SUPREME COURT OF WISCONSIN

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

Petitioners-Respondents-Petitioners,

v.

DANE COUNTY,

Respondent-Appellant

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

Respondents.

Appeal No. 17AP0013

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-Petitioners.

Appeal No. 16AP2503

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

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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

REPLY BRIEF OF PETITIONERS

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ARGUMENT

I. The Insurance Requirements were and are unlawful, as both a proper construction of applicable statutes and Dane County's own admissions demonstrate.

When Dane County finally approved the CUP for Enbridge's Waterloo Pump Station in the Town of Medina, it imposed the "Insurance Requirements" with full knowledge that they were preempted by, and unlawful under, Wisconsin Statutes sections 59.69(2)(bs) and 59.70(25).

In response to this conclusion, the Respondents advance arguments that suffer from three critical flaws. First, Dane County and the Citizens misinterpret the relevant statutes and improperly read section 59.70(25) in isolation. Second, they mischaracterize certain key aspects of the case. Third, the Citizens erroneously rely on *Just v. Land Reclamation, Ltd.*, 155 Wis. 2d 737, 456 N.W.2d 570 (1990).

A. This case centers around two closely related statutory sections: 59.69(2)(bs) and 59.70(25). These sections were enacted on the same day as part of 2015 Wisconsin Act 55. They are codified in neighboring sections. And they both address a county's authority to regulate land use. To that end, this Court should engage in the "holistic endeavor," *United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988), of construing statutory language "not in isolation but as part of a whole" and "in relation to the language of surrounding or closely-related statutes," *State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶ 46, 271 Wis. 2d 633, 681 N.W.2d 110.

Read together, the plain language of sections 59.69(2)(bs) and 59.70(25) confirms that Dane County acted unlawfully when it included the Insurance Requirements in Enbridge's CUP. Section 59.70(25) is phrased as an "if-then" conditional. If a pipeline operator carries certain insurance, then a county cannot require that operator to obtain insurance. Section 59.69(2)(bs) addresses when the "if" side of the conditional must be satisfied in this case: during a county's "approval process for granting a [CUP] . . . ."

To that end, if Enbridge "carries" the insurance described in section 59.70(25) *during* the "approval process for granting a conditional use permit," then Dane County may not "impose" a preempted requirement, Wis. Stat. § 59.69(2)(bs), such as a requirement to "obtain" insurance, § 59.70(25). The Insurance Requirements were thus void *ab initio*.

A proper and strict construction of sections 59.69(2)(bs) and 59.70(25) provides no support for the "continuing duty" interpretation advanced by the court of appeals and the Respondents. (Cty.'s Br. 42–46; Citizens' Br. 21–23.) As a legal matter, whether Enbridge "carries" any particular insurance at some point in the future is immaterial to whether Dane County had the authority to "impose" a preempted requirement at the time it approved the CUP.[1] The "continuing duty" argument presumes that a county could include a preempted, albeit

[1] Of course, Enbridge continues to carry CGL insurance with coverage for sudden and accidental pollution liability. As a practical matter, it would make absolutely no sense for Enbridge to operate without adequate insurance.

unenforceable, condition in a CUP at the time of approval—thereby reading section 59.69(2)(bs) out of existence.

In addition, section 59.70(25) does not specify what information a pipeline operator must produce to show that it "carries" "sudden and accidental" coverage. The Citizens would require Enbridge to produce complete policies. (*See* Citizens' Br. 23–27, 31–33.) But the statute requires no such thing. The record here contains sufficient evidence showing that Enbridge "carries" "sudden and accidental" coverage[2]—and no evidence to the contrary. (*See* Enbridge's Br. 12–13, 19–21.)

B. The Respondents have mischaracterized certain aspects of the case.

First, Dane County asserts, for the first time, that section 59.70(25) places a "continuing duty" on Enbridge. (Cty.'s Br. 42–46.) As explained above, this position depends on the indefensible premise that Dane County could impose an unlawful condition in a CUP at the time of approval. Dane County's argument here must be interpreted as stating the Insurance Requirements were *enforceable* at the time of approval. But that position is contradicted by all of Dane County's previous filings.

