applies to enforcement of all land use controls. "Provisions of this kind recognize not only the fact that landowners have a singular stake in *the enforcement of land-use controls…"* (**e.s.**)

There can be no dispute that a conditional use is a land use control. This Court in *State ex rel. Skelly Oil Co. v. Common Council, Delafield*, 58 Wis. 2d 695, 700-701 (Wis. 1973) expressly recognized conditional uses as a land use control:

> Conditional uses or as they are sometimes referred to, special exception uses, enjoy acceptance as a valid and successful tool of municipal planning on virtually a universal scale. Conditional uses have been used in zoning ordinances as flexibility devices, which are designed to cope with situations where a particular use, although not inherently inconsistent with the use classification of a particular

> zone, may well create special problems and hazards if allowed to develop and locate as a matter of right in a particular zone. The Supreme Court of Minnesota in the case of *Zylka v. Crystal* (1969), 283 Minn. 192, 195, 167 N. W. 2d 45, most aptly described this flexibility:
>
> ..By this device, certain uses (e.g., gasoline service stations, electric substations, hospitals, schools, churches, country clubs, and the like) which may be considered essentially desirable to the community, but which should not be authorized generally in a particular zone because of considerations such as current and anticipated traffic congestion, population density, noise, effect on adjoining land values, or other considerations involving public health, safety, or general welfare, may be permitted upon a proposed site depending upon the facts and circumstances of the particular case." 16 N. W. 2d at page 49.

Enbridge's argument that a conditional use is not a zoning ordinance for the purpose of the Subsection 11 Remedy (E Br. at 39-41) offers no legally cognizable basis for disturbing established precedent premised on the plain words of subsection 11.

Town of Cedarburg v. Shewczyk, 2003 WI App 10, P15-P16 (Wis. Ct. App. 2002) further defeats Enbridge's argument. There the Shewczyks argued that the Town cannot maintain an action for an injunction and forfeitures because a violation of a CUP does not constitute a violation of an ordinance. They reasoned that the CUP constitutes a contract and that therefore the Town's remedy for the Shewczyks' noncompliance is limited to damages for breach of that contract. The Court of Appeals disagreed. It found that municipalities frequently use conditional or special use permits as a device when implementing zoning laws. 8 Eugene McQuillin, *The Law*, concluding "In short, conditional use permits are governed by

ordinances within the Town's Zoning Chapter of the Code of Ordinances. Thus, noncompliance with the terms of a CUP is tantamount to noncompliance with a Town ordinance." *Town of Cedarburg*, 2003 WI App 10, ¶16.

Similarly, Dane County's Zoning Ordinance also establishes that the conditions that the County zoning authority establishes in connection with a conditional use are grounded in the standards found in the zoning ordinance. Thus, in DCO §10.123(3) (c), unregulated oil pipelines and associated appurtenances are listed as a conditional use in land zoned as A-1 Exclusive (§10.255(2) (a), of the DCO, describes the conditional use process),

> However, there are certain uses which, because of their unique characteristics, cannot be properly classified as unrestricted permitted uses in any particular district or districts, without consideration, in each case, of the impact of those uses upon neighboring land or public facilities, and of the public need for the particular use at a particular location. Such uses, nevertheless, may be necessary or desirable to be allowed in a particular district provided that due consideration is given to location, development and operation of such uses. Such uses are classified as conditional uses and are of such an unusual nature that their operation may give rise to unique problems with respect to their impact upon neighboring property or public facilities. The following provisions are then established to regulate those conditional uses which require special consideration.

§10.255(2)(h) of the DCO sets forth specific standards governing the issuance of a CUP (incidentally the same six (6) standards cited by

Enbridge for its proposition of what constitutes a "Zoning Ordinance" (Enbridge brief p. 39[1]).