Dane County admitted in pleadings that "[s]ection 59.70(25) prohibits the County from enforcing the [Insurance Requirements] that are the subject of this action." (P-App.114/R.2 ¶ 32; P-App.101/R.7 ¶ 13; P-App.104/R.7 ¶ 35.) In

[2] Dybdahl, in fact, stated that reviewing the actual insurance policies "was not necessary to evaluate [Enbridge's] insurance coverage . . . ." (R.8:207.) He considered the materials presented to him, which included a certificate of insurance, to be sufficient. (*Id.*)

this Court and below, Dane County repeatedly conceded that the "insurance conditions were rendered unenforceable by the adoption of Wis. Stat. §59.70(25)." (Cty.'s Resp. to Pet. for Review 2; *see also id.* at 13, 21; Cty.'s Opening Br. in Ct. App. 13.)

These admissions are consistent with the facts in the record, (*see* Enbridge's Br. 18–20)—facts even Dane County mentions in its brief here. For instance, Dane County quotes from a ZLR meeting in which the chair stated Act 55 had "rendered" the Insurance Requirements "unenforceable." (Cty.'s Br. 18.) It also discusses how the ZLR modified the CUP by adding a note to reflect that "the County's ability to enforce conditions 7 & 8 [is] affected by . . . Act 55 . . . ." (*Id.*)

By admitting that Act 55 renders the Insurance Requirements unenforceable, Dane County also admits that Enbridge satisfies all of section 59.70(25)'s preemption-triggering preconditions—including that Enbridge "carries . . . sudden and accidental" coverage.

Second, Dane County *did not* finally impose the Insurance Requirements before Act 55 went into effect. Act 55 was enacted "in the midst of the County's consideration of the [CUP]," (P-App.2), while appeals of ZLR's decisions *were pending* before the Dane County Board,[3] (*see* Enbridge's Br. 9–13). Thus, Act 55 was effective before Dane County had completed its action on the CUP. The Citizens concede that Act 55 was enacted "during [the] zoning proceeding" and "[w]hile the administrative appeal was

[3] Under ordinances then in effect, the Dane County Board had authority to "reverse or modify" ZLR actions. Dane Cty. Code § 10.255(2)(j) (2014).

pending." (Citizens' Br. 2, 8.) Dane County, for its part, *modified* the CUP *after* Act 55 was enacted by adding a note to the CUP for the express purpose of acknowledging that Act 55 affected the Insurance Requirements. (Cty.'s Br. 18; R.8:125; P-App.361–62/R.9:253–54.)

Third, Condition 8 does not relate to the reporting of Enbridge's *existing* insurance coverage. Condition 8 incorporates Appendix A of Dybdahl's report, (R.8:177), which lists specifications for the insurance Enbridge must procure under the CUP. Appendix A states: "Upon request by Dane County, Enbridge shall furnish a certificate of insurance . . . which accurately reflects that the *procured insurances* fulfill *these* insurance requirements." (R.8:223 (emphases added).) In other words, Condition 8 requires Enbridge to periodically report its compliance with the Insurance Requirements, which the County had no authority to impose in the first place. (*Cf.* P-App.149/R.9:305 (county representative testifying that "Conditions 7 *and 8* . . . pertain to additional insurance requirements *beyond what Enbridge currently maintains*" (emphases added).) Because Condition 8 relates solely to the unlawful Insurance Requirements, it is unlawful, too—or, at the very least, wholly without effect.

C. Because Dane County admits the Insurance Requirements are unenforceable (and thus admits Enbridge carries the preemption-triggering insurance), *Just* is ultimately irrelevant. Separately, the court of appeals and the Citizens misinterpret *Just*—a case that actually supports Enbridge.

In *Just,* this Court concluded that "sudden and accidental" was ambiguous, as it could reasonably mean *either* "abrupt or immediate" *or* "unexpected and unintended." 155 Wis. 2d at 744–46. Because *Just* was a coverage dispute between an insurer and its insured, the Court resolved the ambiguity in favor of the insured, whose release was not "abrupt or immediate." *Id.* at 741–42, 746. Thus, an insured seeking coverage for "sudden and accidental" pollution need not demonstrate that the pollution was "abrupt or immediate;" it need only show that the pollution was "unexpected and unintended." *Id.* The court of appeals read *Just* incorrectly, erroneously concluding that "sudden and accidental" requires a showing of *both* "abrupt or immediate" *and* "unexpected and intended." (P-App.37–39.)

But under *Just*, Enbridge's insurance need only cover pollution that is "abrupt or immediate" *or* "unexpected and unintended." And, of course, Enbridge's CGL policy does just that. It provides coverage for *any* pollution event, irrespective of the nature of the pollution, subject only to certain discovery and reporting requirements.[4] There can be no doubt that Enbridge's time-element insurance covers "abrupt or immediate" pollution. Moreover, the court of appeals incorrectly concluded that

[4] As Dane County's expert, Dybdahl, confirmed below and elsewhere, "the term sudden and accidental" is "commonly used" to describe a CGL policy that covers pollution events "happening within certain time frames[,]" and Enbridge's CGL policies cover pollution events that "happen in certain time frames." (R.8:210, R.9:474–75; *see also* R.8:211 (Enbridge's "remnant coverage for a pollution event . . . is not just limited to sudden or quick pollution[.]")) *See* David Dybdahl, *A User's Guide to Pollution Exclusions and Environmental Insurance*, Int'l Risk Management Inst. (Sept. 2015), https://www.irmi.com/articles/expert-commentary/a-users-guide-to-pollution-exclusions.

Enbridge's policy does not cover "unexpected and unintended" pollution events. (P-App.37–39.) This is an absurd conclusion, since all pollution coverage is designed to insure against unintentional—as opposed to intentional—acts.

II. Especially because the Insurance Requirements are not "integral" to the CUP, the proper remedy is to strike them.

To cure Dane County's interference with Enbridge's statutory rights, the Court must devise an appropriate remedy. In that regard, this Court benefits from the remedy already prescribed by the circuit court: striking the Insurance Requirements and leaving the remainder of the CUP intact. Indeed, this Court reviews the circuit court's remedy decision under the "highly deferential" erroneous-exercise-of-discretion standard. *Prince Corp. v. Vandenberg*, 2016 WI 49, ¶ 16, 369 Wis. 2d 387, 882 N.W.2d 371.

Statutory authority exists for a circuit court to strike unlawful CUP conditions. Section 59.694(10), which governs certiorari review of a county zoning decision, authorizes a circuit court to "reverse or affirm, wholly or *partly*, or . . . *modify*, the decision brought up for review[]" from the county. (Emphases added.)

Further, as thoroughly explained in Enbridge's opening brief, this Court's decision in *Adams v. State Livestock Facilities Siting Review Board* supports striking the Insurance Requirements. 2012 WI 85, 342 Wis. 2d 444, 820 N.W.2d 404. (*See* Enbridge's Br. 28–34.) Even though *Adams* involved a CUP in the livestock-facility-siting context, it remains this Court's only

analogous land-use case addressing remedies on review of particular conditions in an otherwise *approved* permit.[5] The reasoning and policy underlying the *Adams* decision apply with equal force here.

The Insurance Requirements are not "integral" to Enbridge's CUP. ZLR and the County Board had several opportunities to reconsider the CUP after Act 55 was enacted, but they repeatedly reaffirmed the CUP despite acknowledging the Insurance Requirements were unenforceable. In effect, Dane County *did issue* the CUP *without* the Insurance Requirements. After all, if the Insurance Requirements were truly "integral" to the CUP—i.e., "essential or necessary for [its] completeness," *American Heritage Dictionary* (5th ed. 2018)—then the County Board would not have affirmed the CUP while at the same time acknowledging that Act 55 applies to the Insurance Requirements. The Court should not reward Dane County's improper conduct by giving it another opportunity to take action it could have taken three years ago, well before Enbridge had invested $40 million to construct a new pump station. (*See* P-App.165–68/R.9:321–24.)