Thus, the Dane County Zoning Ordinance, which the Landowners seek to enforce under §59.69(11) specifically provides for and authorizes the conditions (including the Insurance Conditions) in the CUP issued to Enbridge herein. Those conditions reflect the County's careful balancing of interests acting in its legislative capacity, *Forest County v. Goode*, 219 Wis. 2d 654, 657, 579 N.W.2d 715 (1998). *State ex rel. Skelly Oil Co. v. Common Council*, 58 Wis. 2d 695, 701 (1973).

The State Zoning Enabling Act specifically recognizes and authorizes conditional uses along with planned unit developments and rezonings,

> **59.69 Planning and zoning authority. (bm)** The head of the county zoning agency appointed under sub. (10) (b) 2. shall have the administrative powers and duties specified for the county zoning agency under this section, and the county zoning agency shall be only a policy-making body determining the broad outlines and principles governing such administrative powers and duties and shall be a quasi-judicial body with decision-making power that includes but is not limited to conditional use, planned unit development and rezoning. The building inspector shall enforce *all laws, ordinances, rules and regulations under this section.* Emphasis added.

Contrary to Enbridge's assertions, there is nothing "absurd" about allowing landowners to enforce conditions a county has included in a CUP. The Court of Appeals found *Town of Cedarburg*, 2003 WI App 10,¶15-16

persuasive: "…noncompliance with the terms of a CUP is tantamount to noncompliance with a Town Ordinance." *Enbridge Energy Co*., 2018 WI App 39 ¶53

Enbridge's arguments fail because it places an over-reliance on what it deems to be legislative intent without any support for its claims. (E Br. at 43). It has reserved for itself the judicial function of divining the "true intent of Subsection 11". For example with respect to the Subsection11 Enforcement Remedy, it asserts without any authority that, "[t]he legislature made a policy determination to limit a county's ability to impose certain insurance requirements, Wis. Stat. §§ 59.69(2)(bs), 59.70(25), and by extension has precluded the enforcement of those requirements. The Citizens have no authority under section 59" (Enbridge brief p. 44). As with its many other assertions there is nothing in the plain words of the Act 55 Insurance Limitations or in the record to support such a preposterous assertion.

With respect to Enbridge's remaining arguments they hinge on its false claim that it has the insurance necessary to trigger Wis. Stat. §59.70(25)'s Insurance Limitations and Landowners lack any conditions to enforce. As an apparent after-thought Enbridge asserted that the

landowners were not "full parties" in the consolidated case, without citing any authority. The consolidation order (See L-App. 85-86) itself disproves that allegation, R.12-1-2, and no legal argument was presented to support Enbridge's claim that the landowners were barred from raising an issue the County failed to bring up. (*Enbridge Energy Co*., 2018 WI App 39 ¶¶ 43-50)

The Landowners submit that the *Goode* case represents the clearest expression of intent on the Subsection 11 Enforcement Remedy and that neither Subsection 11 nor *Goode* support Enbridge's claims that the Subsection 11 Enforcement Remedy is not available to the Landowners herein.

III. REMAND TO THE ZLR IS THE APPROPRIATE REMEDY

This matter should be remanded to the Circuit Court, with directions that the Circuit Court return it to the ZLR. The ZLR is the body ordained by the legislature to evaluate the facts and weigh appropriate conditions. As this Court has noted with respect to towns, "…municipalities still have ample authority to regulate land use--and they should. Such regulation is an appropriate legislative function; it can serve to protect the health, safety and welfare of the public, and it encourages well-reasoned

growth." *Town of Rhine,* 2008 WI 76, ¶62

> "In general, we are hesitant to overrule administrative decisions. *Snyder,* 74 Wis. 2d at 476. A board's decision is presumed to be correct and valid. Id. The board's findings may not be disturbed if any reasonable view of the evidence sustains such findings. Id. Moreover, we may not substitute our discretion for that of the board's, as committed to it by the legislature." Id. *State v. Waushara Cty. Bd. of Adjustment,* 2004 WI 56, ¶13, 271 Wis. 2d 547, 679 N.W.2d 514

As the ZLR never had the opportunity to determine whether Enbridge has Sudden and Accidental Insurance and if not, whether they would approve the CUP without the insurance conditions set forth in Conditions No 7 and 8 remand will allow the ZLR to exercise its discretion applying a correct interpretation of the Act 55 Insurance Limitations.

As Asst. Corporation Counsel Gault pointed out in the Circuit Court, there are six standards that the ZLR had to satisfy to grant Enbridge a CUP under DCO 10.255(2)(h), and the ZLR never considered granting the CUP without the insurance conditions R.55-98

A. The Insurance Conditions Are Integral to The Conditional Use Permit and Should Not be Removed by the Court.

Enbridge utterly fails to address the County's argument on the integral-to-the-permit concept. The ZLR heard substantial testimony about

the hazards of Enbridge's pipelines, R.9-84-146, 184-200, and Enbridge was involved in litigation with its insurer over clean-up costs for its 2010 spill into the Kalamazoo River while its application was under consideration R.8-196, 215-16., Sufficient insurance coverage is integral to the approval of the CUP-the ZLR conducted months of fact finding and would not have issued the permit without being assured of sufficient insurance coverage. Had the ZLR believed they could not require Enbridge to obtain sufficient insurance, and could not verify Enbridge's insurance coverage it may have imposed other conditions or denied the permit as there is no "right" to a CUP.

> "A conditional use, however, is different than a permitted use. See S. Mark White, Classifying and Defining Uses and Building Forms: Land-Use Coding for Zoning Regulations, American Planning Association Zoning Practice, Sept. 2005, at 8. While a permitted use is as of right, a conditional use does not provide that certainty with respect to land use. See id. Conditional uses are for those particular uses that a community recognizes as desirable or necessary but which the community will sanction only in a controlled manner. *State ex rel. Skelly Oil Co. v. Common Council, City of Delafield,* 58 Wis. 2d 695, 701, 207 N.W.2d 585 (1973); 3 Young, supra, § 21.06 (discussing uses commonly subject to special permit requirements).*Town of Rhine* , 2008 WI 76, ¶20.

Moreover, a CUP does not give rise to property rights, ***Rainbow Springs Golf Co. v. Town of Mukwonago,*** 2005 WI App 163, 284 Wis. 2d 519, 526, 702 N.W.2d 40.

The standards the ZLR is obligated to consider include risks to "the public health, safety, comfort or general welfare"; substantial impairment or diminishment of already permitted uses of other property in the neighborhood; and impediments to "normal and orderly development and improvement of the surrounding property for uses permitted in the district." Section 10.255(2)(h)(1)(2)(3) of the DCO.

The ZLR in insisting on Conditions No. 7 and 8 put Enbridge on notice of its obligation to carry adequate insurance to satisfy the three standards above. The Act 55 Insurance Limitations were clearly not anticipated. Given the significant public welfare issues involved in adequate insurance coverage the remedy of returning this CUP to the ZLR to review Enbridge's alleged Sudden and Accidental Insurance is the appropriate remedy.

Enbridge's only response to the "integral to permit" principle is its statement that "Dane County already approved Enbridge's CUP sans the Insurance Requirements" (Enbridge brief p. 33) is farcical. The record does not support such an outlandish statement; it in fact repudiates such an assertion. Why has Enbridge carried on this legal challenge if Dane County approved its permit without the insurance

conditions?