In the end, not only were the Insurance Requirements unlawful, but Dane County *knew* and *acknowledged* they were unlawful when it imposed them. (*See* Enbridge's Br. 10–13.) Dane County's attempt to intentionally avoid the consequences of

[5] The difference between this case and *Lamar* is critical. *Lamar* involved a permit *denial*, not a permit *approval*, and hence there was no issued permit to consider. The Court was not presented with the option of striking conditions. *See Lamar Cent. Outdoor, Inc. v. Bd. of Zoning Appeals of City of Milwaukee*, 2005 WI 117, ¶¶ 23–24, 284 Wis. 2d 1, 700 N.W.2d 87.

state legislative action should not deprive Enbridge of the benefit of those statutes. And Dane County should not get a "do over" when it knew full well what it was doing the first time.

III. The Citizens had no authority to bring their enforcement suit and participate in this case.

Although blurred together in the Citizens' response, Enbridge advances two separate, independently sufficient arguments that the Citizens had no authority to bring their enforcement suit. First, section 59.69(11) provides no private right to enforce CUP conditions, *regardless* of the terms of those conditions, and *regardless* of this Court's interpretation of Act 55. Second, even assuming section 59.69(11) does authorize private parties to enforce CUP conditions, if Dane County could not enforce the specific Insurance Requirements here, then the Citizens could not enforce them, either. Because the Citizens had no authority to participate in this case from the outset, the Court should dismiss them as parties and disregard all the arguments they have raised.

A. On Enbridge's first argument, the Citizens fail to meaningfully challenge Enbridge's interpretation of the text of section 59.69(11). That section provides that "[c]ompliance with such [county zoning] ordinances may . . . be enforced by injunctional order at the suit of the county or an owner of real estate within the district affected . . . ."

As Enbridge explained in its opening brief, ordinances and permits are different. (*See* Enbridge's Br. 36–39.) Currently, just as when section 59.69(11)'s predecessor was enacted, the words

"ordinance" and "permit" mean different things. *Compare* "Ordinance," *Black's Law Dictionary* (3d ed. 1933) *with* "Permit," *id.* Whereas ordinances address "general subjects," *Wis. Carry, Inc. v. City of Madison*, 2017 WI 19, ¶ 25, 373 Wis. 2d 543, 892 N.W.2d 233, permits apply to specific activities or uses, *see* 8 McQuillin Mun. Corp. § 25:179.15 (3d ed.). Ordinances are legislatively enacted, *Wis. Carry*, 2017 WI 19, ¶ 25; permits are quasi-judicially issued, §§ 59.69(2)(a)1., (5e). "Zoning ordinance" in particular has a unique procedural and substantive meaning under Wisconsin statutes and caselaw, § 59.69(5); *Zwiefelhofer v. Town of Cooks Valley*, 2012 WI 7, 338 Wis. 2d 488, 809 N.W.2d 362. Given the stark distinction between ordinances and permits in historic and contemporary legal usage, section 59.69(11)'s use of the term "ordinance" cannot be fairly read to include "permit," "CUP," or "CUP condition."

Painting in broad strokes, the Citizens contend that a footnote in *Forest County v. Goode*, 219 Wis. 2d 654, 579 N.W.2d 715 (1998), upends Enbridge's entire interpretation argument. (Citizens' Br. 35.) But the Citizens' broad reading of *Goode* finds no support in the actual language of that case. 219 Wis. 2d at 657, 678–79 n.13. *Goode*, in fact, had nothing to do with CUPs, and it does not contradict Enbridge's position in any way.

The Citizens further argue that if the Court adopts Enbridge's interpretation of 59.69(11), then counties would have no vehicle to enforce CUP conditions. That is incorrect. Simply because section 59.69(11) does not authorize CUP enforcement does not mean that a county has no means of enforcing the CUPs

it issues. To the contrary, Dane County has an ordinance for enforcing the conditions of a CUP, Dane Cty. Code § 10.255(2)(m), which is *separate* from an ordinance for enforcing its zoning ordinance, *id.* § 10.25(5)(a). Section 10.255(2)(m), specifically applicable to CUPs, says nothing about "injunctional orders" or citizen suits, instead granting ZLR authority to "revoke the [CUP]" if its conditions are violated.

Finally, *Town of Cedarburg v. Shewczyk* remains unpersuasive. 2003 WI App 10, 259 Wis. 2d 818, 656 N.W.2d 491. As Enbridge explained in its opening brief, *Shewczyk* dealt with municipal, not private, enforcement; it addressed towns, not counties; and its reasoning was internally flawed. (*See* Enbridge's Br. 39–40.)

B. Enbridge's second argument begins by recognizing that Wisconsin Statutes section 59.69(11) provides for enforcement of *enforceable* regulations, regardless of who the enforcer is.[6] Thus, even assuming private parties could enforce CUP conditions under section 59.69(11), those conditions must be lawful in the first instance. If Dane County had no authority to enforce the Insurance Requirements because they were unlawful under Act 55, then the Citizens had no authority to enforce, either. (*See* Enbridge Br. 41–43.) Section 59.69(11) does not

[6] Section 59.69(11) relates strictly to enforcement. It is not a vehicle to challenge the issuance of, or language in, a CUP. Relatedly, the circuit court's consolidation order stated that "[c]onsolidation of" Enbridge's certiorari suit and the Citizens' enforcement suit "shall not alter the . . . remedy available to any party in the type of action originally filed by that party." (P-App.95/R.12:2.)

permit private parties to enforce regulations that a county cannot. Nothing in the text suggests otherwise.

IV. The Court has multiple paths available to reach a decision.

If the Court agrees that the Citizens had no authority to bring their enforcement suit because section 59.69(11) does not authorize private enforcement of CUP conditions (Argument III.A), then the Court need not interpret Act 55 (because Dane County admits that Act 55 applies to the Insurance Requirements). Conversely, if the Court agrees that the Insurance Requirements were unlawfully imposed under Act 55 (Argument I), then the authority of the Citizens is irrelevant and the issue is moot. In short, if the Court agrees with Enbridge on *either* of those issues, then it need not consider the other; it can instead proceed directly to the remedy issue.[7]

CONCLUSION

The Court should reverse the decision of the court of appeals and remand to the circuit court with instructions to: (1) strike the Insurance Requirements from Enbridge's CUP, and (2) enter judgment in Enbridge's favor in both of the consolidated cases.

[7] Contrary to the Citizens' claim, Enbridge has preserved all arguments it may have under federal law and is prepared to raise them in the appropriate forum. (Enbridge's Reply Br. in Cir. Ct. 2 n.1, June 8, 2016.)

Dated this 8th day of November, 2018.

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wisconsin Statutes section 809.19(8)(b)–(c) for a brief and appendix produced with a proportional serif font. The length of this brief is 2,997 words.

Dated this 8th day of November, 2018.

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ELECTRONIC FILING CERTIFICATION

I hereby certify that I have submitted electronic copies of this brief and appendix that comply with the requirements of Wisconsin Statutes sections 809.19(12) and (13). I further certify that the electronic copies are identical in content and format to the printed form of the brief and appendix filed as of this date. A copy of this certificate has been served with the paper copies of the brief and appendix filed with the Court and served on all opposing parties.

Dated this 8th day of November, 2018.

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HAND DELIVERY CERTIFICATION

I hereby certify that on November 8, 2018, this brief and appendix were hand-delivered to the Clerk of the Supreme Court. I further certify that the brief and appendix were correctly addressed.

Dated this 8th day of November, 2018.

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