As the Court of Appeals held:

> , "…the appropriate judicial remedy, when a court holds permit conditions invalid and the conditions were integral to approval of the permit, is to reverse permit approval and not to sever the invalid conditions. *See, e.g.,* Patricia E. Salkin, 2 Am. Law Zoning § 14:17 (5th ed.) (May 2018 Update) (ch. 14, "Special and Conditional Use Permits") (citing authority from Connecticut, the District of Columbia, and Hawaii). *Enbridge Energy Co*., 2018 WI App 39 ¶103

Enbridge relies on *Adams v. State Livestock Facilities Siting Review Bd.*, 2012 WI 85, 342 Wis. 2d 444, 820 N.W.2d 404, a case which did not involve a certiorari review action. The facts of *Adams* demonstrate a complete disconnect between the context in that case and this one. *Adams* was a livestock siting case involving a complete statutory scheme with an agency (the State Livestock Siting Board) and rule making authority created to supplant the authority of local governments in granting permits for livestock facilities. In *Adams* this Court was reviewing the action of an administrative agency (the State Livestock Siting Board) granted specific authority to rewrite the Town of Magnolia's CUP, which under the Siting Law the town was required to issue *unless* the town could make certain findings. Under the expressed terms of the Siting Law the town lacked authority to include certain conditions in the permit absent the required findings. Adams is an unconditional withdrawal of authority from political

subdivisions to regulate livestock facility siting. Here the Act 55 Insurance Limitations are extremely limited and they cannot be read to support a conclusion that the legislature has withdrawn a county's authority to regulate hazardous liquid pipeline facilities.

Conversely, here the ZLR cannot grant a permit to Enbridge *unless* it finds that the six standards in DCO § 10.255(2)(h) are met, and the ZLR has never made that determination when taking into account potential insurance conditions integral to the permit with a proper understanding of the Act 55 Insurance Limitations. Although the legislature put some limits on counties' ability to require additional insurance from a hazardous liquid pipeline company, it failed to create an alternate permitting scheme as it did in the Livestock Siting Board Thus the *Adams* decision is irrelevant to this certiorari petition.

Dane County cannot be mandated to grant a CUP on specific terms an applicant demands. It is legally bound to find that the health, property and environment of the neighboring communities will not be compromised. *Town of Rhine* 2008 WI 76 ¶20, see also *AllEnergy Corp. v. Trempealeau Cty. Env't & Land Use Comm.*, 2017 WI 52, 375 Wis. 2d 329, 895 N.W.2d 368

It was the Circuit Court which usurped the legislative function entrusted to the ZLR by the legislature Wis. Stat. §59.69 and DCO §10.255. It was the Circuit Court which committed error in striking Conditions No. 7 and 8 which the record demonstrates were integral to the decision to grant the permit. The ZLR is the only entity allowed under Wisconsin law to determine which parts of the permit are insignificant enough that they may be stricken from the permit.

The circumstance of whether a CUP is granted or denied does not change the criteria necessary to issuing the CUP. If conditions can be judicially removed, the entire foundation of controlled uses is destroyed, and communities will either be forced to allow such uses, or prohibit them entirely.

The Landowners agree with the County that the proper remedy is for this case to be remanded to the ZLR to: 1) Initially review Enbridge's insurance policies to determine whether Enbridge has the necessary insurance coverage for "abrupt or immediate" or "unexpected and unintended damages."[5] *See Just*, 155 Wis. 2d at 760[1]

[5] Enbridge does not dispute that its insurance policies must meet this threshold set forth in the Court of Appeals decision. (See Enbridge Brief at pp. 23)

to satisfy Wis. Stat. §59.70(25); 2) Confirm that such coverage will be maintained on an on-going basis sufficient to protect the County and its residents in the event of a catastrophic oil spill, and 3) If the County cannot require Enbridge to obtain pollution insurance, then to craft additional conditions necessary to satisfy the findings they require for granting a conditional use permit.

Remand is particularly appropriate when the legal standards have changed during an appeal. This Court in *Lamar Cent. Outdoor, Inc. v. Bd. of Zoning Appeals*, 2005 WI 117, ¶40, 284 Wis. 2d 1, 700 N.W.2d 87 found remand the appropriate remedy (a certiorari case involving a city variance) :

> "On remand, the Board should reconsider and, if necessary, rehear and decide this matter in conformance with the new legal standards governing area variances… We express no opinion on whether Lamar's application should be granted under Ziervogel and Waushara County. The Board is the body best suited to make such factual determinations, and we remand this cause to allow it to do so. *Lamar Cent. Outdoor, Inc. v. Bd. of Zoning Appeals*, 2005 WI 117, ¶40, 284 Wis. 2d 1, 700 N.W.2d 87

Enbridge's effort to distinguish *Lamar* on the basis that it involves a permit denial (Enbridge brief fn 30-31) is the epitome of a distinction without a difference. In both circumstances the police power the local unit

of government is at issue. It is as nonsensical as claiming *Lamar* is inapposite because the case does not involve Enbridge.

With respect to Enbridge's argument that remand "would be inequitable" E Br. at 28 Enbridge has not (as it cannot) assert that remand would interfere with the continued operation of the pumping station as it has been operational for several months.

CONCLUSION[6]

This court should interpret the statutes based on their plain language, and affirm the Court of Appeals' remand of this matter to the circuit court and ZLR committee to find facts necessary to properly apply the law.

[6] In addition to its repeated claims that it has "sudden and accidental pollution insurance coverage" required by Wis. Stat. §59.70(25) with no evidence, Enbridge makes new and unsupported claims in the brief filed in this Court: specifically that "time element" insurance is the same as, or includes "sudden and accidental" coverage (E.Br. at 20, 23 24), that if required to obtain environmental pollution insurance by Dane County their entire system of pipeline insurance would be jeopardized (E.Br. at 26-27), and that the county's insurance conditions violate federal law (E.Br. at 25, 27-28).

For support of the misstatements about the nature of the two kinds of pollution insurance, Enbridge cites to the actions and statements of the county zoning administrator and assistant corporation counsel, neither of whom ever considered the issue or reviewed any documents to come to a reasoned opinion on the matter; and to oral testimony of the insurance consultant (not to his actual report which they chose not to include in their Appendix and which they only cite to once), omitting his quotation marks around his reference to the term "sudden and accidental" and to a portion of the zoning committee minutes cited (R.9-253-54) which defeat its claim that the two terms are "interchangeable" or indicate that one is subsumed under the other (E.Br. at 9), citing to R.9-811-12, which has only 490 pages). There is definitely nothing even remotely in the record to support its claim that its insurance coverage is "even broader than "sudden and accidental" coverage (E.Br. at 23). All that Enbridge cites are its prior self serving claims made by its insurance agent and attorneys in 2015.

There are no record citations to the lengthy statements (E.Br. at 26-27) about the consequences of complying with the conditions in the CUP, because no such record exists.

Respectfully submitted:

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Dated: October 24, 2018

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief conforms to the rules contained in Wisconsin Statutes Section 809.19(8) (b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 10,210 words.

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CERTIFICATE OF SERVICE

The undersigned states, under oath, that she/he served the foregoing Brief of the Plaintiffs/Appellants, Robert and Heidi Campbell, Keith and Trisha Reopelle, James and Jan Holmes and Tim Jensen, by placing three (3) copies in an envelope addressed as indicated below, and depositing the same in the U.S. Mail at Madison, Wisconsin, proper postage prepaid, at approximately 5:00 p.m. on the 24th day of October 2018, to the following persons:

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CERTIFICATION REGARDING ELECTRONIC BRIEF PURSUANT TO SECTION 809.19(12)(f), STATS.

I hereby certify that I have submitted an electronic copy of this brief which complies with the requirements of Wisconsin Statute Section 809.19(12) and (13). I further certify that this electronic Brief is identical in content and format to the printed form 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.

Patricia Hammel
Herrick & Kasdorf LLP

HAND DELIVERY CERTIFICATION

I hereby certify that on October 24, 2018, this Brief was hand-delivered to the Clerk of the Supreme Court. I further certify that the Brief were correctly addressed.

Dated this 24th day of October, 2018.

Patricia Hammel
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